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# THREE TAKES ON GLOBAL JUSTICE

FRANK J. GARCIA\*

## INTRODUCTION

Global justice has become an increasingly common topic of concern and debate, and the relationship between international trade law and global justice is an increasingly accepted one.<sup>1</sup> My goal in this Article is not to document these trends, nor is it to argue for why these are important and welcome developments.<sup>2</sup> Instead, I propose to step back from specific arguments concerning justice and trade law and examine the ways in which we conceptualize the problem of global justice, particularly in view of globalization and the diversity of normative traditions it highlights. My task in this Article is to examine three different approaches to this problem—three “takes,” if you will, on the question of global justice—drawn from Rawlsian liberalism, communitarianism, and consent theory. By comparing these three approaches with respect to how they envision the relationship between trade law and justice, and how they respond to the challenges to global justice raised by normative pluralism, I hope to suggest new ways to craft a truly global approach to the problem of global justice and its relationship to international trade law, one that more fully takes into

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1. See, e.g., Joost Pauwelyn, *Just Trade Under Law: Do We Need a Theory of Justice for International Trade Relations?*, 100 AM. SOC'Y INT'L L. 375 (2006) (the panel concluded “Yes,” there is a need for a theory of justice for international trade relations).

2. Ten or fifteen years ago, however, it would have been necessary to establish both the centrality of globalization and the relationship between trade law and justice as a prolegomena to any project such as this one. See, e.g., Joost Pauwelyn, *Just Trade*, 37 GEO. WASH. INT'L L. REV. 559 (2005) (noting historic resistance of the field to formal normative inquiry beyond trade economics).

account the challenges and opportunities of globalization. Before turning to the substance of this endeavor, I will start by explaining briefly what I mean by globalization and justice.

### I. GLOBALIZATION AND JUSTICE

In essence, globalization today is the dramatic compression of geographic space in human social relations.<sup>3</sup> This compression of space is altering global social relations by interconnecting us in new and powerful ways, and both requiring and facilitating a shift in regulation away from the nation-state and towards new institutions and actors.<sup>4</sup> As a consequence of such changes, our decisions regarding investment, consumption, and politics, to name a few, affect one another's lives and fortunes as never before,<sup>5</sup> making it necessary for us to think about new global institutions and global justice, not simply existing state and interstate institutions and domestic justice.

What do we mean by justice? The term "justice" essentially describes a relationship between a society's values and the results of its social processes.<sup>6</sup> Consider, for example, when a court delivers a ruling, a legislature produces a bill, or an international conference negotiates a treaty. These are social outcomes, the products of communal deliberation. There are many ways we can evaluate these outcomes, such as through their effectiveness, legitimacy, or elegance. "Justice" evaluates these outcomes in terms of their consistency with the values of those subject to them.<sup>7</sup> Such values, when applied to the exercise of public authority, we call the principles of justice. The question of justice then, is whether people will judge a particular outcome consistent with core community values.

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3. See, e.g., DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* 15–16 (1999); ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 64 (1990) (discussing globalization as intensification of interdependence through spatio-temporal compression).

4. Effective regulatory decision-making increasingly involves the meta-state level, leading to a system in which states still have a preeminent, but not the only, role. See, e.g., ANNE MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* (1996).

5. Global financial crises have a way of painfully and dramatically bringing this point home. See MARTIN WOLF, *FIXING GLOBAL FINANCE* 28–57 (2008) (discussing financial crises in an era of globalization); Jeffrey E. Garten, *Lessons for the Next Financial Crisis*, 78 *FOREIGN AFF.* 76 (1999) (discussing the Asian Financial Crisis of the late 1990s).

6. See FRANK J. GARCIA, *TRADE, INEQUALITY, AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE* 44–46 (2003) [hereinafter GARCIA, *TRADE, INEQUALITY, AND JUSTICE*].

7. *Id.*

The answer to this question will vary according to the people involved and their particular core principles—that is the difference between the concept of justice and the many substantive *conceptions* of justice that we find in the world.<sup>8</sup> This inquiry has been carried out primarily in domestic societies in which the characteristics of justice have been developed with reference to the many policy issues that arise out of domestic social interaction.

The significance of globalization lies in its transformation and extension of these social interactions and social processes beyond national boundaries.<sup>9</sup> When we speak of global justice we are arguing, in effect, that globalization is creating social outcomes and processes of the sort that make justice relevant at the global level, and that we need to consider whether these outcomes and processes are indeed acceptable in terms of core principles.<sup>10</sup>

But *whose* core principles, and *which* ones? Put another way, is *global* justice possible, and is the very idea of it coherent? Such questions constitute a major debate among philosophers, political scientists, and globalization theorists.<sup>11</sup> I am not going to attempt to resolve the debate in this Article, nor will I attempt to survey the many theories of global justice in play today.<sup>12</sup> Instead, I will look at the central problem all these approaches encounter, a problem which none of them has completely solved: how do we establish a truly *global* basis for global justice? One consequence of globalization is that we are more aware than ever of the diversity in the world: a plurality of different traditions, cultures, and languages.<sup>13</sup> In the face of such pluralism, how do we put the “global” in global justice?

Each of the three approaches examined in this Article—liberal internationalism, global communitarianism, and consent-based trade theory—offers a different way of addressing this central problem of

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8. JOHN RAWLS, *A THEORY OF JUSTICE* 5–6 (1971) [hereinafter RAWLS, *A THEORY OF JUSTICE*].

9. See Frank J. Garcia, *Globalization, Global Community and the Possibility of Global Justice*, B.C. L. SCH. FAC. PAPERS, Paper 33 (2005), available at [http://sr.nelco.org/bc\\_lsfp/33/](http://sr.nelco.org/bc_lsfp/33/) [hereinafter Garcia, *Global Community*].

10. *Id.*

11. See GLOBALIZATION THEORY: APPROACHES AND CONTROVERSIES (David Held & Anthony McGrew eds., 2007) (surveying the range of globalization theory).

12. For useful surveys of contemporary approaches to transnational justice, see Simon Caney, *International Distributive Justice*, 49 POL. STUD. 974 (2001); Onora O’Neill, *Transnational Justice*, in POLITICAL THEORY TODAY 276, 276–304 (David Held ed., 1991).

13. On the problem of pluralism and international law, see Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L L. 301 (2007) (suggesting an approach based on the policy science of the New Haven School).

normative pluralism. Each “take” assumes a different conception of the relationship between international trade law and justice, and each makes different demands on trade law with respect to the promotion of global justice. By setting these three approaches side by side, highlighting their strengths and weaknesses, I hope to suggest some new directions for the trade and justice inquiry, which might capitalize on the strengths of all three takes while avoiding some of the pitfalls.

Before I begin, let me clarify one final point concerning a fourth approach to global justice—cosmopolitanism—and why I do not include it. The cosmopolitan approach to global justice seeks to ground global justice in a universal appeal to human dignity.<sup>14</sup> Some of the most ambitious and elegant arguments for global justice are cosmopolitan in nature.<sup>15</sup> I do not in any way object to the liberal basis of cosmopolitanism, its human rights language, or its vision of a just world order built on human dignity.<sup>16</sup> However, I think cosmopolitanism has one serious vulnerability which has led me to look to other routes: in a multi-ethnic, pluralistic world of different religious, philosophical, legal, and cultural traditions, I do not consider cosmopolitanism particularly well-suited to serve as the basis for a truly *global* approach to justice. I believe it can be more accurately characterized as a liberal ideal of global justice with considerable rhetorical or symbolic power, but without a strong claim to universal validity; it is more a vision than a path at this point.

For this reason, I am interested in developing alternative or supplementary approaches to the question of global justice. In particular, I am interested in seeing what kind of work can be done by looking in three other directions. I will begin with two takes based on political theories, which might not initially seem congenial to global justice: Rawls’ famous theory of liberal justice, which he confined to justice within states, not between them;<sup>17</sup> and communitarian theories of justice, which limit justice to certain communities, specifically nation-states.<sup>18</sup> The result in both Take One and Take Two is an approach to

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14. See, e.g., SIMON CANEY, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY* 3–4 (2005) [hereinafter CANEY, *JUSTICE BEYOND BORDERS*].

15. Most recently, for example, in the work of Simon Caney, and stretching all the way back to Kant himself. See *id.*, EMANUEL KANT, *Eternal Peace*, in *THE PHILOSOPHY OF KANT* (Carl J. Friedrich ed., 1977).

16. See, e.g., CANEY, *JUSTICE BEYOND BORDERS*, *supra* note 14, at 3–4.

17. JOHN RAWLS, *THE LAW OF PEOPLES* (1999) [hereinafter RAWLS, *THE LAW OF PEOPLES*].

18. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 30 (Basic Books 1983) [hereinafter WALZER, *SPHERES OF JUSTICE*].

global justice that solves some problems while creating others, illuminating the limits of each theory as much as it does the political situation each one addresses.

For Take Three, I will adopt an entirely different approach to the question, which requires less in the way of traditional political theory, but hopefully lies closer to our lived experience of trade and exchange generally, and see what can be built from these materials. In Take Three, I begin with the ways in which our language and law recognize that theft, coercion, exploitation, and trade are not the same thing, though value may change hands in all cases. Using Simone Weil's notions about consent, I try to work out exactly why that might be so, and what implications this has for trade and for the question of justice. Hopefully Take Three fills some gaps identified by the other two takes, particularly with respect to the challenge of finding a consensus for global norms in a pluralistic context.

## II. TAKE ONE - INTERNATIONAL JUSTICE, OR: GLOBAL JUSTICE AS THE FOREIGN POLICY OF LIBERAL STATES

One approach to global justice is to deliberately stop short of trying to develop global norms, and instead root justice in the foreign policy of liberal states.<sup>19</sup> This approach does not attempt to look for or establish a shared normative basis among states or peoples; instead, it simply looks at liberal states, and asks the following question: what are the foreign policy obligations on liberal states by virtue of their liberalism? In other words, are liberal states obligated to pursue a liberal vision of global justice by virtue of the fact that they are liberal?

In the traditional view of liberal political theory, states are free to pursue pragmatism and realism in their international relations, regardless of their domestic political values.<sup>20</sup> They can embrace constitutional democracy at home, and *realpolitik* abroad. Underlying this view is the assumption that foreign relations take place in a sort of value-free zone.<sup>21</sup> On this view, there may be domestic justice, but

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19. The leading example of this is Rawls' *THE LAW OF PEOPLES*, *supra* note 17. For reasons discussed further below, I am instead basing Take One on an international extension of Rawls' domestic model of Justice as Fairness. *See infra* Part II.A.

20. *See generally* Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398 (1997) (discussing the "Lockean dilemma" in liberal constitutionalism).

