Two Conceptions of Justice and the Dystopia of Global Justice

HORACIO SPECTOR*

TABLE OF CONTENTS

 I am thankful for valuable comments by Marcelo Alegre, Alejandro Chehtman, Chiara Cordelli, Pablo Gilabert, Julio Montero, Diego Rios, Eduardo Rivera Lopez, and to the participants in the Roundtable on Global Justice at USD School of Law.

I. INTRODUCTION

To be properly justice, global justice must be a kind of justice. How is this kind defined? Around a negative definition, little dispute seems admissible. Philosophers assume that global justice must be contrasted with domestic or national justice. Just as domestic justice is a virtue of a national society, global justice is a virtue of the global society. On this view, *global* is just a qualifier that does not alter the substance of justice. But what is the substance that remains identical across the national—global divide? On the positive question of what global justice is or could possibly be, various competing conceptions are available, and largely the contestability of global justice depends on the contestability of justice in general. Still there might be a common core to all those conceptions.

The classic definition of justice might give us a clue. According to Ulpian, "[j]ustice is a steady and enduring will to render unto everyone his right."[1] This definition characterizes justice in terms of a *natural* virtue, so to speak. It is a kind of will, or a quality of the soul. For contemporary political philosophers, justice is a moral quality of a political society, rather than a trait of character, and I will follow this modern usage. In any event, I am more interested in the normative content of Ulpian's definition: "to render to each his due," that is, "to give to everyone his own."[2] This part of the definition might seem circular, because, as is obvious, we cannot establish what is everyone's due or own without a just social system that demarcates the rights of different individuals. Yet it is not empty, because it stresses that justice characterizes *some* system of property rights, where "property" is broadly understood as a regime of liberties, claim rights, powers, or immunities to use, consume, enjoy, and control various *external goods* (typically, external resources). Justice-related rights do not exhaust the universe of moral rights and other practical reasons. For instance, people have moral rights to be treated as free and equal persons in all social endeavors, not to be physically harmed or socially humiliated, and to enter and leave all kinds of associative pursuits. I assume that these rights are prior to social conventions and different from property rights (over external resources). Of course, a system of property rights does not mean a system of *private* property. People have different rights in various regimes of property and justice is defined accordingly. Private property is one among various alternative arrangements that regulate the control of external resources.

Whereas fundamental moral rights are conceptually prior to social practices, any system of property rights (e.g., over external resources) is a deliberate or unintended outcome of human action. There is nothing like

1. DIG. 1.1.10 (Ulpian, Rules 1) (Alan Watson ed., 1985).
2. *Id*.

a natural system of justice, if by *natural* we mean a *non-societal*. On this point, legal positivists since Hobbes and Hume agree. They disagree, however, on what kind of human action is required for a system of property rights to emerge and function. Statists hold that there is no property in a pre-political state, which means that government is a conceptual prerequisite for ownership and that, therefore, property rights in the state of nature are meaningless. Hobbes, who embraced this position, thought that in the state of nature we have one single liberty, namely, the liberty to defend ourselves and preserve our life. The vocabulary of property and justice only pops up in the favorable scenario of a commonwealth that assures the protection of life. Today there is abundant empirical literature that belies Hobbes's extreme position. In various stateless situations, there is evidence of systems of property that are stable and generally respected.[3] Hume first adumbrated this stateless, conventional theory of justice. He claimed that the rules of justice are social inventions. But what kind of inventions? Inventions often are deliberately designed artifacts to serve various purposes. Hume says that it is a serious mistake to think that the rules of justice have been invented in the same way. He maintains that the institution of justice is a spontaneous and unintended result of people's self-interested actions. So property rights are not created by the State; they originally derive from social conventions that can be called "laws of nature" only "if by natural, we understand what is common to any species, or even if we confine it to mean what is inseparable from the species."[4] For Hume, laws of nature are artificial but not arbitrary, for they are indispensable for organizing peaceful and productive social coexistence in the human species. Therefore, he takes the existence of property rights to be conceptually independent from government.

Though Hume fixes on individualistic possession, his approach can be applied to the emergence of various regimes of property rights that communalize land and other resources to larger or lesser extent for different

3. *See* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115 (1992) (discussing the system of private governance that has developed in the diamond trade); Avner Grief, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525, 526 (1993) (discussing the reputation mechanism employed by Mediterranean traders that promoted merchant trading abroad).

4. DAVID HUME, A TREATISE OF HUMAN NATURE 311 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1740).

uses.[5] To allow for the variability of spontaneous social regimes, we might correct Hume's naturalistic understanding of the laws of nature and assert that the "laws of nature" are natural in the sense that they comprehend those conventions that are indispensable for human beings at a certain point of their socioeconomic evolution given their particular genotypic and phenotypic features and prevailing ecological conditions—relative vulnerability, limited altruism, scarcity of consumption goods, abundance of land, et cetera.[6] Such features require social cooperation in the guise of labor division, specialization, and long-term organization of productive endeavors, et cetera.

Here I will differentiate two conceptions of justice. Hume illustrates what I call the "transactional conception." On this conception, justice is the compliance with the set of property rights that arise out of various forms of mutually advantageous exchange. Once these transactional justice rules are established by social rules, they have normative force for agents acting in the relevant practical setting. In developed communities, governmental authorities define property rights with greater precision and provide a more or less effective regime for their enforcement. Roman law is an example of how customary rules in agricultural communities tend to be codified as the density of population and the productivity of land make the administration of a formalized and centralized system of justice economically efficient. Codification of the rules of justice already slides from the transactional conception of justice into the associational conception, for it normally involves the conversion of some possessory entitlements into rights in rem, whose normative force is not circumscribed to parties to a transaction but extends to all members of the political association. Actually, the creation of rights in rem presupposes the prior creation of a political community. Even if traditionally considered as institutions of private law, *erga omnes* rights are institutions of public law, because they are conceptually linked to the existence of a commonwealth. Because both participants and nonparticipants to various interpersonal cooperative transactions are obliged by rights in rem, it is not participation in such transactions but rather membership in the commonwealth that makes a subject obliged to respect those rights that are publicly ascertained.

For the "associational conception," justice derives from property rights that are established within a certain kind of association. Associational justice must be consistent with the fundamental moral rights of members

5. See, for example, the pioneering work made by Elinor Ostrom, ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 58–90 (1990), for a discussion of various long-enduring, self-organized, and self-governed common-pool resources.

6. See Garret Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968), for a discussion of the system-sensitivity of moral rules.

and nonmembers and with the rules of justice originated in transactional justice. We have the problem of fair division of burdens and benefits whenever a number of individuals decide to establish an association for common or shared purposes and the furtherance of these purposes requires a certain degree of collectivization of losses and/or benefits. The most important example of associational justice is the so-called "social justice," which derives from the property rights established in a political community.

Political associations raise special questions of justice. Some authors contend that those special questions derive from characteristic features of the modern state. For instance, Thomas Nagel argues that two defining features of the political community justify associative redistributive duties that hold among its members but not among members and nonmembers. Those features are the fact that the political community exercises sovereign power over its members by resorting to the imposition of coercive rules and the fact that it exercises that power in the name of its members.[7] In this paper, I will not challenge this assertion but will nonetheless argue that two other features strongly bear on the special questions of justice raised by political associations. Those features, though contingent, are also commonly true of political associations: (a) their contestability, and (b) their power of self-transformation (which is a feature of sovereignty).

I will argue that the fact that international associations lack sovereign power makes the problem of global justice dissimilar from the problem of domestic social justice. In fact, the principle of self-determination of national States is applicable to national States, but inapplicable to international associations. International associations can only be transformed by the sovereign decision of their State members. Therefore, whereas social justice theorizing can support constitutional interpretation and potential self-transformation of the political community, global justice theorizing can support neither treaty interpretation nor self-transformation of international associations. A corollary of the discussion is that global justice denotes a highly idealized political program for the future organization of a global redistributive association. Free and voluntary membership in such association would be jeopardized by the fact that it could not guarantee substantial exit rights, thus rendering the program dystopian rather than utopian.

In pursuing my argument, I will have to address a myriad of issues. In Section II, I discuss an example of the transactional conception of justice.

7. *See* Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 128 (2005).

My example is Hume's account of the conventions of justice. It is a good example, I think, because Hume contends that such conventions do not presuppose the prior establishment of a political association. In Section III, I discuss the associational conception of justice. I argue that this conception always refers to distributional concerns within a particular kind of association, and I show that associational distributional criteria normally depend on the character of the relevant association. I also explain the problem of *political* or *national* justice in terms of the associational conception of justice. In Section IV, I enumerate some varieties of national political associations and briefly review the different distributional concerns generated by each variety. Section V is devoted to explaining why national political associations are contestable. Contestability, in such associations, derives from a twofold form of constitutional indeterminacy. In Section VI, I point out that international customs generally establish forms of transactional justice but not a regime of global redistribution. In Section VII, I discuss four types of international associations, and I contend that none of these associations can be construed as providing for global redistribution. In Section VIII, I assert that international associations do not offer the same leeway for constitutional interpretation that is present in most national political communities. The orthodox form of legal interpretation that international associations impose, together with their lack of sovereignty, constrain the self-transformative abilities of such associations. A natural outcome of these characteristics of international associations, which I discuss in Section IX, is that the practical import of global justice arguments is much more limited than that of domestic justice arguments. Because there is no way to argue that existing international organizations establish the essentials of a redistributive association, associational justice can justify no redistributive measure to which national States do not explicitly commit themselves by their spontaneous and sovereign decisions. In addition, because transactional justice is irrelevant for warranting those measures, *global justice* is a misnomer save as a label for designating a program for a global redistributive association. This new kind of association is not required by justice, and may even be hard to reconcile—conceptually and in practice—with basic civil liberties.

