

## ABSTRACT

Title of Dissertation: GLOBAL JUSTICE AS FAIRNESS: NON-DOMINATION,  
HUMAN RIGHTS & THE GLOBAL BASIC STRUCTURE

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Most Rawlsian approaches to global justice fall into one of two main types—cosmopolitanisms that expand the scope of Rawls's domestic theory to the entire world, and those that, following Rawls's *The Law of Peoples*, develop a liberal foreign policy rooted in the toleration of "decent" but nonliberal peoples. Global Justice as Fairness offers an alternative to these by incorporating some aspects of each, as well as some unique features, into a coherent whole that avoids their more significant drawbacks. Employing a distinctive understanding of the global original position and a republican view of freedom, the theory generates two principles that aim to ensure the agency and non-domination of peoples. These principles provide the broad outlines of a just global basic structure for states that is both realistic and utopian.

The most basic parameters of Rawlsian theories of global justice are the subject of and parties to the original position(s). Global Justice as Fairness is unique among such theories by identifying the global basic structure as subject (as cosmopolitans do) while also taking peoples, not persons, as the parties (following Rawls's law of peoples). It is

also alone in severing the tie between domestic and global justice and recognizing the fact of reasonable *global* pluralism, according to which it is unreasonable to expect all peoples to hold liberal conceptions of domestic justice. Global Justice as Fairness excludes the parties' knowledge of their domestic conceptions behind the veil of ignorance, forcing them to rely on their generic interests as peoples. This picture of peoples' rationality is developed with an account of global primary goods rooted in their agency and a global analog of citizenship.

Thus situated, the parties are led to select two principles of justice for a global basic structure formulated in terms of the republican vision of freedom. The first principle specifies a human rights regime that ensures the minimal conditions needed for peoples to maintain their distinctly political form of group agency. The second provides guidelines for minimizing the domination of peoples through a just global political and economic order within which they can freely exercise that agency.

GLOBAL JUSTICE AS FAIRNESS: NON-DOMINATION, HUMAN RIGHTS & THE  
GLOBAL BASIC STRUCTURE

by

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# Introduction

## Chapter 1: A *Political* Conception of *Global Justice*

### 1.1 *Goals & Strategy*

The primary aim of this dissertation is to explicate a theory of global justice that is fundamentally Rawlsian in character.<sup>1</sup> My hope, more specifically, is to establish the viability of a political conception of global justice, one analogous to (the later) Rawls's conception of domestic justice, but tailored specifically for the global context. I refer to my conception as Global Justice as Fairness. This undertaking may appear redundant, since in *The Law of Peoples* Rawls himself applies his approach to the international realm. However, it is almost universally acknowledged that the arguments therein are seriously deficient—at best, there are significant gaps to be filled; at worst, both the methodology used and conclusions drawn are downright dubious. There is certainly much to be said about the merits and deficiencies of *The Law of Peoples*, not to mention its proper interpretation. However, I will not have a great deal to say about either in what follows, at least not very directly.

One of the more irritating aspects of the current literature on global justice is the tendency to blur the line between answering exegetical questions and directly arguing for substantive conclusions. (I don't mean to suggest that this problem is at all unique to the domain of global justice.) It is understandable that a work like *The Law of Peoples*, written by a figure as towering as Rawls, would cast a considerable shadow over the

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<sup>1</sup> Rawls never describes his account of the law of peoples as a theory of global justice, but I will occasionally describe it as such. He clearly understands his account as a competitor to (other) theories of global justice, and whatever reasons he may have had for avoiding that locution do not apply to the theory I will defend.

subsequent literature, and of course exegesis is a valuable activity. However, many theorists of global justice have spent more time criticizing or defending Rawls's work than they have developing clear arguments. I will not be following suit here. My project may be same as that of *The Law of Peoples*, and that work has profoundly shaped my thinking about global justice, but the view I will defend is importantly different in several respects. Determining the extent of the disagreement would require a massive exegetical detour, which I have neither the space nor the interest to pursue.

A far more irritating aspect of the relevant literature is what Allen Buchanan has called "Leaf-Blower Theorizing"—resolving a relatively narrow question by simply pushing its problematic aspects into neighboring theoretical space. In the introduction to his excellent work, *Justice, Legitimacy, and Self-Determination*, Buchanan emphasizes the need for a "holistic" approach to global justice:<sup>2</sup>

to determine whether a particular rule (concerning humanitarian intervention, self-determination, secession, etc.) ought to be included in international law will depend in part upon what is being assumed about the other principles that it will coexist with, how they fit together, and what the effects of their joint implementation is likely to be.<sup>3</sup>

This holism he takes to be a direct implication of his thoroughly institutional approach to questions of justice—a broadly Rawlsian approach that I wholeheartedly share.

Buchanan is certainly correct to complain that this holism (including the underlying focus on institutions) is not typical of recent theorizing about global justice; his own theory, with its impressive scope, stands in sharp contrast to such theorizing. Yet while he

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<sup>2</sup> Buchanan describes his project as a "moral theory of international law," not a theory of global justice. As with Rawls's use of 'law of peoples,' for present purposes I will take this choice to be merely rhetorical, and will refer to Buchanan's account as a theory of global justice.

<sup>3</sup> Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2004), 28



systematically takes up a great many practical questions about global justice, his defense of the philosophical framework within which he addresses these issues strikes me as brief and flawed. A truly holistic approach to global justice should be both (practically) wide and (theoretically) deep, paying attention not just to the institutional context of particular questions, but also to their underlying methodological and justificatory bases.

There is a pronounced tendency among theorists of global justice to forgo answering fundamental questions in favor of more exciting and practical ones, such as: Which rights are human rights? Is the structure of the global economy unjust? How should we respond to the staggering poverty and inequality we see in the world? When is humanitarian intervention justified? This tendency is understandable enough, but it also leaves the bases of their answers to these questions frustratingly mysterious. Thus I will opt for the opposite defect here: while I will offer some answers to these questions, they will generally be vague and suggestive. I am far more concerned here with the basis of possible agreement on these answers than I am with the specifics of the answers themselves. Without generating some agreement on the underpinnings of an acceptable theory of global justice—without some common basis for the justification of highly controversial claims about, for example, human rights and global distributive justice—it is hard to see how to make much progress, either philosophical or practical, on the questions that most concern theorists of global justice.

It should be noted at the outset that the essential elements of a Rawlsian approach to political philosophy, while discussed at some length, will not be defended against fundamentally different approaches. While it would certainly be desirable to take up such alternatives, and I hope to do so in the future, there is simply no space to do so here,

and my present purpose is not to pursue such arguments. Thus my basic strategy will be to evaluate the comparative merits of Global Justice as Fairness with other broadly Rawlsian approaches to global justice. However, this task is complicated by the prevalence of "Leaf-Blower Theorizing"—it is difficult to find rival holistic accounts of global justice with which to compare my own. Thus I will invent some, though of course not out of whole cloth. There are two primary Rawlsian camps in the global justice literature, and by drawing upon various works by those in each camp (and filling in gaps where necessary), I will distill two primary competitors to my view. Exhibiting the flaws of these approaches will allow me to present Global Justice as Fairness as the reasonable middle ground, borrowing some elements from either side and working them into a coherent whole. This comparative evaluation will occupy Part II, following the exposition of Global Justice as Fairness in Part I.

Since the views of these rival camps lack common and concise labels, I will make up my own. I will use the term "Rawlsmopolitan"<sup>4</sup> to refer to the cosmopolitan strain of Rawlsianism typified by (some of) the (earlier) works of Charles Beitz and Thomas Pogge. The fundamental defining feature of Rawlsmopolitanism is its commitment to applying Rawls's domestic position to the global context. This camp is united in its rejection of Rawls's own global view. By contrast, the other camp, which I will refer to as "LP-Rawlsian,"<sup>5</sup> takes its inspiration from Rawls's position in *The Law of Peoples*,

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<sup>4</sup> This term strikes me as slightly preferable to the only succinct alternative I have come across—'cosmorawlsian'—from Richard Vernon, "Contractualism and Global Justice: The Iteration Proviso." *The Canadian Journal of Law and Jurisprudence* 19, no. 2 (2006): 345.

<sup>5</sup> This is an abbreviated version of the more cumbersome 'Law of Peoples Rawlsians' from Arash Abizadeh, "Cooperation, Pervasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice," *Philosophy & Public Affairs* 35, no. 4 (2007): 322.

embracing his focus on "peoples" rather than persons. Given the difficulties with *The Law of Peoples* alluded to above, I will rely largely on Samuel Freeman's defense/exegesis of Rawls' work in developing this view.

In addition to these two principal competitors, I will also take up Buchanan's account, as well as Philip Pettit's discussions of global justice. While these views are not Rawlsian *per se*, Buchanan's theory of international law is very close in content to Global Justice as Fairness, and he suggests some interesting ways that his position could be "Rawlsianized." Pettit's work on global issues is an extension of his republican theory of freedom, and as we will see, Global Justice as Fairness assimilates some key insights of his republicanism into its Rawlsian framework. It will thus be worth comparing Pettit's position to Global Justice as Fairness, even though it represents a non-Rawlsian alternative. Furthermore, recent work by both Pogge and Beitz seems to disavow significant elements of Rawls's approach, and we will examine this work in some detail as well. I will not, however, take on (other) non-Rawlsian competitors in any direct way; it will be left to those who reject Rawlsian approaches to determine whether their preferred approaches are more philosophically and practically plausible than the Rawlsian alternatives. This determination will hopefully be made more difficult by the relative plausibility of my particular version of Rawlsian global justice.

It is true that my project here is most likely to appeal those who already accept Rawls's basic approach to political philosophy, and especially that taken in *Political Liberalism* and his later works. Admittedly the target audience is, in this sense, rather narrow. There is, however, a sense in which this admission is quite misleading. Central to (the later) Rawls's approach was demonstrating the possibility of generating an

overlapping consensus on the content of a theory of justice—an agreement on basic political principles from the perspectives of a wide range of conflicting views about the ultimate justification of those principles. My fundamental goal is to generate some hope that such an overlapping consensus can be reached on basic principles of global justice, and thus the theory here expounded, if successful, will necessarily have broad appeal (indeed, as we will see, much broader appeal than Rawls's domestic theory). Even if the basic elements of the theory depart from the reader's more fundamental comprehensive doctrines about morality (or even domestic-level social justice), hopefully the resulting principles can still be viewed as reasonable standards for a global political order characterized by deep and abiding disagreement about such doctrines.

My project is to construct a *political* conception of *global* justice. The conception is "political" in Rawls's rather technical sense of the term; it is "global" in the sense that it is intended to provide principles that hold at the global level, rather than the domestic or local levels. Such a conception is intended to provide a public basis of justification for our global political judgments. Thus the simplest way to summarize my methodology will be to review Rawls's notions of "public justification" and a "political conception of justice" (as found in his domestic theory), and point out the modifications that need to be made when shifting to the global context. Before doing that, however, I will briefly go over Rawls's view of the roles of political philosophy. I share his understanding of the central tasks of the field, and as will become evident, this understanding motivates the project of developing a distinctly "political" conception.

Rawls describes what he calls the “practical” task of political philosophy this way:

...to focus on deeply disputed questions and to see whether, despite appearances, some underlying basis of philosophical and moral agreement can be uncovered. Or if such a basis of agreement cannot be found, perhaps the divergence of philosophical and moral opinion at the root of divisive political differences can at least be narrowed so that social cooperation on a footing of mutual respect among citizens can still be maintained.<sup>6</sup>

This practical role is familiar from the social contract tradition within which Rawls worked, but as we will see, the commitment to practicality is taken to new heights by its embodiment in the notion of public justification. Rawls's strategy for attaining *practical* agreement is to impose rather stringent limits on the scope and basis of principles of justice; this strategy is even more limiting when developing an analogously “political” conception of global justice, which aims at *global* cooperation on a footing of mutual respect among *societies*.

Attaining a basis for agreement on basic issues of domestic justice is, of course, an elusive goal; even merely narrowing the political divisions that plague most modern societies may strike us as too much to ask. Switching to the global context only magnifies such worries—trying to find some basis for agreement on such contentious issues as human rights among the great variety of societies in the world may appear beyond all reasonable expectation. In this way the practical role, especially in the global domain, might be seen as in tension with another role Rawls sets out for political philosophy, which he calls “reconciliation.” His hope is that political philosophy can “reconcile” us with the social world in which we live, a world importantly characterized by “profound and irreconcilable differences in citizens' reasonable comprehensive religious and philosophical conceptions of the world, and in their views of the moral and

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<sup>6</sup> John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge: The Belknap Press of Harvard University Press, 2001), 2

aesthetic values to be sought in human life."<sup>7</sup> In other words, the possibilities envisioned by political philosophy must be constrained by what Rawls calls the fact of reasonable pluralism. If, as I will maintain, there is an analogous fact about the diversity of conceptions of domestic justice at the global level, the role of reconciliation will be even more restrictive at that level.

There is certainly an air of paradox to the idea of conjoining the practical goal of generating agreement with an insistence that disagreement is a fact that must be accommodated. This air is built into Rawls's own description of his project as "realistically utopian." Whether this project is hopeless remains to be seen; only after the political conception of global justice is spelled out can such a judgment be made. However, some ground for optimism is afforded by a third role that Rawls identifies. According to the role of "orientation," "political philosophy may contribute to how people think of their political and social institutions as a whole... [ultimately resulting in] a unified framework within which proposed answers to divisive questions can be made consistent."<sup>8</sup> The hope here is that by taking an expansive, holistic view of political life and approaching fundamental questions systematically, the pressure of consistency can push us toward convergence on matters of basic justice. That such systematic thinking is generally lacking on the domestic level is obvious enough, and doubly so in the global context.

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<sup>7</sup> Rawls, *Justice as Fairness*, 3

<sup>8</sup> Rawls, *Justice as Fairness*, 2-3

## 1.2 Methodology 1: Justification

This understanding of political philosophy as practical, reconciliatory, and orienting underlies Rawls's view of justification. The following passage nicely summarizes this view (in the context of his domestic view, i.e. "justice as fairness"), and unpacking it will prove instructive.

Justice as fairness hopes to put aside long-standing religious and philosophical controversies and to avoid relying on any particular comprehensive view. It uses a different idea, that of public justification, and seeks to moderate divisive political conflicts and to specify the conditions of fair social cooperation between citizens. To realize this aim we try to work up, from the fundamental ideas implicit in the political culture, a public basis of justification that all citizens as reasonable and rational can endorse from within their own comprehensive doctrines. If this is achieved, we have an overlapping consensus of reasonable doctrines, and with it, the political conception affirmed in reflective equilibrium.<sup>9</sup>

Much of this passage requires significant explication; I will start with the notion of a political conception of justice, and then proceed to overlapping consensus and reflective equilibrium.

For a conception of justice to count as "political," it must satisfy three conditions:

1) "it is worked out for a specific subject, namely, the basic structure of a democratic society;"<sup>10</sup> 2) it "does not presuppose accepting any particular comprehensive doctrine;"<sup>11</sup> 3) it "is formulated so far as possible solely in terms of fundamental ideas familiar from, or implicit in, the public political culture of a democratic society."<sup>12</sup> All three of these conditions need to be modified for the purpose of developing a political conception of global justice.

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<sup>9</sup> Rawls, *Justice as Fairness*, 28-29

<sup>10</sup> Rawls, *Justice as Fairness*, 26

<sup>11</sup> Rawls, *Justice as Fairness*, 26

<sup>12</sup> Rawls, *Justice as Fairness*, 27

First, let us consider the subject of a *political* conception of justice—the basic structure. The precise boundaries of such structures are controversial, and any very specific answer is likely to be problematic, as well as undesirably inflexible. Since I am not directly concerned with domestic basic structures here, we need not take up such questions. It is enough to describe them as "the way in which the main political and social institutions of society fit together into one system of social cooperation... the background social framework within which the activities of associations and individuals take place."<sup>13</sup> Just as the basic structure of society is the subject of domestic justice, I take the global basic structure to be the subject of global justice. Such a structure organizes the institutional relations among societies and provides the background framework for international cooperation.

Secondly, political conceptions of justice do not presuppose any (particular) "comprehensive doctrines." The notion of a comprehensive doctrine is largely parasitic upon that of a basic structure—such doctrines are philosophical, moral, or religious views that apply to subjects beyond just the basic structure. The main idea here is that political conceptions of justice, in order to accommodate the fact of reasonable pluralism, must be "freestanding," and thus political philosophy must not be conceived of as applied moral philosophy.<sup>14</sup> I will modify Rawls's prohibition of reliance on comprehensive doctrines for the global context in a novel and distinctive way, a way rejected by both Rawls and his cosmopolitan critics. I will defend an analogous prohibition of reliance upon any particular domestic conception of justice, even Rawls's political liberalism. This is one of

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<sup>13</sup> Rawls, *Justice as Fairness*, 10

<sup>14</sup> Rawls, *Justice as Fairness*, 14



the most fundamental features of Global Justice as Fairness, and will undoubtedly be one of the most controversial.

A closely related, and equally controversial, feature of the view I will defend is connected with the third feature of political conceptions—it is formulated in terms of fundamental ideas found in the public political culture not of a democratic society, but rather of international society. In the domestic context, Rawls says the public political culture of a democratic society "comprises the political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary), as well as historic texts and documents that are common knowledge."<sup>15</sup> These traditions, he writes, are "at least familiar and intelligible to the educated common sense of citizens generally. Society's main institutions, and their accepted forms of interpretation, are seen as a fund of implicitly shared ideas and principles."<sup>16</sup> Plainly put, the foundational shared ideas implicit (or explicit) in the political discourse and practice of a democratic society offer some common ground from which to start narrowing the range of disagreement about matters of basic justice. It is from this shared fund that Rawls hopes to draw the fundamental ideas of his theory.

In a similar fashion, Global Justice as Fairness hopes to draw its fundamental ideas from the public political culture of international society. However, this aspiration is much more difficult to meet, and even to determine if it is met, in the global context. This is due in large part to the relatively nascent and rapidly transforming nature of the global order, and the vast diversity of ways people from different corners of the earth think about this order. It is perhaps worryingly unclear what fund of shared ideas could

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<sup>15</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 13-14

<sup>16</sup> John Rawls, *Political Liberalism*, 14

be plausibly understood as implicit in global public political culture, especially since much of international relations is conducted behind closed doors, often by leaders and officials that lack any credible claim to represent their citizenries. Moreover, the histories of the relevant institutions and the corresponding traditions of their interpretation are admittedly much shorter and often more opaque than those of democratic societies.

In spite of this, I do think there are some plausible candidates with which to start working up a conception of global justice. First, the global public political culture seems to recognize states as the principal actors in global affairs. Second, international institutions, whose primary members are states, have an important role to play in the maintenance (or creation) of a tolerably just global order. And third, these institutions should be judged by principles acceptable to a significant, but crucially also limited, diversity of views about the appropriate ordering of domestic societies. These basic ideas seem to me to be implicit (if not explicit) in the history and text of the United Nations charter and Universal Declaration of Human Rights, as well as the decisions of international courts and tribunals, the global human rights and economic development discourses, and the practices of institutions such as the World Bank, World Trade Organization, and International Monetary Fund. More important, but also much more difficult to ascertain, is that these ideas seem likely to be familiar and intelligible to the educated common sense of the great many people across the world who find themselves, however indirectly, participants in the increasingly interconnected political and economic world order.

As will become evident below, the three basic ideas just offered correspond to the three most fundamental features of Global Justice as Fairness: a focus on political collectivities, its concern with the global basic structure, and the divorcing of global justice from liberal theorizing about domestic justice. To be sure, there are undoubtedly other plausible starting points for a political conception of global justice, and I can offer no systematic grounding for these particular ideas, nor a sophisticated defense for the claim that they are implicit in global public political culture. Hopefully these seem intuitively acceptable, but at this early point, there is little more to be said in their favor. The following comment from Rawls regarding his domestic view applies equally well to Global Justice as Fairness:

The exposition of justice as fairness starts with these familiar ideas. In this way we connect it with the common sense of everyday life. But because the exposition begins with these ideas does not mean that the argument for justice as fairness simply assumes them as a basis. Everything depends on how the exposition works out as a whole and whether the ideas and principles of this conception of justice, as well as its conclusions, prove acceptable on due reflection.<sup>17</sup>

If the principles and/or their practical ramifications are too much at odds with our considered judgments about global justice, then the case for these fundamental ideas will evaporate. If the results do generally comport with those judgments, of course, then the case for these ideas will have been made as well as could have been hoped for.

The above discussion indicates Global Justice as Fairness's most fundamental disagreement with both cosmopolitan approaches, which extend the principles of liberal domestic justice to the global sphere, as well as Rawls's own view of the law of peoples, which "is developed within political liberalism and is an extension of a liberal conception

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<sup>17</sup> Rawls, *Justice as Fairness*, 5n

of justice for a domestic regime to a Society of Peoples."<sup>18</sup> Nonetheless, the appeal of this manner of proceeding should be obvious enough: first and foremost, it allows us to dodge the criticism, often leveled against contemporary conceptions of human rights, that our principles of global justice are particular to liberalism and in that sense objectionably parochial. More broadly it allows, in a straightforward fashion, for the possibility of an overlapping consensus on a conception of global justice.

At the domestic level, Rawls hopes that adherents of many different and fundamentally conflicting comprehensive doctrines can all agree on the basic principles of domestic justice. For instance, he holds that Mill's utilitarianism, Kant's autonomy-based theory, and various religious doctrines that value liberty of conscience can all converge on principles like those of justice as fairness. This sort of convergence on a political conception of justice Rawls calls an overlapping consensus, and it is central to resolving the tension we saw above between seeking practical agreement on political matters and recognizing the fact of reasonable pluralism. Such a consensus allows a pluralistic democratic society to be stable for the right reasons, as opposed to a mere *modus vivendi*—a tenuous balance of power among rival groups or the brutal suppression of dissonant (reasonable) doctrines are not desirable bases for the stability of a society.

In the global context, the diversity of conceptions of justice is even greater than that within any particular society, and to accommodate this fact, I propose that we seek an overlapping consensus on principles of global justice by not grounding such principles in one or another particular conception of domestic justice. This may at first glance seem

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<sup>18</sup> John Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited"* (Cambridge: Harvard University Press, 1999), 9

like little more than "spineless relativism,"<sup>19</sup> a worry I will address momentarily. For now, it is important to note that, for Rawls's domestic theory, it is only *reasonable* comprehensive doctrines that can be part of an overlapping consensus, and I will defend a parallel claim about conceptions of domestic justice at the global level.

The worry that Rawls's method (and mine) is objectionably relativistic brings us to the final aspect of public justification: reflective equilibrium. In line with the practical role of political philosophy, Rawls writes: "Public justification proceeds from some consensus: from premises all parties in disagreement, assumed to be free and equal and fully capable of reason, may reasonably be expected to share and freely endorse."<sup>20</sup> (In the domestic context, these parties are persons; in the global context, they are what Rawls calls "peoples.") All arguments must start somewhere, and a political conception of justice starts from ideas familiar from or implicit in our public political culture. This may indeed sound like relativism, until we consider that a parallel point holds even in the intrapersonal case.

Our own individual views must start somewhere as well, and these starting points Rawls refers to as "considered judgments"—essentially, convictions we have come to hold after due reflection under conditions congenial to sound judgment. "Yet since we are of divided mind and our judgments conflict with those of other people, some of these judgments must eventually be revised, suspended, or withdrawn, if the practical aim of reaching reasonable agreement on matters of political justice is to be achieved."<sup>21</sup> This

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<sup>19</sup> Many similar complaints have been lodged against Rawls's law of peoples; for a particularly trenchant version of this, see Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Polity Press, 2001), 137-138.

<sup>20</sup> Rawls, *Justice as Fairness*, 27

<sup>21</sup> Rawls, *Justice as Fairness*, 30

revisionary process Rawls calls “reflective equilibrium.” Wide reflective equilibrium is achieved when we work our considered judgments (at all levels of generality) up into a unified, coherent whole, carefully consider the most perspicuous alternatives, and finally settle on a particular view. This equilibrium becomes general when consensus is reached.

There is no guarantee that this process will yield a unique result in even the individual case, much less the interpersonal (or inter-societal) case. However, as I suggested above in discussing the role of orientation, the achievement of wide reflective equilibrium is likely to severely constrain the range of alternative views we ultimately accept, and as Rawls says, “we cannot do better than that.”<sup>22</sup> If relativism can only be avoided by insisting that the successful application of reason will infallibly lead us all to affirm the same true theory, then Rawls and I (and many others) are indeed “relativists.” As self-proclaimed relativists would no doubt agree, however, this use of the term robs it of almost all interesting content.

### *1.3 Methodology 2: The Original Position(s)*

Indeed, Rawls's view is non-relativistic in the following, very straightforward sense: relativism is a (family of) view(s) about the truth of moral judgments, and thus cannot serve the purposes of a political conception of justice as laid out above. Affirming such a view would be affirming a comprehensive doctrine. Rawls's view is intended to neither affirm nor deny (reasonable) comprehensive doctrines, and this entails neither affirming nor denying any particular conception of moral truth—“within itself the political conception does without the concept of truth.”<sup>23</sup> Above I (loosely) described comprehensive doctrines as those that make claims about more than just the basic

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<sup>22</sup> Rawls, *Justice as Fairness*, 31

<sup>23</sup> John Rawls, *Political Liberalism*, 94

structure, but that wasn't quite accurate. It is possible that there could be a comprehensive doctrine that applied only to the basic structure, if that doctrine claimed that its principles, for example, accurately described some independent realm of (purely political) values. Examples of such doctrines are not easy to come by, since most conceptions of moral value are not limited to the subject of the basic structure, but the idea does not seem incoherent.

Rather than making claims about the truth of the content of his theory of justice, Rawls describes his view as an example of “political constructivism.” In political constructivism, it is not truth, but reasonableness that provides the standard of correctness for political judgments. This standard is met when judgments are made in accordance with principles of justice that are arrived at via an appropriate procedure of construction. For Rawls, this is a procedure that models fair agreement among reasonable and rational (as well as free and equal) parties. This procedure is, of course, Rawls's famous “original position” thought experiment. I will now very briefly review Rawls's domestic version of this thought experiment, as well as his global version(s) of it, and indicate how my own version of the global original position differs from his.

The domestic original position is a thought experiment in which we are to imagine representatives of citizens trying to reach agreement about matters of basic justice. While this is plainly a version of social contract theory, the agreement here is purely hypothetical and nonhistorical—the parties, and the conditions under which they deliberate, are artificial. This thought experiment is intended to model “fair conditions under which the representatives of citizens, viewed solely as free and equal persons, are

to agree to the fair terms of cooperation whereby the basic structure is to be regulated."<sup>24</sup> Thus, as Rawls says, the parties are “symmetrically situated” in the original position—that is, they are identical in all relevant respects. This prevents the fairness of the agreement reached from being undermined by the sort of bargaining advantages that are found in actual agreements between real persons.

The original position is also intended to model "acceptable restrictions on the reasons on the basis of which the parties, situated in fair conditions, may properly put forward certain principles of political justice."<sup>25</sup> To accomplish this, the parties are placed behind what Rawls calls “the veil of ignorance.” This condition of ignorance deprives the parties in the original position of any knowledge of the race, sex, ethnicity, or social position of those they represent, as well as their levels of native endowments (except that such levels are within the "normal" range). Crucially, the parties also do not know what comprehensive doctrines those they represent espouse. This “veil” thus prevents the parties from offering reasons for principles of justice that would only be acceptable to those of a certain religion, class, race, etc.

As these features of the original position make clear, and as the phrase ‘justice as fairness’ makes quite obvious, the notion of fairness plays a central role in any Rawlsian approach to political philosophy, domestic or global. The original position, as an ideally fair bargaining situation, is designed to reflect a certain form of equality or impartiality with respect to the relevant parties. In the domestic case, this device ensures that the relative bargaining positions of various groups within a society do not result in a basic structure that arbitrarily favors particular comprehensive doctrines. Not only is this

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<sup>24</sup> Rawls, *Justice as Fairness*, 17

<sup>25</sup> Rawls, *Justice as Fairness*, 17



fairness intended to comport with our intuitive judgments about basic justice, but importantly it also contributes to the stability of a society ordered by the principles to which the parties in the original position agree. If we accept the fact of reasonable pluralism, according to which disagreement about comprehensive doctrines will persist indefinitely among reasonable citizens of a free society, then only this sort of impartial conception of justice can be viewed as fair from the perspectives of all (reasonable) citizens. In the absence of such a conception, disfavored groups are certainly unlikely to affirm their society's conception of justice, and the potential for instability in such situations is obvious enough.

The stability of conceptions built upon alternatives to fairness, such as universal benevolence, is less apparent. Rawls insisted that, as a matter of empirical fact, only rather limited altruism could plausibly be attributed to human beings (or at least citizens of modern democratic societies).<sup>26</sup> If this is correct, as it seems to me that it is, a basic structure governed by a highly altruistic conception—one that required (or otherwise achieved the effects of) widespread and general benevolence among citizens—is not likely to be acceptable to most citizens. Such a society would thus not be particularly stable, at least for the right reasons. This worry ignores the larger difficulty with ascertaining the demands of benevolence, which would seem to require the sort of fundamental moral and philosophical argument that the veil of ignorance's prohibition of comprehensive doctrines is intended to avoid.

Of course the stability of pluralistic societies is only desirable if we agree that there is a significant diversity of comprehensive doctrines that ought to be not only

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<sup>26</sup> See John Rawls, *A Theory of Justice*, rev. ed. (Cambridge: The Belknap Press of Harvard University Press, 1999), 110-112

tolerated, but fully accepted within their public political cultures. The particular conception of fairness modeled by the original position, and the attendant claim about stability, clearly begs the question against opposing views. *Ceteris paribus*, however, the potential for greater scope for agreement among (reasonable) citizens is surely a desirable feature of a conception of justice.

The parties decide upon general principles of justice behind the full veil of ignorance. However, this is merely the first of four "stages" in which the knowledge excluded by the veil is sequentially reduced. Only very general principles of justice are decided upon in this first stage, and these principles are far from sufficient to uniquely specify a set of particular laws and norms for an actual society. In the second stage, the constitution is formulated; within this constitutional framework, the third stage guides legislation; lastly, in the application and enforcement of legislation, no information is excluded. What particular types of information are allowed in each subsequent stage need not concern us here.<sup>27</sup> The important point to keep in mind is simply this:

"Different levels and kinds of information are available at each stage and in each case designed to enable us to apply the (two) principles [of justice] intelligently, making rational but not partial decisions favoring our own interests or the interests of those to whom we are attached..."<sup>28</sup>

I follow Rawls in understanding the parties to the global original position as representing "peoples" rather than persons. As we will see in detail below, 'peoples' is intended to pick out something like the citizenries of modern states; importantly, peoples

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<sup>27</sup> For a summary of what kinds of information are available at each stage, see Rawls, *A Theory of Justice*, rev. ed., 175-176.

<sup>28</sup> Rawls, *Political Liberalism*, 398

are not (necessarily) cultural or ethnic groups. Why should we privilege this particular way of grouping persons? While Rawls did not address this question, the basic answer offered here is this: the world is, and seems likely to continue to be for some time, composed of states, and since they are the principal actors in the international realm, we need principles of global justice that are directly applicable to them. Moreover, these principles should be generated by directly taking the corporate interests of their citizens into account.

Since most if not all states contain multiple ethnic and cultural groups, privileging these other groups, and thus addressing principles of global justice to them, would require a rather radical departure from the current political organization of our world. It would require envisioning a world either without states at all, or with each ethnicity or cultural group controlling its own state. These alternative visions, while of course not entirely exotic, do not seem to be plausible elements of global public political culture. These statist tendencies may not be ideal, and may even be lamentable, but Global Justice as Fairness, as a political conception of global justice, seeks to both be practical, and to reconcile us to the world in which we live. That world is a world of (multicultural) states, and the theory hopes to show how such a world could be reasonably just; it does not purport to offer standards for achieving the best or most morally ideal form of political organization. Beyond these considerations, there is no deep reason to focus on states rather than other groups. As with the other fundamental ideas of the theory, this ontological choice will only stand or fall with the acceptability of the whole.

I also follow Rawls in holding that, behind the global veil of ignorance, the parties do not know "the size of the territory, or the population, or the relative strength of the

people whose fundamental interests they represent... [nor do they] know the extent of their natural resources, or the level of their economic development."<sup>29</sup> However, there is one crucial difference between my and Rawls's understanding of the global veil of ignorance—as alluded to above, my version excludes knowledge of the represented peoples' domestic conceptions of justice. Rawls offers two original position arguments in his global theory—in the first, the parties represent liberal peoples, in the second, nonliberal but “decent” peoples are represented—that, he claims, converge on the very same principles for the law of peoples. This claim of convergence has struck many commentators as highly dubious,<sup>30</sup> as it should, especially in light of the notable brevity of Rawls's elucidation of these arguments.

Even if this convergence could be defended, however, I think it is worth exploring the possibility of employing the global original position only once.<sup>31</sup> Not only would this increase the simplicity of the argument greatly, but far more importantly, it would allow us to deny, *contra* Rawls, that such an argument is an extension of a liberal conception of (domestic) justice. If acceptable content can be gotten from such an argument, then it seems clear that a single-stage application of the global original position would be preferable, especially for the purpose of generating an overlapping consensus on

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<sup>29</sup> Rawls, *The Law of Peoples*, 32-33

<sup>30</sup> For examples, see Alistair Macleod, "Rawls's Narrow Doctrine of Human Rights," in *Rawls's Law of Peoples: A Realistic Utopia?*, ed. Rex Martin & David A. Reidy (Malden, MA: Blackwell Publishing, 2006), 143-144 and Kok-Chor Tan, *Tolerance, Diversity, and Global Justice* (University Park, PA: The Pennsylvania State University Press, 2000), 28.

<sup>31</sup> A possibility Rawls explicitly countenances: "At another level, it makes sense to think of liberal and decent peoples together in an original position when joining together into regional associations or federations of some kind, such as the European Community, or the commonwealth of the republics in the former Soviet Union." (Rawls, *The Law of Peoples*, 70)

principles of global justice. Indeed, the question of stability, which the concept of an overlapping consensus is intended to address, does not arise almost at all in *The Law of Peoples*. It is thus difficult to see the (allegedly) convergent results of Rawls's two-stage procedure as more than a *modus vivendi*. By contrast, Global Justice as Fairness takes the question of stability very seriously, and attempts to answer it in a fashion analogous to the way Rawls answered it in the domestic context.

As we just saw above, the notion of fairness plays a significant role in this answer. Global Justice as Fairness hopes to offer the possibility of a stable global order, and the principal contribution to this stability comes from the fairness of the theory's version of the global original position, and thus the resultant principles of global justice. As with Rawls's domestic theory, this particular conception of fairness—as a sort of impartiality toward a diversity of conceptions of domestic justice—begs the question against those that think only liberal conceptions of domestic justice ought to be recognized in international society as fully just and cooperating members. However, the prospects for a rival value such as benevolence are even dimmer in the global case—while some may be tempted to attribute strongly benevolent dispositions among fellow citizens, it is very difficult to make the same attribution to persons across borders, or to states amongst each other.

The basis of flesh-and-blood citizens' deliberations is their particular comprehensive conceptions of the good, but the veil of ignorance makes this basis unavailable to the parties in the domestic original position. Instead, those parties use a generic list of things that all citizens, as citizens, are presumed to need—what Rawls calls “primary goods.” Such goods are, roughly, “various social conditions and all-purpose

means that are generally necessary to enable citizens adequately... to pursue their determinate conceptions of the good."<sup>32</sup> Among the primary goods are things like basic political rights, individual liberties, and income and wealth. These primary goods are used to specify the fundamental interests of the parties, and thus provide the basis of their rationality—they are rational insofar as they try to secure the greatest extent of primary goods for those they represent.

Rawls seems to reject any role for primary goods in his global original positions,<sup>33</sup> but he does specify some fundamental interests of peoples. He says that, in part, a "people's fundamental interests as a people are specified by its political conception of justice."<sup>34</sup> That conception may be liberal, or it may be nonliberal but "decent," but since Rawls deploys the global original position twice, the parties always know the (type of) conception of justice espoused by the peoples they represent. Presumably, this is why he thinks there is no need for a global analog of the notion of primary goods as found in his domestic theory. Since my version of the global original position precludes the parties from knowing the (type of) political conception of justice operative in the societies they represent, I cannot similarly avoid the use of some such notion of primary goods. Thus, unlike Rawls, I will develop a (rough) list of global primary goods in order to characterize the rationality of the parties. While these goods will include some of the interests of peoples that Rawls specifies, such as territorial security, political independence, and cooperative institutions, my list will hopefully fill in the significant gap left by the scant remarks he devotes to this topic—and do so in a way that severs the

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<sup>32</sup> Rawls, *Justice as Fairness*, 57

<sup>33</sup> See Rawls, *The Law of Peoples*, 40.

<sup>34</sup> Rawls, *The Law of Peoples*, 40

tie between the parties' particular domestic conceptions of justice and their rationality. As we will see, doing so will also allow me to make much more explicit the connection between human rights and the interests of peoples, something Rawls leaves somewhat mysterious.

I will also substantially expand (and/or depart from) Rawls's characterization of peoples' reasonableness. My characterization directly parallels the notion of reasonableness found in his domestic original position: "the willingness to propose fair terms of cooperation and to abide by them provided others do... [and] the willingness to recognize the burdens of judgment and recognize their consequences."<sup>35</sup> I will address the burdens of judgment, and their consequences, momentarily. Peoples' willingness to propose and abide by fair terms of cooperation is fairly straightforward, but it also connects with a much murkier point—Rawls's use of the term 'peoples' to characterize the parties represented in the global original positions. I will follow Rawls in this usage, and I will more carefully explicate this notion later, but the basic reason Rawls uses 'peoples' instead of 'states' is this: peoples have moral natures—in particular, they are reasonable in the sense just specified—whereas states have not been traditionally so conceived.<sup>36</sup> I would add that "peoples" are structured collections of persons, whereas states are (merely) apparatuses of political organization. For now, not much weight should be placed on this terminological choice. The substantive issue regarding the rejection of individuals as represented by the parties in the original position will be taken up in some detail later.

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<sup>35</sup> Rawls, *Political Liberalism*, 54

<sup>36</sup> See Rawls, *The Law of Peoples*, sec. 2.

The burdens of judgment are facts about the difficulty of making political judgments—facts that underlie (and explain) the fact of reasonable pluralism. Rawls mentions several such burdens, including the complexity of relevant empirical evidence, the vagueness of our normative concepts, and the difficulty of determining the relative weights of conflicting values. One such burden is particularly worth emphasizing:

To some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ. Thus in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens' total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any significant complexity.<sup>37</sup>

Since Rawls's domestic theory is limited to societies with broadly liberal political traditions—recall that his domestic theory *starts with* ideas implicit in the public political culture of a democratic society—this burden is clearly heavier in the global context. Thus this burden would appear to have implications for the extent of reasonable disagreement about conceptions of domestic justice at the global level. In light of this, I suggest we accept a global analog of Rawls's fact of reasonable pluralism—what I will call “the fact of reasonable global pluralism.” Just as “reasonable persons see that the burdens of judgment set limits on what can be reasonably justified to others,”<sup>38</sup> so too, I suggest, will reasonable peoples recognize that analogous limits apply to what can be justified to other peoples. The chief consequence of acknowledging these limits is that doing so “leads to a form of toleration.”<sup>39</sup> Whereas, as many critics have argued, the notion of toleration in Rawls's global theory is undeveloped at best (and incoherent at

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<sup>37</sup> Rawls, *Political Liberalism*, 56-57

<sup>38</sup> Rawls, *Political Liberalism*, 61

<sup>39</sup> Rawls, *Political Liberalism*, 59



worst), acknowledging the fact of reasonable global pluralism allows an approach such as mine to extend an analog of Rawls's relatively uncontroversial view of domestic toleration to the global context.

There is one crucial remaining aspect of the original position—the subject about which the parties are deliberating. In the domestic case, Rawls takes this to be the basic structure of (a democratic) society; in apparent contrast, he seems to take liberal foreign policy to be the subject of his law of peoples. Most commentators have interpreted this position as a denial of the global basic structure as subject. Yet there is a persistent ambiguity in *The Law of Peoples* on this point. Rawls writes that the parties in the global original position are "deliberating about the correct subject, in this case the content of the Law of Peoples. (Here we may view that law as governing the basic structure of the relations between peoples.)"<sup>40</sup> In discussing the international organizations called for by his law of peoples, Rawls says this:

Here I assume, as in the domestic case, that, unless fair background conditions exist and are maintained over time from one generation to the next, market transactions will not remain fair, and unjustified inequalities among peoples will gradually develop. These background conditions and all that they involve have a role analogous to that of the basic structure in domestic society.<sup>41</sup>

The interpretive question here doesn't particularly concern me, but it is worth pointing out the possibility that Rawls's comments about liberal foreign policy are not intended to preclude the idea of a global basic structure, but rather to indicate that the content of his law of peoples is worked out from within the perspective of his liberal domestic theory.

There will be no such ambiguity in what follows—I will straightforwardly take the global basic structure to be the subject of global justice, and I will do so for reasons

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<sup>40</sup> Rawls, *The Law of Peoples*, 33

<sup>41</sup> Rawls, *The Law of Peoples*, 42n

similar to those Rawls gives for focusing on the basic structure in his domestic theory. I cannot take up this hotly contested issue here; for our purposes, it will suffice to note, in line with the passage from Rawls just quoted, that the basic structure is needed to maintain what he calls “background justice.” Very briefly, this simply means that we need principles of justice in light of which to design the basic legal and economic framework(s) within which persons (and peoples) interact—principles that ensure the continual fairness of those interactions. It is about such principles (for peoples) that I take the parties in the global original position to be deliberating. Like Rawls, I will understand this focus to require the creation of “cooperative organizations” similar to the global institutions that already exist;<sup>42</sup> unlike him, I will explicitly focus on the basic principles of justice in light of which we should evaluate such institutions.

#### *1.4 Six Fundamental Ideas & Arguments (or Lack Thereof)*

To conclude this introductory section, I would like to say a bit about the fundamental ideas of Global Justice as Fairness, and how I intend to argue for the framework and content of the theory. To do so, it will be helpful to quote Rawls, at some length, on his domestic theory:

In this sequence we start with the organizing idea of society as a fair system of cooperation and then make it more determinate by spelling out what results when this idea is fully realized (a well-ordered society), and what this idea applies to (the basic structure). We then say how the fair terms of cooperation are specified (by the parties in the original position) and explain how the persons engaged in cooperation are to be regarded (as free and equal citizens).

This spelling out of the central organizing idea of social cooperation is not a deductive argument. The steps starting with that idea and proceeding to the next are not said to follow from, or to be derived from, it. We specify the organizing idea and make it more determinate as we connect it with the other ideas...

We cannot tell in advance whether the idea of social cooperation, and its two companion ideas [i.e. citizens as free and equal persons and a well-ordered

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<sup>42</sup> See Rawls, *The Law of Peoples*, 42-43.

society], will provide the organizing ideas we need for a workable political conception of justice... Such an idea can be fully justified (if at all) only by the conception of political justice to which it eventually leads when worked out, and by how well that conception coheres with our considered convictions of political justice at all levels of generality in what we may call wide (and general) reflective equilibrium.<sup>43</sup>

The fundamental ideas of Global Justice as Fairness are all analogous to the fundamental ideas of Rawls's justice as fairness. I start with the central organizing idea of international society as a fair system of cooperation, and use the notion of a well-ordered society of peoples to specify that idea further. A well-ordered society of peoples is an ideal that implies (perceived) effective regulation of state (and state-mediated) interaction by a global basic structure according to public principles of global justice. The fair terms of cooperation are arrived at by the device of the original position, which models conditions for fair agreement. The idea of free and equal peoples is used to specify the parties to the global original position. These fundamental ideas, and the resulting principles of global justice, are underpinned by the notion of public justification (including reflective equilibrium, overlapping consensus, and global public reason). The result is a political conception of global justice—one worked out specifically for the global basic structure, independently of any particular conception of domestic justice, and formulated in terms of fundamental ideas drawn from or implicit in the public political culture of international society. Paramount in that political culture, I will suggest, is the value of non-domination, both of peoples by others, and of peoples by their own governments.

There is no pretension of providing a deductive argument demonstrating the truth or correctness of Global Justice as Fairness's framework or principles. Mere logic will

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<sup>43</sup> Rawls, *Justice as Fairness*, 25-26

not yield useful and informative conclusions unless the premises employed are already informative and contentful—in other words, only if they stand in need of substantial argument themselves. Attempting to defend a theory by grounding it in uncontroversial starting points generally front-loads the philosophical action by packing it into the premises, making the subsequent deductions of limited interest. Burton Dreben's understanding of Rawls's approach applies equally to Global Justice as Fairness:

Rawls always starts in *mediis rebus*, quite explicitly so... You start with intuitive moral, political considerations, and then you see what they come to. You can not ground them. And so the original position is always framed under the constraints of the reasonable... The attempt to get as clear as possible about what is rational and what is reasonable is what much of the subject is about. But you can not define these notions... all you can do is start with certain intuitive distinctions and see how you can push them and what work they will do.<sup>44</sup>

In what follows, I will lay out what I take to be some intuitive ideas about global justice and point to some plausible connections between them. Eventually we will end up with principles of global justice that will hopefully seem acceptable upon due reflection. I will conclude with a comparative evaluation of Global Justice as Fairness and some of its primary competitors—chiefly alternative Rawlsian versions of global justice, but some other nearby possibilities as well. This evaluation will include some negative arguments, but the positive argument for Global Justice as Fairness as a whole simply consists of the spelling out of its fundamental ideas and the plausibility of its implications. We now turn to the theoretical machinery that will generate the principles of Global Justice as Fairness.

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<sup>44</sup> Burton Dreben, "On Rawls and Political Liberalism," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (New York: Cambridge University Press, 2003), 322

## Part 1: Global Justice as Fairness

### Chapter 2: The Global Original Position

#### 2.1 Peoples as Civicities

The fundamental guiding idea of Global Justice as Fairness is a global analog of Rawls's domestic original position, wherein peoples rather than persons are represented. This global original position argument will be as analogous as possible to the domestic case—not strictly analogous, however, since the shift in ontology requires some deviations from a perfectly parallel line of argument. As a first approximation, we can take peoples as groups with shared conceptions of domestic justice, their own domestic basic structures and fixed territorial borders. They interact with each other in diverse but familiar ways, and mediate the interactions among their own members and their relations with members of other peoples. Peoples are, essentially, the citizenries of what Rawls calls "well-ordered" societies, and the governments of such states are expressions of their peoples' collective agency. We must first examine this concept more closely, before turning to the other elements of the original position in Global Justice as Fairness.

There are many misconceptions about how Rawls understood peoples as a result of his rather meager attempt at clarifying the concept—most of his explication is dedicated to distinguishing peoples from states. The primary reason that Rawls offers for appealing to peoples instead of states is that he thinks peoples, and not states, have a moral nature. As one of the earliest and most forceful critics of *The Law of Peoples*, Kok-Chor Tan, has pointed out: “While [Rawls] took pains to distinguish between peoples and states, his aim, rather modestly, was only to put aside the notion of ‘states *as traditionally conceived*,’ that is, the ‘realist’ conception of states as entities motivated

primarily by prudential and strategic concerns and that enjoy absolute sovereignty.”<sup>45</sup> Rawls’s point is simply that states (as traditionally conceived) cannot be understood as *both rational and reasonable*, and thus prepared to propose, agree to, and abide by fair terms of cooperation with other peoples. “What distinguishes peoples from states—and this is crucial—is that just peoples are fully prepared to grant... proper respect and recognition to other peoples as equals.”<sup>46</sup> In light of this, it seems straightforward that Rawls is offering the concept of a people as a moralized version of the (traditional) concept of a state, and there needn’t be anything mysterious about such a concept or the motivation for introducing it.

Further consideration of Rawls's use of 'people' or the role that concept plays in his account would be tangential to my purposes here. Philip Pettit's work on these questions is illuminating, and while I disagree with certain aspects of his analysis,<sup>47</sup> his elucidation of the notion of a people is quite useful. He uses the term 'civcity' to better capture the particular sort of socio-political collectivity that he thinks Rawls intends to pick out with 'people';<sup>48</sup> Global Justice as Fairness adopts this understanding of peoples without significant revision. Although for the sake of convenience I will persist in using

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<sup>45</sup> Tan, *Toleration, Diversity, and Global Justice*, 85

<sup>46</sup> Rawls, *The Law of Peoples*, 35

<sup>47</sup> It should be noted that Global Justice as Fairness rejects the purported connection Pettit sees between Rawls's ontology of peoples and his rejection of global distributive justice. For his account of this connection, see Philip Pettit, "Rawls's Peoples," in *Rawls's Law of Peoples: A Realistic Utopia?*, ed. Rex Martin & David A. Reidy (Malden, MA: Blackwell Publishing, 2006), 49-54.

<sup>48</sup> For his defense of the claim that Rawls himself (implicitly) used the notion of a civcity, see Philip Pettit, "Rawls's Political Ontology," *Politics, Philosophy & Economics* 4, no. 2 (2005), esp. sec. 5.

the term 'peoples' throughout, this should always be taken in Pettit's more specific sense, which we will now briefly examine.

Pettit portrays civilities as intermediate between full-blown group agents and mere collections of individuals with common interests. Unlike genuine collective agents, civilities are not characterized by general agreement on the specific interests of the group, the relative priority of those interests, or the best means for pursuing them. They do not resolve this problem, as a mere collection might, by simply ceding their agential powers to a group of representatives. Rather they actively and continuously discuss what their shared ends, and the best means for attaining them, should be. "They will not be able to agree on those questions, of course, and to require the representatives to take heed of the agreements reached... But they still expect the representatives to take their guidance from that public deliberation and debate, and they hold them to that expectation."<sup>49</sup> By holding their representatives to such expectations in the absence of complete agreement, they display the structure of a civility.

The content of these expectations that members of civilities have of their representatives is a byproduct of the members' continual discussion and debate about their common interests and their collective pursuit of these interests. Such discussion will, Pettit thinks, give rise to "considerations that are treated on all sides as relevant to interpreting and implementing the common purposes of the group... These considerations will constitute presumptions and valuations shared within the group... and they will generate a natural constraint on how the representatives are to form their judgments and

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<sup>49</sup> Pettit, "Rawls's Political Ontology," 166

decisions."<sup>50</sup> In the specific case of political civilities that concerns us, these commonly acknowledged "presumptions and valuations" constitute the fund of ideas found in a people's public political culture. In other words, they are the raw materials from which conceptions of domestic justice are constructed.

