

Prerogatives, Incentives, and Institutionalism: A Reply to Brian Berkey

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I should begin by thanking Brian Berkey for his thoughtful discussion of my paper. As will be clear from what follows, I think that, in several instances, Berkey's discussion goes beyond a consideration of anything I proposed. That is all to the good, however, as it prompts his searching claims about some fundamental issues concerning agent-centred prerogatives and egalitarianism. It seems to me, as I will explain further below, that what emerges from his discussion is not a 'defence' of Cohen, but rather a novel view that differs from both Cohen's view and my own.

The most important issue that arises from Berkey's response to my paper concerns the overall structure of my argument. In the first part of my paper I considered a critique of Cohen, pioneered by David Estlund (1996), which is prominent in the literature on Cohen's critique of Rawlsian special incentives (Thomas 2011, pp. 1109–13). In summary, Estlund's concern is that Cohen's endorsement of a hybrid ethical theory, and hence agent-centred prerogatives, is inconsistent with his critique of Rawlsian special incentives. The same ethical grounds that can be given for prerogatives generate justice-based inequalities, too; so how could Cohen permit the former, but object to the latter?

In the course of assessing that argument I canvassed a line of response that I thought Cohen ought to have pursued as a reply to it; in fact, he chose to pursue a different strategy (as I noted). I also concluded that the argument that I suggested on Cohen's behalf was ultimately indefensible (Thomas 2011, p. 1115). Berkey's view, however, is that by proposing this argument for Cohen I was myself *endorsing* the idea of an agent-centred prerogative. Further, given that he finds this proposal far more plausible than my criticism of it, he concludes that I endorse something very like an agent-centred prerogative of a certain kind (a 'protected-zone prerogative') within the scope of that which

Cohen calls ‘the personal’ (Berkey 2015, p. 859). It is, therefore, worth reiterating that I am not a hybrid theorist and I do not think the idea of an agent-centred prerogative can be made to work. More importantly, my aim was to undercut the very distinction between the scope of distributive justice, and the scope of the personal, that underpins the view that such prerogatives are so much as relevant to the issue of permissible inequality; permissible, that is, from the perspective of justice.

This does not mean that Berkey’s discussion of the nature of such prerogatives and their relationship to Rawlsian egalitarianism is not of great interest. It constitutes an original contribution to this debate that seems to me, for reasons I will indicate, as distinct from Cohen’s views as it is from my own. However, because Berkey thinks I want to endorse *some* kind of prerogative located within the personal, he then finds it hard to see how the two separate critiques that I present of Cohen fit together. This is a product of attributing to me a strategy that I proposed for Cohen.

In my paper I claimed that Cohen’s critique of Rawls contained two independent components: there is one argument from the limited scope of prerogatives and another argument from the limited scope of justice (Thomas 2011, p. 1100). While I found neither argument finally convincing, I also claimed that the success or failure of Cohen’s first argument (from the limited scope of prerogatives) was wholly dependent on the success or failure of his second argument (from the limited scope of justice). It is only with Cohen’s *prior* separation of the scope of distributive justice from that of the personal already in place that his discussion of the relation between prerogatives and incentives so much as makes sense. My main strategy, then, was to reject this argument from the limited scope of justice on the basis of that which Berkey correctly describes as an expanded Institutional response to Cohen. My response appeals to an expanded conception of a basic economic structure: a property-owning democracy that represents a full specification of Rawls’s conception of a just society. Those who take decisions to market their labour within a context pervasively structured by such a fully specified basic structure presuppose justice in their avowedly ‘personal’ decisions. There must, therefore, be a continuity between their justice-based motivations and their moral psychology as a whole. As I noted, Cohen has a very different concept of institutionalism in mind: he views Rawls as a latter-day Mandeville who uses institutional engineering to compensate, at the level of the whole

system, for motivations within the system that run counter to justice (Thomas 2011, pp. 1128–9).