II. THE TRANSACTIONAL CONCEPTION

The primary example of a transactional conception of justice is Hume's. Hume follows the classic conception of justice and says that the fundamental conventions are the stability of possessions, their transfer by consent, and the obligation to fulfill promises.[8] He claims that these conventions have

8. HUME, *supra* note 4, at 339.

arisen as a byproduct of patterns of cooperative transactions originally motivated by self-interest: "[t]his system [of justice], therefore, comprehending the interest of each individual, is of course advantageous to the public; though it be not intended for that purpose by the inventors."[9]

How does Hume conceive of the pre-political evolution of the institutions of justice? The key to understanding Hume's thought is that he viewed society as a mutually advantageous invention. The infirmities of humankind foredoom the human species to tragedy without an invention that makes up for humankind's infirmities:

> Of all the animals, with which this globe is peopl'd, there is none towards whom nature seems, at first sight, to have exercis'd more cruelty than towards man, in the numberless wants and necessities, with which she has loaded him, and in the slender means, which she affords to the relieving these necessities.[10]

He goes on to say, "society provides a remedy"[11] in a threefold way: "[b]y the conjunction of forces, our power is augmented. By the partition of employments, our ability increases. And by mutual succor we are less exposed to fortune and accidents."[12]

Now the main challenge to the maintenance of society, which originally grows from the "natural appetites betwixt the sexes" and the new affection to company and conversation cultivated by early society, is the avidity of acquiring goods and possessions for our nearest friends and ourselves, which is "insatiable, perpetual, universal, and directly destructive of society."[13] This destructive sentiment would prevent people from the peaceful "enjoyment of such possessions as we have acquir'd by our industry and good fortune"[14] if all the members of society did not enter a convention "to bestow stability on the possession of those external goods."[15] Hume asserts that "the convention for the distinction of property, and for the stability of possession, is of all circumstances the most necessary to the establishment of human society, and that after the agreement for the fixing and observing of this rule, there remains little or nothing to be done towards settling a perfect harmony and concord."[16]

---

9. *Id.* at 339.
10. *Id.* at 311.
11. *Id.* at 312.
12. *Id.*
13. *Id.* at 316.
14. *Id.* at 313.
15. *Id.* at 314.
16. *Id.* at 315–16.

Hume rejects the idea that the origin of justice rests on a social contract. The conventions founding justice are ultimately caused by "a general sense of common interest."[17] Thus, two individuals' reciprocal regard for their possessions and the ensuing interpersonal protection of their possessory entitlements derive from a sort of transaction:

> I observe, that it will be for my interest to leave another in the possession of his goods, provided he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behavior. And this may properly enough be called a convention or agreement betwixt us . . . .[18]

In this transaction, the two individuals exchange a sort of negative service, namely, the abstention from disturbing each other's possessions. Yet the exchange is not made explicit in a contract or agreement. Similar analyses can be applied to promises mutually exchanged by two individuals and to exchanges of goods, where the parties to the transaction mutually respect their new possessions after the transference. All these are cases of transactional justice, because justice is defined as the quality of a certain transaction, for example, the fulfillment of the terms of the transaction. When these transactions multiply in a community, individuals realize that their regular observance contributes to the public interest, and so the rules of justice are progressively generalized as institutions that apply to all actual and potential transactions within the group. Justice as a kind of customary law has then emerged.

Hume gives two well-known examples to illustrate the possible emergence of the conventions of justice without an explicit contract or agreement. The first example is the spontaneous cooperation between two men in a boat:

> Two men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other. Nor is the rule governing the stability of possession the less derived from human conventions, that it arises gradually, and acquires force by a slow progression, and by our repeated experience of the inconveniences of transgressing it.[19]

The second example concerns the joint draining of a meadow:

> Two neighbors may agree to drain a meadow, which they possess in common; because 'tis easy for them to know each other's mind; and each must perceive, that the immediate consequence of his failing in his part, is, the abandoning the whole project.[20]

---

17. *Id.* at 314–15.
18. *Id.* at 315.
19. *Id.*
20. *Id.* at 345.

The standard way of modeling the two examples is by means of a matrix that represents a perfect convergence of interests (figure 1). Both agents have a single individually and collectively advantageous strategy. Though these examples might be called "conventions" or "agreements," they are hardly conventions or agreements in a proper sense, because both agents will predictably pursue their weakly dominant strategy. To be sure, because the game has two equilibria, the question of equilibrium selection can be formally raised. But coordination seems all too natural in this situation because individual failing guarantees the minimal payoff 0, while choosing Row/Drain offers a chance of one unit with no risk of loss. Therefore, there is no coordination problem in these examples.[21] Although a modicum of understanding is certainly necessary to prevent defection, norms or conventions of coordination seem unnecessary.[22]

FIGURE 1: CONVERGENCE OF INTERESTS

		Player 2	
		Row/Drain	Defect
Player 1	Row/Drain	1 ı 1	0 ı 0
	Defect	0 ı 0	0 ı 0

A preferable model for representing the essential properties of Hume's examples may well be the Stag Hunt Game.[23] This coordination game also includes two equilibria. And, again, one equilibrium, in which both men row, and drain, is the most advantageous, while the other, in which both opt for playing alone, is less advantageous. Now opting for the less advantageous equilibrium is safer because its success does not depend on the other partner (figure 2). Thus, there is no guarantee that the players will follow their best joint strategy.

21. RUSSELL HARDIN, DAVID HUME: MORAL AND POLITICAL THEORIST 78–79 (2007).
22. EDNA ULLMANN-MARGALIT, THE EMERGENCE OF NORMS 79 (1977).
23. BRIAN SKYRMS, THE STAG HUNT AND THE EVOLUTION OF SOCIAL STRUCTURE 2 (2004).

FIGURE 2: STAG HUNT GAME

		Player 2: Row/Drain	Player 2: Defect
Player 1	Row/Drain	2 | 2	0 | 1
	Defect	1 | 0	1 | 1

Unlike what the models might suggest, Hume says that the potential gains resulting from the conventions of justice are not seen immediately. Instead, the rules of justice are strengthened by a "slow progression" and by "our repeated experience of the inconveniences of transgressing it."[24] It is evident that standard game-theoretical tools are too simplistic to model this process because they do not consider the feedback mechanisms that operate when participants' motivational and cognitive systems change over time in response to new environments that are produced by the unexpected consequences of their prior decisions.

Justice is eventually established by convention when people "have had experience enough to observe, that whatever may be the consequence of any single act of justice, performed by a single person, yet *the whole system of actions*, concurred in by the whole society, is infinitely advantageous to the whole, and to every part."[25] While each act of justice on its own does not express a natural moral sentiment, the whole system of justice is advantageous to society. This system requires compliance with the directives of a system of alienable property rights and reliable promises and contracts.

When societies become larger and more complex, legal institutions substitute the conventions. In fact, in modern societies, where land is no longer abundant and population density makes non-legal patterns of transactional justice unviable, general utility demands institutionalizing these rules by defining property rights with greater precision, providing rules for controversial cases and establishing a system of settlement and enforcement that changes the payoffs of players to solve assurance problems in Stag Hunt and Prisoners' Dilemma situations. Conventions alone may be too rudimentary for resolving difficult cases. For instance, conventional rules might fail to establish, at least unambiguously, whether a good faith buyer has a right to keep the purchased good if the sold good was stolen or lost. As I said, the evolution of Roman law is an example of how

24. HUME, *supra* note 4, at 315.
25. *Id.* at 319 (emphasis added).

specialized settlement and public ascertainment can supplement initially well-functioning transactional rules.

The transactional conception of justice and its institutionalization in legal structures do not raise a special problem for the application and settlement of these rules in international disputes. There is no denying that domestic regulation is sometimes insufficient for the protection of justice in these disputes. Thus, the transnational enforcement of property rights and contracts requires both norms for conflicts of national laws and international judicial cooperation. For instance, treaties regulate international sale contracts and the protection of foreign investments, and there are various international arbitration mechanisms for disputes in those areas. Since these international institutions are concerned with transactional justice, it might be farfetched to call them forms of global justice. More accurately, we could say that they are just international instruments for the cross-border implementation of transactional forms of justice.

Among the rules that shape the institutions of transactional justice as publicly ascertained in a legal system, I have distinguished elsewhere two types: "structural rules" and "positional rules."[26] Structural rules define the abstract structure of rights, liberties, powers, and immunities that characterize those institutions. Positional rules establish the positions of concrete persons within the abstract structure. In other words, they specify the concrete rights, liberties, powers, and immunities held by particular persons. The two types of rules work in tandem and positional rules are often derivative from structural rules. For instance, structural rules establish the powers of the owner, and one of those powers is to sell his or her property. Therefore, the positional rule that assigns the ownership of a legitimately sold good to the buyer derives from the structural rule that defines the powers of the seller.

Except in marginal or hard cases, positional rules specify the holdings to which each person has an *erga omnes* right. Entitlement has no meaning outside the set of positional rules established in a public legal system. In a precise, complete, and well-articulated system of property, there is no room for a theory of distributive justice. "Distributive justice" would just amount to the perfect compliance with the public system of property. That is, once basic property rights are defined by structural rules and assigned to particular individuals by positional rules, successive allocations of

26. Horacio M. Spector, *An Outline of a Theory Justifying Intellectual and Industrial Property Rights*, 11 EUR. INTELL. PROP. REV. 270, 273 (1989).

holdings are conducted by means of exchange contracts in the marketplace. Although the rules that establish the initial allocation are politically contentious, exchanges are regulated in less contentious forms by legal rules in accordance with ideals of transactional equity. Administration of this system of property requires arbitration or judicial settlement for particular disputes, but not the kind of distributional management that associational justice demands.

III. THE ASSOCIATIONAL CONCEPTION

Unlike the transactional conception, the associational conception of justice presupposes the establishment of a free and voluntary association by covenant or custom. An association can be established in a customary or formal way when a number of individuals consent or acquiesce to the establishment of and membership in an organization defined in terms of certain foundational goals. Rather than a transaction or series of actual transactions, the free association is a normative structure that reduces transaction costs by regulating the relations of members with respect to the association and of the association with respect to nonmembers. Associations relevant for the associational conception of justice are those that respect the fundamental moral rights of members and nonmembers and the social rules of justice established by transactional justice. Therefore, associations that uphold patriarchal rule, slavery, looting, and other practices that violate fundamental moral rights or conventional duties established by customary norms of transactional justice are ruled out from the domain of associational justice.

Essential to a free association is the establishment of common or shared goals, and the organization of a regime of division of labor that assigns specialized roles and functions. The national State, that is, the political association, can be considered an association in this sense. However, because of the extent of its impact on the lives of members and nonmembers, the free character of a political community must be secured by a variety of special institutional arrangements, though I will not address this topic here. The incorporation of an association is not an exchange contract because its point is to substitute a whole series of separate contracts. The contract constituting an association is a charter that reduces transaction costs by avoiding a great number of complex separate transactions. One single contract, whether written or informal, substitutes a whole series of actual and potential contracts.[27]

A contract that constitutes an association must include two different kinds of rules. First, "governance rules" define the rights and powers of

27. *See* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 388 (1937).

members in the governance of the association. Second, "distributive rules" have a dual role. On the one hand, they define the gains and losses caused by the association. Without a definition of the "common pool" of benefits and burdens, the question of fair division is unintelligible. On the other hand, distributive rules establish how the association's surplus—benefits and costs—must be distributed among members in light of the shared goals that the association is meant to serve. Therefore, distributive rules define a new form of property rights: rights to a share of the associational surplus. The concept of *fair share* is not meaningful without a background association and a common pool of benefits and costs.

