Peoples or Persons? Revising Rawls on Global Justice

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PEOPLES OR PERSONS? REVISING RAWLS ON GLOBAL JUSTICE

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Abstract: John Rawls's *The Law of Peoples* offers an account of international justice grounded in a hypothetical contract between "peoples." I argue that a model of transnational justice rooted in a hypothetical agreement among deliberators representing individual persons—like the one that provides the basis for Rawls's account of domestic justice—would be preferable. In Part I, I focus on Rawls's idea of a "people" before critiquing his almost non-existent argument for beginning with peoples rather than persons. In Part II, I examine the nature of the human rights protections that follow from Rawls's starting point and the appropriate responses of liberal societies to violations of these protections. In Part III, I explore and criticize Rawls's perspectives on international economic aid and the rules of warfare.

INTRODUCTION

John Rawls has offered a provocative account of international justice grounded in a hypothetical contract between "peoples" (i.e., organized societies with many, but not all, of the characteristics typically predicated of states) and explains its significance for issues in-

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cluding war, human rights, and transnational economic assistance. What Rawls calls "the Law of Peoples" comprises a set of norms designed to guide the "foreign policy of a reasonably just liberal people." This system of principles is ultimately intended to structure the "realistic utopia" Rawls calls "the Society of Peoples"—a cooperative, peaceful, international community. Even, however, in a world in which many peoples do not or cannot conform to the Law of Peoples, it can and should serve as an ideal that provides practical guidance for the behavior of reasonable peoples—liberal and nonliberal alike.

Rawls's theory includes both ideal and nonideal elements. The ideal (or "strict compliance") portion of the theory concerns the relationships within an actually existing Society of Peoples and assumes that most or all people act in accordance with its dictates. The nonideal (or "partial compliance") portion focuses on appropriate norms for common departures from the norms delineated in a corresponding ideal theory; it concerns the relationships between well-ordered societies and others Rawls calls "burdened," as well as the conduct of war—both in the present and after the establishment of a Society of Peoples. Rawls's Law of Peoples is best understood both as a norm for an actually existing Society of Peoples and as a standard of justice in transnational relations designed to apply to individual societies whether or not those societies or others are committed to its principles. Absent a functioning Society of Peoples, governments of individual peoples would still be bound by it and could rightly demand that others conform to it.

Rawls exhibits commendable concern for the creation of a just and cooperative international order, human rights, the status of women, and justice in war. His work can and doubtless will make a valuable contribution to the development of norms for our increasingly interconnected world. But I believe his peoples-based approach—by his own

2 Rawls, Law, supra note 1, at 10; see also id. at 82; Charles Beitz, Rawls's Law of Peoples, 110 Ethics 669, 675 (2000) ("[T]he Law of Peoples is a body of principles for the foreign relations of liberal democratic societies: it is an extension of liberal political morality to foreign policy.").

3 See Rawls, Law, supra note 1, at 11–23.

4 See, e.g., id. at 4–5, 58, 85, 89–91, 106.

5 See, e.g., Rawls, Law, supra note 1, at 4–5; Rawls, Restatement, supra note 1, at 13, 65; Rawls, Theory, supra note 1, at 8, 215–18.

6 See, e.g., Rawls, Restatement, supra note 1, at 13; Rawls, Theory, supra note 1, at 216.

7 See, e.g., Rawls, Theory, supra note 1, at 8, 215–18.
admission “fair to peoples and not to individual persons” leads to troubling conclusions at a number of points. I attempt in this Article to show why it is unwarranted and to show that a model of transnational justice rooted in a hypothetical agreement among impartial deliberators representing individual persons—like the one that provides the basis for his account of domestic justice—would be preferable.

A. Rawls’s Second Original Position

A Theory of Justice introduced Rawls’s readers to an imaginative device that embodies some of our culture’s most deeply rooted convictions about justice. We should think of a society’s rules and institutions as fair, he suggests, if they conform to principles that representatives of the society’s members would adopt behind a “veil of ignorance” in the “original position.” People deliberating behind a veil of ignorance do not know the circumstances, abilities, life chances, or moral or religious convictions of those they represent in the real world of their society. Thus, the actors in the original position, all of whom are equal in status and influence, would endorse standards for their society that would protect “a fully adequate scheme of equal basic liberties.” They would judge social and economic inequalities appropriate only if “attached to offices and positions open to all under conditions of fair equality of opportunity.” And they would decide that wealth in their society should be distributed in accordance with what Rawls terms the “difference principle,” according to which economic inequalities are permissible only to the extent that they benefit those who are least well-off.

While the occupants of the original position at the domestic level represent individuals or families, the “second original position” is occupied by representatives of peoples viewed as unitary entities. Rawls

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8 Rawls, Theory, supra note 1, at 17 n.9.
9 See, e.g., Rawls, Liberalism, supra note 1, at 27.
10 See Rawls, Restatement, supra note 1, at 41–42.
11 Id. at 42.
12 Id.
13 See, e.g., Rawls, Restatement, supra note 1, at 61–72; Rawls, Theory, supra note 1, at 65–73. On the derivation and nature of the basic liberties and the basic norms of justice, see Rawls, Liberalism, supra note 1, at 289–371; Rawls, Restatement, supra note 1, at 39–134; Rawls, Theory, supra note 1, at 47–101.
14 See Rawls, Law, supra note 1, at 17, 23–25; Rawls, Theory, supra note 1, at 331–32. For an alternate interpretation of the cited passages in A Theory of Justice, see Thomas W. Pogge, Realizing Rawls 242–44 (1989) [hereinafter Pogge, Realizing] and Thomas W.
fails to argue persuasively for the view that peoples, rather than individual persons, should be represented behind the veil of ignorance in the second original position. And this inadequately defended starting point has substantial, and unfortunate, consequences for the position Rawls proceeds to elaborate.\footnote{15}

B. Rethinking Rawls

In Part I, I focus on Rawls's idea of a people, elaborating in particular his understanding of decent nonliberal peoples, before critiquing his almost non-existent argument for beginning with peoples rather than with persons. In contrast with Rawls, I propose a cosmopolitan alternative. I argue that the Law of Peoples should be understood as emerging from deliberations among individual persons rather than peoples. And I go on to examine alternative arguments for a Rawlsian Law of Peoples, suggesting that none provides good reason to endorse such a Law of Peoples instead of a cosmopolitan alternative.\footnote{16}

Rawls's starting point ensures that the Law of Peoples will not provide adequate protection for freedom and equality in nonliberal societies and makes it less likely that such societies will safeguard some human rights. In Part II, I explore the nature of the human rights protections that follow from Rawls's starting point and the appropriate

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\footnotetext{15}{Compare Frank J. Garcia, The Usefulness of Which Rawls?, 6 INT'L LEGAL THEORY 39, 39 (2000) (In The Law of Peoples, "Rawls does not really apply [his norm of justice as fairness] to the international arena in [sic] at all, and that is [the book's] main shortcoming.") [hereinafter Garcia, Usefulness], with Joel P. Trachtman, The Law and Economics of Global Justice, 96 AM. J. INT'L L. 984, 988 (2002) (reviewing GLOBAL JUSTICE (Thomas W. Pogge ed., 2001)) ("Could it be that the very respect for state sovereignty (including the sovereignty of predatory states) that traditional international law, and to some extent even Rawls's law of peoples, regards as fundamental is actually a primary cause of the problem?").

\footnotetext{16}{In the remainder of this Article, I'll call representatives of peoples in the second original position Rawlsian deliberators; I'll refer to a Law of Peoples of the sort to which Rawlsian deliberators would assent as a Rawlsian Law of Peoples. I'll label representatives of individual persons in an alternative second original position individual deliberators and a Law of Peoples contracting individual deliberators would endorse a cosmopolitan Law of Peoples. I will call a person who supports, or would support, a cosmopolitan Law of Peoples a cosmopolitan liberal. I am not entirely comfortable with the implications of "cosmopolitan," which may suggest an egoism, a lack of local loyalty, and a class identification that would not, on my view, characterize those I call individual deliberators or a Law of Peoples they could be expected to enact; I use the term, nonetheless, to minimize confusion, because Rawls employs it as well.

For an effective positive statement of the cosmopolitan case, see MARTHA NUSSBAUM, FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM (Joshua Cohen ed., 1996).}
ate responses of liberal societies to violations of these protections. I argue that Rawls's Law of Peoples protects too limited a range of human rights. I also suggest that liberals should sometimes be more willing than Rawls believes they should be to pressure nonliberal societies, including decent ones, to respect the full array of human rights.

The "nonideal" portion of Rawls's theory focuses on the duty of well-ordered societies to provide economic aid to burdened societies and on the duties of all societies in wartime. I explore and criticize Rawls's nonideal theory in Part III. According to the Law of Peoples, liberal, and decent nonliberal, peoples have a duty to assist any society burdened by unfavorable conditions until it reaches an appropriate level of political development and stability. Arguing that a society's political culture is the prime determinant of its economic well-being—or will be, at any rate, in a transnational order structured fairly, in compliance with the Law of Peoples—Rawls proposes that this duty with respect to a given society should end as soon as it has become well-ordered. I maintain that his arguments for this conclusion need modification for a variety of reasons.

Rawls's decision not to adopt a cosmopolitan starting point also has unfortunate consequences for his account of the moral norms governing warfare. The Law of Peoples usually protects noncombatant civilians and requires fair treatment of ordinary military personnel. But Rawls maintains, in a somewhat ad hoc fashion, that there should be a "supreme emergency" exception to conventional just war standards. I argue, however, that he has not succeeded in undermining the traditional rules of military conduct.

C. A Cosmopolitan Alternative

Rawls's Law of Peoples treats individual persons unequally in two ways. By treating vastly different peoples equally, it treats the members of these peoples unequally, because a given person's interests will count for more or less depending on the size of the people of which she is a member. And by treating each people as a unitary entity, it denies equal consideration to the interests and perspectives of some members of every people. In effect, it privileges the dominant actors in each society, treating their society's conceptions of the good and its interests as equivalent to theirs. Dissenters and outsiders, whose needs and perspectives may be very different from those of their societies' leaders, are effectively ignored. By Rawls's own admission, his Law of
Peoples is unfair to individuals. A cosmopolitan Law of Peoples, by contrast, would treat the interests of particular persons as equal and distinguishable. Such a Law of Peoples would embody a global version of Rawlsian domestic justice—"justice as fairness." 

Norms of global justice—and thus, in particular, a cosmopolitan Law of Peoples—would be worth explicating and defending even if all peoples were committed to Rawls's theory of domestic justice. There is no guarantee that an array of peoples with just domestic political structures would be justly ordered itself. To be sure, just domestic institutions would be democratic and egalitarian and would protect people against domestic violations of human rights. The frequency of war might be reduced. And just domestic regimes would contribute to the creation of a just global regime; such a regime could not come into being without the support of just peoples. (At the same time, a just global regime could clearly foster the development of greater numbers of just domestic regimes.) However, even if every country's institutions were just and democratic, global resources might still be maldistributed. There is certainly no guarantee that democratic

17 Rawls, Law, supra note 1, at 17 n.9. See Allen Buchanan, Rawls's Law of Peoples: Rules for a Vanished Westphalian World, 110 Ethics 697, 698 (2000) ("To say that the parties [in the second original position] represent peoples is, in effect, to ensure that the fundamental principles of international law that will be chosen reflect the interest of those who support the dominant or official conception of the good or of justice in the society, and this may mean that the interests of dissident individuals or minorities are utterly disregarded."). But see Trachtman, supra note 15, at 990 (maintaining that "the representatives of peoples should be assumed to represent their principals—individuals—with perfect fairness and accuracy, and not with the public choice and other agency problems that are endemic in the real world. In this sense, there would be little difference between an original position among representatives of peoples, and one among individuals themselves. This integrated two-level original position, then, is not different from a single, global original position."). Despite Trachtman's argument, a Rawlsian reason for seeing the deliberators in Rawls's global original position as fairly representing individuals would also be a Rawlsian reason for endorsing a cosmopolitan account of global justice. It is also unclear that, even if Rawlsian deliberators regarded themselves as representing individuals, they would not, when speaking for their societies, seek to defend the interests of the dominant forces in those societies.

18 Richard Steinberg helped me to see the need to make this point; I am grateful to Seana Shiffrin for forcing me to think about it further.

19 Rawls suggests "that democratic peoples engaged in commerce would tend not to have occasion to go to war with one another." Rawls, Law, supra note 1, at 19, 44-54. See generally Dan Reiter & Allan C. Stam, Democracies at War (2002) for some recent empirical support for this view.

20 Rawls may be right that extreme economic deprivation need not threaten those who live in a country with just and democratic institutions. Still, the rules of the transnational game might still be rigged in one way or another to keep some democratic societies marginal. Further, even without rules that deliberately excluded some peoples from the pros-
peoples would respect each other's independence and territorial integrity.\textsuperscript{21} And a commitment to justice as fairness on the part of individual states would not necessarily entail a commitment to justice in war—to, say, the principle of noncombatant immunity.