21. *Id.*

there is no global justice: only politics and power, and to some extent, law.<sup>22</sup>

One way to challenge this view is to take the cosmopolitan approach, and assert that there are overarching principles of human dignity that apply even in international relations. Certainly human rights law tries to do this at the level of positive law, but as discussed above, a cosmopolitan approach to global justice leads directly to the problem of how to justify truly global norms. Instead, Take One embodies a more limited approach; namely, to attempt to hold liberal states accountable abroad to their political principles at home. How does one do this?

#### *A. The Model*

One starting point is in the work of Lea Brilmayer, an international legal theorist. Her project begins with this question: how are international acts by states justified?<sup>23</sup> Her answer is her so-called “vertical thesis”: treat the justification of international acts as a question of the legitimacy of state action.<sup>24</sup> For Brilmayer, governmental action that extends across international borders is governmental action nonetheless,<sup>25</sup> and must be justified normatively by reference to some form of political theory or it will lack legitimacy as a state policy. Thus, the authority for transboundary state action is ultimately derived from its justification in domestic political theory.<sup>26</sup> Such justification is “vertical,” in that it is drawn “upwards” from the political norms regulating the underlying relationship between the individual and the relevant political institution.<sup>27</sup> This is in contrast to the traditional “horizontal” approach to state morality, which analyzes international ethical questions by reference to the ethics between co-equal state actors.<sup>28</sup> In other words, justification comes out of the political morality governing the state’s relationship with its own citizens, rather than out of any notion of the morality of a state’s relationship to other states.<sup>29</sup>

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22. See, e.g., STANLEY HOFFMANN, *Ethics and International Affairs*, in DUTIES BEYOND BORDERS 1, 1–43 (1981) (sketching out the limits of moral choice in international relations from the viewpoint of a “Liberal Realist”).

23. LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 11 (1989).

24. *Id.* at 2.

25. *Id.* at 11.

26. *Id.* at 22.

27. *Id.* at 2.

28. *Id.*

29. BRILMAYER, *supra* note 23, at 29. In this way, Brilmayer’s theory is part of a general shift away from a “society of states” model of international law, and towards a global public law and a global society of persons. See Frank J. Garcia, *Globalization and*

Brilmayer's theory is a powerful argument for the view that states act within a coherent moral universe, in which the legitimacy of *all* their actions, both domestic and international, derives from their observance of the same set of core political principles.<sup>30</sup>

Thus, for the governments of liberal states, this entails that they act as liberal states in their dealings abroad, in the same way their citizens expect them to act as liberal states domestically.<sup>31</sup>

This leads to the next question: if liberal states must act as liberal states abroad, what does a liberal foreign policy look like? With respect to global justice in particular, what does a liberal foreign policy entail in the area of economic relations and economic justice? According to the vertical thesis, one must begin by reference to the state's domestic liberalism, which in the case of this Article will involve principles of economic justice. Therefore, in order to work out one possible model for what a liberal state's foreign policy might look like with respect to economic justice, I will employ Rawls' famous theory of "Justice as Fairness."<sup>32</sup>

I have opted for this theory, despite its problematic relationship to the question of justice across borders,<sup>33</sup> for two principal reasons. First, for reasons I have argued elsewhere, I find it to be the most powerful liberal approach to the central problem of inequality as it affects economic justice, in that it most fully grapples with the liberal dilemma of moral equality and natural inequality.<sup>34</sup> Second, as I have also argued elsewhere, I am not convinced by Rawls' own reasons for refusing to extend his theory to problems of transboundary justice,<sup>35</sup> instead, I find the logic of his argument for domestic justice convincing,

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*the Theory of International Law*, 11 INT'L LEGAL THEORY 9, 10–12 (2005) [hereinafter Garcia, *Theory of International Law*].

30. BRILMAYER, *supra* note 23. The justification of a state's international acts "must be analyzed by reference to the constituting political theory that grants it authority to act domestically." *Id.*

31. Frank J. Garcia, *Developing a Normative Critique of International Trade Law: Special & Differential Treatment* (forthcoming 2010) University of Bremen TranState Working Paper No. 66, 2007, available at <http://www.sfb597.uni-bremen.de/pages/pubApBeschreibung.php?SPRACHE=en&ID=76> [hereinafter Garcia, *Normative Critique*].

32. RAWLS, A THEORY OF JUSTICE, *supra* note 8.

33. Rawls does not extend his theory to matters of international justice, and in THE LAW OF PEOPLES is critical of those who do, opting himself for a more limited "duty of assistance" on matters of economic justice. See RAWLS, THE LAW OF PEOPLES, *supra* note 17; Frank J. Garcia, *The Law of Peoples*, 23 HOUS. J. INT'L L. 659 (2001) (book review).

34. Other liberal theories of justice such as utilitarianism and libertarianism founder in one way or another on the problem of inequality. See GARCIA, TRADE, INEQUALITY, AND JUSTICE, *supra* note 6, at 110–18.

35. *Id.* at 124–28.



regardless of national boundaries.<sup>36</sup> In the discussion which follows, I am assuming familiarity with the outlines of Rawls' basic theory, and only note a few issues of significance which arise in its extension to transboundary justice and international trade law.

Rawls is concerned with inequalities that arise in the distribution of social primary goods, such as wealth, status, rights, privileges, and opportunities.<sup>37</sup> Inequalities in the natural distribution of natural primary goods, such as size, strength, brain capacity, and basic health, deeply affect peoples' life chances, but are not themselves the subject of justice because they are arbitrary natural facts; rather, it is how a society responds to such inequalities that forms the basic subject of justice.<sup>38</sup> The fundamental problem of distributive justice is that inequalities in natural primary goods often lead, through the operation of social institutions, to inequalities in the social distribution of social primary goods.<sup>39</sup> Such inequalities in social primary goods are not deserved, since they are deeply influenced by arbitrary, underlying natural inequalities.

Rawls argues that as a result, the basic structure of society must be arranged "so that these contingencies work for the good of the least fortunate."<sup>40</sup> The distribution of natural talents is to be considered a common asset, and society is to be structured so that this asset works for the good of the least well-off. Through his celebrated account of the "Original Position" as a hypothetical problem involving the choice of first principles, Rawls develops this view into the theory of Justice as Fairness, in particular the "Difference Principle," which states that inequalities in the distribution of social primary goods are justifiable only to the extent they benefit the least advantaged.<sup>41</sup> Satisfying this criterion could entail a variety of social measures, ranging from altering the structure of incentives to reward actions which benefit the least advantaged, such as the charitable gifts deduction found in income tax codes, to the outright redistribution of private wealth through progressive tax and welfare legislation. Rawls contends that a society

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36. All the more so if one takes a Brilmayer approach, in which it is precisely the domestic liberalism of a state which furnishes the starting point for its transboundary liberalism. See BRILMAYER, *supra* note 23, at 22.

37. The brief account of Rawls' theory which follows is based on my summary in Garcia, *Normative Critique*, *supra* note 31, at 5–22.

38. See, e.g., RAWLS, A THEORY OF JUSTICE, *supra* note 8, at 100–08.

39. *Id.* at 72.

40. *Id.* at 102.

41. *Id.* at 75.

so organized would meet the basic Kantian obligation of mutual respect: to treat each other as ends and not as means.<sup>42</sup>

So far, this is domestic Rawls—the starting point for determining the foreign policy implications of liberalism. Having selected a body of domestic political theory to work with, the next step involves adapting the theory for use in an international context, involving, in this case, international trade law. The key normative assumption underlying a Rawlsian account of inequality is that differences in natural endowments are undeserved. In Rawls' terms, they are “arbitrary from a moral point of view.”<sup>43</sup> Translating this to the international setting, it is important to recognize that inequality works at two levels: on individuals, as in the domestic context, and between states (territorially-associated groups of persons).<sup>44</sup> Setting aside the issues of migration and conquest, states and the people born into them must, in general, accept the extent of resources to be found within their territories.<sup>45</sup> These national boundaries and the resource endowments they encompass have a profound distributional impact on individuals' life prospects.<sup>46</sup>

These natural inequalities at both the individual and state levels, the arbitrariness of their distribution and their social consequences, form the subject of justice in a transboundary setting.<sup>47</sup> For liberal states, the task is to determine principles that can serve both as a standard for evaluating their transboundary social responses to natural inequalities, and as a guide to liberal states and the social institutions they influence when making distributive allocations that will impact social inequalities.<sup>48</sup> Put in Rawlsian terms, we must determine the

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42. *Id.* at 179.

43. *Id.* at 72.

44. See Garcia, *Normative Critique*, *supra* note 31, at 7–10.

45. The arbitrariness of international borders and the particular resource “bundles” they circumscribe is becoming a key issue in global social policy today. See generally FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY (Brian Barry & Robert E. Goodin eds., 1992).

46. See, e.g., Thomas W. Pogge, *An Egalitarian Law of Peoples*, 23 PHIL. & PUB. AFF. 195, 198 (1994) (asserting borders have tremendous distributive impact).

47. Rawls would not agree, as he considers material inequalities as the subject of domestic justice. See RAWLS, *THE LAW OF PEOPLES*, *supra* note 17; however, for the reasons I argue elsewhere, Rawls' position on the exclusively domestic nature of material inequality is problematic (see GARCIA, *TRADE, INEQUALITY, AND JUSTICE*, *supra* note 6, at 124–28). But see Mathias Risse, *How Does the Global Order Harm the Poor?*, 33 PHIL. & PUB. AFF. 349 (2005) (offering a thoughtful defense of Rawls' position in *THE LAW OF PEOPLES* that domestic institutions are the chief determinant of material inequality).

48. Garcia, *Normative Critique*, *supra* note 31, at 13.

relationship between the principles of Justice as Fairness developed in a domestic setting, and these issues of transboundary distributive justice.

For the purposes of this Article, the heart of the argument is that representatives in the Original Position would choose the same principles of Justice as Fairness for transboundary issues as they do for domestic issues, because the choice problem is the same.<sup>49</sup> Under circumstances in which people do not know their particular social and economic position in the world, including what state they will be born into and what resources that state commands, they would choose principles of justice which would maximize the social distribution to the least advantaged individual or state, because they may turn out to be that person or be born into that state.<sup>50</sup> Put another way, I am arguing that as an element of a just foreign policy, liberal states must engage in transboundary acts and policies which satisfy the Difference Principle.<sup>51</sup>

Having adopted Justice as Fairness for international economic issues as well as domestic ones, the examination now turns to contemporary international economic law. The task becomes applying these principles to liberal states' actions when they respond to or affect natural or social inequalities through international trade law. Interestingly, the conclusion is that justice requires free trade, but that free trade alone is not enough for a just global economic order.