Some associations probably started in a spontaneous way as evolving patterns of labor division, for example, families and tribes. But beyond a certain degree of organizational complexity, an association requires a formal normative system that creates a governance structure and provides enforcement mechanisms, for example, expulsion. Political associations require a written or customary constitution. How much of the behavioral pattern giving rise to a political association can be explained by game theoretical tools?

Game theory can explain cooperative equilibriums in different scenarios: for instance, coalitions. However, I doubt that the existence and maintenance of a political association can be reducible to a set of equilibriums. Although a political association involves a complex set of connected games, it also involves a normative structure and a collective internal viewpoint linked with that structure. One tricky feature of political associations is that their identity is not defined in terms of its members and their possible interactions. Associations can change in various ways over time and their identity is defined largely in a shared discourse that creates a *we-perspective*. Within that collective perspective members mutually understand and accept the association's missions and functions, the domain of associational benefits and burdens, and the bodies and procedures that are indispensable for the governance of the association.

The classic conception of justice as giving each person his due presupposes a system of property rights such as that established by Hume's social conventions or specified by formalized legal rules, for example, Roman law. In contrast, associational justice is a sort of emergent property of associations of various kinds. Typically, an association generates burdens and benefits, and the fair division of such burdens and benefits is the subject matter of associational justice. Unlike the classic conception of justice, associational justice concerns the distribution and redistribution of joint or shared losses/gains. Because distribution and redistribution must be

done in a way that maintains the effectiveness and stability of the association, the question of fairness can be raised, for example, in terms of what system of distribution and redistribution is best tailored to the nature and goals of the respective association. *Distributive justice* in this sense is just the variety of associational justice that corresponds to political associations.

My account of associational justice is *pluralistic* because it focuses on the various kinds of associations and their impact on the distributive criteria that are to be applied to each kind.[28] As the term *pluralism* is used in different senses in political theory, it is important to emphasize that it is the plurality of associations that sorts out distributional principles in my argument. Other "pluralities," such as the plurality of social goods or the plurality of the grounds of justice, play no role. Therefore, my pluralistic account is to be distinguished from Walzer's "complex equality" theory of justice. Walzer thinks that different political societies establish various sets of distributive principles, and that various categories of social goods within each society are to be subject to different distributive criteria.[29] Tyranny is then defined as the extrapolation of the criteria applicable to one sphere of justice to another one, disregarding the meanings of the social goods pertinent to each sphere.[30] This is not the type of pluralism I defend. Unlike Walzer's focus on a typology of social goods, my focus is on a categorization of political associations. I argue that each kind of political association raises particular questions of fair division and different distributive criteria, and that those criteria can only be understood and justified against the background of a prior definition of the character and scope of the association. On this view, it is mistaken to defend a pattern of distribution in one kind of association on the grounds of a distributive criterion that is proper to a different kind of association—without a prior self-transformation of the former association.

Although this is not the place to take a stand on the choice of a particular political association, I am inclined to think that no political association can be singled out as the morally best political association. Instead, various political associations are consistent with the fundamental moral rights of human beings (freedom, equality, etc.) and with the rules of transactional justice. Of course, we must exclude those heinous associations that violate the fundamental equal standing of individuals by allowing or establishing domination, social hierarchies (e.g., castes), and forms of wealth accumulation that are not congenial with the goals and missions of any free and voluntary

28. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 6 (1983).
29. *See id.* at 21–26.
30. *See id.* at 19–20.

association. However, within the moral constraints of rights and duties and other moral reasons, what association is better for a given society is a matter of collective choice, not of moral truth.

A. The Reference Pool Problem

It is often unnoticed that problems of associational justice do not have a unique and universal solution, that is, a single solution that is true of every kind of association. Various solutions are always available, and the correct selection of one solution can only be done, if at all, with reference to the proper pool of costs and benefits. In turn, the reference pool problem can be solved with a proper interpretation of the character, kind, and missions of the relevant associations. In this section, I would like to emphasize two fundamental points about associational justice. First, indeterminacy with respect to the rules that define the pool of costs and benefits and the resulting surplus generally gives rise to various competing conceptions of justice for a given association. Second, the choice among such conceptions is *pool dependent* in that it depends largely on the reference pool. Since two or more reference pools are often available, the concepts of "fair share" and "fair division" presuppose a determination of the pooling adopted by each association, which in turn depends on its nature and kind. Indeed, the character, kind, missions and goals of the association are sometimes clear indicators of the scope of the association's common pool of benefits and costs. An example will help to illustrate both points.

Three Families: Suppose three families are planning their summer holidays in Cancun. Each family has mom and dad plus two kids. Families A and B have one boy and one girl. Family C has two boys. Parents get the following information about lodging expenses: a double room in their favorite hotel costs $250 per day; they are also informed that a quadruple room costs $350 per day. The hotel does not have triple rooms. The three families plan to stay in the hotel for 10 days. Setting aside the rooms for the parents, each family will spend $2500 in children's lodging if the kids of each family share a double room. Kids' preferences are as follows: each kid is prepared to share a room with his/her sibling; each girl is prepared to share a room with another girl, but not with a boy from a different family, and each boy is prepared to share a room with another boy.

Consider now two different versions of this story:

(a) *Friends*. The parents of the three families have been friends for a long time and have made a habit of sharing holidays. One of the parents develops the idea of inviting the four boys to share a four-bed room and

offering the two girls to share a double room, thus reducing the overall lodging costs. Though the boys know that they will have more fun in the quadruple room, they are also aware that they will have to share the bathroom among four, so they are prepared to accept the arrangement only as a way of sparing family expenses. The two girls also say yes.

(b) *Acquaintances*. The kids are mates in school and the parents have met each other occasionally in family parties at the school. The parents know that they do not have common interests and that they are not going to become friends. The four boys develop the idea of sharing a four-bed room, assuming that the two girls will be able to share a double room. Though they know that they will have more fun in the quadruple room, they are also aware that they will have to share the bathroom among four, so they prefer this arrangement only as a way of sparing family expenses. The two girls also say yes.

If the saving-cost plan proposed is agreed on, in any version of the story, we can conclude that the families have formed a kind of association and that this association will allow them to save lodging costs. First, the informal association, even if it is a single purpose one, reduces transaction costs by avoiding the two complex sublease agreements that a transactional procedure would otherwise demand. Second, the room-sharing plan yields a clear reduction of costs. In the initial scheme, with the kids of each family sharing a double room, the three families will spend a total amount of $7500. With the new arrangement, they will spend an overall amount of $6000. So there is an associational surplus, namely, a cost reduction of $1500. Unfortunately, the agreement reached is incomplete, and they have not established any distributional rule for the surplus. So the parents engage in an interpretive debate about the true conception of distributive justice in associations of this kind.

In both versions of the story, the mixed-siblings parents propose to divide the overall expenditure of $6000 in three equal shares of $2000, thus assigning to each family an equal right of $500 in the overall surplus. However, the two-boy parents think it is fair for them to pay 50% of the cost of the room that their sons are going to use, thus claiming to spend only $1750, which means sparing an amount of $750, instead of $500. After all, they reason, why should they be concerned with the costs of the girls' room if they do not have daughters? Under this distributional pattern, each of the mixed-offspring couples will save only $375—instead of $500.

This is a typical case of distributional contestability caused by the lack of clarity with respect to the distributive rules established or to be established in the association. Most importantly, the rules of the association fail to determine the common pool of costs and benefits, and, therefore, the notion of "fair share" is indeterminate. For instance, it is not certain whether the cost of the double room belongs to the common pool, or is to be borne

only by families *A* and *B*. This semantic gap can be filled according to various theories. Moreover, as is to be expected in informal associations, there is also a gap in terms of possible second-order interpretive rules. That is, there is no rule establishing how to interpret the rules of the association when such rules have gaps or are indeterminate in other ways. As a result of this double indeterminacy, the members of the association can intelligibly claim that the rule of allocation "*truly*" agreed on is the one that favors their competing positions.

Suppose the parents do not want to act strategically, they just want to split the surplus in a fair way. But what does fairness demand in this case? Dividing up the total surplus in equal shares among the three families, or dividing up the rental of the quadruple room in such way that family *C* pays half and families *A* and *B* a quarter each? We have assumed that the three families' contributions are separately necessary and jointly sufficient for the saving-cost scheme to succeed. Yet this does not entail that the egalitarian division of savings is the only permissible distributional pattern. In fact, the concept of "fair share" is always relative to a well-defined common pool. Given that that definition is not explicitly established by the association's rules, we have to look at the character of the association in order to demarcate the common pool. In other words, it is not possible to assess the two contending interpretive theories without considering the nature and kind of association that the families have formed. If the association does not provide for interpretive rules, the best interpretive account should pick out the distributional scheme that serves to realize the goals and missions of the association in light of its nature and kind. The associative conception of justice allows various theories of justice depending on the nature and aims of each association. There is nothing such as a free-floating criterion of fair division. Different distributional solutions fit best with different kinds of associations. Social justice is a good conception of associative justice for associations that establish a high degree of collectivization, for example, "*common venture*" associations. For other kinds of associations, it is simply a dysfunctional, incoherent or confused account.

The two versions of *Three Families* present different kinds of associations. In version (a), we have an association of friends that share their holidays with or without the cost-saving plan. The hotel arrangement is merely incidental to the main purpose of the association, which is to participate in a group experience. On this collectivist conception of the association, the egalitarian proposal seems the most reasonable, and the position of the

two-boy parents looks like a misunderstanding of the primary aim of the association, which is to cultivate friendship and enjoy a common venture.

In contrast, version (b) does not render the position of the two-boy parents (so) implausible. Of course, they could be nice and accept splitting the savings in three equal shares. But the question is not whether they are great people but whether they get it wrong in holding that, as a matter of justice, they have to pay half of the only "common" bill, that is, the bill of the quadruple room. They correctly think that this association has one single purpose, namely, to spare money. They are not parties to the rental of the girls' double room. They are only parties to one common rental, namely, the rental of the quadruple room, and they are prepared to pay their prorated share in that rental (50%). Of course, as reasonable people, they do not expect the mixed-siblings parents to pay more than their prorated share in that room (25% each couple). If the parents of families A and B insist in dividing the total surplus in equal shares, it might seem they do not have a good faith understanding of the kind of association they have formed. Why should they expect family *C* to pay a share of the proportionally more expensive double room?