A global regime isn't just simply because the various domestic regimes that make it up are just: global and domestic justice are conceptually distinct. Domestic justice cannot determine whether the bounds of peoples' territories, as these have developed over time, are appropriate, or what duties a given people owes to another people, or to individual persons who aren't its members. And even if the question of justice in war or transnational economic relations never arose in fact, it still would not be settled simply in virtue of the fact that all domestic regimes were just. We would still need to ask what global justice looked like. We would need a way to decide whether a global order in which all domestic institutions conform to justice as fairness would itself be just. Conceptually, in any case, domestic justice isn't prior to global justice. However just domestic regimes may be, the norms of transnational justice and the means by which they can be derived and justified deserve careful scrutiny.

I. Peoples, the Law of Peoples, and the Second Original Position

"[T]he original sin that continues to haunt the state and the international system . . . [is that] these are artificial entities created and maintained to perpetuate the Westphalian balance of power."\textsuperscript{22} But Rawls's model seems to presuppose the existence of these artificial entities: it is equal representatives of equal peoples or societies—more specifically, it appears, representatives of the dominant actors in these societies—who deliberate in the second original position and frame the norms of international justice. In this Part, I explain the Law of Peoples and its derivation before critically assessing Rawls's account of the second original position.

\textsuperscript{21} Consider the behavior of the United States, a relatively democratic state, in relation to Nicaragua, also relatively democratic, during the 1980s.

A. The Nature of Peoples

Perhaps the most significant feature of *The Law of Peoples* is Rawls's focus on groups. He identifies five kinds of political units with which the foreign policy of a liberal people will be concerned: liberal peoples and nonliberal decent peoples—these two groups together constituting a group Rawls terms well-ordered peoples—as well as outlaw states, societies burdened by unfavorable conditions, and benevolent absolutisms, which “honor most human rights, but . . . deny their members a meaningful role in making political decisions.”23 His principal, though not exclusive, focus is on liberal and decent nonliberal peoples.24

A people is not a state. A state, for Rawls, is an entity that claims to be sovereign; peoples, by contrast, are organized societies that lack the kind of absolute sovereignty characteristically predicated of states. This does not mean that peoples are subsumed within a world federation. It does mean, however, that they are not free to use military force—except to defend themselves or others against unjust aggression—or to abuse the transnationally recognized human rights of persons within their borders. In addition, according to Rawls, because states are primarily or exclusively self-interested,25 because their interests are unlimited by justice, they cannot “firmly accept[] and act[] upon a just Law of Peoples.”26 By contrast, we can attribute moral motives to peoples.27

The rights and duties of peoples “derive from the Law of Peoples itself, to which they would agree along with other peoples in suitable circumstances.”28 Unlike states, “just peoples are fully prepared to grant the very same proper respect and recognition to other peoples as equals” that they themselves expect from others.29 “[J]ust liberal peoples [and decent nonliberal peoples] limit their basic interests as required by the reasonable,” while “the content of the interests of states does not allow them to be stable for the right reasons: that is, from firmly accepting and acting upon a just Law of Peoples.”30 Peo-

23 Rawls, Law, *supra* note 1, at 63.
24 Id.
25 See id. at 27–28.
26 id. at 29.
27 Id. at 17.
29 Id. at 35.
30 Id. at 29. Rawls suggests that the difference between peoples and states is starkest “[i]f rationality excludes the reasonable (that is, if a state is moved by the aims it has and ignores the criterion of reciprocity in dealing with other societies); if a state’s concern with power is predominant; and if its interests include such things as converting other societies
pies acknowledge and act on principle, and not only on the basis of "reasons of state."\textsuperscript{31} United by "common sympathies,"\textsuperscript{32} a people has—as a state does not—"a definite moral nature... [that] includes a certain proper pride and sense of honor."\textsuperscript{33}

Rawls does not imply that peoples will or should be constructed from scratch. Rather (though he does not, I believe, say so explicitly), peoples are often likely to be transformed versions of existing states—ones whose domestic political institutions and attitudes toward other societies take on appropriate characteristics. Some existing societies may already resemble Rawlsian peoples tolerably well, though they would need to shed their pretensions of sovereignty to qualify as peoples. Other extant states will likely need to be transformed much more radically to become peoples. (How this is to be done is presumably a question for a nonideal theory of domestic justice, unless external intervention is required to facilitate the transition.)\textsuperscript{34}

B. Decent Nonliberal Peoples

Rawls devotes sustained attention to what he calls decent nonliberal peoples. A nonliberal society qualifies as Rawlsianly decent if it meets several conditions. It must not be aggressive. Its legal order must serve the common good and protect human rights. Its legal norms must possess moral legitimacy from the standpoint of its people. It must view its people as responsible moral actors. And its officials must act on the assumption that its legal and political order does and must embody a genuine concern for the common good.\textsuperscript{35} Representatives of (the leaders of) decent hierarchical peoples,\textsuperscript{36} Rawls is confident, would endorse the Law of Peoples in the original position.\textsuperscript{37} This means both that liberal peoples may reasonably expect them to adhere to the Law of Peoples and that they deserve to be tolerated by liberal societies.

to the state’s religion, enlarging its empire and winning territory, gaining dynastic or imperial or national prestige and glory, and increasing its relative economic strength." \textit{Id.} at 28.

\textsuperscript{31} Id. at 27.
\textsuperscript{32} Id. at 23 n.17 (quoting J.S. Mill, \textit{Considerations on Representative Government} (J.M. Robinson ed., 1977)).
\textsuperscript{33} Rawls, \textit{Law}, supra note 1, at 44.
\textsuperscript{34} Thanks to Seana Shiffrin for helping me to see the need to address this issue.
\textsuperscript{35} See Rawls, \textit{Law}, supra note 1, at 64–68.
\textsuperscript{36} See id. at 69 (maintaining that representatives of decent hierarchical peoples would adopt the Law of Peoples).
\textsuperscript{37} See id. at 68–70.
While he observes that other models are possible, Rawls focuses on (imagined) decent hierarchical peoples he depicts as associationist as examples of decent nonliberal peoples.38 In these societies, people are related to the body politic as members of various societal groups with presumed commonalities of interest. An associationist model, Rawls suggests, might be preferred by those who find liberal society deracinated and who conceive of individuals' identities as to a great degree conferred by the groups to which they belong.39 A decent hierarchical society seeks and preserves the common good by means of a "decent consultation hierarchy"—an array of bodies representing various organic social groups that must be consulted before important public decisions are made.40 "Each person [in a decent hierarchical society] belongs to a group represented by a body in the consultation hierarchy . . .."41 In turn:

Persons as members of associations, corporations, and estates have the right at some point in the procedure of consultation (often at the stage of selecting a group's representatives) to express political dissent, and the government has an obligation to take a group's dissent seriously and to give a conscientious reply. . . . Judges and other officials must be willing to address objections. They cannot refuse to listen, charging that the dissenters are incompetent and unable to understand, for then we would have not a decent consultation hierarchy, but a paternalistic regime.42

Assemblies of "bodies in the consultation hierarchy" are free to question official positions and the government must respond.43 Its response must indicate the way in which it "thinks it can both reasonably interpret its policies in line with its common good idea of justice and impose duties and obligations on all members of society."44 Rawls evidently opts for this consultative structure because there is, he

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38 See id. at 63–68. I use the plural "peoples" advisedly, since Rawls offers only a single (imaginary) example of a decent hierarchical people, the Central Asian Muslim society he calls "Kazanistan." See id. at 64.
39 See id. at 72–73 (citing G.W.F. Hegel, Philosophy of Right § 308 (1821)).
40 Rawls, Law, supra note 1, at 71–72.
41 Id.
42 Id. at 72.
43 Id. at 78.
44 Id. For a critique of Rawls's position that liberal and decent societies can oblige their members, see Carole Pateman, The Problem of Political Obligation: A Critique of Liberal Theory 117–20, 125–29 (2d ed. 1985).
suggests, some historical precedent for it in Muslim political theory.\textsuperscript{45} He proposes an imagined Muslim people, Kazanistan, as a model decent nonliberal society, perhaps because he is concerned with the viability for Muslims in particular of the consultative hierarchical model he has proposed.\textsuperscript{46}

For a consultation hierarchy to be just, a range of conditions must obtain:

First, all groups must be consulted. Second, each member of a people must belong to a group. Third, each group must be represented by a body that contains at least some of the group's own members who know and share the fundamental interests of the group. . . . Fourth, the body that makes the final decision . . . must weigh the views and claims of each of the bodies consulted, and, if called upon, judges and other officials must explain and justify the rulers' decision. In the spirit of the procedure, consultation with each body may influence the outcome. Fifth, the decision should be made according to a conception of the special priorities of [the particular society] . . . . Sixth[,] . . . these special priorities must fit into an overall scheme of cooperation, and the fair terms according to which the group's cooperation is to be conducted should be explicitly specified.\textsuperscript{47}

A decent nonliberal society may have an official religion—or, presumably, an official comprehensive doctrine of some other kind. That it does, however, need not call into question its status as a decent society, because it declines to propagate its comprehensive doctrine by force and it allows those who do not share it to practice their traditions without fear.\textsuperscript{48} It may, however, privilege adherents of the dominant comprehensive doctrine by, for instance, giving them the exclusive right to hold certain major public offices.\textsuperscript{49}

Like other features of the public order of a decent nonliberal society, this stance toward religious plurality is not, Rawls maintains,

\textsuperscript{45} See Rawls, Law, supra note 1, at 72 n.12.
\textsuperscript{46} See id. at 75–78; cf. Antonio F. Perez, The International Recognition of Judgments: The Debate Between Private and Public Law Solutions, 19 Berkeley J. Int'l L. 44, 46 n.13 (2001) ("Rawls' recognition that even [!] Islam is amenable to participation in public discourse with other comprehensive conceptions suggests that his basic methodology can be extended to global political ordering.").
\textsuperscript{47} Rawls, Law, supra note 1, at 77 (footnote omitted).
\textsuperscript{48} See id. at 75–77.
\textsuperscript{49} Id. at 75–76.
“fully reasonable,” but it is compatible with status as a decent society and does not warrant intolerant behavior by liberal societies.\footnote{See id. at 74–75.} Provided a society truly is decent, Rawls maintains, liberal societies should accept it ungrudgingly as a full-fledged member of the Society of Peoples and avoid taking coercive or overly intrusive action designed to influence it to change its public order.\footnote{Id. at 59–60.} I will argue against this conclusion below.

C. The Content of Rawls’s Law of Peoples

The fact that both liberal and decent nonliberal peoples make up the Rawlsian Society of Peoples affects the content of a Rawlsian Law of Peoples. A just Law of Peoples, for Rawls, is one that would be endorsed behind a veil of ignorance among representatives of (the dominant actors in) both liberal and decent nonliberal societies. Rawlsian deliberators do not reflect (like their counterparts at the domestic level) on a potentially unlimited range of possible conceptions of justice. Instead, they assess some “familiar and traditional principles of justice among free and democratic peoples.”\footnote{See RAWLS, THEORY, supra note 1, 39–50 (discussing the reasons why certain principles are selected).}

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.\footnote{RAWLS, LAW, supra note 1, at 37.}

Rawls suggests that equal representatives of the world’s presumptively equal peoples, deliberating behind a veil of ignorance, would endorse
these traditional principles with some qualifications, with the addition of "principles for forming and regulating federations (associations) of peoples and standards of fairness for trade and other cooperative institutions." Thus, the Law of Peoples is a refinement of existing norms of international law.

D. The Equality of Peoples in Rawls's Second Original Position

The fact that representatives of equal peoples determine the content of the Law of Peoples is fatefully decisive for Rawls’s argument. It leads to a stark contrast between Rawlsian norms of domestic and

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54 See id. at 37–38. For instance, the fourth principle "will obviously have to be qualified in the general case of outlaw states and grave violations of human rights. Although suitable for a society of well-ordered peoples, it fails in the case of a society of disordered peoples in which wars and serious violations of human rights are endemic." Id. at 37–38.

55 Id. at 38 (footnote omitted).

56 See id. at 41. When he first envisioned extending his theory to the international arena, Rawls made much the same point. See Rawls, Theory, supra note 1, at 332–33. Rawls said "the principles chosen would, I think, be familiar ones." Id. at 332 (footnote omitted). Referencing James Leslie Brierly, The Law of Nations: An Introduction to the International Law of Peace (Sir Humphrey Waldock ed., 6th ed. 1963), he observed, "[t]his work contains all that we need here." Rawls, Theory, supra note 1, at 332 n.27. Of course, the Law of Peoples as Rawls now conceives it does contain more demanding standards for governmental conduct than those commonly regarded as forming part of international law in 1963, when the edition of Brierly’s book that Rawls cites was published; the norms envisioned in The Law of Peoples are more elaborate than those canvassed in A Theory of Justice.