So I need to re-iterate the relationship I envisaged between these two critiques of Cohen's two arguments; with the argument from the limited scope of justice rejected, then the first argument from the limited scope of prerogatives is wholly undercut. The issue of whether or not I endorse an agent-centred prerogative within the personal does not so much as arise. That is because I contest Cohen's proprietary notion of the scope of 'the personal'. (It is the aim of his argument from the limited scope of justice to place the boundaries between justice and the personal where Cohen needs them to be.) Berkey, however, sees things differently: because he believes I endorse an agent-centred prerogative, and want to combine this with institutionalism, he finds it puzzling how these two arguments can be run side-by-side. He is right to be puzzled, but fortunately that was not my aim. I will return to this structural point after considering Berkey's subtle treatment of the relationship between prerogatives and incentives and noting how different it is from Cohen's own views.

The argument I offered to Cohen — before ultimately rejecting it — was that a person with an agent-centred prerogative ought to exercise discretion in its operation. This gives a more than rhetorical point to Cohen's imaginary dialogues between a single, representative, better-off person and a single, representative, worst-off person. These dialogues certainly annoy the Rawlsian, who points out that justifications for inequality are systemic and impartial, with the upshot that Cohen's envisaged 'personalization' of the context of justification is question-begging. However, I would suggest on Cohen's behalf that it is in the context of an actual dialogue — and the activation of 'second-personal reasons' in an I–thou form — that it can seem increasingly unreasonable for the better-off person to insist on the full exercise of the discretion afforded them by their agent-centred prerogative.¹ This discretion is on a 'sliding scale' and tempered by how much better off that person is than the representative worst-off individual.

I complained that this kind of view introduced a second-order rigorism, in that discretion was being given to an agent that was then regulated as a matter of degree. Berkey quite reasonably responds that this seems to misunderstand the nature of an agent-centred prerogative. That is exactly how they *do* work, except for a special and

¹ The kind of second-personal reason described by Stephen Darwall in his book *The Second-Person Standpoint* (Darwall 2009).

restricted kind of prerogative (a ‘limited-zone prerogative’) that does seem to work in the way I had in mind. However, prerogatives generally do assign to an agent discretion tempered as a matter of degree. The hybrid theorist always balances the impartial significance of everyone’s interests with the disproportionate weight of the individual’s interest to him or her, as judged from his or her personal point of view. In Cohen’s envisaged dialogues between a better-off and a worse-off person the former is in the same position as any agent deciding whether to do what is objectively the best or whether to exercise an agent-centred prerogative. The case of justice is a special instance of the general class of cases modelled by a hybrid ethical theory that seeks to reconcile the demands of the impartial and the personal.

That seems reasonable enough, but it seems to me equally clear that when we return to the formulation of an agent-centred prerogative in Scheffler’s work, as Berkey helpfully does, we locate the fault line that runs through the hybrid theorist’s position. Berkey cites the following passage:

a plausible agent-centred prerogative would allow each agent to assign a certain proportionately greater weight to his own interests than to the interests of other people. It would then allow the agent to promote the non-optimal outcome of his choosing, provided only that the degree of inferiority to each of the superior outcomes he could instead promote in no case exceeded, by more than the specified proportion, the degree of sacrifice necessary for him to promote the superior outcome. (Scheffler 1994, p. 20; cited in Berkey 2015, p. 859)

Something evaluative, measured in terms of a disproportion between agent-neutral and agent-relative value, is ‘balanced’ against something else, explained in terms of an agent’s reasons (specifically, in terms of that which an agent may reasonably be asked to sacrifice). It is not clear to me exactly how that process of balancing an evaluative disproportion with the importance of different kinds of reason is supposed to work — but that is one of the reasons why I am not a hybrid theorist.²

Pursuing this line of argument in more detail, Berkey’s objection is not that I have misunderstood prerogatives, but that I have failed to

² I cannot go into these reasons here, but see Thomas 2005 for a general conception of the personal point of view as value disclosing, but not, itself, a determinant of value. If it does not determine value, then there are no discrepancies between outcomes as valued from the impartial point of view and as valued from the personal point of view. Since these evaluations do not differ, then there is no ‘disproportion’ between valuations to which one can appeal in order to determine the scope of an agent’s discretion.