The conclusion I want to draw from this discussion is that there is no theory of fair division that is valid across different types or categories of associations. Rather, in cases of indeterminacy, incompleteness, or associational reform, we must assess the distributional theories proposed by contending participants in light of the character, kind, goals, and functions of the association. When the indeterminacy relates to the definition of the associational surplus, as in *Three families*, there is no true conception of justice for the association at stake that is independent from an interpretation of its nature and kind. This general point applies to national political associations, intergovernmental associations, and global associations as well.

B. Political Associations and Political Justice

Western political theory often defines the State as a kind of association and national law as the set of norms created by that association. Though these definitions are rather basic, they are useful to explain the associational conception of justice. Like any other kind of association, the political association must have certain common and shared goals and a governance structure, which is established by a customary or written constitution. While any political association is expected to institutionalize those transactional rules that are indispensable for a peaceful and productive society, the very existence of the political association raises a new question, namely, that concerning the fair division of collective gains and losses among the members of the association. It is common to call this form of justice "social justice."

This is misleading because it suggests that this conception of justice qualifies a society. But a society in the sociological sense is not an association in the normative sense. Social justice is an emergent property of political associations. In the absence of a political association, the discourse of social justice is misguided, except as an indirect proposal for establishing a political association. Rather than "social justice," it would be much clearer to talk about "political justice" or "national justice". With respect to social justice, Aristotle is right in asserting that this form of justice presupposes a political association: "[j]ustice . . . belongs to the polis; for justice, which is the determination of what is just, is an ordering of the political association."[31]

Like nonpolitical associations, a political association is based on a written or customary constitution. There is no society in the political sense that lacks some kind of "constitution" (Aristotle) or "basic structure" (Rawls). It is not that a society chooses a basic structure, but rather that the basic structure establishes a society as a political association. In fact, in the absence of a polis incorporated by a constitution, there would be no problem of social justice.

Unlike private associations, the political community has sovereignty, which comprehends the powers of self-government and self-transformation. A national State may well have a legitimate claim to supreme authority to organize its constitutional essentials and to modify them in accordance with the changing preferences of its people. Self-transformative capacities are a significant aspect of sovereign authority. This aspect is absent from private associations. Private associations can have greater or lesser capacities of self-transformation in accordance with their charters and the regulatory measures approved by the sovereign State in which they operate. But national States, at least those that satisfy conditions of moral legitimacy, have a right of self-determination. This principle is widely recognized in international law.[32] However, international associations do not have the power of self-determination. A corollary of this is that international associations can only be changed through the sovereign decision of their sovereign State members.

Typically, a customary or written charter establishes the essentials of the political association. Among such essentials are the organization of departments and different levels of governance; the general point, goals and functions of the association; the powers, privileges, and prerogatives

31. ARISTOTLE, THE POLITICS OF ARISTOTLE 8 (Ernest Barker trans., Oxford Univ. Press 1948) (c. 350 B.C.E.).

32. *See, e.g.*, U.N. Charter art. 1, ¶ 2.

of the agencies of the association; forms and procedures of governance; the political rights of members, and so on. Following the terminology I introduced above, I call these "governance rules." In addition, the basic charter must establish "distributive rules." Distributive rules in political associations are of two kinds: (a) rules that define the associational surplus, namely, what costs and gains are defined as common pool; and (b) rules that establish the division of common costs and benefits among members.

The problem of just political division of shared gains and losses only makes sense against the background of a political association that broadly defines such sharing and is expected to lay down distributional rules for dividing the shared output. This point has Aristotelian resonance. In effect, Aristotle says that the fundamental question in a discussion about the ideal constitution is, "[w]hat are the things in which the members of a political association are associated, and what is the extent of their association?"[33] Despite the overtones, I do not endorse Aristotle's most distinctive views about the political association. For instance, I do not accept that the polis is prior to the individual, and that self-sufficiency is one of the functions of the polis. The correct point I think Aristotle's discussion brings out is that distributional justice cannot settle the extent of associational sharing because that extent is prior to justice.

Therefore, the problem of social justice in political associations does not have a unique solution. Various associations raise different questions of fair division, depending on their character, point, and goals. An ideal constitution would provide either (a) complete and clear answers or solutions for all the questions or problems that could be raised in light of the organizational, structural, and distributive rules of the association; or (b) a complete and clear procedure for determining those answers or solutions in case the relevant rules are equivocal, incomplete, or indeterminate in any other way. Again, various political associations can be expected to have different charters or constitutions, and, therefore, different rules of distribution.

IV. KINDS OF POLITICAL ASSOCIATION

I will discuss four kinds of political association and show that each kind raises differential problems of fair division or "political justice." By "political association," I understand a free and voluntary association that has and claims to have sovereignty over an ordered pair of territory and population, where "sovereignty" is defined as the power to issue binding rules and directives, and to be free from the dictates of any other higher authority. Real, historical States exemplify one or more of these kinds. Because my goal here is just to illustrate general points about the problem

33. ARISTOTLE, *supra* note 31, at 47–48.

of associational justice, the following list has no claim to comprehensiveness. There may be other kinds of political associations that are consistent with the fundamental moral rights of members and nonmembers and with the demands of transactional justice, but I believe that the discussion of these other kinds would have little marginal utility in the context of my argument about associational justice.

A. The Protective Association

Classical liberals have conceived of the political association as a kind of agency that is charged with the responsibility of protecting pre-political rights, for example, natural rights, by offering a centralized system of enforcement as well as a centralized system of settlement of disputes concerning the potential violation of those rights. John Locke's commonwealth is the classic example of a protective association established by a covenant, and Robert Nozick's "dominant protective agency" is the contractual precursor of a minimal state that can emerge in ways that are not violative of natural rights by a series of individual contracts of provision of protection services.[34] It is controversial whether any historical State is an instance of a pure protective association, as most States have pursued goals and functions other than the internal security of their members and the external defense of the association from external attacks.

The protective association does not produce collective benefits in a strict sense. In fact, this kind of association does not encompass private benefits and gains resulting from private productive efforts. Benefits and gains arising out of transactions do not raise a distributional problem for the association, since transactional justice allocates property rights without a pattern of associational justice. To be sure, there is a shared benefit, namely, the avoidance of individual costs and investments in self-defense and/or hiring of private protection. This benefit is spread throughout the community because internal and external protection functions as a kind of public good that has the double characteristic of non-rival and non-excludable enjoyment. However, protective efforts can be allocated in various ways, and protective associations oftentimes lack clear and explicit rules for allocation of protective services. As far as this question is not clearly or unequivocally

34. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION (Ian Shapiro ed., Yale Univ. Press 2003) (1690); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

decided by the charter or constitution, this confronts us with a distributive problem.

In any case, the fundamental distributional problem for the protective association is how to divide the expenses of the association among all or some of its members. The association needs resources for executing its protective services, and, in the absence of predatory actions against members or nonmembers, those resources must be obtained by a scheme of division of costs funded by "taxes" or "fees."[35] In the ideal charter of a protective association, the regime of taxation would be stated in a clear, unequivocal, and complete way. However, real associational constitutions often leave these issues unsettled and, therefore, there is room for various theories of fair or equitable taxation. In fact, historical States have changed their systems of taxation over time in response to programs for reform that stressed the unfairness of previous regimes of taxation.

B. The Public Goods Association

In practice, States as protective associations are usually coupled with associations entrusted with responsibility for carrying out public works that provide public goods in an economic sense. Though this kind of political association goes back to ancient times, for example, Roman aqueducts, it acquired prominence as a form of regulating private activities in accordance with the public interest after the Great Depression. The regulatory association is a subspecies of a public goods association that started to prevail when the U.S. and European nations accepted the proposition that private markets cannot supply such major public goods as macroeconomic stability and full employment. The Pigouvian explanation of the regulatory association is that market failures make it unrealistic to expect members of the association acting on their own to produce the desirable levels of various public goods. As I said above, the major good produced by the protective association, that is, internal and external security can also be viewed as a public good. Therefore, we might see the public goods association as a natural extension of the protective association. Classic police power functions, such as public health, hygiene and sanitary conditions, public roads, public bridges, ports, lighthouses, and some forms of public transportation, for example, trains are usually cited as examples of public goods. Like internal or external security, these public goods have the dual characteristic of non-rivalry and non-excludability, which avoids the problem of distributing the enjoyment of such goods.

Though public education and environmental protection are not public goods in a technical sense, they share some features of public goods. We

35. I am ignoring here legal nuances.

all have a common interest in living in an educated and civilized society, and in democratic regimes we also share an interest in educating new members in the essentials and management of the political association. The adequate reproduction of the association's membership is a critical question when the association is established as a sort of perpetual association. In fact, political associations do not generally contemplate procedures for their own dissolution. Their existence is meant to continue indefinitely.

C. The Social Security Association

In the 1880s, Bismarck established in Prussia the first universal schemes of mandatory social insurance regulated by the State. The historical origin of these schemes indicates that they presuppose a degree of "nationalization" that exceeds the narrow boundaries of the protective and public goods association. During the twentieth century, social insurance schemes spread over the whole world, fully reaching American shores in 1935 with the enactment of the Social Security Act.[36]

Since those years, it has become common to view the political association as an organization capable of regulating or supplying social insurance services that private insurance markets could not provide via universal schemes. Market failures such as self-selection and moral hazard explain why, for instance, unemployment insurance schemes are not expected to arise in private markets. Bismarck established legal regimes of sickness insurance, accident insurance, disability insurance, and retirement.[37] All these schemes raise special questions of fair division because they include a special distributive component like the division of contributions among workers and employers. Again, the ideal charter or constitution of a social security association should establish the distributional rules that establish the division of costs among members, but in practice, the constitution or charter generally fails to provide for specific, explicit rules about these issues, which allows debates about the best "theory" of social insurance equity. Legislative measures usually establish various mechanisms of

36. *Social Security Act of 1935*, SOC. SECURITY ADMIN., https://www.ssa.gov/history/35act.html [https://perma.cc/TRA3-K9F7] (last visited Nov. 19 2015). There were antecedents of non-universal social legislation in America since the late eighteenth century: HENRY W. FARNAM, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860 (Clive Day ed., Carnegie Institution of Washington 1938).