By limiting the options on which Rawlsian deliberators would reflect at the global level to existing norms of international law, Rawls has not freed himself from the need to claim that the principles that form the Law of Peoples are the best available standards. (Thanks to Seana Shiffrin for this point.) But Rawls’s decision to begin with existing norms of international law does highlight, at any rate, his relative comfort with the existing international legal order. But García reasonably characterizes Rawls’s decision to begin with existing principles of international law as a "shortcut." García, Usefulness, supra note 15, at 41. And Thomas W. Pogge, Rawls on International Justice, 51 Phil. Q. 246, 249 (2001) [hereinafter Pogge, Justice], plausibly suggests that the model Rawls proposes for determining norms of domestic justice "provides more flexibility for adapting social institutions to variable circumstances." By contrast, the approach Rawls proposes in The Law of Peoples "provides no such flexibility. The members of Rawls’s society of peoples are locked into a particular set of rules which may well prove too rigid to fulfil their interests as peoples under diverse global circumstances." Id.

global justice and between the Law of Peoples and a cosmopolitan standard of global justice. A cosmopolitan view "is concerned with the well-being of individuals, and hence with whether the well-being of the globally worst-off person can be improved." By contrast, what matters "to . . . [a Rawlsian] Law of Peoples is the justice and stability for the right reasons of liberal and decent [nonliberal] societies, living as members of a Society of well-ordered Peoples." Rawls makes clear that his Law of Peoples "is fair to peoples and not to individual persons." I argue here that Rawls provides no good reason to opt against a cosmopolitan Law of Peoples and that, given his earlier argument in *A Theory of Justice* for the equality of persons, we should prefer a cosmopolitan to a Rawlsian Law of Peoples.

1. Rawls's Argument for the Domestic Equality of Persons

Rawls's arguments about domestic justice show plausibly, if implicitly, why a Law of Peoples should be cosmopolitan. His arguments for the equality of persons at the domestic level, reflected in the equality of their representatives in the first original position, seem to provide strong support for the equality of persons on the global level. The considerations that lead Rawls to opt for an original position populated by individual deliberators at the domestic level seem to apply with equal force when the second original position is being designed. Rawls initially identifies these considerations in *A Theory of Justice*:

It seems reasonable to suppose that the parties in the original position are equal. That is, all have the same rights in the procedure for choosing principles; each can make proposals.

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59 Rawls, Law, supra note 1, at 120 (emphasis added).

60 Id. at 17 n.11.

submit reasons for their acceptance, and so on. Obviously the purpose of these conditions is to represent equality between human beings as moral persons, as creatures having a conception of their good and capable of a sense of justice. The basis of equality is taken to be similarity in these two respects.\textsuperscript{63}

Rawls frames his argument in \textit{A Theory of Justice} as a straightforward claim that those who can participate in shared reflection on the norms governing political life should have an equal right to do so. "[E]qual justice is owed to those who have the capacity to take part in and to act in accordance with the public understanding of the initial situation."\textsuperscript{64} Those deliberating in the domestic (first) original position—and, by implication, those they represent—are equal in that each has certain minimum capacities required for pursuing personal goals and assessing the fairness of social arrangements. It seems, at least initially, as if, because they possess these moral powers, all persons on our planet should be understood as morally equal and should therefore be entitled to equal representation in the second original position.\textsuperscript{65} But Rawls rejects the view that individual persons should be understood as equal according to the Law of Peoples and, with it, a cosmopolitan original position.

Rawls's defense of his starting point is likely to leave readers unsure of the grounds of his decision to opt against the equality of persons in the second original position. I will explore his explicit arguments before considering several alternative justifications for the Law of Peoples, suggested by his other work, which he might be inclined to adduce. None, I believe, is successful.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{63} \textsc{Rawls, Theory, supra note 1}, at 17; see also \textsc{Rawls, Liberalism, supra note 1}, 79–81; \textsc{Rawls, Restatement, supra note 1}, at 20, 87; \textsc{Rawls, Theory, supra note 1}, at 441–49; cf. \textsc{Rawls, Liberalism, supra note 1}, at 19 ("Since we start within the tradition of democratic thought, we also think of citizens as free and equal persons. The basic idea is that in virtue of their two moral powers (a capacity for a sense of justice and for a conception of the good) and the powers of reason (of judgment, thought, and inference connected with these powers), persons are free. Their having these powers to the requisite minimum degree to be fully cooperating members of society makes persons equal.").
\item \textsuperscript{64} \textsc{Rawls, Theory, supra note 1}, at 442.
\item \textsuperscript{65} See \textsc{Rawls, Law, supra note 1}, at 82. Rawls notes the obviousness of this sort of argument, see \textit{id.}, but rejects it without careful consideration. \textit{See infra} Part I.D.2 ("Rawls's Explicit Arguments for the Equality of Peoples").
\end{enumerate}
\end{footnotesize}
2. Rawls's Explicit Arguments for the Equality of Peoples

Given the importance of the fact that it is peoples who are represented in the second original position, it is surprising how little argument Rawls offers for this arrangement. In Section 1 of *The Law of Peoples*, he asks: "Why does the Law of Peoples use an original position at the second level that is fair to peoples and not to individual persons? What is it about peoples that gives them the status of the (moral) actors in the Law of Peoples?" The reader will find the answer, he promises, in Sections 2 and 11. But in Section 2, he clarifies his position rather than actually justifying it, and his putative defense in Section 11 is question-begging. Elsewhere in *The Law of Peoples*, he repeats his account of the second original position as if doing so justified his decision to regard those deliberating in it as representing peoples rather than persons, but he offers no new argument for this decision. He appeals unpersuasively—and, again, question-beggingly—to the liberal value of tolerance and implies that a cosmopolitan Law of Peoples would be unappealingly intolerant. He suggests that a cosmopolitan Law of Peoples would be inappropriate because it would require the pursuit of policies damaging to the self-respect of nonliberal peoples. He plausibly undermines the claim that intolerant regimes lose the right to be tolerated simply in virtue of their intolerance, but his having done so provides no positive reason for endorsing a Rawlsian Law of Peoples. None of his arguments justifies rejecting the intuitively attractive view, supported by his earlier work, that the second original position should be structured in a way that is fair to free and equal persons.

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66 See Brilmayer, *supra* note 57, at 38, 39 (stating that Rawls "is surely aware that his decision to base his contractarian analysis on the preferences of states is deeply controversial. Rawls recognizes the problem, without offering any satisfactory response. . . . The world is not composed only of states, or of peoples, but also of people. There are non-governmental organizations, universities, human rights organizations, churches, mosques and many other institutions that have just as much independent validity internationally as states do, from a purely theoretical point of view. There is no reason theoretically to start with states as the relevant actors. Or if there is a reason, Rawls does not provide it."). *But cf.* Harry D. Gould, *A Response to Professor Brilmayer on Rawls, 6 INT'L LEGAL THEORY* 42, 43 (2000) ("The detailed discussions on Human Rights which this generates (§ 10), and its concomitant challenge to traditional notions of sovereignty surely indicate that while peoples are primary in the formulation of principles, people are the guiding concern.").

67 RAWLs, LAW, *supra* note 1, at 17 n.9.

68 *Id.* ("Part of the answer is given in § 2, in which the idea of peoples is specified; but the fuller explanation is given in § 11. Those who are troubled by this question should turn to it now.").
a. Clarifying the Nature of Peoples

Rawls says that Section 2 of The Law of Peoples contains "[p]art of the answer" to the question why a Rawlsian Law of Peoples is grounded in a procedure "that is fair to peoples and not to individual persons. What is it about peoples that gives them the status of the (moral) actors in the Law of Peoples?" But Section 2 provides little assistance to the puzzled reader. In this section, Rawls spells out the idea of a people as a group with a shared cultural identity, united by common sympathy and loyalty to a set of public institutions and norms of fairness. These characteristics explain why peoples matter, why they might be thought to have morally relevant value, and why liberal peoples—which recognize this value and which are, in any case, committed to norms of respect—would show appropriate regard for other peoples, both liberal and nonliberal. But what Rawls says about the nature of a people serves at best to lay the groundwork for his later argument. Explaining what peoples are is not the same as showing that their interests ought to trump those of the particular persons who are their members. Rawls's explanation of the nature of peoples does not undermine his arguments for the freedom and equality of persons, for democracy, or for the contention that persons should not be asked to sacrifice themselves for the well-being of their societies.

b. Question-Begging Rejection of the Global Equality of Persons

Rawls tells us that Section 11 offers "the fuller explanation" of his decision to treat peoples rather than persons fairly at the global level. But it does not. Or, if it does, "the fuller explanation" isn't especially complete. In Section 11, he explicitly rejects the idea of a global original position as the basis for the Law of Peoples. We should not attempt, he says, to derive a set of global norms by imagining all individual persons around the world as deliberating in the original position or to hold all societies accountable for failing to adhere to liberal standards of justice. Advocating a cosmopolitan approach "amounts to saying that all persons are to have the equal liberal rights of citizens in a constitutional democracy." This approach would require liberal societies "to act gradually to shape all not yet

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69 Id.
70 See id. at 23–25.
71 Id. at 17 n.9.
72 Rawls, Law, supra note 1, at 82–83.
73 Id.
liberal societies in a liberal direction, until eventually (in the ideal case) all societies are liberal.”74 We shouldn’t endorse such a requirement, however, unless we are sure that nonliberal societies are not “acceptable,” something we would know only in view of “a reasonable liberal Law of Peoples.”75 The fact that we can envision “a global original position” doesn’t demonstrate that liberal democracy is the only reasonable option, “and we can’t merely assume it.”76

To be sure. But the procedure Rawls suggests for the derivation of the Law of Peoples guarantees the outcome for which he argues.77 He emphasizes that “the parties [in the second original position] are the representatives of equal peoples, and equal peoples will want to maintain this equality with each other.”78 No doubt this is true: if peoples begin with equal status behind the veil of ignorance, they will undoubtedly seek to maintain this equality. The rejection of cosmopolitanism is as much a consequence of the structure of the second original position as the rejection of hierarchy is of the structure of the first. The equality of peoples is simply assumed in one case as the equality of persons is in the other.79 The promised warrants are nowhere to be found. For all Rawls has said, his arguments for the freedom and equality of persons remain as valid as ever.80

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74 Id. at 82.
75 Id. at 83.
76 Id.
77 In a broad sense, of course, this is true of contractarian theories of all sorts (thanks to Carole Pateman for this point). This kind of circularity is not necessarily a fatal flaw in Rawls’s argument. However, given his argument’s circular character, it provides little support for his starting point. See, e.g., PATEMAN, supra note 44, at 7, 14–20.
78 RAWLS, LAW, supra note 1, at 60.
79 Cf. id.
80 Rawls makes a similar move earlier in The Law of Peoples. He notes an apparent conflict between the equality of people in the first original position and the equality of peoples in the second but does little to justify it. In the first original position, he says, “we counted citizens as free and equal because that is how they conceive of themselves as citizens in a democratic society.” RAWLS, LAW, supra note 1, at 33–34. Similarly, “[i]n the Law of Peoples . . . we view peoples as conceiving of themselves as free and equal peoples in the Society of Peoples (according to the political conception of that society).” Id. at 34. He observes only that “[t]his is parallel to, but not the same as, how in the domestic case the political conception determines the way citizens are to see themselves according to their moral powers and higher-order interests,” Id. Current transnational society, in which peoples theoretically conceive of themselves as equals, is treated as a given. Again, Rawls begs the question. See id. at 33–34.
c. Liberal Tolerance

Rawls suggests that some observations he makes while arguing for liberal tolerance of decent nonliberal peoples help to explain why a Rawlsian Law of Peoples should be preferred to a cosmopolitan Law of Peoples.\(^81\) He contends that liberal societies should tolerate decent nonliberal societies—that they should not use military force or economic sanctions to coerce such societies into becoming more liberal.

\[\text{[P]arties [deliberating in the second original position] are the representatives of equal peoples, and equal peoples will want to maintain this equality with each other. ... No people will be willing to count the losses to itself as outweighed by gains to other peoples; and therefore the principle of utility, and other moral principles discussed in moral philosophy, are not even candidates for a Law of Peoples.}\(^82\)

Because Rawlsian deliberators represent peoples, they will doubtless wish to maintain the equality of the groups they represent. But the original position is a "device of representation,"\(^83\) which "models what we would regard—you and I, here and now—as fair conditions under which the parties ... are to specify the Law of Peoples, guided by appropriate reasons."\(^84\) Rawls simply specifies that "the parties as representatives and the peoples they represent are situated symmetrically and therefore fairly."\(^85\) He may be right that symmetry is fair here. He cannot, however, simply assert that it is. After all, whether it is fair is precisely the point at issue. And he has offered independent arguments elsewhere for the fundamental equality of persons. It might seem that he needs to respond to his own arguments before asserting that we ought to accept the view that peoples are equal, given that the equality of peoples implies the inequality of persons.