distinguish between two types of them. Berkey concedes that protected-zone prerogatives do work in the way I envisaged. However, while I take them to be excessively rigoristic, Berkey has the diametrically opposed intuition that they are, on the contrary, too morally undemanding. For him, discretion operating in a protected zone is insufficiently attentive to how badly the worst-off are doing under a given distribution. This is, in fact, the essence of Berkey's own prerogative-based argument for understanding permissible inequalities of justice. We can all agree that the actual world is very far from just, particularly at a global level, but Berkey's view is that protected-zone prerogatives are particularly vulnerable to the charge of moral complacency because of the context in which they operate. He notes that on the kind of view that is now emerging—one that he accepts is internally consistent—incentives that are modelled on such protected-zone prerogatives could be accompanied by *further* personal obligations that are also directed towards the goal of justice. (This would be so even if they do not reflect the demands of justice itself.) That would help to address the charge of moral complacency (Berkey 2015, pp. 861). Berkey suggests that the proponent of protected-zone prerogatives could appeal to those supplementary obligations to explain cases where such prerogatives alone fail to reflect the demandingness of justice. This would be the case, relative to some context of operation where the worst-off are doing very badly indeed such as, plausibly enough, the actual world.

The most important thing to say about this proposed view is that it is not mine. This combination of protected-zone prerogatives plus further obligations towards justice certainly marks a contrast with Berkey's own view, where prerogatives do not operate in this 'restricted zone' way. It was not my aim to defend either view. From a standpoint above this particular fray, however, I would like to make three points relating to the rival positions about prerogatives and justice which emerge from Berkey's paper.

First, given his assumption that prerogative-based incentives that worked in a 'protected zone' way would be too undemanding in the actual world, Berkey concedes that, in addition to the justice of the basic structure, there could be personal obligations towards justice located in the personal. (I attributed a view of this kind to Norman Daniels, who offers one of the most trenchant extant Rawlsian responses to Cohen (Thomas 2011, p. 1104, n. 10, citing Daniels 2002).) Berkey then claims that there is nothing at stake here between the two contrasting views of prerogatives that have emerged from his

discussion. He thinks that orthodox agent-centred prerogatives, with their constant weather eye on the fate of the worse-off, are an appropriate model for prerogative-based inequalities that reflect the demands of justice. By contrast, protected-zone prerogatives are, from his perspective, always at risk of justifying moral complacency. But is this merely a terminological issue as he claims?

I do not think that it is: we want to keep separate the issue of the nature of our duties from the question of how stringent they are given the actual state of the world.³ Bearing in mind that we are developing a sustained analogy here between prerogatives and justice, the kinds of context that Berkey thinks would reveal protected-zone prerogatives to be morally complacent would be handled by Rawls in a different way. He would appeal to the distinction between his general, and special, conceptions of justice to deal with such cases (Rawls 1971/1999, pp. 55–6). Berkey thinks that the theory of justice ought to represent the requirements of justice as very demanding; so much so that this gives us independent reasons for abandoning the idea of a protected-zone prerogative as an appropriate model for those requirements. Unrestricted prerogatives seem to him a more promising way to explain those reasons, but Rawls does not think that this is how one ought to approach the problem. In cases of serious and chronic societal injustice, we apply the general, and not the special, conception so that the justification of the kinds of inequalities permitted by the difference principle is not an issue at all. That is because the two principles and their lexical priority are not part of the general conception of justice. We do not have to find a way to model them based on agent-centred prerogatives as it is characteristic of the general conception of justice that these incentives are absent.

Secondly, I think we can infer, even if Berkey does not explicitly so state, that he is drawn to a view that sees a combination of a hybrid ethical view and a critique of incentives as compatible. Indeed, he identifies a significant analogy between agent-centred prerogatives and permissible incentive-based inequalities. While a hybrid theorist, and not a consequentialist, Berkey seems to find this view appealing because it balances a comprehensive assessment of total social outcomes with an appropriate concern for an individual's personal point of view given the demandingness of justice in our world. Whatever the attractions of this position, the least one can say is that it is not

³ I discuss his point in the context of the general problem of moral demandingness in Thomas 2009.

Cohen's. As I noted in my paper, he followed a different strategy to defuse Estlund's argument (Thomas 2011, pp. 1112–13). Given Cohen's prior separation of the scope of distributive justice from the personal, he saw no inconsistency between accepting prerogatives and rejecting incentives. That is because each has been relativized to a separate sphere and is thus insulated from the other.