In a civility, citizens "will be party to certain shared ideas that are capable of being articulated into a theory of justice. And they will control the government that represents them, they will constitute it as their representative, to the extent that the government is ordered or regulated by those common reasons, and by the corresponding conception of justice."<sup>51</sup> As Pettit notes, these conditions amount to the conditions Rawls places on well-ordered societies: in such societies, there is a mutually acknowledged agreement on a public conception of justice that effectively regulates the basic structure.<sup>52</sup> Thus in a well-ordered society, the government will represent its citizens by governing according to the common currency afforded by a shared conception of domestic justice. The government will be a group agent that acts in pursuit of the goals, and within the constraints, provided by the ties of conscientious representation that bind it to the people. This allows us to understand peoples themselves as possessing agency, albeit in an indirect sense—they are group agents that act through their governments.

Of course, this agency can be lost. If a government ceases to act in accordance with its people's conception of domestic justice, "then the people are no longer present, no longer represented, in what is said or done. A usurper has taken its place."<sup>53</sup> As we

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<sup>50</sup> Pettit, "Rawls's Political Ontology," 166

<sup>51</sup> Pettit, "Rawls's Peoples," 48

<sup>52</sup> See Rawls, *Justice as Fairness*, 8-9.

<sup>53</sup> Pettit, "Rawls's Peoples," 43



will see below, peoples have a deep and abiding interest in guarding against such usurpation, and this interest is crucial to the conception of human rights in Global Justice as Fairness. For now, it is enough that we have a tolerably clear understanding of the notion of a people. They are civilities composed of persons with common conceptions of domestic justice that regulate their basic structures via the representative agency of their governments.

It is important to stress that the notion of a people is an ideal, one very closely related to the ideal of a well-ordered society. Lest this ideal appear objectionably idealistic, it is worth bearing in mind that many theories of global justice, and (I think) all theories of *distinctly domestic* justice make use of some such notion.<sup>54</sup> Compared to many alternative views of political society, the notion of peoples used here is rather minimal—it does not require any considerations of nationality, ethnicity, shared history, or almost any other factors identified by Mill as creating the "common sympathies" that unite a people.<sup>55</sup> While Rawls himself refers to Mill's analysis when he characterizes peoples,<sup>56</sup> Global Justice as Fairness does not follow suit. On Pettit's understanding of peoples, all that is required is a general agreement (usually, an overlapping consensus) on a domestic conception of justice—shared culture, religion, history, or even language are

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<sup>54</sup> Perhaps the most notable exceptions here are libertarianisms of the sort defended by Robert Nozick, whose radically individualistic theory of justice is inherently cosmopolitan, and Rawlsmopolitanisms that confusingly fail to distinguish the global and domestic contexts. I address the latter below. For a discussion of the former, see Pettit, "Rawls's Political Ontology."

<sup>55</sup> See J.S. Mill, *Considerations on Representative Government*, in *The Collected Works of John Stuart Mill*, volume XIX, ed. J.M. Robson, 371-578. (Toronto: University of Toronto Press, 1977), 371-578 (cited in Rawls, *The Law of Peoples*, 23).

<sup>56</sup> Rawls accepts, at most, a diluted version of Mill's position. See Rawls, *The Law of Peoples*, 23-25.

not needed. A people's conception of domestic justice may even incorporate the absence of such shared traits by requiring partial autonomy for different groups within society. Of course, none of this is meant to deny that actual peoples can, or even often do, share many of these cultural, linguistic, or historical traits, but merely to indicate that it is not necessary that they do so. It seems undesirable to foreclose the possibility of genuinely multicultural peoples by demanding these further traits, especially in the face of such *prima facie* examples as the US and Canada.

It should be noted, however, that multicultural peoples need not have a culturally neutral conception of domestic justice. Global Justice as Fairness is not an example of "civic nationalism," which Tan describes as "allegedly neutral about culture, and hence... in principle, inclusive and universalistic rather than exclusive and parochial."<sup>57</sup> A people's domestic conception of justice, as well as its underlying *political* culture, may be rather exclusive even if the people is made up of several distinct nationalities or ethnicities. The millet system of the Ottoman empire, under which Muslims, Christians and Jews were given partial political autonomy, illustrates this possibility. I am not, of course, suggesting that the Ottoman empire was well-ordered; I am merely indicating the possibility of a multicultural people unified around a set of "parochial" institutions that, taken together, could plausibly represent the people as a whole and whose operation could be viewed as the exercise of their collective agency, in spite of rather deep internal cultural divisions.

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<sup>57</sup> Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism* (New York: Cambridge University Press, 2004), 89. Tan's characterization of 'civic nationalism' comes from Brian Barry, "Statism and Nationalism: A Cosmopolitan Critique," in *Global Justice*, Nomos 41, ed. Ian Shapiro and Lea Brilmayer, (New York: New York University Press, 1999).

There is surely much more to be said about peoples, and determining whether any real-world collection of persons constitutes a people will almost always be messy and difficult. Peoplehood is not an either/or affair—whether there are one or more peoples among a set of individuals will always be question of degree. There are also lingering questions about the relation between states and peoples, and what to do about states with multiple peoples; these questions will be taken up later. At this point, I merely hope to have provided a *prima facie* plausible notion of a people and the sort of agency such a collectivity can exhibit. This is an important first step toward defending a theory of global justice that focuses on peoples rather than persons, or what Beitz calls a "morality of states." He is surely correct when he says of such a theory that "[u]nless some independent sense can be given to the idea of the state as a moral agent, this view cannot be very persuasive."<sup>58</sup> Pettit's notion of a civicity does precisely this, and as we will see, Global Justice as Fairness relies heavily on his picture of (political) group agency.

I believe this ideal of well-ordered peoples is at least implicit in the public political culture of international society. Like the divine right of kings, the view that governments need not represent their citizens in something like the manner of a civicity seems to have gone by the wayside. Certainly most governments publicly affirm the need to govern in accordance with their peoples' conceptions of domestic justice, even though their actions often belie such proclamations. In any event, I hope the value of well-orderedness in the above sense strikes most as intuitive; it is a central plank of Global Justice as Fairness, and thus will ultimately stand or fall with the theory as a whole.

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<sup>58</sup> Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), 76

## 2.2 *The Global Veil of Ignorance & Peoples as Free, Equal & Reasonable*

Perhaps the most central difference necessitated by identifying peoples, rather than persons, as the parties in the global original position is found in the veil of ignorance. In the domestic version, persons' conceptions of the good are excluded by the veil, but peoples do not have conceptions of the good (even though it is possible for all of their members to share the same such conception). As we have just seen, however, they do have conceptions of domestic justice. These conceptions are what ultimately regulate the exercise of peoples' (indirect) collective agency; analogously, persons' conceptions of the good fundamentally guide their individual actions. In Global Justice as Fairness, it is peoples' conceptions of domestic justice that are excluded by the veil of ignorance in the global original position.

It is crucial to keep in mind that although the parties are ignorant of the *particular* conceptions of domestic justice held by the peoples they represent, they do know that those conceptions are generally shared and operative in their societies—their domestic basic structures are effectively regulated by some such common conception. In other words, the parties know that their societies are well-ordered. Peoples cease to be genuine agents when their governments do not appropriately represent them and are not constrained by their peoples' conceptions of domestic justice. The assumption that peoples are well-ordered (which implies having their own domestic basic structures, and thus their own states) is necessary at the level of ideal theory. While it belongs to non-ideal theory to take up the difficulties posed by the world's current failure to align with this assumption, it is important that ideal theory possess the resources with which to forge a resolution of these difficulties. I believe Global Justice as Fairness does have such

resources, as we will see later when I consider how to deal with states that contain multiple peoples.

The global veil of ignorance must also exclude much other information, of course. This includes such things as the size of the parties' respective territories, degree of economic development, amount of natural resources, ethnic and religious composition, and extent of military might. As with the domestic original position, the veil must be tailored to prevent the parties from advancing reasons for principles of justice that could only be shared by some subset of the parties.

Global Justice as Fairness views the peoples represented in the global original position as free and equal in a manner similar to the way persons are so regarded in the domestic original position. In the domestic case, persons' freedom and equality are explained largely in terms of what Rawls calls the two moral powers: the capacity for a sense of justice, and that for a conception of the good. The former is "the capacity to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation."<sup>59</sup> There is no difficulty in attributing to peoples an analogous capacity for a sense of global justice, which allows them to understand, apply, and act from the principles of justice that specify the fair terms of international cooperation. The "capacity to have, to revise, and rationally to pursue a conception of the good,"<sup>60</sup> as I have already noted, is not an attribute of peoples—their capacity for a conception of domestic justice, however, serves

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<sup>59</sup> Rawls, *Justice as Fairness*, 18-19

<sup>60</sup> Rawls, *Justice as Fairness*, 19

an analogous function. Thus we can regard peoples as having two moral powers analogous to those of persons.

The moral powers of peoples help explain the sense in which they are free and equal. In the domestic original position, persons "are regarded as equal in that they are all regarded as having to the essential minimum degree the moral powers necessary to engage in social cooperation over a complete life and to take part in society as equal citizens."<sup>61</sup> Peoples are similarly equal in the global original position—they are assumed to have the requisite degree of the moral powers needed to engage in global cooperation and take part in international society as equal members. This is closely connected with the assumption of their well-orderedness.

Peoples are free in two senses. First, they are not identified with any particular conception of domestic justice; rather, they are conceived of as "capable of revising and changing this conception on reasonable and rational grounds, and they may do this if they so desire."<sup>62</sup> This is, of course, directly tied to the second of their moral powers just discussed. There is another sense in which peoples are free, however, that is not explicated in terms of their moral powers—they are "self-authenticating sources of valid claims." In his domestic argument, Rawls describes persons as "entitled to make claims on their institutions so as to advance their conceptions of the good (provided these conceptions fall within the range permitted by the public conception of justice)."<sup>63</sup> Similarly, all peoples are entitled to make claims on global institutions in pursuit of their

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<sup>61</sup> Rawls, *Justice as Fairness*, 20

<sup>62</sup> Rawls, *Justice as Fairness*, 21

<sup>63</sup> Rawls, *Justice as Fairness*, 23

conceptions of domestic justice (within the limits set by the public conception of global justice).

Rawls contrasts being a "self-authenticating source of valid claims" with the status of a slave. This sense of the freedom of persons is at the heart of the republican conception of freedom as non-domination, resurrected and defended most notably by Pettit. As I did when discussing the notion of a people, I will frequently appeal to aspects of Pettit's view in what follows; I believe his view of freedom can be seen as neatly complementary to Rawls's domestic theory, and that complement can be very usefully extended to an analogous global theory. Pettit himself recognizes, to some degree, this complement between his work and Rawls's by arguing that freedom as non-domination is a Rawlsian "primary good."<sup>64</sup> We will return to the notions of non-domination and primary goods below, where we will see a fruitful connection between Pettit's civilities and human rights.

In addition to being free and equal, peoples are also regarded in Global Justice as Fairness as rational and reasonable, again analogously to the way persons are regarded in the domestic context. One aspect of reasonableness—the willingness to offer and abide by fair terms of cooperation—is the same. However, another aspect—recognition of the burdens of judgment—must be modified for the global context. In the domestic case, persons recognize that it is unreasonable to expect all citizens to agree on a particular conception of the good. On my global view, peoples take seriously the fact of reasonable *global* pluralism, according to which it is unreasonable to expect all peoples to share a (broadly similar) conception of domestic justice. More specifically, this fact rules out as

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<sup>64</sup> See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (New York: Oxford University Press, 1997), 90-92.

unreasonable the expectation that all peoples will hold a conception of domestic justice in which persons are regarded as free and equal, and reasonable and rational, as they are in Rawls's domestic theory. In other words, it is unreasonable to expect all peoples to be "liberal" according to the fact of reasonable global pluralism. Of course, this is contingent upon a specification of the extension of the term 'liberal'—a task that will not be attempted here. Depending on how this line is drawn, it is possible that on Global Justice as Fairness all reasonable peoples will turn out to be "liberal." The important point here is that the range of reasonable peoples significantly outstrips the set of "democratic societies" from whose public political cultures Rawls draws the fundamental ideas of his domestic theory.

It is a central, defining (and of course highly contentious) feature of Global Justice as Fairness that peoples are modeled as reasonable in the above sense. However, I will neither argue directly for this notion of reasonableness, nor for the associated fact of reasonable global pluralism. The support for this central feature will rest ultimately on the plausibility of the conclusions reached (including both the principles generated and their practical implications) and the overall coherence of the various elements of the theory. I myself find it more intuitive to think that something like the fact of reasonable global pluralism, rather than its denial, is implicit in global public political culture.

This much can be said for this putative fact now: the fact of reasonable global pluralism, while clearly going beyond cultural relativism, is a relatively weak and minimal assumption. The Rawlsopolitans are committed to the stronger claim that only liberal conceptions of domestic justice (in Rawls's specific sense) should be tolerated. If, as will hopefully become evident, acceptable conclusions can be generated with the fact



of global reasonable pluralism, then *ceteris paribus* we have a reason to favor my weaker assumption over the stronger cosmopolitan alternative. As indicated by their acceptance of "decent" nonliberal peoples as *bona fide* members of the society of peoples, the LP-Rawlsians recognize something at least very close to the fact of reasonable global pluralism.<sup>65</sup> If it is at all stronger than their position, parsimony counts strongly in favor of my assumption, since it allows for a single application of the global original position, instead of requiring the convoluted dual procedure they employ.

### 2.3 *The Rationality of Peoples & Global Civitas*

We now need to consider the rationality of peoples. This requires, as it does in the domestic case, a partial conception of the good (the good of peoples, not that of persons—it is important to distinguish such a conception from individual persons' conceptions of the good). It is on the basis of this (partial) conception that the parties decide upon principles of justice behind the veil of ignorance. As indicated above, Rawls seems to specify peoples' interests at least partially by reference to their conceptions of domestic justice. Since my version of the global veil of ignorance excludes knowledge of the parties' conceptions of domestic justice, we cannot use those conceptions to specify their interests. Thus Global Justice as Fairness requires a notion of global primary goods that can serve a function analogous to that played by primary goods in Rawls's domestic theory.

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<sup>65</sup> Rawls explicitly rejects the claim that "a decent hierarchical society is as reasonable and just as a liberal society" (Rawls, *The Law of Peoples*, 83) and according to Freeman, Rawls held that his "principles of justice are required in every society in the world" (Samuel Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (New York: Oxford University Press, 2007), 298). This apparent conflict with the claim here is dissolved by distinguishing between the reasonableness of peoples and the reasonableness of their domestic conceptions of justice.

As previously mentioned, Pettit argues that his notion of freedom as non-domination is a primary good in Rawls's sense, and as we will see, I think this value is prominent in global public political culture and thus can serve to underwrite an overlapping consensus on principles of global justice. However, I think we should reject the idea that non-domination is a primary good. Examining the reasons for this rejection in some detail will, I think, prove useful in both clarifying the notion of primary goods and the use to which I will ultimately put the notion of freedom as non-domination.

Pettit characterizes non-domination as a status enjoyed by people when "no other has the capacity to interfere on an arbitrary basis in their choices."<sup>66</sup> Interference counts as "arbitrary" when it is not forced to "track" (i.e. promote or otherwise take heed of) the relevant interests of those suffering the interference. Promoting non-domination thus requires the identification of certain "relevant" interests, and therein lies the difficulty with identifying it as a primary good. When the instrument of interference is the law (or whenever multiple individuals collectively suffer interference), Pettit tells us that these relevant interests are those that are shared, not sectional or factional.

But how to test for what is sectional or factional? The only possible means is by recourse to public discussion in which people may speak for themselves and for the groups to which they belong. Every interest and every idea that guides the action of a state must be open to challenge from every corner of society; and where there is dissent, then appropriate remedies must be taken. People must find a higher-level consensus about procedures, or they must make room for secession or conscientious objection or something of that kind.<sup>67</sup>

Regardless of the merits of this ideal in real-world situations, it is clearly of no help to us in specifying the interests of the imaginary parties in the original position—the veil of

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<sup>66</sup> Pettit, *Republicanism*, 67

<sup>67</sup> Pettit, *Republicanism*, 56

ignorance excludes the particular interests of individuals and the groups to which they belong. I think Pettit's claim that his suggestion is the "only possible" one is, however, too hasty.

An adequate account of primary goods would certainly exclude any interests that are sectional or factional, and Pettit clearly accepts the possibility of identifying some such goods, since he argues that freedom as non-domination is among them. He claims that non-domination is "something that a person has instrumental reasons to want, no matter what else they want,"<sup>68</sup> and presumably "recourse to public discussion" is not necessary to establish this claim. Indeed, he rests his argument for this claim on the instrumental value of avoiding the "uncertainty, strategy, and subordination" to which dominated persons are subject.<sup>69</sup> Thus we can see the possibility of identifying relevant interests by appealing to the value of certain features associated with the status of non-domination. However, it would be circular to count an interest in non-domination itself as one of them, since non-domination assumes a prior specification of those very interests.

I think we can generate a plausible list of global primary goods by considering the value of a status very closely related to that of non-domination—the status of citizen (more precisely, the global analog of such a status). In Pettit's view citizenship, as the opposite of slavery, is at the very heart of his republican vision of freedom—his explication of non-domination is essentially his way of working out and specifying the root idea of citizenship. As we saw above, Rawls similarly invokes the contrast with slavery in his characterization of citizens as free and equal. In fact, Rawls specifies his

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<sup>68</sup> Pettit, *Republicanism*, 90

<sup>69</sup> See Pettit, *Republicanism*, 90-92.

list of primary goods (in the domestic context) by explicitly invoking the notion of citizenship, generating his list by considering "what free and equal persons (as specified by the political conception) need *as citizens*."<sup>70</sup>

It is important to distinguish this characterization of primary goods from the gloss from Pettit just cited. Rawls views this partial conception of the good as bound up with his normative conception of persons (citizens), not simply as things people (human beings) have reason to want irrespective of their particular interests. His list of primary goods is not rooted in such universal interests or basic human needs, but rather in the needs of persons viewed "as citizens who are fully cooperating members of society, and not merely as human beings apart from any normative conception."<sup>71</sup> We will return to this point in connection with human rights below; the important point for our present purposes is that my account of global primary goods will similarly draw upon a normative conception of peoples. (We have already seen part of that normative conception in the above discussion of civilities.)

The problem with Rawls's account of primary goods is that he claims to derive his list from the conditions needed for the development and exercise of the two moral powers of free and equal citizens. I will not dwell on the inadequacies of this method in the domestic context, although I think they are significant. The more immediate difficulty for us is that it is not at all obvious what the development and exercise of *peoples'* two moral powers would require. While it is at least somewhat intuitive for Rawls to claim that basic political liberties are essential for citizens to realize their capacity for a sense of justice, or that other freedoms are necessary conditions of citizens' capacity to have and

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<sup>70</sup> Rawls, *Justice as Fairness*, 60 (emphasis added)

<sup>71</sup> Rawls, *Justice as Fairness*, 58

revise a conception of the good, the considerations involved are basically psychological.<sup>72</sup> As such, they cannot carry over to the global context, at least without serious alteration—peoples are not psychological entities in any straightforward sense, and their moral powers are realized only in the social and institutional manifestations of their group agency. My suggested remedy for this difficulty (and one of the reasons for the above detour through Pettit's view) is to focus less on peoples' moral powers and more on the second of Rawls's senses of freedom: being a "self-authenticating source of valid claims," or more simply and usefully, as having the global analog of the status of citizen. I take this status to amount to being a fully cooperating (equal) member of the society of peoples, and will draw on elements of Pettit's view to flesh out the conditions necessary to maintain it.

Pettit stresses two fundamental themes in his defense of the republican conception of freedom—"liberty-versus-slavery" and "law-and-liberty"—which he illuminatingly elucidates through his discussion of Roman political thought. In connection with the first theme, he writes:

The contrary of the *liber* or free person in Roman, republican usage was the *servus* or slave. Whereas the slave lived at the beck and call of a master, the free person enjoyed a status at the other extreme. The free person was more than a *servus sine domino*, a slave without a master, who might be picked upon by anyone; the *liber* was, of necessity, a *civis* or citizen, with all that that implied in the way of protection against interference.<sup>73</sup>

The important point of contrast with slavery is that citizens require more than the absence of interference (or low expectation of possible interference)—genuine citizenship is a status that affords some guarantee against interference. We have already seen a

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<sup>72</sup> See Rawls, *Justice as Fairness*, 45.

<sup>73</sup> Pettit, *Republicanism*, 32

connection between the status of citizenship and Rawls's conception of free and equal citizens, and this can be usefully extended to the society of peoples. Free and equal peoples, I suggest, have a status that ensures some measure of self-determination and a corresponding immunity to interference: global *civitas*, as I will refer to it.

Regardless of the historical origins of this notion, the evil of the absence of assurance against outside interference is surely implicit, if not explicit, in global political discourse. Even if actual interference is not particularly likely, weaker states must always take into account their vulnerability to the interference of more powerful states.<sup>74</sup> This lack of robust security, and the attendant (real or perceived) deference to foreign powers on the part of governments, is clearly a source of much discontent and resentment. Not only does this vulnerability impede weaker peoples' ability to pursue their domestic conceptions of justice as they see fit, but the resentment thus generated presents problems for the powerful as well—the specter of international terrorism is perhaps the most salient example. This suggests the plausibility of constructing a normative conception of peoples that emphasizes the value of global *civitas*, which will prove useful in identifying global primary goods.

The law-and-liberty theme emphasizes that citizenship "is a status that exists, of necessity, only under a suitable regime of law."<sup>75</sup> This is implied by the need for assurance just discussed, and is a commonplace point in the domestic context. Whatever freedom may be found in anarchy is not the freedom associated with citizenship. The value of the rule of law is intimately connected with that of citizenship—a connection

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<sup>74</sup> For a useful discussion of this point, see Philip Pettit, "A Republican Law of Peoples," *European Journal of Political Theory* 9, no. 1 (2010): 78-79.

<sup>75</sup> Pettit, *Republicanism*, 36

that, as Pettit points out, was quite explicit in Roman thought. The point emphasized by Pettit in discussing this theme, and the one of most concern to us, is that proper laws constitute, rather than constrict, the freedom of citizens. Conceiving of citizens as free and equal, we can thus say, requires conceiving of them as living under a suitable legal regime, or in other words, a just basic structure.

By similarly conceiving of peoples, we can say that their freedom, far from being undermined by appropriate international law, actually requires it. Seen in this light, peoples have a clear rational interest in establishing and maintaining a just global basic structure. Admittedly, this point is far less salient in the global context. This is probably due, at least in part, to the overwhelming tendency of most domestic theories to simply assume the central importance of the rule of law. If we accept it as given, we don't need to think much about the underlying rationale for the rule of law, and thus we may not notice that a parallel rationale is present in the global context as well. Even Rawls, while extensively defending his *focus* on the domestic basic structure, takes its *existence* for granted, and then goes on to reject the need for a global basic structure (at least on some interpretations of *The Law of Peoples*). Nonetheless, it does seem as though international law is increasingly seen as legitimate and necessary; even in the US, leaders now generally feel the need to attempt to justify military actions in terms of international law enforcement.

I will defend the choice of the global basic structure as the subject of Global Justice as Fairness below. For now, I merely want to emphasize that if persons have a clear interest in the rule of law domestically, then there is good reason to suppose that peoples have an analogous interest at the global level. Furthermore, the notion of the rule

of law and that of the basic structure go hand in hand. By appealing to the idea of global *civitas*, we can dispel the air of tension between peoples' rights of self-determination and robust international rule of law, between their freedom and the potential coercion of the global basic structure. If this (admittedly vague) idea is a plausible way of understanding peoples' freedom and equality, then the rule of law will figure prominently in the determination of their interests.

This rough portrait of peoples as well-ordered and fully cooperating members of the society of peoples is, I think, a promising starting point for a normative conception of peoples of which an account of their rationality (and thus of global primary goods) is one part. At the very least, it is more promising than concentrating on the conditions needed for the development and exercise of peoples' two moral powers, while still drawing upon an understanding of peoples as free and equal in a sense deeply consonant with Rawls's analogous understanding of citizens as free and equal.

#### *2.4 Global Primary Goods*

Without (yet) using the notion of non-domination, Pettit's view can, I have suggested, be employed to fill out a list of global primary goods in a manner somewhat, although not strictly, analogous to how Rawls proceeds in the domestic case. Our question is thus: What is needed for peoples to be fully cooperating members of the society of peoples, and to pursue their conceptions of domestic justice? In other words, what do civilities need in order to enjoy full global *civitas*? Answering it will provide us with the needed conception of primary goods, on the basis of which we can rationalize the choice of principles made by the parties in the global original position.



It is important at the outset to point out that the list of primary goods provided below is not intended to be more than vague and suggestive. In the first stage of the global original position, where fundamental principles of justice are decided upon, this is all that is required. Indeed, a very concrete determination of such goods would rob the subsequent principles of justice of an advantageous degree of flexibility. Regarding his domestic list of primary goods, Rawls says this:

It suffices, for example, that in the original position the general form and content of the basic rights and liberties [and the other primary goods] can be outlined... The further specification of those rights and liberties [*et al.*] is left to the constitutional, legislative, and judicial stages as more information is made available, and particular social conditions can be taken into account. In outlining the general form and content of basic rights and liberties, we must make their special role and central range of application sufficiently clear so that at each later stage the process of specification is guided in a suitable way.<sup>76</sup>

This may seem like a low bar to set for a conception of primary goods, but setting it higher would immunize the resulting principles of justice from important empirical considerations in a way that is deeply antithetical to the aforementioned practical view of political philosophy that I share with Rawls.

Again, our question is: What do peoples need as well-ordered and cooperating members of the international community, and to pursue their conceptions of domestic justice? In answering, it is useful to group these global primary goods into two categories: those that pertain to peoples' well-orderedness, or the "internal" cooperation between peoples and their governments; and those that pertain to the well-orderedness of the global basic structure, or peoples' "external" cooperation with other peoples. The following is, I think, a plausible list of (types of) global primary goods:

A. Internal Goods:

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<sup>76</sup> Rawls, *Justice as Fairness*, 172

1. satisfaction of citizens' basic needs
2. development of citizens' sense of justice
3. development of a shared conception of domestic justice
4. reliable representation of citizens by their government

B. External Goods:

1. territorial integrity
2. participation in global governance
3. participation in the global economy
4. global coordination

Before considering the items on this list individually, it will be helpful to note two key differences between Rawls's account of domestic primary goods and the global one put forward by Global Justice as Fairness.

In the domestic case, Rawls identifies five classes of primary goods: two groups of rights and liberties; powers and prerogatives of offices; income and wealth; and the social bases of self-respect.<sup>77</sup> Global Justice as Fairness only includes global analogs of the first three of these classes—income and wealth and the social bases of self-respect are omitted. While the latter good simply has no clear analog for the case of peoples, the exclusion of income and wealth requires some justification. Rawls himself denied that peoples have an interest in income and wealth,<sup>78</sup> and Global Justice as Fairness follows Leif Wenar's interpretation of his position:

A people must be concerned with its level of wealth if this is insufficient to support what its members see as a just political order... But above the goal of

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<sup>77</sup> Rawls, *Justice as Fairness*, 58-59

<sup>78</sup> See Rawls, *The Law of Peoples*, secs. 15-16.

internal justice... a people as such is totally uninterested in its economic status both absolutely and relative to other peoples.<sup>79</sup>

We will take up the case of "burdened societies," or those who lack the resources to be well-ordered, later. For now I simply want to suggest that it is not counterintuitive to think of peoples as disinterested in greater wealth.

Persons are clearly interested in income and wealth, since more of these things will (at least almost) always help them in pursuit of their conceptions of the good. Since peoples have no conception of the good, a perfectly analogous argument cannot be made, although it may be argued that more income and wealth will help peoples to pursue their conceptions of domestic justice. However, conceptions of the good and conceptions of domestic justice are importantly different: the former are continuous pursuits that citizens don't typically expect to fully complete, whereas the latter are satisfied as long as peoples are well-ordered. Once they have realized their conception of domestic justice, the political and economic structure of a people will, in the absence of external interference, constitute a self-sustaining system with no further use for additional wealth.

Furthermore, as suggested by the closely-related "resource curse," great wealth under the collective control of a people may actually have a detrimental impact on domestic justice.

The omission of wealth and income from the list of global primary goods clearly has implications for global distributive justice, which we will consider below. It is worth pointing out now that Global Justice as Fairness concurs with Wenar's gloss of Rawls's position that "a global distributive principle for wealth must have a target, because

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<sup>79</sup> Leif Wenar, "Why Rawls is Not a Cosmopolitan Egalitarian," in *Rawls's Law of Peoples: A Realistic Utopia?*, ed. Rex Martin & David A. Reidy (Malden, MA: Blackwell Publishing, 2006), 105

beyond some minimal level peoples' concern for wealth simply cuts off."<sup>80</sup> In application, Global Justice as Fairness would certainly require some transfers of wealth among peoples, but this is not because peoples have a general interest in wealth.

The second difference between Global Justice as Fairness's global primary goods and Rawls's domestic primary goods is more relevant to our present purpose—whereas Rawls's list is, in large part, a list of rights and liberties, the above list is comprised of interests. As we will see, these interests need to be protected by rights, but the crucial point of contrast is that, in Global Justice as Fairness, rights come at a later stage of argument. The rights enshrined in Rawls's first principle of justice are, so to speak, baked into the cake: they are the very same rights that he considers primary goods. It is thus utterly unsurprising that the parties in his domestic original position would favor his first principle. Global Justice as Fairness takes a bit more circuitous, and hopefully illuminating, route, by first identifying particular interests that motivate peoples, and then allowing those underlying interests to guide the formulation of the rights that protect them.

All of the types of interests in the first group of global primary goods are grounded in peoples' rational interest in maintaining their well-orderedness. If peoples' governments do not, by any minimal standard, faithfully represent their basic ideas about (domestic) justice—in other words, if they cease to be civicities—their group agency is lost, and there is no hope of collectively pursuing their shared political ends. In such

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<sup>80</sup> Wenar, "Why Rawls is Not a Cosmopolitan Egalitarian," 105

circumstances, a system of social cooperation is replaced by one of domination,<sup>81</sup> and all peoples have a clear interest in guarding against this calamity. Assurance from the international community of some minimal standards for the treatment of citizens by their governments is thus a crucial condition for global *civitas*. Without such assurance, genuine global cooperation among peoples would be highly tenuous at best.

The rationale for this type of global primary goods can be supported, albeit imperfectly, with an analogy with the domestic context. Clearly individuals cannot lose their agency in quite the same way that peoples can lose theirs, since persons' agency is direct, while peoples' agency is realized indirectly through their governments, but in both cases, the agents have a rational interest in maintaining their agency. Imagine if the clearly deranged or delusional were treated as full agents—they are held to whatever contracts they (are convinced to) sign, held criminally liable, etc. Since it isn't feasible to protect against such losses of agency, it makes little sense to count such protection as a domestic primary good, so imagine a world in which mind control was not uncommon. In such a world, it seems obvious that citizens would have a powerful interest in being protected against the hijacking of their minds, and this interest would count as a primary good, on a par with other security concerns like bodily integrity. Since it is rather commonplace in the actual world for peoples' governments to be similarly hijacked, I think the case for counting the protection of peoples' agency among the global primary goods is clear and compelling.

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<sup>81</sup> Here I am using the term 'domination' in the loose sense employed by Rawls as a contrast with genuine systems of cooperation. This should not be confused with the technical conception of domination discussed below.

I will now briefly sketch the content of, and rationale for, each of the groups of internal goods from the above list, beginning with citizens' basic needs. The case for the inclusion of these goods is perhaps the most straightforward (although by no means uncontroversial, of course)—if citizens are not secure in their control of their own bodies and possessions, or if their access to basic human necessities is not assured, there is little prospect of social cooperation. I take these basic needs to include the following:

1. Citizens' Basic Needs:

- Security:

- a. physical security (against murder, rape, assault, forced labor, etc.)
- b. security of property (against theft, fraud, search, etc.)

- Subsistence:

- c. adequate food and potable water
- d. rudimentary medical care
- e. basic housing and clothing
- f. tolerably clean/unpolluted living environment

Governments that fail to ensure even such minimal human necessities cannot be plausibly seen as responsibly representing their citizens. In general, it is only in rather dire circumstances that modern states are literally incapable of satisfying their citizens' basic needs (circumstances we will consider below); when the capacity is present but those duties go unfulfilled anyway, we have a clear example of a system of domination. Under the specters of crushing poverty and wanton violence, there is simply no way for citizens to realize their collective agency as peoples. More fundamentally, there is no way for citizens to develop a conception of domestic justice, much less a shared one. The

satisfaction of basic needs is a precondition for the enjoyment of all of the other internal goods, and thus their status as global primary goods is assured.

To see the underpinnings of the rest of the internal goods, recall that as civilities, (well-ordered) peoples are groups of individuals that share a conception of domestic justice in accordance with which they expect their representatives to govern. In order to attain and maintain their status as a civility, then, citizens of peoples will need three basic things: a sense of justice, or the ability to form, endorse, and act upon a conception of domestic justice; the ability to share that conception with their fellow citizens (and to know that it is shared); and the ability to determine and ensure that their government is governing according to that conception. These three aspects of civilities ground the three remaining categories of internal global primary goods.

It should be clear that in order to be a civility at all, citizens will need to be able to form and endorse a conception of domestic justice—the first of Rawls's moral powers discussed above. Without this ability, a modern state cannot represent a system of cooperation, since a conception of justice is required to specify the terms of any such system. The process of formation and endorsement, moreover, must be at least minimally free and informed; a society in which a conception of domestic justice is simply forced upon citizens represents only a mockery of social cooperation. This gives rise to the first of the remaining clusters of internal goods mentioned above:

2. Citizens' Sense of Justice:

- a. access to (relevant) information
- b. development of intellectual capacities
- c. ability to freely form judgments and hold opinions

d. ability to practice one's religion/comprehensive doctrine

It is worth pointing out that the ability to practice one's religion (or none) is an important part of forming a conception of domestic justice even when that conception is entirely secular. If there is an overlapping consensus on a conception of domestic justice (which is far more likely than full agreement), then citizens will affirm that conception from within their various comprehensive doctrines. Being able to freely pursue and reflect upon those comprehensive doctrines is thus something all citizens need as members of well-ordered peoples. Of course they will also have a fundamental interest in obtaining the relevant information and basic intellectual tools needed to work up their comprehensive doctrines into conceptions of domestic justice.

This picture of citizens' needs regarding their sense of justice ignores the fact that most citizens develop their conceptions of domestic justice largely through interaction with others. This neglect is benign, however, since civilities require more than that citizens each have their own conception of domestic justice—they must share a common conception, and it must be generally known that it is shared. Hence the need for the next group of internal global primary goods:

3. A Shared Conception of Domestic Justice:

- a. ability to interact with (all) other citizens
- b. ability to freely discuss domestic justice

In the absence of these abilities, there is no possibility of a shared conception of domestic justice, no matter how loosely we use the notion, emerging to unite citizens into a people. There will simply be no fund of common ideas which, as we saw above, is necessary if fellow citizens are to exercise their collective agency in the manner of a civility. These



basic abilities are thus of paramount importance, and peoples surely have an abiding interest in securing them. It should be noted that domestic conceptions of justice are always evolving and citizenries are always in flux; thus these abilities must be protected on a continual basis—they cannot be jettisoned once an overlapping consensus is initially generated.

Once a commonly shared conception of domestic justice has emerged, a people can then, through their representatives, exercise their group agency. In order for this agency to be fully realized, however, certain relations must obtain, and be known to obtain, between the government and its citizens. This underwrites the final class of internal goods:

#### 4. Reliable Representation

- a. access to information about governmental activities
- b. ability to publicly express dissent

Transparency is, to some degree, required for citizens to have any reasonable assurance that their governments are governing according to the citizenry's shared conception of domestic justice. If citizens are kept ignorant of their government's actions, then the connection between the people's shared conception of domestic justice and their representatives will be, at best, extremely tenuous. This connection, as we saw above, is the crux of peoples' exercise of their (indirect) collective agency, and as such the attendant need for transparency should be counted as a basic interest of all peoples.

The ability to express dissent is perhaps the most controversial among the global primary goods discussed so far, but it should be rather clear why it is needed in a civility. In order for a government to govern in accordance with citizens' shared conception of

domestic justice, citizens will need a way to communicate that conception to their government. This means, at the *very* least, that peoples have a fundamental interest in being able to tell their governments that they disapprove of their governance.

Furthermore, they will need to be able to do so publicly—there must be some corrective measures whereby citizens can influence their governments, and this minimally requires the ability of citizens, as individuals or groups, to publicly demand that their government adequately represent them. Without some such feedback mechanism, a people's status as a civicity cannot be secure; for this reason, it is included in the list of internal global primary goods.

Having completed our first look at the internal goods on the list of global primary goods, we can now turn to the second half of that list—people's "external" goods.

Whereas the groups of interests just examined were grounded in aspects of people's well-orderedness, or their nature as civicities, these are grounded in the well-orderedness of the global basic structure. The following account of external global primary goods is somewhat analogous to Rawls's treatment of domestic primary goods, in that it is developed by considering the things peoples need to be fully cooperating members of the international community and to pursue their conceptions of domestic justice. The internal goods discussed above were all *preconditions* for the agency of peoples; we now turn to the conditions and means necessary for peoples to *exercise* that agency.

We will start the examination of external global primary goods in a manner that directly parallels the previous discussion of the internal goods—with the basic needs of peoples. The following interests are surely attributable to all peoples:

1. Territorial Integrity:

- a. military security (against physical incursion)
- b. cyber-security (against electronic incursion)
- c. environmental security (against foreign sources of pollution)

It seems obvious that the threat of violations of any of these aspects of territorial integrity will undermine the ability of peoples to participate fairly in the international community.

A global basic structure that allowed such violations to occur, or did not provide assurance against them, could not represent a system of cooperation. This only seems somewhat dubious if the territorial nature of states is questioned; this concern will be addressed later. If we assume, as I have so far, that peoples have their own states with (more or less) fixed borders, peoples' interest in territorial integrity should be beyond doubt, and is thus an uncontroversial entry on the list of external global primary goods.

The remaining three groups of external goods are all drawn from the normative conception of peoples which attributes to them the global analog of the status of citizenship—what I called above "global *civitas*." Free and equal peoples participate in global cooperation, as do citizens in the domestic context, in two basic respects: politically and economically. The first gives rise to the next set of external global primary goods:

## 2. Participation in Global Governance:

- a. ability to influence the formation and administration of international law

If peoples lack this ability, there is little chance that the global basic structure will appear to be anything more than an alien system of domination. The goal of developing Global Justice as Fairness is to arrive at a conception of global justice that could be the object of an overlapping consensus among reasonable peoples; this means that the international

community must resemble a "civcity of civcities" in certain respects. In particular, global governance must be conducted on the basis of a shared conception of global justice, and as we saw in connection with the last group of internal goods, this requires at least some measure of transparency and means of dissent. Furthermore, peoples are here regarded as free and equal, and it is difficult to imagine a more fundamental equality among peoples than their fair (as we will see, not necessarily equal or proportional) participation in global governance. If some peoples were not allowed to so participate, they would clearly not be treated as equals—there would be a hierarchy of peoples that is antithetical to the notion of global *civitas*. It thus appears clear that all peoples have a strong and foundational interest in participating in global governance on an equal footing with other peoples.

The more familiar and commonplace way peoples cooperate with each other is through commerce and trade. As Kant put it, peoples "stand in a community of possible physical interaction (*commercium*), that is, in a thoroughgoing relation of each to all the others of offering to engage in commerce with any other."<sup>82</sup> Economic interaction among peoples has surely gone on for as long as there have been peoples at all, and it is now not only inevitable, but necessary in order for peoples to acquire the resources needed for the functioning of modern states. To pursue their conceptions of domestic justice, peoples can, will, and need to engage in international trade; the inability to do so fairly is a serious threat to peoples' well-orderedness and an affront to their freedom and equality. This leads naturally to the idea of "the possible union of all nations with a view to certain

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<sup>82</sup> Immanuel Kant, *The Metaphysics of Morals*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), 121 (emphasis removed)

universal laws for their possible commerce."<sup>83</sup> Hence the third cluster of external global primary goods:

3. Participation in the Global Economy:

- a. access to transportation routes
- b. access to global markets
- c. domestic autonomy
- d. financial stability (security against currency/commodity price shocks, etc.)

The status of each of these interests as global primary goods is, I think, rather intuitive. First, the interest in having access to transportation routes is an obvious prerequisite for engaging in global trade. This issue is perhaps most pressing with respect to landlocked countries, but the ability to travel and send or receive goods via land routes and through airspace is crucial as well. Peoples simply cannot participate in the global economy if they are unreasonably restricted in their ability to travel and transport goods to the territories of other peoples.

Denial of access to transportation routes is not, of course, the only way peoples' global economic cooperation can be undermined—tariffs, subsidies, import controls, currency manipulation, and other barriers to international trade can be just as problematic. Peoples thus have an interest in a relatively open and competitive global marketplace. This is not to deny that *some* trade barriers may be important tools in peoples' pursuit of their conception of domestic justice. But surely peoples have an

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<sup>83</sup> Kant, *The Metaphysics of Morals*, 121. It should be noted that Kant is here discussing what he calls "cosmopolitan right," which he takes to be *a priori* and hold universally. Global Justice as Fairness does not share this understanding—the economic interests of peoples are part of the normative conception of peoples that is internal to Global Justice as Fairness and are meant to reflect modern international conditions and the current state of global public reason.

interest in the general reduction of such barriers, and they certainly have an interest in being able to negotiate with other peoples about such matters within a framework that moderates (if not nullifies) the potentially drastic differences in the parties' bargaining positions. Genuine global cooperation among free and equal peoples calls for reasonable and fairly negotiated access to foreign markets, and thus we should consider such access a global primary good.

Completely unfettered international trade is not, of course, without substantial drawbacks; exposure to global markets can pose significant threats to a people's pursuit of their conception of domestic justice, and this reality underpins the two remaining primary goods under the present heading. The first danger of global trade is the potential loss of domestic autonomy. As Buchanan suggests, "in order to keep their economies healthy, [contemporary] states must attract and sustain capital investment, [and] in a world in which capital is highly mobile this makes states vulnerable to dependency on capital."<sup>84</sup> While Buchanan's concern is with peoples' abilities to realize their own principles of domestic *distributive* justice, there are more pressing concerns in this vein. When smaller or less developed economies receive significant influxes of foreign capital, they can easily be held hostage to the interests of the owners of that capital, and in such situations there is a permanent possibility of exploitation under the threat of its withdrawal. The most likely forms of such exploitation are the relaxation (or abolishing) of labor and environmental standards extorted from domestic governments under the specter of economic turmoil or collapse. More broadly, bribery constantly threatens to undermine peoples' collective pursuit of their conceptions of domestic justice. People

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<sup>84</sup> Allen Buchanan, "Rawls's Law of Peoples: Rules for a Vanished Westphalian World." *Ethics* 110, part 4 (2000): 702

thus have a clear interest in security against these types of losses of internal or domestic autonomy.

The second significant danger of international commerce is the potential loss of financial stability. Significant exposure to global markets can make peoples vulnerable to the adverse effects of commodity and currency speculation, which can sometimes quickly and unexpectedly undermine a people's well-orderedness. More generally, commodity price shocks (whatever their causes) are dangers inherent in the global economy, and are especially damaging to developing economies or those in which a particular industrial or commercial sector is dominant. Currency fluctuations, sometimes dramatic, are also predictable consequences of international financial and economic interaction, and again are particularly threatening to small and developing economies. Ameliorating the effects of these known threats to financial stability is therefore clearly in the interest of all peoples.

This brings us to the final group of external global primary goods:

#### 4. Global Coordination:

- a. access to global commons (oceans, outer space, Antarctica, etc.)
- b. (global) environmental protection
- c. disease prevention (containment across state borders)

Peoples' interests in these goods are, I think, clear enough; they are here considered as external goods because they cannot effectively be pursued by peoples separately, but rather require coordinated action by all peoples. Many environmental concerns, particularly regarding the oceans and atmosphere, clearly require concerted international efforts; likewise, the spread of disease is a global concern that demands global solutions.

Failures to so coordinate are potentially threatening to the well-orderedness, and sometimes the very existence, of peoples. While access to global commons is not as vital of an interest, some agreement on (and enforcement of) rules governing areas not under the jurisdiction of particular states is important for avoiding unnecessary conflicts among peoples, not to mention ensuring the safety of international travel, trade, research, and exploration. As the long history of "the law of the sea" reflects, peoples have a clear and enduring interest in common rules for interactions that take place outside the bounds of their territories.

This concludes our look at the list of global primary goods used in Global Justice as Fairness. Surely some plausible goods were omitted, and some items on the list are open to doubt. As I said above, nailing down the list of primary goods very specifically would deprive Global Justice as Fairness of a valuable measure of flexibility, and I think the list offered is, on the whole, intuitively plausible. More crucial than the particular content of the list is the grounding of that content—peoples' interests in maintaining their agency (as civilities), their global *civitas*, and the pursuit of their conceptions of domestic justice can be used to further specify, amend, or emend the list given here. In any event, I believe this conception of global primary goods will suffice for the purpose it was designed to fulfill, namely, to generate a conception of the rationality of peoples robust enough to guide the parties' selection of principles of justice in the global original position.



## **Chapter 3: Two Principles of Global Justice**

### *3.1 Freedom as Non-domination*

With the above conception of global primary goods in hand, we can finally begin to consider what principles of global justice would be selected in the global original position, as understood in Global Justice as Fairness, in which peoples are symmetrically situated and represented as free and equal, and reasonable and rational. The global veil of ignorance excludes not only facts about a people's population, economic development, ethnic and religious makeup, and the size of their territory or its natural resources, but also their conception of domestic justice. In this condition of ignorance, the parties must rely on common or generic interests of peoples, which are given by the account of global primary goods. The principles of global justice selected will dictate how these global primary goods are to be further specified and distributed; they will also specify more-or-less necessary means for securing them.

Before examining these principles, however, we need to return briefly to Pettit's notion of freedom as non-domination. As we saw above, on his version of this republican ideal, domination is a capacity to interfere arbitrarily in the choices of others, and freedom amounts to the extent of one's immunity to such interference. Interference is arbitrary when it is not forced to track the (relevant) "interests and opinions" of those subjected to it. Earlier I suggested that a conception of primary goods could be used to determine which of peoples' interests were "relevant;" this was in sharp contrast to Pettit's preferred method, which requires what he calls "contestatory democracy." I will now briefly discuss the attractiveness of Pettit's general view of freedom as non-domination, before turning to the drawbacks of his particular treatment of arbitrariness; I will then

demonstrate how Global Justice as Fairness's conception of global primary goods can be used to remedy this defect. This will yield an understanding of non-domination that is amenable to a Rawlsian perspective while still retaining the advantages of Pettit's view, and can thus be used to formulate Global Justice as Fairness's principles of global justice. Hopefully, the intuitive appeal of the value of freedom as non-domination (along with that of the list of global primary goods) will carry over into the resultant principles.

While the importance or weight of the value of freedom in the context of domestic justice is often controversial, the same can hardly be said about global justice. The traditional ("realist") conception of sovereignty views peoples' freedom as more-or-less absolute—the only moral constraints on the behavior of states are imagined to be the dictates of national interest. As a matter of practice, most modern states jealously guard their so-called sovereignty, invoking this notion at the first sign of any form of foreign interference. This is why Global Justice as Fairness can safely attribute the view of peoples as free to global public political culture; the question for theories of global justice is not whether freedom is important or not, but whether there are even any other values to compete with it. As we will see, the principles of Global Justice as Fairness reflect the supremacy of freedom, almost to the exclusion of other values—this is a key factor in the plausibility of their being an object of overlapping consensus. However, there are many ways of understanding the concept of freedom, and in order to make any use of it, we need to specify it further. Pettit's republican conception of freedom is very helpful in this regard.

Freedom is almost always taken to be opposed to some form(s) of interference, and the primary rival to Pettit's account is a view that equates freedom with the simple

absence of interference, a view he attributes to Hobbes and Bentham.<sup>85</sup> There are two primary advantages of Pettit's view of freedom as non-domination over mere non-interference, which are associated with the two themes of his view discussed above, namely, "liberty-versus-slavery" and "law-and-liberty." The first theme reflects the fact that there can be domination without interference, while the second shows that there can be interference without domination. Both of these features, as I will now briefly suggest, are intuitively desirable features of a conception of freedom.

As we saw above, non-domination is a status—the opposite of the status of slavery. Not only does it require an absence of (certain) interference, but an absence of the very capacity for such interference—it does not suffice for non-domination that there is merely a low expectation of interference. Thus domination can occur even in the absence of interference, whenever others are in a position to interfere (on an arbitrary basis) with one's choices. Even if a capacity for interference is only exercised benevolently, it can still represent domination. (This is why interference, in order to be non-dominating, must not only track the interests of those suffering it, but must be *forced* to track their interests.) Freedom as non-domination is thus enjoyed more "robustly," as Pettit describes it, than freedom as non-interference. He nicely sums up the associated advantages of his view this way:

It promises to do better in delivering a person from uncertainty, and from the associated anxiety and inability to plan; from the need to exercise strategy with the powerful, having to defer to them and anticipate their various moves; and from the subordination that goes with a common awareness that the other person is exposed to the possibility of arbitrary interference by another: that there is another who can deploy such interference, even if they are not likely to do so.<sup>86</sup>

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<sup>85</sup> See Pettit, *Republicanism*, 37-44.

<sup>86</sup> Pettit, *Republicanism*, 89

Militarily or economically weaker states would certainly appreciate these advantages of non-domination over non-interference, and it seems highly likely that the parties in the global original position would seek to secure them. As I suggested above, stronger states would also benefit from the reduction of the subordination suffered by weaker states, since the resentment generated by such subordination is likely to be a significant contributor to international terrorism.

The "law-and-liberty" theme emphasizes that there can be interference without domination, and thus not all interference compromises freedom. Non-dominating interference occurs whenever the interference is not arbitrary, i.e. forced to track the interests and opinions of those whose choice situations are being affected. This has the significant advantage of removing the tension between freedom and the interference of appropriate law. If we view freedom as non-interference, we will have to view all laws as representing objectionable interference, presumably justified only by securing a greater reduction of interference from other sources. While this may sound intuitively plausible, insofar as it places stringent constraints on the legal system in the name of freedom, it does so, I believe, in an unpalatable fashion; it also turns out to be a view that few traditional champions of freedom actually endorse.