\(^{81}\) Id. at 82 ("To proceed in this way ... takes us back to where we were in § 7.2 (where I considered and rejected the argument that nonliberal societies are always properly subject to some form of sanctions), since it amounts to saying that all persons are to have the equal liberal rights of citizens in a constitutional democracy.").

\(^{82}\) Id. at 60.

\(^{83}\) RAWLS, LIBERALISM, supra note 1, at 25.

\(^{84}\) RAWLS, LAW, supra note 1, at 32. In the passage quoted, "you and I, here and now" are "citizens of some liberal democracy, but not of the same one." Id. at 32 n.35. Subsequently, Rawls argues that persons who are "members of decent hierarchical societies, but not the same one" would endorse the same eight principles of justice as Rawlsian deliberators (listed in Part I.C, infra, "The Content of Rawls's Law of Peoples"). See id. at 69 n.8.

\(^{85}\) Id. at 32.
Rawls says that, in virtue of a cosmopolitan Law of Peoples as he interprets it, liberals would deny "a due measure of respect"\textsuperscript{86} to non-liberal peoples. But this way of putting the matter is surely question-begging because what is at issue is precisely what level of respect liberal peoples should accord the public institutions and cultural patterns of nonliberal peoples. In addition, Rawls needs to distinguish between the different senses in which liberals might be said to show, or fail to show, respect for nonliberal peoples. Liberal peoples could perfectly well regard—as they would in any case regard—the institutions of illiberal peoples as deficient and unreasonable without seeking publicly to humiliate such peoples or show contempt for them.

Defending Rawls, Harry Gould argues that, given a cosmopolitan standard of justice, "decent hierarchical societies are ruled out [if not declared oxymoronic], and . . . an entire segment of the world is declared morally illegitimate."\textsuperscript{87} A cosmopolitan standard is objectionable because it denies the "acceptability" and "dignity of all other types of societies than our own."\textsuperscript{88} It is not clear what sort of claim Gould is making.\textsuperscript{89} Is it one that liberals ought to accept as liberals? From the standpoint of a cosmopolitan theory of justice, Rawls's decent hierarchical societies would, indeed, count as unjust. By denying their members full social and legal equality, by refusing to institute democratic decision-making procedures, and by declining to respect the full panoply of liberal rights, such societies would fail to meet the demands of justice. But nothing of great interest follows. Rawls is not a relativist. He believes that the version of liberalism he defends is ultimately reasonable in a way that competing nonliberal views are not.\textsuperscript{90} And, indeed, this is surely part of what it means to affirm any normative view.\textsuperscript{91} The fact that, if a given view is correct, contradictory views will be incorrect should be relatively obvious and noncontroversial. Liberals and nonliberals will doubtless think of each other as

\textsuperscript{86} Id. at 61.
\textsuperscript{87} Gould, supra note 66, at 44 (alteration in original).
\textsuperscript{88} Id. at 44.
\textsuperscript{89} Beitz, supra note 2, at 681, considers and rejects as circular the argument that "a cosmopolitan approach would necessarily be less tolerant of the diversity of political traditions and cultures." After all, the question at issue is in part precisely "whether or to what extent international institutions and the foreign policies of liberal states should tolerate nonliberal cultures." Id.
\textsuperscript{90} CHARLES LARMORE, THE MORALS OF MODERNITY 146–51 (1996); see RAWLS, LAW, supra note 1, at 62.
wrong in important ways, even if they take each other’s dignity and value seriously. That a theory justifies liberals in believing there is something wrong with illiberal practices should hardly be thought of as cause for embarrassment.

Whatever Rawls says about decent nonliberal societies, he has already classified “an entire segment of the world” as “morally illegitimate.”92 He clearly condemns benevolent absolutisms (with qualifications) and outlaw states as unjust.93 And he regards even well-ordered illiberal societies as less just than liberal societies.94 It would hardly be open to him to object to a cosmopolitan Law of Peoples merely because a variety of regimes appeared to be unjust in its light, given that the same is true, even if to a lesser degree, of a Rawlsian Law of Peoples.

d. The Self-Respect of Decent Nonliberal Peoples

Rawls rightly believes that decent nonliberal societies’ undemocratic public institutions and limited human rights protections would be inconsistent with a cosmopolitan Law of Peoples.95 Judging nonliberal peoples to be unjust would have negative consequences for their self-respect; thus, he implies, we should opt against a cosmopolitan Law of Peoples.96

This is a curious argument. It does nothing to show that persons are not equal for political purposes and that they are not entitled to equal status domestically and globally, to opportunities for democratic participation, and to a range of basic liberties crucial to personal autonomy and democratic self-government. And it is logically odd, if it is intended as an argument against the claim that a cosmopolitan Law of Peoples would be just in a way that a Rawlsian Law of Peoples would not. If a given practice is inconsistent with the demands of justice, recognizing that it is might undermine the self-respect of some persons who support it. But even if identifying the practice as unjust might undermine their self-respect, this has no tendency to show that there is anything wrong with challenging the practice. A norm can be just even if it undermines the self-respect of some persons by calling

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92 Rawls, Law, supra note 1, at 62; see also Gould, supra note 66, at 44.
93 Rawls, Law, supra note 1, at 62.
94 See id.
95 Id.
their behavior into question. Obviously, there might be good reason for liberals not to announce their disapproval of decent nonliberal peoples, but that they ought not to do this is irrelevant to the question whether the institutions of such peoples merit their disapproval. In any case, the harm to the self-respect of decent nonliberals might be relatively limited, given that liberals would ordinarily avoid interfering coercively with decent nonliberal states. The argument from self-respect leaves Rawls's own arguments for equality, freedom, and democracy untouched.

Rawls's self-respect argument focuses on the interest in self-respect of those who govern decent nonliberal societies or support the status quo in those societies; and this interest does not, I believe, trump the interest of other citizens of nonliberal societies in freedom, equality, and democracy. Just how strong is the interest in self-respect which a cosmopolitan Law of Peoples might threaten? Rawls doesn't tell us. After all, liberals will regard a variety of societies, notably those he calls "outlaw states," as governed in unequivocally inappropriate ways. Liberal criticisms might adversely affect the self-respect of some persons in these societies, but this fact—rightly—fails to persuade Rawls that liberals should avoid criticizing them. And Rawls doesn't indicate whose self-respect is at issue. Those denied various human rights by their decent nonliberal societies presumably wouldn't regard calls for their societies to recognize these rights as humiliating. Rawls gives us no reason to treat only the self-respect of those committed to upholding the status quo as worth protecting while ignoring the self-respect of those interested in fostering change (which might be enhanced by external pressures for liberalization and diminished by internal disregard for human rights). Indeed, the self-respect of citizens of decent nonliberal societies who wanted reforms that would make their societies more liberal and democratic might actually be enhanced by the recognition that justice was on their side.

The interest in self-respect grounded in group identity is best thought of as an individual interest—an individual interest served by group membership, but an individual interest nonetheless. Group identity is merely one contributor to the good of individual self-respect, not a master good that subsumes or trumps all the other primary goods that individual deliberators might acknowledge. 97 Individual deliberators might well support the continued existence of organized peoples as part of a just global order. They might affirm the

97 Cf. Tushnet, supra note 96, at 1074–75.
value of self-respect rooted in group membership. They might acknowledge reasons for tolerating decent nonliberal societies. But the appropriateness of these judgments would still be a function of the individual interests at stake, interests whose independence and value are effectively represented by means of a cosmopolitan second original position and reflected in a cosmopolitan Law of Peoples.

Rawls has not shown that recognizing the liberal rights of all persons would necessarily do great harm to the reasonable self-respect of particular peoples. He has also failed to show convincingly why a people's interest in preserving its identity and self-respect trumps the interests of any of its individual members in something approximating the full panoply of liberal rights. His argument from the value of self-respect does not warrant basing norms of global justice on the conclusions of Rawlsian deliberators rather than individual deliberators.

e. Equality for Non-Egalitarians?

Rawls considers the objection that, because decent nonliberal societies are not egalitarian, they should not be entitled to equal representation. In response, he maintains, reasonably enough, that this is on its face a non sequitur, given that we treat groups with different organizational patterns (churches, say, or universities) as equal for certain purposes. But rebutting one objection to his model is not the same as offering any persuasive reason for adopting the device of an original position in which peoples rather than individual persons deliberate. It is hard not to conclude, in short, that abandoning the equality of persons at the transnational level is simply "an ad hoc hypothesis" that enables Rawls "to reach the results that he has in advance decided are the most plausible for the law of nations."

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98 See id. Rawls's belief that liberal societies ought to respect decent nonliberal societies does not depend on the conviction that the institutions of decent nonliberal societies are as satisfactory as those of liberal societies. Rawls, Law, supra note 1, at 62.
99 Cf. Pogge, Justice, supra note 56, at 248.
100 Rawls, Law, supra note 1, at 69-70. Rawls rightly notes that various kinds of decision-making mechanisms may exist in different kinds of organizations, but that we may nonetheless regard these organizations as equal for some purposes. But this observation could be challenged on the basis that a university is easy to leave, as a nation is not, and that it is much less obvious that there is a single appropriate form for university organization than it is that democracy is of great moral importance.
102 Id.
3. Alternative Rawlsian Justifications for the Equality of Peoples

Given the liberal conviction that persons are equal and Rawls's own arguments that they are, liberals should reject his model of peoples as the contractors in the global original position in light of its potentially problematic consequences for particular persons. Rawls's explicit arguments against the alternative, a cosmopolitan Law of Peoples, are both unclear and weak. It is worth asking, therefore, whether there might be other, more persuasive arguments which he might understand as providing a more secure foundation for his peoples-based model. I will consider five such arguments below. One argument might depend on Rawls's belief in the undesirability of a world government; Rawls may believe that a cosmopolitan Law of Peoples would require such a government, and that the unattractive-ness of such a government makes a cosmopolitan Law of Peoples itself an unappealing option. I argue both that a cosmopolitan Law of Peoples would not require a world government and that such a government need not, in any case, be objectionable for the reasons Rawls believes it would be.

The second possible argument I will consider focuses on the concern with public justification and legitimacy that has surfaced in Rawls's work since A Theory of Justice. Perhaps a Rawlsian Law of Peoples could achieve legitimacy, while a cosmopolitan Law of Peoples could not; I suggest, however, that a cosmopolitan Law of Peoples could achieve Rawlsian legitimacy and that its binding character does not depend, in any case, on its Rawlsian legitimacy.

A third possible argument focuses on the importance of fair cooperation for Rawls's position. Rawls might argue that, absent a world government, which he opposes on other grounds, a cosmopolitan Society of Peoples could not qualify as a fair system of cooperation that deserved the loyalty of the world's people. I suggest, by contrast, that a cosmopolitan Law of Peoples could, indeed, ground a fair system of global cooperation and that, even if no such system of cooperation ex-

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103 Cf. Pogge, Justice, supra note 56, at 247 ("By accepting an account that makes the interests of peoples morally fundamental, liberals compromise their conviction that social institutions should be assessed by appeal to the interests of individuals (normative individualism), and by appeal to their freedom and fundamental equality in particular. (Decent [nonliberal] societies, by contrast, are so well accommodated by Rawls that they seem to pay no price of accommodation at all.")

104 Cf. Trachtman, supra note 15, at 989 ("A reasonable conclusion is that Rawls's position is not merely mistaken but is so weak that it leaves one searching beyond Rawls's text for an explanation.")
isted, Rawls seems to hold views which imply that a cosmopolitan Law of Peoples could still bind the actions of governments and individuals.

A fourth argument—trading on some passages that, taken in isolation, could support a relativistic interpretation of Rawls’s work—might suggest that a commitment to democratic equality is a feature of Western liberal thought which most peoples (or persons) would not share and which they would therefore have no reason to endorse. I maintain, however, that Rawls’s contextualist model of justification does not have relativistic implications that would rule out the moral universalism of a cosmopolitan Law of Peoples.

Rawls could also argue for the equality and fundamental importance of peoples on the basis that responsibility for the world’s resources needs to be allocated to particular groups if these resources are to be protected. Responding to this fifth argument, I note that resources can be appropriately protected, if necessary, even if all persons are treated as equal and morally basic for purposes of identifying an appropriate global political morality.

a. The Rejection of a World Government

Perhaps in *A Theory of Justice* Rawls simply takes the equality of states, and the appropriateness of a Rawlsian Law of Peoples, for granted, despite the direct and indirect conflicts between this position and the commitment to the equality of persons that grounds his account of domestic justice.105 Perhaps it simply seems obvious to Rawls that peoples, not persons, are fundamental when norms of global justice are being constructed. If so, pointing out the positive arguments he offers elsewhere for the freedom and equality of persons and emphasizing the importance of making such freedom and equality the basis for global norms of justice may be sufficient to show the inappropriateness of his position.