37. Sidney B. Fay, *Bismarck's Welfare State*, 18 CURRENT HISTORY 1–7 (1950).

distribution that are vindicated as equitable toward those who could not afford to pay similar private insurances.[38]

D. The Redistributive or Common Venture Association

The redistributive association emerged with the Mexican revolution of 1910 and the Russian revolution of 1917. In the U.S., Johnson's Great Society can be considered a program for establishing a *common venture* association, and this program has inspired American theorists of social (domestic) justice. Since the second half of the nineteenth century, socialists have been advocating for the removal of the increasingly uneven distributive outcomes produced by the operation of the rules of transactional justice in the context of an industrial and urban economy. Their final goal was to convert nineteenth century political associations into *common venture* associations that could substitute the public or social property of the means of production for private property and capitalism. This goal was achieved to a greater or lesser extent in various countries at different times, but the influence of their advocacy was immense. Today, the general sense that a society is a sort of redistributive association surely prevails in Western intellectual and political circles.

Clearly, the *common venture* association raises new and vast problems of distribution and redistribution. While the Mexican constitution of 1917 and the Russian constitution of 1918 established redistributive associations by collectivizing the land and other resources, the distributional rules thereby established were not so determinate as to solve all the problems of allocation that commonly emerge in redistributive associations.[39] In a socialist State, the basic assumption is that profits, benefits, and gains are forms of social wealth that the redistributive association is entitled to allocate according to various fairness or distributive standards. The presence of a distributional authority makes the notion of "fair share" meaningful.

Though socialist charters can establish various forms of socialist or social democratic distributive regimes short of communist or socialist property, they agree on the basic principle that social wealth is an associational asset to be distributed among the members of the association. If the best form of distribution coincides, totally or partially, with the form of distribution that would result from market mechanisms working according to the classic rules of justice, this would be just a contingent result that is not obligatory as a matter of justice. As a matter of justice, the association

38. In Nozick's minimal state, there is also some degree of distribution in favor of the "independents," that is, individuals who do not want to voluntarily enter the dominant protective association.

39. U.S.S.R. CONSTITUTION ch. 2; MEXICAN CONSTITUTION art. 27.

is empowered to allocate wealth, income, and other goods in accordance with various criteria. Since the association has distributional authority, property rights can be awarded to individuals, but only on a temporary and precarious basis. For instance, even if business executives have legal rights to the profits of their investments, such profits are not theirs in a deep moral sense. The association has a sort of all-encompassing eminent domain over all assets whose exercise does not require any specific declaration of public use, let alone previous compensation to legal owners. From the standpoint of the redistributive association, legal property rights are revocable licenses or precarious rights that, as a matter of justice, can be curbed or canceled by the authorities of the association whenever the demands of justice call for other forms of allocation of private property or call, more radically, for the collective or public forms of property. While in practice the redistributive association can be implemented through various mixed economic systems, which allow greater or lesser governmental meddling with markets, the basic charter does not assume *individual moral entitlements* on any asset, wealth, or income, except essential goods that can be characterized as "personal property," for example, clothes, bikes, or toothbrushes. The moral premise is that all assets are, as a matter of justice, constantly subject to distribution and redistribution.

The most famous example of a theory of fair division for a redistributive association is Rawls's theory of justice.[40] Rawls premises his theory of justice for a "national society" on an abstract interpretation of society as a "cooperative venture for mutual advantage."[41] As Philip Pettit points out, "[t]his assumption casts society as an active association of people with a common goal and common resources of action."[42] On this assumption, Rawls seeks to establish the principles that should "provide a way of assigning rights and duties in the basic institutions of society" and "define the appropriate distribution of the benefits and burdens of social cooperation."[43] Rawls does not ask, what are the principles that define the domain of society's gains and losses, as opposed to their members' gains and losses. He takes this issue to be settled by his conception of society, as a "cooperative venture," which entails that all "primary goods," namely, rights and liberties, wealth

40. JOHN RAWLS, A THEORY OF JUSTICE 74 (rev. ed. 1999).
41. *Id.* at 4.
42. Philipp Pettit, *The Rawlsian Ideal*, PRINCETON INDEP., http://princetonindependent.com/issue01.03/item10b.html [https://perma.cc/WNR8-ECMP] (last visited Dec. 15, 2015).
43. RAWLS, *supra* note 40, at 4.

and income, the social bases of self-respect, et cetera, are societal resources.[44] Rawls's famous two principles of justice govern the basic structure of a redistributive association, where "basic structure" is understood as the set of norms and institutions that regulate the political, legal, and economic organization of a society so conceived.[45]

The important point is that the total surplus generated by the members of society is, as a matter of justice, subject to distribution and redistribution among all the members. Two fundamental tasks of the basic structure are precisely to demarcate the domain of the goods included in social ownership and to establish the principles or rules of distribution. This kind of conception of society is laid down in socialist constitutions, but is completely alien to the historical American constitution, as interpreted according to any plausible exegetical methodology. However, historical constitutions, even socialist ones, do not provide for specific rules of distribution. Instead of explicit rules, they use vague and equivocal concepts that only indicate in a rough way what kind of distribution the drafters have in mind, such as "*fair*," "*classless*," "*collective property*," "*elimination of poverty*," and so on. More often than not, the constitutions that offer the institutional settings in which such theories of justice are proposed were not originally conceived as charters for redistributive associations, and, consequentially, the need for new "*theories*" of justice and "*new*" theories of "constitutional interpretation" is even more pressing.

V. THE CONTESTABILITY OF POLITICAL ASSOCIATIONS

What is the nature of Rawls's conception of society? As is well known, Rawls differentiates between "concepts" and "conceptions."[46] Concepts that denote social and institutional practices are value-laden. Therefore, the concrete definition of such practices is essentially contestable because their assessment is multi-dimensional and there is no agreed-on criterion for prioritizing such dimensions. Therefore, reaching an uncontroversial conclusion about the concrete demands of the practice is always impossible.[47] Various conceptions or "interpretations" of a concept stress different dimensions or features and express divergent value judgments about the point, goals, and functions of the practice. Rawls's conception of justice

44. *Id.* at 54.
45. *Id.* at 76.
46. *Id.* at 9.
47. *See* RONALD DWORKIN, LAW'S EMPIRE 152–53 (1986); RAWLS, *supra* note 40, at 74; W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 177 (1955–1956); Christine Swanton, *On the "Essential Contestedness" of Political Concepts*, 95 ETHICS 811, 814 (1985).

as fairness is an interpretation of the principles of justice that should govern a redistributive political association.[48]

Some social practices are not institutionalized and present more difficult problems of interpretation. One telling example is art. Since its point, goals, and functions are not formally expressed in a set of values, principles, or rules, the primary controversial matter is how to express the mutually understood values, principles, or rules that govern art. Diverse theories stress various possible features of art, and according to some theories surrealism is more valuable than romanticism, and cubism is a better expression of art than expressionism. There is ample room for interpretive disagreement. Generally, the codification of embodied values, principles, and rules is a controversial matter, because various participants in the practice may have different views, even though they must have a core agreement for any social practice to exist. Codification is then the first contestable matter to be addressed before picking out one "true" conception or interpretation of the practice. Social interpretation in this sense is value-laden and includes what Continental social theorists call *Verstehen*.[49]

In a similar vein, political associations established by a customary constitution raise the problem of contestable codification of the values, principles, and rules of the association. Constitutional interpretation in this case is a form of social interpretation, rather than sematic exegesis. However, written constitutions often establish the essentials of a political association. Textually chartered associations may allow room for "conceptions" or "interpretations" depending on the degree of determinacy of the constitutional text. Constitutional texts may be vague, equivocal, incomplete, or in other forms indeterminate. Even if the legal text is indeterminate, it could establish rules for its interpretation. For example, Andres Bello's Civil Code states in Article 19: "[w]hen a law's meaning is clear, its literal import shall not be disregarded under the pretext of consulting its spirit. When the law's terms are obscure, however, one may turn to its clear intent, spirit, or legislative history."[50] In the following Article, the Chilean Code declares, "law's words shall be taken in their natural and obvious sense, in accordance with ordinary usage."[51] In fact, constitutional texts seldom lay down interpretive rules, not even broad ones such as Bello's.

48. RAWLS, *supra* note 40, at 9.
49. Theodore Abel, *The Operation Called Verstehen*, 54 AM. J. SOC. 211, 211–13 (1948).
50. ÁNGEL R. OQUENDO, LATIN AMERICAN LAW 490 (2d ed. 2011).
51. *Id.*

Therefore, if the meaning of a clause in the constitutional text is indeterminate, there is a *dual* normative or semantic gap: first, the constitution does not provide a solution for a possible case; second, the constitutional text has a *second-order gap* because it does not contain interpretive rules that are meant to be applied to the interpretation of first-order rules. The second-order indeterminacy exacerbates the first-order indeterminacy. Imperfect constitutional texts encourage various "conceptions" or "interpretations" of the constitutional practice, and such conceptions and interpretations routinely involve theories of constitutional interpretation.

When the rules and principles that establish the character, goals and missions of the political association are indeterminate, either because of a first-order semantic indeterminacy or incompleteness, or because of a second-order exegetical indeterminacy or incompleteness, the very nature of the political association could become contestable. The central question is what kind of political association is ours? Is it a protective, a public goods, a social security or a *common venture* association? Constitutional drafters generally include vague clauses that leave the nature of the association indeterminate. For example, the Necessary and Proper Clause in the U.S. Constitution has allowed government to expand the powers of the federal Government into areas originally reserved to the people, or the States.[52] Given the lack of determinacy in constitutional texts, political associations exert both *de facto* and *de jure* power of self-definition and self-transformation via constitutional interpretation. Because of this, the very nature, goals, and functions of the State become a contestable matter. The object of the association becomes contestable because of the contestability of the constitutional text. Because not only the first-order text of the Constitution allows interpretive discretion, but also the often-inexistent set of second-order exegetical rules, various participants can claim the Constitution permits, or perhaps requires, the association to be/become a redistributive association, rather than just a protective association, or one entrusted with the provision of public goods.

Social justice claims could obviously be presented as critical appraisals of existing institutions or as programs for constitutional reform, but in the American context they are often framed in terms of social and constitutional interpretation. Constitutional elasticity makes it possible for some participants, for example, politicians, law professors, judges, et cetera, to view the political association as a redistributive association. By hypothesis, the rules of fair division of social or collective wealth are not

52. U.S CONST. art. I, § 8, cl. 18; *see, e.g.*, McCulloch v. Maryland, 17 U.S. 316, 316 (1819).

established either.[53] Constitutional contestability in the definition of the category of political association may then lead to another form of contestability.