It is rather counter-intuitive to consider the interference of laws prohibiting murder or assault as compromising freedom, at least if we value freedom simply as such—there is something odd about saying that such laws must be counted in the negative side of the moral ledger. Most of us don't want to say that the freedom to kill or harm people at will is a morally significant freedom at all, the loss of which requires compensation. Yet if we view freedom as non-interference, these sorts of tradeoffs will

continually need to be made, and as Pettit points out, the results of these balancing acts will not necessarily be in favor of legal protection:

Imagine that we have a choice between leaving employers with a lot of power over employees, or men with a lot of power over women, and using state interference to reduce such power. Maximizing overall non-interference is perfectly compatible with taking the first option. While we do not guard against interference by the stronger under that option, we may not think that it is very likely to occur; and because we do not guard against interference by the stronger, we will count the absence of state interference as a great boon.<sup>87</sup>

A similar view might underlie the popular but morally absurd position, sometimes (erroneously) associated with "American exceptionalism," that international law is good for the rest of the world, but not for the United States. Defenders of this idea might argue that the US, as a beneficent global actor, is unlikely to interfere with other states, and thus the onerous shackles of international law would represent a drastic and uncompensated loss of freedom. I consider it a significant advantage (as, I think, would the parties in the global original position) that viewing freedom as non-domination short-circuits this line of argument. More fundamentally, it is desirable to remove the conflict, inherent in the conception of freedom as non-interference, between law and liberty.

Republicans such as Pettit are far from alone in defending the compatibility of law and freedom—many libertarians (and other liberals) also embrace it. As the prominent (left-) libertarian Peter Vallentyne puts it, "libertarianism is concerned with *moral* freedom as opposed to *empirical* freedom."<sup>88</sup> G.A. Cohen neatly states the implication of this view, which he calls the "rights definition" of freedom (and plausibly attributes to Nozick), this way: "I am unfree only when someone prevents me from doing

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<sup>87</sup> Pettit, *Republicanism*, 85

<sup>88</sup> Peter Vallentyne, "Left-Libertarianism and Liberty," in *Contemporary Debates in Political Philosophy*, ed. Thomas Christiano & John Philip Christman (Malden, MA: Wiley-Blackwell, 2009), 144

what I have a right to do, so that he, consequently, has no right to prevent me from doing it."<sup>89</sup> On this view, laws that prevent one from doing what one did not have a (prior) right to do are not restrictive of freedom; thus the compatibility of law and liberty is not a unique advantage of the republican conception of freedom as non-domination.

However, as Jeremy Waldron (among many others) has pointed out, this "moralization" of freedom has a rather severe drawback: it effectively "excludes the concept of freedom altogether from the debate about the justification of... rights."<sup>90</sup> By building a prior account of rights into the very definition of freedom, this view renders any freedom-based arguments for particular rights viciously circular. This theoretical move is fundamentally at odds with Global Justice as Fairness's approach, which hopes to appeal to the value of freedom in order to arrive at principles of global justice, which in turn specify certain rights. Furthermore, the appeal to a prior conception of rights is antithetical to any broadly Rawlsian methodology. At least for our present purposes, then, I conclude that Pettit's conception of freedom as non-domination is superior to the chief alternatives.

Viewing freedom as non-interference, as I indicated above, makes stringent demands on the justifiability of laws, and this is of course a good thing—any conception of liberty that failed to place some constraints on legal authority would be seriously deficient. Pettit's view does this by requiring that justified interference be non-arbitrary, that is, it must (be forced to) track the (relevant) interests and opinions of those suffering

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<sup>89</sup> G.A. Cohen, "Capitalism, Freedom, and the Proletariat," in *The Liberty Reader*, ed. David Miller (Boulder, CO: Paradigm Publishers, 2006), 170

<sup>90</sup> Jeremy Waldron, "Homelessness and the Issue of Freedom," in *Contemporary Political Philosophy: An Anthology*, edited by Robert E. Goodin & Philip Pettit (Oxford: Blackwell Publishers, 1997), 452. Cohen makes a similar point; see Cohen, "Capitalism, Freedom, and the Proletariat," 171-172.

it. To ensure that the interference of the legal system is not arbitrary, Pettit argues that we need a "contestatory democracy"—a form of government that "follows deliberative patterns of decision-making, that includes all the major voices of difference within the community, and that responds appropriately to the contestations raised against it."<sup>91</sup> It is this ongoing possibility of meaningful contestation that Pettit thinks allows us to identify the relevant interests and opinions, the tracking of which would render interference non-arbitrary.

I suggested above that this manner of proceeding is not fruitful if we want to appeal to the value of liberty in coming up with principles of justice via the device of the original position. Apart from this narrower point, however, there are more general grounds for skepticism about Pettit's contestatory test of arbitrariness—it is, in a manner of speaking, excessively democratic. Although his view is very much concerned with the tyranny of the majority, there are no constraints placed on the input or outcome of his deliberative and contestatory democratic process. He happily admits:

once a contestatory democracy is in place, then of course everything is up for grabs. If the operation of that democracy leads to the emergence of different aims from those that we have outlined, or if it forces a rethinking of constitutionalist constraints, then it is obviously the dictates of that democratic process that should prevail.<sup>92</sup>

On Pettit's view, even constitutionalist constraints are vulnerable to contestation, in spite of the great importance he places on the rule of law in securing non-domination. This is disappointing, since I consider the republican account of constitutionalism, separation of powers, and the empire of law, as well as the general institutional focus of such views

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<sup>91</sup> Pettit, *Republicanism*, 200

<sup>92</sup> Pettit, *Republicanism*, 201

(which Pettit draws from the likes of Montesquieu and Madison) to be one of its most significant advantages.<sup>93</sup>

Global Justice as Fairness incorporates these attractive features of Pettit's view while rejecting the claim that everything except contestability is "up for grabs." In typical Rawlsian fashion, it denies the moral importance of claims made on the basis of unreasonable doctrines, which Pettit's contestatory democracy is presumably unable to do. Global Justice as Fairness identifies certain interests of all peoples, or primary goods, independently of any deliberative procedures. While the account of these interests is flexible, as we saw above, they are not hostage to the outcomes of (possibly unreasonable) contestation as they are on Pettit's view. These interests, which are not sectional or factional, can plausibly be identified as the "relevant" ones for the purposes of non-domination. Furthermore, Global Justice as Fairness is sure to track the relevant "opinions" of peoples, since its main ideas and values are drawn from global public political culture. By thus using global primary goods to determine non-arbitrariness, Global Justice as Fairness can employ the conception of freedom as non-domination to generate principles that retain all of the above advantages of Pettit's republicanism while avoiding its shortcomings.

I submit that the parties in the global original position, as understood in Global Justice as Fairness, would select the following lexically ordered principles of justice for the global basic structure:

1. Minimal Domestic Freedom: Ensure minimal non-domination of all citizens
2. Maximal Global Freedom: Maximize non-domination of peoples, with respect to:

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<sup>93</sup> For Pettit's comments on these aspects of his view, see Pettit, *Republicanism*, 35-41, 106-109 & 172-183.



- a. security and global governance
- b. trade, coordination, and all other domains of choice

The first principle is chosen in light of the account of internal global primary goods, and prevents certain capacities for interference with citizens that is fundamentally inconsistent with the interests of peoples *qua* civilities. The second reflects peoples' interests in external global primary goods, segregated into two classes, and calls for the minimization of capacities for interference with peoples that is not forced to track their interests grounded in global *civitas*. It is crucial to note that the first principle has priority over the second principle, and the first part of the second principle has priority over the second part. Before examining these principles more closely, we should first consider the general form of a complete original position argument for them. For reasons that will become clear, the defense of these principles given below does not pretend to offer such a complete argument, nor is such an argument needed to accomplish my central task.

Rawls defended his principles of domestic justice (in part) by comparing their relative merits with other prominent alternative principles from the perspective of the parties in the global original position. He concluded that, given his conception of the parties and the strictures of the veil of ignorance, his principles would be preferred to certain forms of utilitarianism and intuitionism. Of course, this style of argument is very limited, insofar as each comparison can only hope to establish the superiority of one set of principles over another; there is always the possibility of other alternative principles turning out to be preferable. In general, the parties in any original position argument must choose between the rival sets of principles that they are offered; describing their reasoning is a purely comparative exercise that is inherently limited by the number of

alternatives available. A truly complete original position argument is an impossibility, since the number of alternative sets of principles is, in theory if not in practice, simply too great.

In what follows I will not even attempt to formulate alternatives from which the parties to the original position, as understood by Global Justice as Fairness, select the principles offered here. While we will briefly take up a few alternative formulations of the individual principles, nothing like Rawls's comparative evaluation of his principles will be attempted. There is no doubt that this renders the case for Global Justice as Fairness's principles rather incomplete. However, I don't think filling this lacuna is nearly as urgent as it might seem.

The primary aim of the present work is to defend a particular approach to global justice—one that recognizes the fact of reasonable global pluralism, takes peoples as the primary actors of international affairs, and is focused on the global basic structure. This approach itself can only be defended by a comparative evaluation of plausible alternatives. In Part II I take on some nearby alternative approaches, almost exclusively Rawlsian in character; this comparative evaluation is the primary argument for Global Justice as Fairness's basic framework. This argument will not, of course, be terribly persuasive to those who already reject these alternatives, or generally do not accept a broadly Rawlsian approach at all. While certainly desirable, further comparisons are simply beyond the scope of the present work.

Those that hold, or are sympathetic to, a Rawlsian approach to global justice already have a particular view of the global original position, one that no doubt differs from the view presented here. For this reason, the specific (comparative) reasoning of the

parties in Global Justice as Fairness's original position is not of particular interest—those that already have broadly Rawlsian views of global justice will not find such reasoning persuasive. They will (rightly) object that the setup of the global original position is precisely what is at issue, and hence any defense of particular principles from within the version of the global original position offered here would simply beg the question against their preferred principles.

This is not to say that there is simply no defense of Global Justice as Fairness's principles whatsoever. The specific discussions of each principle connect them, in what are hopefully rather straightforward ways, with the above conception of the parties. In particular, the close connections between the parties' rationality—specifically, the account of global primary goods—and the principles offered here should constitute an intuitive *prima facie* case for those principles. It should not be mysterious why the parties in the original position, as understood above, would choose something like the principles discussed below. However, I would certainly not want to deny that there might be other principles that could be shown to be superior.

The specific formulation and content of the principles is not my primary concern; more important is the conception of the global original position. (It is worth repeating here that the global original position is merely a useful, but by no means necessary, device of representation that models and makes perspicuous the basic features of a framework for thinking about principles of global justice.) Thus the more important comparative evaluations, for present purposes, are those that compare the basic approach of Global Justice as Fairness with other, similar approaches, not those that would be undertaken by the parties in a fuller original position argument. It suffices for such

comparisons that the particular principles offered by Global Justice as Fairness are plausible *prima facie* candidates for the outcome of the comparative reasoning that would constitute a full original position argument for them.

### 3.2 *The First Principle: Minimal Domestic Freedom*

The Minimal Domestic Freedom Principle directs us to ensure a minimal level of non-domination of citizens within their domestic basic structures. For the purposes of this principle, the interests identified as relevant for determinations of arbitrariness are those given by the above list of internal global primary goods. Interference that is forced to track these interests does not count as arbitrary, and thus domestic governments' pursuit of these interests, when suitably constrained, does not represent domination.

In order to ensure this minimal level of citizens' freedom, the Minimal Domestic Freedom Principle specifies a list of certain important rights that citizens hold against their governments, which are enforced by the global basic structure. These rights set a threshold below which peoples can no longer be considered well-ordered, and have thus lost their collective agency as exercised through their structure as civilities. The threshold set by the principle is, importantly, the same for all peoples—all are guaranteed an equal level of protection for their interests in internal global primary goods.

While we may be tempted to think that the parties in the global original position would instead choose a principle of *maximal* domestic freedom, we should consider the fact that enforcement of these rights always represents interference with peoples' internal affairs. (Since such interference would be forced to track peoples' interests in internal global primary goods, it would not be arbitrary.) Beyond the threshold of agency, peoples will want to be free to act according to their domestic conceptions of justice

without any threat of outside intervention, and this is only possible under a minimal principle, since a maximal principle would legitimize any outside efforts to increase citizens' (relevant) domestic freedoms. Peoples would certainly reject such a principle, since it threatens to eliminate any sphere of autonomy for their domestic basic structures. Peoples' particular conceptions of domestic justice specify their particular (full) understandings of citizens' appropriate freedom, but a maximal domestic freedom principle would all but eliminate this important source of diversity among (reasonable) peoples.

More broadly, it would simply be self-defeating for peoples to select a principle that sought to maximize their agency, rather than set a threshold for it, in much the same way that analogous agency-based domestic principles would be—in both cases, such principles would undermine the very things they aimed to protect. The exercise of agency, whether by persons or peoples, cannot plausibly be limited to choices that do not detrimentally affect the extent of that agency. Enabling basic structures to maximize agency, at any level, would also be likely to create capacities for arbitrary interference—the setting of thresholds is far less likely to be abused than an open-ended effort to maximize.

I will henceforth refer to the rights specified by the first principle as "human rights." As may already be apparent, and as will become quite obvious below, this use of 'human rights' deviates from more traditional views in some significant respects. Indeed, many have criticized Rawls's very similar use of the term as a "stipulative redefinition"

that there is "no good reason to accept."<sup>94</sup> However, I am not interested in semantic debates about 'human rights.' I am concerned with certain interests that peoples (as understood in Global Justice as Fairness) have, and how those interests can motivate the parties in the global original position to select principles that protect peoples' agency. While there are obviously some close affinities between human rights as understood in Global Justice as Fairness (and by Rawls) and the more traditional conceptions (they are rights that citizens of all states have, their violation is of international concern, etc.), if this usage seems objectionable, I would be happy to employ a different locution for the same purpose. The notion of human rights used here is completely internal to Global Justice as Fairness, which neither affirms nor denies the existence of human rights in more traditional moral senses. These traditional conceptions are clearly comprehensive doctrines that Global Justice as Fairness rules out as appropriate bases for a political conception of global justice.

Before turning to the content of the list of human rights, it should be emphasized that these rights are here understood as rights that citizens hold against their governments. They are not rights that all humans hold against all others (fellow citizens, foreign nationals, foreign governments, Martians, etc.). The primary duty-bearers of human rights are domestic governments, and when these duties are not upheld, it is (in the first instance) the responsibility of the global basic structure to enforce them. As we will see in more detail below, I follow Pogge in conceiving of human rights violations as

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<sup>94</sup> Allen Buchanan, "Taking the Human out of Human Rights," in *Rawls's Law of Peoples: A Realistic Utopia?*, ed. Rex Martin & David A. Reidy (Malden, MA: Blackwell Publishing, 2006), 165. See also James Griffin, *On Human Rights* (New York: Oxford University Press, 2008), 24 and James W. Nickel, "Are Human Rights Mainly Implemented by Intervention?," in *Rawls's Law of Peoples: A Realistic Utopia?*, ed. Rex Martin & David A. Reidy (Malden, MA: Blackwell Publishing, 2006), 264-277.

requiring "official disrespect;"<sup>95</sup> this means, for instance, that a murder committed by a serial killer will *not* (usually) constitute a violation of the victim's human rights, even though there is a human right to life. It also means that an absence of reasonable legal protections against being arbitrarily killed *would* (usually) constitute a violation of human rights, *even if no one were actually killed*.

While accounts such as Pogge's may be vulnerable to the objection that focusing only on "official disrespect" unjustifiably ignores "non-official" threats to human rights, the appeal to non-domination in the Minimal Domestic Freedom Principle provides structural support for this focus. The principle ensures an absence of certain capacities for interference that are not forced to track certain relevant interests of peoples. This means that citizens must have a certain minimal degree of immunity to the sorts of arbitrary interference in question, and this immunity is, as we saw above, a matter of having a certain status. The focus on official disrespect is not justified, as someone like Pogge might argue, by an empirical claim that doing so is the most effective way of protecting citizens' human rights; rather, lack of official disrespect is constitutive of the very sort of status called for by Global Justice as Fairness's first principle. I discussed Pettit's institutional focus earlier, which he shares with the major figures in the republican tradition, but it is worth emphasizing it again here. The following passage is especially clear on the institutional reality of republican freedom:

If freedom consists in being a citizen of a polity and a society in which each is protected against arbitrary interference by others, then freedom is not brought causally into existence by the institutions that characterize that polity and society.

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<sup>95</sup> See Thomas Pogge, *World Poverty and Human Rights*, 2nd ed. (Cambridge: Polity Press, 2008), 65-69.

Like citizenship, it involves nothing over and beyond the status of being suitably incorporated within those institutions.<sup>96</sup>

The point here is that, unlike freedom as non-interference, non-domination is inherently institutional—a point of which Global Justice as Fairness makes substantial use.

Freedom is not something that just happens to be best pursued under suitable institutions; rather, suitable institutions are constitutive of liberty itself.

Rawls has often come under attack for his focus on institutions, perhaps most perspicuously by G.A. Cohen,<sup>97</sup> and although I think such critiques are (at best) misguided, it is a clear advantage of Global Justice as Fairness that the centrality of freedom as non-domination can underwrite its Rawlsian focus on the basic structure.<sup>98</sup> This point will emerge again, and perhaps more straightforwardly, in connection with Global Justice as Fairness's second principle, but it should be clear enough that focusing on non-domination in connection with human rights makes the concern with official disrespect inevitable. Indeed, the Minimal Domestic Freedom Principle is doubly focused on basic structures, since it places certain requirements on *domestic* basic structures in order for them to operate as agents within the *global* basic structure. Since Global Justice as Fairness grounds human rights in peoples' agency, as exercised through their governments, it should in any event be unsurprising to identify governments as the primary duty-bearers of human rights.

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<sup>96</sup> Pettit, *Republicanism*, 108

<sup>97</sup> See, for example, G.A. Cohen, "Where the Action is: On the Site of Distributive Justice," *Philosophy & Public Affairs* 26, no. 1 (1997).

<sup>98</sup> Cohen understands his critique as, at bottom, a form of the feminist critique of liberalism, according to which focusing on institutions leads theorists to exclude from the purview of justice many issues important to women. It is a further advantage of incorporating non-domination into a Rawlsian framework that Pettit's view of freedom is quite congenial to such feminist worries. See Pettit, *Republicanism*, 138-140.



It should also be made clear, if it isn't already, that on this view human rights are not "pre-political"—they do not apply to human beings merely as such, apart from any form of political organization or social cooperation. They represent (one class of) interests that peoples have when viewed as cooperating members of the international community *as we currently see it*. Human rights reflect certain minimal standards of the official conduct of *modern governments* toward *modern citizens*. The content of human rights according to Global Justice as Fairness would not be appropriate for designing principles of global justice for the world of a thousand years ago, and this is no doubt true for the world as it will be a thousand years from now. The normative conception of peoples laid out above is (intended to be) drawn from the world as we—"you and I, here and now," to use Rawls's phrase—currently see it.

The Minimal Domestic Freedom Principle is comprised of the following clusters of human rights:

1. Basic Rights (security and subsistence)
2. Individual Rights (to education and information, freedom of conscience)
3. Social Rights (freedom of movement, association, and expression)
4. Political Rights (to governmental transparency, peaceful assembly/protest, and freedom of the press)
5. Supporting Rights (associated with the rule of law, legal self-ownership)

The first four types of rights should seem familiar, since they are directly tied to the four types of internal global primary goods examined above. The fifth group of supporting rights emerges from the appeal to non-domination. I will now briefly defend a rough specification of the rights in each cluster, before turning to the second principle.

The inclusion of security and subsistence rights, like the corresponding inclusion of basic needs in the list of global primary goods, is the most straightforward. Global Justice as Fairness follows Henry Shue's influential account in viewing security and subsistence rights as *basic* rights. Rights are "basic" when "enjoyment of them is essential to the enjoyment of all other rights."<sup>99</sup> It is this status that grounds the claim that security and subsistence rights are human rights. If citizens do not enjoy these rights, they simply cannot enjoy any other rights; crucially for our present purposes, they cannot enjoy the remaining rights on the above list.

Furthermore, securing these rights is critical for ensuring any significant degree of non-domination of citizens. When individuals lack reliable protections for their basic rights, the possibilities for domination are obvious and familiar—such individuals are routinely exposed to capacities for interference that is not forced to track their interests, surely including their interests in ensuring their group agency. While it may seem as though a principle of non-domination would be “negative” in the sense that it merely prohibits certain capacities for arbitrary interference, to infer that only “negative” rights could follow from it would be to misunderstand such a principle. So-called “positive” rights, such as subsistence rights, are integral components of any overall strategy to ensure (any level of) non-domination of persons.

More broadly, it is a mistake to think of any of the following rights (basic or otherwise) as “negative” if this is taken to mean that they can be fully enjoyed simply by the mere forbearance of others. For instance, the human right to life, as we saw above, can be violated even if no one is actually killed—a domestic government’s failure to

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<sup>99</sup> Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd ed. (Princeton: Princeton University Press, 1996), 19

adequately protect citizens from being murdered is a violation of this right, and this can happen in the absence of any actual deaths. Protecting citizens against certain capacities for arbitrary interference will generally require that governments take active steps toward constraining or eliminating these capacities, and whether these steps include ascribing “positive” or “negative” legal rights to citizens, the assurance of these rights will always require governments to actively do things, not merely to avoid violating citizens’ rights themselves.

Unsurprisingly, Global Justice as Fairness specifies these rights as basic:

1. Basic Rights:

A. Security Rights

- a. rights over ones body (against murder, rape, assault, forced labor, etc.)
- b. rights over ones property (against theft, fraud, search, etc.)

B. Subsistence Rights

- a. access to adequate food and potable water
- b. access to rudimentary medical care
- c. access to basic housing and clothing
- d. access to a tolerably clean/unpolluted environment

In light of the above account of global primary goods, the case for these rights is, I think, clear enough. It should be noted that the property rights included here are rather minimal, extending only to personal possessions. Global Justice as Fairness does not view the right to own, for example, means of production as a human right, since such ownership rights are not integral to peoples’ agency. It is also worth noting that the right of access to medical care may not be able to be satisfied by some governments because of

the existing intellectual property regime for drugs. In such cases, it is a duty of the global basic structure to provide assistance in some form, perhaps best achieved by modifying the current intellectual property rights regime.

The rights that I above grouped together under the headings 'individual,' 'social,' and 'political' do not correspond particularly well with the customary referents of such labels. The reason for this departure from standard usage is to reflect the grounding of each of these three clusters of rights in the three distinct features of civilities discussed in connection with global primary goods; hopefully these labels will appear more apt momentarily. I also consider it a virtue that these clusters cut across typical groupings of human rights—I view the traditional categorizations, especially the "political/social" and "positive/negative" dichotomies, as theoretically suspect, and the uses to which they are typically put misleading if not pernicious.<sup>100</sup> As we have seen, in order to attain and maintain their status as civilities, citizens of peoples will need three basic things: the ability to form and endorse a conception of domestic justice; the ability to share that conception with their fellow citizens (and to know that it is shared); and the ability to determine and ensure that their government is governing according to that conception. The first pertains primarily to individual citizens, the second to relations among fellow citizens, and the third to relations between citizenries and their governments—hence the classification used here.

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<sup>100</sup> For a compelling rejection of these dichotomies, see Shue, *Basic Rights*, ch. 2. I do not mean to suggest that there is no distinction to be made between positive and negative rights, only that, as Shue does, the institutional realization of all human rights, even the most clearly "negative" among them, will require significant "positive" action (and resources) on the part of the relevant institutions. Non-institutional views of human rights have made much use of this dichotomy to defend conclusions deeply at odds with the picture presented here.

The primary goods associated with citizens' development of their sense of justice give rise to the individual rights. We have already seen that in order to affirm a conception of domestic justice, all citizens need to develop their intellectual capacities, be able to access relevant information, and be allowed to hold and practice their comprehensive doctrines. These interests underwrite the following rights:

2. Individual Rights:

- a. the right to access (relevant) information (social, scientific, historical, etc.)
- b. the right to basic education (especially civic education)
- c. freedom of conscience and thought/opinion

Censorship of the sorts of information relevant here is a clear sign of an attempt to usurp the role of a representative government in a civility, and prosecution of citizens based on their comprehensive doctrines is similarly an obvious attempt to govern in accordance with a conception of domestic justice that is not shared by all citizens. The denial of the right to basic education is not necessarily so malevolent, since sometimes states lack the needed capacities to ensure this right. We will discuss such cases below; the present point is that denying education to some citizens for reasons other than a lack of resources is typically another indication of a government's attempt to govern on a factional basis. In any event, a basic level of education is surely necessary for citizens of modern states to develop sensible conceptions of justice (both domestic and global), and to reasonably believe that their representatives are governing in accordance with them.

The need to come to share a conception of domestic justice grounds what I have called "social" rights.

3. Social Rights:

- a. freedom of movement
- b. freedom of association
- c. freedom of expression

As paradigmatic "negative" rights, not only are these freedoms typically easy for governments to ensure, but there is little reason for them to fail to do so beyond preventing citizens from exercising their collective agency. As we saw above, members of civilities must be able to actively discuss political matters with each other, and all three of these freedoms are straightforwardly necessary for them to do so.

Protecting the development of a shared conception of domestic justice is, of course, of little value to peoples if they are not governed according to that conception (and reasonably believe they are so governed). The global primary goods associated with reliable representation give rise to the next set of human rights:

#### 4. Political Rights

- a. the right to access information about governmental conduct
- b. freedom of the press
- c. the right to peaceful assembly and protest

These rights are perhaps the most controversial, but it should be rather clear why they are needed in a civility. Transparency is, to some degree, required for citizens to have any reasonable assurance that their governments are governing according to the citizenry's shared conception of domestic justice. This is, I think, relatively uncontroversial in the context of domestic affairs, but here I extend the requirement of transparency to international relations as well. I am well aware that this demand is almost never met, and there are at present often very good practical reasons for keeping citizens in the dark

regarding the niceties (and absurdities) of diplomacy; all this shows, however, is that the current global basic structure (if one exists) is seriously deficient.

Within the context of the robust global basic structure called for by Global Justice as Fairness, there is much less reason to think that international affairs must be conducted behind closed doors, at least to any greater degree than domestic affairs. Just as it is important for domestic lawmakers to shield their sausage-making from the full light of day, international negotiations will similarly require some degree of opacity. However, it is not only the process, but the outcome of diplomacy that is often kept secret. The typical rationale for the current lack of transparency is to allow agreements to be reached among leaders without the knowledge of their citizenries, which could not otherwise be made. However, peoples generally need to be aware of their governments' actions in order for those actions to be plausibly seen as exercises of their collective agency (although of course if the stakes are grave enough, exceptions must be made). In any event, many of the most pressing issues (usually security-related) frequently addressed in these backroom negotiations would be transformed into matters of international law enforcement, which we should not understand as *requiring* the cooperation of state governments. It may be desirable, but even to insist on seeking such cooperation reflects an outdated notion of absolute sovereignty that Global Justice as Fairness simply rejects.

The rights to assembly and peaceful protest are far more controversial. These rights are often explicitly denied on the grounds that they pose threats to stability, and in some sense this is surely a correct assessment. However, the stability thereby threatened cannot be more than a mere *modus vivendi*. In order for a civicity to be stable for the right reasons, there must be some way for citizens to communicate their discontent with

their government's actions. Without this, the government has no reliable way to ensure that it is governing in accordance with its citizens' shared conception of domestic justice. Even if benevolent rulers were to happen, as if by chance, to so govern, the crucial agential link between the government and the people would be absent, and thus the citizens' trust in their government's representation could not be reasonably expected. The rights to assembly and peaceful protest seem to be minimal requirements for establishing and maintaining the reliable representation of peoples by their governments that is necessary for being a civicity. It is worth pointing out that democratic rights, while frequently justified in a similar manner, have been excluded from the list of human rights; I will defend this exclusion below. The present point is that the ability to protest the actions of their governments is something peoples all have clear reason to want.

Probably the most controversial of all of the human rights enumerated above is freedom of the press, and it is the one whose inclusion I am least sure about. However, I think there is a plausible intuitive case to be made for it on the basis of maintaining a people's status as a civicity. As we just saw, some level of governmental transparency is necessary for citizens to know that their government is faithfully representing them; without freedom of the press, however, they would have to rely exclusively on their government's own accounting of its actions. Even if there are fairly reliable institutional reporting mechanisms in place, as would be called for by the right to transparency, the independent investigation of governmental doings would bring obvious benefits: errors would be corrected, falsifications and omissions would be strongly discouraged, and public confidence in official reports would increase greatly. Furthermore, there is little reason for governments to restrict press coverage of politics and related domains except



to attempt to govern on a factional basis, outside the bounds of their citizens' shared conception of domestic justice. Finally, there is a case to be made for including freedom of the press under the heading of "social" rights above, since freedom of movement and expression may not be enough to establish an awareness of a shared conception of domestic justice in large modern states. All of these points taken together, I think, amount to a compelling rationale for considering freedom of the press a human right within the framework of Global Justice as Fairness.

I have called the final group of human rights "supporting rights" because they do not straightforwardly fall out of the list of global primary goods. Nor are they basic rights, in the sense above, since other rights can (arguably) be enjoyed in their absence. They are, however, necessary for the enjoyment of any significant measure of non-domination, and in that sense they support the other human rights called for by the Minimal Domestic Freedom Principle.

#### 5. Supporting Rights:

- a. rights associated with the rule of law (to due process, "natural justice," prospective and general laws, etc.)
- b. right of legal self-ownership (for adults)

I have already emphasized the connection between republican freedom and the rule of law, but this connection is especially important here (and also, as we will see, when discussing the supporting principles included under the Maximal Global Freedom Principle). A legal system that is not general, in the minimal sense that it leaves some above the law, embodies a permanent capacity for arbitrary interference; rejecting such

systems is at the heart of the traditional republican emphasis on an empire of law, rather than an empire of man.

However, as Pettit stresses, legal systems also come with a price: "Criminal law processes often terrorize the innocent as well as the guilty... And criminal-law agents represent potential forces of domination that it is difficult for even the most conscientious republican regime to keep in check."<sup>101</sup> For these reasons it is crucial to ensure basic due process protections and the right to a fair trial. Living under the prospects of arbitrary arrest, indefinite detention, secret trials, and biased or corrupted judicial rulings is inherently disruptive of freedom as non-domination. Some minimal constraints on law enforcement and a significant degree of judicial independence are thus crucial if the capacities for interference prohibited by the previous human rights are to be avoided.

The right to legal self-ownership might be thought redundant, since the rule of law is often taken to include some principle of equality, and this may be construed as implying self-ownership. However, I have intentionally excluded equality before the law as part of the (minimal) vision of the rule of law employed in Global Justice as Fairness's conception of human rights, since it is not obvious that a non-dominating system of law need include such a principle. However, the ability for adults to make their own legal decisions and to control their legal status is obviously crucial to avoid capacities for domination that would be destructive of the interests underlying the other human rights on the list. This right is especially important for women, who too frequently lack the legal power to make crucial decisions. It also makes explicit the rejection of slavery that is implicit in the security rights already discussed—while forced labor is a clear violation

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<sup>101</sup> Pettit, *Republicanism*, 154

of citizens' personal security rights, slavery can come in many forms, allowing less conspicuous means of legal control of some by others.

The following table summarizes the first principle of Global Justice as Fairness and its relationship to global primary goods:

**Table 1: Global Primary Goods & Minimal Domestic Freedom**

<b>1st Principle: Minimal Domestic Freedom</b>	
Ensure minimal non-domination of citizens (lexically prior to 2nd principle) <i>Prevent capacities for interference with citizens fundamentally inconsistent with the interests of peoples qua civilities</i>	
<b>Internal Global Primary Goods</b>	<b>Human Rights</b>
<i>basic needs:</i> - physical integrity - security of property - adequate food & water - adequate shelter & clothing - basic medical care - minimally safe living environment	<i>basic rights:</i> - security rights  - subsistence rights
<i>development of citizens' sense of justice:</i> - access to relevant information - development of basic intellectual capacities - ability to freely hold opinions - ability to practice one's religion/comprehensive doctrine	<i>individual rights:</i> - right to information - right to basic education  - freedom of conscience/opinion
<i>development of a shared conception of domestic justice:</i> - ability to interact with other citizens  - ability to freely discuss domestic justice	<i>social rights:</i> - freedom of movement - freedom of association - freedom of expression
<i>reliable representation:</i> - access to information about governmental activities - ability to publicly express dissent	<i>political rights:</i> - right to governmental transparency - freedom of the press - freedom of assembly/peaceful protest
	<i>supporting rights:</i> - rights associated with the rule of law - right of legal self-ownership

So much (for now) for the content of Global Justice as Fairness's first principle of global justice. Before turning to the second, it is imperative to keep in mind that the principles are lexically ordered, with the first having priority over the second. This means that there can be no trade-offs involving the sacrifice of the kind of freedom called for by the first principle for the sake of greater freedom of the sort called for by the second principle. In other words, violations of human rights cannot be tolerated for the sake of a people's non-domination by others. These rights, furthermore, should be dealt with at the constitutional stage, enshrined in what might appropriately be called a "bill of human rights."

This priority, I think, expresses Rawls's claim that human rights delineate peoples' sovereignty and "limit admissible domestic law of societies in good standing in a reasonably just Society of Peoples."<sup>102</sup> Governments that violate the human rights of their citizens do not meet the requirements of adequate representation specified by the Minimal Domestic Freedom Principle, and thus their actions cannot be viewed as manifestations of the agency of their peoples. Without the agential link between a people and its government, a people cannot even act, much less cooperate, in global society. This means that such usurping governments cannot be regarded as in good standing in the international community, and their greater freedom to act cannot be considered a benefit to anyone except the usurpers. The lexical ordering of the principles is meant to reflect the paramount importance of peoples' agency.

Enshrining human rights in international law as limits on states' sovereignty means that human rights violations are grounds for permissible intervention, just as

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<sup>102</sup> Rawls, *The Law of Peoples*, 80

domestic law enforcement intervenes against violators. It is important to keep in mind that intervention can take many forms, and only in grave cases will military action be justifiable. Before moving on to Global Justice as Fairness's second principle of global justice, we need to briefly examine how violations of the first principle are to be addressed. There is a basic distinction to be made between two types of human rights violators, and I will follow Rawls in referring to these non-well-ordered peoples as "burdened societies" and "outlaw states."<sup>103</sup>

Outlaw states intentionally violate or fail to ensure the human rights of their citizens, and as such are criminals according to international law. It is thus incumbent upon the global basic structure to punish and attempt to rectify these injustices. Outlaw states, by giving up their good standing in the international community, will always forfeit at least some of their rights within global institutions. It would be morally perverse for outlaw states to hold positions in bodies that monitor and enforce human rights, for instance (even though this happens with alarming frequency in the current UN Human Rights and Security Councils). Other institutional rights may be suspended as well, and diplomatic, economic, and even military intervention may be warranted.

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<sup>103</sup> For Rawls's classification of societies, see Rawls, *The Law of Peoples*, 4 & 63. Rawls includes a further category, "benevolent absolutisms," which he describes as respecting human rights yet failing to be well-ordered. Global Justice as Fairness rejects this category altogether, and identifies respect for human rights as sufficient for well-orderedness. It is extremely unlikely that we would be tempted to think of any government that fully respected Global Justice as Fairness's list of human rights as "absolutist," since it would be incredibly difficult for such a regime to reliably track its peoples' shared conception of domestic justice. If such a regime did exist, however, Global Justice as Fairness offers no grounds for complaint—it would count as a well-ordered society. For the purposes of international law, it would be extremely difficult to formulate sufficient conditions for peoples' adequate representation and agency, and the account of human rights offered here are merely necessary (and practically enforceable) conditions. It is thus possible, although extremely unlikely, that non-civilities could count as well-ordered from the perspective of the global basic structure.

Among the most important of these types of interventions are economic. In particular, the global basic structure will often be justified in denying what Pogge calls the "international borrowing privilege" and the "international resource privilege." Doing so would revoke an outlaw state's "privileges freely to borrow in the country's name... and freely to dispose of the country's natural resources."<sup>104</sup> The ability of usurping governments to saddle their citizens with debt and rob them of their natural resources is a tragic and repugnant reality; as Pogge argues, it is a reality for which well-ordered societies share a great deal of blame.<sup>105</sup> Surely these privileges provide a powerful temptation for governments to attain and maintain power by violating the human rights of their people. No just global basic structure would grant these privileges to governments regardless of their human rights record. Whereas Pogge sees the denials of these privileges as matters of "global economic justice," Global Justice as Fairness views them as tools of human rights enforcement. Beyond denying these two privileges, Global Justice as Fairness may, for similar reasons, also call for the suspension of trade with state-owned enterprises in outlaw states, even if these enterprises do not have an impact on the state's natural resources.

Military intervention is always fraught with danger, and should of course be used as a last resort. A standard of proportionality must also be met by any proposed interventions. David Luban proposes such a standard in his classic article "Just War and Human Rights," the general position of which Global Justice as Fairness embraces. To determine proportionality, according to Luban, we need to "compare the violations of socially basic human rights likely to result from the fighting of a war with those which it

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<sup>104</sup> Pogge, *World Poverty and Human Rights*, 119

<sup>105</sup> See Pogge, *World Poverty and Human Rights*, 118-123.

intends to rectify."<sup>106</sup> This standard, as formulated, is not open to Global Justice as Fairness, since we are here understanding human rights violations as requiring official disrespect, and international law enforcement does not constitute such disrespect. However, Global Justice as Fairness adopts a very similar standard, one that further demonstrates the value of an account of global primary goods. Global Justice as Fairness's understanding of proportionality requires that any proposed intervention be expected to generate a net increase in peoples' enjoyment of internal global primary goods. While Luban applies his account only to just war theory (military intervention), Global Justice as Fairness extends this proportionality requirement to all forms of intervention, diplomatic and economic as well as military.

It is worth pointing out that that there is no room for just war theory in Global Justice as Fairness, at least as traditionally understood. Importantly, the central traditional assumption of the non-innocence (and thus liability to attack) of combatants has no place in a theory that views all international violence as under the purview of a global basic structure—soldiers complying with international law would be considered just as innocent as civilians are traditionally taken to be; furthermore, noncombatants may turn out to be non-innocent in many cases, and thus not necessarily immune to attack. In general, understanding the ethics of war *vis-à-vis* the paradigm of international law enforcement makes nonsense of much of traditional just war theorizing, which, far from being a drawback, I view as a distinct advantage. In particular, the standard of proportionality proposed here at least seems to avoid many of the difficulties that plague

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<sup>106</sup> David Luban, "Just War and Human Rights," *Philosophy & Public Affairs* 9, no. 2 (1980): 176

traditional accounts of proportionality within just war theories.<sup>107</sup> While it would be tangential to fully defend this claim, it seems advantageous that Global Justice as Fairness renders the ethics of war no more complicated, at least in principle, than the ethics of domestic law enforcement (and self-defense).

Burdened societies are those, alluded to above, that fail to ensure the human rights of their citizens due to a lack of resources. Such failures trigger what Rawls calls the "duty of assistance,"<sup>108</sup> which can be likened to a global version of a domestic social safety net. Global Justice as Fairness understands this duty as shouldered by the global basic structure, and requires that burdened societies are given whatever aid is necessary for them to become well-ordered. This is still a form of intervention, since not only is the offer of aid required, but its acceptance by the burdened society is as well. It is important to stress that the duty of assistance does not always, or perhaps not even usually, require aid in the form of money or physical resources. Often what will be needed is the building of institutional capacities, which may include external monitoring, professional training, and the sharing of scientific and institutional knowledge. Of course, aid in the forms of food, medical supplies, and other resources may also be required, but the aim of the duty of assistance is always to allow the burdened society to become (and stay) well-ordered, and this aim will not usually be well served by simply throwing money or resources at the problem.<sup>109</sup>

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<sup>107</sup> For a good presentation of these difficulties, see Thomas Hurka, "Proportionality in the Morality of War," *Philosophy & Public Affairs* 33, no. 1 (2005).

<sup>108</sup> For his account of this duty, see Rawls, *The Law of Peoples*, 106-113.

<sup>109</sup> This point is increasingly emphasized in the foreign aid literature; a persuasive example is William Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (New York: Penguin Press, 2006). See



Fairly and effectively dealing with outlaw states and burdened societies requires that the global basic structure have adequate human rights institutions. Monitoring mechanisms will of course be needed. All peoples must be subject to periodic human rights assessment, and international monitors must be allowed access to peoples' territories. Citizens must also have an effective capacity to report human rights violations; effective monitoring may require the right to emigrate as well. Monitoring and enforcement must be conducted within fair and inclusive processes. Furthermore, an independent judiciary is needed to determine whether violations have occurred, and customary due process protections must be afforded to all peoples. Proper enforcement of the Minimal Domestic Freedom Principle requires the effective rule of international law, which we will address more fully in connection with the second principle.

### *3.3 The Second Principle: Maximal Global Freedom*

The second principle of Global Justice as Fairness, the Maximal Global Freedom Principle, calls for principles of the global basic structure (except those dealing with human rights) that maximize the non-domination of peoples by others. More specifically, it calls for the minimization of capacities for interference with peoples that is not forced to track the interests specified by the list of external global primary goods. Unlike the first principle, the second is a maximizing principle, and thus there is no need for the sort of line-drawing required for determining the list of human rights. This means that there is much greater flexibility in the specification of the Maximal Global Freedom Principle; it also means that the optimal approximation of its realization will always depend heavily on empirical considerations. For these reasons, the explication of the second principle

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also Dambisa Moyo, *Dead Aid: Why Aid is not Working and How There is a Better Way for Africa* (New York: Farrar, Straus and Giroux, 2009).

will be less specific than that of the first. There may be many different ways of achieving non-domination among peoples (in good standing), and Global Justice as Fairness does not foreclose many possibilities, with one significant exception—the political and security rights (and some supporting principles) of peoples are prioritized over the remaining rights and principles. This lexical ordering prevents trade-offs in the same fashion as the priority of the first principle over the second.

The second principle specifies features of the global basic structure that reflect peoples' interests in the four groups of external global primary goods; in the same manner as the first principle, the notion of non-domination again brings with it some additional supporting principles. As a maximizing principle, it calls for creating as much non-domination of peoples as possible. In order to do this, we need to determine what counts as arbitrary interference, which is done with the list of external global primary goods. Capacities for interference that is forced track interests in those goods are not arbitrary, and thus do not diminish peoples' freedom as non-domination. The second principle of Global Justice as Fairness specifies certain capacities for *non-arbitrary* interference that can be used to reduce the capacities for *arbitrary* interference to which peoples are exposed, as well as to provide some collective goods.

The first principle primarily prohibits certain forms of domination of peoples by their governments, and only condones capacities for interference needed to enforce these prohibitions. The second, by contrast, not only seeks to minimize domination among peoples, but also condones capacities for interference (largely on the part of the global basic structure) that are forced to track peoples' interests in external global primary goods. It instructs us to maximize the freedom of peoples and *requires* whatever

capacities for interference are needed for the pursuit of this goal, but it also *permits* other capacities for interference. The principle allows, but does not demand, these further capacities for the pursuit of global collective goods, even though these capacities are independent of any concerns about domination. Given Global Justice as Fairness's specification of peoples' freedom, the second principle both calls for its maximization *and* makes room for capacities for interference that do not compromise it.

The content of the Maximal Global Freedom Principle can be summed up this way:

A. lexically prior principles:

1. Security Rights
2. (Fair Value of) Political Liberties
3. Supporting Principles

B. lexically posterior principles:

4. Structure of the Global Economy
5. Resolution of Collective Action Problems
6. Supporting Principles

The segregation of these principles into two lexically prioritized groups is similar, but not identical, to Rawls's prioritization of his first domestic principle, which deals with basic justice (rights and liberties), over the second, which addresses distributive justice. In both cases, the lexically prior group is to be determined at the constitutional stage, whereas the posterior group is relegated to the legislative stage. The motivation for the prioritization is also the same: the prior groups being more urgent, their satisfaction easier

to determine, and agreement about them more likely to obtain.<sup>110</sup> However, Global Justice as Fairness places no theoretical weight on the distinction between principles of distributive justice and other principles. As we will see, I am happy to call the principles that structure the global economy "distributive," as long as it is understood that global distributive justice, like the rest of global justice, is importantly distinct from domestic justice. However, the posterior group also includes principles that would not be considered "distributive" in any traditional sense.

Furthermore, the principles here are no doubt incomplete, since the domination of peoples need not pertain to their interests in global primary goods at all—the Maximal Global Freedom Principle aims to eliminate the domination of peoples regardless of the domain of choice affected by the domination. The principles laid out here deal only with the domains of choice relevant to peoples' interests in external global primary goods, but it should be understood that there are certainly further sorts of domination, not discussed here, that will be of concern to any minimally just global basic structure.

The security rights assured under the Maximal Global Freedom Principle, like those called for by the first principle, are quite straightforward and, I take it, relatively uncontroversial. They reflect the obvious interests all peoples have regarding their territorial integrity:

1. Security Rights:
  - a. rights against incursion (military as well as electronic)
  - b. rights against external pollution

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<sup>110</sup> See Rawls, *Justice as Fairness*, 48-49.

Minimizing capacities for others—not just other peoples, but also nonstate actors such as terrorist organizations and criminal syndicates—to interfere with peoples' territorial integrity requires, just as securing citizens' personal security does, the criminalization of such interference, as well as robust legal enforcement that effectively deters, punishes, and rectifies violations. Enshrining these security rights in international law, and backing them with the threat of coercion, would create a capacity for interference with peoples by the global basic structure. However, this interference would not be arbitrary—interfering with peoples' abilities to compromise other peoples' territorial integrity, like the domestic prohibition of murder and assault, does not represent a reduction of freedom as non-domination. On the contrary, doing so is a very important strategy for protecting peoples' liberty.

The principle of nonaggression, fundamental to contemporary international law, already reflects a commitment to protecting these security rights, even if this commitment sometimes seems shaky in practice. I take it that any theory of global justice that lacked these basic security rights would be highly counter-intuitive and *prima facie* unacceptable; I will not spend more time on them.

The second group of rights, the political liberties, should be almost as uncontroversial as peoples' security rights. As we saw, peoples have an interest in being able to participate in global governance by playing a role in both the formation and administration of international law and policy. This gives rise to these familiar rights:

2. (Fair Value of) Political Liberties:

- a. the right to hold office
- b. the right to vote

These rights effectively create capacities for interference with peoples by other peoples, but not, presuming that adequate constraints are in place, for arbitrary interference. We will look at these constraints when we turn to the first group of supporting principles. The present point is that protecting peoples' rights to shape international law and administration is a tool for ensuring their liberty—one that no peoples would want to go without. It is scarcely imaginable that peoples would agree to a structure for global governance that was not at least vaguely democratic.

As with Rawls's protection of analogous domestic rights, Global Justice as Fairness calls for more than the merely formal assurance of these liberties, but also what he calls their "fair value." In the domestic context, this "means that the worth [usefulness] of the political liberties to all citizens, whatever their economic or social position, must be sufficiently equal in the sense that all have a fair opportunity to hold public office and to affect the outcome of elections, and the like."<sup>111</sup> In the global context, where all peoples would obviously have permanent representation, the concern would be to ensure that peoples have a fair opportunity to affect the outcomes of legislative and administrative decisions, in addition to the results of elections for offices and committees. This is a superficial difference with the domestic case, but the global context also calls for a deeper modification of this understanding of "fair value."

Importantly, equality is not likely to be an appealing standard for the usefulness of peoples' political liberties, since peoples differ greatly in population. The parties in the global original position know this, and would not want to grant to tiny states influence in global governance equal to that of larger states. However, influence strictly proportional

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<sup>111</sup> Rawls, *Justice as Fairness*, 149

to population would also probably be rejected, in the interest of protecting smaller states. This suggests a mixed approach, involving something like the American bicameral legislature: one house with proportional representation; one with equal representation. More practically, voting could simply be weighted for population, with an added requirement that a majority of member states also vote in the affirmative. The important point is that the fair value of the political liberties does not require any approximation of equality in the usefulness of those liberties to peoples. Indeed, a mixed approach would probably be optimal in terms of reducing overall non-domination, since it would provide an important check on the power of the basic structure, just as it does in the American domestic system.

It is worth noting now that, in contrast to the strict equality of human rights protections in the first principle, no aspect of the second principle has any initial presumption of equality. Achieving maximal non-domination may not be best served by equality, or even proportionality for that matter, although there may be significant tendencies for the principle to call for equality in some areas.<sup>112</sup>

In many domains, however, the "fair" value of the political liberties will not imply an equality of their usefulness to peoples, or even a standard proportional to population. In some contexts, especially those dealing with global trade, it will be important to ensure that smaller or less-developed economies are able to resist the influence of larger or more developed economies. Pursuing non-domination may thus require, in some cases, that peoples with developing economies be assured a greater or disproportionate value of their political liberties, rather than merely equalizing that value with the usefulness of those

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<sup>112</sup> Pettit discusses this point in the domestic context, and that discussion largely carries over into Global Justice as Fairness. See Pettit, *Republicanism*, 110-119.

liberties to peoples with developed economies. Whether such arrangements would be optimal for pursuing the second principle is unclear, but it is a question that Global Justice as Fairness regards as open. The important point here is that the value of non-domination will determine what counts as a "fair" value of the political liberties, and that optimal arrangements in one context may differ sharply from those in other settings.

As indicated, the first half of the Maximal Global Freedom Principle applies to the constitutional stage, and the political liberties it calls for are essentially democratic. These points clearly imply the existence of a global constitution and other formal mechanisms for the creation and enforcement of international law—in other words, a fairly robust global basic structure. Since freedom as non-domination is a status that is institutionally constituted, peoples have just as much interest in a global basic structure as persons have in a domestic basic structure. As Kant points out,

a state of nature among nations, like a state of nature among individual human beings, is a condition that one ought to leave in order to enter a lawful condition... Only in a universal association of states (analogous to that by which a people becomes a state) can rights come to hold conclusively and a true condition of peace come about.<sup>113</sup>

While Kant's notion of freedom differs from the republican one used in Global Justice as Fairness, a similar point holds in both cases—liberty and law, far from being in conflict, are intimately connected, and robust rights are central to this connection. I will discuss this point further below in defending Global Justice as Fairness's identification of the global basic structure as the subject of global justice.

Our immediate concern is the best principles for governing this structure, and ensuring the non-domination of peoples by the global basic structure is of the utmost

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<sup>113</sup> Kant, *The Metaphysics of Morals*, 119 (emphasis removed)



importance in making that determination. The means for doing so are identified by the supporting principles of the first part of the second principle. They include the following:

3. (lexically prior) Supporting Principles:

- a. the rule of law
- b. constitutionalism
- c. separation of powers

Above we saw the need to realize, to some minimal extent, analogous supporting principles in domestic basic structures in connection with the first principle; since the second principle is a maximizing one, it makes much greater demands on the global basic structure.

These supporting principles are drawn from three closely related features that Pettit requires of good domestic republican governance—what he calls the "empire-of-law," "dispersion-of-power," and "counter-majoritarian" conditions.<sup>114</sup> We have already discussed the rule of law briefly above in the context of human rights, and I have little to add here, other than to emphasize again that the first principle merely sets a threshold of minimally effective rule of law, whereas the second principle calls for a much more robust conception. International law must be clear, prospective, general, and well-promulgated, as well as enforced by independent and unbiased courts, etc. The best means of assuring peoples' non-domination will almost undoubtedly include these typical aspects of the rule of law,<sup>115</sup> but how to settle the details is an empirical task beyond the scope of Global Justice as Fairness.