It is also possible, however, that Rawls regards rooting the Law of Peoples in a social contract framed by individual deliberators as im-

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105 Rawls notes that “[t]he basic principle of the law of nations is a principle of equality. Independent peoples organized as states have certain fundamental equal rights. This principle is analogous to the equal rights of citizens in a constitutional regime.” RAWLS, THEORY, supra note 1, at 332. But this is best seen, not as an argument for the design of the second original position, but simply as a brief elaboration of the principles that might form part of a Law of Peoples (though he doesn’t use the term) and as an example of the unsurprising congruence between such a Law of Peoples and currently accepted norms of international law.
plying or necessitating the existence of a putatively undesirable world government. Rawls says he

assume[s] that ... a world government would be either an oppressive global despotism or a fragile empire torn by frequent civil wars as separate regions and cultures tried to win their political autonomy. A just world order is [thus] perhaps best seen as a society of peoples, each people maintaining a well-ordered and decent political (domestic) regime . . . .

Unlike Rawls, I believe a stable, democratic world government is a reasonable possibility. He provides no sustained argument for the view that such a government would become a despotism or collapse into anarchy. Kant’s *Perpetual Peace*, which Rawls cites in support of his position, doesn’t do so either. Kant simply says that

the separate existence of a number of neighboring and independent states . . . is better than that all the states should be merged into one under a power which has gained ascendancy over its neighbors and gradually become a universal monarchy. For the wider the sphere of their jurisdiction, the more laws lose in force; and soulless despotism, when it has choked the seeds of good, at last sinks into anarchy.

Though “every state, or its ruler, desires to establish lasting peace in this way, aspiring if possible to rule the whole world,” differences in language and religion fortunately prevent them from doing so. Kant is surely right that a world government created as a result of one state’s attempt to rule the world would not be stable. Such a government would, indeed, confront regular challenges to its authority from oppressed regions and minority groups. Given the scale of its operations, a world government rooted in conquest might well have difficulty maintaining despotic control over the entire planet; breakaways and civil conflicts might well be common.

But neither Kant nor Rawls provides any reason to suppose that a democratic world government formed by the free choice of the world’s people would necessarily be unstable or despotic. Provided that a global regime was truly democratic and inclusive and that it provided

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106 Rawls, Restatement, supra note 1, at 13 (footnotes omitted); cf. Rawls, Law, supra note 1, at 36.
107 See Rawls, Restatement, supra note 1, at 13.
109 See id.
substantial opportunities for participation in decision-making by all citizens, it could evoke sufficient loyalty to remain stable. Provided that ample opportunities were available for popular oversight of policy-making and implementation and that limits on the concentration of power were institutionalized, a democratic world government need not become a despotism. And contemporary communication and transportation technologies would make Kant's proposed inverse-square law of the efficacy of political authority less plausible: the extent of a global government's reach need not constrain its effectiveness to the degree Kant supposed.

On a broadly Rawlsian view, the principles of justice for a world government would presumably be those that would be framed by individual deliberators. Such deliberators would presumably endorse justice as fairness or a nearby position as politically normative for the global community. The creation of a global government committed to justice as fairness strikes me as appealing and worth pursuing. But the appropriateness of a cosmopolitan Law of Peoples does not turn on the attractiveness or viability of the goal of a unitary democratic world government committed to justice as fairness.

Suppose Kant and Rawls are right that the idea of a world government is non-viable. Nothing follows at all regarding the status of a cosmopolitan Law of Peoples. Indeed, the viability of a world government would affect the appropriateness of a cosmopolitan Law of Peoples in only two cases: (1) if we assumed that individual deliberators would necessarily opt for a world government, or (2) if the idea of a cosmopolitan Law of Peoples were reasonable only on the assumption that a world government existed. Neither assumption is plausible.

No more than their domestic counterparts would individual global deliberators rest content with an unfair concentration of wealth in the hands of some peoples. They would doubtless opt for extensive human rights protections. They would likely also favor the creation of global structures designed to secure these protections and foster democracy. But it does not follow that they would opt for a world govern-

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ment. If the sorts of reasons Kant, Rawls, and others have found persuasive convinced global deliberators that such a government was undesirable, they would opt against it; there is no artificial feature of a cosmopolitan original position that would require them to opt for a unitary world government.\textsuperscript{112} They could reasonably take into account any tendencies inherent in human social life or individual psychology that might lead Kant or Rawls to doubt the viability of a world government. If such a government proved either non-viable or unattractive, they clearly would not judge that justice required its creation.

I believe that there is nothing inherently troubling about the idea of a world government and that there is a great deal that is attractive. But whether I am right or wrong is irrelevant to the appropriateness of a cosmopolitan Law of Peoples, which would endorse the existence

Arguably sympathetic with Rawls, Edward Foley believes that the principles of global justice should be determined by what I have termed individual deliberators rather than Rawlsian deliberators. See Edward Foley, \textit{Human Rights Theory: The Elusive Quest for Global Justice}, 66 \textit{Fordham L. Rev.} 249, 263 (1997). Foley maintains that "recognizing the unacceptable threats to human liberty that a unified global state would present, the parties to the original position would adopt principles of global justice that call for the existence of separate, sovereign nation-states." \textit{Id.} at 263. Though this conclusion is possible, it is not obvious. A range of possible alternatives would be open to individual deliberators: they might endorse a loose global confederation of nation-states, a much stronger federation, or even a unitary world-state committed to protecting local autonomy. Even if individual deliberators endorsed the existence of nation-states, they might surely raise questions about the existence of such large numbers of states and about current state boundaries. Indeed, Foley argues that "the scale of government should be as large as is humanly feasible, without creating an exclusive monopoly of power in a single global state." \textit{Id.} at 268. Foley also suggests that continent-wide governments would be appropriate. \textit{See id.} at 266–71. \textit{Compare} Trachtman, \textit{supra} note 15, at 991 ("It is difficult to see why the correct extension of Rawls’s theory is not for each individual to enter into a global original position, recognizing that in the real world, the satisfaction of each individual’s preferences takes place at many different levels and utilizes many different kinds of governance: family, church, workplace, locality, substate, state, regional, and global. With multiple centers of authority, we would seem to require multiple, and interrelated, original-position analyses. Each original position would involve some decisions about what is not to be addressed within the particular center of authority in question, and may thus be retained by individuals or assigned to other centers of authority.") (footnote omitted). \textit{See generally} Stefan Gosepath, \textit{The Global Scope of Justice, in Global Justice} (Thomas W. Pogge ed., 2002). A variety of \textit{ad hoc} non-governmental arrangements can obviously make a difference as well. \textit{See, e.g.}, Roger E. Rustad, Jr., \textit{What Lessig (Almost) Gets}, at http://www.kuro5hin.org/story/2002/10/4/23856/9235 (last visited Oct. 19, 2003) (arguing for an international treaty governing unsolicited bulk commercial email).

\textsuperscript{112} Valuing cultures and traditions and recognizing the practical as well as existential significance of local loyalties, global deliberators might even choose a global system featuring peoples with demarcated borders. They might doubt that an organization above a certain size would prove manageable without the creation of an excessively powerful state apparatus that could become tyrannical. They might also consider the value to persons of participating in self-governing local communities with traditions of independence.
of separate peoples if expediency or justice so required. And a cosmopolitan Law of Peoples could enjoy public justification and legitimacy and ground a fair system of cooperation in the absence of a world government. My subsequent analyses of arguments related to public justification and a Society of Peoples as a fair system of cooperation will show why.

b. Public Justification and Legitimacy

After completing A Theory of Justice, Rawls came increasingly to focus on stability for the right reasons and related ideas, including the notion of an overlapping consensus and the requirement of public justification, as essential features of a theory of domestic justice. His growing perception of the importance of these ideas may have played a role in motivating his decision to opt against a cosmopolitan original position. He might seek to argue that a global order grounded in a cosmopolitan Law of Peoples could not be publicly justified and would not enjoy the support of an overlapping consensus of reasonable comprehensive doctrines. I argue, however, that a cosmopolitan Law of Peoples could achieve legitimacy. It might, indeed, be publicly justified, either because an overlapping consensus already exists or could emerge. Rawls does not appear, in any case, to regard public justification as essential to the validity of basic norms of political morality like those that would form the core of a cosmopolitan Law of Peoples. It would therefore be difficult for him to claim that lack of public justification deprived such a Law of Peoples of legitimacy.

i. Rawls’s Account of Overlapping Consensus and Public Justification

In A Theory of Justice, Rawls envisioned a political order in which justice as fairness was understood as a “comprehensive doctrine” organizing the moral as well as political lives of citizens. But it was unrealistic, he subsequently concluded, to believe that, given the “fact of reasonable pluralism,” people in a modern liberal society could be expected to unite in endorsing a single comprehensive doctrine. If

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113 Rawls makes clear that concern with the problem of stability lies at the root of the transformation undergone by his theory between its initial formulation and its subsequent development. See generally Rawls, Liberalism, supra note 1, at xvii–xxx, xxxix–lxii.
114 See id. at xviii.
115 Id. at 36–68; Rawls, Restatement, supra note 1, at 3–4, 40, 84.
116 Rawls, Liberalism, supra note 1, at xvii–xx.
the stability of a society committed to justice as fairness were dependent on the existence of a consensus supporting a particular comprehensive doctrine, such a society simply wouldn’t be stable. Deciding to reformulate his account of justice as fairness, he began to defend it as a “political conception,” designed to provide a basis for fair cooperation within a diverse society. On this basis, he advanced an alternate account of the stability of a society committed to justice as fairness.\(^{117}\) The ideas of public justification and legitimacy play important roles in this account.

Justice as fairness is both legitimate and a source of stability, Rawls maintains, only if “it can win its support by addressing each citizen’s reason, as explained within its own framework.”\(^{118}\) He appears confident that justice as fairness can meet the test he has proposed. A politically liberal society whose institutions are framed in accordance with norms endorsed in the first original position would be stable, for Rawls, for two reasons. First, people raised in a society endorsing such norms would tend to develop, and would have good reason to develop, the sense that institutions consistent with these norms were fair. Second, a reasonable citizen in a liberal society would tend to support the norms created in the first original position on the basis of the reasonable comprehensive doctrine to which she adhered.\(^{119}\)

Rawls maintains that justice as fairness is not a comprehensive moral vision but only a reasonable political morality. He intends his theory to be compatible with a wide range of alternative comprehensive doctrines. It is not meant to compete with such doctrines for popular allegiance. Justice as fairness can therefore enjoy stable support even within a highly diverse society. Despite the “fact of reasonable pluralism,”\(^{120}\) representatives of diverse ideological positions could endorse justice as fairness, because it is concerned only with the political realm; it leaves people free to live out the tenets of their various comprehensive doctrines outside the political sphere.

The stability of justice as fairness depends on the existence of an overlapping consensus of comprehensive doctrines. While representatives of diverse comprehensive doctrines might have very different reasons for regarding social institutions shaped by justice as fairness as reasonable, their respective doctrines might give each of them reason to view such institutions as deserving their support. The point is not that

\(^{117}\) See id. at xvii–xxxiii.

\(^{118}\) Id. at 143 (footnote omitted).

\(^{119}\) See id. at 141–42.

\(^{120}\) Id. at 36–68; Rawls, Restatement, supra note 1, at 3–4, 40, 84.
the norms endorsed in the first original position would be determined by means of an empirical inquiry into the various comprehensive doctrines endorsed within a given society. Rather, Rawls simply wants to suggest that persons sharing the basic assumptions about a liberal society embodied in the first original position could, despite their doctrinal differences, endorse the norms emerging from the original position. “All those who affirm the political conception [of justice] start from within their own comprehensive view and draw on the religious, philosophical, and moral grounds it provides.”

At the domestic level, Rawls supposes, justice as fairness would gradually be endorsed as its attractiveness became progressively more apparent. Initially, liberal institutions would be grudgingly tolerated as part of a constitutional settlement. Increasingly, politically liberal norms would appreciatively be accepted, without much theoretical support, as assumed features of the constitutional order. Finally, widespread affirmation of an overlapping consensus supporting politically liberal principles would emerge. Rawls suggests that the pressures generated by a liberal constitutional order will tend to lead to the creation of a broader, principled commitment to political liberalism (and something approximating justice as fairness).

[C]itizens who affirm the political conception [of justice], and who have been raised in and are familiar with the fundamental ideas of the public political culture, find that, when they adopt its framework of deliberation, their judgments converge sufficiently so that political cooperation on the basis of mutual respect can be maintained.