Cohen's final view is that each is a separate source of inequality; prerogative-based inequality is a departure from justice, but reasonable overall. It is, therefore, acceptable 'all things considered'. Incentive-based inequality is a departure from justice, but *never* justified; it represents the tainting of the pure principles of justice by the mere expediency more characteristic of 'rules of regulation'. Cohen believed that, in the real world, the sources of the inequality that trouble egalitarians are generated by structural aspects of a market economy (Cohen 2008, pp. 391–2). He believed that these inequalities are *not* significantly affected by talented people not taking high-paying jobs, for which they are qualified, because they would prefer to write the Great American Novel. Such inequality-generating choices exist, and Cohen's commitment to hybrid theory means that he accepts them, yet he takes them to be comparatively insignificant in the overall scheme of egalitarian concerns. I think he was correct: the relation between agent-centred prerogatives and justice-based inequalities really is a side issue in this debate. So the line that Berkey pursues in his paper is as opposed to Cohen's strategy as it is to my own.

This point can be reinforced by noting how Berkey and Cohen are on opposite sides of a crucial question with a bearing on the justification of Cohen's Platonism about the 'pure' principles of justice. Charles Larmore has argued that Cohen was inconsistent in so much as recognizing the ethical legitimacy of agent-centred prerogatives (Larmore 2013, pp. 25–6). That is because this recognition reflects the hybrid theorist's fundamental methodological commitment to developing a theory of justice that takes into account the kind of person for whom it is a theory.⁴ That seems to Larmore inconsistent with

⁴ As Arthur Ripstein notes in his insightful critical notice of *Rescuing Justice and Equality*, Rawls shares with the hybrid theorist a commitment to this one 'fact insensitive' principle: 'a regulative principle ... requires further specification' (Ripstein 2010, p. 681). But the point of this commitment to this basic methodological fact-insensitive principle then licenses Rawls's *further* principles to be sensitive to the relevant facts governing the kind of object theorized (Ripstein 2010, pp. 678–82). It seems to me that this 'specificationism' about principles has a direct bearing on the requirement that Rawls's principles need to be *further* specified into the kind of ideal-typical form represented by a property-owning democracy (or by liberal market socialism). However, the more important point is that Cohen requires all the ultimate

Cohen's professed Platonism. But it seems to me that this is another bullet that Cohen can dodge because of his relativization of prerogatives and incentives to separate spheres. Cohen, consistent with his Platonism, can reply that agent-centred prerogatives generate inequalities that are rationally justified overall, but inconsistent with the equality that justice demands (a combination of views that Berkey notes in order to disagree with it (Berkey 2015, p. 857, n. 16, citing Cohen 2008, p. 30, n. 7)). In Cohen's final view, prerogatives do not taint or compromise the content of the true principles of justice that, therefore, retain their purity.

However, this simply reinforces the point that Berkey and Cohen are at odds here: Berkey commits himself to the view that the departures from equality mandated by agent-centred prerogatives are *themselves* just. This consilience between agent-centred prerogatives and justice reflects a deeper commitment to at least one 'fact insensitive' principle: the theory of justice, like hybrid theory generally, is sensitive to the fact that each of us has a personal point of view and our own life to lead. This is not, then, Cohen-style Platonism where *all* the ultimate principles of justice are fact-insensitive 'all the way down'. So it is Berkey who needs to address Cohen's scepticism as to how much of a defence of permissible inequalities a view of this kind could hope to be. From Cohen's uncompromising perspective, Berkey's defence of justice-based inequalities via agent-centred prerogatives will be as guilty as Rawls's view of tainting the pure content of the principles of justice. This is because of its unwarranted accommodation of the content of the theory of justice to the 'facts' of human nature.

So now the challenges to Berkey's view come both from me and from Cohen. In my case, that is because I think Berkey has misinterpreted the scope of my institutionalism (as I will explain next). In the latter case, that is because of Cohen's insistence that, in the actual world, very few objectionable inequalities stem from the exercise of agent-centred prerogatives within the personal. Berkey needs to explain why he thinks Cohen was wrong to relativize prerogatives and incentives to their separate spheres of operation, thereby insulating them from each other, as the basis for his further claim that prerogatives do not generate substantial inequalities. They ought not to be the focus of our egalitarian concern.

principles of justice — and only justice — to be entirely fact-insensitive and this is an important point of disagreement with Berkey.