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<sup>114</sup> For his discussion of these conditions, see Pettit, *Republicanism*, 172-183.

<sup>115</sup> I have in mind here accounts such as Fuller's and Raz's. See Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law: Essays on Law and Morality*, 2nd ed. (New

The same can be said of constitutionalism and the separation of powers. Global Justice as Fairness does not make any specific demands in these areas, but looks to traditional republican heroes such as Madison and Montesquieu for time-tested means of protecting people against the tyranny of both governments and popular majorities. Dispersing power, instituting checks and balances, subjecting legislation to judicial review, and insulating constitutional essentials from the whim of majorities are all likely to be called for by the Maximal Global Freedom Principle. Adapting these to the global context will surely require much trial and error, and the optimal specification of these principles is not amenable to philosophical speculation. The failures and shortcomings of current and past global institutions would certainly be useful guides. One likely positive feature of current arrangements is the dispersion of power reflected in the significant independence of institutions like the World Bank, International Monetary Fund, World Trade Organization, World Health Organization, and United Nations.

So much for global security and governance, which are lexically prioritized in the first half of the second principle. We now turn to the second half, which deals with global trade and coordination. As we saw in the account of external global primary goods, peoples have significant and diverse interests in these areas, and thus appropriate international law and policy to further them will not count as capacities for arbitrary interference. Peoples' liberty will indeed be enhanced by a fair and mutually beneficial framework for trade and other issues requiring global coordination. Again, it should be emphasized that the following account is undoubtedly incomplete—domination can take

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York: Oxford University Press, 2009) and Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

many forms, but the principles discussed below only address capacities for interference that threaten domains of choice relevant to peoples' interests in global primary goods.

We will first look at the features of the global basic structure related to international trade and finance, which include:

4. Structure of the Global Economy:

- a. pass-through rights (for travel and transport of goods)
- b. regulation of trade barriers (tariffs, subsidies, etc.)
- c. prohibition of currency manipulation
- d. minimal labor and environmental standards (for international goods)
- e. prohibition of bribery
- f. access to global lending facilities
- g. discouragement of currency speculation

Even more so than in the context of the first half of the Maximal Global Freedom Principle, it is important to keep in mind here that there is no presumption of specifying these features of the global economy such that they apply equally to all peoples, or even in a population-proportional manner. The question of optimal specification is, again, a difficult empirical question that cannot be settled here. However, there are good reasons to think that maximizing non-domination will require unequal or disproportional treatment of peoples with respect to some of these guidelines.

The rough outlines of the world economy as envisioned by the second principle should be rather unsurprising in light of Global Justice as Fairness's account of external global primary goods. As we saw, peoples have a general interest in having access to transportation routes and international markets while retaining domestic autonomy and

financial stability. Without reliable access to waterways, airspace, and overland routes, a people's ability to participate in the global economy could be quite significantly undermined, possibly even threatening the government's capacity to ensure the human rights of its citizens. Furthermore, when access to these routes is under the complete control of neighboring peoples, the potential for domination will be ever-present—access could be withheld entirely arbitrarily, and the threat of doing so will infect all other aspects of the relevant peoples' interactions. The possibilities of extortion and manipulation of other peoples are inherent in such a situation. It is thus important for the global basic structure to protect reasonable pass-through rights for important trade and travel routes.

This does not mean that individual states should have no control over who or what passes through their rivers, highway systems, or airspace. However, any significant restrictions should have to meet some minimal standards of justifiability, and negotiations over such rights should, as far as possible, be conducted in such a way that the bargaining advantage that less-isolated peoples have over the more-isolated be nullified. Other unfair bargaining advantages may also need to be controlled, such as the relative economic might of the respective parties. The global basic structure should include procedures for negotiating over such matters, including independent arbitration and subsequent enforcement. Here is another clear example of how the Maximal Global Freedom Principle may call for unequal or disproportional protection of peoples' interests in the pursuit of non-domination.

These sorts of fair bargaining procedures will be needed in other contexts as well, perhaps nowhere so perspicuously as in the context of trade barriers and agreements.

Subsidies, tariffs and other import controls, as well as currency manipulation all represent potentially powerful capacities for arbitrary interference among peoples. Absent some reasonably fair methods for reaching agreements, assuring compliance, and arbitrating disputes regarding these issues, the possibilities for domination are clear and familiar. In these contexts, not only do less-developed economies need more robust protections, but less-diverse ones as well—when an economy is dominated by a handful of export goods, stability is especially at risk, and thus may justify some protectionist policies on the part of less-developed economies. Tan summarizes the problem well:

That many developing countries are compelled by monetary incentives to replace subsistence agriculture with the production of commodities (like sugar, coffee, cacao) for markets in the developed world has put citizens in the developing countries in an especially precarious situation in which their ability to sustain themselves has become nearly wholly dependent on the prices of commodities in the global market, which is extremely fickle and contingent on various extraneous factors, including the betting patterns of speculators and brokers.<sup>116</sup>

Exposure to the "betting patterns of speculators" in global currency markets can have disastrous effects as well, especially for developing economies.

Peoples may suffer domination not only from other peoples, but from other global actors as well—in the economic context, the most important examples are multinational corporations. Peoples' domestic autonomy can be severely compromised by the corrupting influence of unscrupulous foreign investors, and it should be rather uncontroversial that a just global basic structure should try to prevent such corruption, by prohibiting bribery if nothing else. There are, however, less overt forms of domination that are equally if not more important to prevent.

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<sup>116</sup> Tan, *Justice Without Borders*, 117

The threat of capital flight is a potent bargaining chip, especially when held against weaker or less diverse economies. Once foreign investment becomes entrenched as a large, integral part of a domestic economy, a people may not be able to afford to resist the investors' demands for the relaxation or elimination of nettlesome labor or environmental standards. Particularly struggling economies may also, contrary to their peoples' conception of domestic justice, relax or abandon such protections in order to attract foreign capital, which can also put human rights at risk. It thus seems reasonable to hold that some minimal labor and environmental standards for international goods (their production for export and their distribution) would be built into the economic framework of a just global basic structure. Such standards, if properly enforced, would presumably have staved off the environmental disasters caused by foreign oil companies in places such as Nigeria and Ecuador, as well as some of the more dire situations of laborers in, for example, Zambian copper mines or Bangladeshi garment factories.

Most of the features of the world economy discussed so far would presumably fall under the purview of a body somewhat akin to our current World Trade Organization; institutions similar to the International Monetary Fund and World Bank will also be called for under the Maximal Global Freedom Principle. Having reliable access to international lending facilities is an important protection against some standard threats posed by significant exposure to global markets, discussed above, such as crashes in commodity prices and currency values. In order for peoples to maintain enough financial stability to avoid domination by others and meet the needs of their members, an IMF-like fund is essential as a lender of last resort. Here too the goal of maximizing global non-domination will likely favor unequal treatment of peoples, likely permitting discounted

lending rates to less-developed economies. The discouragement of currency speculation, perhaps by the imposition of a Tobin tax, would also contribute to stability.

Of course the IMF has frequently been attacked as a source of domination, since it frequently attaches (often misguided) conditions on its loans. Global Justice as Fairness takes this possibility seriously, although always lending with no strings attached is not likely to be optimal. When loans or other assistance is provided to burdened societies, some conditions may be quite appropriate, especially when a dearth of institutional capacity is to blame for the need. In the absence of human rights failures, however, it is generally best to lend funds without dictating how they are to be spent. This will ensure that the lending body will not become a dominating party and allow peoples to pursue the realization of their conceptions of domestic justice as they see fit, which should not be problematic in the case of well-ordered peoples. (There is no question of lending to outlaw states since, as we saw above, an important aspect of human rights enforcement is the revocation of the borrowing privilege.)

There are other domains, beyond the broadly "distributive" realm just discussed, that stand in need of structuring by a just global basic structure under the second principle of Global Justice as Fairness. Some aspects of cooperation among peoples, consistent with their interests as specified by the list of global primary goods, present difficulties that more closely resemble pure collective action problems. Effective international coordination on some issues, while vital, may not be likely or possible in the absence of robust global institutions and the settling function of genuine international law. The following are clear examples, although there are surely other likely candidates:

##### 5. Resolution of Collective Action Problems:

- a. rules governing global commons
- b. global pollution controls
- c. global disease controls

In each of these cases, peoples have an interest in effective coordinated action, and thus the creation of capacities for interference from the global basic structure that are forced to track these interests does not constitute domination.

The least controversial of these is the need to have settled rules covering the use of, and interactions occurring within, geographical areas that are not part of any people's territory. The primary examples of such global commons are the oceans, outer space, and uninhabited landmasses such as Antarctica. All peoples benefit from having known and enforced standards of conduct for interactions that occur within these areas; the long history of the law of the sea attests to this. Furthermore, as the extraction of resources from these areas becomes increasingly feasible and lucrative, fair rules governing such extraction and the derivative benefits will also be needed. Somewhat surprisingly, examples of such policies are already in place: some offshore mining is subject to "equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and land-locked among them."<sup>117</sup> This is yet another clear example of how non-domination among peoples may call for unequal treatment of peoples.

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<sup>117</sup> Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995) (quoted in Buchanan, *Justice, Legitimacy, and Self-Determination*, 208). Drawing from Franck's work, Buchanan discusses many real-world examples of the sorts of features of the global basic structure called for by the second half of Global Justice as Fairness's Maximal Global Freedom Principle. See Buchanan, *Justice, Legitimacy, and Self-Determination*, 205-208.



Global controls on pollution and disease are far more controversial, but from the perspective of the parties in the global original position, it is hard to see why this should be the case—pollution of the oceans and atmosphere and the spread of harmful diseases (of plants and animals as well as humans) negatively affect all peoples, and effective coordination to combat them is likely to be best achieved by regulation on the part of the global basic structure. While there is not much downside to controls for disease, the case of global environmental protection will presumably require limitations on emissions and ocean contaminants, and may thus be quite difficult to achieve. However, I think it is safe to say that the need for such limits and regulations are increasingly being felt around the world.

The robust framework of institutions and law prescribed by the Maximal Global Freedom Principle (as well as the human rights regime imagined by the Minimal Domestic Freedom Principle) will of course require significant resources to be effective. How to procure the requisite funds is the subject of the final, supporting feature of a global basic structure:

6. Supporting Principle:

a. global taxation scheme

This is sure to be even more controversial than international pollution controls, but a fair method of funding global institutions is clearly necessary under the principles of Global Justice as Fairness. I have nothing particularly concrete to say about how to devise an optimal scheme, although it seems likely that a progressive rate proportional to per capita gross domestic product (or some similar measure) would be a strong candidate. Here I merely want to emphasize that the taxation of peoples appears necessary (especially in

light of the UN's difficulties collecting dues from its current members), and there seems to be no reason to think that the parties in the global original position would find some such scheme objectionable. The workings of a global basic structure, from the interventions and assistance required for human rights enforcement to more humdrum regulatory functions, must be paid for somehow, and the point here is merely that securing the requisite funds via the taxation of states would not constitute dominating interference and thus not reduce people's freedom.

Table 2 below summarizes the main implications of the Maximal Global Freedom Principle and their connections with external global primary goods. This concludes the general overview of Global Justice as Fairness's two principles of global justice: the Minimal Domestic Freedom Principle, which ensures some measure of non-domination of citizens by specifying the content of human rights, as well as the associated institutional arrangements and enforcement mechanisms; and the Maximal Global Freedom Principle, which strives to guarantee as much non-domination of peoples as possible by establishing guidelines for a just global basic structure, as well as making room for non-arbitrary interference in the pursuit of some collective goods. We will next comparatively evaluate Global Justice as Fairness by examining some nearby alternatives (Rawlsmopolitanism, LP-Rawlsianism, as well as a few others); in the process, some aspects of the admittedly vague explication of Global Justice as Fairness's principles will hopefully be clarified.

**Table 2: Global Primary Goods & Maximal Global Freedom**

<p><b>2nd Principle: Maximal Global Freedom</b>          Maximize non-domination of peoples (lexically posterior to 1st principle)  <i>Minimize capacities for interference with peoples that is not forced to track their interests grounded in global civitas</i></p>	
<b>External Global Primary Goods</b>	<b>Principles of Global Basic Structure</b>
Constitutional Stage (lexically prior)	
<p><i>territorial integrity:</i></p> <ul style="list-style-type: none"> <li>- military security</li> <li>- cyber-security</li> <li>- environmental security</li> </ul>	<p><i>security rights:</i></p> <ul style="list-style-type: none"> <li>- rights against incursion</li> <li>- right against external pollution</li> </ul>
<p><i>participation in global governance:</i></p> <ul style="list-style-type: none"> <li>- ability to influence formation and administration of international law</li> </ul>	<p><i>(fair value of) political liberties:</i></p> <ul style="list-style-type: none"> <li>- right to hold office</li> <li>- right to vote</li> </ul>
	<p><i>supporting principles:</i></p> <ul style="list-style-type: none"> <li>- the rule of law</li> <li>- constitutionalism</li> <li>- separation of powers</li> </ul>
Legislative Stage (lexically posterior)	
<p><i>participation in global economy:</i></p> <ul style="list-style-type: none"> <li>- access to transportation routes</li> <li>- access to global markets</li> <li>- domestic autonomy</li> <li>- financial stability</li> </ul>	<p><i>structure of global economy:</i></p> <ul style="list-style-type: none"> <li>- pass-through rights</li> <li>- regulation of trade barriers</li> <li>- prohibition of currency manipulation</li> <li>- minimal labor and environmental standards (for international goods)</li> <li>- prohibition of bribery</li> <li>- access to global lending facilities</li> <li>- discouragement of currency speculation</li> </ul>
<p><i>global coordination:</i></p> <ul style="list-style-type: none"> <li>- access to global commons</li> <li>- environmental protection</li> <li>- disease prevention</li> </ul>	<p><i>resolution of collective action problems:</i></p> <ul style="list-style-type: none"> <li>- rules governing global commons</li> <li>- global pollution controls</li> <li>- global disease controls</li> </ul>
	<p><i>supporting principle:</i></p> <ul style="list-style-type: none"> <li>- global taxation scheme</li> </ul>

## Part 2: Two Fundamental Comparisons

### Chapter 4: Human Rights

#### 4.1 Contra LP-Rawlsianism I

We will start our consideration of the relative merits of Global Justice as Fairness by first considering the LP-Rawlsian position on human rights, before turning to the Rawlsmopolitan position(s); we will then take up these rival accounts' treatments of global distributive justice and other issues concerning the global basic structure (those that fall under the second principle of Global Justice as Fairness). The reason for proceeding this way, rather than considering each alternative view in its entirety, has to do with the general failure to respect holism mentioned in the introduction—many theorists of global justice tend to treat the topics of human rights and global distributive justice as distinct or even unrelated. (As we will see, others make no distinction between them whatsoever, which is a similarly important mistake.) It will thus be easier to compare Global Justice as Fairness's two principles with their corresponding rivals separately rather than holistically.

It should be noted that I will not proceed quite the way Rawls does when he argues for his domestic theory by making two fundamental comparisons.<sup>118</sup> As discussed above, there Rawls largely argues that the parties in the original position would favor his principles over those of utilitarian and intuitionist conceptions of justice. However, the proper setup of the global original position is extremely controversial among Rawlsians broadly conceived, and I am more concerned with settling this debate than I am with answering questions about the particular content of global justice. Thus although the

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<sup>118</sup> For these comparisons, see Rawls, *Justice as Fairness*, 94-134.

intuitive plausibility of the content of Global Justice as Fairness's two principles will play a large role in what follows, the subsequent comparisons will focus more on the adequacy of alternative original position arguments, which will prominently include differences in the setup of the original position itself. It would be straightforwardly question-begging to reject these rival views by simply assuming that Global Justice as Fairness's construal of the global original position is correct. The following comparisons are better viewed not as internal to Global Justice as Fairness's original position argument, but rather as considerations of alternatives in the quest to achieve wide reflective equilibrium regarding our basic (Rawlsian) approach to global justice.

The content, basis, and function of human rights that Rawls defends in *The Law of Peoples* is fairly similar to the account of these rights in Global Justice as Fairness. The LP-Rawlsians view human rights as grounded in social cooperation, which leads them to embrace a rather minimal list of rights (notably excluding democratic rights), and they identify these rights as limits on states' (internal) sovereignty or, in other words, as grounds for justifiable intervention. The list of human rights given above is a bit more expansive than those embraced by LP-Rawlsians, with the primary differences arising in connection with Global Justice as Fairness's social and political rights. Erin Kelly's (LP-) Rawlsian list of human rights, for example, excludes free public speech and freedom of the press (although she does include "the right to have reasonable and accountable political representation").<sup>119</sup> The focus on social cooperation is shared, although Global

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<sup>119</sup> See Erin Kelly, "Human Rights as Foreign Policy Imperatives," in *The Ethics of Assistance: Morality and the Distant Needy*, ed. Deen K. Chatterjee (Cambridge: Cambridge University Press, 2004), 185-188.

Justice as Fairness gives much more determinate content to this idea by employing Pettit's notion of a civicity.

The most problematic aspect of the LP-Rawlsians' approach to human rights is how to arrive at their conception via the device of the original position. Alistair Macleod sums up the difficulty nicely when he says of Rawls's global original position argument that it is

peculiarly ill-suited to settling questions about the rights of the individual members of a society, since it is said to be the principal (perhaps the only?) function of the argument to tell us what justice requires in *the relations between peoples*. If there is an original position argument that can furnish the rationale for a doctrine of human rights—where these are, at least centrally, rights *individual human beings* are taken to have—it looks as though it would have to be a "first level" [i.e. domestic] original position argument.<sup>120</sup>

As we will see, even those sympathetic to Rawls's position on human rights seem confused about why the parties in the global original position, if they are construed as representing peoples and not persons, would agree to *any* human rights whatsoever.

Eradicating this apparent lacuna in a peoples-based Rawlsian approach to global justice is a primary motivation for developing Global Justice as Fairness. The account of human rights given above suggests that peoples would consent to (the coercive enforcement of) human rights for the sake of their rational interest in maintaining their agency in the form of civicities. Given Rawls's own emphasis on social cooperation as the basis of human rights, it may seem surprising that LP-Rawlsians have had difficulty accounting for human rights within the confines of the original position. However, the reasoning for human rights provided by Global Justice as Fairness is, to my knowledge,

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<sup>120</sup> Macleod, "Rawls's Narrow Doctrine of Human Rights," 142

unique.<sup>121</sup> LP-Rawlsians, as well as their Rawlsmopolitan critics, almost exclusively focus on the question of the particular content (and function) of human rights, ignoring the prior question of the basis for human rights *simpliciter* in the original position. When they do take up this problem, LP-Rawlsians typically invoke the dangers that human rights violations in outlaw states and burdened societies pose to *other* (i.e. well-ordered) peoples. As I will now argue, this position is not defensible.

Rawls and his followers rightly understand (although somewhat waveringly) that human rights, if they are to be accounted for at all by an original position argument, must be a matter of peoples' rationality. It is tempting to think that concern for the rights of individuals in foreign countries would arise from the moral nature of the parties, but this would be a mistake under the strictures of original position arguments. The parties are presumed to be mutually disinterested and do not reason on the basis of moral factors—since the goal is to arrive at principles of justice, it would be at best unhelpful (and at worst circular) to build a particular moral doctrine into the conception of the parties. The moral dimension of the parties refers to their reasonableness; as we saw above, this largely consists in the willingness to propose and abide by fair terms of cooperation and the acceptance of the burdens of judgment. Neither of these features of reasonable peoples implies a moral concern for the well-being or rights of any persons or (other) peoples.

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<sup>121</sup> Oddly, it is Beitz who comes closest to suggesting that something like the line taken by Global Justice as Fairness is plausible, although he does not accept it. In his critical analysis of *The Law of Peoples*, he says this: "If [a well-ordered] society's government engaged in a pattern of violations of its citizens' human rights, there would be no philosophical difficulty in holding that remedial intervention in some form by other members of the Society of Peoples would be justified. This much is a legitimate conclusion from the argument in the international original position." (Charles Beitz, "Rawls's Law of Peoples," *Ethics* 110, part 4 (2000): 686)

Instead of following Global Justice as Fairness in appealing to peoples' rational interest in preserving their own agency, however, Rawls and his sympathetic interpreters appeal to peoples' rational interest in maintaining international peace and security. Rawls puts it this way: "Outlaw states are aggressive and dangerous; all peoples are safer and more secure if such states change, or are forced to change, their ways. Otherwise, they deeply affect the international climate of power and violence."<sup>122</sup> The basis for the parties' decision to include human rights in their principles of global justice, then, is tied to their rational interest in avoiding the dangers posed by human rights violators. This would, presumably, lead the parties to determine the list of human rights by considering which violations would (somehow) pose a threat to other peoples.

Since Rawls's principles of his law of peoples, like all sane theories of global justice, already prohibit inter-state aggression, this justification for human rights may seem, at best, redundant. The argument seems to be that well-ordered peoples should be able, for the sake of their own safety, to preemptively (or more accurately, preventatively) intervene in other states if the prevailing social conditions make it likely that internal turmoil will spill across their borders. The desirability of such preemptive law enforcement is, to say the least, highly dubious. More worryingly, however, is the highly minimal content of human rights that would likely issue from this understanding of their basis. In his defense of this view, Freeman raises the central worry here when he points out that "there are many 'outlaw' and 'burdened' states whose rulers do not respect the human rights of their own people, but nonetheless present no danger to liberal peoples... Why not tolerate these 'harmless outlaws,' too, so long as they present no threat

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<sup>122</sup> Rawls, *The Law of Peoples*, 81



to one's one security?"<sup>123</sup> Rawls himself even recognizes the problem: "We must at some point face the question of interfering with outlaw states simply for their violation of human rights, even when these states are not dangerous and aggressive, but indeed quite weak."<sup>124</sup> This is indeed the crucial question; as we will see presently, however, neither Freeman nor Rawls (or any other LP-Rawlsians) appear to have a plausible answer.

Freeman's initial response to this worry is to insist that "liberal peoples do indeed have a good deal to fear from a state that has no respect for human rights... One only has to look at the dislocation of individuals... that is caused by violations of human rights in Africa today."<sup>125</sup> This is a helpful observation—it is certainly worth pointing out that human rights violations need not result in aggressive war in order to be threatening to other peoples. Nor does the potential danger need to come from governments themselves, as David Reidy emphasizes:

Liberal democratic (or other decent) peoples cannot rely on [outlaw states]... to keep their populations from aggressive, violent, or criminal activities. And since outlaw states do not honor basic human rights, their populations, or significant portions thereof, are unlikely to be sufficiently satisfied with their domestic condition to refrain from [such] activities. So, states that violate basic human rights, outlaw states, pose a real threat to international peace and security, even when they are nonaggressive toward their neighbors. Accordingly, liberal democratic (and other decent) peoples have good reason to insure that basic human rights are universally honored.<sup>126</sup>

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<sup>123</sup> Freeman, *Justice and the Social Contract*, 277

<sup>124</sup> Rawls, *The Law of Peoples*, 81n. Rawls goes on to say that he takes up this question in later sections, but in fact he merely addresses *how* to interfere or assist such societies; he never explains *why* such interference or assistance would be agreed to in his global original positions.

<sup>125</sup> Freeman, *Justice and the Social Contract*, 278

<sup>126</sup> David A. Reidy, "Political Authority and Human Rights," in *Rawls's Law of Peoples: A Realistic Utopia?*, ed. Rex Martin & David A. Reidy (Malden, MA: Blackwell Publishing, 2006), 175

As valiant as these defenses are, they do not address the fundamental problem with anchoring human rights in the self-interest of third parties. Even if the problems generated by violations were not forms of direct international violence, but rather took the form of fleeing refugees and cross-border criminal activity, we still have to ask: Why not simply enforce the laws that prevent *those* problems, rather than preemptively (or preventatively) intervene to stop violations of rights that tend to generate them?

More fundamentally, we still have to ask: What about violations that aren't particularly likely to generate even these problems? As Beitz notes, "there is very little systematic evidence that governments that abuse their people's human rights pose a greater threat than other governments to international order, and it is not at all clear what causal mechanism could explain such a regularity, if it were found to exist."<sup>127</sup> It is clear that all LP-Rawlsians want to include in their lists of human rights some rights the violations of which pose no obvious threat to well-ordered peoples or international peace. One fairly clear example may be the system of arbitrary arrest, detention, and forced labor in China—it would at best be a rather circuitous argument that concluded that these practices posed any significant threat to anyone other than Chinese citizens themselves. Yet the case for the enforcement of even these basic rights in such cases cannot be made within the LP-Rawlsians' original position argument for human rights.

Some of these theorists even appear aware of this problem, although they say little to mitigate the obvious damage it does to their position. Kelly claims that the "content of human rights can be understood to be the subject of negotiation between societies that are supported by morally concerned individuals who affirm that the fundamental interests of

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<sup>127</sup> Charles Beitz, *The Idea of Human Rights* (New York: Oxford University Press, 2009), 132

all persons matter morally."<sup>128</sup> For reasons we saw above, she cannot have in mind the deliberations of the parties in the global original position when referring to such 'negotiations'—as she is surely aware, the parties must be understood as morally disinterested. Whatever the purpose of this comment, it cannot help the LP-Rawlsians address the present objection. Even Freeman feels compelled to go beyond original position arguments in discussing the basis of human rights. In a telling passage, he writes,

putting the original position and the motivations of its parties aside, the fact is that liberal peoples themselves do value human rights for their own sake... Peoples as peoples have a moral nature, and as such they have a sense of justice and are concerned with respect for human rights for their own sake... Just because, from the point of view of the parties to the original position, respect for human rights by other peoples is important for instrumental reasons, this does not mean that the Law of Peoples regards human rights purely instrumentally or from a self-interested perspective... To say that Rawls's justification of human rights is purely "instrumental" is to fail to see that the parties in the original position are only part of a larger argument.<sup>129</sup>

If the point here is simply that conceiving of peoples in the original position as morally indifferent does not imply that real peoples are thus indifferent, Freeman is surely correct. However, he seems to be making the mistake, discussed above, of suggesting that there is some connection between human rights and peoples' moral nature. The basic problem here still remains: if appropriate content for human rights cannot be gotten from the global original position, then the moral concern that peoples have for human rights "for their own sake" cannot be reflected in the LP-Rawlsian approach to global justice. More simply, if the commonsense content of even basic human rights cannot be generated by an original position argument, then LP-Rawlsians must either give up that content or give

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<sup>128</sup> Kelly, "Human Rights as Foreign Policy Imperatives," 184

<sup>129</sup> Freeman, *Justice and the Social Contract*, 278

up on the Rawlsian framework, and appealing to the moral nature of actual peoples in no way offers a way around this difficulty.

Although Global Justice as Fairness's account of human rights is importantly similar to that of the LP-Rawlsians, it should be clear that it does not suffer from the same deficiency. The lacuna left by Rawls in his argument concerning human rights has not been filled by his followers, and I take it as a very significant advantage of Global Justice as Fairness that it renders the reasoning of the parties in the global original position regarding human rights straightforward and intuitive. Furthermore, since the content of human rights is quite similar on each view (the LP-Rawlsian view being a bit more minimal), I can see little reason not to prefer Global Justice as Fairness's conception of human rights.

#### 4.2 Contra Buchanan I

Before turning to the other major Rawlsian alternative to Global Justice as Fairness, it will be fruitful to examine Buchanan's "moral theory of international law." While he has rather vociferously criticized Rawls's view of human rights,<sup>130</sup> he also says this:

I am in complete agreement with the basic idea that grounds [Rawls's] approach to the moral theory of international law: it is wrong to require all societies to satisfy the same standards of justice that may be justifiably enforced in liberal democratic societies. I agree with him that what I call standards of transnational justice should not require what we, the citizens of liberal democracies, reasonably believe is perfect justice. My theory has that much in common with Rawls's variety of 'moral minimalism'.... My disagreement with Rawls concerns just how minimal the minimum is.<sup>131</sup>

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<sup>130</sup> See esp. Buchanan, "Taking the Human Out of Human Rights" and *Justice, Legitimacy, and Self-Determination*, 159-175.

<sup>131</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 175-176

Presumably Buchanan would have a similar assessment of Global Justice as Fairness, since it is a theory of distinctly global justice that shares much in common with Rawls's approach to human rights. Indeed, he would presumably find Global Justice as Fairness's account more satisfactory, since as we just saw, Global Justice as Fairness's list of human rights is a bit more robust than that of the LP-Rawlsians. Buchanan's own list of human rights<sup>132</sup> is in fact extremely similar to the one offered above. The major difference between his list and Global Justice as Fairness's is that Buchanan includes democratic rights, and it is this point of contention that I will largely focus on here.

In order to make sense of his argument for a human right to democracy, however, we will first need to look at Buchanan's general account of human rights. His view is of particular interest not merely because it is a highly developed, systematic, and persuasive account of global justice with content similar to Global Justice as Fairness, but also because he suggests an interesting modification to the Rawlsian global framework. He does not endorse this modified Rawlsian approach in the context of human rights, although he seems to do so with respect to global distributive justice.<sup>133</sup> We will briefly consider this modification, and then move on to his official position.

Buchanan suggests that we understand the global original position, similarly to the LP-Rawlsians (but not Global Justice as Fairness), as a two-stage procedure. Rather than having liberal and nonliberal decent peoples represented in two distinct applications of the original position, as Rawls does in *The Law of Peoples*, Buchanan suggests that individual persons be represented in the first stage, and peoples in the second. In the first stage the interests of persons would generate principles of "transnational" justice, while

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<sup>132</sup> See Buchanan, *Justice, Legitimacy, and Self-Determination*, 129.

<sup>133</sup> See Buchanan, *Justice, Legitimacy, and Self-Determination*, 216.

the interests of peoples would generate principles of "international" justice in the second stage.<sup>134</sup> Standards of transnational justice are those "that the international community ought to ensure are met by all states in their internal affairs" while international justice "includes the rights and duties of the subjects of international law so far as they are not members of the same state or do not stand in the relationship of government to governed within a state."<sup>135</sup> Roughly, the first stage would settle the content of Global Justice as Fairness's first principle (i.e. human rights), while the second stage would cover the same areas as Global Justice as Fairness's second principle, (i.e. those pertaining to international interactions within the framework of the global basic structure).

This modified construal of the global original position(s) is a tempting one. In line with Global Justice as Fairness, it recognizes the need for distinct principles of specifically interstate justice, and agrees that an original position in which peoples are represented is the best method for a Rawlsian approach to generate those principles. Buchanan writes: "Whatever else a morally defensible international legal system will include—and I believe it will include principles for individuals—it will include principles for relationships among states, at least if it is to supply any direct normative guidance for our world."<sup>136</sup> This recognition marks a stark contrast with the cosmopolitan positions we will examine later, while at the same time providing a similarly individualistic basis for minimal intrastate standards of justice. Thus Buchanan's modified Rawlsian account seems to allow us to have our cake and eat it too.

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<sup>134</sup> See Buchanan, "Rawls's Law of Peoples," esp. 700.

<sup>135</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 192

<sup>136</sup> Buchanan, "Rawls's Law of Peoples," 700

However, this understanding of the global original position fails to fill the lacuna that plagues the LP-Rawlsian argument for human rights, at least without further argument. We can allow that the first stage, in which persons are represented, will yield a list of human rights such as Buchanan's. These will be principles of transnational justice. What to do about transnational justice, however, is a matter of international justice: "International justice also includes principles specifying the permissibility and/or obligatoriness of intervention in support of principles of transnational justice."<sup>137</sup> Since these principles will be selected by the representatives of peoples in the second stage, we are left to wonder why peoples would select principles for the enforcement of human rights. While this is superior to the LP-Rawlsian position insofar as it accounts for the content of human rights, it still fails to account for their role.

Since Global Justice as Fairness is simpler in requiring only one application of the global original position, while still providing an adequate basis for the content and enforcement of human rights, I take it to be superior to Buchanan's modified Rawlsian framework. His suggestion is still a worthwhile and interesting one, and with some finessing could possibly yield principles of global justice similar to Global Justice as Fairness's; it is thus useful to examine what could plausibly be regarded as a close cousin of Global Justice as Fairness. The advantage of not representing persons at all in the global original position, however, is very significant. Not only is the procedure much simpler with only one stage, but Global Justice as Fairness does not need to employ a conception of personhood. Since, as will soon become evident, Buchanan would represent persons as Rawls does domestically, namely as free and equal, the two-stage

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<sup>137</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 192

procedure runs afoul of the fact of reasonable global pluralism, and thus undercuts the possibility of a broad overlapping consensus across types of societies. In other words, Global Justice as Fairness is not only simpler, but also promises similar principles with significantly weaker premises, and should thus be preferred.

As promising as the above framework may be, Buchanan does not use it in the context of human rights. He instead appeals to what he calls "the Moral Equality Principle," which is central to his theory as a whole, and his account of human rights in particular. According to this familiar principle, "all persons are entitled to equal respect and concern."<sup>138</sup> This in turn "requires appropriately protecting... the interests that are necessary for a decent human life."<sup>139</sup> Buchanan then derives his list of human rights from considering which such interests demand protection as a matter of transnational justice.

The Moral Equality Principle, according to Buchanan, "is fundamental to any conception of morality worth seriously thinking about" and thus he declines to provide any argument for it.<sup>140</sup> This is unfortunate, since Global Justice as Fairness does not accept (or deny) any such claims about the moral equality of persons as such. Some such principle is surely at the heart of Rawls's domestic theory, as reflected in its conception of persons as free and equal, but this conception is, crucially, omitted by Global Justice as Fairness. As we have just seen, accepting this principle is theoretically rather costly, especially since the only significant gain over Global Justice as Fairness is the (possible) inclusion of democratic rights as human rights. His commitment to the Moral Equality

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<sup>138</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 87

<sup>139</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 133

<sup>140</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 88 (see also 132)



Principle makes Buchanan's theory a version of comprehensive, not political, liberalism, and Global Justice as Fairness rejects principles based on such theories as unreasonable. (We will look at a more straightforward version of comprehensive liberalism below in discussing the Rawlsmopolitans.)

The forgoing does not, strictly speaking, constitute an argument against Buchanan's position—it may be that Global Justice as Fairness's omission of democratic rights will prove too counter-intuitive if Buchanan's arguments for their inclusion are compelling enough. He gives three such arguments, only the first of which makes direct appeal to the Moral Equality Principle. We will examine each in turn.

According to his first argument, "equal consideration... requires that all persons have the same fundamental status, as equal participants, in the most important political decisions made in their societies."<sup>141</sup> This would place democratic rights on a par with all other basic (not derivative) human rights. The contention here must be that democratic rights protect interests that are necessary for a decent human life. This claim is, however, *prima facie* quite dubious, and Buchanan does not go on to defend it. It seems to straightforwardly imply that no one who fails to enjoy democratic rights can live a decent life, which is difficult to believe on any construal of 'decent.' Surely it is not the case that *none* of the citizens of, say, Singapore or Hong Kong have "decent" lives; quite the opposite seems closer to the truth.

I suspect that Buchanan does not put particular weight on this argument alone, and will leave it aside, having merely cast some doubt on it. He seems to place more emphasis on the remaining two arguments, which appeal to the instrumental value of

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<sup>141</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 143

democracy and its importance for the legitimacy of states. We will take up the issue of legitimacy first.

The legitimacy-based argument for a human right to democracy "takes seriously the claim of governments to represent or serve as the agents of their citizens."<sup>142</sup> Buchanan contends that only democratically elected governments can genuinely so represent their citizens; in other words, only democracies can be fully legitimate. In order for the actions of governments in international affairs, which have potentially great impact on their citizens, to carry moral weight, governments must be seen as responsible agents of their populations. Of course, Global Justice as Fairness wholeheartedly agrees with this last claim—the point of understanding peoples as civilities is precisely to explain the way in which state governments represent their citizens and how citizens exercise their collective agency indirectly through their governments.

According to Global Justice as Fairness, however, civilities need not be democracies in order to be minimally legitimate from the perspective of the global basic structure. Surprisingly, Buchanan seems to agree with this claim (or a very similar one) about the threshold of legitimacy.<sup>143</sup> He writes that on his view,

we may distinguish between what might be called minimal and full political legitimacy. Where institutional resources for democratic authorization are lacking, an entity can be politically legitimate—can be morally justified in exercising political power—if it satisfies minimal standards for protecting individuals' rights by processes and policies that are themselves at least minimally just. However, this legitimacy is deficient or at least less than optimal: It fails to

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<sup>142</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 144

<sup>143</sup> Even more surprising is that Pettit, even though he emphasizes "contestatory democracy," is also willing to grant non-democracies international legitimacy. See Philip Pettit, "Legitimate International Institutions: A Republican Perspective," in *The Philosophy of International Law*, edited by Samantha Besson & John Tasioulas (New York: Oxford University Press, 2010), 154.

reconcile the exercise of political power with the fundamental equality of persons.<sup>144</sup>

As this last sentence makes clear, Buchanan's account of legitimacy appeals to his Moral Equality Principle, which renders this argument for a human right to democracy as problematic, by the lights of Global Justice as Fairness, as the first. In order to avoid begging the question, it would seem we need to examine his particular arguments in support of his view of legitimacy<sup>145</sup>

Luckily, we do not actually need to do so. Since Buchanan concedes that minimal legitimacy, which does not require democracy, is sufficient, there is not much real disagreement with Global Justice as Fairness. Given Global Justice as Fairness's commitment to domestic rule of law and the individual, social, and political rights included in its conception of human rights, it seems rather likely that Buchanan would agree that all societies that are well-ordered according to Global Justice as Fairness are "minimally legitimate" on his view.

The only area of significant disagreement is over cases in which the "institutional resources for democratic authorization" are not lacking, yet the society in question is not democratic or ceases to be so. In order to incorporate Buchanan's view into international law, it seems that the human right to democracy would have to be made contingent upon whether or not these resources are indeed available or not. Needless to say, it would be preferable if international human rights law applied equally to all peoples, and did not require the sort of differential application that Buchanan's position seems to imply. If

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<sup>144</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 259

<sup>145</sup> For those arguments, see Buchanan, *Justice, Legitimacy, and Self-Determination*, ch. 5.

minimal legitimacy is enough for some, I submit that it should be enough for all. Once again, we seem to have a slight expansion in the content of human rights purchased at a rather substantial theoretical cost.

The instrumental argument for recognizing democratic rights as human rights is, I think, the most interesting, and the most pressing for Global Justice as Fairness. This argument, unlike the other two, does not rely on controversial moral premises that Global Justice as Fairness avoids, and thus must be refuted from within the theory itself. However, this also means that this argument cannot be used to assert the superiority of Buchanan's theory to Global Justice as Fairness—if successful, it would merely establish that Global Justice as Fairness's account of human rights must be modified to include democratic rights, which there is no inherent difficulty in doing. It is nonetheless worth considering in some detail here, since the question of a human right to democracy is hotly contested and clearly of general interest.

Like Global Justice as Fairness, Rawls's own view in *The Law of Peoples* is open to the possibility that there might be an instrumental justification for a human right to democracy. In his discussion of human rights, he says this: "Should the facts of history, supported by the reasoning of political and social thought, show that hierarchical [i.e. not democratic] regimes are always or nearly always, oppressive and deny human rights, the case for liberal democracy is made."<sup>146</sup> Buchanan's final argument is precisely of this nature—it is an empirical conjecture that "democratic governance... is of such great instrumental value for the protection of human rights that it ought to be required of all

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<sup>146</sup> Rawls, *The Law of Peoples*, 79

governments as a condition of their legitimacy under international law."<sup>147</sup>

Unfortunately, beyond simply pointing to Amartya Sen's work on famine, Buchanan does not make a case for this empirical claim.

Neither does Rawls even attempt to refute such a claim. As Alyssa Bernstein notes in her defense of his position, "Rawls neither asserts nor denies the general empirical claim that only states with procedurally democratic regimes can secure the basic human rights... but he offers both conceptual and intuitive arguments against it."<sup>148</sup>

Unlike Bernstein, I (along with many, many others) do not find these "conceptual and intuitive" arguments persuasive, and will thus pursue this empirical argument. As a philosopher, I can claim no particular expertise in such matters, so I will rest content with taking on one recent empirical argument for the instrumental justification of a human right to democracy by a leading contemporary philosophical authority on the subject.

#### 4.3 Contra *Christiano on the Instrumental Argument for Democratic Rights*

In a recent article, Thomas Christiano, a prominent theorist and champion of democracy, has provided much flesh for the skeletal argument Buchanan offers, and it is clear from the rest of *Justice, Legitimacy, and Self-Determination* that Buchanan is quite sympathetic to Christiano's views. Furthermore, Christiano explicitly mentions Buchanan's book as suggesting precisely the sort of argument he goes on to defend in his article. It will therefore be appropriate to conclude our consideration of Buchanan's account of human rights, and democracy more generally, by examining Christiano's case.

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<sup>147</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 143

<sup>148</sup> Alyssa Bernstein, "A Human Right to Democracy?," in *Rawls's Law of Peoples: A Realistic Utopia?*, ed. Rex Martin & David A. Reidy (Malden, MA: Blackwell Publishing, 2006), 289

For present purposes, the central conclusion Christiano argues for is that "minimally egalitarian" democracy is "normally necessary" for the protection of personal integrity rights. I have so far ignored the complicated question of how 'democracy' and 'democratic rights' are best understood, and I will largely continue to do so, noting simply that on Christiano's (and as we saw above, Buchanan's) view a human right to democracy would include equal rights to vote and run for office.<sup>149</sup> These rights provide the chief point of contrast with Global Justice as Fairness. (It is worth pointing out that most other elements that Christiano and Buchanan include under the heading of "democracy," such as constitutionalism, the rule of law, and freedom of expression, are included in Global Justice as Fairness's list of human rights.) Christiano focuses exclusively on personal integrity rights because they are among the least controversial and most fundamental of human rights, and can thus serve as a reasonable proxy for human rights generally.

The crucial notion in the argument is that of "normal necessity." Christiano purports to show that "minimally egalitarian democracy will protect the rights to personal integrity under normal conditions of human motivation, knowledge, and rationality"<sup>150</sup> while other forms of government will fail to do so. While he denies that minimally egalitarian democracy is a necessary or sufficient condition for respect for human rights, he argues that it is "normally necessary." He does so by appealing to three empirical arguments: the first establishes a correlation between democracy and respect for personal integrity rights; the second picks out democracy as a crucial independent variable in this correlation; the third suggests a causal relationship by looking at the sequencing of

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<sup>149</sup> For his explication of "minimally egalitarian democracy," see Thomas Christiano, "An Instrumental Argument for a Human Right to Democracy," *Philosophy & Public Affairs* 39, no. 2 (2011): 146.

<sup>150</sup> Christiano, "An Instrumental Argument," 159

societies' implementation of democracy and their general respect for the relevant rights. Since I lack the statistical sophistication to evaluate the second (nor do I doubt its accuracy), we will focus on the first and third.

These empirical arguments are based on analyses of two basic datasets. The first is provided by the Polity IV scale,<sup>151</sup> which rates governments using "a composite index that includes level of participation, competition for office, and judicial checks on the executive."<sup>152</sup> The second is the Political Terror Scale,<sup>153</sup> which is an "aggregate measure of the violations of the different rights of personal integrity."<sup>154</sup> Together, the datasets generated by these indices provide the basis for Christiano's empirical claims regarding the correlation and sequencing of democracy and human rights. Christiano writes that these "datasets and the criteria they use deserve greater study and analysis than philosophers and political theorists have so far given them"<sup>155</sup>—we will therefore look at this data in a bit of detail.

The correlation and sequencing arguments together purport to show that democracy is normally necessary for the protection of human rights. More specifically, they purport to show that, normally, minimally egalitarian democracies reliably protect

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<sup>151</sup> See [www.systemicpeace.org/polity/polity4.htm](http://www.systemicpeace.org/polity/polity4.htm) for the relevant data and other information about the scale. All data discussed below regarding this scale were accessed there on 5/22/2012.

<sup>152</sup> Christiano, "An Instrumental Argument," 150 He also appeals to the Vanhanen Index of Democratization, for which there is, I believe, no dataset regarding current governments. I ignore this index here; I have no reason to think that this omission affects the discussion that follows.

<sup>153</sup> See [www.politicalterrorsscale.org/countries.php](http://www.politicalterrorsscale.org/countries.php) for the relevant data and other information about the scale. All data discussed below regarding this scale were accessed there on 5/22/2012.

<sup>154</sup> Christiano, "An Instrumental Argument," 150

<sup>155</sup> Christiano, "An Instrumental Argument," 150-151

personal integrity rights, while all other governments are normally unreliable in their protection of those rights. There are two important classes of counter-examples to these arguments that I have culled from the two aforementioned datasets, which we can simply call "good non-democracies" and "bad democracies." Good non-democracies are those that score poorly on the Polity IV measure while performing well on the Political Terror Scale; bad democracies do well on the former but poorly on the latter.

The Polity IV Project rates the quality of democratic institutions on a scale from 0 to 10 (10 being best), as well as the degree of authoritarianism, ranging from -10 to 0 (-10 being most authoritarian). According to Christiano, studies have shown that there is a threshold reached at the Polity IV rating of 8, at which there is a very steep increase in the protection of personal integrity rights.<sup>156</sup> Furthermore, the data supporting the sequencing argument appears to show up to a five year lag between reaching this threshold and the correlated increase in rights protection.<sup>157</sup> Therefore, I will take "bad democracies" to be those that have been rated at 8 or higher on the Polity IV index for at least the past five years, while being ranked poorly on the Political Terror Scale. Any state that performs well on the Political Terror Scale and is ranked below a 7 on the Polity IV scale I will take to be a "good non-democracy."

The following table shows the relevant scores for countries of both types of counter-examples. Note that since the Political Terror Scale uses scores from both Amnesty International and the U.S. State Department, when those scores differ, the former organization's rating appears first, followed by the latter's.

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<sup>156</sup> See Christiano, "An Instrumental Argument," 151-152.

<sup>157</sup> See Christiano, "An Instrumental Argument," 153.



**Table 3: Democracy & Security Rights**

	Country	Polity IV Scale	Political Terror Scale
<i>Good Non-Democracies</i>	Qatar	-10	1: "Countries under a secure rule of law, people are not imprisoned for their view, and torture is rare or exceptional. Political murders are extremely rare."
	Oman	-8	
	United Arab Emirates	-8	1/2
	Singapore	-2	2/1
	Guyana	6	1/2
	Kuwait	-7	2: "There is a limited amount of imprisonment for nonviolent political activity. However, few persons are affected, torture and beatings are exceptional. Political murder is rare."
	Laos	-7	
	Congo	-4	
	Fiji	-4	
	Tajikistan	-3	
	Bhutan	3	
	Gabon	3	
	Ecuador	5	
	Malaysia	6	
Hong Kong	NA	NA	
<i>Bad Democracies</i>	United States	10	3/NA
	Guatemala	8	3: "There is extensive political imprisonment, or a recent history of such imprisonment. Execution or other political murders and brutality may be common. Unlimited detention, with or without a trial, for political views is accepted."
	Indonesia	8	
	Moldova	8	
	Paraguay	8	
	Israel	10	4: "Civil and political rights violations have expanded to large numbers of the population. Murders, disappearances, and torture are a common part of life. In spite of its generality, on this level terror affects those who interest themselves in politics or ideas."
	India	9	
	Jamaica	9	
	Brazil	8	
	Mexico	8	
Philippines	8		

We will first consider the good non-democracies, since these counter-examples go more directly to the heart of Christiano's conclusion.

The best examples of good non-democracies are, of course, the ones that are most authoritarian yet most protective of personal integrity rights: Qatar, Oman, United Arab

Emirates, and Singapore. Also of particular interest are Kuwait, Laos, Congo, Fiji, and Tajikistan, which are all fairly authoritarian and score only slightly worse on the Political Terror Scale. The remaining good non-democracies, since they are rated by the Polity IV scale above 0, are vaguely democratic, but well below the threshold that Christiano identifies for "minimally egalitarian" democracy. I have included Hong Kong, even though there is no data for it, since it seems highly likely that the methods used by these indices would place it squarely within the category of good non-democracies.

The question to consider about these outliers—and I readily admit they are outliers—is whether these regimes' abilities to protect personal integrity rights in the absence of democracy indicates that something strange or abnormal is going on that explains these counter-examples away. Are there abnormal circumstances in place such that these governments should not upset the claim that democracy is normally necessary for the protection of personal integrity? I suggest a negative answer—the similarities among many of the better examples suggests that they are not simply anomalies. First and foremost, all of these countries (and Hong Kong) are rather small, both in area and population. Congo and Oman are by far the largest of the aforementioned territories (the only two above 100,000 square miles), yet their populations are dwarfed by those of United Arab Emirates and Hong Kong (the only two over 7,000,000); adding Bhutan and Gabon only reinforces this pattern. Only the two most democratic of the good non-democracies, Malaysia and Ecuador, have sizable populations, and their territories are still smaller than that of Congo.<sup>158</sup> Ten of the fifteen good non-democracies are in Asia;

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<sup>158</sup> All of the population and area data mentioned here were taken from [http://en.wikipedia.org/wiki/List\\_of\\_sovereign\\_states\\_and\\_dependent\\_territories\\_by\\_population\\_density](http://en.wikipedia.org/wiki/List_of_sovereign_states_and_dependent_territories_by_population_density) on 5/25/2012.

the three clearest examples (Qatar, Oman, and United Arab Emirates) have large Muslim majorities, as do Kuwait, Malaysia, and Tajikistan.

There are thus fourteen countries, all small in area and mostly small in population, that can be aptly called good non-democracies by the lights of Christiano's own data. Furthermore, this number most likely understates the case. I have already pointed out that Hong Kong is a notable example for which the Polity IV and Political Terror Scales does not provide data. Since one or both of these scales also fails to provide data for some the smaller island states around the world, there very well may be other instances of small good non-democracies.

It is certainly possible that a more sophisticated analysis would reveal these cases to be genuinely anomalous, but barring further discussion, these cases strike me as too numerous and too similar to not be considered important counter-examples to Christiano's instrumental argument for a human right to democracy. Simply in light of the (admittedly limited) data above, should we conclude that Singapore, Oman, and Hong Kong are currently violating the human rights of their citizens, and should thus be subject to appropriate international enforcement mechanisms? Or are the situations of these countries so abnormal that they do not affect the thesis that minimally egalitarian democracy is *normally* necessary for the protection of personal integrity rights? It seems to me that the answer to both of these questions is rather clearly "No."

The case of bad democracies is, I think, less clear-cut, and thus Christiano's claim that minimally egalitarian democracy is normally *sufficient* for the protection of personal security rights is on stronger ground. In particular, the strongest counter-example, Israel, surely does face rather abnormal circumstances, and is plausibly viewed as anomalous.