Rawls emphasizes that his is not a “modus vivendi” position, in accordance with which a group unable to exercise commanding authority in a given society might endorse political liberalism as a matter of expediency. “[A] balance of reasons as seen within each citizen’s comprehensive doctrine, and not a compromise compelled by circumstances, is the basis of citizens’ respect for the limits of pub-

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121 RAWLS, LIBERALISM, supra note 1, at 147.
122 See id. at 158–68.
123 See id. at 166–67.
124 Id. at 156.
125 See id. at 147–49.
Justice as fairness will enjoy stable support because it is endorsed, not out of expediency but out of principle.\textsuperscript{126} A society rooted in Rawlsian justice as fairness would be stable because justice as fairness is “a liberal political view, one that aims at being acceptable to citizens as reasonable and rational, as well as free and equal, and so as addressed to their public reason.”\textsuperscript{127} A position accepted by citizens exercising public reason is \textit{publicly justified}. Rawls distinguishes “full justification” from “public justification.”\textsuperscript{128} On the one hand, “full justification is carried out by an individual citizen as a member of civil society . . . [as she] accepts a political conception and fills out its justification by embedding it . . . into . . . [her] comprehensive doctrine as either true or reasonable.”\textsuperscript{129} Rawls notes that “[s]ome [citizens] may consider the political conception fully justified even though it is not accepted by other people.”\textsuperscript{130} On the other hand, “[p]ublic justification happens when all the reasonable members of political society carry out a justification of the shared political conception by embedding it in their several reasonable comprehensive views.”\textsuperscript{131} “There is . . . no public justification for political society without a reasonable overlapping consensus . . . .”\textsuperscript{132}

Determining if “an overlapping consensus on the political conception is possible is a way of checking whether there are sufficient reasons for proposing justice as fairness [as a doctrine] . . . which can be sincerely defended before others without criticizing or rejecting their deepest religious and philosophical commitments.”\textsuperscript{133} In turn, provided “there are adequate reasons for diverse reasonable people jointly to affirm justice as fairness as their working political conception, then the conditions for their legitimately exercising coercive po-

\textsuperscript{126} \textit{Rawls, Liberalism}, supra note 1, at 169; see \textit{id.} at 169–71.
\textsuperscript{127} \textit{id.} at 148.
\textsuperscript{128} \textit{id.} at 143.
\textsuperscript{129} \textit{id.} at 386–87.
\textsuperscript{130} \textit{id.} at 386.
\textsuperscript{131} \textit{Rawls, Liberalism}, supra note 1, at 386.
\textsuperscript{132} \textit{id.} at 387. But Rawls doesn’t seem to require unanimity elsewhere—for example, once “the principles of justice . . . [have been] provisionally selected . . . [W]e have to check whether, when realized, just institutions as specified by those principles can gain \textit{sufficient support}.” \textit{id.} at 65 (emphasis added). And he can’t really mean to require universal agreement here. Perhaps he should distinguish between “public justification,” which would occur once a consensus had emerged, and “full public justification,” which would occur only in the unlikely event that \textit{everyone} had adopted the position supported by this consensus.
\textsuperscript{133} \textit{id.} at 388.
\textsuperscript{134} \textit{id.} at 390 (footnote omitted).
litical power over one another . . . are satisfied."\(^{135}\) This is because "our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason."\(^{136}\) "Only a political conception of justice that all citizens might be reasonably expected to endorse can serve as a basis of public reason and justification."\(^{137}\) And "the principles of justice . . . [the parties in the original position] would adopt would in effect incorporate this principle of legitimacy and would justify only institutions it would count legitimate."\(^{138}\)

ii. Overlapping Consensus, Public Justification, and the Law of Peoples

An argument against a cosmopolitan Law of Peoples based on the need for public justification might proceed as follows. Political liberalism is defensible at the domestic level because it enjoys the support of a consensus of reasonable comprehensive doctrines. Many of these doctrines are liberal, but even those that are not have not been shaped by their adherents' experience as members of a liberal society. Proponents of illiberal comprehensive doctrines are likely, therefore, to recognize the merits of political liberalism as a framework for political life, even if they dispute the claims of comprehensive liberalism as an account of the moral life. Thus, the fact that a domestic consensus of reasonable comprehensive doctrines might come to exist in support of political liberalism is historically contingent.

Justice as fairness, defended in politically liberal terms, might be—indeed, Rawls clearly thinks it is—more reasonable than any alternative; nonetheless, it is perfectly possible that there might be societies in which many or most people adhere to comprehensive doctrines that provide little or no support for justice as fairness. But if this is so, it is plausible to think that there will be many people in our world in light of whose comprehensive doctrines political liberalism will appear inadequate. Committed to various illiberal ways of life, they will resent and resist the implications of a cosmopolitan Law of Peoples, which they will decline to endorse. Such a Law of Peoples,

\(^{135}\) Id.

\(^{136}\) \textit{Rawls, Liberalism, supra note} 1, \textit{at} 137.

\(^{137}\) Id.

\(^{138}\) Id. \textit{at} 137 \textit{n}5; \textit{cf. id. at} 225.
therefore, will be unlikely to garner the support of an overlapping consensus of reasonable comprehensive doctrines.

By contrast, a Rawlsian Law of Peoples might have a reasonable chance of gaining the support of such a consensus. Because it generally assumes the existing norms of international law and the equality of states instead of challenging them, and would thus leave room for nonliberal societies to continue implementing illiberal public policies, endorsing it would be far less difficult for most peoples on the basis of their comprehensive doctrines. A Rawlsian Law of Peoples could therefore be publicly justified, while a cosmopolitan Law of Peoples could not. A Rawlsian Law of Peoples would be legitimate while a cosmopolitan Law of Peoples would be illegitimate.

iii. Defending the Legitimacy of a Cosmopolitan Law of Peoples

There are two possible responses to such an argument. A cosmopolitan liberal could maintain that such a Law of Peoples would in fact garner the support of an overlapping consensus of reasonable comprehensive doctrines in an actually existing Society of Peoples. Alternatively, she might maintain that such a consensus need not be a *sine qua non* of legitimacy.

A. Securing a Consensus for a Cosmopolitan Law of Peoples

A cosmopolitan liberal might defend the claim that a cosmopolitan Law of Peoples would be endorsed by an overlapping consensus of reasonable comprehensive doctrines in several ways. First, she could suggest that such doctrines already overlap more than a critic might suppose—enough, in fact, that they might yield adequate support for a cosmopolitan Law of Peoples. Second, an overlapping consensus in support of a cosmopolitan Law of Peoples could emerge over time after the initial implementation of such a Law and the gradual emergence of the necessary consensus could provide a cosmopolitan Law with Rawlsian legitimacy. Finally, she might seek to limit the relevant doctrines to ones that could, in fact, provide support for a cosmopolitan Law of Peoples.

1. A Surprising Current Consensus

The cosmopolitan liberal might maintain that, given the widespread influence of the Western media and the intrinsic appeal of liberal ideas, there is more global support for cosmopolitan liberalism than might immediately be supposed. While those in power in many
of the world’s societies might refuse to act in accordance with the norms contained in a cosmopolitan Law of Peoples, the cosmopolitan liberal need not show that they would support such a Law of Peoples or conform their domestic policies, laws, and institutions to it. She need only show that, given the opportunity, a substantial majority of the world’s people would endorse domestic and inter-societal institutions and norms consistent with a cosmopolitan Law of Peoples. Their support could be sufficiently widespread to ensure global legitimacy for cosmopolitan liberalism.

This is not a wildly far-fetched idea. Official pundits in various illiberal societies may praise the virtues of their societies’ institutions, but this is no guarantee that their people would share their sentiments. The Western media have spread images of freedom and—if not often enough—equality all over the world. The development of democratic movements in a variety of authoritarian and totalitarian societies suggests that liberal and democratic ideas already enjoy some support in these societies. The arguments here are, of course, highly speculative; however, they do provide ways of blocking a Rawlsian challenge to the legitimacy of a cosmopolitan Law of Peoples.

2. A Possibly Emergent Consensus

If she chooses not to make the difficult claim that the world is already full of anonymous liberals, the cosmopolitan liberal could nonetheless argue that support for a cosmopolitan Law of Peoples could develop over time. Rawls suggests, of course, that a similar kind of development might occur in the case of political liberalism at the domestic level. Once in place, liberal principles of justice could generate their own bases of support. They respond effectively to the diverse convictions prevalent in the environment to which they apply, giving adherents of various comprehensive doctrines an opportunity to forge satisfactory relationships despite their disagreements. The principles of justice as fairness are—says Rawls—clearer and easier to apply than those of other, more complex and comprehensive positions, and thus more likely to be seen as attractive bases for an initial, “constitutional,” consensus. And when liberal principles are endorsed and liberal institutions in place, they “tend to encourage the

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139 See Rawls, Liberalism, supra note 1, at 168, 390.
140 See id. at 161.
141 See id. at 162.
142 See id.
cooperative virtues of political life: the virtue of reasonableness and a sense of fairness, a spirit of compromise and a readiness to meet others halfway, all of which are connected with the willingness to cooperate with others on political terms that everyone can publicly accept."\(^{143}\) In short, the viability and attractiveness of liberal principles and institutions tends to affect the ways in which people think about them at the domestic level.

Rawls hypothesizes that, over time, variants of previously illiberal comprehensive doctrines capable of providing appropriate support for an overlapping consensus endorsing political liberalism might emerge.\(^{144}\) In turn, the need to justify their views to others who cannot simply be ignored or silenced would require people to rethink their comprehensive doctrines and to recast their grounds and implications in light of their new political environment. They would seek to explain their underlying convictions and the specific policy recommendations following from these convictions in ways at least comprehensible to those who did not share their comprehensive doctrines.\(^{145}\) Doing so would be especially challenging because of the need to articulate responses to a wide range of diverse issues.\(^{146}\) As with an overlapping consensus developed over time, citizens would come authentically to endorse political liberalism not merely out of expediency but as an expression of their own underlying convictions.

There is no reason a consensus of this sort could not emerge at the global level. The same kinds of pressures that might incline proponents of diverse views to support liberal and democratic institutions once they were in place domestically could generate support for such institutions transnationally. The inherent attractiveness of such institutions could become apparent once people became accustomed to them and were in a position to compare them with alternatives. Even were people not liberally inclined initially, they might change their minds once given the opportunity to live as equal persons within free institutions. Again, there is no way of determining for certain whether an overlapping consensus in support of a liberal and democratic global regime would develop. However, the same factors that might make the cosmopolitan liberal hope that a consensus in support of a regime already existed, together with the considerations to which Rawls points in support of his contention that such a consensus could

143 Id. at 163.
144 See RAWLS, LIBERALISM, supra note 1, at 163.
145 See id. at 165.
146 See id. at 165–68.
develop at the domestic level, might make the cosmopolitan's expectation that such a consensus might emerge globally appear less naïve.

It is obvious that the principles that make up justice as fairness, particularly the difference principle, are controversial and will continue to be so for the foreseeable future. Rawls nonetheless regards these principles as capable of earning the support of a domestic political consensus. In part, this is perhaps best seen as a consequence of understanding these principles as derived by implication from convictions widely shared in democratic political cultures. Rawls appears to believe that, if taken seriously, the basic norms of equality, freedom, and fairness to which people in such cultures assent entail support for something like his two principles of justice—even if the implications of these basic norms have not previously been evident. Stable support for these principles must follow, then, from citizens' recognition that to endorse common standards of equality, freedom, and fairness—to which they are likely already committed—is therefore also to endorse Rawls's principles of justice. Perhaps the same might be true transnationally: while a number of peoples might initially be inclined to reject the specific principles contained in a cosmopolitan Law of Peoples, they might ultimately come to see the acceptance of these principles as inescapable because they appear, perhaps surprisingly, to follow from more general, abstract norms they already endorse.

3. A Constrained Consensus

A cosmopolitan liberal could argue that a cosmopolitan Law of Peoples would enjoy Rawlsian legitimacy were it endorsed by persons committed to Rawlsian norms of (domestic) public reason. She could go on to note that such norms, themselves grounded in the deliberations of

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147 Rawls's political conception of justice "tries to put no obstacles in the path of all reasonable doctrines endorsing a political conception by eliminating from this conception any idea which goes beyond the political, and which not all reasonable doctrines could reasonably be expected to endorse." Id. at 389. But even if this refers only to the barebones structure of the original position, it is hard to say that all comprehensive doctrines would be likely to endorse it. As far as possible, citizens in a politically liberal regime decline—while engaging in political discourse, not necessarily in their non-political lives—to reject as false any particular comprehensive religious or philosophical doctrine; taking these issues off the table is a crucial part of respecting other citizens and maintaining a stability-preserving consensus. See id. at 150–52. However, if "someone insists, for example, that certain questions are so fundamental that to insure their being rightly settled justifies civil strife," it may be necessary to insist, in practice if not explicitly, that doctrines on the basis which she insists that strife is appropriate are incorrect. See id. at 152–53.