The point of the foregoing discussion was three-fold: first, to characterize Berkey's own position and, secondly, to show that it differs not only from my own position but also from Cohen's. Thirdly, it allows me to set up the discussion of my critique of Cohen's limited scope of justice argument freed from a restrictive assumption that Berkey brings to it. That assumption is that my aim was to run an endorsement of some kind of agent-centred prerogative alongside an Institutional response to Cohen. I agree with Berkey that any position with that general shape would face serious problems.

A view of that kind would concede to Cohen that there is an area, demarcated as 'the personal', that falls outside the scope of distributive justice, but that is the *main* thing that I want to deny. The whole force of my argument rests on an expanded basic structure response to Cohen. We are to see that basic economic structure as further specified, at least at the comparatively abstract level of Weberian 'ideal types' of kinds of economic arrangements, into either a property-owning democracy or liberal-market socialism. We are then to see agents who choose to market their labour in an economy structured that way as having already presupposed a context that reflects a commitment to fairness. Two points are relevant here, both emphasized by Paul Weithman, namely that we are to assess these ideal typical forms when they are 'working well' and are to assess their impact on the moral psychologies of citizens in a well-ordered society (Weithman 2013, citing Rawls 2001, p. 137). In a well-ordered society citizens freely elect to live under transparent and commonly known principles and to adjust their own deliberations accordingly; as Weithman puts it, 'economic systems ... [shape] the persons we desire to be'. This point undermines Cohen's attribution of a very different understanding of institutionalism to Rawls, where we are to see him as introducing system-wide compensation mechanisms for the toleration of motives within the personal that are incompatible with justice. They would be, therefore, incompatible with Rawls's conception of the moral psychology of a citizen living under just social arrangements (Baldwin 2008).

Some of the discussion in Berkey's paper as to whether the position I describe counts as 'morally monist' or 'morally dualist' does seem to me merely terminological. Certainly, I could say a great deal more about how individual motivation interfaces with institutionalism: what it is for an individual to endorse, reject, or to be complicit with a set of institutions. That awaits another occasion; others have already begun to outline how such an account

might be developed.⁵ Here I simply note that the presumption that I am committed to an agent-centred prerogative puts me at cross-purposes with Berkey throughout his discussion as to whether adjusted procedural justice tends to eliminate the special incentives to which Cohen objected.

It is essential to a ‘pre-distributivist’ egalitarianism of the kind that I attributed to Rawls that the only feasible way to make a market fair is to embed it in an institutional context that patterns its outcomes as fair. Berkey characterizes this view accurately: the main Institutional claim is that there are no ‘non-procedural conditions’ on just outcomes, at least for a fully specified case of adjusted procedural justice. That is because ‘the relevant procedure having been followed is both a necessary and a sufficient condition for the justice of the distribution that results’ (Berkey 2015, p. 852). Cohen, by contrast, claims that a ‘fully just set of basic structural institutions will at least sometimes be insufficient for justice’; the Institutional denies this. Further, as Berkey also notes, it is a corollary of the Institutional’s position that it cannot be the case that individual efforts to improve the conditions of the worst-off will make a fully institutionally specified basic structure any more just. Therefore, individuals cannot be obligated to do this.

The entry point for Berkey’s critique of institutionalism as a whole, and my version of it in particular, is that which he takes to be an important concession from Rawls—made more or less in passing. Rawls noted that an institutional scheme that implements adjusted procedural justice is necessary and sufficient for justice ‘at least so long as it is *within a certain range*’ (Rawls 1971/1999, p. 74, emphasis added). That qualifier seems to Berkey to weaken Rawls’s commitment to proceduralism: whether an outcome is within or outside that range is a ‘non-procedural condition’. Therefore, Rawls is a less-than-complete proceduralist. Berkey comments that there may be ‘no guarantee’ that ‘even the best of basic structures alone will always bring about distributions that fall within the required range’ (Berkey 2015, p. 854).

I am puzzled by this remark and the role that the word ‘guarantee’ plays in it: the appropriate test is whether Rawls’s regime types—when ‘working well’—implement justice. The only way to address that question is by reflection on the outcomes in the context of

⁵ I have in mind an unpublished paper by Robert Jubb (MS); Jubb, in turn, acknowledges the influence on his approach of Schapiro 2003.

wide reflective equilibrium drawing on our best knowledge in the social and psychological sciences. Our target notion is our intuitive concept of justice as evidenced by a range of considered moral judgments in which we have a reasonable degree of confidence: procedures, and target concept, are mutually adjusted one to the other. In the background here, shaping Berkey's objection that this process cannot be 'guaranteed' to determine just outcomes, is a merely instrumental conception of institutional implementation. Even so, it is not clear what underpins the force of the word 'guarantee', nor why it does not beg the question against an Institutionalist who believes that a suitable set of institutions—one that has withstood critical reflection—constitute a just outcome.