However, the above data should certainly give us pause. India, Jamaica, Brazil, Mexico, and the Philippines all meet the threshold for minimally egalitarian democracy, and have done so for at least five years, yet receive a rating of four out of five on the Political Terror Scale. This is the same rating given to countries such as China, Pakistan, Zimbabwe, Yemen, Iran, and Nigeria—not exactly good company. Indonesia only does slightly better. These six countries are all, except Jamaica, extremely populous—together, they account for over 25 percent of the world's population. Thus a quarter of humanity is living under a minimally egalitarian democracy, has been doing so for at least five years, and yet faces serious threats to personal integrity. I find it difficult not to think that this fact alone casts significant doubt on Christiano's claim regarding normal sufficiency. Perhaps a quarter of the world's population lives under anomalous, abnormal circumstances, but this possibility clearly pushes the term 'abnormal' close to its breaking point.

I don't want to overstate this brief and roughshod critique of Christiano's instrumental argument for a human right to democracy. I do not have the space or training required for a full and proper evaluation of the empirical evidence either for his rather narrow claim, or the broader one that democracy is normally necessary for the reliable protection of human rights generally. I do think, however, that I have said enough to raise some serious worries about the instrumental argument. As I pointed out above, if the empirical evidence turns out to be strongly in favor of the instrumental argument, Global Justice as Fairness can happily accommodate a human right to democracy by including it, along with the rule of law, as a "supporting right."

It should also be noted that it is rather likely that democratic reform would frequently be a part of enforcing and remedying serious human rights violations under Global Justice as Fairness. If an outlaw regime cannot be more gently brought into compliance, replacing it may be necessary, and there will usually be no practical replacement available except democracy. In light of this, we can see that the gap between Global Justice as Fairness's conception of human rights and Buchanan's is even narrower than it first appeared. The deepest conflict between the two is Buchanan's commitment to a form of comprehensive liberalism, which we will take on more directly in discussing the Rawlsmopolitans.

#### *4.4 Contra Rawlsmopolitanism I*

We will now take up the Rawlsmopolitan conception of human rights. This task will not be a straightforward one, since as we will see, the most notable figures associated with this position (Beitz and Pogge) have recently defended accounts of human rights fundamentally at odds with what I will consider the "official" Rawlsmopolitan position. While Beitz and Pogge remain firmly opposed to the position Rawls defends in *The Law of Peoples*, they have both also abandoned the basic Rawlsian framework as a tool for addressing questions about human rights. I will thus initially rely more on Tan's cosmopolitan account, which is explicitly Rawlsian in character, even though his remarks on human rights *per se* are rather scant. For reasons we will soon see, this dearth is likely no accident, since there is no obvious space for a distinct account of *human rights* in Rawlsmopolitan theories as I have characterized them, i.e. as globalized versions of Rawls's domestic theory. After discussing the "official" Rawlsmopolitan position, I will then take up the accounts offered by Beitz and Pogge, although they cannot be considered

particularly nearby alternatives to Global Justice as Fairness given their fundamentally non-Rawlsian approaches.

The basic methodology of Rawlsian cosmopolitanism is the construction of an original position argument in which persons, not peoples, are represented, and which is global in scope. Such theories generate principles of global justice by imagining the deliberations of persons, conceived of as free and equal, and reasonable and rational, behind a veil of ignorance that excludes knowledge of their citizenship, tasked with arriving at fair terms of cooperation for a worldwide basic structure. In essence, Rawlsian cosmopolitanism defends Rawls's domestic theory in its entirety, with one crucial exception—the scope of the theory is expanded to the whole world, rather than limited to domestic basic structures.

Importantly, the global basic structure advocated by this view does not exclude the continued existence of something like modern states (although it does not ensure their persistence either). Tan, rightly in my view, contends that "cosmopolitan justice has no specific institutional entailment... [and] does not call for a world state, even though its principles are to regulate and determine the justice of institutions. It is open to... a range of institutional forms."<sup>159</sup> Pogge is even clearer on this point. Although, as already noted, he no longer holds a Rawlsian cosmopolitan view, Pogge's discussion of the extension of Rawls's domestic theory to the global context both clarifies the stance such a position would take toward global institutions, as well as neatly summarizes the position as a whole. The following passage is thus worth quoting at length:

...even if a justly structured world government were infeasible, this would not invalidate the global application of Rawls's public criterion of social justice. This criterion does not prescribe a specific institutional design, but governs the comparative assessment of alternative feasible institutional designs. Applied

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<sup>159</sup> Tan, *Toleration, Diversity, and Global Justice*, 95-96

globally, it would instruct us to design global political institutions that would secure the basic liberties of human beings as far as possible and to design the global economic order so that fair equality of opportunity is realized worldwide as far as possible and so that it engenders socioeconomic inequalities among persons only insofar as this raises the socioeconomic floor... If world government would lead to despotism or civil strife, then the public criterion would correctly reject this institutional option for its failure to secure the basic liberties of human beings worldwide. This criterion would then favor another global institutional design—perhaps a global federation on the model of the European Union, or a loose league of nations as Kant had described, or Rawls's similar Society of Peoples, or a state system like that existing now.<sup>160</sup>

We will return to questions about global institutions below; for now I merely want to preempt the common objection to all forms of cosmopolitanism that it requires a (dangerous and/or practically impossible) world state.

As Pogge makes explicit, Rawlsmopolitanism calls for an all-encompassing global basic structure that satisfies Rawls's two principles of domestic justice for all persons. In particular, this means guaranteeing for everyone a fully adequate scheme of rights and liberties familiar from liberal-democratic theory, including the fair value of the political liberties. It also means guaranteeing fair equality of opportunity for all, and applies the difference principle to the structure of the global economy. Rawlsmopolitans are most often concerned with the global extension of distributive justice, and the difference principle in particular, frequently to the point of forgoing any significant discussion of human rights. Perhaps the two most developed accounts of Rawlsmopolitanism, those of Beitz and Tan, focus almost exclusively on questions of global distributive justice.<sup>161</sup> This rather poignant neglect of human rights in their

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<sup>160</sup> Thomas Pogge, "Do Rawls's Two Theories of Justice Fit Together?," in *Rawls's Law of Peoples: A Realistic Utopia?*, ed. Rex Martin & David A. Reidy (Malden, MA: Blackwell Publishing, 2006), 208

<sup>161</sup> See Tan, *Justice Without Borders and Toleration, Diversity, and Global Justice*, and Beitz, *Political Theory and International Relations*.

discussions of global justice, while surprising, is not, I suggest, a contingent omission. Rather, it is a natural consequence of the structure of their views—there is simply no conceptual space in the Rawlsmopolitan framework for the notion of human rights, at least if we understand the category of human rights as at all distinct from other rights.

This point should be clear enough from the Rawlsmopolitan commitment to the global reach of Rawls's first domestic principle. If all persons, as a matter of justice, should enjoy the full panoply of liberal-democratic rights called for by that principle, then there is simply no conceptual work left to be done by a distinct notion of human rights. In other words, human rights simply *are* liberal rights on this view. Just as these rights, on Rawls's domestic view, ought to be constitutionally enshrined and legally enforced by the basic structure, Rawlsropolitans seem to be committed to the protection of these rights under international law.

This is a *very* strong view of human rights. Rawls's principles of domestic justice are maximal principles in the same sense that the second principle of Global Justice as Fairness is maximal—they all set ideal standards that no actual basic structure is ever likely to fully satisfy.<sup>162</sup> By contrast, Global Justice as Fairness's first principle is a

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<sup>162</sup> This claim is somewhat misleading, since on Rawls's mature view, the content of his first principle is simply specified by a list of basic rights and liberties, which might suggest that it is a minimal principle in the same sense that Global Justice as Fairness's first principle is minimal. I think this conclusion is mistaken, however. Even though the rights and liberties covered under the first principle are (vaguely) enumerated before they are presented to the parties in the original position, Rawls describes this list as "a fully adequate scheme" (Rawls, *Justice as Fairness*, 42) and is quite clear that this principle also includes a proviso that ensures the fair value of the political (but not other) liberties (see Rawls, *Justice as Fairness*, 149). In light of this, it seems more natural to take Rawls's first principle to be a maximal one. (Although I cannot pursue this point here, I also think Rawls's domestic theory would be more plausible if its first principle were formulated in a more explicitly maximal way, and a promising way to do this would be to follow Global Justice as Fairness in replacing Rawls's "list" conception of liberty with



minimal one; in line with almost all typical accounts of human rights, it sets a minimal standard that imposes duties with which their bearers are fully expected to comply. By extending Rawls's first domestic principle to the global context, Rawlsmopolitans are forced to embrace a maximal account of human rights. The content of such a conception of human rights would outstrip even that of the Universal Declaration of Human Rights and subsequent human rights covenants—which most theorists already view as bloated.

On such a maximal view, human rights cannot serve the function that Global Justice as Fairness (and many others) identify for them, namely, as limits on internal sovereignty. Since in practice all societies will be open to some degree of criticism under Rawls's first principle, the specter of external interference will almost always loom over peoples' domestic affairs. Such a drastic reduction of the domain of peoples' self-determination is surely worrisome. Rawlsmopolitanism thus seems to lack the resources with which to identify a threshold of sufficiency for the respect of human rights. While it may be possible to develop a minimal standard for liberal legitimacy, as Rawls is sometimes taken to have done in *Political Liberalism*, that could serve this function, I am not aware of any such arguments. Furthermore, Rawlsmopolitans are unlikely to adopt such an account, since it is developed within the framework of political liberalism. As we will see shortly, Rawlsmopolitans largely reject Rawls's shift to political liberalism, and instead (and more consistently) embrace liberalism as a comprehensive doctrine.

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Pettit's notion of freedom as non-domination. Thus Rawls's domestic principles could be recast as domestic analogs of the two parts of Global Justice as Fairness's second principle, applied to persons rather than peoples. I hope to explore this line of argument in the future.)

Before we take up the debate between comprehensive and political liberalism, we need to consider Tan's reply to the worry that Rawlsmopolitanism would be excessively interventionist due to its global commitment to full liberal rights:

Whether a society that fails the test for toleration [i.e. respects liberal rights] is to be intervened against is a further question (of enforcement) that brings into play other pragmatic and moral considerations (including the common considerations in just war theories). This distinction between making a judgment and acting on that judgment... gives cosmopolitans a way around the criticism that a cosmopolitan conception of toleration would be too interventionist. Cosmopolitans can recognize that while many societies are lamentable and open to criticism for their failure to respect individual rights and liberties, intervention is not necessarily the best strategy for protecting these rights and liberties, or even a morally acceptable course of action (if the intervention would violate the moral limits of just war). *A global basic structure informed by the cosmopolitan ideal therefore need not diverge in practice from Rawls's Law of Peoples...* The main difference, however, and not an insignificant one, is that the cosmopolitan position will set higher ideals for a just society of peoples to aspire to.<sup>163</sup>

Tan's claim here seems to be that it would be counter-productive to enforce many Rawlsmopolitan human rights, and that it would only be worthwhile to enforce such rights in roughly the same circumstances as those called for by Rawls's global theory, and thus also by Global Justice as Fairness. This is a rather dubious claim, however. There doesn't seem to be anything impractical or counter-productive<sup>164</sup> about, say, placing mild economic sanctions on states that fail to ensure the fair value of the political liberties (perhaps due to a lack of reasonable campaign finance laws), or barring states from certain positions in global institutions if their citizens do not enjoy fair equality of opportunity. Global Justice as Fairness would clearly reject such measures, but there

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<sup>163</sup> Kok-Chor Tan, "The Problem of Decent Peoples," in *Rawls's Law of Peoples: A Realistic Utopia?*, ed. Rex Martin & David A. Reidy (Malden, MA: Blackwell Publishing, 2006), 91-92 (emphasis added)

<sup>164</sup> Of course some standard of proportionality would need to be met for any such sanctions.

seems to be no Rawlsmopolitan reason not to thus use the global basic structure to encourage compliance with liberal/human rights.

The main point here is that there is no reason to assume that the only rights it would be practical to enforce would be the ones that, by Global Justice as Fairness's lights, are not specifically liberal rights. But let us grant Tan this assumption, and concede that there would be little difference between his Rawlsmopolitan view and Global Justice as Fairness in practice. Assuming that Tan finds the extent of human rights enforcement under Global Justice as Fairness to be the most intuitive, we have to ask: why not prefer a theory, such as Global Justice as Fairness, that matches that intuitive judgment in a principled manner, over the Rawlsmopolitan position, on which this alignment of intuition and theoretical result is (at best) a happy coincidence? I suspect the answer has nothing to do with human rights at all, but rather with what seems to be the Rawlsmopolitans' primary objective—to extend the difference principle to the global context. Since it would make little sense to argue that only the difference principle, and not the rest of Rawls's principles of domestic justice, is applicable globally, Rawlsmopolitans seem to grudgingly accept a very inflated conception of human rights, and then appeal to the impracticality of enforcing such rights in order to bring that conception into rough (practical) alignment with our standard intuitions about human rights.

#### *4.5 Contra Tan on Comprehensive Liberalism*

We will consider whether this price is worth paying for a global difference principle later. First, we should consider a much more principled reason to accept the

Rawlsmopolitan view of human rights, namely, a commitment to comprehensive liberalism. As Tan himself aptly notes (albeit in a different context),

to put too much weight on the problem of enforceable international law obscures (by pushing back a step) the real dispute between Rawls and the cosmopolitans... In Rawls's view, justice among peoples should differ from justice within a state... because he thinks the scope of reasonable pluralism ought to be broadened in the global context.<sup>165</sup>

Ignoring interpretive questions about *The Law of Peoples*, the point can be put in terms of our present concern with the choice between Rawlsmopolitanism and Global Justice as Fairness: while Global Justice as Fairness is a *political* conception of *global* justice (i.e. an analogous application of the methodology of political liberalism to a *distinct* global context), Tan's account is a *comprehensive* conception of liberalism. According to the latter, a commitment to liberal rights domestically demands a commitment to liberal rights globally as well. While this may do some violence to common intuitions about human rights, Tan might say, it is a small price to pay for avoiding the inconsistency inherent in the framework of political liberalism.

The first thing to point out here is that, unlike Rawls's law of peoples, Global Justice as Fairness is *not* an extension of a domestic theory of liberal justice—this is one of the principal attractions of the theory. Thus there need be no inconsistency whatsoever between defending Global Justice as Fairness and defending *any* particular conception of domestic justice, liberal or otherwise, unless of course that conception is unreasonable by the lights of Global Justice as Fairness. While this is analogous to the way accepting political liberalism is consistent with adherence to nonliberal (but reasonable) conceptions of the good, it must be kept in mind that it is merely an analogy. Hence the

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<sup>165</sup> Tan, *Justice Without Borders*, 81-82

following remark from Tan, while it may apply to Rawls's global theory, does not apply to Global Justice as Fairness: "To be consistent with its own fundamental commitments, a *liberal* Law of Peoples has to take a stance against nonliberal hierarchical societies."<sup>166</sup> While it employs the basic approach of political liberalism, Global Justice as Fairness modifies that approach for the global context, and it would be misleading at best to describe it as a "liberal" theory. It is, like political liberalism, a *political* conception of justice (in the sense described above), but unlike political liberalism, it is (exclusively) concerned with *global* justice, and it does without the central structural feature of (Rawlsian) liberalism—the conception of persons as free and equal.

Of course, if one is sympathetic to the methodology of Global Justice as Fairness, then one is also quite likely to be sympathetic to political liberalism (and hopefully *vice versa*). Furthermore, since some of Tan's objections to political liberalism, if successful, would also apply to Global Justice as Fairness, it will be useful to examine his critique. While a full-scale defense of political liberalism's superiority to comprehensive liberalism is well beyond the scope of the present work, we must at least be assured that Global Justice as Fairness has the resources to make a compelling case. This task is especially urgent because I take Rawlsian liberalism, and the comprehensive liberalism that underwrites it, to be the most consistent and theoretically plausible alternative to Global Justice as Fairness.

We first need to be clear about what, exactly, comprehensive liberalism is. Recall that there are two primary ways moral doctrines can be comprehensive in Rawls's sense: they can apply beyond the subject of the basic structure, and they can claim truth for

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<sup>166</sup> Tan, *Justice Without Borders*, 79

themselves. Political conceptions of justice, by contrast, are supposed to be free-standing, doing without the concept of truth and developing an internal notion of reasonableness that is, in the domestic case, independent of any particular conception of the good, and in the global case, independent of any particular conception of domestic justice. Thus political liberalism eschews any anchoring in ethical theory or fundamental philosophical positions, and Global Justice as Fairness goes even further by unmooring itself even from domestic political theory. The former concerns itself exclusively with what Tan refers to as "political autonomy," and we can say that the latter is concerned solely with the "political autonomy" of peoples. By contrast,

comprehensive liberalism is concerned also with the ethical autonomy of persons. In other words, because it remains grounded on this comprehensive moral commitment to autonomy, comprehensive liberalism maintains that the value of autonomy holds in all areas of society and that the state should therefore protect and promote individual autonomy throughout.<sup>167</sup>

Comprehensive liberalism thus develops principles of justice from a foundational moral and philosophical view, whereas political conceptions of justice work up principles from ideas familiar from or implicit in the relevant public political culture.

The example of the internal workings of churches will highlight the differences between these two views. Political liberalism regards the internal workings of religious associations as outside the scope of the political, and thus beyond the (direct) purview of domestic justice. Tan, however, holds that "a religious community whose internal institutional structure prevents women from holding high office within the community and hence effectively bars them from its decision-making processes... fails to meet liberal

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<sup>167</sup> Tan, *Toleration, Diversity, and Global Justice*, 49

standards."<sup>168</sup> According to comprehensive liberalism, the state should oppose these practices and "deem such matters appropriate political concerns."<sup>169</sup> While Tan would be quick to point out that there is an important gap between making a judgment and acting on it, this would likely be of little comfort to, for example, the millions of Catholics whose internal affairs comprehensive liberalism opposes and regards as an appropriate object of political concern.

This example clearly demonstrates that comprehensive liberalism is a stronger view than political liberalism, in that it makes the scope of appropriate political concern much greater. Presumably this would make achieving a consensus on principles of justice much more difficult for the comprehensive liberal. There seems to be no room for the notion of an overlapping consensus within comprehensive liberalism, and it is unclear whether such views can embrace the practical task of political philosophy discussed above. As a comprehensive doctrine, liberalism insists that the moral value of individual autonomy holds universally, and cannot tolerate opposing conceptions of the good.

Why would we prefer a stronger theory with less prospects for general acceptance over a weaker one with broader appeal? Presumably the answer would have to do with how compelling the fundamental moral and philosophical arguments that support comprehensive liberalism are. Unfortunately, Tan does not provide us with those arguments. Instead, he merely tries to show that political liberalism must also, in the end, provide similarly foundational moral and philosophical arguments, and thus has no advantage on this front. He further contends that political liberalism, to its detriment and contrary to his (comprehensive) liberal nationalism, cannot embrace group rights. We

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<sup>168</sup> Tan, *Toleration, Diversity, and Global Justice*, 50

<sup>169</sup> Tan, *Toleration, Diversity, and Global Justice*, 50

will consider these arguments in turn; although the first is directed at a much deeper point of contention, the latter will give us an opportunity to return to the specific subject of human rights.

Tan's fundamental critique of political liberalism is that it does not have the resources to respond to illiberal objectors. When liberalism itself is fundamentally challenged by illiberal views, according to Tan, the political liberal must cut argument short, since she cannot appeal to any comprehensive doctrines. The comprehensive liberal, by contrast, can freely pursue arguments with such objectors, claiming that the objector's moral principles are false while his moral principles are true. Tan finds the following passage from Rawls especially objectionable:

The idea of the politically reasonable is sufficient unto itself for the purposes of public reason when basic political questions are at stake. Of course, fundamentalist religious doctrines and autocratic and dictatorial rulers will reject the ideas of public reason and deliberative democracy. They will say that democracy leads to a culture contrary to their religion, or denies the values that only autocratic or dictatorial rule can secure. They assert that the religiously true, or the philosophically true, overrides the politically reasonable. We simply say that such a doctrine is politically unreasonable. Within political liberalism *nothing more need be said*.<sup>170</sup>

Tan would, rightly, add that nothing more *can* be said, given the strictures of public reason. He lays out his interpretation and critique of the above passage this way:

What [Rawls] means is that these antiliberal views are to be put down or contained without further justification or explanation. This avoidance of appealing to liberal comprehensive views to warrant the putting down of these challenges, it seems then, is for the sake of democratic legitimacy—the state should offer only reasons that its citizens can reasonably accept.

But this strategy of avoidance seems to me to, ironically, violate a most basic criterion for democratic legitimacy: that the state offers *some* justification for its actions, even if these are *self*-justificatory ones. It has to explain why unreasonable views are unreasonable and therefore deserving of the sanction of the state. It has to show how these challenges violate the bounds of public reason

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<sup>170</sup> Rawls, *The Law of Peoples*, 178 (emphasis added)



as determined by the liberal political culture of the state, and *why* that political culture is worth defending and preserving. At this point, I have argued, the liberal state has to invoke certain philosophical claims to back its judgments and sanctions, and not simply pass and enforce them in silence.<sup>171</sup>

There are several confusions here.

First, Tan seems to think that justification for state actions *must* come in the form of a comprehensive doctrine. This simply begs the question against the conception of justification employed by political liberalism and Global Justice as Fairness. Tan gives no argument to actually show that only doctrines that make appeals to ultimate philosophical truth and/or moral principles that apply beyond the basic structure to all areas of human life are capable of providing acceptable reasons to citizens. It seems perfectly obvious that a political liberal state *would* offer "self-justificatory" reasons for its actions, rooted in the value of reasonableness. This is a far cry from merely declaring all unreasonable doctrines to be such, and proceeding to "put down" such doctrines "without further justification or explanation."

Furthermore, it seems that these very same criticisms can be applied to comprehensive liberalism as well. What is the comprehensive liberal to do when her comprehensive moral doctrine is questioned by the illiberal objector? Perhaps she should read aloud from Mill or Kant until the objector concedes that the value of ethical autonomy and the attendant principles of liberal morality have been philosophically demonstrated to be true. Or perhaps the comprehensive liberal should instead use the critical power of philosophy to prove to the objector that his comprehensive doctrine is false. Surely, Tan seems to think, the illiberal objector will be much more satisfied with such a defense of the liberal state's actions. But why? Disagreement will obviously

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<sup>171</sup> Tan, *Toleration, Diversity, and Global Justice*, 58

persist even in the face of the (unspecified) philosophical defense of comprehensive liberalism. Should the comprehensive liberal then declare that these conflicting views "are to be put down or contained without further justification or explanation?"

All arguments have to start and end somewhere. Those of political liberals will terminate once the very notion of reasonableness proves to be beyond the scope of agreement. Those of comprehensive liberals must end once the value of ethical autonomy (or whatever) is directly questioned. Unless we are under the spell of an absurd Cartesian fantasy according to which we can take indubitable premises and deductively demonstrate the truth of liberal moral/political principles, the comprehensive liberal will at some point have to "merely" insist that her principles are the true ones, and that the liberal state's actions are justified. The state will presumably then go on making "its judgments and sanctions" and "pass and enforce them in silence." The point is that the dreaded "silence" will always be reached at some point, and it is far from obvious that the comprehensive liberal's stopping point is any better than the political liberal's.

Indeed, it seems to me that the political liberal is in a better position here, not a worse one. Consider the unreasonable and illiberal religious fundamentalist. Political liberalism invites such an objector to consider that his comprehensive view cannot reasonably be accepted by all citizens, without making any philosophical or moral claims that directly undermine or fundamentally conflict with that doctrine. The value of toleration and the practical need for broad agreement will be emphasized. If this doesn't work, there is nothing more to be said. For the comprehensive liberal, there is *much* more to be said. The objector's moral and religious views will come under direct scrutiny. If the objector cannot be brought to see the fundamental value of individual

autonomy and the truth of liberal moral principles, then presumably the argument will move on to metaethical questions or the merits of various philosophical theories of truth. Or perhaps the objector's religion itself could be shown to be false with the appropriate metaphysical arguments. Only once all of these avenues are exhausted can the comprehensive liberal stop trying to justify the actions of the liberal state.

Once the silence is reached, which approach will have better respected the demands of "democratic legitimacy" and offered more adequate reasons to the illiberal objector? I suggest it is political liberalism. Once the comprehensive liberal is through attempting to justify the actions of the liberal state, the illiberal religious fundamentalist will rightly view the liberal state as hostile to her comprehensive moral and religious views, including her personal conception of the good. The political liberal, by contrast, expresses no such fundamental hostility. The objector to political liberalism will view the state as hostile to the objector's lack of tolerance and efforts to use state power in the name of his comprehensive doctrine—in other words, the objector will know that the state views him as unreasonable. Under comprehensive liberalism, objectors' entire worldviews are open to official declarations of falsehood. I simply fail to see how comprehensive liberalism has any advantage here.

This isn't perhaps quite fair to Tan's critique. As we saw, he insists that the liberal state explain "*why* that political culture is worth defending and preserving." The methodology of political liberalism (and thus of Global Justice as Fairness) identifies liberal (or global) political culture as a starting point, and the implicit ideas and ideals of that culture are not taken to be conclusions of further and more fundamental moral arguments. Comprehensive liberalism rejects this approach, and includes such further

layers of argument in the appropriate justification of its political principles. But this merely pushes the problem, if we take it to such, back a step. Just as Tan demands an explanation for why the political culture of a liberal society is worth defending and preserving, can we not similarly demand an explanation for the worth of an ethical theory rooted in individual autonomy? Again, at some point explanations will run out, and thus "democratic legitimacy" cannot depend on being able to give reasons that will ultimately force all detractors into logical inconsistency, patent irrationality, or the denial of self-evident (or "self-justificatory") truths.

The fundamental question is where we want to stop the regress of justification for the purposes of a theory of justice. Political liberalism aims to narrow the range of disagreement by limiting the domain of the political and demanding the (non-exclusive) use of public reason, requiring justification for principles that are acceptable to any reasonable comprehensive doctrine. In this way it expresses the fundamental value of toleration and pursues what Rawls calls the "practical role" of political philosophy. Comprehensive liberalism, by contrast, has no direct concern for agreement, and indeed greatly expands the scope of possible disagreement by committing itself to fundamental moral and philosophical doctrines that are at odds with many doctrines that political liberalism deems reasonable.

Still, we may think all this added philosophical machinery is a price worth paying for the more robust content that can be gotten from comprehensive liberalism. This is especially true in the global context, since domestically political and comprehensive liberalism seem to have somewhat similar content, whereas the differences between comprehensive liberalism and Global Justice as Fairness are potentially much more

dramatic. However, we should recall that, at least as far as human rights go, Tan concedes that there will not be much of a practical difference between his view and Rawls's law of peoples. Since Global Justice as Fairness's conception of human rights is a bit more robust than Rawls's, the practical differences with Tan's view are presumably all but imperceptible. So the high theoretical cost of comprehensive liberalism only affords (supposed) theoretical advantages, with no practical upshot. Global Justice as Fairness is theoretically simpler, holds out promise of much broader consensus, and allegedly will not differ from Tan's comprehensive liberalism in practice, at least as far as human rights are concerned. The differences between these two views regarding global distributive justice may still be big enough to tempt us toward comprehensive liberalism; I will cast doubt on that claim later.

#### *4.6 Contra Tan on "Cultural" Rights*

If we consider the details of Tan's conception of liberal/human rights, however, we will actually see that there *is* a practical difference between his view and Global Justice as Fairness, and the difference does not favor comprehensive liberalism. Tan's account of group rights, which he thinks political liberalism is deficient in ignoring, actually introduces a great deal of indeterminacy into Tan's view. No similar indeterminacy plagues Global Justice as Fairness, so Tan's second argument against political liberalism actually turns out to support Global Justice as Fairness.

Tan's criticism of political liberalism with respect to group rights does not mark a fundamental contrast between comprehensive liberalism and Global Justice as Fairness, since many comprehensive liberals reject group rights, along with the nationalist claims Tan employs to ground them. However, not only does this criticism highlight a

difference between Tan's and Global Justice as Fairness's accounts of human rights, but it also affords an opportunity to clarify the role of culture in Global Justice as Fairness. It is thus worth examining, although not in any thorough manner; the following discussion will thus be rather sketchy.

One may have thought that the Rawlsmopolitan position would at least have a theoretical advantage over theories like Global Justice as Fairness in that it avoids any commitment to collectivities such as peoples. Indeed, Tan himself derides the "(Hegelian) metaphysical conception of the state... as a moral person [i.e. agent]"<sup>172</sup> that is central to a morality of states (such as Global Justice as Fairness). In other words, one would have thought that the Rawlsmopolitan position would have the advantage of a leaner ontology, one that jettisoned collectivities and focused exclusively on individuals. We should keep in mind that a relatively streamlined ontology can only help decide between theories of comparable scope and content. Since radically individualistic cosmopolitan positions cannot take into account the interests of states and deny their moral importance as global actors, their leaner ontologies are not, in my view, worth the price. Tan's Rawlsmopolitanism, however, is not such a theory. While his version of cosmopolitanism is able, at least to some extent, to recognize the importance of collectivities, it can only do so by expanding its ontology. While Global Justice as Fairness has an ontology of peoples (as civilities), Tan's ontology crucially includes nations, or national cultures.

By embracing liberal nationalism, and the attendant ontology, Tan sacrifices some theoretical simplicity for the sake of grounding group rights. Chief among these group

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<sup>172</sup> Tan, *Justice Without Borders*, 36

rights is that of self-determination, the value of which is firmly entrenched in Global Justice as Fairness. Tan's claim that political liberalism is unable to recognize group rights is thus of no direct concern for our purposes—we are here only concerned with the global context, and Global Justice as Fairness clearly grants rights to peoples. If Tan's Rawlsian cosmopolitanism has an advantage here, it will have to be found either in the grounding or specific content of his group rights. I will very briefly argue that grounding group rights in national cultures is less appealing than grounding them in civilities, and that the particular group rights that Tan defends introduces undesirable conflicts among rights that Global Justice as Fairness is able to avoid.

The value of some form of collective self-determination is very widely acknowledged, and only the more radical cosmopolitan positions reject it outright. While they cannot directly account for collective self-determination, less radical cosmopolitans can do so indirectly by appealing to its importance for individuals. As Tan puts it:

Liberal nationalists accept that the right to national self-determination is a universal right of all nations, and that the reason why national self-determination is important is not because the nation itself enjoys a certain transcendental moral worth, but because of the value of nationality for individuals. ...liberal nationalists take membership in a national culture to be an important liberal good because culture provides individuals with the context of choice within which to form, pursue, and revise their conceptions of the good.<sup>173</sup>

Although I would quibble with the description of peoples' moral worth as "transcendental," Global Justice as Fairness certainly conceives of peoples as collective moral agents, whose freedom and equality provides the starting point for principles of global justice. Peoples' pursuit of their (reasonable) conceptions of domestic justice are of the utmost importance from the perspective of Global Justice as Fairness, although

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<sup>173</sup> Tan, *Justice Without Borders*, 99

there is no reason to think that this importance does not ultimately derive from the importance this has for the individuals who comprise them. There is thus no difficulty in accounting for the value of collective self-determination; for "moralities of states" such as Global Justice as Fairness, the pressing problem is rather how to limit the claims made in the name of this value.

Tan's position has the opposite difficulty—the case for collective self-determination must be made without any appeals to group agency or the pursuit of collective goals. Even if we grant that membership in a "national culture" is very important for individuals, why does this necessitate granting rights of self-determination to these national groups? Tan's answer seems to be that without such rights, national cultures cannot protect themselves from more dominant or pervasive cultures. The worry is not that without such rights, groups will not be able to realize their conceptions of domestic justice, but rather that their "national cultures" will be put at risk.

At this point we need to be clear about what Tan means by 'nation.' If we took "nations" to be peoples in Global Justice as Fairness's sense, there would be no conflict here. However, Tan is quite clear that "nations" are not the sort of purely political group agents that civicities are, as the following passage makes quite clear.

It is the cultural component of nations that makes them the relevant social units for liberals. Nations constitute what Kymlicka calls "societal cultures," namely cultural communities "whose practices and institutions cover the *full range of human activities*, encompassing both public and private life." In a similar vein, Raz calls nations "encompassing groups" with "pervasive cultures." Individuals find in their nationality "a culture which shapes to a large degree their tastes and opportunities, and which provides an anchor for their self-identification and the safety of effortless, secure belonging." ...it is exactly the cultural features of nations that the rights of peoples aim to protect and promote.<sup>174</sup>

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<sup>174</sup> Tan, *Toleration, Diversity, and Global Justice*, 114



So national self-determination, on this view, is needed to protect national groups' "pervasive cultures," without which individuals would lack "self-identification" and "secure belonging," as well as the crucial "context of choice" without which ethical autonomy could not be exercised. Yet the alleged importance of these cultures still does not show that nations should have rights of self-determination, since it is surely possible for national cultures to coexist alongside others within the same domestic basic structure.<sup>175</sup> So far, all we have is a reason to protect the rights of individuals to participate in the cultural life of their "nation."

To fill this lacuna, Tan goes on to describe an institutional facet of nationalism. "Self-determination, in its most fundamental interpretation, is a claim for a public political sphere in which a nation's cultural identity can be expressed, reflected, and fostered."<sup>176</sup> We must apparently add that it is a claim for an *exclusive* "public political sphere," since again, it is presumably at least possible for multiple national cultures to coexist within the single such sphere. Tan makes this clear when he insists on "the securing and maintaining of a relatively autonomous set of public and nationalized *institutions*, in one appropriate form of political arrangement or another, so that a given national culture may be publicly expressed and fostered."<sup>177</sup> Once again, however, this does not actually explain the need for such exclusive political institutions, since national

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<sup>175</sup> This should not be taken to suggest that any actually existing national culture could practically exist alongside any other actually existing national culture. The claim here is merely that well-ordered multicultural states are possible (presumably, the US is a relatively uncontroversial example of this).

<sup>176</sup> Tan, *Justice Without Borders*, 91

<sup>177</sup> Tan, *Justice Without Borders*, 92

cultures seem capable of being "publicly expressed and fostered" even in the absence of such institutions.

By contrast, Global Justice as Fairness's peoples are assumed to have their own domestic basic structures, because it is only through such structures that a domestic conception of political justice can be realized. In short, peoples need their own governments in order to realize their collective agency as civicities. Since Tan's cosmopolitanism cannot tolerate claims to collective agency, his right to national self-determination needs further defense. This defense will only emerge once we consider the particular rights that Tan grants to nations.

The function of group rights, for Tan, is to "protect the preconditions for the proper exercise of individual autonomy,"<sup>178</sup> which are uniquely provided by national cultures. These cultures, he claims, compete on an unfair playing field, since "richer societies are better able to market and export their 'cultural products' [and] cultures of rich nations are associated with a life of security, comfort, and affluence, which is especially appealing to poor societies sorely lacking even basic needs."<sup>179</sup> It is this "unfair" global cultural marketplace that provides the underlying rationale for group rights on Tan's view, including the right to self-determination: "Because of this inequality in the capacity of nations to disseminate and sustain their cultures, there is a need to grant some people special cultural rights in order to help protect and sustain their ways of life and identities."<sup>180</sup> These "special cultural rights" include "positive" rights to financial support from rich countries for the maintenance of poorer national cultures, as well as the

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<sup>178</sup> Tan, *Toleration, Diversity, and Global Justice*, 126

<sup>179</sup> Tan, *Toleration, Diversity, and Global Justice*, 120

<sup>180</sup> Tan, *Toleration, Diversity, and Global Justice*, 121

active dissemination of poorer cultures into richer ones. I mention these only to highlight the contrast between Global Justice as Fairness and Tan's Rawlsmopolitanism—Global Justice as Fairness clearly has little room for such "positive" cultural rights.<sup>181</sup>

With respect to the need for self-determination, the relevant group rights are those that allow national cultures to insulate themselves from the influence of foreign cultures. These rights, along with the rights to assistance just mentioned, are what Tan (following Kymlicka) calls "external protections," in contrast to "internal restrictions." External protections shield national cultures from others, and it is presumably such protections that give rise to the need for national self-determination. Internal restrictions, on the other hand, are measures adopted within a particular national culture that deny certain freedoms to its individual members. Tan rejects (almost) all internal restrictions as incompatible with his comprehensive liberalism, since such restrictions "not only do not protect the context of choice of individuals but, worse yet, they deny members the very right to make choices, including choices regarding the context itself."<sup>182</sup> While external protections are, for Tan, crucially important, internal restrictions are antithetical to liberalism's core commitments.

Regardless of what one thinks of the merits of external protections for national cultures, the problem here is that they are difficult to differentiate from internal restrictions. The distinction is clear enough in theory, but it is difficult to see how the value of individual autonomy can both call for external protections while denouncing

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<sup>181</sup> This does not mean that Global Justice as Fairness rejects all such rights outright. Tan also cites historical injustices (such as colonialism) as support for certain "positive" cultural rights, and Global Justice as Fairness can happily admit such rights as a matter of nonideal theory. Issues of redress do not show the need for continual "balancing" of the "cultural marketplace," however.

<sup>182</sup> Tan, *Toleration, Diversity, and Global Justice*, 125

internal restrictions. The basic point is that protecting the "context of choice for individuals" seems to be in tension with protecting "communal institutions and practices... from the decisions of outsiders or their influences."<sup>183</sup> The sorts of external protections most closely connected with self-determination would presumably be things like "permitting some countries to impose quotas on cultural imports threatening to drown out their local cultures."<sup>184</sup> The point of such protections is clearly to minimize the exposure of a culture's members to other cultures. How can this be construed as anything other than restricting the scope of individual choice? Do these external protections not straightforwardly "deny members the very right to make choices regarding the context itself?" Is it really plausible to hold that ethical autonomy cannot properly be exercised unless one's "context of choice" is insulated from exposure to foreign cultures?

National cultures, according to Tan, are so important because they are important to individuals. Presumably, if individuals truly place so much importance on their national cultures, then they would not be easily tempted by "outside influences" to abandon them (or otherwise threaten their existence by whatever means Tan's external protections aim to avoid). It is hard to see how external protections don't simply restrict the available choices of some so that others might continue to enjoy their "communal institutions and practices" without having to tolerate dissenters within their midst. Perhaps many individuals are simply blind to the existential threat that other cultures pose to their "context of choice," and thus the group, knowing better, preempts such moral calamities from befalling its members. If so, then why not have internal

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<sup>183</sup> Tan, *Toleration, Diversity, and Global Justice*, 125

<sup>184</sup> Tan, *Toleration, Diversity, and Global Justice*, 121

restrictions as well? If a national culture is the only way to have a genuine "context of choice" that is a precondition for the exercise of ethical autonomy, then why not accept internal restrictions as well as external protections?

To be fair, Tan acknowledges that this tension between external protections and internal restrictions will sometimes arise, generating a moral dilemma. In these cases, he admits, some internal restrictions may be necessary. However, he claims that these cases will be very rare, and thus we "are not forced to abandon the idea of collective rights just because they may conflict in practice with individual rights."<sup>185</sup> Of course rights can sometimes conflict, but obviously a theory of global justice should at least try to minimize such conflicts. It is thus a *prima facie* advantage of Global Justice as Fairness that it excludes such cultural rights while still affirming collective self-determination. It is also worth noting that, compared to Global Justice as Fairness, Tan's account provides a rather tenuous basis for self-determination, following the serpentine argument from ethical autonomy to contexts of choice, national cultures, and finally external protections.<sup>186</sup>

Clearly, I am not sympathetic to Tan's appeals to national cultures, and this is reflected in Global Justice as Fairness's exclusion of the attendant cultural rights he defends. I am also far less optimistic than Tan that the conflicts between such rights and individual rights will in practice be "rare." This is not the place to properly defend either

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<sup>185</sup> Tan, *Toleration, Diversity, and Global Justice*, 127

<sup>186</sup> For a different critique of Kymlicka's account (which Tan largely follows), see Steven Wall, "Collective Rights and Individual Autonomy," *Ethics* 177, no. 2 (2007): 241-244. The (comprehensive) liberal argument Wall goes on to give for collective rights focuses on political autonomy specifically, and his account of collective self-determination is, in broad strokes, supportive of Global Justice as Fairness's insistence that peoples ought to have their own domestic basic structures. See Wall, "Collective Rights and Individual Autonomy," 245-264.

of these attitudes, however. I have raised some doubts about the plausibility of Tan's liberal nationalism, and shown that his inclusion of group rights creates the potential for conflicts among rights—conflicts Global Justice as Fairness avoids. Furthermore, I have shown that the only way for Tan's version of Rawlsmopolitanism to account for collective self-determination is to embrace an ontology of national cultures, which seem to have just as much "transcendental moral worth" as Global Justice as Fairness's peoples do. In short, if cultural rights are even worth defending at all, they are not worth the price to be paid in terms of theoretical coherence, and they eliminate any ontological advantage cosmopolitanism might have been thought to have over moralities of states.

Denying a role for national cultures does not, however, mean that Global Justice as Fairness places no value on any aspect of culture or the "context of choice" it provides. As we saw, Global Justice as Fairness's first principle explicitly recognizes the importance of individuals' ability to form and revise their conceptions of domestic justice, which in turn requires the protection of their ability to form and revise their conceptions of the good. Also essential to Global Justice as Fairness is the development and protection of a lively and open political culture, which provides the very basis of a people's shared conception of domestic justice, and is crucial to the exercise of their indirect collective agency via their representatives in government. Finally, collective self-determination is clearly entrenched in Global Justice as Fairness, since it affirms the need for peoples to have their own political institutions.

The major difference between Global Justice as Fairness and Tan's Rawlsmopolitanism goes back to the foundational issue of comprehensive liberalism: for Global Justice as Fairness, it is *political* culture that is of paramount importance, while

other aspects of culture are at best only of indirect moral significance; on Tan's view, all of culture is within the purview of political concern, because his theory of justice is rooted in a moral concern for ethical autonomy in *all* aspects of individuals' lives. I have tried to suggest here that the great theoretical costs make the addition of a small class of culturally-based human rights, which also promise at least the occasional conflict with other rights, unappealing. The only remaining potential advantage of Rawlsmopolitanism (and the comprehensive liberalism that underlies it) over Global Justice as Fairness concerns global distributive justice. We will return to Rawlsmopolitanism when we take up the subject of the global basic structure. Before doing so, however, we will briefly take up the non-Rawlsian accounts of human rights offered by Beitz and Pogge.

#### 4.7 Contra *Beitz & Pogge*

The motivation for discussing the recent non-Rawlsian accounts of human rights offered by Beitz and Pogge is, in large part, to indicate the surprising convergence of these accounts with Global Justice as Fairness's. The convergence is surprising because both authors previously embraced explicitly Rawlsmopolitan theories of global justice,<sup>187</sup> and their names are almost always the first mentioned in discussions of globalizing Rawls's domestic theory. The convergence is not limited to the content of human rights either—perhaps more interesting is the convergence on the understanding of the concept of human rights. Even more surprising is the fact that both authors incorporate significant aspects of the later Rawls's distinctly political conception of justice, particularly the practical role of political philosophy, shared by Global Justice as

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<sup>187</sup> See Beitz, *Political Theory and International Relations* and Thomas Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989).

Fairness. This indicates certain concessions to political liberalism which, as we saw above, is anathema to Tan's Rawlsianism.

I will not make a sustained effort to substantiate these claims of convergence,<sup>188</sup> since doing so would be largely tangential to the present task of showing the comparative advantages of Global Justice as Fairness to rival accounts. Instead, I will briefly highlight the differences and only the most crucial similarities between Global Justice as Fairness and the accounts of Pogge and Beitz. In particular, I will suggest that both authors' accounts, while significantly different, suffer from a common deficiency—they are both theoretically isolated from other issues of global justice. Both offer theories of human rights that are distinctly *not* components of broader theories of global justice, and thus represent undesirable failures of holism of the sort of which Buchanan has complained. Since Global Justice as Fairness incorporates most of the features of Beitz's and Pogge's accounts of human rights while also addressing other, and importantly connected, issues of global justice, I will conclude that we ought to prefer Global Justice as Fairness to their theories. Furthermore, I will suggest that even by the lights of their own criteria, Global Justice as Fairness outperforms these rival views.

We will look at Beitz's theory of human rights first, since it is more explicitly aligned with Rawls's basic approach, and thus closer, in both content and conception, to Global Justice as Fairness. Beitz is also much more explicit in his rejection of holism: "A theory of human rights is not a theory of ideal global justice."<sup>189</sup> His approach is an intentionally narrow one, focused on the "discursive and political" practice of human

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<sup>188</sup> See Beitz, *The Idea of Human Rights*, esp. chs. 5 and 7, and Pogge, *World Poverty and Human Rights*, esp. sec. 1.6 and essay 2.

<sup>189</sup> Beitz, *The Idea of Human Rights*, 128



rights. This "practical approach" "tries to grasp the concept of a human right by understanding the role this concept plays within the practice."<sup>190</sup> By taking contemporary global practice as a starting point, Beitz embraces a position very much in line with the political conception of global justice, with its emphasis on the practical role of political philosophy, employed by Global Justice as Fairness and Rawls (in his later works). The primary difference here is that Global Justice as Fairness's starting point, global public political culture, is significantly broader than the global practice of human rights.

Beitz also seems to embrace another controversial aspect of political conceptions such as Global Justice as Fairness—the importance of the possibility of overlapping consensus. He contends that the authors of contemporary human rights practice

disowned the thought that human rights are the expression of any single conception of human nature or human good or of any but the most general understanding of the purposes of human social organization. They took it as an ineliminable fact that people would differ about these matters. They therefore aspired to a doctrine that could be endorsed from many contemporary moral, religious, and cultural points of view and that was suited to be implemented by means distinctive to characteristically modern forms of social organization. The approach that takes human rights as the expression of a received philosophical idea risks missing this feature of international human rights.<sup>191</sup>

Although it is derived from contingent features of the practice rather than from the methodology of international political theory, the commitment to an overlapping consensus indicates a deep affinity between Beitz's approach to human rights and Global Justice as Fairness. This passage even seems to acknowledge something like the fact of reasonable global pluralism, as long as we construe liberal conceptions of domestic justice as expressing a "conception of human nature" (invoking ethical autonomy or the freedom and equality of persons), or as more robust than merely "the most general

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<sup>190</sup> Beitz, *The Idea of Human Rights*, 8

<sup>191</sup> Beitz, *The Idea of Human Rights*, 8

understanding of the purposes of human social organization." It is worth noting that Beitz does not go on to appeal to any such "general understanding" of social organization, while Global Justice as Fairness does precisely this by employing the notion of a civicity.

Beitz's "practical" approach also leads him to explicitly embrace a statist view of human rights, insofar as they "apply in the first instance to states, and they rely on states, individually and in collaboration, as their principal guarantors."<sup>192</sup> While he does not claim that (anything like) the current system of states is acceptable from the perspective of ideal international political theory, the practice of human rights as we know it presupposes the existence of such a system, and thus so does his theory. The states system, by granting significant domestic autonomy to state governments, generates the permanent possibility of internal tyranny; the practice of human rights emerged in response to this threat. Within this context, Beitz suggests something akin to an original position argument for human rights: "an informal thought experiment" in which we are "to choose principles for a 'society of states.'"<sup>193</sup> Of a global political order structured as ours in fact is, he asks

under what conditions it would be reasonable to accept and support it. If we assume that it is reasonable to care about protecting one's most important interests against predictable forms of official abuse and neglect, then, recognizing that the global order disposes a capacity for self-regulation, it seems, *prima facie*, that a condition of its acceptability would be the establishment of an apparatus by which the domestic jurisdiction of states could be limited and its exercise regulated so as to guard against such a threat. A global practice of human rights might be understood as such a precautionary apparatus.<sup>194</sup>

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<sup>192</sup> Beitz, *The Idea of Human Rights*, 128

<sup>193</sup> Beitz, *The Idea of Human Rights*, 130

<sup>194</sup> Beitz, *The Idea of Human Rights*, 131

It should be clear that this basic conception of the function of human rights, as well as the thought experiment invoked to support it, are very similar to human rights as conceived by Global Justice as Fairness. Although Beitz's statism is merely a concession to reality, and his thought experiment is posed to persons rather than peoples, the fundamental conception he offers is very much akin to that offered by Global Justice as Fairness. Global Justice as Fairness's foundational commitment to collective self-determination, reflected in its appeal to peoples, yields a more principled result while simultaneously providing greater grounds for confidence in the possibility of a broad overlapping consensus.

In spite of this convergence on the function, practical foundation, and statist aspects of human rights, Beitz's theory suffers from a significant degree of indeterminacy, which Global Justice as Fairness is able to avoid. This indeterminacy stems from two sources: his claim that the interests protected by human rights are irreducibly pluralistic, and his separation of human rights from broader considerations of global justice. We will briefly look at each of these features of Beitz's theory, and the relative clarity provided by Global Justice as Fairness.

Very generally, Beitz's denial that "human rights are best understood as protecting or deriving from a single underlying interest or value"<sup>195</sup> leaves the content of his conception of human rights rather vague. His denial of such an underlying value derives from his rejection of naturalistic theories of human rights that focus on features of human beings "as such," such as autonomy-based or basic needs/capabilities approaches. However, Global Justice as Fairness is not such a theory; indeed, it agrees

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<sup>195</sup> Beitz, *The Idea of Human Rights*, 138

wholeheartedly with his rejection of such views. His worries about such theories don't appear to carry over to Global Justice as Fairness's distinctly political conception that derives a list of human rights from the value of peoples' agency (*vis-à-vis* the list of internal global primary goods).

Furthermore, Global Justice as Fairness's conception appears to offer a plausible guide for the further specification of the rights defensible under Beitz's proposed "schema" for the justification of human rights. This schema indicates three contentions that must be established in order to justify particular claims about the content of human rights. These contentions are as follows:

1. That the interest that would be protected by the right is sufficiently important when reasonably regarded from the perspective of those protected that it would be reasonable to consider its protection to be a political priority.
2. That it would be advantageous to protect the underlying interest by means of legal or policy instruments available to the state.
3. That in the central range of cases in which a state might fail to provide the protection, the failure would be a suitable object of international concern.<sup>196</sup>

I think it is plausible to hold that the interests specified in Global Justice as Fairness's account of internal global primary goods meet all three of these conditions. The only remaining question would be whether there are any further interests that satisfy Beitz's schema. He worries that there is "a danger that any relatively specific list of interests to be protected by human rights might be undesirably exclusive."<sup>197</sup> There is also a danger, however, that leaving such a schema so open-ended might render the content of human rights undesirably indeterminate. Since Beitz does not offer anything like a list of justifiable human rights, it would seem as though the burden of proof would be on those that want to include further rights not called for by Global Justice as Fairness. Beitz's

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<sup>196</sup> Beitz, *The Idea of Human Rights*, 137

<sup>197</sup> Beitz, *The Idea of Human Rights*, 139

discussions of specific human rights suggest a broad congruence with the list offered by Global Justice as Fairness, even its (tenuous) rejection of democratic rights,<sup>198</sup> and do not suggest that Global Justice as Fairness has made any significant exclusions. This supports the adequacy, from Beitz's own perspective, of Global Justice as Fairness's account; Global Justice as Fairness's greater specificity supports its superiority.