Once the Constitution is interpreted as a "socialist" constitution, it raises the problem of fair division of societal resources. It is important to note that by a "socialist" constitution I do not mean socialist in the economic sense. As is well known, Rawls was not a supporter of state socialism or even liberal socialism. In fact, he suggested property-owning democracy as an alternative to "welfare-state capitalism," "state socialism," and "liberal socialism."[54] By a "socialist" constitution, I mean a constitution that rejects at the deep moral level that individuals have individual property rights that morally constrain the range of possible organizations of capital. In a "socialist" constitution, such regimes are to be picked out with a view to realizing the principles of justice. As a contingent matter, it might turn out that the best regime tolerates private property under certain conditions. In fact, the rejection of individual property rights at the deepest level of the theory is consistent with various regimes of organizing the ownership of capital, even one that allows a good deal of private property, like Meade's property-owning democracy.[55] A "socialist" Constitution is a constitution that rejects private property as a matter of justice and endorses instead a general regime of public or collective property as a matter of justice.

As long as a socialist conception of the political association is adopted, the constitutionally required kind of political association becomes a redistributive one, and the concept of social justice comes in, but generally only in a very vague and contestable form. To be sure, it is now understood that the political association is a redistributive association and that one of its goals is to ensure a fair distribution of all benefits and burdens arising out of social cooperation. This means that "society" is entitled to fairly divide the whole economic output among its members according to principles of justice. While society's entitlement to social wealth is assumed, it is recognized that the charter of the redistributive association is not there. An ideal redistributive charter would lay down principles of fair division, but the Equal Protection Clause does not even mention *equality of opportunities*, let

53. If they were established, then it would be clear from the start that the Constitution establishes a distributional association.

54. RAWLS, *supra* note 40, at xiv–xv.

55. *See* J.E. MEADE, EFFICIENCY, EQUALITY AND THE OWNERSHIP OF PROPERTY 40 (1964).

alone *fair equality of opportunities*.[56] Because the redistributive association is interpreted on the basis of socially recognized ideals, the principles of justice should also be found out in a conception of justice that must be constructed.

At that point, philosophical interpreters must supplement the work of constitutional interpreters. So philosophical interpreters go about proposing conceptions of social justice that are more or less radical depending on their political views about how to redefine the kind, goals, and functions of the political association. Needless to say, this vast scale process of social interpretation is often done without considering the rules of constitutional amendment established in the constitutional text. For instance, in Rawlsian jargon, since the Constitution embodies a liberal conception of citizens, we must regard them as "free and equal" citizens whose ideal choice setting is a highly idealized "original position" that lacks any commonality with the political debates that gave rise to the historical association. Once the principles of justice are constructed in this way, they should guide the legislative and executive measures of the political association, and, hopefully, a future amendment of the Constitution that puts its text in line with the principles of justice so constructed.

VI. CUSTOMARY INTERNATIONAL LAW

If global justice is a form of social justice at the global level, then we must assume that the global community is a cooperative venture for mutual benefit. Customary International Law, which is the analog of the social conventions of justice, establishes classic conventions of "international justice." It is natural to view these conventions as cooperative equilibriums in Stag Hunt games.[57] International customs include, for instance, the criminalization of piracy, the principle *pacta sunt servanda*, diplomatic immunities, and so on. Yet none of these conventions raises a question of global socioeconomic distribution or redistribution. Like the conventions of domestic transactional justice, international customs are minimal rules that assume a background of general respect for other nations' public and private property rights. If there is room for global justice, it should be looked for at the level of treaties and international associations.

VII. INTERNATIONAL ASSOCIATIONS

Since the aftermath of the Second World War, the international system can be regarded as a set of interconnected international associations of

56. U.S CONST. amend. XIV, § 1.
57. SKYRMS, *supra* note 23, at 3.

different kinds with different purposes and functions. The major organization is the United Nations, whose charter was signed in San Francisco in 1945.[58] The United Nations was meant to substitute the League of Nations, which was established in 1919 with the explicit but ineffectual purpose of maintaining world peace.[59]

A. The Peace Association

There is no doubt that the major goal of the international system is to avoid war and maintain peace. In fact, since the Treaties of Westphalia the goal of valuable intergovernmental pursuits has been to preserve peace by protecting the equal sovereignty and territorial integrity of all States. The Treaties also established the right of Christians to practice their religion regardless of the church established in their State, which was the first step toward the recognition of international human rights as constraints imposed on the sovereignty of States.

Unlike constitutional lawyers, international lawyers do not disagree about the proper character of the UN charter. There is no doubt that the charter establishes an intergovernmental peace association. The charter says that "all Members shall settle their international disputes by peaceful means" and "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[60] One of the organs established by the charter is the International Court of Justice, which has voluntary jurisdiction for settling disputes among States.[61]

Because the peace association seeks to supply a kind of international public good, namely, a peaceful world, the benefits are spread over the world and no question about the distribution of benefits can possibly be raised. Yet it is possible to raise the question about the division of burdens. For instance, the Administrative and Budgetary Committee of the United Nations General Assembly decides on the scale of assessments for contributions to the Regular Budget.[62] The scale of assessments reflects a country's capacity to pay as measured by such factors as its national

58. U.N. Charter pmbl.
59. *History of the United Nations*, UNITED NATIONS, http://www.un.org/en/aboutun/history/ [https://perma.cc/7HH8-YNJZ] (last visited Dec. 15, 2015).
60. U.N. Charter art. 2, ¶¶ 3–4.
61. U.N. Charter art. 7, ¶ 1.
62. G.A. Res. 45/248, § B, ¶ VI (Dec. 21, 1990).

income and population.[63] The US pays the largest contribution to the UN.[64]

B. The Trade Association

Perhaps the first serious attempt at establishing a pro-trade intergovernmental organization is the International Monetary Fund (IMF) established at the Bretton Woods Conference in 1944.[65] The explicit goals of the IMF are to promote global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world.[66] The idea of the so-called Bretton Woods Institutions was to prevent a new era of trade protectionism via monetary and exchange policies that could create such economic tensions as those that led to a wave of hysterical nationalism in Germany, which eventually caused the Second World War.[67]

Today the free trade association is one tangible reality of the international system. The Uruguay Round of Multilateral Trade Negotiations established in 1994 the current international trade association, called World Trade Organization (WTO).[68] The Final Act of the Uruguay Round resolved to "develop an integrated, more viable and durable multilateral trading system."[69] According to Article II, "[t]he WTO shall provide the common institutional framework for the conduct of trade relations among its Members."[70] Essential to this framework is the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2).[71] The visible goal of the settlement system is to prevent retaliatory measures that could diminish free international trade.

Parties to the Agreement recognize that "there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international

63. G.A. Res. 67/238, ¶ 5 (Dec. 24, 2012). Peacekeeping operations have their own

64. *Id.* ¶ 11.

65. *The IMF at a Glance*, INT'L MONETARY FUND (Sept. 16, 2015), https://www.imf.org/external/np/exr/facts/glance.htm [https://perma.cc/ZGL5-QUK4].

66. *Id.*

67. *Id.*

68. *Understanding the WTO: Who We Are*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm [https://perma.cc/R7SB-JKG3] (last visited Dec. 15, 2015).

69. Marrakesh Agreement Establishing the World Trade Organization pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154, 155 [hereinafter Marrakesh Agreement].

70. *Id.* at 155–56.

71. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

trade commensurate with the needs of their economic development."[72] Such positive efforts related with international trade are, for example, special provisions for releasing developing countries from requirements that could be burdensome for their economies. For example, Articles 65, 66, and 67 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), administered by the WTO, establish transitional periods of application and encourages forms of technical cooperation for the benefit of developing and least-developed countries.[73] For instance, least-developed countries were not required to comply with the obligation to establish minimum standards of legal protection of intellectual property rights for a transitional period of ten years.[74] However, it is important to note that the "positive efforts recognition" should not be interpreted as a regime of global redistribution of benefits arising out of international trade. Aaron James cites this recognition as part of "standing trade law" in arguing for principles of structural equity that are internal to the international trade system.[75] James's claim is interesting but very contentious, for that statement of recognition is a part of the preamble to the WTO treaties, and, according to the Vienna Convention on the Law of Treaties, preambles are not *per se* binding but provide the context for interpreting the binding clauses of a treaty.[76]

It is uncontroversial that the point of the multilateral trading system is to enter "into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations."[77] Free trade is the most effective way to reduce global poverty and WTO is the most effective international instrument for achieving this goal.[78] However, a multilateral trading system and its associated dispute settlement body are not meant to establish a global redistributive association.

---

72. Marrakesh Agreement, *supra* note 69, 1867 U.N.T.S. at 154.

73. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

74. *Id.*

75. AARON JAMES, FAIRNESS IN PRACTICE: A SOCIAL CONTRACT FOR A GLOBAL ECONOMY 148 (2012).

76. Marrakesh Agreement, *supra* note 69, 1867 U.N.T.S. at 154; Vienna Convention on the Law of Treaties art. 31, ¶ 2, May 23, 1969, 1115 U.N.T.S. 332, 340.

77. Marrakesh Agreement, *supra* note 69, 1867 U.N.T.S. at 154.

78. LOREN E. LOMASKY & FERNANDO R. TESÓN, JUSTICE AT A DISTANCE, EXTENDING FREEDOM GLOBALLY 158, 171 (2015).

C. The Public Goods Association

Many international associations pursue the international provision of public goods, especially in cases in which the lack of an international consensus can cause permanent damages to the ecosystems. The public goods association is no different from its counterpart at the domestic level. Whereas domestic regulation is useful for internalizing negative *local externalities*, international regulation is needed for internalizing negative *remote externalities*.[79] Just as the domestic public goods association is a national form of cooperation for mutual benefit, the international public goods association is an intergovernmental form of cooperation for mutual benefit.

Public goods are defined in terms of actual or expectable preferences of groups of persons. There is no need to appeal to moral standards or principles to justify the provision of public goods. Though a utilitarian case could be made, in fact, it would be superfluous, for utilitarian justifications become relevant when the Pareto principle is not satisfied and some people's gains must compensate others' losses.[80] In a typical public goods situation, the Pareto principle is satisfied by collective regulation because market mechanisms cannot be expected to produce the optimal level of the desired good.