The kind of institutional view that I endorse is not instrumentalist about institutions; in this respect it stands closer to one strand of republican political theory. It sees no grounds for Berkey's 'in principle' pessimism about reforming institutions so as to deliver justice. By contrast, Cohen's Platonism could easily generate such a pessimism: he may well have believed that nothing as historically and socially compromised as the specific institutions of our political tradition could adequately reflect the content of the pure contents of justice. However, I have indicated that Berkey is no Platonist; his commitment to hybrid theory is a break with Cohen's assumptions. It is not clear, then, what sustains his aprioristic requirement that this is a matter of guarantees, or otherwise. You can even be an instrumentalist about institutions and not share Berkey's pessimism; in a related connection, Richard J. Arneson has described the practical task for the theorist of justice of 'work[-ing] within the consequentialist and welfarist moral foundations of the classical liberal traditions, suitably amended, and seek[-ing] to derive from these foundations institutional proposals in the spirit of the social democratic tradition' (Arneson 2012).⁶

Overall, Berkey objects that my position on the issue of non-procedural conditions on the justice of a distribution is 'not entirely clear'; it should be clear enough that I do not think that there are any! However, following Rawls, I do think that there are issues about justice that are far wider than questions about the justice of the basic structure. My suspicion is that these issues are being treated differently by Berkey: as issues that the Institutionalist tries, and

⁶ Arneson continues: 'the idea would then be to fuse the perfectionist welfarist consequentialism of J. S. Mill (and Derek Parfit) with twentieth century social science and with the wisdom and lore accumulated through the historical experiences of modern social democratic regimes'.

fails, to bring within the scope of her theory. From his perspective the Institutionalists' failure shows the limitations of the view. However, as Scheffler has pointed out, Rawls has a relatively narrow concern with distributive shares as determined by the basic structure (Scheffler 2003, p. 28). Against this background, broader issues of justice arise: these other issues do not fall within the scope of Rawls's concerns, but he does not deny that they are real and important.⁷ For example, Rawls notes that it is an open question whether his austere justificatory resources, devised solely for the theory of justice so narrowly conceived, are adequate in 'other kinds of cases' (Rawls 1999b, p. 364).⁸ So when Berkey finds examples of issues of justice that are not covered by institutionalism, he classifies them as proof that there are non-procedural conditions on justice that show it is inadequate. I treat them, as Rawls did, as falling outside the limited focus of the theory of justice as he narrowly conceived of it.

What kinds of case show the insufficiency of institutionalism? The two examples cited by Cohen that Berkey seems to endorse are where the worst-off are 'quite badly off' or a case of systematic gender injustice. The latter takes the form of discrimination within families in the guise of 'favoring sons over daughters in the matter of providing higher education' (Cohen 2008, p. 136). These two examples could hardly be more unconvincing from my specific Institutionalist perspective: if the worst-off are 'quite badly off' by some objective standard, then this is a case calling for the general and not the special conception of justice where, as I have noted, the issue of incentive-based inequalities does not arise. As for gender discrimination of the kind Cohen envisages within the personal there is a great deal for the proponent of an expanded basic structure to say. Given that a property-owning democracy is committed to the universal holding of capital and on-going access to it, the first point to emphasize is that human capital is as important in this scheme as physical capital. The institutions of such a society will prevent this kind of discrimination arising, perhaps by providing a free and high-quality public

⁷ One—prominent—issue of this kind involves that which Rawls calls 'redress', such as justice in the treatment of those with disabilities (Freeman 2003, p. 414). I note the bearing of this on Cohen's critique of Rawls at Thomas 2011, p. 1133.