The particular human rights Beitz discusses also highlight the second source of indeterminacy, namely, his rejection of holism. The problem is particularly clear in the case of "anti-poverty" rights. His discussion of these rights emphasizes the complexity surrounding the various reasons for global poverty, which agents are responsible for remedial action, and which specific courses of action are required.<sup>199</sup> This (undesirable) complexity is a predictable consequence of considering human rights in isolation from other issues of global justice, such as the structure of the global economy. Within Global Justice as Fairness's more inclusive view, some sources of failures to respect subsistence rights will not represent violations of human rights at all, but will rather be addressed by its second principle. Unfair trading practices, onerous tariffs, and destructive subsidies harmful to poor peoples will be resolved, as they should be, by considering the justice of the global basic structure directly, relieving "anti-poverty" rights of much of the complexity that plagues Beitz's account. This complexity is further reduced in Global Justice as Fairness by its specification of the appropriate mechanisms for the enforcement of human rights. The holistic approach offered by Global Justice as Fairness is thus able to avoid many of the difficulties Beitz attributes to subsistence rights (and, I think, to many other types of human rights as well).

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<sup>198</sup> See Beitz, *The Idea of Human Rights*, 174-186.

<sup>199</sup> See Beitz, *The Idea of Human Rights*, 161-174, esp. 172-3.

As we will see, Pogge's theory of human rights suffers from a similar difficulty, insofar as he attempts to address the problems of global poverty exclusively in terms of human rights. However, while Beitz may attempt to take on such difficulties by addressing them from the perspective of global justice, Pogge cannot make such a move, since he seems to consider his account of human rights to be exhaustive of, rather than insulated from, global justice.

This last point may not be fair. Pogge's recent, non-Rawlsian approach to "global justice" is quasi-libertarian in that it is exclusively harm-based, admitting only negative duties to avoid harming others and eschewing any positive duties such as those powerfully advocated by Peter Singer.<sup>200</sup> While he wholeheartedly echoes Singer's impassioned and urgent calls for the elimination of global poverty, Pogge argues that the same goals can be reached by invoking only the "libertarian" negative duty not to cooperate in the imposition of a global order that foreseeably generates massive human rights violations if those violations are reasonably and knowably avoidable. (It is worth noting right away that the compensatory duties attendant upon the violation of this "negative" duty seem to be potentially as demanding as Singer's positive duties, at least on the weaker version of his thesis in "Famine, Affluence, and Morality.") In other words, if we cooperate in imposing an unjust institutional order on others in the face of just alternative orders, we are harming the victims of that order. But how do we know when an institutional order is unjust?

Here I invoke a somewhat rudimentary account rather than a full-blown conception of global justice which, at the present time, would be highly contentious. We need not agree on a fully specific criterion [such as Global

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<sup>200</sup> See Peter Singer, "Famine, Affluence, and Morality," *Philosophy & Public Affairs* 1, no. 3 (1972).

Justice as Fairness] in light of which the justice of alternative designs of a global institutional order could be assessed and compared. It suffices to settle on some characteristics such a design must not possess on pains of being unjust.<sup>201</sup>

Thus it is probably fairer to describe Pogge's theory as one of global *injustice*; since Pogge's standard of injustice simply is respect for human rights, however, this theory is still exhausted by his account of human rights.

Quite apart from the dubious account of "harm" employed here, which I will not bother to argue against, the question is why we should rest content with an account of "global injustice." Perhaps we could take Pogge as arguing that, since a theory of global justice would be "highly contentious," it would be unreasonable (in the specific Rawlsian sense employed by Global Justice as Fairness) to use such a theory to design global institutions. The contention may be that global public political culture simply does not possess the raw materials needed to work up a "full" theory of global justice, although it can support an overlapping consensus on a "rudimentary" criterion of injustice such as Pogge's.

This possible answer would be understandable if we assumed, as Rawlsopolitans (and cosmopolitans of other stripes as well) do, that a "full-blown conception of global justice" would simply amount to a globalized version of "full-blown" conceptions of social justice. I suspect that Pogge indeed accepts this position; however, it simply begs the question against theories such as Global Justice as Fairness. If Global Justice as Fairness is not hopelessly utopian or objectionably parochial, as I have tried to suggest, then a "full-blown" conception of global justice is not necessarily "highly contentious" in the relevant (Rawlsian) sense. (Presumably we should not

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<sup>201</sup> Pogge, *World Poverty and Human Rights*, 25

interpret this phrase as implying *mere* disagreement, but rather something like *reasonable* disagreement.) I will now briefly try to show that Global Justice as Fairness's account of human rights better satisfies Pogge's criteria for such accounts than his own, generates much of the same conclusions, and does so in a more principled manner. Furthermore, importantly, Global Justice as Fairness's conception of human rights is able to do this while still being embedded within a broader theory of global justice, which enables us to make many further commonsense judgments about global institutions that cannot be gotten from his theory of (mere) global injustice.

Let us first examine Pogge's own criterion for an acceptable theory of global injustice/human rights. He offers four desiderata, all of which, Global Justice as Fairness agrees, should be taken seriously:

- 1 The sought universal criterion of justice ought to work with a thin conception of human flourishing, which might be formulated largely in terms of unspecific means to, rather than components of, human flourishing. Though disagreements about what human flourishing consists in may prove intractable, it may well be possible to bypass them by agreeing that nutrition, clothing, shelter, certain basic freedoms, as well as social interaction, education, and participation are important means to it, which just social institutions must secure for all. Such a thin conception would express some respect of the autonomy of diverse cultures, favoring social institutions acceptable to persons from different (religious, social, ethnic, etc.) backgrounds representing a wide range of diverse more specific conceptions of human flourishing.

- 2 The sought universal criterion ought to be modest. Rather than define justice as the highest attainable point on an open-ended scale, it should define justice as a solid threshold compatible with an international diversity of institutional schemes that are merely required to treat persons affected by them in a minimally decent and equitable way.

- 3 The requirements of the universal criterion should not be understood as exhaustive. They should, for instance, leave the various societies free to impose their own more demanding criteria of justice upon their own national institutions and even to judge foreign or global institutions by the lights of such more ambitious criteria.

- 4 The supplementary considerations introduced by such more ambitious criteria of justice must not, however, undermine the universality of the modest criterion and therefore must not be allowed to outweigh the latter in situations of conflict or



competition (e.g. over scarce resources). The requirements of the universal criterion should therefore be understood as preeminent within any more ambitious national criterion.<sup>202</sup>

Global Justice as Fairness's account of human rights meets all of these desiderata, with two notable exceptions—it makes no appeal to human flourishing, and it disallows peoples from judging the global and foreign domestic basic structures by the lights of their own conceptions of domestic justice. As will hopefully become clear, these "failures" actually indicate the relative strength of Global Justice as Fairness.

Before looking at the notion of human flourishing, we will consider the other aspects of the first desideratum. It calls for a "thin conception" of the objects of human rights, which as Pogge goes on to make clear, implies something like a Rawlsian account of primary goods. Such a thin conception is desirable, he says, because it would express respect for the autonomy of diverse cultures, as well as making more likely an overlapping consensus regarding the content of human rights. Since Global Justice as Fairness has its own account of global primary goods and recognizes the fact of reasonable global pluralism, it very clearly satisfies these expectations. It is a bit more mysterious how Pogge's theory satisfies them, however, since he declines to provide more than the briefest sketch of what he considers to be primary goods. More worryingly, he offers no explanation for why an explicitly cosmopolitan account such as his should have any direct concern for the autonomy of "diverse cultures." Perhaps he has something like Tan's group rights in mind here, but this seems rather unlikely in light of his discussion of sovereignty.<sup>203</sup>

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<sup>202</sup> Pogge, *World Poverty and Human Rights*, 42-43

<sup>203</sup> See Pogge, *World Poverty and Human Rights*, essay 7.

Leaving this difficulty aside for the moment, let us look more closely at Pogge's account of the objects of human rights. While he employs the notion of human flourishing, as opposed to the notion of a civility, to underwrite his account of primary goods, the content of his account is strikingly similar to that of Global Justice as Fairness's. He argues that since there are many conflicting accounts of human flourishing, we should pick out primary goods by identifying the preconditions for people to develop "an ethical world view of their own." He identifies two clusters of goods directly required for this development, as well as some more fundamental necessities:

First, liberty of conscience, the freedom to develop and to live in accordance with one's own ethical world view so long as this is possible without excessive costs for others. This freedom must include various other liberties, such as freedom of access to informational media (such as books and broadcasts) and the freedom to associate with persons holding similar or different ethical views. And second, political participation: the freedom to take part in structuring and directing any comprehensive social systems to which one belongs. This includes the freedom publicly to express ethical criticisms of political institutions and decisions, freedom of assembly, and freedom to participate on equal terms in the competition for political offices and in the struggle over political decisions.

Other, more elementary basic goods are important for both the ethical and the personal value of human life. Among these are physical integrity, subsistence supplies (of food and drink, clothing, shelter, and basic health care), freedom of movement and action, as well as basic education, and economic participation.<sup>204</sup>

This indicates a very striking convergence with Global Justice as Fairness's account of human rights. Since Global Justice as Fairness generates this content without reference to the notion of ethical autonomy, it has the same sort of advantage over Pogge's account that we saw it to have over Buchanan's (and, on a practical level, Tan's) account. Moreover, most of the rights under the heading of "participation" are much more straightforwardly accounted for by Global Justice as Fairness, since their connection to human flourishing or ethical autonomy are left unclear (or at least not argued for),

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<sup>204</sup> Pogge, *World Poverty and Human Rights*, 54-55

whereas Global Justice as Fairness's emphasis on peoples' status as civilities provides a very clear rationale for them.

As with Buchanan's account, there is only one significant discrepancy between Pogge's list and the list of internal global primary goods offered by Global Justice as Fairness: the "freedom to participate on equal terms in the competition for political offices and in the struggle over political decisions." Since Pogge's account is explicitly rooted in the *means to achieving* human flourishing, however, he can, unlike Buchanan, only invoke instrumental reasons for including such democratic rights. Since I have already rejected the instrumental argument for a human right to democracy, I will not make the case for Global Justice as Fairness's exclusion of such a right again. It is worth pointing out, however, that Pogge's inclusion of democratic rights is quite tenuous—if such robust democratic rights are necessary preconditions for a minimally decent human life, then the vast majority of humanity has never had a minimally decent human life. This seems absurd. Furthermore, even though Global Justice as Fairness rejects such rights, its focus on the importance of collective agency provides more promising grounds for including such rights than accounts such as Pogge's.

These considerations suggest that, by Pogge's own lights, Global Justice as Fairness's account of human rights is superior both in content as well as in grounding. Global Justice as Fairness includes almost all of the same rights as Pogge does, and it provides more straightforward grounds for those rights (even the ones that Global Justice as Fairness excludes). And it does all this while only appealing to the freedom and equality of peoples, rather than the notion of ethical autonomy or individual human

flourishing, thus providing more likely grounds for an overlapping consensus and much more directly valuing the autonomy of "diverse cultures."

For related reasons, Global Justice as Fairness's peoples-centric conception also gives more secure grounding than can Pogge's for the institutional understanding of human rights that he defends. (Ironically, his rejection of Rawlsianism is due in part to his perception that it cannot account for his institutional view.<sup>205</sup>) A crucial aspect of Pogge's view, which is also one aspect of the "modesty" required by the second of his desiderata, is that human rights violations are in some sense perpetrated by institutions and thus involve "official disrespect"—an idea that, as we have seen, Global Justice as Fairness endorses as well.

For Global Justice as Fairness, this focus on official disrespect is a straightforward implication of the centrality of peoples' group agency; on Pogge's view, the needed rationale is rather unclear at best. His argument seems to be simply that people intuitively judge "official" wrongs as worse than "ordinary" ones: "Such wrongs do not merely deprive their victims of the objects of their rights but attack those very rights themselves; they do not merely subvert what is right, but the very idea of right and justice."<sup>206</sup> While it is certainly plausible to hold that official wrongs tend to be, for this reason, greater threats to human flourishing, it is still unclear why ordinary, non-official wrongs should be excluded altogether from the purview of human rights. Indeed, in spite of his "institutional" conception of human rights, Pogge himself points out that he is merely "counting official denials and deprivations *more heavily* than otherwise

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<sup>205</sup> See Pogge, *World Poverty and Human Rights*, 277 n. 99.

<sup>206</sup> Pogge, *World Poverty and Human Rights*, 65

equivalent private ones."<sup>207</sup> This is puzzling: if we are concerned with human flourishing, why declare some threats to it to be worse than others, even though they are "equivalent" in all respects other than whether the threat is "official" or not? This move brings Pogge's understanding of human rights closer to contemporary usage, and somewhat restricts the demandingness of his "negative" duties, but seems entirely unmotivated from within his cosmopolitan concern for human flourishing.

A similar problem arises with another way in which Pogge seeks to render his proposed universal criterion of justice "modest." Just as Singer did in his famous article on world hunger,<sup>208</sup> Pogge offers a weaker version of his thesis as "sufficient:" "any institutional design is unjust if it foreseeably produces *massive* avoidable human rights deficits."<sup>209</sup> While Singer is clear that he sees no reason to accept the weaker version of his argument, Pogge leaves it unclear whether the restriction of universal justice to only "massive" human rights deficits actually represents his considered view, or if it is merely rhetorical. If it is his considered view, there is no justification offered for why we should only care about human flourishing when the threats to it are "massive." This restriction does, of course, make the proposal more modest, but as with Singer's weaker version, there does not seem to be any principled reason to accept it.

By focusing on the minimal criteria for qualifying as civilities, Global Justice as Fairness has a clear and principled reason to "define [global] justice as a solid threshold compatible with an international diversity of institutional schemes that are merely required to treat persons affected by them in a minimally decent and equitable way."

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<sup>207</sup> Pogge, *World Poverty and Human Rights*, 277 n. 99 (emphasis added)

<sup>208</sup> See Singer, "Famine, Affluence, and Morality," 231.

<sup>209</sup> Pogge, *World Poverty and Human Rights*, 25 (emphasis added)

Global Justice as Fairness's principle of minimal domestic non-domination thus meets Pogge's desideratum as well as could be wanted. Meanwhile, Pogge's own view, since it has no principled place for collective autonomy, appears to lack the resources to avoid defining "justice as the highest attainable point on an open-ended scale." While he may be able to avoid some the most demanding implications of consequentialist views like Singer's by requiring that duties of justice fall upon only those that participate in imposing coercive institutional orders, he cannot plausibly restrict those duties by appealing to the source or size of the threats to human flourishing. Since he seems to think that only (true) hermits and recluses do not "participate" in the imposition of the global order in the relevant sense, the former avoidance is cold comfort for those, such as (allegedly) Pogge himself, who think global justice should make only "modest" demands.

In stark contrast to Pogge's view, Global Justice as Fairness does not rely on any dubious claims about the pervasive violation of negative rights via the imposition of a coercive global order, while also avoiding Singer-esque appeals to positive duties. According to Global Justice as Fairness, the structure of the global order is the subject of global justice, and duties of global justice only fall to individuals insofar as the relevant institutions are deficient or non-existent. Thus Pogge's theory has no advantage in being "libertarian," at least if that advantage is supposed to be its avoidance of "positive" duties for individuals. This alleged advantage is further diminished once we recognize that on Pogge's harm-based view, any degree of participation in the current global order triggers indeterminate compensatory duties. Given the severity of global poverty, it is hard to see how these duties could fail to be roughly as demanding as Singer's "positive" duties, except for the fact that on Pogge's view, we can escape such duties by becoming hermits.

We can consider Pogge's third and fourth desiderata together. These require a universal criterion of justice to leave room for more demanding conceptions of domestic or local justice, even allowing peoples to judge others or the global basic structure by their lights, while insisting on the preeminence of the universal criterion in cases of conflict. There are two key differences with Global Justice as Fairness here. The first is that while Global Justice as Fairness *requires* that peoples have a shared conception of domestic justice in order to be well-ordered, Pogge is clear that his view merely allows that groups *might* have such conceptions. He claims that requiring a universal criterion of justice to be nonexhaustive, as Global Justice as Fairness does, "would needlessly undermine its widespread acceptance and hence the plausibility of its claim to universality."<sup>210</sup> I suggest that this claim could only be true if we rejected, as Pogge seems to, any principled distinction between global and domestic justice. Either way, it is quite mysterious why requiring a distinct sphere of domestic justice would "undermine widespread acceptance" of a conception of global justice. In light of the value peoples clearly attach to self-determination, it seems more likely that such a requirement would make agreement more likely, by providing clear grounds for an overlapping consensus on (distinctly) global justice. I thus see little reason to suppose that Global Justice as Fairness is at any disadvantage here.

The second difference has to do with the propriety of judging foreign societies or the global basic structure by the lights of a peoples' own conception of domestic justice. By recognizing the fact of reasonable global pluralism, Global Justice as Fairness disallows such judgments immediately—while all reasonable peoples can affirm the

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<sup>210</sup> Pogge, *World Poverty and Human Rights*, 272 n. 52

content of Global Justice as Fairness from within their own conceptions of domestic justice, that content is importantly restricted by peoples' reasonableness. Thus judgments about the global basic structure especially must be made within the confines of global public reason, that is, they must be made in terms that other peoples can be reasonably expected to accept. Pogge seems to recognize this:

There must be tight limits, however, on how a society may sanction another when it judges the institutions of the latter to accord with the universal criterion but not with the former's own more ambitious criterion of justice. Agreement on a universal criterion would lose much of its point, if fulfillment of this criterion did not shield national regimes against coercive reform efforts from outside.<sup>211</sup>

This is surely correct, but it seems to make more sense to make such limitations absolute, as Global Justice as Fairness does, rather than merely "tight" and thereby allowing some (how little is unclear) room for "coercive reform efforts from outside" on the basis of admittedly parochial conceptions of justice. Once again, I see no reason not to prefer Global Justice as Fairness on this front.

For these reasons, I take Global Justice as Fairness's account of human rights to be superior to Pogge's by his own desiderata for such accounts. The final criticism I want to make of Pogge's view is similar to the final worry I raised about Beitz's view: ignoring other considerations of global justice when thinking about human rights (especially subsistence or "economic" rights) is unnecessarily and undesirably limiting. Unlike Beitz, Pogge's primary concern is with the reduction of global poverty, and thus he focuses heavily on what he calls "global economic justice." I assume he uses this phrase instead of 'global distributive justice' because he is addressing only violations of human rights; since he thinks any more inclusive criterion of universal justice would be too

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<sup>211</sup> Pogge, *World Poverty and Human Rights*, 271 n. 51



demanding and controversial, he cannot directly address many concerns that would typically be thought of as matters of distributive justice. Essentially, Pogge limits the demands of "universal justice" to human rights claims, and thus tries to include much of what is typically considered to be issues of global distributive justice into his account of human rights. Not only does this introduce the same sort of complexity we saw with Beitz's understanding of subsistence rights, but it actively prohibits us from making many commonsense judgments about the fairness of the global basic structure—judgments Pogge himself seems to endorse.

Consider the issues of global "economic" justice that Pogge takes to be most crucial: "the international resource and borrowing privileges and the political mechanisms through which the rules of the world economy are created and revised."<sup>212</sup> As we saw above, Global Justice as Fairness wholeheartedly embraces the withholding of the resource and borrowing privileges from regimes that violate human rights. It also, under the second half of the Maximal Global Freedom Principle, directly addresses the sorts of mechanisms that give rise to the rules of the global economy (as well as the rules themselves). The problem with Pogge's view is that it can only judge these mechanisms and rules from the perspective of human rights. As long as the global economy is structured so that (foreseeable and avoidable) massive deprivations of basic human needs are avoided, the structure of the world economy would be beyond reproach.

This is a needlessly impoverished view of the justice of the global basic structure. Pogge's view could lead us to judge as perfectly just a global economic order characterized by deep unfairness. For example, the profound bargaining disadvantages of

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<sup>212</sup> Pogge, *World Poverty and Human Rights*, 123

poorer peoples may be perfectly acceptable as long as richer peoples dump enough resources onto the latter to avoid massive deprivations of basic needs. Clearly, Global Justice as Fairness would reject such conclusions, and allow us to judge what are intuitively clear cases of unfairness directly, without having to take Pogge's very limiting detour through human rights. Global Justice as Fairness is thus superior in that it has the resources to morally evaluate global institutions beyond Pogge's minimal threshold, while simultaneously defending such a threshold for domestic basic structures and thus respecting collective autonomy.

These issues, as Global Justice as Fairness suggests, are better addressed by considerations of global distributive justice, and those of the global basic structure more broadly, than by a theory of human rights. Having now concluded our comparative evaluation of Global Justice as Fairness's first principle, we will turn to those considerations in the comparative evaluation of Global Justice as Fairness's second principle.

## Chapter 5: The Global Basic Structure

### 5.1 Contra *LP-Rawlsianism* 2

First, let us recall Global Justice as Fairness's second principle—it directs us to judge the justice of the global basic structure by the extent to which the freedom (as non-domination) of peoples is maximized. Peoples enjoy maximum non-domination when no other agents (other peoples, private organizations, individuals, or crucially, global institutions) have a capacity for interference with their affairs that is not forced to track their interests as specified by Global Justice as Fairness's account of global primary goods. This principle charges the global basic structure with minimizing the domination of peoples, and enables it to establish for itself certain capacities for non-arbitrary interference in order to pursue that goal. Beyond these, it also enables the global basic structure to possess further capacities for interference as long as they are forced to track peoples' interests in global primary goods. It is crucial to keep in mind that this principle presupposes Global Justice as Fairness's first principle, which ensures peoples agency; also important is the lexical priority it assigns to rights and principles needed to minimize domination that threatens peoples' political and security interests.

I have described the sort of global basic structure that Global Justice as Fairness calls for as "robust" because it has many of the same sorts of powers and functions that domestic basic structures do; it provides governance to the international realm in ways that parallel domestic governance. It ensures peace, enforces international law (including human rights), structures the global economy, and provides certain collective goods. In the pursuit of these goals, the global basic structure avoids becoming a source of domination in ways that are largely familiar from traditional republican (as well as

liberal) reflections on the state—very broadly, democratic legislative procedures constrained by a constitution and independent judiciary and implemented by separate executive/administrative powers. It would probably be desirable for its major institutions to be relatively independent of one another, as the various global trade, security, health, and financial institutions are now. Such a global basic structure would of course require a certain amount of material resources in order to maintain itself, which it would presumably procure through taxation.

As we have seen, Global Justice as Fairness is focused squarely on the global basic structure, since it assumes that this structure is the subject (or, if you like, the site) of global justice. In some sense, this assumption is a safe one, since almost no Rawlsian theorists of global justice seem to deny the moral importance of international law and at least some global institutions. Thus it seems plausible to construe most debates among Rawlsian theorists of global justice as disagreements over the particular content of international law and the particular shape of the global institutional framework. For present purposes, the most interesting question is thus whether Global Justice as Fairness's robust global basic structure is too robust, not robust enough, or perhaps robust in the wrong way. However, there are prior questions that must first be addressed.

Specifically, we need to take up the question of the existence of the global basic structure; more precisely, we need to determine whether its existence has any relevance for a theory of global justice. The LP-Rawlsian position, at least officially, denies that the global basic structure is the subject of global justice; it also denies that a global basic structure, in the relevant sense, exists. These contentions underlie the apparent LP-Rawlsian rejection of principles of global distributive justice. Global Justice as Fairness

strongly rejects this line of argument, even though, just as with its first principle, its second principle does not generate conclusions that are dramatically at odds with the LP-Rawlsian position. I will argue that Global Justice as Fairness's ability to generate these conclusions while avoiding dubious claims about the (relevance of) the non-existence of the global basic structure is a distinct advantage, once again indicating the relative superiority of Global Justice as Fairness's political conception of global justice and its attendant understanding of the global original position. We will then turn to other rival theories, which present more substantive contrasts with the robust global basic structure defended above.

I think the issue of the appropriate subject of global justice is a red herring, so we will get it out of the way first. LP-Rawlsians insist on a very significant asymmetry between the domestic and global contexts: in the former, the basic structure is the subject, while in the latter, it is "liberal foreign policy." This asymmetry does not seem to hinge on the alleged non-existence of a global basic structure, however. Rawls first invokes the notion of foreign policy in the following passage:

Finally, it is important to see that the Law of Peoples is developed within political liberalism and is an extension of a liberal conception of justice for a democratic regime to a Society of Peoples. I emphasize that, in developing the Law of Peoples within a liberal conception of justice, we work out the ideals and principles of the *foreign policy* of a reasonably just *liberal* people.<sup>213</sup>

The point here is not that, since there is no global basic structure, we have no alternative but to take up liberal foreign policy as the subject of global justice. Rather, it seems clear that Rawls identifies liberal foreign policy as subject because his law of peoples is an extension of his domestic theory. As we have seen, this marks a very deep contrast

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<sup>213</sup> Rawls, *The Law of Peoples*, 9-10

between Global Justice as Fairness and the LP-Rawlsian position—Global Justice as Fairness is explicitly *not* an extension of liberal domestic theory; it is, rather, *analogous* to domestic theory, but modified specifically for the global context and its ontology of peoples. But this difference does not explain why "foreign policy" should be the subject of a theory of global justice (although it does explain why its "ideals and principles" are specifically tailored for "liberal" peoples).

Furthermore, it is quite clear that what Rawls meant by "foreign policy" should not be understood as principles for particular peoples, considered individually, to follow in the international domain. His law of peoples explicitly includes principles that should be embodied in supra-national institutions. In the global original position, Rawls says, "the parties will formulate guidelines for setting up cooperative organizations and agree to standards of fairness for trade as well as certain provisions for mutual assistance."<sup>214</sup> It is unclear at best in what sense the formulation of these guidelines amounts to "foreign policy." Clearly, Rawls is describing certain principles for institutions that have all well-ordered societies as their members, institutions that are part of what he refers to as the *basic structure* of the Society of Peoples.

Even in the context of interactions with non-well-ordered states, Rawls's "foreign policy" is described in terms of the common principles of these institutions. He argues that well-ordered peoples ought to try to bring all societies into the Society of Peoples as full members in good standing, and in order to do so,

they should establish new institutions and practices to serve as a kind of confederative center and public forum for their common opinion and policy toward non-well-ordered regimes. They can do this within institutions such as the United Nations or by forming separate alliances of well-ordered peoples on

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<sup>214</sup> Rawls, *The Law of Peoples*, 42

certain issues. This confederative center may be used both to formulate and to express the opinion of the well-ordered societies.<sup>215</sup>

From this it seems clear that Rawls's law of peoples can only be understood as "foreign policy" insofar as the supra-national institutions it regulates includes only well-ordered societies as full members in good standing. If all societies became well-ordered, then the Society of Peoples would be truly global, and there would be no sense whatsoever in insisting that its principles pertained to "foreign policy." Furthermore, holding that only well-ordered peoples count as full members in good standing does not mark a contrast between LP-Rawlsians and Global Justice as Fairness. Respect for the human rights specified under Global Justice as Fairness's first principle is a precondition for full membership, and failures trigger restrictions of the rights of the violating states within the global basic structure.

The main point here is that the choice of liberal foreign policy as subject does not preclude the sorts of principles for global institutions advanced by Global Justice as Fairness. While Global Justice as Fairness's institutional focus is much more direct and explicit, the LP-Rawlsians' "foreign policy" is similarly concerned with institutional principles. The important difference with Global Justice as Fairness is the LP-Rawlsians' insistence on *liberal* foreign policy, not liberal *foreign policy*.

Moreover, not only is there room for such global-institutional principles within the LP-Rawlsian framework, but the content of Global Justice as Fairness's second principle is very much in line with the central claims advanced by its defenders. In defending Rawls's view, Freeman says this:

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<sup>215</sup> Rawls, *The Law of Peoples*, 93

in reference to "the guidelines for setting up cooperative organizations," "standards of fairness for trade," and "provisions for mutual assistance," Rawls states: "Should these cooperative organizations have unjustified distributive effects, these would have to be corrected in the basic structure of the Society of Peoples." Presumably, he means here the "Confederation of Peoples" [Rawls's term for an ideal version of the United Nations] and international economic institutions with regulatory oversight may impose duties over economic agents as they engage in trade, international investment, and other economic transactions.<sup>216</sup>

He even asserts that "Rawls takes for granted that non-exploitive principles of fair trade would be agreed to among [well-ordered] peoples, determined behind a veil of ignorance regarding wealth and the size of one's economy."<sup>217</sup> These passages from Freeman make abundantly clear that the LP-Rawlsian vision of the global economy is, at least in broad strokes, very similar to the structure called for by Global Justice as Fairness's second principle.

The problem with the LP-Rawlsian argument for these conclusions is that there seems to be no principled reason for the parties in the global original position to agree to them. Specifically, it is left unclear at best why the parties would not agree to a principle of distributive justice, such as a global version of the difference principle, that applied among peoples. As we have seen, Global Justice as Fairness concurs with Rawls's suggestion that peoples are uninterested in wealth beyond the level needed to be well-ordered, which explains the omission of wealth and income from the account of global primary goods. But Rawls's arguments against a global distributive principle don't seem to make much use of this point, nor does Freeman's defense of these arguments. Rawls's arguments in *The Law of Peoples* on this matter are notoriously opaque and problematic,

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<sup>216</sup> Freeman, *Justice and the Social Contract*, 289. Freeman is referring to Rawls, *The Law of Peoples*, 115; for Rawls's notion of a "Confederacy of Peoples" see Rawls, *The Law of Peoples*, 42-43.

<sup>217</sup> Freeman, *Justice and the Social Contract*, 310



and I will simply not discuss them here, opting instead for Freeman's extended defense of them. This defense is, from Global Justice as Fairness's point of view, very problematic, and the primary advantage (in this context) of Global Justice as Fairness is that it explicitly rejects Freeman's position while still offering a principled argument for rather similar content. Examining his position will reveal the inadequacy of the LP-Rawlsians' response to Rawlsopolitans' demands for global distributive justice, thus paving the way for the comparative evaluation of the latter's view.

In his rejection of principles of global distributive justice, Freeman's arguments are often directed against cosmopolitan critics of *The Law of Peoples*, and as such these arguments are not relevant here. He does advance one argument, however, that purports to undermine any Rawlsian distributive principle at the global level. Simply put, he denies that there is a global basic structure, and claims that it is only within such a structure that global distributive justice could become applicable. This argument also requires a suppressed premise that the demands of global justice would not require the creation of a global basic structure in its absence. All three elements of this argument are problematic; we will consider the suppressed premise after dealing with Freeman's explicit claims.

For now, let us grant that the demands of global justice would not require the creation of a global basic structure if one does not exist (I will later reject this claim). For Freeman's rejection of global distributive justice to go through, he would have to defend two claims: 1) distributive justice is only applicable within basic structures, and 2) there is no basic structure that is global in scope. His argument can be summarized thusly:

How property and the economy should be designed is the first subject of distributive justice. Distributive justice is, then, in the first instance, a feature of

*basic social institutions*... The primary role for a principle of distributive justice is to provide standards for designing, assessing, and publicly justifying the many legal and economic institutions that structure daily life.

Since these basic institutions are social and political it should follow that distributive justice is social and political. If so, then in the absence of a world state, there can be no global basic structure on a par with the basic structure of society... Of course, there is global cooperation and there are some global institutions, but these are not *basic* institutions. Rather, global political, legal, and economic arrangements are *secondary* institutions and practices: they are largely the product of agreements among peoples and are supervenient upon the multiplicity of basic social institutions constituting the basic structures of many different societies.

Consequently, the only feasible global basic structure that can exist is also secondary and supervenient: It is nothing more than "the basic structure of the Society of Peoples."<sup>218</sup>

The primary problem with this argument is that it crucially relies on a narrow construal of both 'distributive justice' and 'basic structure.' Global Justice as Fairness happily accepts that *domestic* distributive justice a feature of *domestic* basic structures; however, it also accepts that in much the same way, *global* distributive justice is a feature of the *global* basic structure.

To avoid Global Justice as Fairness's position here, Freeman must show that "distributive" justice can only be a feature of "basic" structures. He can do this, however, only by defining 'distributive justice' in such a way that it can only be a feature of structures that govern interactions between individuals, not peoples, and that such structures must be "basic," not "secondary." The real issue here is the allegedly "secondary" nature of the global basic structure (or "basic structure of the Society of Peoples"), but we should briefly look at the former definitional issue first.

There can be no principled objection to using 'distributive justice' to apply *only* to systems that structure the interactions of *individuals*—this is merely a terminological

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<sup>218</sup> Freeman, *Justice and the Social Contract*, 306

choice that by itself carries no philosophical weight. However, it is a highly misleading choice. As we have seen above, Freeman accepts that there are principles of global justice that should govern the institutions that (ought to) structure the world economy. He even approvingly quotes this assertion from *The Law of Peoples*: "Should these cooperative organizations have unjustified *distributive* effects, these would have to be corrected in the *basic structure* of the Society of Peoples."<sup>219</sup> The contention here seems to be that, even though LP-Rawlsians call for principles governing (and the creation of) international institutions that ensure standards of fair trade, regulate global finance, and even correct "unjustified distributive effects" among peoples, they are not principles of "distributive" justice.

It is difficult not to interpret this misleading terminological choice as anything other than a lame attempt to substantiate the LP-Rawlsians' rejection of more demanding global distributive principles. Global Justice as Fairness provides a principled argument for this rejection by denying that wealth and income are global primary goods, and thus there would be no basis for the parties in the global original position to adopt a more demanding principle. (It is worth repeating that greater wealth under peoples' collective control does not necessarily contribute to the realization of their conceptions of domestic justice—just as greater amounts of natural resources often do, so presumably can greater wealth actually undermine peoples' well-orderedness.) It would be far more straightforward for LP-Rawlsians to simply admit that they defend principles of global distributive justice, and like Global Justice as Fairness, argue that global distributive justice differs in important respects from its domestic analog.

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<sup>219</sup> Rawls, *The Law of Peoples*, 155 (emphasis added)

The more interesting aspect of Freeman's argument is the claim that the global basic structure is merely "secondary" and not "basic" in the relevant sense.

Unfortunately, Freeman does not provide a definition of, or set of criteria for determining when institutions count as, 'secondary' or 'primary.' Rather, he offers this revealing explication:

An example of what I mean by the "secondary" nature of global norms and institutions is when firms contract for goods and labor on the international market their contracts, property rights, powers, duties, and liabilities are specified and enforced according to the laws of one or another society. It is a society's legislative specification of property systems, contract law, [etc.]... that is crucial here, not their coercive enforcement... Also, even in cases where international norms do exist independent of any nation's particular laws... these norms do not issue from any global political body with non-derivative original political and legal jurisdiction, for there are none.<sup>220</sup>

There are two claims here: first, that domestic institutions are the ones that specify legal relations between individuals (not global ones), and second, that when the first claim isn't true, the institution doing the specifying does not have the same sort of jurisdiction that (most) modern states enjoy.

We can now more fully understand Freeman's aforementioned claim that a global basic structure would require a world state—the reason is simply that he thinks a global basic structure, in order to count as such, must do exactly the same sorts of things that states do, and must have exactly the same sort of jurisdiction (whatever that is supposed to mean in this context) as states have. Since such a global basic structure would obviously make domestic basic structures redundant, we can at least make some sense of Freeman's argument against the existence of a global basic structure. If we require a global basic structure to be no more than a domestic one writ large, of course we will

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<sup>220</sup> Freeman, *Justice and the Social Contract*, 307

never find one (short of the complete dissolution of the state system). However, we could much more plausibly infer from his observations that global and domestic basic structures are just different sorts of things.

LP-Rawlsians (and, as we will see later, their Rawlsmopolitan critics also) seem to view the notion of a basic structure as a univocal one, arguing as if there was only one sort of thing we can rightly call a "basic structure," and it can just happen to be either global or more local. It should be clear that from Global Justice as Fairness's perspective, this is a highly misleading way of proceeding. Just as it would be more helpful to distinguish between global and domestic distributive justice, it seems far more fruitful to accept that there is (or should be) both domestic and global basic structures, that these structures are importantly different sorts of things, and thus that our theorizing about justice in each context, while analogous in many respects, should be informed by the distinct natures of these structures.

Perhaps the putative fact that global institutions are the "product of agreements among peoples" could help Freeman's case, but this seems unlikely. This claim would be useful to him if, contrary to his stated view, coercion played a significant role in his argument: worries about coercion can (sometimes) be dispelled by pointing to the voluntary nature of institutional arrangements. (Of course we should keep in mind that membership in global economic institutions is hardly without coercion, given that the cost of exclusion can be very great.) But, as Freeman himself asserts, the coercive nature of institutions is irrelevant to his case.<sup>221</sup> Rather, he seems to claim that basic structures,

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<sup>221</sup> Freeman, *Justice and the Social Contract*, 314

by their very nature, *cannot* be created through agreement. If this claim has any basis whatsoever, Freeman declines to supply it.

The deeper problem with Freeman's argument here, however, is that it threatens to eliminate not just considerations of global distributive justice, but of global justice in its entirety. If there cannot be principles of global distributive justice because there is no "global political body with non-derivative original political and legal jurisdiction," then how are we to avoid the conclusion that there similarly cannot be principles of global *non-distributive* justice? Freeman cannot avoid this conclusion by denying that the principles of "liberal foreign policy" are in some sense not matters of justice. Regarding the claim that the domestic basic structure is the "reference point" of distributive justice, he writes: "By no means does this imply that justice is exclusively a social duty, owed only to members of one's own society. We have all kinds of duties of justice according to the Law of Peoples to other societies and their members."<sup>222</sup>

Of course, it would have been more accurate for him to say that we have "all kinds" of duties of justice *except distributive ones*. The absence of a rationale for this exclusion makes it appear arbitrary; unless this lacuna is filled, the argument becomes a skeptical one that casts doubt on any duties of global justice. The LP-Rawlsian position on global distributive justice seems to rest on an unmotivated distinction between the conditions that give rise to claims of distributive justice and those that give rise to other justice-based claims. In other words, it rests on a bifurcated account of what have been called the "existence conditions" of (global) justice.

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<sup>222</sup> Freeman, *Justice and the Social Contract*, 299

The question of when duties of global justice are triggered brings us to the suppressed premise of Freeman's argument, according to which claims of global distributive justice can only be triggered by the existence of a global basic structure. In the absence of such a structure, on this view, no such duties get triggered. This is to say that LP-Rawlsians view the global basic structure as an "existence condition" of global (distributive) justice. By Global Justice as Fairness's lights, this is simply a conflation of the subject of global justice and its existence conditions. In other words, the global basic structure can be the subject of a theory of global justice even if such a structure does not currently exist. In their insistence on "liberal foreign policy" as subject, LP-Rawlsians seem to deny this.

Arash Abizadeh has recently pointed out this conflation in a related but distinct manner. He argues that the LP-Rawlsians fail to appreciate the distinction between what the existence conditions of justice from its "instrumental" and "constitutive" conditions. He writes: "Justice may require a basic structure in the sense that it *presupposes* the existence of a basic structure before its demands *arise*; in the sense that it *includes* (and so constitutively demands) a basic structure as one of its *constituent* parts; or in the sense that it instrumentally *demand*s a basic structure as a means for justice to be fully *realized*."<sup>223</sup> While constitutive and instrumental conditions on justice represent demands for a basic structure, existence conditions are mere triggers for the application of principles of justice.

In the domestic context, Rawlsians of all stripes regard the basic structure as a constitutive or instrumental condition of justice, not an existence condition. As Rawls

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<sup>223</sup> Abizadeh, "Cooperation, Pervasive Impact, and Coercion," 324

put it, the "natural duty of justice" "constrains us to further just arrangements not yet established."<sup>224</sup> Thus even in a state of nature, there is at least one duty of justice—to leave it. The reasons for this may be largely empirical, as they were for Locke, or *a priori*, as Kant argued,<sup>225</sup> but they all point to the same conclusion: a domestic basic structure is not an existence condition of justice. Thus there is no difficulty in maintaining that the basic structure is the subject of a theory of justice even if no such structure currently exists.

The question facing the LP-Rawlsian account is why we shouldn't view the global context in the same way. The domestic analog of that position would imply that if we could empirically verify the non-existence of a basic structure in, say, Somalia, then there would be no (justice-based) claims to be made regarding the establishment of just institutions in that region. We would have to understand justice in this example as the domestic analog of "liberal foreign policy," whatever that would mean. Global Justice as Fairness rejects this way of proceeding, and holds that if a global basic structure did not exist, justice among peoples would require its creation. (We will return to the question of the existence conditions of global justice below; for now, I simply assume that they obtain.)

LP-Rawlsians only invoke this claim about the existence conditions of global justice in the context of distributive justice. However, placing such importance on the prior existence of a global basic structure threatens to eliminate duties of non-distributive

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<sup>224</sup> Rawls, *A Theory of Justice*, rev. ed., 115

<sup>225</sup> For contemporary developments of these reasons for leaving the state of nature, see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), Part I and Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009), ch. 6.



global justice as well, such as those grounded in human rights. There are two basic routes around this sort of general skepticism about global justice, but neither is very convincing. We will briefly look at each.

The first route, taken by Nagel, is to defend a set of international duties arising from a prepolitical conception of human rights and mutual assistance. These duties are rather minimal, and largely amount to duties of noninterference and easy rescue. In other words, Nagel fills the content of global justice by appealing to a conception of natural rights.<sup>226</sup> These rights, as Rawls would describe them, are metaphysical, not political: they are not constructed, they do not apply primarily to institutions, and presumably don't change or evolve (except perhaps in application). This is a heavy price to pay in order to maintain the claim that there is no such thing as global distributive justice: such *a priori* moral theorizing is precisely what Rawls strove to undermine. This is perhaps more clearly evident in his later works, but given that both defenders and critics of *The Law of Peoples* seem to agree that that work represents a continuation of the evolution of Rawls's thought found in *Political Liberalism*, it must be admitted that there is a strong tension within Nagel's account. Furthermore, as Beitz has effectively argued, Rawls's approach to human rights in *The Law of Peoples* amounts to a total rejection of the natural law tradition, and is thus utterly antithetical to Nagel's position.<sup>227</sup>

The other way to avoid skepticism about global justice, while still rejecting all global distributive principles, is to show that there is something special or distinct about

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<sup>226</sup> See Thomas Nagel, "The Problem of Global Justice," *Philosophy & Public Affairs* 33, no. 2 (2005), esp. 130-132.

<sup>227</sup> See Charles Beitz, "Human Rights and the Law of Peoples," in *The Ethics of Assistance: Morality and the Distant Needy*, ed. Deen K. Chatterjee (Cambridge: Cambridge University Press, 2004).

*distributive* justice, so that we can still understand human rights as demands of political, non-metaphysical justice. Unsurprisingly, this option is preferred by those, such as Freeman, who are more overtly committed to Rawls's broader (not merely global) understanding of justice. As we have already seen, Freeman does not adequately defend this move; often, the claim about the distinctive nature of distributive justice tends to be merely asserted, or just plain tacit. However, some positive argument, successfully marking off distributive from non-distributive justice, is clearly needed, since Rawls does not (at least in his domestic theory) make such a distinction. Indeed, for Rawls, all questions of justice are distributive in a sense: "the basic structure of a society *distributes* certain primary goods... the chief primary goods at the disposition of society are rights, liberties, and opportunities, and income and wealth."<sup>228</sup> Rawls, to my knowledge at least, never even hints at the possibility that the (domestic) conditions that trigger demands for justice in the distribution of rights and liberties differ from those that trigger demands for justice in the distribution of wealth and income. Such a maneuver would require a bifurcated account of the existence conditions of (domestic) justice, and I submit that the dubious nature of such an account is clearly indicated by the complete absence of supporting arguments in the literature. I see no reason to suppose some asymmetry here with the global case.

In light of the above, I suggest that Global Justice as Fairness offers a superior approach to global distributive justice (or whatever we want to call it) than the LP-Rawlsian position. Global Justice as Fairness reaches similar conclusions about global economic institutions without needing to invoke some differentiated account of the

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<sup>228</sup> Rawls, *A Theory of Justice*, rev. ed., 54 (emphasis added)

existence conditions of specifically distributive justice, narrowly understanding the notions of distributive justice and the basic structure as univocal and exclusively domestic, or confusingly construing the moral evaluation of global institutions as a matter of "foreign policy." The most substantive difference between the two views does not have to do with the content of the second half of Global Justice as Fairness's second principle (nor with its first principle), but rather with that of the first half of its second principle, which deals with matters of (supra-national) *non-distributive* justice. This difference is alluded to in the LP-Rawlsians talk of liberal (and decent) peoples' "voluntary confederacy," but is not addressed by them in any direct fashion. However, in his writings on global justice, Pettit has made some arguments very relevant to this point, and so we will briefly look at these arguments before returning to the Rawlsmopolitans.

### *5.2 Contra Pettit on Global Governance*

Although his distinctive republican approach is not explicitly Rawlsian, Pettit has, in extending his view to the global context, aligned himself with the LP-Rawlsian approach in several important respects—he even refers to his view as "a republican law of peoples." Although Global Justice as Fairness makes extensive use of his explication of the notion of a people, and adopts a similar understanding of freedom as non-domination, Pettit's work on global justice also provides some interesting points of contrast. Most relevant to our present concerns are his reflections on global institutions and governance, and discussing these contrasts will afford an opportunity to make clearer the sort of global basic structure called for by Global Justice as Fairness.

It is rather surprising that there should be much difference between Global Justice as Fairness and Pettit's view on this subject. Pettit directly takes up the question of the

domination of peoples, and identifies many of the same sources of domination that have been stressed above.<sup>229</sup> He even considers deploying the traditional republican remedies he advocates in his domestic theory at the global level:

In the domestic context the republican state naturally presents itself as the solution to problems of private domination by some members of society over others... It would empower the weak and restrain the strong, thereby reducing private domination, and unlike the benevolent despot it would not be itself a source of public domination, as it would be subject to the check of an equal citizenry and so exercise only non-arbitrary interference... The checks envisaged in the tradition involve election to and rotation in office, the separation of powers, the rule of law, exposure to public invigilation, and a raft of other devices. Might an international regime of some kind play an analogous, constitutional part?

A world state might serve in the role envisaged, at least in principle, but nothing even approaching such a state is feasible in current circumstances and, given the diversity and distrust between cultures, it is doubtful if such a state ever could be successfully established. But what about relying on international, state-supported bodies like the United Nations, and a regime of public international law, in order to provide the nondominating restraints that might block the domination of states by other states? Could the networks of authorities and officials that currently determine so much of what happens in the world order ever assume the power, deriving from a checked and non-alien form of control, that would effectively reduce such domination? Could they ever impose a rule of international law and convention—a global, quasi-constitutional arrangement—that would substantially reduce the prospect of domination by states of states?<sup>230</sup>

Surprisingly, Pettit's answer to these questions is "no;" Global Justice as Fairness, on the other hand, embraces precisely the sort of "global, quasi-constitutional arrangement" he rejects. If this rejection were convincing, it would undermine much of the specific content proposed under Global Justice as Fairness's second principle (but not the general principle itself).

Pettit's skepticism, however, seems like little more than unfounded pessimism.

He does not argue that such a global arrangement would inevitably be a source of domination; indeed, he claims that "there are many factors whereby the control exercised

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<sup>229</sup> See Pettit, "A Republican Law of Peoples," 77-79.

<sup>230</sup> Pettit, "A Republican Law of Peoples," 80-81

by international agencies and their officials can be rendered non-arbitrary, despite the democratic deficits on which critics have seized."<sup>231</sup> Rather, his worry seems to be purely practical:

National states comes in enormously different sizes, and with greatly different degrees of strength. It would be utopian to expect the more powerful to allow others an equal stake in the control of such bodies and, even if they allowed this, to let such bodies exercise any intrusive degree of jurisdiction over their behavior. A regional body like the European Union may achieve a high degree of discipline in relation to member states—and even here the effect on larger states is limited—but there is no prospect of such discipline being imposed by the United Nations or, in their more insulated domains, by the World Trade Organization, the World Bank, the International Criminal Court, or even the World Health Organization.<sup>232</sup>

This is a rather confident assertion of the limits of practical possibility, which would require at least some empirical substantiation. Unfortunately, the only support Pettit offers for his claim that "there is no prospect" for effective global institutions is a single example: the 1986 preemptive American withdrawal from the International Court of Justice in response to the court's ruling in favor of Nicaragua. This is, to say the least, a very flimsy basis for such a bold and sweeping claim. Surely similar "evidence" could have been marshaled against the prospect of the formation of the European Union at the turn of the previous century. The sort of global basic structure envisioned by Global Justice as Fairness is obviously not a reasonable short-term goal, but that does not make it utopian in the pejorative sense intended by Pettit. As Rawls described his law of peoples, which is also not in the immediate offing, Global Justice as Fairness is realistically utopian.

Although I cannot pursue such matters in much detail here, I believe there is cause for some optimism about the eventual formation of a global basic structure that is,

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<sup>231</sup> Pettit, "A Republican Law of Peoples," 81

<sup>232</sup> Pettit, "A Republican Law of Peoples," 81

by Global Justice as Fairness's lights, reasonably just. Much has changed since 1986, and the eclipse of American global dominance is now widely regarded as an inevitability, and a not terribly distant one at that. With the continual rise of China, Brazil and India, the best way for the Western powers to maintain their influence abroad may well be to submit to the robust sorts of supra-national institutions called for by Global Justice as Fairness. These institutions could attract relatively well-ordered powers such as Brazil, India, and Japan, as well as smaller states with strong Western ties such as South Korea, Israel, and South Africa, and serve as a powerful deterrent to the increasingly intransigent outlaw regimes in China, Russia and Iran (as well as providing incentives for them to reform). This prudential argument is helped along by the apparently spreading realization that state sovereignty does not entail absolute internal latitude and the rejection of all external authority, as many recent events (such as the Libyan intervention and the conviction of Charles Taylor) suggest.

Furthermore, it seems that Pettit's argument here could be just as easily deployed in the domestic context, rendering his presumable confidence in the possibility of state formation unexplained. Take again the example of Somalia—if (for the sake of argument) we assume that there is no basic structure currently in place, with various armed groups and warlords defending their own patches of territory, we could say the following: "Warlords and their armies come in enormously different sizes, and with greatly different degrees of strength. It would be utopian to expect the more powerful to allow others an equal stake in the control of state institutions and, even if they allowed this, to let such bodies exercise any intrusive degree of jurisdiction over their behavior." We could substitute 'feudal lords, medieval monarchs, and Popes' for 'warlords' to similar

effect; further examples are easily imagined. In general, prior to the formation of modern states, we could have made the same argument against states that Pettit makes against global institutions—in both cases, we must make the "utopian" assumption that the more powerful will eventually yield to the (non-dominating) power of institutions that, at least to some degree, represent the interests of the less powerful. If this expectation is utopian in the global context, it is equally utopian in the domestic context.