The core commitment of contemporary trade law is that of free trade: international economic relations are to be free, or as free as possible, from governmental restrictions in the form of tariff and non-tariff barriers, and nondiscriminatory with respect to country of origin (the most-favored-nation rule) and domestic origin (the national

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49. Thus simplified, we have glossed over several interesting technical issues. For example, critics and proponents of a Rawlsian approach to international justice have argued whether a second, "international" Original Position is required, or whether the principles chosen in the "domestic" Original Position would, by extension and without further choice, apply to transboundary state action. See GARCIA, TRADE, INEQUALITY, AND JUSTICE, *supra* note 6, at 131–33. There, I opted for a second Original Position as most consistent with Rawls' own (limited) approach to international justice, for reasons germane to my argument. *Id.* at 132. For the purposes of this Article and in line with Brilmayer's vertical thesis, it makes more sense to speak in terms of a single Original Position, as the principles of justice chosen there will apply equally to domestic and foreign policy choices.

50. For a fuller treatment, see GARCIA, TRADE, INEQUALITY, AND JUSTICE, *supra* note 6, at 131–36.

51. This is a separate question from the twin problems of international politics, namely what politics are necessary to enact such measures internationally, and what modifications or compromises to such commitments are necessary in view of the political realities of a fragmented illiberal international society. These are formidable problems, but their difficulty does not detract from the transformative significance of accepting *ab initio* that liberal states have liberal foreign policy commitments, however realized or realizable.

treatment rule).<sup>52</sup> The starting point, therefore, in the elaboration of a liberal theory of trade is to examine whether, from a normative point of view, this commitment to free trade is justifiable.<sup>53</sup>

One can deduce from the principle of Justice as Fairness that a well-ordered society requires free trade as a policy.<sup>54</sup> However, free trade is not enough. Adherence to the full extent of the principles of Justice as Fairness also requires that inequalities in the distribution of social primary goods be justified by their contribution to the well-being of the least advantaged.<sup>55</sup> The reason for this is the problem of inequality and its effects on trade.

The global inequality in natural resources leads, through a complex variety of domestic and international private and public actions and institutions, to social inequalities in wealth, privileges, rights, and opportunities.<sup>56</sup> Empirical studies suggest that economic size does matter, and that these inequalities are not, on the whole, working for the benefit of the least advantaged—it is actually quite the reverse.<sup>57</sup> Smaller economies are the most vulnerable to adverse changes in their trade in the global economy, and in the international economic law system.<sup>58</sup> Thus, they face the most obstacles to economic development and effective competition.<sup>59</sup>

In light of these facts, applying Justice as Fairness to international trade leads to a very basic question, which liberal states must address in their international economic relations: given the fact of inequality and its adverse effects on the least advantaged (the smallest economies and the people living in them), how can the international economic system be restructured to ensure that such inequalities work to the benefit of the least advantaged? This is where a set of trade rules known as special and differential treatment (S&D) can play a role.<sup>60</sup>

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52. For a clear and concise overview, see MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 20–38 (2d ed. 1999).

53. The discussion which follows is drawn from Garcia, *Normative Critique*, *supra* note 31, at 13–15.

54. For an alternative approach justifying free trade as an actual principle of justice chosen in a Rawlsian original position, see Ethan B. Kapstein, *Distributive Justice and International Trade*, 13 *ETHICS & INT'L AFF.* 175, 175–82 (1999).

55. Garcia, *Normative Critique*, *supra* note 31, at 17.

56. *Id.* at 20.

57. *Id.*

58. *Id.* at 20–21.

59. *Id.* at 21.

60. See Garcia, *Normative Critique*, *supra* note 31, at 21. S & D has been criticized as ineffective or worse. See Jeffery L. Dunoff, *Dysfunction, Diversion and the Debate Over Preferences: (How) Do Preferential Trade Policies Work?*, in *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM* 45 (Chantal Thomas & Joel R. Trachtman eds., 2009).

At the core of S&D is the practice of asymmetric trade liberalization, involving the terms on which states allow access to their markets and expect access in return.<sup>61</sup> S&D attempts to secure the benefit of social inequality in developed countries, in the form of the wealth and resources of their markets, for the least advantaged states, through market access that is both preferential, in that it is on better terms than those received by larger economies, and non-reciprocal, in that larger economies cannot expect equivalent concessions from smaller economies in return.<sup>62</sup> It is this asymmetry which enables S&D to play a key role in justifying inequalities in the international allocation of social goods.<sup>63</sup> By opening their markets to exports from smaller economies on a preferential basis, large economies, in effect, place the consumption power of their larger, richer consumer market at the service of the smaller economies, which can increase their exports and thereby strengthen their economic base.<sup>64</sup> Thus, preferential market access for developing countries allows the inequalities that manifest themselves in the form of wealthy consumer markets to work to the benefit of the least advantaged, thereby meeting the central criteria for liberal distributive justice.<sup>65</sup>

Applying the difference principle to trade law, and with an understanding of the role of the market as a manifestation of economic inequalities, a liberal theory of just trade would require liberal states to establish market access on terms that benefit the least advantaged, both unilaterally (i.e., through trade preferences) and through their role in multilateral institutions such as the World Trade Organization (WTO).<sup>66</sup> Having determined this mandate, the stage is now set for a detailed normative analysis and review of existing trade preferences and multilateral trade laws.

It is impossible to carry out or even thoroughly summarize such an analysis within the confines of this Article; however I will state the conclusions which I have argued elsewhere. First, while S&D, as

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Nevertheless, it represents the sole systematic effort within trade law to address the problem of inequality on a structural level.

61. See Garcia, *Normative Critique*, *supra* note 31.

62. *Id.* at 22.

63. Market access is managed through the two principal components of S&D: market access preferences and market protection mechanisms. In this Article, I will focus on the market access branch of S&D. For an evaluation of market protection mechanisms, as well as the wealth transfer aspects of S&D, see GARCIA, TRADE, INEQUALITY, AND JUSTICE, *supra* note 6, at ch. 4.

64. Garcia, *Normative Critique*, *supra* note 31, at 23.

65. *Id.*

66. *Id.*

currently embodied in unilateral preference programs and multilateral WTO rules, plays an important role in justifying inequalities, a Rawlsian analysis reveals how much work still needs to be done to craft trade rules which truly satisfy the core requirement of a liberal theory of justice; namely, that social inequalities work to the benefit of the least advantaged.<sup>67</sup> In case after case, the details of the rules and how they operate actually subvert the normative purpose and basic framework of such rules, working to the benefit of the most advantaged states instead of the least advantaged.<sup>68</sup>

Second, this basic form of analysis is not limited to trade law, but can be applied to any aspect of international economic law in which there are resources to be allocated, and in which states act either unilaterally or through international institutions to allocate such resources. For example, one can also apply Justice as Fairness to the work of institutions such as the International Monetary Fund (IMF) and the World Bank, exploring what responsibilities liberal states might have within such institutions to influence their policies so as to benefit the least advantaged.<sup>69</sup>

### *B. Contributions and Limits of This Model*

To recapitulate, in this section I have outlined one “take” on the question of global justice and international trade law; namely, to approach justice as a matter of the foreign policy obligations of a liberal state with respect to transboundary questions of economic justice. Following Brilmayer’s vertical thesis, this approach has assumed a model of transboundary justice as essentially similar to domestic justice, in that it roots the legitimacy of state action in a state’s constitutive political theory, regardless of whether such action crosses territorial

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67. GARCIA, TRADE, INEQUALITY, AND JUSTICE, *supra* note 6, at 147–92.

68. *Id.* To take only one example, the rules governing which goods are eligible for trade preferences (central to S&D) establish criteria which have more to do with the domestic industries and foreign policy goals of the granting state than they do the economic needs of the beneficiary state. *See id.*

69. Matters of international monetary and credit policy are significantly under-theorized. *See* Sanjay G. Reddy, *Just International Monetary Arrangements*, in GLOBAL INSTITUTIONS AND RESPONSIBILITIES 218, 218 (Christian Barry & Thomas W. Pogge eds., 2005) (“[D]espite the acknowledged centrality of monetary arrangements in modern economies, they have received surprisingly little attention from philosophers concerned with distributive justice, whether in the national or the global context.”). *Id.* With respect to the IMF, one key question is whether their currency lending and intervention policies benefit the least advantaged. For the World Bank, the question is whether the terms on which the Bank loans and manages development capital benefits the least advantaged. Frank J. Garcia, *Global Justice and the Bretton Woods Institutions*, in THE FUTURE OF INTERNATIONAL ECONOMIC LAW 23 (William J. Davey & John Jackson eds., 2008).

boundaries. In this model, international trade law is subject to the same normative criteria as domestic law because the same liberal states are actively asserting their power in both arenas.

The greatest advantage of this approach is that it is not contingent upon the existence of any global normative consensus on justice, or upon the persuasiveness of local theories of justice across national boundaries. Instead, it confines itself to articulating what kind of global trade policy a liberal state should pursue in order to be consistent with its own normative commitments. This would apply equally to situations in which the state acts unilaterally, and when it acts through an international organization by advocating for, or setting, that institution's policies.

This offers advocates for global justice an immediately available set of normative and rhetorical tools with which to address the many pressing problems of global distributive justice, at least insofar as liberal states are actively involved, whether through their own policies or through the organizations they influence. Reformers do not need to initially win any controversial theoretical battles, or design new global institutions. Instead, they need only point out the global distributive ramifications of current normative commitments. Such an approach also encourages greater coherence in liberal states between domestic and international policies.<sup>70</sup>

Take One also offers liberal states a familiar basis on which to evaluate their own transboundary actions, because it resembles the kind of evaluation already carried out for domestic policies.<sup>71</sup> Precisely because it operates within the boundaries of traditional domestic political theory, this approach is particularly well-suited to offer concrete normative benchmarks for evaluating international law and policy. As the abbreviated analysis of trade law and S&D above sought to illustrate, Justice as Fairness can be the basis for a robust, detailed critique of existing law, and can suggest specific reforms in law and institutional practice. This is possible, in part, because Justice as Fairness yields a clear, normative benchmark for regulatory policy: are

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70. See Michael Javid, *Increasing the Coherence of Global Economic Policy-Making—Suggestions for Improving the Governance Structure of the International Economic Law Regime* (Spring 2009) (unpublished manuscript, on file with the author) (discussing the benefits of policy coherence).

71. For example, Rawlsian analyses of domestic tax policy abound. See, e.g., James Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 *VAND. L. REV.* 1129 (2008); Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 *FORDHAM L. REV.* 1991 (2004).

the rules designed so that the social process of allocation they structure work to the benefit of the least advantaged?

However, as is often the case, the limits of this approach flow directly from its strengths. By foregoing the search for a global normative theory, Take One articulates a strong claim on liberal states, but it cannot reach beyond liberal states to other states, some of which are those pursuing the most destructive policies. This model does not offer arguments as to why illiberal states are obligated to pursue those foreign policies we in liberal states consider to be “just” or necessary, nor does it give us guidance on how to manage relations between liberal and illiberal states, a problem that preoccupied Rawls at the end of his life.<sup>72</sup> I do not mean to minimize the significance of persuading even liberal states to follow a liberal theory of justice internationally—that by itself would be transformative. However, the limits of this approach are built in at the theoretical level.