148 Alternatively, of course, they might simply reject or reformulate these underlying principles because of their undesired implications.
parties in the original position, requires commitment to freedom and equality and exclude comprehensive doctrines, even reasonable ones, from the public political realm. She might observe that proponents of illiberal positions could not defend their positions using Rawlsian (domestic) public reason. She might conclude, therefore, that, if the kind of justification required for Rawlsian legitimacy is justification using Rawlsian (domestic) public reason, justice as fairness—or a close cousin—could achieve global public justification in roughly the same way that a politically liberal view could achieve domestic public justification.

This need not be a merely definitional victory. The cosmopolitan liberal could offer substantive reasons for her position. She could argue that she is perfectly prepared to defend a global version of political liberalism: she is not simply ruling those who disagree with her out of court. She could argue hypothetically using comprehensive doctrines she does not share if doing so will make her position comprehensible and persuasive to persons with illiberal views.

Most fundamentally, however, the cosmopolitan liberal could note that the idea of free public reason is itself a liberal notion. Because it depends on the assumption that persons are free and equal, the idea of free public reason cannot effectively be invoked in support of fundamentally illiberal positions. It requires accountability to all persons as reasonable decision-makers and deliberately excludes certain kinds of reasons from consideration. A nonliberal, then, cannot simply invoke this principle to reject a liberal position.

The canons of public reason constrain the outcome of public debate, requiring broadly liberal conclusions. And the principle of legitimacy itself requires justification in terms of public reason, so that the illiberal must either accept justification in terms of public reason—in which case justice as fairness or a cousin will likely achieve public justification—or else ask for some other sort of justification. But a liberal's failure to justify an institution or policy in terms other than those acceptable as part of public reason need be no bar to legitimacy from the standpoint of individual deliberators in the second original position. On its own terms, therefore, justice as fairness could be publicly justified.

149 See Rawls, Liberalism, supra note 1, at 225.

150 The idea of public reason is a politically liberal idea. See Rawls, Law, supra note 1, at 143-44. ("[T]he content of public reason is given by the principles and values of the family of liberal political conceptions of justice meeting these conditions. To engage in public reason is to appeal to one of these political conceptions—to their ideals and principles, standards and values—when debating fundamental political questions.").
It would obviously be open to a nonliberal to respond by challenging political liberalism in general. It is, of course, entirely possible that she might be right: there is no guarantee that political liberalism is the most reasonable political theory. What she could not do, however, is challenge it by maintaining that it lacked Rawlsian public justification. At best, a continuing challenge to a global political liberalism would undermine the ability of cosmopolitan liberals to bring into being a regime marked by a desirable level and kind of stability. It would not prevent a cosmopolitan Law of Peoples from achieving Rawlsian public justification because illiberal views cannot be defended using public reason as Rawls’s has defined it at the domestic level.

Rawls manages to avoid this conclusion only because he evidently views global public reason as subject to constraints different than those that apply to domestic public reason. The norms of public reason operative in the Society of Peoples are those “appropriate to the Society of Peoples.” And because representatives of peoples rather than persons frame Rawls’s Law of Peoples, it is to peoples—often governed by persons committed to illiberal comprehensive doctrines—that public justification will be owed. Rawlsian deliberators in the second original position would frame a Law of Peoples that required that public justification be offered to peoples in ways that respected their freedom and equality. The norms of public justification they would adopt would thus not exclude the claims of illiberal societies from consideration. But this is a consequence of the questionable groundrules Rawls has established, and so cannot be used to rule out alternatives absent arguments in support of those ground rules. Individual deliberators would presumably opt for the same norms of public reason that govern domestic public life in a Rawlsianly just society.

“There is no reason,” Rawls says in respect of domestic justice, “why any citizen . . . should have the right to use state power to decide constitutional essentials as that person’s . . . comprehensive doctrine directs. When equally represented, no citizen could grant to another person . . . that political authority. Any such authority is, therefore, without grounds in public reason . . . .” He seems to want to make a similar move on the global level. It’s as if he were to say:

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151 Id. at 59; see id. at 54–58. Interestingly, Rawls devotes almost no attention to the operation of the norms of public reason in the section of The Law of Peoples concerned with decent nonliberal peoples. Id. at 54–58.

152 RAWLS, LIBERALISM, supra note 1, at 226.
There is no reason why any people should have the right to use its power to decide constitutional essentials for another people as its own comprehensive doctrine directs. When equally represented, no people could grant to another people that political authority. Any such authority is, therefore, without grounds in public reason.

But this application of Rawls's principle of public reason to the transnational sphere would fail.

First, the promotion of democracy and human rights by liberal peoples need not involve the imposition of a comprehensive doctrine by these peoples on others. Liberal peoples promoting democracy and human rights (not necessarily by using military or economic power to intervene in radical ways) could do so on the basis of what Rawls himself is at pains to emphasize is a purely political conception of justice, not a comprehensive doctrine. Second, and fatally, the objection presupposes what Rawls fails to demonstrate: peoples should be treated as equal. It is hardly surprising that equal peoples would endorse canons of global public reason that would rule out fundamental challenges to at least some illiberal cultural, legal, and political regimes. Equal persons, however, would not. They would be much more likely to adopt broadly Rawlsian norms of domestic public reason as global norms. These norms obviate justification of governmental institutions and policies in terms of unreasonable comprehensive doctrines. Their adoption would rule out fundamentally illiberal objections to the legitimacy of justice as fairness at the global level. Only those positions prepared to argue in publicly defensible ways would count, and since only disagreements couched in terms of Rawlsian public reason would count, there would be no real question about the legitimacy of an international regime committed to liberal norms of justice.

B. Legitimacy Without Consensus

Rawls's own arguments suggest that, while desirable, the public justification of a principle of political morality is not required for it to bind persons and institutions. I argue, therefore, that it would be inconsistent of him to maintain that a cosmopolitan Law of Peoples would lack legitimacy until supported by an overlapping consensus of reasonable comprehensive doctrines. We can reasonably believe that such a Law of Peoples would be authoritative for the actions of an actually existing Society of Peoples or an individual government whether or not it had achieved public justification.
It might appear that, for Rawls, a political conception is publicly justified in a given society only if everyone in the society endorses it. It would seem, then, that the Law of Peoples could be legitimate, that it could bind the world’s people, that a global government could act in accordance with its terms, and that, absent such a government, governments of individual peoples could be bound by it and could demand that others conform to it—but only if all of the world’s people had assented to it. Rawls sometimes appears to suggest that public justification requires unanimity: “Only a political conception of justice that all citizens might be reasonably expected to endorse can serve as a basis of public reason and justification.” But notice that Rawls does not say here that all citizens must in fact endorse a political conception for it to count as justified. Rather, Rawls suggests that in a well-ordered society, “each [citizen] cooperates . . . with the rest on terms all can endorse as just.” It is one thing to say that everyone can reasonably endorse political liberalism, another to say that a politically liberal regime is just only if everyone does, in fact, endorse the basic principles that ground it.

Rawls clearly recognizes that, while everyone adhering to the canons of public reason might be able to affirm political liberalism and either justice as fairness or some nearby view, not everyone would endorse these canons. “Views that would suppress altogether the basic rights and liberties affirmed in the political conception [governing a politically liberal society], or suppress them in part, say[,] its liberty of conscience, may indeed exist, as there will always be such views.” Rawls simply holds out the hope that “they may not be strong enough to undermine the substantive justice of the regime.” If a supporting consensus didn’t exist, justice as fairness would be “in difficulty”; it might even be the case that no democratic position could attract stable support. Rawls regards this possibility as troubling. But he does not—rightly—suggest that it would call into question the actual reasonableness of justice as fairness. Lack of a stable overlapping consensus in support of a cosmopolitan Law of Peoples need not call the legitimacy of such a Law of Peoples into question. A global government could still implement it. And, absent such a government, individual

153 Id. at 137 (footnote omitted).
154 RAWLS, RESTATEMENT, supra note 1, at 27 (emphasis added).
155 RAWLS, LIBERALISM, supra note 1, at 65.
156 Id.
157 Id. at 66–66.
158 See id. at 66.
peoples could still be bound by it and could still demand that others adhere to it. Even if a cosmopolitan Law of Peoples had not yet achieved public justification, none of the responsibilities or rights flowing from such a Law of Peoples—at least, none with which I am concerned here—need be impaired.

Rawls explicitly grants that peoples have responsibilities and rights with respect to other societies that have not, presumably, acknowledged the legitimacy of the Law of Peoples. They have the responsibility to aid “burdened societies” and to respect the rights of individual combatants and noncombatants in war. They have the right to defend themselves and others against attacks by “outlaw states.” They also have the right—and perhaps the duty—to exert cultural, economic, and, in extreme cases, military pressure on outlaw states to end human rights abuses. Rawls evidently believes, then, that a liberal people may be bound by the Law of Peoples whether or not any other society endorses it. He is similarly clear that societies that do not acknowledge the Law of Peoples are nonetheless responsible for respecting the obligations it embodies. Presuming he is right, he can hardly claim that a cosmopolitan Law of Peoples would be illegitimate, and therefore non-binding, because a significant number of peoples would not accept its dictates. Whether under a Rawlsian or a cosmopolitan Law of Peoples, societies would be seen as bound by a Law of Peoples they had not acknowledged as legitimate. And well-ordered societies would be required to abide by such a Law of Peoples whether or not it was globally publicly justified, even when dealing with peoples and persons who failed to accept its validity.

Legitimacy on the basis of public justification appears, in short, to play a relatively minor role in determining appropriate norms of transnational behavior for Rawls. Given what he says about duties that hold in the apparent absence of public justification, he has two options. He can abandon his principle of public justification entirely.

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159 See Rawls, Law, supra note 1, at 105–13. Note that while some burdened societies may have democratic political institutions, helping a burdened society change its political culture is part of what aiding such a society entails; therefore, it follows that not every burdened society necessarily offers even the relatively minimal human rights protections afforded by the Law of Peoples. See id. at 109–10.

160 See id. at 94–97; Rawls, Theory, supra note 1, at 332–35.

161 See Rawls, Law, supra note 1, at 91. Though Rawls notes that outlaw states are “aggressive and dangerous,” id. at 81, he does not regard self-defense as the only appropriate reason for confronting outlaw states. See id. at 81 n.26, 93 n.6.

162 See id. at 93 n.6; cf. id. at 80–81.
Alternatively, he can claim that a policy or institution is legitimate if it could be justified using liberal norms of public reason.

iv. The Legitimacy of a Cosmopolitan Law of Peoples

A cosmopolitan Law of Peoples might face justificatory hurdles that a Rawlsian Law of Peoples would not. But a cosmopolitan Law of Peoples could nonetheless prove legitimate on Rawlsian grounds. A supporting overlapping consensus of reasonable comprehensive doctrines in support of a cosmopolitan Law of Peoples might already exist; and, if it does not, it might emerge simply because of the attractiveness of liberal ideals and their widespread influence. If Rawlsian limits on public justification were applied at the global as well as the domestic level, so that only reasonable comprehensive doctrines accepting the canons of Rawlsian public reason needed to be taken into account, the likelihood that a cosmopolitan Law of Peoples could achieve Rawlsian legitimacy would obviously be even greater.