Pettit does try to distinguish the global and domestic contexts in a manner that could underwrite this asymmetry:

The forms whereby more powerful states can control less powerful states are so various that no form of central regulation, and certainly not the sort that is associated with currently existing bodies, could effectively prevent state-state domination. It might legalize and inhibit intervention or infiltration by one state in the affairs of another but how could it inhibit the sort of control exercised on the basis of greater economic power, wider diplomatic clout, or the enjoyment of some strategic advantage?<sup>233</sup>

If this claim is restricted to global institutions as they currently exist, perhaps we should accept it, although such a claim would be of limited interest and utterly tangential to the comparison with Global Justice as Fairness. If we understand it more broadly, however, parallel domestic arguments once again seem to undermine this sort of skepticism: "The forms whereby more powerful corporations and tycoons can control less powerful citizens are so various that no form of central regulation could effectively prevent corporation-worker or rich-poor domination. It might legalize and inhibit physical assault and trespassing but how could it inhibit the sort of control exercised on the basis of greater economic power, wider political clout, or the enjoyment of some strategic advantage?" Why the forms of state-state domination are so much more "various" than

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<sup>233</sup> Pettit, "A Republican Law of Peoples," 82

person-person domination Pettit does not tell us. One would presume that if traditional republican remedies can be effective in the latter case, they could (at least in principle) be effective in the former as well. At the very least, some story would need to be told in order to undermine this assumption, but Pettit's arguments simply fail to carry this burden of proof.

Of course, if there are more immediately available means for reducing the domination of peoples, we should, *ceteris paribus*, prefer those to Global Justice as Fairness's relatively distant goal of a robust global basic structure. So what are Pettit's recommendations for combating international domination? He offers two suggestions. The first is the development of a "currency of common global reasons"<sup>234</sup> through interstate discussion in the forums provided by global institutions—the same institutions whose power to directly reduce domination he doubts. These forums are important because "the possibility of deliberation on the basis of commonly acceptable reasons should establish a culture in which international law can strengthen and serve as a discipline for inhibiting potential dominators and for protecting states from one another."<sup>235</sup> This discipline would be attained, not through genuine enforcement of international law, but rather by states' desire to avoid "ignominy and ostracism" in the international community and the disapproval of their own citizenries.

This first suggestion, Pettit admits, will not provide very stringent checks on interstate domination. The existence of common reasons merely provides a basis for possible non-domination; it does not, by itself, do much to actively counteract domination. His second suggestion is directed toward such active measures. Having rejected the global

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<sup>234</sup> Pettit, "A Republican Law of Peoples," 82

<sup>235</sup> Pettit, "A Republican Law of Peoples," 83



analog of the optimal domestic strategy, which he refers to as "constitutional provision," he appeals to the second-best strategy of "reciprocal power," which aims to increase the relative power of weaker parties so that they can defend themselves against potential dominators.<sup>236</sup> The idea is that weaker states "can unite in common cause in order to give themselves the required muscle to resist the power of the stronger."<sup>237</sup> Apparently unlike the domestic case, in which constitutional provision can create non-dominating forms of power to address domination and generate mutual respect among fellow citizens, "states will respect one another only in the measure that they command one another's respect; they each have enough power to leave others no choice but to respect them."<sup>238</sup> Weaker states must thus band together to wrestle respect from global powers.

The problem with both of these suggested remedies for reducing global domination is that they represent little more than a defense of the status quo. We already have forums for international deliberation, and there is already at least something like a currency of common global reasons.<sup>239</sup> (As we have seen, Global Justice as Fairness assumes the existence of such a currency, referred to above as global public political culture.) As Pettit himself points out, weaker states have already discovered the power of combination; the Doha round of trade talks makes this clear, and surely many older examples could be found. Thus it seems as though Pettit's prescription for greater global non-domination is simply to do nothing. It is difficult to imagine this prescription

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<sup>236</sup> For his general discussion of these two strategies, and the superiority of constitutional provision, see Pettit, *Republicanism*, 67-68.

<sup>237</sup> Pettit, "A Republican Law of Peoples," 84

<sup>238</sup> Pettit, "A Republican Law of Peoples," 84

<sup>239</sup> Laborde makes this point in her discussion of Pettit's article. See Cécile Laborde, "Republicanism and Global Justice: A Sketch," *European Journal of Political Theory* 9, no. 1 (2010): 60.

meeting with much success, and the victims of current domination are, to say the least, unlikely to be comforted by it.

There is one suggestion Pettit offers, albeit in a different article than the one in which he lays out his republican law of peoples, that would constitute an improvement over the status quo. In his discussion of the legitimacy of global institutions, he writes:

It is hard to imagine an international forum of discussion in which there was no agreement that those with larger populations should get greater access to some common benefit—say, a vaccine that is distributed by international agencies—and that those with more natural resources should be enabled to use them to their commercial advantage. And, equally, it is hard to imagine that there might not be agreement that those with lesser wealth should not have to pay the same as those with greater wealth into international agencies and that those with smaller populations should not be subject to unconstrained, majority control in international bodies.<sup>240</sup>

As we saw above, Global Justice as Fairness rejects strict equality among peoples, and advocates precisely this sort of asymmetrical treatment of peoples within global institutions in order to advance the cause of non-domination. However, this recommendation, as Pettit would likely agree, is of rather limited use by itself. From Global Justice as Fairness's perspective, such asymmetries will only be fruitful in the context of the sort of robust global basic structure of which Pettit is skeptical.

Global Justice as Fairness concurs with Cécile Laborde's view that even in the international domain, non-domination "can never be achieved outside the law... freedom can only be achieved under institutionalized schemes setting fair (non-dominating) terms of social cooperation."<sup>241</sup> Very much in the spirit of Global Justice as Fairness, the lesson she draws from this for the global context is that

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<sup>240</sup> Pettit, "Legitimate International Institutions," 158

<sup>241</sup> Laborde, "Republicanism and Global Justice," 59

states are encouraged to leave the international 'state of nature' and institutionalize their mutual relationships. Thus the ideal of non-domination, by contrast to those accounts [such as those of some LP-Rawlsians] which make the demand for justice conditional on the density of schemes of social interaction, does not provide reasons for rich states to disaffiliate from their existing relationships in order to exempt themselves from demands of justice.<sup>242</sup>

Here we have a distinctly republican rationale for the duty, discussed above, to leave the international state of nature. Global Justice as Fairness only differs insofar as it stresses international rather than social cooperation. Laborde defends a more cosmopolitan version of Pettit's republican law of peoples, which as she herself points out, raises difficulties concerning potential conflicts between pursuing the non-domination of persons and that of states simultaneously.<sup>243</sup> As we will see presently, Rawlsmopolitan accounts suffer from a similar difficulty.

### 5.3 Contra *Rawlsmopolitanism 2*

Above we saw that the LP-Rawlsians seem to make the mistake of taking the presence of a basic structure as an "existence condition" of justice—they deny that there is a basic structure globally, and thus limit (distributive) justice to the domestic context. Abizadeh compellingly argues that this line of argument is fundamentally inconsistent with a Rawlsian approach to justice, making a very useful observation about the connection between the scope and the site of justice: "the basic structure is the site but does not necessarily limit the scope of justice."<sup>244</sup> Global Justice as Fairness concurs with this claim, yet it also fundamentally rejects the lesson that Abizadeh and the

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<sup>242</sup> Laborde, "Republicanism and Global Justice," 60

<sup>243</sup> See Laborde, "Republicanism and Global Justice," 64.

<sup>244</sup> Abizadeh, "Cooperation, Pervasive Impact, and Coercion," 320

Rawlsmopolitans draw from it, namely, that the scope of what I have been calling domestic justice is actually global.

The essential Rawlsmopolitan strategy is to apply Rawls's domestic theory to the global context, and the basis for this application is a claim about the existence conditions of domestic justice holding at the global level. This fundamental maneuver is at the heart of Beitz's influential defense of global Rawlsian distributive justice in *Political Theory and International Relations*. He rightly rejected the LP-Rawlsian contention that effective institutions must already be in place for demands of justice to be triggered, and recognized that weaker existence conditions are appropriate: "The conclusion that principles of distributive justice apply globally follows from the premise that international economic interdependence constitutes a scheme of social cooperation like those to which requirements of distributive justice have often been thought to apply."<sup>245</sup> (Although Beitz now rejects any such existence conditions, and Tan seems to follow him in this,<sup>246</sup> I will consider the "official" Rawlsmopolitan position to include a commitment to some existence conditions for justice. The denial of all existence conditions will be taken up below in connection with Buchanan.)

Global Justice as Fairness follows the Rawlsmopolitans in asserting only rather weak existence conditions for global justice, and also agrees that these conditions currently obtain. However, the Rawlsmopolitan position suffers from the same crucial

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<sup>245</sup> Beitz, *Political Theory and International Relations*, 154

<sup>246</sup> See Charles Beitz, "Cosmopolitan Ideals and National Sentiment," *The Journal of Philosophy* 80, no. 10 (1983): 595 and Tan, *Justice Without Borders*, 59 (but cf. Kok-Chor Tan, "Luck, Institutions, and Global Distributive Justice: A Defence of Global Luck Egalitarianism," *European Journal of Political Theory* 10, no. 3 (2011): 411). Both theorists recognize that this move commits them to a comprehensive form of liberalism that Rawls rejected.

mistake made by the LP-Rawlsians—both camps understand 'justice' and 'basic structure' univocally. Refusing to recognize a distinction between global and domestic justice of course implies that there are no distinct existence conditions of justice at the global and domestic levels. Because of this, the two camps are locked in a seemingly intractable, semi-empirical debate about the appropriate scope of justice (*simpliciter*)—the Rawlsropolitans asserting that there is enough cooperation (in some murky sense) across borders to render justice global, and the LP-Rawlsians denying such claims. Global Justice as Fairness transcends this debate by sharply distinguishing global and domestic justice, as well as their respective existence conditions. While the existence conditions of domestic justice hold (or don't) among persons, the existence conditions of global justice hold (or don't) among peoples.

I do not have a precise account of these conditions to offer, but I think we can safely leave the details aside. Some significant (not necessarily high) degree of broadly cooperative interaction and mutual understanding will be necessary before demands of justice are triggered; when this interaction occurs in the absence of appropriate institutions, justice demands their creation. I will simply assume that these conditions obtain among all currently existing states, although probably not all peoples. (It is worth noting that the Rawlsropolitans have a much more difficult task of demonstrating that these conditions hold among all individual persons). While as with any account of the existence conditions of justice, there will be some hard cases, this is an acceptable price for avoiding the implications of rejecting all such conditions, as we will see below. In any event, this question is tangential to our present concern.

The important point of contrast between Global Justice as Fairness and Rawlsmopolitanism is that while both accept some form of global distributive justice, the Rawlsmopolitans assume that the relevant principles apply to structures governing interactions among persons, whereas Global Justice as Fairness's principles apply to a statist global framework. In other words, the Rawlsmopolitan position understands global justice as simply domestic justice writ large. Concerning distributive justice at least, the LP-Rawlsians buy the premise underlying this conclusion, but reject it on empirical grounds. Global Justice as Fairness's disagreement is more fundamental, since it views global justice as *sui generis*.

We will be concerned largely with matters of distributive justice here, since these provide the most substantive points of divergence between Global Justice as Fairness and Rawlsmopolitanism. The reason for this, however, is not that Global Justice as Fairness agrees with what Rawlsmopolitans have to say about global non-distributive justice, but rather that such theorists have extremely little to say about non-distributive matters. Almost all of the debate about global justice among Rawlsians and their cousins has focused on human rights and distributive justice, with little attention paid to the issues addressed by the first half of Global Justice as Fairness's second principle.<sup>247</sup> Before we turn to distributive issues, however, we will briefly look at these neglected aspects of global justice.

If we consider whether Rawls's *first* domestic principle (covering the basic liberties and constitutional essentials) rather than his *second*, should apply globally, we can immediately see the grain of truth in the LP-Rawlsians' objections regarding a world

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<sup>247</sup> Beitz himself points out this pervasive tendency. See Charles Beitz, "Cosmopolitanism and Global Justice," *The Journal of Ethics* 9, no. 1-2 (2005): 24-26.

state. If global political justice were simply domestic political justice writ large, then the most natural conclusion to draw would be that justice calls for a global democratic state with all persons as citizens. Since all Rawlsopolitans, at least to my knowledge, reject this sort of world state, they must have other arrangements in mind. The question is how to think about these other arrangements. How are we to ensure, for example, the fair value of the political liberties equally for all persons in a world composed of multiple states (or other sorts of sub-units)?

Pogge offers an intriguing possibility here, albeit no longer on Rawlsian grounds—what he calls the "vertical dispersion of sovereignty." He argues that "persons should be citizens of, and govern themselves through, a number of political units of various sizes [from "neighborhood" to "world at large"], without any one political unit being dominant and thus occupying the traditional role of state."<sup>248</sup> This suggestion is actually not far from the sort of global arrangements called for by Global Justice as Fairness. As I will very briefly argue, I think the differences, while not dramatic, favor Global Justice as Fairness.

The first difference is over questions of "downward" vertical dispersal—while Pogge actively recommends such dispersal, Global Justice as Fairness would defer to peoples' shared conceptions of domestic justice on such matters. (Recall that some peoples' conceptions of domestic justice may crucially include such downward dispersal, as in above example of an idealized Ottoman empire.) Of course Pogge would here object to the very idea of "peoples" as having conceptions of specifically "domestic"

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<sup>248</sup> Pogge, *World Poverty and Human Rights*, 184

justice, but I think this difference is insignificant enough, and tangential enough to distinctly global matters, to set aside.

The important difference involves upward vertical dispersal, or more specifically, how each position views the most encompassing institutional layer. On Pogge's view, presumably, there is something like a partial or limited world state—a set of institutions that govern some very narrow and basic aspects of all persons' lives. All persons, presumably, are able to vote for representatives in these institutions, which in turn exercise political authority over a clearly-defined domain that includes only matters of truly universal shared concern. What makes this a "partial world state" is that it would have the power to govern persons directly, in the manner of states. By contrast, the global basic structure called for by Global Justice as Fairness is explicitly statist, the agents of which are limited to representing the interests of peoples *only* as corporate agents, and limited to exercising power over individuals or non-state group agents (such as corporations) only with respect to their international conduct.

Which should we prefer? Both accounts suggest some federative or confederative global arrangement with much "sovereignty" dispersed downward. The difficult issue with such arrangements is how to limit the power of the more encompassing institutions. Pogge's suggestion seems to be to limit each level to only certain governmental functions, and although he does not provide any guidance on how this might be accomplished, he does point out that such arrangements already exist in federal systems.<sup>249</sup> While current federal systems could serve as models in some sense, their use is clearly limited by the fact that all such systems constitute states, and the federal level of such states have a

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<sup>249</sup> See Pogge, *World Poverty and Human Rights*, 183.



notable tendency to accumulate power over time (the US is, for good or ill, a clear example<sup>250</sup>). More generally, it is clear that Pogge wants to avoid the concentration of power at the global level similar to what we see currently at the state level. How to accomplish this on the basis of differentiated "governmental functions" is worryingly unclear.

The global basic structure envisioned by Global Justice as Fairness would not differentiate the powers of global and sub-global institutions on the basis of governmental functions. Rather, global institutions would be prevented from governing the lives of individuals directly, except in their dealings with foreigners or their conduct outside of state borders. Even Global Justice as Fairness's human rights regime is only directed at state governments (and as we saw above, so is Pogge's). Put simply, Pogge's global institutions would be limited in their functions and not their level of operation, while Global Justice as Fairness's would be limited essentially to the state level and would not be restricted to pre-determined functions. I can merely assert here that I think Global Justice as Fairness's framework is better equipped to guard against the sorts of worries traditionally lodged against the idea of a world state. It also seems plausible that if global institutions were limited to particular governmental functions, they would lose an important degree of flexibility in their attempts to combat the domination of peoples.

Let us now return to the Rawlsopolitans' much more favored topic of distributive justice, for it is in this context that the most significant practical differences with Global Justice as Fairness show up. As with political justice, if global distributive justice is simply domestic distributive justice writ large, the most nature assumption

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<sup>250</sup> In personal correspondence, Christopher W. Morris has (rightly, in my view) pointed out to me that Canada is an interesting counterexample to this claim.

would be that we need a globalized version of a domestic basic structure, or at least the portions of such a structure that bear on distributive issues. This sort of direct strategy, of course, again raises the specter of a world state. Thus the Rawlsmopolitans are forced to pursue indirect strategies for meeting the demands of global distributive justice. As we will see, these indirect strategies come at a significant price, and while some may find this price (in addition to the other problems discussed above) worth paying for global egalitarianism, even here we will see that the practical differences are not as dramatic as expected.

We would expect these differences to be dramatic because, unlike Global Justice as Fairness, Rawlsmopolitans are committed to globalized versions of Rawls's equality of opportunity principle and difference principle. On their view, the global basic structure should ideally "mitigate inequalities that could otherwise be inherited due to inequalities of wealth and income among families"<sup>251</sup> and "maximize the well-being of the worst-off individual."<sup>252</sup> The difficulty with globalizing these principles is that doing so seems to require the global basic structure to do many of the things now done by domestic basic structures—provide a legal and economic framework within which individuals act. This threatens to make domestic basic structures redundant at best, and at worst troublesome obstacles to global justice that ought to be eliminated. Yet Rawlsmopolitans do not call for the elimination of states, and usually go even further in positively affirming their value; we saw Tan do this above, and we will see below Darrel Moellendorf defending a similar position. If states are needed and/or desirable, then domestic basic structures will

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<sup>251</sup> Darrel Moellendorf, "Equality of Opportunity Globalized?," *The Canadian Journal of Law and Jurisprudence* 19, no. 2 (2006): 301

<sup>252</sup> Tan, *Justice Without Borders*, 60

be integral to the satisfaction of Rawls's metropolitan distributive justice. Then what is left for the global basic structure to do? In order to effectively coordinate the equality of all persons' opportunities and maximize the position of the worst-off person worldwide, the global basic structure would presumably need to do at least two things: 1) transfer wealth from richer states to poorer ones, and 2) dictate the operation of domestic distributive structures within each state. Neither of these, I will argue, is desirable.

First consider the transfer of wealth across borders. At first it may not seem as though such transfers would be necessary, since analogous transfers are not required by Rawls's second domestic principle. But there is an important asymmetry between the global and domestic contexts here. Domestically, distributive justice can be maintained by the operation of the legal and economic background that provides the framework for persons' economic activity. Given the same opportunities, just incentive and tax structures, and an adequate social safety net, it is possible to satisfy Rawls's second domestic principle with respect to all citizens within a particular domestic basic structure. However, given the significant differences among states in wealth and level of economic development, equality of opportunity cannot be achieved across societies without eliminating (or at least greatly mitigating) these differences. As long as there are domestic basic structures, Rawls's metropolitan distributive justice seems to require some measure of material egalitarianism among states, even though such egalitarianism is not required on the domestic level.

Furthermore, it will not suffice for Rawls's metropolitan distributive justice to ensure the satisfaction of Rawls's second principle *both* within states among individuals *and* among states as wholes. This suggestion misunderstands the nature of the global basic

structure. It imagines that economic interaction among states is perfectly analogous to economic interaction among individuals, and thus that a global basic structure could maintain distributive justice among states in just the way that domestic basic structures do among individuals (i.e. without egalitarian transfers). But the global economic framework does not (primarily) structure interaction and exchange among states—states are not, for the most part at least, economic agents in any straightforward sense. The point is that international economic activity is mostly *conducted* by individuals and corporations, although much of this activity is *mediated* by states. The structure of the global economy simply cannot be designed so as to fulfill a statist version of Rawls's second principle, since its rules and regulations do not primarily apply to the economic activity of states at all. Much more important than the activity of individuals and corporations across borders, the fundamental function of a global economic framework is to govern the economic policies of states that mediate such activity. If this is right, then the operation of a principle of equal opportunity for states (whatever that would mean<sup>253</sup>) or a global difference principle (which would sanction the very inequalities that we just saw must be avoided) would not bear directly on the collective wealth of peoples at all.

Of course none of this suggests that transfer payments intended to equalize the wealth of all states is a bad thing; perhaps Rawlsmopolitans would welcome this conclusion (although they rarely argue for this claim explicitly). Global Justice as Fairness and the LP-Rawlsians also advocate some such transfers of wealth in the form of assistance to burdened societies (those without the resources to become and remain well-

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<sup>253</sup> Buchanan offers an explication of such a principle, but not for the purposes of realizing global individual equality of opportunity. See Buchanan, "Rawls's Law of Peoples," 711.

ordered), so why should we object to the Rawlsian position here? The answer is that such a statist egalitarian policy generates something of a dilemma: it would either require payments to state governments, thus incentivizing them to pursue the receipt of such payments over the economic success of their peoples, or would (somehow) distribute wealth (or other resources) directly to individuals, circumventing and thereby undermining domestic institutions.

The first option is undesirable because, like the resource and borrowing privileges, it creates the temptation to govern for profit rather than according to peoples' conceptions of domestic justice, and could greatly increase the likelihood of corruption. The second option is not necessarily problematic, since in the case of burdened societies, there are no effective institutions to undermine; this is why the duty of assistance is acceptable. But a statist egalitarian scheme would apply continually, and would direct transfers to citizens of well-ordered societies as well. This is a clear threat to the continued well-orderedness of such societies, since it would reduce the responsibility of domestic institutions to serve the collective ends of their citizens. In much the same way that foreign aid can, and frequently has, unwittingly created obstacles to good domestic governance, this option would threaten the well-orderedness of societies that are already well-ordered.

There are perhaps routes around the drawbacks of state-level egalitarian transfers identified above; there are perhaps even ways around the need for such transfers altogether. Even so, Rawlsians cannot avoid the conclusion that their vision of global distributive justice would require the global basic structure to dictate the operation of domestic distributive structures within individual states. This represents a potentially

severe restriction of peoples' self-determination, since it would require all domestic basic structures to be guided by Rawls's second domestic principle (and task the global basic structure with ensuring this). Yet, short of taking over the economic functions of domestic basic structures in the manner of a world state, the Rawlsopolitans must also leave some room for domestic institutions to act autonomously. Moellendorf puts the point helpfully:

One need not be committed to the irrelevance of state government with respect to matters of distributive justice in order to endorse global equality of opportunity. However, it does seem to be the case that just as the existence of the family makes equality of opportunity within states an ideal that can never fully be realized, so the existence of states makes perfect global equality of opportunity impossible. So, if we assume that there is a moral case for states—and I do not dispute this—the value of equality of opportunity will have to be weighed against the value of self-determination. That neither can be fully realized, if both are recognized, is not a reason to reject either.<sup>254</sup>

While he is right that this inherent conflict is not, *ceteris paribus*, a reason to reject his Rawlsopolitan position, it does obviously make it less attractive. This is a pervasive conflict that would require constant balancing of countervailing values in the pursuit of distributive justice. Without any clear method for resolving the conflict between state autonomy and Rawlsopolitan distributive justice, we should, *ceteris paribus*, prefer a theory of global justice, such as Global Justice as Fairness, that does not generate such a conflict.

Of course the relevant *ceteris* are not *paribus* in this instance—the Rawlsopolitan call for global equality of opportunity and the maximization of the worst off individual on a worldwide basis are goals that significantly outstrip the content of Global Justice as Fairness. If obtaining these stronger results has a very great intuitive

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<sup>254</sup> Moellendorf, "Equality of Opportunity Globalized?," 316-317

pull, it may strike Rawlsopolitans as worth forfeiting the many advantages of Global Justice as Fairness adduced above. While there is little to say to directly attack such intuitions, we can still compare the practical suggestions Rawlsopolitans have put forward with those of Global Justice as Fairness. Since there is an admitted need to balance state autonomy and distributive justice on the Rawlsopolitan view, the concrete demands of global justice may not differ much from those of Global Justice as Fairness. If so, then the method of reflective equilibrium should lead us to revise our Rawlsopolitan intuitions about distributive justice in favor of the greater clarity and coherence provided by Global Justice as Fairness.

There are a variety of proposals, vaguely Rawlsopolitan in character, about how to realize distributive justice for all persons globally, and I will not attempt to survey them here. Rawlsopolitan theorists themselves are, however, usually much more concerned to establish *that* equality of opportunity and/or the difference principle apply globally rather than *how* they are supposed to do so. This makes attributing particular practical aims to their position difficult. Tan approvingly offers the following proposals, which I will consider representative for present purposes:

Pogge, for instance, proposes a global resource tax (GRT) that will tax the better-endowed countries for extracting natural resources in their own territories and that the revenue from these taxes be channeled toward a development fund. This GRT, he shows us, is one consequence of a faithful application of Rawls's second principle to the global context. Other global economic structural reforms that have been suggested include the establishing of formal mechanisms for regulating and monitoring the activities of multinational corporations, to whose dictate many poor countries relent; regulating global currency and commodity speculation; restructuring international institutions like the International Monetary Fund as is commonly called for; and conducting technology transfers from wealthy countries to poor ones.<sup>255</sup>

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<sup>255</sup> Tan, *Toleration, Diversity, and Global Justice*, 167

To this we can add a Tobin Tax, which would "both tax and discourage short-term international financial speculation"<sup>256</sup> as well as Pogge's rejection of the international borrowing and resource privileges discussed above.

How different are these Rawlsian proposals from the global economic recommendations offered by Global Justice as Fairness? I am not familiar enough with the relevant issues to evaluate the proposal of "conducting technology transfers," but it seems like a minor point, and I will set it aside. The various "global economic structural reforms" Tan offers, as well as the rejection of the borrowing and resource privileges and a Tobin tax, are explicitly embraced by Global Justice as Fairness. Importantly, these policies issue from Global Justice as Fairness without any need to balance state autonomy and the demands of global justice, (nor need any distinctly liberal assumptions be employed). The only potential difference between Tan's proposals and Global Justice as Fairness's is Pogge's GRT.

While it is possible that a GRT could be acceptable by Global Justice as Fairness's lights, I think there are better ways to secure the resources necessary to meet the demands of alleviating world poverty and aiding burdened societies. The global basic structure envisioned by Global Justice as Fairness would presumably raise these funds through more direct taxation of states (proportionally to per capita GDP or some similar measure). Pogge's GRT, on the other hand, is biased against resource-rich states, or more accurately, against resource-consuming states, since the extra cost of extraction would be reflected in commodity prices. It seems preferable to directly tax states rather than resource extraction, which would be much more difficult to monitor and track than GDP.

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<sup>256</sup> Tan, *Justice Without Borders*, 81n



However, there are some advantages to Pogge's proposal, particularly that it would have a positive environmental impact.<sup>257</sup> But Global Justice as Fairness explicitly calls for global environmental regulation, and while a tax on resource extraction may be part of that regulation, it seems more appropriate to fund environmental initiatives with the taxes thus raised rather than rely on those funds to fulfill the duty of assistance. The point, once again, is that the differences here are rather insignificant.

In light of Global Justice as Fairness's relative theoretical coherence, weaker premises, and its apparent practical convergence with Rawlsian liberalism, Global Justice as Fairness provides a superior account of a just global basic structure. Adhering to a purely abstract commitment to the globalization of Rawlsian domestic distributive justice, in the face of deep theoretical conflict and with little or no practical upshot, does not make sense in light of the alternative offered by Global Justice as Fairness, or so I have tried to show. This completes the core of our comparative evaluation of Global Justice as Fairness and its nearby rivals; in what remains we will briefly take up Buchanan's account once again, largely in order to clarify Global Justice as Fairness's account of the existence conditions of global justice, the distinction between ideal and nonideal theory, and the issue of secession; in the final section, we will end by considering some potentially lingering worries about peoples and states.

#### *5.4 Contra Buchanan 2*

As mentioned above, Beitz has come to reject any existence conditions for (global) justice, and Tan shares this position, which puts them at (slight) odds with the Rawlsian view just discussed. Buchanan also shares this position, rejecting what

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<sup>257</sup> For a detailed discussion of his proposal, see Pogge, *World Poverty and Human Rights*, ch. 8.

he calls the "interactionist" view, which requires some degree of interaction among persons (or peoples) for duties of justice to hold. Pogge's harm-based account is a prime example of such an interactionist view, and Global Justice as Fairness holds a similar view for reasons we will consider below. Before taking on the issue of the existence conditions of global justice directly, however, we will look at Buchanan's account of global distributive justice. This account is intermediate between those of the Rawlsopolitans and LP-Rawlsians, just as is his account of human rights. What is particularly interesting for our purposes is that he makes a crucial distinction between ideal and nonideal theory in this context, a move that closely parallels the interactionist claim he rejects.

In his *Justice, Legitimacy, and Self-Determination*, which is otherwise notable for its impressive breadth and holistic approach to global justice, Buchanan declines to address the subject of ideal global distributive justice. Instead, he refers us to his review article, "Rawls's Law of Peoples: Rules for a Vanished Westphalian World:" "Elsewhere I have shown how a Rawlsian hypothetical contract, with two stages, the first where the parties represent individuals, the second where they represent states (or the peoples of states), can generate ideal theory principles of transnational and international distributive justice respectively."<sup>258</sup> This two-stage original position, with different types of agents represented at each level, was discussed above; while it is an interesting suggestion, it is a complicated proposal that Buchanan does not elaborate in any, much less sufficient, detail.

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<sup>258</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 126

His claim to have "shown" how such an argument would work is, at best, a significant exaggeration; as he himself states in the article in question: "It is not my goal here to provide a theory of global distributive justice."<sup>259</sup> However, he does offer the following:

Surely parties representing peoples would choose a principle of global equality of opportunity—a principle designed to ensure that their societies are not disadvantaged as a result of their members not having fair access to desirable positions and roles in the most important international economic institutions and in global corporations. Successful implementation of such a global equality of opportunity principle might, in fact, require significant redistributions of wealth, just as some have argued that Rawls's principle of equal opportunity, applied domestically, would. Notice that global equality of opportunity is compatible with lack of equality of opportunity within states. A hierarchical society might limit those who are allowed to compete for positions and roles in the global basic structure to those of a certain class.<sup>260</sup>

We considered the difficulties with this sort of principle in the previous section, so I won't bother to repeat my objections: this principle would either create a worrisome system of incentives for state governments or undermine existing institutions, and Buchanan says nothing about how such a principle would work in practice, much less about how to avoid this dilemma. What is worth noting is that Buchanan proposes a state-level principle of equality of opportunity not as a means to achieving worldwide individual equality of opportunity, but rather as a consequence of a statist original position argument. I think Global Justice as Fairness's second principle would sufficiently address peoples' concern for their adequate representation in the global basic structure, which Buchanan is surely correct to point out, through appropriate institutional design rather than transfers of wealth. Global Justice as Fairness does not, however, take account of peoples' interest in having their citizens attain positions of power in

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<sup>259</sup> Buchanan, "Rawls's Law of Peoples," 711

<sup>260</sup> Buchanan, "Rawls's Law of Peoples," 711

multinational corporations. Positing such an interest seems like an unnecessary concession to the power of such corporations, which Global Justice as Fairness's global basic structure is designed to check; I thus don't see this as a problematic omission on the part of Global Justice as Fairness.

Regardless of these differences between Global Justice as Fairness and Buchanan concerning ideal global distributive justice, Buchanan's practical recommendations are strikingly similar to those made by Global Justice as Fairness. This is because "the international legal system's institutional incapacity is relatively more serious at present in the area of distributive justice" and thus that "the nonideal moral theory of international law... must assign a relatively minor or at least indirect role to... principles of distributive justice."<sup>261</sup> In light of this "institutional incapacity," Buchanan claims that nonideal distributive justice would not include a commitment to global equality of opportunity; instead, it would call for

the development and implementation of global labor standards to improve the conditions of working people, those environmental reforms that ameliorate the inequitable flow of resources from underdeveloped to developed countries, provisions in trade agreements designed to ameliorate the injuries that fluctuations in market prices inflict on poorer countries, multilateral commitments to development aid, and support for democratic government and basic civil and political rights so far as these enhance the accountability of government to all citizens, not just the rich. Just as important is the economic effect of achieving better compliance with existing international human rights norms against discrimination, especially discrimination against women.

Finally... international efforts to reduce the most dramatic global disparities in health may do more to improve the lot of those in the poorest countries than policies that aim at the direct redistribution of income... [in part by developing] an intellectual property rights regime that prevents the worst off from being left behind by the biotechnology revolution while at the same time preserving adequate incentives for the risk-taking that innovation requires.<sup>262</sup>

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<sup>261</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 220

<sup>262</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 226

Whatever differences there may be between Buchanan's nonideal theory and Global Justice as Fairness's (ideal) theory are too insignificant to bother addressing here. Once again we find that, at least on a practical level, there is a surprising convergence among Global Justice as Fairness and rival theories; also once again, the question is whether Global Justice as Fairness is preferable on a more theoretical level.

To answer this question we need to know how Buchanan arrived at the particular content of his nonideal theory, but unfortunately, he has little to say about this.

Presumably, nonideal theory should tell us how to reach the point at which we can begin to apply ideal principles. In replying to a version of the LP-Rawlsian rejection of global distributive justice, Buchanan seems to concur with this:

The infeasibility objection wrongly assumes that principles of justice have no useful role to play prior to the point at which they can be successfully implemented. This is not the case. Principles of justice can play a role in helping us to determine what sorts of institutions we need to build in order to be able to achieve justice.<sup>263</sup>

This is very much in line with Global Justice as Fairness's insistence on the irrelevance of the existence of a global basic structure—if the institutions required for justice are absent, we have a duty to bring them about. However, it does not seem as though Buchanan's nonideal theory is advanced for the purposes of bringing about an institutional setting in which ideal justice can become applicable. Indeed, if all of the recommendations listed above were all realized, then there would presumably be even less inclination on the part of states to address the alleged "institutional incapacity" that characterizes our current situation.

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<sup>263</sup> Buchanan, "Rawls's Law of Peoples," 713

The irrelevance of Buchanan's ideal theory for determining his nonideal theory is made rather clear in his discussion of the global system's current institutional incapacity, which he attributes to a lack of consensus and the difficulty of monitoring compliance. Concerning this incapacity, and immediately prior to providing the list of reforms quoted above, he says this:

It does not follow from this that international law at present can play no significant role in efforts to establish distributive justice, only that at present its role will be for the most part indirect and somewhat limited. Given the strategic importance for states of preserving their role as the primary arbiters and agents of distribution, the greatest hope for success at present lies with reforms that do not directly or transparently challenge that role.<sup>264</sup>

There are two interesting points implicit in this claim. First, Buchanan seems to be admitting that ideal global distributive justice would require that the global basic structure displace, at least to some degree, the role of states as the "arbiters and agents" of distribution. This suggests that we need a global basic structure to take over the distributive functions that states currently serve, which requires what I called above a "partial" world state. In addition to being generally perceived to be undesirable and/or dangerous, this is another clear threat to the self-determination of peoples.

The other point is more pertinent to our present discussion. By asserting that the application of nonideal theory should not "directly or transparently challenge" the distributive role of states, Buchanan seems to be saying that nonideal theory should not try to "directly or transparently" bring about the conditions called for by his ideal theory. Perhaps he is suggesting that his nonideal theory is merely a form of subterfuge, which offers the only hope of ("indirectly") bringing about ideal conditions. He does not even hint at the sort of exotic tactical argument that would be required to make good on this

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<sup>264</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 225-226

claim, however; the more natural assumption is that there is simply no connection between his ideal and nonideal theories of distributive justice. If that is the case, it is utterly mysterious how he arrives at the particular content of his nonideal theory, and thus Global Justice as Fairness's account clearly offers a superior account of that content. Furthermore, given the difficulties with a global principle of equality of opportunity, it seems like no advantage to retain Buchanan's commitment to such a principle once (or if) "ideal" conditions finally come about (by chance, of course, since his nonideal theory does not direct us to bring them about).

Buchanan's use of the distinction between ideal and nonideal theory here operates in a very similar fashion to an existence condition on distributive justice. He claims that we should not pursue ideal global distributive justice, nor even try to bring about its triggering circumstances, until the current institutional incapacity decreases. In other words, we don't have duties of ideal global distributive justice until certain conditions are met—not even the duty to bring about those conditions. There is a fine line between this position and that of the LP-Rawlsians, Buchanan's vociferous attacks on the latter notwithstanding.

Let us now take up the question of the existence conditions of global justice directly. While Buchanan is correct to argue that his "Moral Equality" and "Natural Duty of Justice" principles<sup>265</sup> commit him to denying the interactionist thesis, he neglects to address some troubling implications of this move for an institutional cosmopolitanism such as his. Before considering these implications, however, we first need to be a bit clearer about the "interactionist" position.

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<sup>265</sup> See Buchanan, *Justice, Legitimacy, and Self-Determination*, 94.

Buchanan understands this position to "require the problematic assumption that the global basic structure is a cooperative scheme in [a] normatively significant sense." By contrast, "the Natural Duty approach does not require cooperative interaction, *or indeed any interaction at all*, as a condition for the existence of obligations of distributive justice."<sup>266</sup> As this latter claim suggests, there is a clear distinction between (mere) interaction and "cooperative interaction" (for which we could presumably substitute 'cooperation'). While Buchanan rightly rejects cooperation as an existence condition of global justice, he also construes the interactionist position as committed to that claim, and then simply argues that his outright rejection of existence conditions is correct because the cooperation-interactionist claim is false.

This, however, is a false dilemma—there is a perfectly salient third option, according to which mere interaction, not cooperation, is the appropriate existence condition. This is, roughly, the position adopted by Global Justice as Fairness. More specifically, Global Justice as Fairness holds that duties of global justice hold among regularly interacting peoples that *could* affirm similar conceptions of global justice. Importantly, this does not mean agreeing on questions of global justice "all the way down," but merely being members of an overlapping consensus on principles of global justice. As importantly, this does not mean that unreasonable peoples are outside the scope of global justice—overlapping consensus must be a genuine possibility, but not a reality.

Why insist on these existence conditions of global justice rather than follow Buchanan and Beitz in rejecting them? On a theoretical level, the Rawlsian commitment

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<sup>266</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 218 (emphasis added)



to a distinctly political conception of justice requires that it be reasonable to expect that the conception can be affirmed by all those to whom its principles apply. The requirement of at least minimally regular interaction is a more general feature of the social contract tradition; intuitively, it is hard to see why we ought to establish common institutions with people with whom we do not interact. At least none of the typical (moral) Kantian or (practical) Lockean reasons for leaving the state of nature suggest that we ought to do so.

On a practical level, embracing these existence conditions allows us to avoid an unpalatable implication of views such as Buchanan's: that we morally ought to establish a global basic structure that enforces a conception of justice within and among even isolated peoples, with whom we do not interact and who cannot be reasonably expected to understand, much less endorse, that conception. I have in mind here recently (or not yet) "discovered" indigenous peoples in such places as the mountains of Papua New Guinea or the rain forests of the Amazon and Congo. Views such as Buchanan's or the later Beitz's seem to be committed to incorporating such peoples into the global basic structure, requiring them to abide by their conceptions of human rights, and perhaps even requiring the rest of us to provide "development aid" to them.<sup>267</sup> Far from being a plausible duty of global justice, forcing a conception of global justice on such peoples seems downright immoral.<sup>268</sup>

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<sup>267</sup> See Buchanan, *Justice, Legitimacy, and Self-Determination*, 422.

<sup>268</sup> Rawls himself seems to argue roughly along these lines, albeit briefly: "we must at some point ask the question of whether it is ever legitimate to interfere with outlaw states simply because they violate human rights, even though they are not dangerous and aggressive toward other states, and indeed may be quite weak. Certainly there is a prima facie case for intervention of some kind in such cases, yet one must proceed differently with advanced civilizations than with primitive societies. Primitive, isolated societies,

We should perhaps not even describe these isolated groups as "peoples" at all, given the normatively loaded sense that we have been using that term. Whatever we call them, it seems plainly wrong to insist that they offer compulsory elementary education or even ensure freedom of speech or religion, and it borders on the absurd to require them to govern themselves democratically or abide by some conception of distributive justice. The simplest and most direct way of avoiding these consequences is to say that the existence conditions of global justice are not met with respect to such groups, and they are thus beyond the scope of global justice. There may be more convoluted routes around these troubling implications, since as we have seen, many cosmopolitan positions are forced to balance the value of peoples' autonomy against the demands of global justice; although I am unaware of compelling arguments to this effect, if they could be produced, the desired result would still be obtained much more simply and directly by Global Justice as Fairness.

If we consider these isolated groups as beyond the scope of global justice, however, what should we say about them? Do we simply have no duties toward them whatsoever? Of course not. That they are not (yet) members of the society of peoples and outside the direct purview of the global basic structure does not give the rest of us license to rape, pillage and plunder them at will. How to think about our duties regarding such groups is a large and difficult question, which cannot be pursued here. There are two basic points to be made on this front. First, the territories occupied by these isolated groups should not be under the jurisdiction of the surrounding states. If such groups are not part of the

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with no contact with liberal or decent societies, we really have no way to influence. But those that are more developed, seeking trade or other cooperative arrangements with liberal or decent societies, are a different story." (Rawls, *The Law of Peoples*, 93n)

society of peoples, neither are they part of any of its member states, and the global basic structure should ensure that domestic basic structures do not encroach on their territories. This does not mean that we need to recognize these groups as independent *states*, but it does mean that such groups should be able to govern themselves as they see fit, and that the resources within their territories are not available to anyone but them. This is not a matter of such groups' human rights (in Global Justice as Fairness's sense), but rather of the proper scope of justice. To this extent, the existence conditions defended by Global Justice as Fairness have important implications for the global basic structure.

The second point is that all further questions about how to deal with these isolated groups are simply outside the purview of Global Justice as Fairness. The theory is worked out for a specific subject only—the global basic structure—and is not equipped to answer questions about other subjects. Surely there is much to be said about the ethical treatment of such groups, as there is about intelligent extraterrestrial life. However, Global Justice as Fairness is a theory of *global justice*, not *universal morality*, and the existence conditions it recognizes show that, as an empirical matter, even 'global' is currently a bit too strong of an adjective. The point is that it is not an embarrassment for Global Justice as Fairness that it cannot answer questions about these isolated groups (beyond the global basic structure's recognition of their legitimate territorial and jurisdictional claims).

Of course there will be hard cases, and it will not always be obvious whether we should regard a group as within or beyond the scope of justice. Global Justice as Fairness's existence conditions should be understood as rather weak, such that only groups that are highly isolated, both culturally and physically, count as outside its

purview. There must be no real possibility of a domain of shared reasons between such a group and international society. My guess is that very few groups will fail to meet Global Justice as Fairness's existence conditions, but again, these will be thorny issues. While it is not a desirable feature of Global Justice as Fairness that it generates these difficult questions, it is still preferable to cosmopolitan positions, since it restricts such difficulties to very isolated groups. Cosmopolitan positions, by contrast, must address these issues with regard to many more groups, since they must deal with the issues raised above by balancing the claims of collective self-determination (not just by isolated groups) with the demands of global justice. While the character of the conflict differs somewhat, at least its domain is much more restricted under Global Justice as Fairness.

The above discussion is sure to raise broader worries about states and peoples, especially regarding questions of secession and collective self-determination. If very isolated groups can be outside their containing states' jurisdictions, what about less isolated groups that nevertheless seem to constitute distinct peoples within broader states? More generally, what should we say about states that contain multiple peoples? Clearly, the real world does not meet Global Justice as Fairness's ideal of states containing only one people, so we at least need to say something about how nonideal theory can address this problem. Buchanan's critique of Rawls's view on this front seems to apply to Global Justice as Fairness as well:

In Rawls's system, the fiction that the population of a state is a "people" unified by a single political culture removes problems of intrastate conflict from the domain of international law. The question of whether, and if so how, international legal institutions should respond to intrastate conflicts cannot even be raised within Rawls's framework because the parties who choose the Law of Peoples are understood to be representatives of "peoples," groups characterized by deep political unity and already possessing their own states. Rawls's political homogeneity assumption is not a mere detail; it shapes his understanding of what

international law is for, by eliminating from the Law of Peoples principles designed to cope with important conflicts that arise within states.<sup>269</sup>

We will conclude our discussion of Buchanan's view by taking up this challenge; if left unanswered, this would indicate a significant shortcoming of Global Justice as Fairness.

I will not attempt a careful response to Buchanan's critique of *The Law of Peoples* for two reasons. First, some of that critique hinges on Rawls's particular view. More importantly, however, much of his attack is based on the claim that there is no room for group rights to self-determination in cases of intrastate conflict on Rawls's view. This can easily be conceded, and although this point applies to Global Justice as Fairness as well, Buchanan's own view, as formulated in his later *Justice, Legitimacy, and Self-Determination*, similarly excludes these group rights.<sup>270</sup> There he claims that a great advantage of his view is that it is

a human rights-based approach to conflicts concerning self-determination and secession, rather than the abandonment of the human rights enterprise in favor of developing a new, practically dangerous and normatively incoherent international legal doctrine and practice that ascribes an expansive right of self-determination to nations, distinct peoples, or cultural groups.<sup>271</sup>

His "Remedial Right Only" view of secession and his rectification-based view of intrastate autonomy do not avail themselves of the very thing that he had previously criticized Rawls's view for lacking, and thus we will not worry about the specifics of his critique. In fact, I will argue that Global Justice as Fairness can (and should) incorporate Buchanan's account of secession and much of his view of intrastate autonomy.

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<sup>269</sup> Buchanan, "Rawls's Law of Peoples," 716

<sup>270</sup> See Buchanan, *Justice, Legitimacy, and Self-Determination*, chs. 8-9.

<sup>271</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 439

The basic thrust of Buchanan's worry about *The Law of Peoples*, however, still needs addressing before Global Justice as Fairness can incorporate Buchanan's views on this subject. The worry is this: Global Justice as Fairness is committed to the ideal of peoples' self-governance under the auspices of their own states, and given its "political homogeneity assumption" about the nature of peoples, very few states will meet the ideal. Therefore Global Justice as Fairness's nonideal theory requires an empirical, social-scientific concept that can be applied to existing groups and used to redraw (or otherwise bring about) state boundaries that realize the ideal of one people per state. I believe this worry is unfounded, and that Global Justice as Fairness's ontology of peoples does not stand in the way of embracing something very similar to Buchanan's human-rights based approach to secession and intrastate autonomy.

It should first be noted that Global Justice as Fairness's concept of a people is not intended to be the sort of social-scientific concept that would be needed to pick out peoples in the real world. Rather, it is an explicitly normative notion, and must be understood as an ideal. The central feature of peoples is their group agency, i.e. their status as Pettit's civilities. Civilityhood is surely a scalar concept, and no actual group will be able to perfectly manifest the ideals implicit in it. No group will be able to attain full agreement or overlapping consensus on a conception of domestic justice; similarly, no government will perfectly represent its citizens or govern in complete accordance with its citizens' shared conception of domestic justice. Peoples may also be subjugated by another group, in which case the exercise of their agency will be wrongly limited.

It is crucial to also point out that Buchanan's allegation that peoplehood implies "political homogeneity" is, in the context of Global Justice as Fairness, simply false. As

emphasized above, having a shared conception of domestic justice does not imply that a people is particularly unified on many political questions. All that is required is an overlapping consensus on basic questions of domestic justice. As in the idealized example of the Ottoman Empire, this shared conception of domestic justice may explicitly include very significant degrees of self-governance or other forms of autonomy for various groups within the people. This does not imply the existence of multiple peoples, but rather an ethnically, religiously, or otherwise diverse people sharing a conception of justice based around differentiated group membership. It is still perfectly possible for such diverse peoples to display the sort of group agency relevant for the purposes of Global Justice as Fairness.

If we wanted to use this understanding of peoples to develop a social-scientific concept capable of picking out peoples empirically, we would presumably need to find some threshold below which groups fail to exhibit the traits of (ideal) peoples to some specifiable degree. This would be probably be a very difficult task, although we can at least say that groups completely lacking their own institutions or governments could not be peoples, since they lack what is the crucial medium of their agency. It would thus be better to refer to such groups as something like "proto-peoples."

It may seem as though Global Justice as Fairness cannot be applied to the real world, and thus is incomplete, without setting some such threshold for peoplehood—that is, without providing *sufficient* conditions for being a people. However, I highly doubt that a workable criterion for the purposes of international law could be devised. Luckily, Global Justice as Fairness can get by without such a criterion (although it may need to say something about proto-peoplehood). Global Justice as Fairness only provides some

*necessary* conditions for peoplehood (namely, satisfaction of human rights) and then grants existing states that meet these conditions the benefit of the doubt. As long as we can pick out states (and their citizenries), we simply don't need to be able to pick out peoples.

When gross and persistent human rights violations occur against members of a group *qua* their membership in that group, then secession may be the only remedy, and for these purposes we may need a criterion of proto-peoplehood. I see no particular difficulty in this, however, since a simple vote could serve as an appropriate test, or if that is impossible, we can simply grant the group the same benefit of the doubt extended to existing states, again using human rights violations as indications of failure. This is essentially the position Buchanan defends—his Remedial Right Only Theory allows unilateral secession only in cases where it is needed to avoid further violations of basic human rights. There is no reason to think that Global Justice as Fairness cannot simply incorporate this position on secession under its first principle as a remedy for human rights violations.

Intrastate autonomy is a trickier question. Buchanan offers several possible justifications for the global basic structure's insistence that states grant groups some measure of internal self-governance short of secession.<sup>272</sup> Beyond human rights concerns similar to those in his view of secession, these justifications are all rooted in rectificatory justice. In the case of human rights violations, there is again no conflict with Global Justice as Fairness, but intrastate rectificatory justice is another matter. By Global Justice as Fairness's lights, such issues are part of peoples' domestic politics, and thus the global

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<sup>272</sup> See Buchanan, *Justice, Legitimacy, and Self-Determination*, 415-421.



basic structure should not interfere in such cases. As long as there are no violations of human rights, the global basic structure should stay its hand.