Moreover, this approach reinforces two problematic aspects of international relations: the “society of states” model and the “liberal hegemony” problem. First, by articulating the basis for transboundary liberalism in a state’s own domestic political theory, this approach undercuts the normative thrust of the human rights movement; namely, that states owe certain obligations to human beings as human beings, without the need for any mediating domestic theory. In its strongest form, this is the essence of the cosmopolitan approach to global justice. Despite the limits of cosmopolitanism discussed above, it is clear that international society has moved beyond merely a society of states, and has encompassed, even in a limited degree, individuals as subjects of international law.<sup>73</sup> In this sense, Take One can be seen as a retrograde movement, trading away individual normative and legal status for increased binding force.

Second, by situating justice within the realm of unilateral state action and state influence over multilateral institutional policy, Take One reinforces the link between power and ideology in international relations. In other words, when one factors in the preponderance of global economic power held by the U.S. and Europe states, together the most prominent liberal states, the stage is set for the critique of “justice” as the ideology which cloaks “liberal” states in their international pursuit of power and influence.<sup>74</sup> Put another way, the objects of

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72. See RAWLS, *THE LAW OF PEOPLES*, *supra* note 17.

73. See Garcia, *Theory of International Law*, *supra* note 29, at 10–12.

74. It is difficult to evaluate the morality of a state’s foreign policy without a clear understanding of the moral framework of the institutions through which it acts. See Nancy



unilateral state action or multilateral institutional rules, may have reason to resent the power which allows liberal states to carry out or enact their policies, however “liberal” they seem. At its worst, a liberal foreign policy approach to transboundary justice becomes a kind of “liberal triumphalism.”

Finally, this approach does not, by itself, offer a theory of global justice which applies to international organizations directly—in other words, it does not offer an independent normative argument for binding international institutions *qua* institutions to principles of distributive justice.<sup>75</sup> Instead, if such institutions happen to follow just policies, it will only be because they are controlled by a majority of liberal states, who have decided to fulfil their liberal commitments and have encountered or created the politics necessary to enact this agenda, not because the institution is independently obligated to do so.

For all these reasons, I would characterize the approach in Take One as international justice, not global justice. As a theory of liberal state obligation, it can play an important role in the pursuit of global justice, but standing alone, there is nothing truly *global* about it.

### III. TAKE TWO - GLOBALIZATION AND THE POSSIBILITY OF GLOBAL JUSTICE

The preceding section presented an approach to global justice which presupposes that global social relations have not changed in any significant way. In essence, this limits justice to international justice, or justice between states and through states, for their citizens. This allowed us to take a strong normative base (obligations of liberal justice on liberal states) and extend it to cover transboundary distributive issues, but its limit was its reach—by definition it can only apply directly to liberal states and to global institutions through the votes and policy influence of those states.

But what about a truly *global* justice—is that possible? If we are not going to proceed on the basis of a universalist account of political morality, as cosmopolitanism does (which has some serious difficulties, as mentioned before), and if we are not yet willing to abandon traditional forms of political theory entirely (as Take Three will

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Kokaz, *Theorizing International Fairness*, in GLOBAL INSTITUTIONS AND RESPONSIBILITIES 65, 71–72 (Christian Barry & Thomas W. Pogge eds., 2005).

75. This may be symptomatic of a larger fault with contemporary political theory about global justice: a failure to closely engage with institutions. See Christian Barry & Thomas W. Pogge, *Introduction* to GLOBAL INSTITUTIONS AND RESPONSIBILITIES 1, 1–2 (Christian Barry & Thomas W. Pogge eds., 2005).

explore), then what are our options? One possibility is to take seriously the “global” aspect of global justice in the following respect: to examine what normative possibilities are created by the ways in which globalization is changing social relationships.

In particular, the question of a truly global justice requires us to consider the relationship between justice and society—in this case the possibility of global society.<sup>76</sup> Can we really speak of global justice independent of the question of whether there is a global society?<sup>77</sup> Liberal internationalism can try to do so by focusing on the foreign policy commitments of liberal states, but as Take One demonstrated, this approach has its limits. Moreover, do obligations of justice depend on the prior existence of a certain, specific *kind* of global social relationship; namely, *community*?<sup>78</sup>

Two branches of justice theory present this challenge most acutely: the social contract tradition and the communitarian approach to justice. Both present the limiting factor to justice in terms of social relationships. Contractarians cite the absence of a social contract beyond national borders, and communitarians require even more: communal bonds, expressed in terms of shared traditions, practices, and understandings that go beyond social contract requirements.

Accordingly, these two branches represent a specific kind of challenge to the possibility of global justice; namely, that global justice requires a kind of global society or community that we simply do not have, and maybe cannot have. But that is where globalization comes in. In my view, globalization is creating the possibility for exactly those sorts of relationships, thereby opening the door to new normative possibilities.<sup>79</sup> As communitarianism is the more stringent of the two,<sup>80</sup> I will confine myself, within the limits of this Article, only to consideration of the communitarian form of this argument.<sup>81</sup>

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76. Here, I am speaking of social relations among individuals and groups of individuals, not a global “society of states.” See Garcia, *Theory of International Law*, *supra* note 29, at 10–12.

77. David R. Mapel & Terry Nardin, *Introduction to INTERNATIONAL SOCIETY* 3, 3–4 (David R. Mapel & Terry Nardin eds., Princeton Univ. Press 1998).

78. Garcia, *Global Community*, *supra* note 9, at 9.

79. *Id.*

80. By requiring community, and not merely society, communitarians go beyond the criteria established by social contract theory; therefore, if one can meet the stringent standards of the communitarians, by implication, one has gone a long way towards meeting the standards of the contractualists as well.

81. See John Linarelli, *What Do We Owe Each Other in the Global Economic Order?: Constructivist and Contractualist Accounts*, 15 FLA. ST. J. TRANSNAT'L L. & POL'Y 181 (2006) (offering an overview of contractualist approaches to global economic justice issues).

*A. The Model*

Essentially, communitarians maintain that justice is a property of certain groups. Taking Michael Walzer's work as an example, the communitarian position is that global justice is not possible because we lack the sort of social relations on a global level, which make justice possible in domestic society.<sup>82</sup>

According to Walzer, distributive justice is relative to social meanings.<sup>83</sup> Only in domestic societies do we find the shared practices, traditions, and understandings which define what justice is, and which help create the social solidarity and sense of common purpose necessary to support the sacrifices and obligations of justice.<sup>84</sup> In Walzer's words, justice "is rooted in the distinct understandings of places, honors, jobs, things of all sorts that constitute a shared way of life."<sup>85</sup> Unless these kinds of social relationships exist, there is no possibility of justice.<sup>86</sup>

Given that for Walzer it is a society's shared life which determines justice, and not the other way around, justice requires a prior community in which all relevant distributive decisions take place according to shared traditions, practices, and understandings of justice.<sup>87</sup> In such communities, justice is determined by their shared understandings, not coercive of them—otherwise, justice would be tyranny.<sup>88</sup> On this view, distributive justice "presupposes a bounded world within which distribution can take place: a group of people committed to dividing, exchanging, and sharing social goods, first of all among themselves."<sup>89</sup>

Given the nature of this community, there are necessary limits to the scope of justice. It is only within particular communities that you can determine what justice consists of, and who owes justice to whom. Thus, Walzer and others argue that it is only within nations that justice makes sense.<sup>90</sup> Determining what justice might be requires a historical analysis of that society's shared life, not an *a priori* argument or a rational reconstruction of their beliefs.<sup>91</sup> In other words, justice requires

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82. This account is drawn from my treatment of Walzer in Garcia, *Global Community*, *supra* note 9. See WALZER, SPHERES OF JUSTICE, *supra* note 18.

83. Garcia, *Global Community*, *supra* note 9 at ch. 1.

84. *Id.* at 16.

85. WALZER, SPHERES OF JUSTICE *supra* note 18, at 314.

86. *Id.*

87. *Id.*

88. *Id.* at 313.

89. *Id.* at 31.

90. Garcia, *Global Community*, *supra* note 9, at 19.

91. *Id.*

a shared understanding of social goods. Only political communities have such shared understandings, and the preeminent example is the nation-state.<sup>92</sup> Therefore, we are justified in preferring compatriots over non-compatriots in many sorts of distributions, including economic benefits.<sup>93</sup>

This is where globalization comes in. It is my contention that globalization itself is changing the nature of this argument.<sup>94</sup> I am not suggesting that, at this point in our history, global social relations form the sort of full-blown political community which communitarians find in domestic social relations.<sup>95</sup> In my view, however, globalization is creating a third alternative, something between the nation state and a global community, consisting of “limited” degrees of community.<sup>96</sup> This means that global society, taken as a whole, may not rise in all cases to the level of community which communitarians posit, but has *enough* elements of community, and contains enough *pockets* of community, to support an inquiry into justice in at least in some areas of global social relations.<sup>97</sup> In order to illustrate this, I will examine in greater detail two particular aspects of globalization—the globalization of knowledge and the globalization of regulation—in which this change is salient.

First, globalization is creating a community of knowledge. Through globalization we know a great deal, immediately and intimately, about the suffering of people in other parts of the world, more so now than at any time in the past.<sup>98</sup> Such knowledge satisfies a basic requirement for community—that we have the capacity to know one another’s needs, concerns, and preferences.<sup>99</sup> Moreover, this flow of information is not simply about global harms to “poor Others.” Globalization is also contributing to a shared sense of vulnerability to “remote” forces, even among citizens of wealthy, developed nations.<sup>100</sup>

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92. *Id.*

93. *Id.*

94. *Id.* at 12–14.

95. *Id.* at 21.

96. Garcia, *Global Community*, *supra* note 9, at 21.

97. *Id.* at 13–14.

98. HELD, *supra* note 3, at 58 (asserting that the globalization and telecommunications revolution brings people into other social realities they otherwise would not know).

99. See David Miller, *The Ethical Significance of Nationality*, 98 ETHICS 647, 653 (1988) (citing BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1991)) (noting the importance of media in allowing dispersed bodies of people to think of themselves as belonging to a single community).

100. Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485, 516 (2005) (“We [meaning the U.S.] also may feel the growing significance of ‘remote’ forces on our lives, whether those forces are multinational

This kind of knowledge is an important element in the communitarian argument for community as a prerequisite of justice, because it is within community that we have the knowledge of each other that is necessary for justice to work at all.<sup>101</sup> This knowledge forms the basis for the social determination of “need” and “whose needs count,” as well as the basis for Walzer’s shared understandings. In this way, such knowledge about each other is the basis for creating solidarity—that leap of the moral imagination which says that your concerns are my concerns.