⁸ This is connected to another, tangential, aspect of the Rawls–Cohen dispute upon which I have not focused, namely, the controversy over luck egalitarianism where they are also at odds. One aspect of that controversy is what counts as a primary good: for Rawls, all such goods are 'social' primary goods and he is not concerned with 'natural' primary goods such as 'health and vigour, intelligence and imagination' (Rawls 1971/1999, p. 54).

education system such that a woman's ability to attend university will not be restricted by the sexist attitudes of her parents. As to whether the institution of the family falls outside the basic structure as Rawls understood it, the issue has been intensively discussed and his final answer was 'no' (Rawls 1999c). Finally, to draw on Norman Daniels's argument again as a fallback position for the Rawlsian, Cohen has to show that this putative gender injustice is a defect in justice and not an instance of a fully just society accompanied by ethically defective attitudes that are not failings in justice (Daniels 2002).

Overall, my conclusion is this: Berkey places an 'each-way bet' that my critique of Cohen will not succeed whether or not I endorse such non-procedural conditions on justice. I have investigated both disjuncts of that claim. The first disjunct depends on Berkey's belief that I found '[an] element of Cohen's view ... valuable and worth endorsing', specifically that I endorsed some 'non-procedural conditions' on outcomes (Berkey 2015, p. 856). That is the putative commitment to agent-centred prerogatives that I do not, in fact, endorse, so that first set of arguments can be set aside.

To prove the second disjunct, Berkey needs to show that fully adjusted procedural justice not only might, but probably will, deliver unjust outcomes. He is happy to concede that, in a fully implemented property-owning democracy, the following will be true:

individuals ... are more committed to justice (on either a Rawlsian or a Cohenian account of the requirements of justice) than are those who are committed to acting within and supporting the institutions of the version of welfare-state capitalism that best satisfies Rawls's principles of justice. It even seems possible that a well-functioning property-owning democracy could effectively ensure that inequalities remain minimal and that even the worst-off members of society are fairly well off.⁹ (Berkey 2015, p. 866)

The only objection Berkey raises to the view expressed in this passage is a re-iteration of the insufficiency of institutionalism and the complementary re-assertion of his instrumental conception of the role of institutions in securing justice. He asserts that even a fully implemented version of a property-owning democracy 'is liable ... at times to give rise to inequalities that exceed what a plausible

⁹ This passage calls for a correction that has a bearing on Cohen's position, even if not Berkey's. For Rawls, no version of welfare state capitalism can satisfy his principles of justice given that it violates the principle of reciprocity (Rawls 2001, pp. 135–40, 158–62). This is relevant to my complaint in Thomas 2011 (p. 1130) that Cohen was a complacent egalitarian who did not seek radically to reject the basis of welfare state capitalism; he accepted it, and simply wanted citizens to pay more personal taxation (Cohen 2008, p. 70, n. 41).

prerogative can justify' (Berkey 2015, p. 866). I have questioned this pessimism about the resources of institutionalism; there is certainly a risk here that Berkey and I simply beg the question against each other. Certainly, given my view as I have described it, I cannot accept Berkey's statement that such inequalities are liable to occur and *therefore* 'Thomas's view does not really answer to the core of Cohen's critique'. Adding in further, non-procedural demands of justice in addition to a fully specified proceduralism was precisely what I meant by 'double counting' the demands of justice.

However, I note, again, that Berkey cannot recruit the later Cohen—as he does—to press the objection that such inequalities that would exceed the range envisaged by the Institutionalists would exceed that which a prerogative would justify. That is because, as I have noted, Cohen thought the inequalities generated by prerogatives were comparatively insignificant compared to those permitted by Rawls's special incentives. From his perspective, the damage caused by the latter reflects Rawls's more fundamental error about the scope of distributive justice. In fact, my suspicion is that Berkey actually believes that adding to the theoretical discussion the empirical facts about the extent of severe poverty in the world generates a very demanding view, all things considered. If prerogatives generate a case only for a limited degree of inequality, then for him they *are* playing their role adequately. This remains a different strategy from that of Cohen, who locates the 'site' of distributive justice elsewhere and attaches little overall significance to prerogative-based inequalities. However, this does mean that in the now three-way dispute between Cohen, Berkey, and myself there is at least one point in which I can make a common cause with Cohen. I share his scepticism as to whether the project of grounding justice-based inequalities on agent-centred prerogatives so much as locates the issue in the right place.¹⁰

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¹⁰ I am very grateful to Kathryn Brown for her comments on successive drafts of this paper; they have greatly improved the end result.

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