The Stockholm Declaration of 1972 is a clear instance of the intergovernmental public goods association.[81] Principle 6 of the Declaration, for example, provides "[t]he discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order that serious or irreversible damage is not inflicted upon ecosystems."[82] Pollution is one of the remote externalities the Declaration encourages State members to prevent through legislative and executive policies. Thus, Principle 7 says, "states shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human

79. For the distinction between local and remote externalities, see David Schmidtz, *The Institution of Property*, *in* THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW 119 (Roger E. Meiners & Andrew P. Morriss eds., 2000). The distinction is based on Ellickson's similar distinction between small, medium, and large events. *See* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1325, 1327–35 (1993).

80. ALLEN E. BUCHANAN, ETHICS, EFFICIENCY, AND THE MARKET 4–13 (1985).

81. G.A. Res. 2994 (XXVII), Declaration of the United Nations Conference on the Human Environment (June 16, 1972), http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503 [https://perma.cc/U56W-DZWR].

82. *Id.*

health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."[83]

The Declaration is not concerned with fairness, equity, or any value other than the collective provision of a public good, namely, the protection and improvement of the environment. If there is any kind of justice here contemplated, it is rather intergenerational justice, but it is a form of intergenerational justice that is quite distant from Rawls's concern with distributive fairness across generations. Though Principle 2 of the Declaration says "[t]he natural resources of the earth . . . must be safeguarded for the benefit of present and future generations, through careful planning or management," it is clear that the goal is to avoid the depletion of such resources, and that "careful planning and management" does not mean global collectivization of natural resources.[84] In this declaration, there are no traces of a regime of global ownership of natural resources that fall under the sovereignty of State members.

D. The Humanitarian/Human Rights Association

Since the first Geneva Convention in 1864, the protection of civilians, shipwrecked personnel, and prisoners of war has been one of the main concerns of the international system.[85] Broadly regarded as a humanitarian association, its first stated purpose was to protect non-combatants in wartime. Another group of vulnerable people that deserved intergovernmental concern was workers. The International Labor Organization (ILO) of 1919 survived the demise of the League of Nations and became an agency of the United Nations.[86] The ILO's goal is to promote international labor standards and universal workers' rights involving such issues as improvement of conditions in the working place, decent wages, children's labor, and job security.[87]

---

83. *Id.*
84. *Id.*
85. *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 Aug. 1864*, INT'L COMMITTEE OF THE RED CROSS, https://www.icrc.org/ihl/INTRO/120?OpenDocument [https://perma.cc/K6CV-6JXD] (last visited Dec. 15, 2015).
86. *Origins and History*, INT'L LABOUR ORG., http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm [https://perma.cc/9EU9-A69Q] (last visited Dec. 15, 2015).
87. *ILO Constitution*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO [https://perma.cc/JV3R-9BVM] (last visited Dec. 15, 2015).

After the Second War World, the scope of the humanitarian association expanded to include progressive standards of respect for human rights. Three major international documents, the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights, the latter two of 1966, could be interpreted as establishing an intergovernmental human rights association, as many of those rights exceed the limits of what can be broadly characterized as humanitarian concerns. For instance, article 21 of the Universal Declaration states "everyone has the right of equal access to public service in his country."[88] Though this is a lofty goal for any legitimate State, we would probably not regard it a demand of *humanitarian law*. Indeed, the Covenant on Civil and Political Rights establishes the Human Rights Committee (article 28), whose eighteen members shall be persons of "high moral character" and "recognized competence in the field of human rights," "considerations being given to the usefulness of the participation of some persons having legal experience."[89]

Article 2.1 of the International Covenant on Economic Social and Cultural Rights establishes that each State party "undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant."[90] Some of the social rights have socioeconomic implications. In accordance with ILO's conventions, Article 7 establishes workers' right to "fair wages and equal remuneration at work" and "a decent living for themselves and their families."[91]

The humanitarian/human rights association represents an intergovernmental commitment to protect and foster human rights through national policies backed by voluntary international assistance and cooperation. It is clear that State members maintain the right to noninterference with their domestic affairs, except with respect to gross international violations of human rights, such as those contemplated in the Rome Statute of the International Criminal Court.[92] Even in this case, the ICC can only investigate and

88. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 21, ¶ 2 (Dec. 10, 1948).

89. International Covenant on Civil and Political Rights art. 28, Dec. 19, 1966, S. TREATY DOC. 95-20, 999 U.N.T.S. 172, 179.

90. International Covenant on Economic, Social and Cultural Rights art. 2, Dec. 16, 1966, S. TREATY DOC. 95-19, 993 U.N.T.S. 4, 5.

91. *Id.* at 6.

92. Rome Statute Of The International Criminal Court pmbl., July 17, 1998, 993 U.N.T.S. 90, 91.

prosecute international crimes when the respective State members are unable or unwilling to do so.[93]

Mathias Risse argues that human rights can be regarded as membership rights in a global order that should recognize the egalitarian ownership of world natural resources. By taking a cue from such natural lawyers as Hugo Grotius, Risse defends the following thesis: "Egalitarian Ownership: The world's natural resource base belongs in some, possibly rather weak, sense to humankind collectively."[94] Risse argues that the best interpretation of Egalitarian Ownership is *common ownership*, which he defines as a regime in which several individuals own a resource and are equally entitled to use it within constraints.[95] On the grounds of common ownership of the earth and of the intellectual commons, Risse suggests a new interpretation of human rights as membership rights in a global order that assumes humanity's ownership so conceived.[96] Risse draws a whole gamut of normative implications from that interpretation of human rights, which range from a human right to essential pharmaceuticals to a human right to drinkable water.[97]

Now Grotius could reasonably think that Christendom was a sort of global association under the authority of God, and that members in that association had an ownership right to those resources created by God.[98] However, that kind of global order no longer exists. The general principle in contemporary international law is that economic resources, both raw materials and manufactured products, are placed either under the sovereignty of each national State, or under a regime of regulated commons. Risse's claim that there is a regime of egalitarian ownership of the earth might be true with respect to *some resources*. For instance, Article 87 of the Convention on the Law of the Sea of 1982 prescribes that "[t]he high seas are open to all States, whether coastal or land-locked," and Article 89 establishes that

93. *Id.* at 100.

94. Mathias Risse, *How Does the Global Order Harm the Poor?*, 33 PHIL. & PUB. AFF. 349, 359 (2005).

95. *Id.* at 361.

96. MATHIAS RISSE, ON GLOBAL JUSTICE 209–10 (2012).

97. *See* Mathias Risse, *The Human Right to Water and Common Ownership of the Earth*, 22 J. POL. PHIL. 178 (2014); Mathias Risse, *Is There a Human Right to Essential Pharmaceuticals? The Global Common, the Intellectual Common, and the Possibility of Private Intellectual Property* 1 (Harvard Kennedy Sch. Faculty Research Working Papers Series, Working Paper No. RWP08-074, 2008).

98. Mark Weston Janis, *American Versions of the International Law of Christendom: Kent, Wheaton and the Grotian Tradition*, 39 NETH. INT'L L. REV. 37, 46 (1992).

"[n]o State may validly purport to subject any part of the high seas to its sovereignty."[99] The Convention puts the high seas in a regime of common ownership, provided they are used for "peaceful purposes."[100] In this respect, the Convention followed Grotius' teachings. Yet the high seas are an exception rather than the rule.

Today national sovereignty constrains the program envisaged by global justice theorists to carry out a transformation of the humanitarian/human rights association into a full-fledged redistributive international association. In fact, there is no indication in the constitution of the humanitarian or human rights association that it is or plans to become a global redistributive association. Indeed, the opposite is true. Article 1 (1) of the Covenant on Civil and Political Rights provides that "[a]ll peoples have the right of self-determination."[101] Furthermore, Article 1 (2) states "[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law."[102] The only plausible interpretation of this provision is that it denies that the international system establishes a global redistributive association that is entitled to dispose of the wealth and resources of each State party.

VIII. ARE INTERNATIONAL ASSOCIATIONS CONTESTABLE?

Social justice presupposes a pool of shared burdens and benefits, and this, in turn, presupposes a political association that declares that its goal is to establish a "cooperative venture for mutual advantage" in a redistributive sense.[103] If the goal of the association is, for instance, a "cooperative association for the provision of public goods," the ideal of social justice is meaningless. I think that the defining properties of a political association, for example, monopoly of coercion and political representation, do not entail on their own the moral requirement to adopt a specific set of distributional rules. Indeed, a protective association and a public goods political association certainly have those features and still do not contemplate explicit redistributive duties and correlative property rights. For instance, their constitutions could establish governmental duties related to safety, public goods, and social insurance. It is not morally necessary for an association to lay down strong redistributive duties. As

99. United Nations Convention on the Law of the Sea art. 87, 89, Dec. 10, 1982, 1833 U.N.T.S. 397, 432.

100. *Id.* at 433.

101. International Covenant on Civil and Political Rights art. 1, *supra* note 89, 999 U.N.T.S. at 173.

102. *Id.*

103. RAWLS, *supra* note 40, at 4, 73–74.

long as the association is a voluntary one, it is, however, clearly permissible for the constitution to establish those duties. Nor do those abstract features *per se* entail that the members of those associations have a moral duty to turn them into redistributive associations. Provided fundamental moral demands are met, what association one is a member of is more a matter of choice than one of moral truth. This does not preclude the possibility for philosophers and constitutional scholars to argue that there are moral reasons for reforming the constitution in such a way that it establishes a redistributive association, that is, a setting in which the problem of the fair division of social wealth can be raised and in which their various theories can be practically debated and eventually tested. In the meanwhile, the theories should be understood as programs for an associational reform.[104] They could more fruitfully be understood as proposals for associations that already are redistributive associations, or are planning to become redistributive associations.

Proposals for associational reform are always possible, because political associations can transform themselves over time. Self-transformation is one of the most significant aspects of political sovereignty. Typically, political associations establish rules and procedures for the change or amendment of their constitutional texts. If those procedures are not followed, some degree of change can be implemented by legislative measures. However, it is controversial whether a significant change in governmental powers can be justified by appealing to such general provisions in the Constitution. Much depends on the methodology of interpretation adopted. The more lax the methodology, the lesser need to use the formal amendment procedures. The scope of potential constitutional interpretations and the scope of necessary constitutional amendments are, so to speak, complementary classes.