One specific type of shared knowledge important to globalization is the growing recognition of the risks we share as human beings on this planet, and of our shared interest in addressing those risks. In this sense, globalization is “de-territorializing” risk, creating what has been called a “community of risk.”<sup>102</sup> The literature is remarkably consistent in its listing of common risks facing all human beings: war and security challenges; climate change and environmental degradation; economic crises and increased economic competition and dislocation; infectious disease and global pandemics; natural disasters; and rapid population growth, to name a few.<sup>103</sup> Moreover, the desire for security, environmental health, and sustainable development, for example, are not unique to any one specific culture.<sup>104</sup>

The mere fact that shared risks exist is not by itself enough to create community.<sup>105</sup> In order to see a sense of community emerge from the mere recognition of shared risks, we need to look at *how* we are responding, which brings me to my second point about the globalization of institutions. This community of knowledge and risk is increasingly becoming a community of shared traditions, practices, and understandings concerning how we respond to such risks.<sup>106</sup> These grow, both spontaneously and institutionally, out of our perception of

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corporations, global terrorist organizations, world capital markets or distant bureaucracies such as the European Union.”).

101. Garcia, *Global Community*, *supra* note 9, at 27.

102. PAUL KENNEDY ET AL., *GLOBAL TRENDS AND GLOBAL GOVERNANCE* 158–59 (2002).

103. *Id.* President Obama alluded to this in his September 23, 2009 remarks to the U.N.G.A., in which he said the self-interests of states have never been more aligned than they are today. President Barack Obama, First Speech to the United Nations General Assembly (Sept. 23, 2009), *available at* <http://www.cnn.com/2009/POLITICS/09/23/obama.transcript/index.html>.

104. See Bruno Simma & Andreas L. Paulus, *The “International Community”: Facing the Challenge of Globalization*, 9 *EUR. J. INT’L L.* 266, 272 (1998) (listing bases for a dialogue on a minimal set of common values).

105. Garcia, *Global Community*, *supra* note 9, at 28.

106. *Id.* at 29.

shared needs and interests, our capacity to help and to harm, and our awareness of each other's plight—in short, our understanding of globalization as interlocking our fates.<sup>107</sup> I would like to focus on two particular types of contemporary shared practices, markets and meta-state institutions, as highlighting the interplay between globalization and our community-building responses to shared risks.<sup>108</sup>

Insofar as globalization is creating a global market society, this in itself is a shared practice or set of practices, albeit quite complex, contributing to a community of interests.<sup>109</sup> The advanced capitalist form of market society practiced by the most developed countries is not, of course, implemented in identical ways, even in all market societies. Nevertheless, market society has certain attributes—the need for bureaucratic regulation, recognition of private property, and functioning civil courts, to name a few—which by virtue of their significant spill-over effects, contribute to the formation of shared interests among participants.<sup>110</sup> Not the least of these is an interest in developing institutions which supplement and mitigate the rigors of capitalism, compensating the “losers” through some form of wealth transfer.<sup>111</sup>

Perhaps the strongest evidence of an emerging global community involves our recognition of a shared need to look to institutions beyond the state, in order to frame an adequate social response to many of the problems and challenges we face.<sup>112</sup> In other words, the need for increased global governance is itself a shared understanding, and the reality of global governance by its nature constitutes a shared practice.<sup>113</sup> Social regulation today is increasingly conducted through a complex partnership, consisting of states and their constituent units, international organizations, and non-state actors through mechanisms such as the market, all regulated or established through international law.<sup>114</sup> From a distributive justice perspective, globalization is revealing domestic society as an incomplete community, incapable of

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107. *Id.*

108. *Id.* at 30.

109. *Id.*

110. See, e.g., DON SLATER & FRAN TONKISS, MARKET SOCIETY: MARKETS AND MODERN SOCIAL THEORY 92–116 (2001) (surveying the range of institutions which markets require and/or are embedded in).

111. Garcia, *Global Community*, *supra* note 9, at 31.

112. *Id.*

113. *Id.*

114. “[T]he institutions and quasi-formal arrangements affecting persons’ life prospects throughout the world are increasingly international ones – international financial institutions, transnational corporations, the G8, the World Trade Organization . . . .” CHARLES JONES, GLOBAL JUSTICE: DEFENDING COSMOPOLITANISM 8 (1999).

securing the overall well-being of its members by itself, thus prompting us to look to a higher level of community as part of group efforts to secure well-being.<sup>115</sup>

The role played by common institutions, sharing a common language in building polities out of disparate peoples, has long been recognized in domestic politics as “nation-building.”<sup>116</sup> For example, in the U.S. we reinforce our shared identity as a nation when, together, we look to the federal level for resource allocations and policy responses, as in the case of natural disasters or security crises.<sup>117</sup> Similarly, our tendency to look, at least in part, to meta-state institutions for responses to social and environmental problems globally, reflects a shared understanding that such institutions play an increasingly prominent role in formulating or channeling social policy decisions and orchestrating social welfare responses, and that few states can act without them on any important social issue.<sup>118</sup>

If one is willing to accept, even provisionally, that globalization is leading in some manner or degree to the emergence of a global community of some kind, then the stage is set for an examination of a communitarian approach to global justice. However, this undertaking poses quite a complex set of questions. If, despite the effects of globalization, there is still no comprehensive community at the global level, then it will not be possible to develop as comprehensive a theory of global justice as, say, the liberal theory of foreign policy. Instead, we might be limited to something along the lines of Michael Walzer’s “thin” approach to global justice, covering only those areas of overlap among normative communities.<sup>119</sup> Alternatively, we might find that insofar as there is limited or partial community, it is liberal in nature (the global market, for example, on some accounts). If so, we might find that a liberal theory of justice, first considered in *Take One* as limited to the foreign policy of liberal states, might be sustainable with regard to all participants—states and institutions alike—in the specific global community of the global market.<sup>120</sup> In other words, we might

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115. Garcia, *Global Community*, *supra* note 9, at 23.

116. Will Kymlicka, *Territorial Boundaries: A Liberal Egalitarian Perspective*, in *BOUNDARIES AND JUSTICE* 249, 256 (David Miller & Sohail H. Hashmi eds., 2001).

117. Garcia, *Global Community*, *supra* note 9, at 34.

118. *Id.*

119. MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* (1994).

120. We might even find, in the end, that communitarian changes in global social relations make cosmopolitanism sustainable bit by bit—a sort of creeping cosmopolitanism—insofar as we see emerging pockets of liberal community.

find that a liberal theory of economic justice is an appropriately pluralistic theory of global economic justice for the global economy, because the global economy has been fashioned along liberal lines and reflects a consensus among participants on this basic point.

Much more work needs to be done on these questions.<sup>121</sup> For the moment, let me offer this set of suggestions regarding what kind of international law such an approach might support at this stage, along the lines of a “global minimal ethics.”<sup>122</sup> If global community is emerging, at least in a limited form, then we need something like a global public law to structure it.<sup>123</sup> This is the central opportunity (and challenge) which globalization offers to international law: to move from the public law of inter-state relations, to the public law of a global community.<sup>124</sup> Such a shift at the global level may resemble the emergence at the regional level of a “European” law and a “European” economic community out of the many disparate states involved in the European integration process; a new legal order emerges out of a reconstituted (and constitutive) set of social relationships.<sup>125</sup>

With respect to global justice, such a process should involve a global system for safeguarding and delivering what can be called the “global basic package.” This global basic package is a basic bundle of political, social, and economic rights, safeguarded through global law and delivered in a partnership between global and national institutions, in much the same way that political, social, and economic rights are safeguarded by Federal law and delivered through a variety of Federal/State partnerships in the U.S. This list can be drawn in a variety

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121. Such questions are part of a larger process of inquiry I am engaged in, of which *Global Community* is a preliminary prospectus. Garcia, *Global Community*, *supra* note 9.

122. Dirk Messner, *World Society—Structures and Trends*, in GLOBAL TRENDS AND GLOBAL GOVERNANCE 33 (Paul Kennedy et al. eds., 2002). Here I am thinking in more general terms, along the lines of what sorts of norms, albeit ‘thinner’ ones, could reflect the broadest possible support from a limited ‘global’ community. A particular, deeper, ‘sub-community’ of globalization, such as the global market, might be able to support a ‘thicker’ set of norms, as suggested above.

123. Global public law can be conceptualized as the organization of the structure of powers, duties, and limits of meta-state governance and its officers; relations of the meta-state levels of governance (IOs) to the midrange (states) and to individuals; and the definition and exercise of powers of meta-state governance for the public good. Alternatively, one can think of it as the regulatory system for delivery of global public goods. See generally PROVIDING GLOBAL PUBLIC GOODS (Inge Kaul et al. eds., 2003).

124. Garcia, *Theory of International Law*, *supra* note 29, at 21.

125. For a recent overview of this process which emphasizes the role of legal institutions, see Vlad Perju, *Reason and Authority in the European Court of Justice*, 49 VA. J. INT’L L. 307 (2009).



of ways, but should involve, at a minimum, the following four elements: security, subsistence, liberty, and voice.<sup>126</sup>

We see the germ of a global basic package today in international human rights law and international trade law. With respect to security and subsistence, international human rights law already recognizes a core commitment to deliver food, shelter, and some minimum level of security, as a function of our basic human rights.<sup>127</sup> Through the WTO, multilateral international trade rules offer some guarantee of liberty to economic actors, enabling them to exercise their economic rights. However, there is still no effective mechanism for global wealth transfers at the scale necessary to support the global basic package; and there is no effective mechanism to deliver individual political representation or voice at the global level, on economic matters or otherwise.<sup>128</sup> Continuing the work of “thickening” this model of global communitarian justice in economic and non-economic matters will require a sustained re-examination of core international legal doctrines and institutions, such as boundaries, sovereignty, legitimacy, citizenship, and the territorial control of resources, from the perspective of emerging global polities.

#### *B. Contributions and Limits of This Model*

The principal advantage of this approach is that it tries to directly address the question of global justice by articulating a basis for a global normative community. On this view, globalization itself is in the process of creating a new global community, consisting of shared understandings, practices, and traditions capable of supporting obligations of justice at a global level. Members of this global web of relationships are increasingly aware of each other’s needs and circumstances, increasingly capable of effectively addressing these needs, and increasingly contributing to these circumstances in the first place. They find themselves involved in the same global market

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126. The brief overview which follows is drawn from an earlier preliminary run-through of some of these issues. See Garcia, *Theory of International Law*, *supra* note 29, at 21–26.

127. The fact that, in reality, this often amounts to very little, has lead commentators such as Jean Elshtain to argue that there is still no equivalent to the state, citing Arendt’s point that the only meaningful site for citizenship remains the state. Annual Meeting of American Political Science Association Panel, *Theorizing Globalization in a Time of War: Challenges and Agendas* (Sept. 2, 2004).

128. Jay Mandle and Louis Ferleger refer to this as the need for institutional mechanisms for compensation and control, two fundamental elements of the regulation of global market society. Jay Mandle & Louis Ferleger, *Preface: Dimensions of Globalization*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 8 (2000).

society, and together they look to the same organizations, especially those at the meta-state level, to provide regulatory approaches to addressing problems of global social policy.