However, concerns regarding intrastate autonomy and secession go beyond failures of rectification and human rights, since there may be distinct peoples or proto-peoples within a state even without legitimate claims of past or current wrongs—such groups may merely fundamentally reject the conception of domestic justice otherwise shared by the citizens of their state. These are admittedly hard cases; however, I believe they are rather rare. It seems likely that the most typical reasons for sub-state groups to reject the prevailing conception of domestic justice are rooted in human rights violations. Even so, some groups will pursue independence in the absence of such violations, using anything from non-violent protest to outright insurrection against the dominant people; failures of rectification are likely motivations for such movements. Unfortunately, the typical response to these movements from the dominant people is to crack down on the dissident minority, often violating their human rights in the process. Such conflicts have a strong tendency to escalate beyond the point at which we can treat them as cases for ideal theory—in these contexts, non-compliance is certainly the norm. In the absence of this escalation, the trend will usually be toward incorporation into the dominant people, likely including some measure of intrastate autonomy for the minority. The middling cases, in which independence movements result neither in human rights violations nor in acceptance of the dominant (perhaps modified) political conception, although somewhat problematic, will thus be rather rare.

As the above discussion suggests, Global Justice as Fairness views intrastate autonomy arrangements as ways to *create* peoples, rather than to accommodate *multiple*

peoples within the same state. They may also be effective remedies for human rights violations, preferable to outright secession. In general, Global Justice as Fairness shares Buchanan's view that the proliferation of intrastate autonomy arrangements should be encouraged. However, if a people's struggle for rectificatory justice does not escalate to the point where it provokes violations of their human rights, Global Justice as Fairness's principles of global justice are silent, and this is a point of contrast with Buchanan's account. How significant this difference is, and which theory's position is preferable, I will leave to the reader to discern.

### 5.5 "Contra" *Morris on Peoples & States*

Having concluded our consideration of Buchanan's theory, there may still be a more general worry about peoples and states lingering—Global Justice as Fairness's apparent bias toward the modern state system. Is this merely status-quo bias? In what remains, I will try to argue that this is not the case. To do so, I will reply to some worries in this vein expressed by Christopher Morris, although his worries don't appear to rise to the level of outright criticism (hence the scare quotes in the heading).

In Rawls's work there certainly seems to be an element of status-quo bias in favor of the modern state, and many cosmopolitans (and others) find such bias objectionable. Morris expresses this sentiment well: "When one reads Rawls's work, it seems that the framework of a modern state is simply assumed, forming the background of his account of justice."<sup>273</sup> I do not wish to quibble with Morris's interpretation of Rawls; I believe his assessment is correct. However, I do want to offer a few reasons why we may want to accept at least a version of this assumption.

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<sup>273</sup> Christopher W. Morris, *An Essay on the Modern State* (New York: Cambridge University Press, 1998), 48

First, we should recall the starting point of Rawls's thinking, namely, "fundamental ideas familiar from, or implicit in, the public political culture of a democratic society."<sup>274</sup> Although it was not obvious in *A Theory of Justice* (perhaps even to Rawls), there is no pretense of justifying these fundamental ideas with independent argument in Rawls's work. As I noted above, the quest for practical agreement must always start from some shared premises, and for Rawls's domestic theory, part of this initial common ground is the assumption that the basic structure of a modern liberal democracy is the primary subject of political justice. We may thus find the entirety of the Rawlsian project—that of developing a political conception of justice as characterized above—as shot through with objectionable status-quo bias. It is beyond the scope of this work to defend Global Justice as Fairness's project against such general worries. However, I think it must be admitted that there are advantages to using this methodology over others if it can generate intuitively acceptable conclusions, not the least of which is the possibility of generating overlapping consensus in a pluralistic world.

I think there is more to be said in favor of the Rawlsian assumption of a world of multiple, distinct domestic basic structures. There is undoubtedly something unsatisfying about simply assuming "that things are roughly as they are, especially that our world is a world of states"<sup>275</sup>—especially in light of the terrible atrocities committed by states. Morris writes, "that [the world] is a world of states I cannot assume uncritically. For I wish to determine whether the way the world is has a rationale."<sup>276</sup> As the previous paragraph indicates, "determining whether the way the world is has a rationale" is a

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<sup>274</sup> Rawls, *Justice as Fairness*, 27

<sup>275</sup> Morris, *An Essay on the Modern State*, 250

<sup>276</sup> Morris, *An Essay on the Modern State*, 250

(much) more ambitious project than the one being undertaken here, but at least there is something to say about the relative merits of a world of distinct domestic basic structures in comparison with the alternatives.

What, exactly, are these alternatives? The most obvious one, and the one most salient to theorists of global justice, is a world state. We have already seen that most theorists of global justice are skeptical of this alternative, so I will set it aside and instead focus on other possibilities. Morris is one of the few philosophers to seriously consider such alternatives, so we will rely on his discussion in what follows.

Before doing so, however, I need to be clearer about the way I am using 'state' and 'domestic basic structure.' The last passage from Morris just cited continues thus: "So I must determine whether there is a deeper rationale to the *territorial nature* of our fundamental forms of political organization."<sup>277</sup> As he rightly claims, states are territorial—they have more-or-less clearly defined and enduring geographic borders, and persist even when their governments disintegrate. As we have seen, Global Justice as Fairness assumes that peoples (ideally) have their own territories in this sense—in other words, that they have their own states. But is it necessary to think of domestic basic structures as states in this sense—must they be territorial? Morris seems unsure: "It is certainly *possible* to think of nonstatist political, social, and economic institutions that might be considered a basic structure, but it is not clear that they would necessarily constitute a single, unitary system."<sup>278</sup> There are two questions raised by this claim: 1) What sort(s) of nonstatist institutional arrangements does Morris have in mind here; 2)

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<sup>277</sup> Morris, *An Essay on the Modern State*, 250 (emphasis added)

<sup>278</sup> Morris, *An Essay on the Modern State*, 48

Why should we think of (domestic) basic structures as "unitary systems" in any significant sense? Answering the second question will help us to answer the first.

As I have suggested with respect to Global Justice as Fairness's global basic structure, basic structures need not be particularly "unitary" (although *some* degree of unity is probably preferable). Again, Rawls describes the (domestic) basic structure as "the way in which the main political and social institutions of society fit together into one system of social cooperation,"<sup>279</sup> but this need not entail that this "way" is unified in any interesting sense. For instance, there was surely a "way" in which the main political and social institutions of the Roman Empire fit together into a system of social cooperation. Morris seems to acknowledge this when he claims that the "empire's political structure may be thought of as a 'capstone government,' where the ruling elites remained separated and culturally distinct from the subject communities and where government did not penetrate deeply the latter."<sup>280</sup> We might be tempted to say that there were many domestic basic structures that comprised the Roman Empire—indeed we might even say the same of the United States (or any federal state). But Morris clearly admits that the Roman Empire had a "political structure," and no one denies that there is a single American basic structure, so I see little point in trying to deny that this structure did not constitute a domestic basic structure.

So domestic basic structures need not be especially "unitary," as the example of the Roman Empire suggests. More importantly, this example also suggests an alternative to fixed territorial basic structures (i.e. states), for the Roman Empire, like all empires, was not territorial in the way that modern states are. Morris puts it nicely: "The empire's

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<sup>279</sup> Rawls, *Justice as Fairness*, 10

<sup>280</sup> Morris, *An Essay on the Modern State*, 30

boundaries were not borders, but merely frontiers—the furthestmost point reached by conquest."<sup>281</sup> Since I will assume that peoples' territories have stable boundaries, not frontiers, empires represent an important alternative to the statist assumption that I follow Rawls in adopting. Establishing the superiority of states over empires would thus go some way toward defending that assumption.

Empire is not the only such alternative, however. While we can say that the Roman Empire had a basic structure, albeit one that was only shallowly unified, the same cannot be said for medieval Europe. To characterize the feudal system as a single basic structure seems to stretch the term 'basic structure' to the breaking point. Thus feudalism represents a more radical alternative to the state system than empire—such governance is not territorial at all, but personal. Anarchism is, of course, an even more radical alternative; at the other end of the spectrum is the possibility of a world state. I will not try to argue for the moral indictment of anarchism implicit in Global Justice as Fairness's duty to create just institutions, and as we have seen, a world state is not exactly a popular option. But imperial and feudal systems are important alternatives to the state system, and there should at least be something to be said for Global Justice as Fairness's preference for the latter over the others.

The imperial alternative is not at odds with the state system regarding the fundamentally territorial nature of governance; the difference is whether the limits of territories are viewed as more-or-less fixed borders, or merely temporary frontiers. By contrast, feudal governance is not asserted over a territory, but rather over particular people. Feudal lords merely own land, they do not have territorial jurisdiction in the way

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<sup>281</sup> Morris, *An Essay on the Modern State*, 30-31

that states do.<sup>282</sup> Furthermore, it is perfectly consistent with a feudal system that a particular person be subject to the authority of many different masters simultaneously, as the sometimes tangled webs of overlapping and conflicting personal allegiances in medieval Europe remind us. In contrast to territorial forms of rule, the personal nature of feudal governance also means that it is, at least in some (perhaps normatively insignificant) sense, voluntary.

States' (or empires') claims to territory, if they could be justified, would count against feudalism and go some distance toward vindicating Global Justice as Fairness's assumption of the state system. However, Morris rightly notes:

It is hard to see how the justification for territoriality could be other than consequential, broadly speaking. There is a large literature on nonconsequential, especially "Lockean", accounts of private ownership of land and other resources. Whatever plausibility these accounts may have, they do not seem to carry over to the thesis of the territoriality of states. The main rationale for the latter would seem to be convenience and practicality. Understood thus, it would seem to be conditional and limited.<sup>283</sup>

As we saw above in connection with Buchanan's account of secession, Global Justice as Fairness also views states' claims to territory as "conditional and limited" (specifically, by respect for human rights). It also rests its case for territoriality on consequentialist grounds.

Morris suggests some of these grounds in his discussion of Nozick's "dominant protection agencies." In a (Lockean) state of nature, Nozick contends, there will initially be multiple protection agencies competing for the same customers. However, an "invisible hand" process will result in the eventual elimination of all but one such agency in any given territory, giving rise to "something very much resembling a

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<sup>282</sup> See Morris, *An Essay on the Modern State*, sec. 8.4.

<sup>283</sup> Morris, *An Essay on the Modern State*, 265

minimal state or a group of geographically distinct minimal states."<sup>284</sup> In vindicating Nozick's argument, Morris points out that there are historical precedents for this scenario:

For instance, in medieval Europe feudal lords offered security services to vassals and others who could ally themselves with the lords (and kings) best able to protect them. One could argue that feudalism was a reasonably successful alternative to the modern state for several hundred years. But the result almost everywhere in early modern Europe was virtual monopolies of political power over fairly large territories. Note as well that the feudal analogues to protective agencies characteristically were not particularly solicitous of the welfare of peasants and other unfree individuals who made up the bulk of the population.<sup>285</sup>

The broader point here is that purely personal governance will tend to become territorial—in other words, nonterritorial rule seems to be unstable. Furthermore, as Morris notes, feudalism does not seem to promise much in terms of individual welfare. He goes on to point out that at present, "while the power of government is greater, in most Western states at least, it is also constrained and tamed, unlike the concentrated powers of earlier times." With a nod to Pettit, he adds that the "power of the arbitrary especially has been reduced and contained by the modern state, at least in its constitutional and democratic forms."<sup>286</sup>

This suggests some fairly powerful consequentialist reasons for the assumption of territoriality, and since few theorists of global justice advocate a return to feudalism, we will set this alternative to the state system aside. Imperialism, as Morris argues, is not as easily dismissed; since it is still fundamentally territorial, albeit inherently expansionist, it does not suffer from the same instability that afflicts feudalism. It is also possible that empire's historical record may also be a bit better. In his "What's Wrong with

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<sup>284</sup> Nozick, *Anarchy, State, and Utopia*, 17

<sup>285</sup> Morris, *An Essay on the Modern State*, 70

<sup>286</sup> Morris, *An Essay on the Modern State*, 100



Imperialism?" Morris suggests that "empires may be better suited to securing global order today than the apparent alternatives."<sup>287</sup> Our final task before concluding the comparative evaluation of Global Justice as Fairness will be to confront Morris's suggestion; doing so will offer the opportunity to further explicate Global Justice as Fairness's understanding of the global basic structure and hint at some of its practical implications for the world as it stands now.

First we must more clearly distinguish between states and empires—so far all we have said is that empires have frontiers while states have borders. It cannot be merely the potential expansion of territory that marks off empires, however, since there is no trouble in imagining a state annexing new territory and thus expanding its borders. (The American purchase of Alaska is a fairly straightforward example.) The expansive nature of empire goes beyond the mere incorporation of greater territory—crucially, empires also incorporate other peoples. Since virtually all inhabitable land is now claimed by some group or other, an essentially expansionist policy requires the incorporation, displacement, or slaughter of the residents of any newly acquired territory. Since slaughter is clearly impermissible, and displacement is typically only justifiable as a matter of rectification, incorporation is the only generally acceptable option.

Morris characterizes empires as "typically large, composite and diverse, composed of different peoples and previously separate groups or societies, and usually created by conquest. And empires are constituted by a dominant core or center and a subordinate periphery."<sup>288</sup> As this characterization makes clear, it is not quite apt to describe empires

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<sup>287</sup> Christopher W. Morris, "What's Wrong with Imperialism?," *Social Philosophy and Policy* 23, no. 1 (2006): 165-166

<sup>288</sup> Morris, "What's Wrong with Imperialism?," 157

as "incorporating" other peoples—empires *subordinate* other peoples, usually against the wills of those being subordinated. The result is a form of governance that is, in a sense, incompatible with the self-rule of peoples. *Prima facie*, this seems to make empires necessarily objectionable from the point of view of Global Justice as Fairness.

This appearance, however, is deceptive, since acceptable empires are also "necessarily transitional." As Morris points out,

the civilizing mission of many empires seems crucial to their justification and to whatever legitimacy they may have. If the subject population were not in need of improvement, some instruction in civilization, then how might being part of an empire make the subject population better off? But that civilizing mission suggests that its success should bring an end to the empire.<sup>289</sup>

In light of this, we can understand "nice empires" (as Morris refers to them) as committed to the self-rule of the peoples they subjugate. If this is right, and we interpret "instruction in civilization" as "assurance of human rights," there is no deeply fundamental reason for Global Justice as Fairness to reject empires. In fact, the extent of the apparent disagreement between Global Justice as Fairness and Morris's defense of imperialism is difficult to determine.

Global Justice as Fairness shares Morris's worries about strengthening existing global institutions, especially his skepticism that "the UN in particular, unless radically reformed, can offer a promising source of increased order in the world." He rightly argues that the UN is inherently problematic because "it is by its nature an organization open to all (and only) states, however just or illegitimate."<sup>290</sup> Global Justice as Fairness's basic structure is not open to similar objections, since it withholds full standing from states that do not respect the human rights of their citizens, act aggressively toward other

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<sup>289</sup> Morris, "What's Wrong with Imperialism?," 162-163

<sup>290</sup> Morris, "What's Wrong with Imperialism?," 165

states, or otherwise violate its laws. Furthermore, Global Justice as Fairness recognizes the possibility that outlaw states and burdened societies may best be dealt with by the temporary denial of their self-rule—in fact, since the peoples in such societies are necessarily deprived of their collective agency as civilities, there is really no relevant "self-rule" of which to deprive them anyway.

There do seem to be at least some differences, however, between Global Justice as Fairness and Morris's recommendation of empire. The following sheds a bit more light on the specific nature of his suggestion:

Rome spread slowly, mainly by conquest. Its spread established the rule of law, such as it could be, in many places where it never existed. Niall Ferguson argues that the British Empire did the same. The suggestion is that systems of law may come to be by a number of different means and that empire may prove to be a better mechanism than, say, the UN. If one thinks that strengthening existing international organizations may risk greater global disorder, then one must think of alternatives. Empire is an obvious possibility. It may be argued that empire is a more promising means, in our world, for securing greater global order and establishing the rule of law. The anachronistic nature of empires, as well as various nasty associations, may require the use of another term. I am suggesting, however, that the "imperial" imposition of order by the great powers—in particular, the United States or the European Union, or possibly India—may be a more effective road to global order than the available alternatives.<sup>291</sup>

While Morris does not provide further clarification of (or argument for) this suggestion, this passage does suggest some differences with Global Justice as Fairness that are worth considering.

The chief difference is over the parties doing the "imposing" of order where it is lacking. Morris suggests "the great powers" undertake this mission, perhaps alone but presumably more often as leaders of coalitions of the willing. By contrast, Global Justice as Fairness charges the global basic structure with this sort of "civilizing" task, which it

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<sup>291</sup> Morris, "What's Wrong with Imperialism?," 165

takes to be a duty, not optional as Morris seems to suggest. There are several reasons to prefer Global Justice as Fairness's approach to Morris's on this point. First and foremost, Global Justice as Fairness's global basic structure includes specific legal guidelines and an institutional process for determining when and how such "imperial" interventions ought to be conducted. This would almost certainly increase the perception of legitimacy in the eyes of the groups being subjugated, which would greatly contribute to the eventual acquisition of full standing in Global Justice as Fairness's basic structure. Empirical examples are far too complex to be of help in the present context, but it seems likely enough that the more interventions appear to be matters of international law enforcement undertaken by inclusive global bodies and less like voluntary adventures rooted in mixed (or worse) motives undertaken by coalitions of the willing, the better. (Consider the likely effects of an imperial India "bringing law and order" to Pakistan, for instance.)

More generally, Morris seems to leave intervention to particular states because he is skeptical of global institutions generally, even the sort of basic structure imagined by Global Justice as Fairness. Although that global basic structure is, at best, a radically revised version of the UN (and other important global institutions), it is still a form of supra-national governance with a genuinely global jurisdiction, and Morris may find this too close to "world government" for comfort. Be that as it may, his suggestion of imperial imposition of order by the great powers seems to underestimate the significant potential for instability resulting from such practices.

More troubling, however, is the very great potential for domination inherent in his suggestion—without the discipline of robust international legal institutions, the

interventions of the great powers will lack any of the standard checks on governmental power that are crucial to the domestic operation of the "great powers." In such a situation, the great powers could all too easily become great dominating powers, regardless of the purity of their initial motives. (I don't mean to suggest that they aren't already.) Moreover, without some generally acknowledged standards and processes for intervention, even fairly well-ordered peoples will live under the perpetual fear of the great powers (or other interveners following their precedent), and this sort of constant uncertainty is anathema to republican freedom. Even though such interventions may track the interests of the people suffering it, it is not *forced* to do so in any significant sense. Thus if we value the non-domination of peoples, as I think global public political culture does, we ought to embrace the traditional republican remedies for domestic domination at a global level. This seems to be the fundamental difference between Global Justice as Fairness and Morris's imperial alternative.

Of course, nothing like Global Justice as Fairness's global basic structure currently exists, and Morris's suggestion is explicitly offered in the context of the present. Perhaps this somewhat diminishes the differences just indicated—Global Justice as Fairness's nonideal theory certainly does not prohibit the great powers from intervening to protect peoples against grave human rights violations or to confront inter-state aggression. However, Global Justice as Fairness also calls for the creation of its robust global basic structure, and this ought to constantly inform states' actions in the global arena. In particular, we ought to be sensitive to the fact that imperial behavior on the part of the great powers may undermine the enthusiasm, or perceived need, for the sorts of global institutions called for by Global Justice as Fairness.

## Conclusion

### Chapter 6: Summary & Speculation

#### 6.1 Synopsis of Global Justice as Fairness

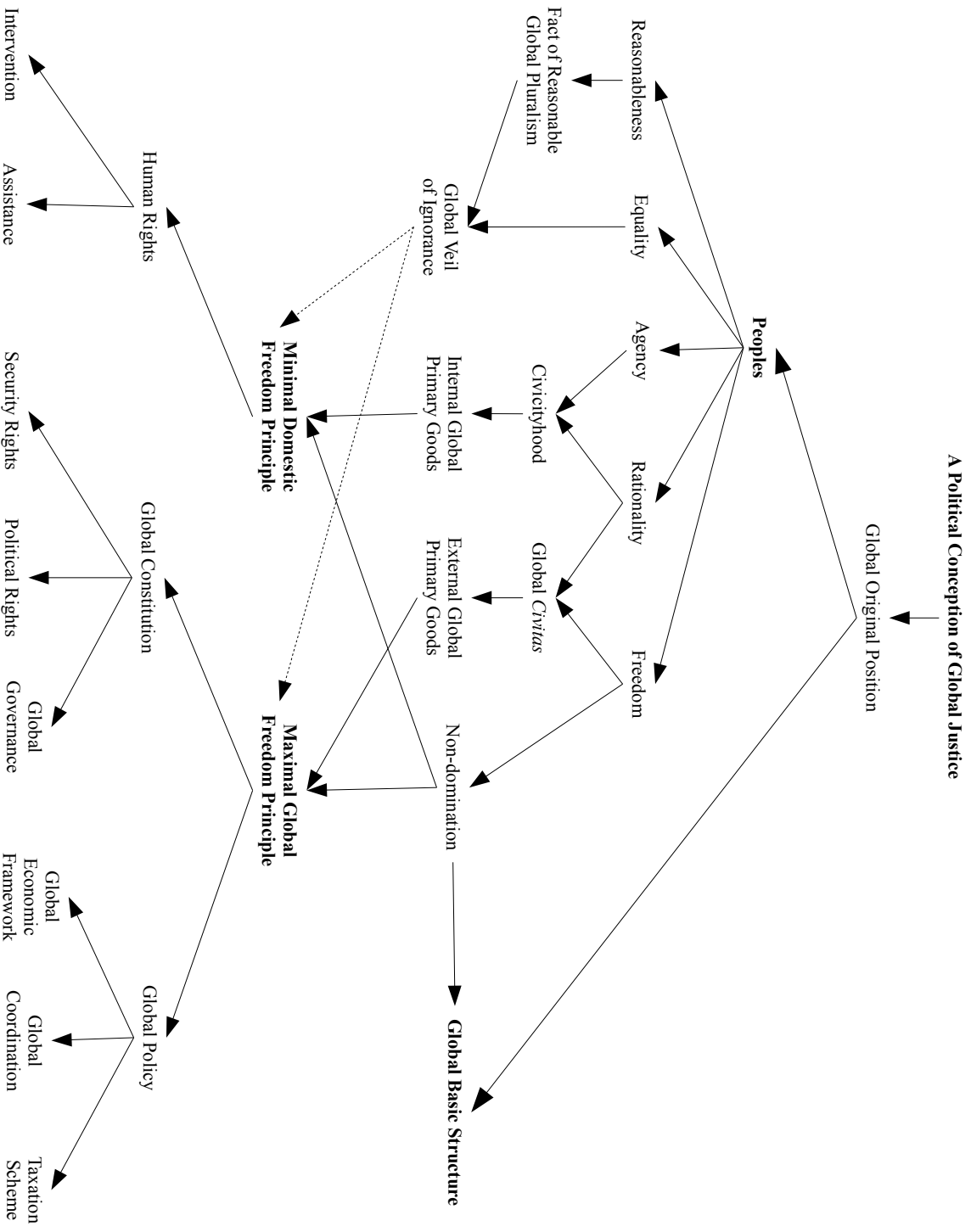
Although I have tried to dispel some of the worries often raised about statist theories, perhaps none of what has been said above will be enough to convince thoroughgoing moral individualists that a peoples-based theory of global justice can be acceptable. As I indicated at the outset, Global Justice as Fairness's choice of ontology is a basic parameter choice that cannot be directly argued for on prior or independent grounds. The same goes for its account of reasonableness, which recognizes what I have called "the fact of reasonable global pluralism," as well as its distinctly *political* approach to distinctly *global* justice and its attendant methodology. Nothing above purports to show that any of these features of Global Justice as Fairness ought to be accepted, on their own, as elements of any acceptable theory of global justice. At most, I have suggested that these elements are broadly consonant with global public political culture, implicit in which seems to be an ideal of free and equal peoples with diverse domestic conceptions of justice.

From these vague root concepts and basic methodology, Global Justice as Fairness develops unique conceptions of peoples' rationality, reasonableness, agency, and freedom, and a distinctive procedure for determining the fair terms of global cooperation. This procedure results in a full-blown conception of global justice, anchored in the agency and non-domination of peoples, the principles of which lay out what I hope are intuitively plausible guidelines for a just global basic structure. This conception of global justice, like any other, can only stand or fall as a whole—the method of reflective

equilibrium requires a *holistic* evaluation of Global Justice as Fairness, taking into account its starting points, practical implications, and its internal coherence, as well as a *comparative* evaluation of plausible alternative conceptions. I will now briefly summarize the case for Global Justice as Fairness made above, by first reviewing its basic framework, fundamental ideas, principles, and concrete recommendations, and then summarizing its advantages over nearby rival theories. We will then end by taking up some practical questions about the prospects of achieving global justice as understood by the theory.

Global Justice as Fairness is guided by the basic goal of developing a political conception of justice analogous to Rawls's domestic theory, but exclusively for the global context. It aims to spell out principles of global justice that could be the object of overlapping consensus among (almost) all peoples in spite of the wide range of conceptions of domestic justice they espouse. In pursuit of this goal, Global Justice as Fairness employs a version of Rawls's famous thought experiment, the original position, that is tailored specifically for the global domain. The design of this global original position incorporates specific conceptions of the fundamental ideas of the theory.

The two most essential aspects of Global Justice as Fairness's original position are its choices regarding the parties to the deliberation and the subject about which they are deliberating. Identifying peoples as the parties and the global basic structure as the subject makes Global Justice as Fairness a distinctive alternative to the two most prevalent approaches to Rawlsian global justice, LP-Rawlsianism and Rawlsmopolitanism, both of which accept one of these choices but reject the other. The following diagram lays out the connections among the main ideas of the theory:





As the diagram illustrates, Global Justice as Fairness's principles largely follow from its conception of peoples and their representation in the global original position. (All of the practical implications of the principles *apply* to the global basic structure, but are not particularly *informed* by its identification as the subject of global justice.) The distinctive account of peoples' reasonableness offered by Global Justice as Fairness (which crucially includes recognition of the fact of reasonable global pluralism), in conjunction with a standard assertion of their formal equality, generates a unique version of the global veil of ignorance. Behind this veil of ignorance, peoples are ignorant of their conceptions of domestic justice, even whether their conceptions are broadly liberal.

They do know, however, that they are well-ordered and fully cooperating members of international society. These two facts give content to the conception of peoples' rationality, which provides the basis for their choice of principles of global justice. Global Justice as Fairness explicates this well-orderedness in terms of peoples' group agency. Specifically, it adopts Pettit's notion of a civicity in order to explain the nature of this agency, whereby peoples collectively act indirectly through their representatives in government. Their rational interest in maintaining their status as civcities serves as the basis for Global Justice as Fairness's account of internal global primary goods, which are more-or-less necessary conditions for civcityhood.

As fully cooperating members of international society, peoples also have a rational interest in maintaining their status in that society. Global Justice as Fairness understands this status as a global analog of the domestic notion of citizenship, or global *civitas*. More specifically, it translates the republican vision of freedom as citizenship into the global context by advancing an ideal of free peoples as possessing a status that secures

them against certain forms of interference by others. Just as fully cooperating individuals within a domestic society, fully cooperating peoples in international society have basic interests in political and economic participation, and these generic interests serve as the basis for Global Justice as Fairness's account of external global primary goods.

More fundamentally, Global Justice as Fairness adopts the general republican conception of freedom as non-domination. On the particular conception it employs, non-domination is the absence of capacities for arbitrary interference, or interference that is not forced to track the relevant interests of those suffering it, and the relevance of peoples' interests is established by the account of global primary goods. This conception of freedom as non-domination shapes the formulation of Global Justice as Fairness's two principles, as well as adds some supporting content to them. It also reinforces the identification of the global basic structure as the subject of global justice. Just as free citizens' non-dominated status is institutionally constituted, the non-domination of free peoples is inherently an institutional reality—the relevant status cannot be possessed outside of an institutional setting. The primary republican strategy for the maximization of freedom is the effective mitigation of domination vis-à-vis capacities for *non-arbitrary* interference, and the only way to ensure that these capacities are *forced* to track relevant interests is with appropriately designed institutions.

Under the formal constraints of the global veil of ignorance, the account of global primary goods and the value of freedom as non-domination produce the content of Global Justice as Fairness's two principles, which apply to the global basic structure. The Minimal Domestic Freedom Principle sets a threshold of necessary conditions for peoples to be considered agents, and thus full members in good standing of international society.

These conditions are formulated as specific rights, held by citizens against domestic governments, that protect the interests provided in the account of internal global primary goods. These rights are understood as necessary assurances against capacities for arbitrary interference that threaten peoples' status as civilities, and from this follows certain supporting rights regarding domestic institutions. Together, these rights comprise Global Justice as Fairness's account of human rights, which are enforced by the intervention or assistance of the global basic structure.

The lexically posterior Maximal Global Freedom Principle directs the global basic structure to maximize peoples' non-domination, or minimize the capacities for arbitrary interference to which they are exposed. The relevant interests for identifying arbitrary interference are those provided by the account of external global primary goods. This principle gives rise to a lexically prior set of peoples' security and political rights which, along with a supporting institutional framework, should be enshrined in something like a global constitution (or constitutions), and a wide array of lexically posterior global policies regarding the structure of the world economy, coordination issues, and the taxation necessary to fund the global basic structure. Since a just global basic structure would be designed so as to be forced to track peoples' relevant interests, its capacities for interference, both in the pursuit of peoples' non-domination as well as in the provision of certain collective goods, would not themselves represent domination. The Maximal Global Freedom Principle opposes all capacities for arbitrary interference with peoples while simultaneously condoning certain capacities for non-arbitrary interference.

This positive account of Global Justice as Fairness is hopefully persuasive in light of its rather minimal and intuitive assumptions, as well as the plausibility of its practical

implications. The case for it is further bolstered by a comparative evaluation of its nearby rivals. The following table shows the main differences between Global Justice as Fairness and its primary nearby competitors:

**Table 4: Comparison of Global Justice as Fairness & Rival Theories**

	<b>Global Justice as Fairness</b>	<b>Rawlsian</b>	<b>LP-Rawlsians</b>	<b>Buchanan</b>	<b>Roche</b>
<i>source of fundamental ideas</i>	global public political culture	comprehensive liberalism	liberal public political culture	Natural Duty of Justice & Moral Equality Principle	human flourishing
<i># of original positions</i>	1	1	2 (liberal and then decent peoples)	2 (individuals in one, peoples in another)	n/a
<i>parties in original position</i>	peoples	persons	peoples	persons & peoples	n/a
<i>subject of global justice (site)</i>	global (not domestic) basic structure	basic structure (global includes domestic)	liberal foreign policy	global (not domestic) basic structure	global order (limited to injustice)
<i>existence condition of global justice (scope)</i>	interaction among peoples	interaction among persons	distributive: existence of world state; other: ?	none	participation in (unjust) global order
<i>relation of global to domestic justice</i>	distinct (but analogous)	identical	extension of domestic	distinct	global constrains domestic
<i>basis of human rights</i>	peoples' agency (civility/hood)	persons' agency (personhood)	threats to global stability/order	basic human interests	individual autonomy
<i>content of human rights</i>	minimal, nondemocratic	maximal, democratic	very minimal, nondemocratic	minimal, democratic	minimal, democratic
<i>responsibility for human rights</i>	global basic structure	anyone in a position to help	liberal & decent states	liberal institutions & liberal coalitions	those responsible for (relevant) harms
<i>structure of global governance</i>	state-based global institutions (civility of civilities)	optimal structure for liberal justice (whatever that is)	loose, voluntary confederations	both (reformed) current global institutions & club of liberal democracies	vertically dispersed aspects of domestic basic structures
<i>basis of collective self-determination</i>	fundamental value of peoples' agency	value of national cultures to individuals	maximization of # of liberal states	optimal assurance of human rights	minimization of harm
<i>realization of collective self-determination</i>	maximal non-domination of peoples (reasonable)	cultural group rights	toleration of all decent peoples	remedial/rectificatory rights to secession & substate autonomy	vertical dispersal of sovereignty
<i>content of global distributive justice</i>	fair structure of global economy	Rawls's 2nd domestic principle	none (in absence of world state)	equality of opportunity (nonideal: fair structure of global economy?)	n/a (not distinct from human rights)

As I have tried to argue above, most of these differences represent advantages enjoyed by Global Justice as Fairness in terms of both clarity and coherence. The following table highlights some of these particular advantages:

**Table 5: Advantages of Global Justice as Fairness over Rival Theories**

	<b>Human Rights</b>	<b>Global Basic Structure</b>
<i>Rawlsmo-politarianism</i>	avoids identification of full liberal rights as human rights	avoids conflation of global & domestic basic structures
	avoids comprehensive commitment to ethical autonomy	avoids appeals to cultural group rights to justify collective self-determination
<i>LP-Rawlsianism</i>	avoids appeals to the dangers violations pose to <i>other</i> societies	avoids bifurcated account of existence conditions of global non-/distributive justice
	provides clear rational basis for the content of human rights	doesn't place normative significance on lack of global basic structure
<i>Buchanan</i>	avoids comprehensive commitment to moral equality	avoids unprincipled formulation of nonideal theory
	avoids dubious instrumental justification for democratic rights	avoids worries of imperialism regarding isolated groups
<i>Pogge</i>	avoids commitment to human flourishing & derivative commitment to individual autonomy	avoids making all forms of global injustice matters of human rights
	avoids reliance on dubious notion of harm via the imposition of an unjust global order	offers basis for condemnation of unfair practices that are independent of human rights

Given these many differences, it is rather surprising that the recommendations of Global Justice as Fairness converge, to a very significant degree, with those of the other theories; there seems to be far more agreement on practical matters than theoretical ones. The relative weakness of its premises and correspondingly greater hope for practical agreement, while generating similar and intuitively plausible conclusions, is the general advantage of Global Justice as Fairness over competing theories—this is the basis of the fundamental argument in its favor. By offering a *political* conception of *global* justice,

Global Justice as Fairness hopes to widen the scope of agreement and hold out the possibility of a genuine and stable overlapping consensus on its principles by employing minimal premises that do not presuppose any comprehensive doctrine or conception of domestic justice, while still delivering broadly acceptable conclusions. This concludes our review of Global Justice as Fairness.

### *6.2 Practical Prospects*

As is typical for largely theoretical works about global justice, I will conclude with some very brief, sketchy, and highly speculative remarks about if and how Global Justice as Fairness can be realized in practice. Unlike comprehensive moral views, it is crucial for a political conception of justice to be *realistically* utopian—such views take the practical role of political philosophy very seriously. Admittedly, philosophers are not especially well-suited to evaluating the degree to which things are "realistic" (something I hope to remedy on a personal level in the future); however, I doubt that political "scientists" are all that much better at making the needed predications about the future of humanity.

The first thing to be said is that, in light of the significant convergence on the practical implications of Rawlsian and near-Rawlsian theories of global justice, Global Justice as Fairness is not at a particular disadvantage on this front. Indeed, given the very significant diversity of actual peoples' conceptions of domestic justice, the theory defended above has a marked advantage in making an overlapping consensus a genuine possibility. However, while other theories are free to insist on principles of justice that are unrealistically utopian and content themselves by lamenting the hopelessly unjust nature of the world, political conceptions of global justice cannot follow suit. If the

world proves too recalcitrant, Global Justice as Fairness would, by its own lights, require revision. Of course we must keep in mind that the theory has little hope of being remotely realized in the near future. The evolution of more-or-less tolerably just states took centuries, and a just global basic structure is probably unlikely to emerge from the nascent global order we have today any more rapidly.

There are, I think, some reasons to be optimistic, at least about the long term. The various UN declarations on human rights are at least paid much lip service these days, and their content significantly outstrips that of Global Justice as Fairness's account of human rights. The primary difficulty here is with adequate enforcement. While there has perhaps been some progress in stopping or preventing some of the gravest sorts of human rights violations (interventions in the Balkans, Libya, and East Timor may be examples), such progress is inherently limited by the lack of a truly legitimate and global enforcement mechanism. Currently, interveners must either work within what is a patently illegitimate system (in particular, the UN Security Council), or act alone (usually in coalitions), which brings with it the inherent danger of the interveners becoming dominating parties themselves, or at least being widely regarded as such.

The central difficulty here is how to bring about just global institutions. Reforming our current institutions does not seem very promising, since the needed reforms are quite drastic. For instance, Global Justice as Fairness would clearly require (as any sane theory of global justice should) that China and Russia have no say whatsoever in the Security Council, much less permanent vetoes, in light of their current human rights records. If attempts to make Security Council membership contingent upon respect for human rights were at all successful (which is highly unlikely), the predictable result would be the exit

of China and Russia (and probably many other states) from the system. Should that happen, it would most likely undermine the very global framework we were hoping to reform.

An opposite difficulty faces the needed reform of the major global economic and financial institutions. There, the problem is that states such as China and Russia have too little power, not too much. With the increasing economic might of states such as China, Brazil, and India, there is not much hope of institutions such as the World Bank, WTO and IMF continuing to operate successfully while still being controlled almost exclusively by the US and Europe. Indeed, even many in the West have called for granting these states significantly greater sway within such institutions.<sup>292</sup> Heeding such advice would merely serve to undermine whatever legitimacy these institutions already enjoy, by giving gross human rights violators the same sort of control over economic institutions that they already enjoy over security matters in the Security Council. Failure to more fully incorporate states such as China into these institutions may lead to their demise, but I think that is a price worth paying.

None of this is to suggest that we ought to completely abandon the current global system, although it is to suggest that we ought not fully respect its claimed authority. There are obvious benefits to having an inclusive body like the UN, and abandoning it would likely have very destabilizing effects. A much more promising strategy, I suggest, is the creation and gradual expansion of a set of, or perhaps multiple regional sets of,

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<sup>292</sup> For recent examples, see Daniel Alpert *et al.*, "The Way Forward: Moving From the Post-Bubble, Post-Bust Economy to Renewed Growth and Competitiveness." (New America Foundation, Oct. 2011); Sergei Guriev, "BRICs Proposals for IMF Reforms Are Not Radical Enough," *East Asia Forum*, July 20, 2012; Ana Palacio, "Reinventing the World Bank," *Project Syndicate*, Feb. 20, 2012.



supra-national institutions designed with justice firmly in mind. While these would not initially be truly global institutions, the aspiration to become so should be an explicit aspect of their foundational self-conceptions. The EU, which until recently seemed set to expand beyond Europe, is an obvious example of the possibility of such institutions; since the sort of global basic structure called for by Global Justice as Fairness is less robust than that of the EU, the likelihood of establishing such a structure is presumably even greater. It may be desirable to incorporate current economic institutions into this "global" basic structure, but it should be recognized that this would prevent them from playing the sort of role they currently play, and would require rethinking their functions and structure.

The primary obstacle for this strategy is the reluctance of the most powerful states, especially the US, to give up almost any aspect of their claimed sovereignty. It is admittedly difficult to imagine the US voluntarily incorporating itself into anything like the global basic structure imagined by Global Justice as Fairness. As I suggested above, however, similar skepticism about the formation of the EU a century or two ago would probably have been equally warranted. Just as the eclipsing of European states' global dominance made the formation of the EU more likely, so too, presumably, will the continued rise of China, India and Brazil make the US more inclined to change its views about sovereignty. A further advantage of the piecemeal strategy suggested here is the increased perception of legitimacy that would come with voluntary membership. Moreover, efforts to attract smaller states would be likely to provoke concessions on the part of the more powerful with respect to many of the features of the economic framework called for by Global Justice as Fairness—concessions that seem far less likely

to be won within the current global economic order.

There is no doubt that this gradual strategy in pursuit of a truly just and global basic structure is utopian, as is the more general hope that anything like Global Justice as Fairness's principles can eventually be realized by any means whatsoever. All I hope to have done here is cast some doubt on the claim that this utopia is objectionably unrealistic.

## Appendix: Freedom in Rawls, Pettit & Global Justice as Fairness

The purposes of this appendix are threefold. The first is to explain the reason for Global Justice as Fairness's most significant departure from a strict global analog of Rawls's domestic theory: the use of Pettit's republican conception of freedom as non-domination. The second is to lay out the differences between the notion of non-domination employed here with Pettit's (evolving) understanding of that notion. Pursuing these matters above would, I think, have been more distracting than illuminating; they will only get a brief and roughshod treatment here. The third is to anticipate some related potential concerns with Global Justice as Fairness's second principle, and hint at how they might be addressed.

Rawls's mature formulation of his first principle of domestic justice represents a significant revision of its formulation in *A Theory of Justice*. In its early form, his first principle required that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."<sup>293</sup> As stated, the principle suggested to some that liberty as such was something to be maximized. In response to objections from H.L.A. Hart in this vein,<sup>294</sup> Rawls revised his principle to read: "Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all."<sup>295</sup> Agreeing with Hart's arguments, Rawls subsequently made quite clear that "the idea of a maximum does not

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<sup>293</sup> See John Rawls, *A Theory of Justice* (Cambridge: The Belknap Press of Harvard University Press, 1971), 60.

<sup>294</sup> See H.L.A. Hart, "Rawls on Liberty and Its Priority," *The University of Chicago Law Review* 40, no. 3 (1973).

<sup>295</sup> Rawls, *Justice as Fairness*, 42

apply to specifying and adjusting the scheme of basic liberties."<sup>296</sup> Rather, the scheme, as discussed briefly above, is specified by considering the basic liberties needed by citizens "for the adequate development and full exercise of the two moral powers of free and equal persons."<sup>297</sup> These liberties are identified as primary goods.

If it were perfectly analogous with Rawls's domestic theory, Global Justice as Fairness would specify some of its external global primary goods by considering the liberties needed for the development and exercise of peoples' moral powers. Doing this would replace the first half of the Maximal Global Freedom Principle with Rawls's mature formulation of his first principle, only applied to peoples instead of citizens. This line of argument would have had three significant drawbacks. The first is that it is, at best, unclear what would be required for peoples, as opposed to persons, to develop and exercise their two moral powers—as collectivities, peoples are very different sorts of things. This difficulty could, perhaps, be overcome. The second drawback is not a similar lack of clarity, but rather a lack of explanatory power. By identifying the basic liberties as primary goods, Rawls renders the choice of his first principle in the original position utterly trivial. This is not exactly a problem with the position so much as it is merely unhelpful.

The third drawback is the most significant: the use of a prior list confines the value of freedom, for the purposes of a theory of justice, to only a narrow range of domains of choice. While Rawls asserts that there is a "general presumption" against interference,<sup>298</sup> no defense for this presumption is given, and it is not at all clear what the justification for

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<sup>296</sup> Rawls, *Political Liberalism*, 333

<sup>297</sup> Rawls, *Justice as Fairness*, 45

<sup>298</sup> See Rawls, *Justice as Fairness*, 44.

such a presumption is supposed to be within his framework. By contrast, Global Justice as Fairness's second principle aims to minimize all forms of arbitrary interference, regardless of the context of choice (provided of course that only non-dominating means are employed toward this end).

Pettit, himself deeply influenced by the Hart/Rawls debate about liberty, develops his own account of the basic liberties. He understands non-domination as freedom from capacities for *arbitrary* interference in *certain* choices. He identifies these certain choices with his account of the basic liberties, for which he offers three criteria he claims to be rooted in the republican ideal of citizenship. These criteria amount to a modified version of Rawls's first domestic principle (one that avoids Hart's objections), picking out "co-enjoyable" and "personally significant" liberties and requiring that the resulting set be as extensive as possible. Since there are many possible ways to fully specify the set of basic liberties, deliberative procedures must be invoked to decide between them. Any capacities for arbitrary interference with choices that are not protected by the basic liberties are of no moral concern—the domain of freedom is thus restricted to the set of basic liberties.<sup>299</sup>

The view attributed to Pettit above, which Global Justice as Fairness modifies for its own purposes, is not his current view. He previously identified arbitrary interference as interference that is not forced to track the relevant interests and opinions of those suffering it. These relevant interests were supposed to be those that were shared, not sectional or factional. There is a simple fact of the matter as to which interests are

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<sup>299</sup> This paragraph summarizes the discussion in Philip Pettit, "The Basic Liberties," in *The Legacy of H.L.A. Hart: Legal, Political and Moral Philosophy*, ed. Matthew H. Kramer *et al.* (New York: Oxford University Press, 2008).

shared—they are the avowable interests that are literally common to all members of the relevant group. If everyone in the group is disposed to avow an interest, then capacities for interference that are forced to track that interest would not be dominating. However, as a practical matter, shared interests were to be determined by a deliberative process of public discussion. It is this deliberative process that Global Justice as Fairness's account of primary goods is intended to replace, since (beside being rather unworkable in practice) such a deliberative process is not useful from the perspective of the original position—the rational interests of the parties must be fixed in advance. This move also ameliorates what Pettit calls the problem of the unauthorized state, since he freely admits that there may be significant domination that a state cannot combat without itself resorting to domination for want of an authorizing shared interest.<sup>300</sup>

Pettit now identifies capacities for arbitrary interference as non-deliberative control. Interference that is invited and can be called off by the one suffering it does not constitute control. Control occurs when others can raise the likelihood of your making the choice they favor; this control becomes non-deliberative when that likelihood can be changed by force, coercion, manipulation or deception. Only deliberative control does not count as non-deliberative; this occurs largely when sincere advice is given on a take-it-or-leave-it basis. Any other form of control represents a capacity for arbitrary interference, and when the choice affected is one of those protected by the basic liberties, it represents domination. Pettit's current view, then, seeks to reduce as much as possible any alien and non-deliberative control over the choices protected by the basic liberties. It sets the standard for domination quite low, since any influence over choice beyond

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<sup>300</sup> See Philip Pettit, "The Determinacy of Republican Theory: A Reply to McMahon," *Philosophy & Public Affairs* 34, no. 3 (2006): 282.

sincere advice will count as such, but it only applies to a restricted (but possibly quite extensive) domain of certain relevant choices.<sup>301</sup>

By contrast, Global Justice as Fairness identifies arbitrary interference as interference that is not forced to track certain interests, which are specified by its account of primary goods. It thus seeks to reduce as much as possible capacities for interference that do not reliably track interests in specified generic goods. It sets the bar for domination higher than Pettit does, since it allows capacities for non-deliberative interference to count as non-dominating as long as it is forced to track interests in primary goods. Global Justice as Fairness does not, however, restrict the domain of morally relevant freedom—any reductions in capacities for arbitrary interference, no matter what choices they impact, are regarded as moral improvements.

Global Justice as Fairness authorizes the global basic structure to interfere with peoples as long as that interference is forced to track their interests in global primary goods. This endows it with a capacity for non-arbitrary interference in the pursuit of common goods. Beyond this capacity, the global basic structure should minimize the domination of peoples by other peoples, foreign non-state actors (such as corporations, terrorist networks, and NGOs), and crucially, itself. It does not restrict this concern for the minimization of domination to only certain domains of choice (the global analog of the basic liberties).

Pettit may object that Global Justice as Fairness's use of primary goods to identify the interests relevant for determining arbitrariness is objectionable insofar as it disconnects freedom from people's actual interests, which cannot be determined in

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<sup>301</sup> This paragraph summarizes the discussion in Pettit, "Legitimate International Institutions," 139-141.

advance. However, his account of the basic liberties also disconnects freedom from people's actual interests, albeit it in a different way: it predetermines which areas of choice are even candidates for protection against domination. The drawbacks of Pettit's older view are significant: people's actual interests are very difficult to ascertain and unless those interests are actually shared across the entire group, the state is not authorized to interfere on their bases (the problem of the unauthorized state). Pettit's more recent view may avoid this problem, since it doesn't require an identification of interests at all, but it has its own drawbacks: almost any interference (anything but simple advice) with protected choices is objectionable, and yet any interference with choices outside of those protected by the basic liberties is perfectly acceptable. This would give the state a very significant power to eliminate capacities for interference in the predetermined areas of choice while simultaneously being limited in the range of such areas of choice. In other words, it is a more demanding view of freedom restricted to a predetermined range of choices.

Global Justice as Fairness has a wider but also weaker understanding of freedom, on which less capacities for arbitrary interference is always better, but the standards for non-arbitrary interference are easier to meet, as well as to determine. There are (at least) two potential worries one may have about Global Justice as Fairness's use of the notion of freedom, which I will conclude by very briefly trying to divert.

The first worry is simply about maximization—what if it turns out that maximizing overall non-domination leaves some peoples very dominated? The following passage from Pettit makes what I take to be an adequate response to this sort of worry:

The fact that each person's freedom as non-domination is a function of their relative powers has an immediate impact on the possibility of increasing the overall



intensity of non-domination by introducing a greater inequality in its distribution. Any anti-equality initiative will make at last two parties less equal in their intensity of non-domination. It will do this either by increasing the advantaged person's powers or by decreasing the powers of the other party or by doing both at once: in whatever way, it will worsen the power-ratio of the disadvantaged party. But if the initiative is intended to raise the overall intensity of non-domination by the same margin by which it raises the intensity of non-domination of the favoured party, it is ill-designed. For the shift in the power-ratio that raises the advantaged party's absolute intensity of non-domination by interval A (for advantage) will serve at the same stroke to lower the disadvantaged person's intensity of non-domination, in absolute terms, by interval D (for disadvantage). The weaker party's absolute intensity of non-domination is a function of their relative powers, and anti-equality initiative is bound to worsen it.<sup>302</sup>

However, if this response proves to be inadequate, there is no difficulty in modifying the Maximal Global Freedom Principle. It might be replaced with a Maximal Equal Global Freedom Principle, or even better, by a Global Freedom Difference Principle, according to which we should maximize the non-domination of the most-dominated people.

The second worry has to do with intuitively acceptable forms of interference that nevertheless fail to track the relevant interests. Since Global Justice as Fairness aims to minimize all capacities for arbitrary interference, it may be possible to produce some examples of arbitrary interference that nonetheless we would intuitively want to permit. For example, if an important oil-producing country decides to drastically cut exports for whatever reason, this may significantly interfere with other peoples' pursuit of their conceptions of domestic justice. This interference clearly does not track (much less is forced to track) other peoples' interests in global primary goods. Should the global basic structure then interfere with the oil-producing state to prevent this sort of interference?

I think (but am not sure) that this sort of worry can be addressed by keeping in mind that the global basic structure itself can become a dominating agent. Any capacities

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<sup>302</sup> Pettit, *Republicanism*, 114

for interference that it possesses must be suitably constrained under a robust rule of law. Thus any interference undertaken to reduce the domination of peoples must be done under the auspices of duly enacted international law. The sort of laws needed to avoid the interference in the above example would be very difficult to codify, and as general rules may very well counteract peoples' interests in participating in a (fair) global economy. In other words, the protection of decisions regarding matters such as export levels may very well track peoples' generic interests.

There is certainly room for doubt here. However, it is straightforwardly possible for Global Justice as Fairness to adopt a global analog of something like Pettit's account of the basic liberties. Doing so would increase the complexity of the theory and is thus, *ceteris paribus*, not desirable, but if the sorts of examples imagined under this second worry prove too numerous or too damning, such a maneuver would be worth the cost. As the responses to both of these worries indicate, the particular formulation of the Maximal Global Freedom Principle is not a very deeply entrenched feature of Global Justice as Fairness, and related principles could readily be formulated so as to avoid worries about the theory's unrestricted concern for the overall minimization of capacities for arbitrary interference.

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