It is evident that the American political association is no longer a merely protective association, and that the amendments to the Constitution have not warranted this change. The historical text has been broadly interpreted to allow the legislative self-transformation of the association into both a public goods association and a social security association. Whether the association already has traits of the redistributive association is more controversial, but I am inclined to answer in the affirmative. The self-transformative capacities of the American republic originate from various

104. They could more fruitfully be understood as proposals for associations that already are redistributive associations, or are planning to become redistributive associations.

two-layer indeterminacies that its constitutional text offers. To mention one example, the Taxing and Spending Clause, and especially the General Welfare Clause included in the former (Article I, Section 8, Clause 1),[105] together with the absence of second-order exegetical rules in the Constitution, show a degree of indeterminacy and incompleteness that has made it possible for Presidents and other representatives to propose transformations of the political association by legislative and judicial procedures that are not contemplated in the procedure of amendment (Article V).[106]

For a theory of distributive justice to be conceivable, we need to assume a conception of "society" that collectivizes at the basic level economic resources. We need, so to speak, socioeconomic sovereignty besides political sovereignty. The State, which is society's institutional vehicle, should be regarded as holder of a sovereign ownership power over all resources, regardless of the property claims of its citizens.

I hope it is by now clear that the problem of social justice as the fair division of national economic output can only emerge in a political association that either (1) is explicitly established by a "socialist" constitution that declares, as a matter of justice, there is no private property but only collective or social property; or (2) is established by an imperfect constitution that offers mutually reinforcing first-order and second-order indeterminacies and that, therefore, allows at the limit a socialist interpretation of the basic system of property to which the Constitution is itself committed. If none of these conditions obtains, a "theory of social justice" is *merely* a program for constitutional reform. The theory could not claim that justice requires a fair division of social wealth if the association establishes no regime of *social* wealth.

Now international associations neither establish a redistributive association nor meet the assumption of contestability about their nature that is a prerequisite for interpretive self-transformation. On the contrary, international associations impose the principle of national sovereignty over the natural resources placed within the boundaries of national territories. In addition, international treaties do not have vague clauses that can be interpreted as establishing a regime of global common ownership, except in some narrowly specified cases, for example, the high seas. When the assumption of contestability is not met with respect to the determination of the character and missions of the relevant association, justice theorizing is not an exercise in constitutional interpretation—it is an exercise in idealized institutional design. Its intellectual interest should not be underestimated, nor should its practical importance be overestimated. Some practical interest is there, however. Global justice theorizing could present itself as

105. U.S. CONST. art. I, § 8, cl. 1.
106. U.S. CONST. amend. V.

a programmatic proposal for changing the nature and goals of international associations. If not served by constitutional interpretation, that change could only be introduced by following the rules and procedures of associational reform. Unlike national associational self-transformation, which is always possible, international self-transformation into a global redistributive association requires a prior national self-transformation that carries forward sovereignty from national States into some sort of international sovereign entity. That institutional process involves insurmountable complexities.

International associations are not units of sovereign power and, therefore, lack the institutional resources for self-definition and self-transformation. Their reform depends on the sovereign decisions of the national parties to the relevant treaties. Self-government is one of the essential qualities of a sovereign association, and without self-government, there is no self-transformative authority. Without that authority, international associations cannot claim to have a sovereign power to redistribute resources from rich nations to poor nations. Nor have members of poor nations associational rights over the resources of other nations. Thus, global justice interpretation cannot provide the conceptual resources for international associations to provide authoritative interpretations that recognize redistributive *rights*. Of course, this does not mean that sovereign nations could not establish in future a global assistance association, but even in that scenario the associational "rights" granted by that association would depend on the continued generosity and good will of its sovereign State members. Therefore, they would not be rights in a strict sense. Unlike a national sovereign State, international associations are not free states and, therefore, the "rights" to global resources they could acknowledge would always be gracious concessions, or at most precarious and revocable rights, awarded as a matter of humanitarian concern, rather than as a matter of associational justice. For full-fledged global justice rights to emerge, national States should have to transfer their perpetual sovereignty over their resources to a global association. Relinquishment of national ownership or eminent domain generally involves a constitutional reform and a renunciation of full sovereignty. In sum, sovereignty over national resources is at odds with global *justice*. It is consistent, still, with various forms of global *assistance* or global *solidarity*.

As for the contestability of international associations, which are commonly established by treaty, international lawyers are often more orthodox in interpreting treaties than some American constitutional scholars in

interpreting the US Constitution. I guess that if treaties were amenable to broad interpretation techniques, there would be fewer treaties and, consequentially, less international cooperation. Moreover, unlike many constitutions, which lack second-order interpretive rules, international law provides an explicit interpretive principle in the Vienna Convention on the Law of Treaties. In fact, article 31.1 of this convention says that treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[107] This interpretive principle seems inconsistent with the style of constructive social interpretation that James tries out, which he courageously describes at one point as "an inherently messy affair."[108] There is no denial that international treaties often present problems of interpretation. My modest point is that the fundamental norms that establish the nature, missions and goals of the relevant associations are sufficiently clear and determinate.

IX. "GLOBAL JUSTICE" AS A DYSTOPIAN POLITICAL PROGRAM

We have seen that none of the international associations we have canvassed establishes, in any plausible interpretation of its aims and rules, a global redistributive association. There is no indication at all that all States or their peoples have a right to a fair share of global productive capital or wealth. Different national political associations establish various regimes of capital ownership and management. But there is no national political association that considers the capital placed under its sovereign jurisdiction as a kind of global asset to be globally redistributed to improve the condition of the global poor. Many international documents encourage or require State members to provide decent living standards to their peoples, though there are no effective enforcement mechanisms in this respect. Various international treaties also recognize that international assistance and cooperation can be useful to supplement those national endeavors. Overall, there is a long way from those documents to a global redistributive association. In the absence of global ownership of capital and wealth, the question of intergovernmental fair division of benefits and burdens of trade or other forms of cooperation cannot be raised meaningfully.

Is there any other form of interpreting global justice works? Whereas there are socialist constitutions at the domestic level, there is no global socialist constitution. So global justice programs cannot be viewed as

107. Vienna Convention on the Law of Treaties art. 31, *supra* note 76, 1115 U.N.T.S. at 340.

108. JAMES, *supra* note 75, at 155.

proposals for interpreting or completing the distributive rules of a global socialist constitution. The logical consequence is that global justice is an enterprise in global associational reform. What advocates of global justice propose is to replace the existing international legal order for a sort of global common venture association that honors common ownership of world wealth and capital. This proposal merits consideration.

Global associative self-transformation could proceed by explicit institutional reform or by interpretation of existing legal norms. Because there is a near-zero probability that rich countries such as Russia, the U.S., and China will agree on a massive institutional reform that recognizes global ownership over their resources, wealth, and income, the exegetical route seems more promising, at least in the sense that its failure is not so visible as to deter interesting deliberation on the proposal. Therefore, the question is whether exegetical self-transformation is worth considering. As I said, international associations lack *de facto* and *de jure* capacity to put in practice a process of interpretive self-transformation. Though there is no "living international law" movement that advocates for the same plastic leeway defended with respect to national constitutions, global justice theorists are already embarked on the task of portraying ideal global societies. This is a prestigious philosophical tradition, and it is not my intention to challenge the value of these intellectual pursuits. My point is that that task does not serve global constitutional interpretation.

Given that the task of portraying a world that is organized around the idea of global justice is an exercise in idealized institutional design, my question is whether that design is utopian or rather dystopian. I think that global justice theorizing is dystopian, despite its noble aims. To be operative a global redistributive association should possess the powers usually conferred on a national distributive association. For example, it is inconceivable to establish a global redistributive association without broad taxation, spending and redistributive powers. This vast concentration of powers on a global level would resemble very much a world government. For instance, it should have a decision-making procedure for reaching directives that apply to all countries, including those countries that disagree with the majority. This already implies relinquishing a degree of national sovereignty. It should have some settlement and enforcement mechanism.

Is a global redistributive association worth pursuing? Rawls says to justify his rejection of a world government:

> [a] world government—by which I mean a unified political regime with the legal powers normally exercised by central governments—would either be a global

> despotism or else would rule over a fragile empire torn by frequent civil strife as various regions and peoples tried to gain their political freedom and autonomy.[109]

My own prediction is a bit different. I bet that a world government would eventually become a regime of patronage, populism, and political clientelism. This kind of global political regime would tend to keep poverty in the poorest regions of the world as a form of maintaining global power. Because these features are already present in most of the redistributive associations in the world, why should we expect the global redistributive association to perform better? Given the looser representative character of global politicians, and the weaker accounting schemes that global redistribution allows, globalization would just exacerbate the various pathologies that affect the average political association in the world.

However, my argument against a global distributive association does not rely on such factual claims as those wielded by Rawls against a world government. My argument draws on a normative assumption and a defining feature of a global distributive regime. National political associations have a fundamental feature that a global association would not have, and that feature contributes to their possible justification. It is relevant to frame the feature in terms of international legal norms, but the point is more ethical than legal. Article 12 (2) of the International Covenant on Civil and Political Rights declares, "[e]veryone shall be free to leave any country, including his own."[110] This provision relies on the freedom of any individual to exit any association, political or otherwise. Free States guarantee that no one should be compelled to belong to an association against his or her will, be it a national association or any other kind of association. Whereas free States guarantee this human right and dictatorial States disregard it, it is in principle possible for all national States to respect this right. In contrast, a world government could guarantee only a hollow right to leave the global political association. Even in a world of "unions" and "federations", the French and the Polish can leave the European Union and settle in Paraguay or Singapore. But in a world of one single political association, free exit would be inconceivable. Because free exit makes it possible for membership to be voluntary, rather than compulsory, there is a morally significant sense in which membership in a world government would be compulsory.

History teaches that freedom of movement across national sovereign jurisdictions is a sure bulwark against political persecution. Is the promise of improving the global distribution of resources a sufficient justification

---

109. JOHN RAWLS, THE LAW OF PEOPLES, WITH "THE IDEA OF PUBLIC REASON REVISITED" 36 (1999).

110. International Covenant on Civil and Political Rights art. 12, *supra* note 89, 999 U.N.T.S. at 179.

for the sure loss of a fundamental human right? If government by consent becomes an empty ideal because divergence with the basic global structure cannot express itself in exile, asylum, or emigration, the program for a global distributive association becomes dystopian. A world in which individuals have the real freedom to choose their political membership within a broad set of different kinds of associations seems perfect for a nice sleep. A world run by a global bureaucratic apparatus that recognizes no moral rights on income and wealth rather evokes a nightmare. And why should we dream of a world in which our basic civil liberties are in peril?