Having established a basis for global norms, this approach also offers the opportunity to reflect on what such norms might look like. Depending on the degree of global community one can identify, global norms may resemble “thick” domestic theories of justice, such as Justice as Fairness, or “thin” models of global justice along the lines of the global minimal ethics approach sketched out above. In either case, what is significant is that such norms are understood to apply to all global participants, because they are justified by reference to the community relationships they are all a part of and they are all building, through their global activities. Moreover, these norms can also be applied directly to international institutions *qua* institutions, a significant improvement over the limits of Take One. These institutions are involved in meeting the globally shared needs of their communities through the allocation of the benefits and burdens of social cooperation such as rights, opportunities, privileges, membership, and resources: activities that have traditionally been understood in the domestic sphere to make justice both relevant and necessary.

One important drawback to this approach, however, is that it tangles the question of global justice in controversial claims about the changing nature of global social relations. There is an interesting analogy here to the history of international law itself. For several centuries, international law was mired in a theoretical dispute over whether it was law at all, which largely turned on the fact that international society did not look like domestic society, and our models of law were drawn from domestic society: no international sovereign, no international law.<sup>129</sup> The way out of this dispute was, in effect, to look out of the window and see that a lot of law-abiding was going on, regardless of the theory.<sup>130</sup> In other words, we had to recognize that reality had bypassed theory.

In a similar sense, it is costly to suspend attention to the many pressing tasks of global justice while we debate whether or not we are

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129. See Rafael Domingo, *The Crisis of International Law*, 42 VAND. J. TRANSNAT'L L. 1543 (2009).

130. In the famous words of Louis Henkin, “Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed.1979) (emphasis omitted).

seeing global society, global community, or global justice.<sup>131</sup> We do not see communitarian accounts of global justice in the literature, let alone communitarian-based critiques of existing global distributive institutions. The fundamental work necessary for such an account has yet to be done at a global level, because the necessary preconditions to such an account are still in contention. Thus, Take Two can be useful in helping us get to the point of global justice, but may not yet be much help in telling us what global justice might look like.

#### IV. TAKE THREE - CONSENT, OPPRESSION, AND THE NATURE OF TRADE ITSELF

Thus far we have considered two approaches to the question of global justice. The first, in Take One, extends domestic principles of liberal justice to the question of transboundary justice problems, at least insofar as that is a reasonable goal for the foreign policy of liberal states. Take Two examines the nature of global social relations, and argues that even assuming the stringent communitarian standard for obligations of justice, some degree of global community is in fact emerging, at least in certain areas, enough to support an inquiry into principles of justice.

Both approaches are alike in having their strengths and weaknesses. Each contributes something vital and will continue to be part of the global justice debate. Even more fundamentally, however, both are limited by their proponents' quest for a basis on which to constrain other actors. Insofar as advocates of either view seek to assert normative claims against other participants, they both must pay attention to, and are ultimately limited by, the theoretical basis for such claims. The liberal internationalist view cannot establish a basis for claims which bind anyone beyond liberal societies, leaving the question of global justice ultimately to unilateral action and the political process of global policy-setting institutions. The global communitarian view seeks to transcend this problem by arguing for the emergence of some form or degree of global community, thus situating global justice squarely in the middle of controversial empirical and normative claims.

What if there was another avenue that began, instead, closer to participants' immediate experience of economic interactions, and which might offer a basis for mutually-agreed regulation which evades both the limits of particular normative communities and the ambiguity of

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131. See AMARTYA SEN, *THE IDEA OF JUSTICE* (2009) (arguing in favor of a more pragmatic, less theoretical (and divisive) approach to global justice).

global social relationships? That is the experiment which this section undertakes.

I propose to look at how economic interactions themselves have certain intrinsic requirements or characteristics which support what we might otherwise describe as just behavior. Instead of working from first principles, this approach seeks to work from experience and the language that arises from experience. In this way, it is hoped that the law can strengthen what is already working, and wrestle with what is not working, in such experience.<sup>132</sup>

I am suggesting in this Take that “consent” is that essential characteristic which makes economic exchanges “trade,” rather than theft, coercion, exploitation, or the like. The hope is to identify aspects of trade law and trade agreements that look and act like trade, but are something else, and that damage the subject of trade because they do not reflect consent, therefore generating costs which impede the flourishing of trade.

#### *A. The Model*

This model begins with the notion of trade as a transaction.<sup>133</sup> We engage in many types of transactions, whether involving money, goods, ideas, services, affinity, or information. However, if we think of what distinguishes trade from the many other exchanges we participate in, it is that trade involves a transfer of economic value.

There are many different types of transactions involving a transfer of value. For example, gifts are transactions involving a transfer of value, but one of their distinguishing characteristics is their unilateral nature: the gift-giver transfers something of value for nothing in return. In contrast, trade transactions are bilateral, or mutual, in nature, involving a *bilateral* exchange of economic value.

Theft is another type of unilateral transaction, helpful in clarifying the nature of trade. A theft involves an involuntary transfer of value. It could be said that theft is not trade because it is unilateral, but a simple thought experiment clarifies that this is not the essence of the

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132. This approach is based on an ongoing project involving the role of consent in trade law. See Frank J. Garcia, *Is Free Trade “Free”? Is It Even “Trade”? Oppression and Consent in Hemispheric Trade Agreements*, 5 SEATTLE J. FOR SOC. JUST. 507 (2007) [hereinafter Garcia, *Free Trade*]; see generally DERYCK BEYLEVELD & ROGER BROWNSWORD, *CONSENT IN THE LAW* (2007) (analyzing the role of consent in public and private law).

133. The overview which follows is drawn from Garcia, *Free Trade*, *supra* note 132, at 507–10.

distinction. A thief could give you a cheap watch in return for your wallet, but it would still be a theft despite its bilateral quality. Thus, trade must also be voluntary, which introduces the key notion of consent—both parties must consent to the transaction or there is some element of theft. The role of voluntariness is reflected in our language. We can speak of good trades versus bad trades in terms of meeting our goals, and yet we distinguish bad trades from “rip-offs” or thefts. We would not refer to the experience of being robbed as a “bad trade,” except in a deliberately ironic sense.

Another aspect to the voluntariness of bilateral exchange can be expressed through the notion of bargain. Bargaining, or the process of reaching mutually agreeable terms, is often a necessary element in reaching consent. Even where parties to an exchange do not actually bargain, the exchange presumes the freedom of both parties to consider and propose a variety of possibilities on the road to saying yes or no. Otherwise, if either of the parties were not able to bargain freely, the resulting transaction might still be voluntary in a basic sense, but something has been lost. This is more like coercion than trade.

This notion of bargained-for consent is reflected in our law through the concept of a “meeting of minds.” The meeting of minds in contract law, even as a constructive notion, is key to the whole system for enforcing promises. If we look at the key justifications for getting out of a contract—mistake, duress, or fraud—we see that they reflect the absence of bargained-for consent.

In summary, by examining our experiences and language of economic exchange, I have constructed a notion of trade as consisting of voluntary, bargained-for exchanges of value among persons for mutual economic benefit. Based on this preliminary inquiry, several alternatives to trade (i.e., other economic interactions that we do not consider trade) can be examined in order to paint a fuller picture of what trade is and what it is not. In doing so, I rely primarily on the work of Simone Weil, the 20<sup>th</sup> century French philosopher, known for her frank examination of the role of consent and its absence in distinguishing between economic transactions and economic oppression.<sup>134</sup>

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134. See ADRIENNE RICH, *For a Friend in Travail*, in AN ATLAS OF THE DIFFICULT WORLD: POEMS 1988–1991, at 51 (1991) (“*What are you going through?* she said, is the great question. / Philosopher of oppression, theorist / of the victories of force.”). “She” being Simone Weil, who wrote, “The love of our neighbor in all its fullness simply means being able to say to him: ‘What are you going through?’” See SIMONE WEIL, *WAITING FOR GOD* 115 (Capricorn Books 1959) (1951). Many thanks to Kim Garcia for introducing me to Weil and suggesting the connection between Weil’s thought and trade.

In the previous discussion on the nature of exchange, the concept of theft as a contrast to trade was introduced. Essential to this distinction is the absence of consent on the part of the one surrendering economic value. Weil writes that one cannot seek consent where there is no power of refusal.<sup>135</sup> Thus, where there is no power to refuse, there is no trade because there can be no consent.<sup>136</sup>

At the private-party level, contract law recognizes this difference through the concept of duress: a defense to the finding of a contractual obligation. In other words, where one party's consent to enter into a contract was not freely given, but was given under some form of pressure, the law will not recognize this as a meeting of minds and will not find a contract.

In economic terms, the equivalent to theft—transactions which are not mutual and where consent is not present—can be called extraction or predation; add a political element and we call it economic dominance or colonialism.<sup>137</sup> In these cases, an economic benefit flows from one party to the other, but it is not mutual in a meaningful sense, and most importantly, it is not consensual. Rather, the economic benefit in these cases is achieved through power inequalities as expressed by economic or military force.<sup>138</sup> Such transactions are not consistent with our concept of trade as outlined above; they are, instead, a form of wealth extraction in the purest colonial sense.

Short of predation, we can recognize a more subtle weakening of consent, involving what I will call coercion. Coercion occurs when a transaction is mutual, and in some basic way consensual, but something weakens the fullness or freedom of the consent, short of outright theft or duress. This usually involves a restriction on the range of possible bargains that the parties are free, or not free, to propose and consider. Thus, coercion presupposes an inequality in bargaining power, where one party works to limit the range of possibilities “on the table,” so to speak.

As with duress, contract law also reflects this distinction. The law provides particular protections for consumers and those with weaker bargaining power when they deal in what the law calls “adhesion

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135. SIMONE WEIL, *Justice and Human Society*, in SIMONE WEIL 116, 123 (Eric O. Springsted ed., 1998) [hereinafter WEIL, *Justice and Human Society*].

136. Garcia, *Free Trade*, *supra* note 132, at 511.

137. The discussion which follows is drawn from Garcia, *Free Trade*, *supra* note 132, at 511–12.

138. *Id.* There remains the difficult issue of determining the limits of acceptable “influence” or persuasion between states (through forms of soft power, for example), which the discussion of coercion below only partly answers.

contracts:” contracts with commercial parties or manufacturers who possess greater bargaining power. In such cases (where a dealer says “if you want this, these are the terms and the only terms,” leaving the consumer unable to negotiate), courts will look carefully before assuming the consumer consented to the adverse terms of the contract, despite the fact that, in all other material respects, it looks as if a contract was voluntarily entered into. Courts will not automatically void such a contract, as would be the case with duress, but they will look closely at the contract and may not enforce all of its provisions.

I am relying on the work of Hillel Steiner to consider a third useful contrast, that between trade and exploitation.<sup>139</sup> In addition to the requirements that trade be a bilateral, voluntary exchange, Steiner adds a third element: that the two transfers are of roughly equal value.<sup>140</sup> Where two transfers are not of equal value, yet the exchange is voluntary, Steiner characterizes this as evidence of exploitation.<sup>141</sup>

Exploitation can have many causes, but the illustration Steiner offers is of a market for services in which the top bid, the one the service provider ultimately accepts, does not reflect the maximum possible value of the services. It is simply the top bid in that market at that time.<sup>142</sup> However, Steiner does not rely on an objective theory of value to characterize the bid as inadequate.<sup>143</sup> Instead, he suggests we look at other parties who might have bid, and perhaps bid more, but for various reasons did not.<sup>144</sup>

Among the reasons other parties may not have bid—reasons which may indicate exploitation—he includes the possibility that earlier rights violations occurred, such that the potential offerors either lacked the resources to bid, despite an interest in doing so, or were prevented from

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139. Hillel Steiner, *Exploitation Among Nations* (2005) (unpublished manuscript, on file with author) [hereinafter Steiner, *Exploitation*]; see generally Hillel Steiner, *A Liberal Theory of Exploitation*, 94 *ETHICS* 225 (1983–84) (analyzing exploitation in terms of prior rights violations).

140. By rough equality, I mean (and I take Steiner to mean) that both parties consider the exchange *fair*—there is an appropriate relation, in their eyes, between what they are giving and what they are receiving. See DAVID MILLER, *MARKET, STATE AND COMMUNITY: THEORETICAL FOUNDATIONS OF MARKET SOCIALISM* 175 (1989) [hereinafter MILLER, *MARKET, STATE AND COMMUNITY*] (explaining that exploitation consists of the use of special advantages to deflect markets away from equilibrium, defined as exchanges involving equivalent value).

141. Steiner, *Exploitation*, *supra* note 139, at 2.

142. *Id.* at 3.

143. Steiner has been criticized for this, though in my view unpersuasively. See, e.g., MILLER, *MARKET, STATE AND COMMUNITY*, *supra* note 140, at 180.

144. Steiner, *Exploitation*, *supra* note 139, at 3–4.

participating in the auction due to governmental interference.<sup>145</sup> In either case, the result for the service provider is that they accept a voluntary mutual exchange, but for less than they might otherwise have received. In other words, the transaction is consensual and mutual, yet exploitative, because a potentially higher-paying third party was not able to participate in the auction.<sup>146</sup>

When applied to trade, this suggests that where certain third-party states and/or citizens are kept out of markets, or are economically unable to participate effectively in markets, an offeror suffers a detriment because he or she receives a lower bid from someone else.<sup>147</sup> Therefore, the resulting exchanges between that offeror and the ultimate purchaser are not trade, but rather exploitation.<sup>148</sup> This differs from coercion in that the force, pressure, or rights violation occurs with respect to the third party, not between the two primary parties to the transaction.<sup>149</sup> Nevertheless, this affects our evaluation of the consensual nature of the resulting transaction, in that the offeror's consent was granted among a restricted range of choices.<sup>150</sup>

To summarize, the essence of trade, as defined here, is consent to a voluntary, mutual, bargained-for exchange of roughly equal value.<sup>151</sup> I have suggested three other types of transactions which, while they may look somewhat like trade, do not in fact meet the definition: predation, coercion, and exploitation.<sup>152</sup> Participants in any of these three transactions will see economic value exchange hands, and society may reap some economic benefit, but this occurs under conditions involving the absence or impairment of consent.<sup>153</sup>

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145. *Id.* at 6.

146. *Accord* MILLER, MARKET, STATE AND COMMUNITY, *supra* note 140, at 177, 186 (providing that it is in the nature of exploitation that the exploited party is unable to consider alternative, more attractive hypothetical transactions, due to the exploiter's use of unfair advantage). Miller considers the rights-violation theory of exploitation too narrow. For my purposes here, it is enough to note that such a case would be exploitation, even if, as Miller argues, other cases should also qualify. *See also* Garcia, *Normative Critique*, *supra* note 31, at 181–82.

147. Garcia, *Free Trade*, *supra* note 132, at 514.

148. Steiner, *Exploitation*, *supra* note 139, at 6. In the inter-state context, we are again presented with the question of what level of interference is acceptable 'pressure' and what rises to the level of exploitation. It is easier to mark the clear cases at one end of the spectrum (illegal use of force, human rights violations) than it is to map out the middle zone.

149. Garcia, *Free Trade*, *supra* note 132, at 514.

150. *Id.* For an example drawn from this hemisphere's experiences with the Monroe Doctrine, see *infra* notes 163–166 and accompanying text.

151. *Id.*

152. *Id.*

153. *Id.*



Based on this understanding of trade, I would argue that the policy goal of international trade law can now be seen as more than simply eliminating economically distorting domestic legislation. The goal is to maintain an environment in which trade can take place, and flourish, much as the goal of economic regulation in a domestic setting is to protect and promote a healthy market. A consent approach to trade law suggests that in matters of global rulemaking, which today means principally economic rulemaking through trade agreements, we actually structure such negotiations to achieve and reflect the consent of their participants, aiming for substantive rules which protect and support consent at the private party level. We do this not as a way of confining trade within a particular view, but as a way to promote its flourishing across the widest possible spectrum of individuals, transactions, and relationships.

First, this is going to require that we take the role of consent in trade negotiations seriously. If trade consists of voluntary, bargained-for exchanges, then the rules governing trade must preserve the possibility of bargained-for exchanges among private parties, and the rules themselves must be the fruit of such a bargain.<sup>154</sup> If the rules of the game are not mutually agreed to, then any bargains struck under those rules are not fully free because they are not fully agreed to.<sup>155</sup> Without consent, agreements structuring economic exchange will be a form of oppression, or worse, predation.<sup>156</sup>

In order to illustrate this point, I will refer to the Central America Free Trade Agreement (CAFTA), a recent trade agreement between the U.S., five Central American states, and the Dominican Republic.<sup>157</sup> One serious issue affecting the CAFTA negotiations is the problem of underrepresented groups.<sup>158</sup> In Nicaragua, for example, during the CAFTA negotiations, there was widespread ignorance among most

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154. *Id.*

155. Garcia, *Free Trade*, *supra* note 132, at 514. I leave for another day the important question of whether any degree of failure of consent at level one (inter-state negotiations) fatally vitiates the possibility of true trade at level two (private party contracts). I am grateful to my colleague Paulo Barrozo for raising this issue.

156. *Id.* at 514–15.

157. *Id.* at 515.

158. *Id.* While no government can hope to represent the full range of affected citizens, there is in my view an essential, if complex, relationship between consent at the state level and representation at the domestic level. While one can justify this connection through liberal political theory, that is not my approach here. Rather, it seems to me that if individual consent is an essential element in trade transactions, then some form of consent, or at least representation, with respect to the process of framing the *rules* for trade, must be an element.

affected groups regarding what CAFTA would do, and there were allegations of a campaign of disinformation on the part of the government.<sup>159</sup> Many sectors of society were concerned that the new government only spoke for and negotiated on behalf of the moneyed interests, despite a recent history of social revolution.<sup>160</sup> For these sectors, the treaty and its resulting economic activity are neither mutual, nor voluntary; the parties are not trading—something is being taken from them.<sup>161</sup> In consent theory terms, the treaty does not create trade between the parties, but a form of theft or extraction.<sup>162</sup>

Even if CAFTA is both mutual and voluntary, we must still consider whether it represents the full consent of the parties.<sup>163</sup> During the CAFTA negotiations, for example, it was often mentioned by the Nicaraguan government that the country did not have a real alternative to the treaty, due to the U.S. playing such a dominant role in the Nicaraguan economy as the principal source of capital and markets.<sup>164</sup> Moreover, given the history of external domination of the southern hemisphere, both colonially and post-colonially, we must consider the possibility that other states in the region and elsewhere—states that might have offered more attractive alternative markets and sources of capital than the U.S.—may not have been able to do so.<sup>165</sup> Put in the terms of this Article, this raises the possibility that the treaty may be exploitative.<sup>166</sup>

In summary, I am proposing that instead of beginning with traditional normative theory as an avenue towards global justice, we begin with an examination of the nature of trade itself, our language, and our experiences in economic exchange. I am suggesting that such an examination reveals trade to consist of mutual and consensual exchanges of roughly equal value—and that the proper goal of international trade law is to safeguard the conditions for such exchanges, thereby ensuring that we are actually involved in trade, and not some form of predation, coercion, or exploitation. Among other things, this implies a need for change in our approach to trade negotiations and to the social costs of trade rule enforcement. In talking about issues such as exploitation, coercion, and human rights violations,

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159. *Id.* at 516.

160. *Id.*

161. Garcia, *Free Trade*, *supra* note 132, at 516.

162. *Id.*

163. *Id.* at 517.

164. *Id.*

165. *Id.*

166. *Id.*

we have reached key elements of the global justice agenda, but through a different doorway.

*B. Contributions and Limits of This Model*

The strength of Take Three is that it achieves some of the goals of the first two, without the weaknesses. First, by focusing on the nature of trade itself, it gives us a basis on which to regulate globally that, unlike cosmopolitanism or global communitarianism, does not depend on a prior normative consensus. Instead, it identifies the appropriate regulatory goal of trade law: protect an environment in which trade can take place, and not predation, coercion, or exploitation. If we cannot all agree on norms of economic justice, and we have not yet become a single global community of justice, what is our best avenue towards increasing the justice of our global economic relationships? We safeguard the consent of the parties, and trust them not to enter into unfair bargains when they do not have to.

Second, by highlighting consent, Take Three emphasizes a criterion very congenial to liberalism, but not by arguing for it as a matter of political theory. Instead, it grows out of a close analysis of the meaning of our concept of trade itself. Moreover, by focusing the law on maintaining a healthy regulatory environment for economic exchanges, this goal is articulated in a manner that is very congenial to business actors and economic interests generally: the law exists to support and protect a vigorous market.

Third, by pointing us towards consent, Take Three gives us a good policy metric or benchmark (in much the way that liberal internationalism did with the Difference Principle) through which to evaluate trade rules and trade agreements. Do they grow out of a consensual process? Does a treaty represent the effective consent of states? If so, does this consent include at least representation if not the consent of all of the affected groups in those states? Do the substantive rules protect the consent of private parties? If so, are they the sorts of rules which freely bargaining parties would have agreed to? These inquiries require us to pose difficult questions with respect to negotiations: whether the states have anything resembling equal bargaining power; whether a negotiating government speaks for the full range of affected citizens (or whether it speaks for its people at all); and whether a government has an adequate alternative to a negotiated

outcome.<sup>167</sup> Otherwise, we risk mistaking a mere form of consent for actual consent.<sup>168</sup> These are not easy questions, but they are manageable—at least, we are used to working with them in evaluating domestic policy outcomes.

One weakness of Take Three is that, like global communitarianism, it grounds the inquiry into global justice in a contestable, theoretical claim. With respect to global communitarianism, the claim involved the nature of globalization and its effects on social relationships at the global level. Here, the claim involves the nature of economic exchange and my exegesis of it, which could be challenged as idiosyncratic, simply wrong, or as confined to the experience of English-speaking Western participants in trade. However, it may be that the intuitions underlying this account are more general, and could be matched to the experience and language of other participants in economic exchange from other cultures and legal systems.

A second weakness of Take Three may be that, like liberal internationalism, it does not give us a basis on which to constrain other parties in a hard, formal sense, nor would it necessarily furnish a basis on which to argue for significant wealth redistributions of the sort, which feature prominently on most global justice agendas.<sup>169</sup> However, Take Three does offer a basis on which to regulate global trade towards substantively fairer transactions, one that does not presuppose or enforce a normative consensus. Instead, it identifies consent as essential to the object of regulation itself: a thriving market for economic exchanges. This may well have the power to attract support through an appeal to self-interest, which in the long run may be more significant than the power to compel obedience.

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167. In negotiation theory, the latter is referred to as a party's Best Alternative To a Negotiated Agreement (BATNA). If a party has no BATNA, it is in a very weak position. BATNA "is the only standard which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept." ROGER FISHER & WILLIAM URY, *GETTING TO YES* 100 (Bruce Patton ed., 2d ed. 1991).

168. Similarly, Weil writes that in looking purely at the fact of voting, democratic theory mistakes true consent for a form of consent, which can easily, like any other form, be mere form. See WEIL, *Justice and Human Society*, *supra* note 135, at 126.

169. It may be that Take Three resembles liberal internationalism in another, paradoxical respect: by focusing on the consent of states, Take Three may also reinforce the primacy of states and hence trend more towards international justice rather than global justice. I leave further exploration of this possibility to another day, and I am grateful to my colleague, Jeffrey Dunoff, for raising this issue.

## CONCLUSION

*A. Where Have We Been?*

This Article began with the question of how to articulate claims for global justice in a normatively pluralistic, globalizing environment. In Take One, we looked at one response: frame global justice as a foreign policy commitment of liberal states, and leave it to their unilateral actions and multilateral advocacy to establish this justice through the many global policy forums which globalization is creating or strengthening. This approach has the principal benefit of sidestepping the problem of global norms and working within established channels of state action, but at the cost of limiting the reach of global justice. For this reason, I was led to characterize this approach as “international” justice.

In Take Two, we approached the question from a different direction, namely, by examining whether globalization was sufficiently changing the nature of global social relationships such that we could articulate justice in communitarian terms: as the shared traditions, practices, and understandings of an emerging global community with respect to “who gets how much of what social goods.” This approach has the advantage of taking globalization and the possibility of truly global norms seriously, but suspends the realization of global justice pending continued social evolution and the resolution of debates over the nature and extent of global social relationships.

In Take Three, we approached the question from yet another direction, by an examination of the phenomenon of economic exchange and our language for it. Through this avenue, “trade” was characterized as consisting of voluntary, mutual, bargained-for exchanges of roughly equal value. This allowed us to claim that the goal of international trade law should be to safeguard and promote the conditions necessary for such exchanges to flourish, and that protecting the true consent of the parties, both negotiating states and transacting private parties, was a principal means to this end. The advantage of this Take is that, by adopting a “bottom-up” approach to characterizing the normative goal of trade law, we can arrive at something like global economic justice (read as “fair transactions”) through a market-oriented consensual process that parties from any normative tradition could recognize and support as essential to the proper functioning of the global economic system. However, this approach does not offer a basis other than self-interest on which to claim adherence, and might not be adequate for

larger projects of wealth redistribution, beyond promoting the conditions for fair economic transactions.

*B. Where Might We Be Going?*

One of the principal effects of the global justice debate is to raise the question of the proper purpose of international trade law, as law. In order for law to be effective as regulation, it must begin with the clearest possible understanding of the phenomenon to be regulated. What is our objective? What are we trying to ensure? What are we trying to prevent? What are we hoping to safeguard? International trade law is no different in this respect.

Since the end of the Second World War the public, ostensible goal of international trade law has been to promote free trade. A considerable body of economic theory backs this up, and a remarkable policy apparatus, including the WTO, has emerged to implement this goal.<sup>170</sup> However, I would argue that in a fundamental way we have gotten it wrong. One way to understand the global justice debate is as evidence that we are dissatisfied with the limits of our own ambitions with respect to international trade law, given its increasing scope in a global economy and globalizing world.

The consent analysis in Take Three suggests that we have focused too much on the “free” part and not enough on the “trade” part. Most of us would not rally behind calls for open and unrestrained economic coercion, predation, or exploitation, but that is what “free trade” has become in many instances, because we have misunderstood the nature of trade itself. When we ignore the role of consent in economic exchange, we risk facilitating coercion or exploitation, instead of promoting open economic exchanges. The fact that in the process, our regulatory apparatus has reduced the domestic regulatory burden attendant to such transactions—the conventionally understood “free” part of trade—does not make the resulting transactions “trade,” nor does it restore their intended social benefit.

Instead, trade law should be about facilitating a thriving trading environment at all levels of this emerging global market. It is not to promote economic exchanges of any kind, provided they are free of protectionist domestic regulation. That is not free *trade*. The problem arises when the methods we use to advance trade, so to speak, undercut

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170. PASCAL LAMY, ABOUT THE WTO—A STATEMENT BY THE DIRECTOR-GENERAL (2010), [http://www.wto.org/english/thewto\\_e/whatis\\_e/wto\\_dg\\_stat\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm).

trade itself because they undercut consent, both in the negotiations between nations and in the transactions which the rules facilitate. This is really a new form of mercantilism—the view that trade law should be about my “market trouncing your market,” with law playing a dual role: supporting my market at home, and facilitating my trouncing your market internationally. This is a disservice both to the economic opportunities which trade offers, and to law itself.

This makes it critically important that we understand what it is we are trying to regulate and protect. In a sense, the global economy has grown faster than our intelligent regulation of it. Some see in this the natural tendency for law to lag behind social facts; others see in it a deliberate attempt to create a particular vision of the global market: the under-regulated market of robber baron capitalism. It is probably a bit of both. But if we understand trade more accurately, we can create an environment which, over time, can make us all wealthier by truly promoting a market and not an open space for exploitation.

I have argued for why safeguarding consent is a key element in promoting a more just trading system, and thereby a more just global economy, by ensuring it is a *trading* system and not a disguised system for predation, coercion, or exploitation. In closing, I would like to suggest two additional ways in which trade law can promote a flourishing market for the benefit of all participants.

My first point involves internalizing the costs of enforcement. What do I mean by the costs of enforcement? One of the functions of law in economic matters is to restrain the human tendency to seek profit for one’s self and to shift cost and risk onto other parties. Economists describe this as the process of creating externalities. It is no surprise that human beings in economic relationships should seek to advance their own interests, trying to shift risk and costs to others. That is one reason we have law: to plan ahead for this tendency and build in certain safeguards. In corporate matters, we expect that corporate actors will seek to maximize profit, transfer risk, and externalize cost, and we legislate with that in mind. We consider economic law successful when it is effective in ensuring that parties who exercise control and derive profit bear an appropriate degree of risk and internalize their costs.

This is true in international trade as well. We have to be careful that in designing instruments to create global markets through treaties, we do not talk the rhetoric of trade while instead creating the reality of coercion. If trade agreements are negotiated under circumstances in which our trade partners have no real possibility of consent, and significant sectors of their domestic societies have no way of expressing their consent or lack of consent, such a treaty is not going to promote an

effective trading environment. Instead, such a treaty promotes instability to the degree to which it is coercive or exploitative, provoking resentment and unrest which often lead to violence by both citizens and governments. This creates costs for the societies involved and ultimately for all of us, as we are faced with the prospect of supporting oppressive regimes solely to maintain the economic opportunities we have created through predation or coercion.<sup>171</sup>

If the use of such force is not internalized as a cost of that production, then the goods coming from a factory in such countries might seem cheaper, since labor costs are lower. However, this would not be a true price, and consumers would not have an accurate reflection in the price of the costs they may also have to bear as taxpayers and citizens, resulting from the violence necessary to enforce that bargain. If, on the other hand, the costs of enforcement are internalized, then the full nature of the bargain will be clearer to consumers and to society as a whole, and it will be seen as the bad bargain it is. Such an approach in the trade area would be similar to the “political risk” calculations made in the foreign investment area, and would be equivalent to adding a “social tax” to the cost of the goods.

My second point involves a concern for the sustainability of trade relationships. In terms of sustainability, it is important to recognize that trade is not solely a series of one-shot transactions. In game theoretic terms, trade is a repeat game, in which partners must contemplate a series of ongoing exchanges.<sup>172</sup> The self-interested calculation of what strategies and tactics to employ changes when one contemplates a repeat game, as opposed to a single iteration. Approaches which may seem attractive for their short-term gains might seem less attractive if they depend on exploitation, coercion, or manipulation that can poison the well for future iterations of the game. Over time, the oppressive nature of such agreements becomes clearer.

Moreover, through a long-term relationship of economic exchanges, one gains knowledge of one’s partner, their economy, their strengths and weaknesses, their needs, and their aspirations. Such knowledge brings with it increased responsibility. Do we use that knowledge to increase our ability to manipulate, exploit, or coerce our partners? Or do we build in safeguards to maintain a trade environment between us, in which we preserve the possibility of consensual bargains,

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171. See Daphne Eviatar, *A Big Win for Human Rights*, THE NATION, May 9, 2005, available at <http://www.thenation.com/doc/20050509/eviatar>.

172. See generally GEORGE J. MALAITH & LARRY SAMUELSON, REPEATED GAMES AND REPUTATIONS (2007).



even in the face of insider knowledge which we could exploit? Thus long-term economic relationships have the potential to deepen the links between societies through trade, or promote resentment, oppression, and violence through the misuse of knowledge. When individual actors lose sight of the repeat nature of trade, the law must step in and regulate with that view in mind.

This can be put in a different context, namely, the global financial crisis and the failures of domestic economic regulation. Because of an impoverished view of the free market, certain financial actors were allowed to pursue strategies which had tremendous short-term yields for them, but through a process which shifted the tremendous risks onto other parties. When this collapsed, all of global society was left bearing the costs.<sup>173</sup> This illustrates the risks for us and for trade law when the conditions for a healthy market are misunderstood by the regulators, and parties are allowed to operate for the short-term, while externalizing costs and risks. If the global financial crisis and the global justice debate can together teach us anything, it is that the stakes are too high to allow us to structure the framework for global economic relations in such a manner.

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173. Anup Shah, *Global Financial Crisis*, GLOBAL ISSUES, July 25, 2009, available at <http://www.globalissues.org/article/768/global-financial-crisis#Acrisissoservertheworldfinancialsystemisaffected>.