Rawls's own stance suggests, in any case, that the validity of some aspects of political morality do not depend on legitimacy, and therefore on public justification. While specific policies and institutional arrangements might lack binding force absent Rawlsian legitimacy, basic principles of justice, at any rate, evidently do not. Rawls's own treatment of issues including war and transnational aid suggests that the demands of justice apply whether or not these demands have been publicly justified on a global scale and whether or not those affected acknowledge them. It does not appear, then, that a Rawlsian argument focusing on public justification could lead to the conclusion that a cosmopolitan Law of Peoples was illegitimate.

c. The Society of Peoples as a Fair System of Cooperation

For Rawls, a just society is, among other things, a fair system of cooperation. A society counts as a fair system of cooperation if the following requirements are met: people generally act in accordance with suitable regulative norms; these norms are to some extent internalized (and do not need constantly to be backed up with the threat of punitive sanctions); these rules are designed, at least in principle,

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164 See RAwLS, RESTATEMENT, supra note 1, at 5–8; RAwLS, THEORY, supra note 1, at 4; cf. RAwLS, RESTATEMENT, supra note 1 at 50, 95–96.
to foster the good of each participant; and social interactions are designed to be reciprocally or mutually beneficial.165

Rawls is clear that the use of coercive authority to coordinate the behavior of otherwise independent actors does not render a system of cooperation fair.166 Nonetheless, he might suggest that absent a world government or other mechanisms for regulating the behavior of particular national governments, a cosmopolitan Society of Peoples would not count as a fair system of cooperation, because peoples and individuals would be too prone to ignore its requirements. I argue, however, that a cosmopolitan Society of Peoples could be a fair system of cooperation and that, in any case, at least some of the duties incumbent on persons and societies under a cosmopolitan or Rawlsian Law of Peoples would be binding, by Rawls’s own lights, in the absence of a fair system of cooperation—that fairness, rather than cooperation, seems to be the decisive factor. If I’m right, an objection to a cosmopolitan Law of Peoples based on the importance of ensuring that a Society of Peoples was a fair system of cooperation wouldn’t rule out a cosmopolitan starting point for reflection on international justice.

i. Why a Cosmopolitan Society of Peoples Might Be Thought Not to Be a Fair System of Cooperation

Rawls maintains that a given set of arrangements are just with respect to those who participate in them only if these arrangements constitute a fair system of cooperation.167 A Society of Peoples, he might argue, could be just to persons—could be a fair cooperative venture among them—only if a world government existed. Absent a world government—which Rawls has, recall, characterized as undesirable on other grounds168—responsibility for the enforcement of transnational legal norms would rest largely with the governments of individual peoples. And since a cosmopolitan Law of Peoples would constrain a government’s relationship with its citizens, limit the pursuit of its objectives, and in some cases require that its citizens contribute substantially to schemes designed to enhance the welfare of others, the governments of individual peoples would be willing to implement it fitfully at best.

165 See Rawls, Restatement, supra note 1, at 7.
166 See Rawls, Liberalism, supra note 1, at 15.
167 See id. at 15–16. At one point, Rawls frames the fundamental question in which he is interested as “What is the most appropriate conception of justice for specifying the fair terms of social cooperation between citizens of a democratic regime regarded as free and equal?” Id. at 391 n.27.
168 See Rawls, Law, supra note 1, at 36.
Without consistent support from authorities with the power to implement a cosmopolitan Law of Peoples, it would be inconsistently applied, and the Society of Peoples would not qualify as a fair system of cooperation.\footnote{Perhaps this sort of analysis lies behind some observations offered in (at least partial) explanation of Rawls’s preference for peoples over persons. See Brilmayer, supra note 57, at 38 (“Rawls transposes his familiar domestic methods to construct a ‘Law of Peoples’ and justifies this by observing that peoples as corporate bodies organized by their governments already exist in some form all over the world. These existing entities must agree to any proposed political reforms. This being the case (Rawls believes) all principles and standards proposed for the law of peoples must be acceptable to the considered and reflective opinion of ‘peoples’ and their governments.”). But this makes little sense as a basis for an account of justice.} The Law of Peoples might be thought to lack binding force under such circumstances.

Any account of international norms will doubtless not prove effective unless supported at least to some degree by the entities with the power to affect the international environment; and, in the absence of a global government, the governments of individual societies would clearly be among those entities. Thus, in turn, such norms also require the support of the people to whom democratic governments are accountable. It seems possible, however, that a cosmopolitan Society of Peoples might enjoy more consistent support than Rawls supposes. Rawls’s Law of Peoples might not be easy to enforce in the absence of a global government, which suggests that his standards for fair cooperation ought not to be overly high. And he is not, in any case, prepared to make a great deal turn, at least at the global level, on the existence of an actual scheme of fair cooperation. It would be unreasonable of him to hold proponents of a cosmopolitan Law of Peoples to a higher standard than those to which he holds himself.

ii. The Possibility of Cooperation Under a Cosmopolitan Society of Peoples

A cosmopolitan Law of Peoples could, indeed, be a fair cooperative venture. It would feature mechanisms designed to foster cooperation even in the absence of a global government, and it could reasonably be expected to attract significant support.

A. Fostering Cooperation Under a Cosmopolitan Law of Peoples

It is simply not clear that the transnational order is shaped by states to the degree Rawls suggests. States may well be less important...
than he appears to assume they are.\textsuperscript{170} A variety of existing non-state institutions could help to secure support for a cosmopolitan Law of Peoples in the absence of a global government. So would the governments of existing peoples. There would also be other transnational institutions (a global criminal court, for instance), with which individuals might have direct relationships and which would, in any case, help to ensure general compliance with the Law of Peoples.

In any case, it is not clear that enforcement mechanisms are the issue here. "Like most laws, international rules are rarely enforced, but usually obeyed."\textsuperscript{171} There is some evidence that governments adhere to at least some norms because they perceive these norms to be fair.\textsuperscript{172} And domestic legal systems regularly internalize transnational legal norms even in the absence of relevant global enforcement mechanisms.\textsuperscript{173} Thus, the absence of a global government would not keep a cosmopolitan Law of Peoples from functioning as a fair system of cooperation.

The absence of a global government would create potential problems for a Rawlsian Law of Peoples just as it would for a cosmopolitan Law of Peoples. If a Rawlsian Law of Peoples could count as a fair system of cooperation in the absence of a world government, this provides added reason to suppose that a cosmopolitan Society of Peoples could as well.

Supposing states are centrally important, however, this fact could create difficulties for a Rawlsian Society of Peoples just as it could for a cosmopolitan Law of Peoples. If a world government did not exist, arrangements in the Society of Peoples might in fact be fair. But it is not clear that a Rawlsian Society of Peoples would be any better at ensuring the fairness of these arrangements than would a cosmopolitan Law of Peoples. Without such a government, militarily or economically strong peoples would be in a position to be more abusive to weak peoples than strong individuals or strong groups of private persons would be to weak persons under a world government. Societies might well seek to shirk their putative obligations under the Law of Peoples.

\textsuperscript{170} See generally id.; Buchanan, supra note 17.


\textsuperscript{172} See generally THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995).

\textsuperscript{173} See Koh, supra note 171, at 2645–58.
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ples.\textsuperscript{174} Rawls might argue that he is talking about fairness under circumstances in which there is already widespread acceptance of his proposed Law of Peoples, but if full compliance can be treated as a premise, then it is reasonable to assume that a cosmopolitan Law of Peoples would lead to a fair system of cooperation as well. If most or all people adhered to a cosmopolitan Law of Peoples, all would be in a position to reap its benefits without excessive cost. As Rawls conceives of the Society of Peoples, it is clearly a fair cooperative venture. Thus, to imply that a cosmopolitan Society of Peoples minus a world government would not be such a venture would be at the same time to imply that the Society of Peoples \textit{he} imagines wouldn’t be either.

The global order might be unstable even if liberal and decent nonliberal peoples endorsed the Law of Peoples, given that significant numbers of other peoples might not endorse it. But the empirical extent of the likely support available for a Rawlsian Law of Peoples does not appear to occupy a central place in Rawls’s argument. Apparently, despite the potential lack of widespread support for a Rawlsian Law of Peoples, such a Law could still serve as a fair system of cooperation. Rawls could not reasonably maintain, then, that a similar lack of support would prevent a cosmopolitan Society of Peoples from qualifying as a fair system of cooperation.

B. \textit{The Extent of Support for a Cosmopolitan Law of Peoples}

There is an obvious Rawlsian objection, however, to arguments focusing on alternatives to a global government and on the parity between a Rawlsian and a cosmopolitan Law of Peoples. The objector can grant the potential existence of institutions that might help to implement a cosmopolitan Law of Peoples absent a global government and despite the formal parity between Rawlsian and cosmopolitan Law of Peoples. But, she might argue, this misses the point: the ability of a cosmopolitan Law of Peoples to ground a fair system of cooperation would be limited, given the likelihood of widespread opposition to its

\textsuperscript{174} Joseph Heath, \textit{Immigration, Multiculturalism, and the Social Contract}, 10 CAN. J.L. & JURISDICTION 343, 347 (1997) argues that "even if social contract principles would recommend a system of global relations in which freedom of movement among nations was guaranteed, there is no reason to think that such principles should be respected by any state in the absence of an effective institutional structure that can provide reasonable guarantees of compliance among the others." This international structure need not, however, be a global state; a variety of other possibilities are readily imaginable.
radical features. But a cosmopolitan Law of Peoples could enjoy more support than a Rawlsian objector might initially suppose.175

Even if some peoples failed to endorse the terms of a cosmopolitan Law of Peoples, if a substantial majority of peoples did so, support for it could continue to prove sufficiently stable to ground a system of cooperative interaction between persons and societies.176 Potential instability need not prevent it from grounding a fair system of cooperation, even if stability is a requisite of such a system. As Rawls grants, a substantial number of peoples may well not endorse a Rawlsian Law of Peoples. He does not seem to regard this possibility as justifying the further attenuation of his proposed Law of Peoples, however. Indeed, he acknowledges elsewhere that “a just scheme of cooperation may not be in equilibrium, much less stable.”177

Rawls does not suggest that the Law of Peoples be reframed to secure the support of outlaw states or benevolent absolutisms, whatever their numbers or influence. And it would be odd if he did so. In modern liberal democracies, wealthy people exercise disproportionate influence over political decision-making. Under ordinary circumstances, it will be extremely difficult to enact or enforce a public policy without their support. But he does not, in the interests of stability, accord their voices or interests extra weight when designing the domestic


176 Rawls explicitly acknowledges that there might be many who do not find a sense of justice for their good; but if so, the forces making for stability are weaker. Under such conditions penal devices will play a much larger role in the social system. The greater the lack of congruence, the greater the likelihood, other things equal, of instability with its attendant evils. Yet none of this nullifies the collective rationality of the principles of justice; it is still to the advantage of each that everyone else should honor them. At least this holds true so long as the conception of justice is not so unstable that some other conception would be preferable.

RAWLS, THEORY, supra note 1, at 505.

177 Id. at 434–35; cf. Trachtman, supra note 15, at 989 (observing that “some measure of social proximity is necessary for solidarity” but noting that “[t]his position is more a behavioral insight about human nature than a philosophical or logical principle” and thus should not be used “as a basis for determining what human action or what institutional arrangements would be just” (footnote omitted)). Of course, judgments about human nature cannot directly lead to conclusions about justice. However, if certain psychological characteristics of a population make a particular scheme of justice difficult to implement, this might be an especially strong argument against implementing it, despite its moral attractiveness. See generally Bernard A.O. Williams, Ethics and the Limits of Philosophy (1985).
original position. It makes no more sense to treat peoples rather than persons fairly when designing the second original position.

Even though only cosmopolitan liberals may at first wholeheartedly endorse the principles of a cosmopolitan Law of Peoples, this need not mean that a transnational regime governed by such a Law of Peoples would enjoy so little support from decent nonliberal peoples that it would be too unstable to serve as a system of fair cooperation. Decent nonliberal peoples could certainly endorse many of the provisions of a cosmopolitan Law of Peoples. Assuming a Rawlsian Law of Peoples would be stable, it seems as if the stability of a cosmopolitan Law of Peoples would be threatened, if at all, only when it yielded requirements different from those contained in a Rawlsian Law of Peoples. A cosmopolitan Law of Peoples would, of course, yield some requirements that would be unlikely to attract the support of illiberal governments. But it need not affect adherence to norms that aren’t in dispute. And the overall stability of support for a cosmopolitan Law of Peoples might be such that a measure of dissent over certain features of such a Law would not lead to significant upset. Governments that did not find individual features of a cosmopolitan Law of Peoples attractive might support them because doing so reduced domestic discontent—many members of their societies might, after all, respond positively to increased liberalization and democratization. And the overall stability of a global order shaped by a cosmopolitan Law of Peoples might contain the effects of dissent regarding particular, more controversial norms.

iii. A Cosmopolitan Law of Peoples Could Bind Absent a Fair System of Cooperation

It is unclear, in any case, that Rawls can reasonably maintain that the basic norms of his preferred political morality apply only in circumstances marked by fair cooperation. He makes clear with respect to transnational duties that a number of the requirements of his political morality hold in the absence of a fair system of cooperation. So it would be difficult to mount a Rawlsian argument against a cosmopolitan Law of Peoples on the basis that a cosmopolitan Society of Peoples could not count as such a system of cooperation.

Rawls clearly believes that the Law of Peoples binds individuals in the absence of a global government. He notes that the “political (moral) force” of the “human rights honored by both liberal and de-
cent hierarchical regimes . . . extends to all societies, and they are binding on all peoples and societies, including outlaw states." 178 Among the principles making up his proposed Law of Peoples is the requirement that peoples "observe certain specified restrictions in the conduct of war." 179 And he makes clear that these restrictions bind individuals. Discussing the norms of war, he provides good reason to suppose that in the second original position, "the traditional prohibitions incorporating the natural duties that protect human life would be chosen." 180

[C]onscious refusal in time of war . . . is based upon the same theory of justice that underlies the [domestic] constitution and guides its interpretation. Moreover, the legal order itself presumably recognizes in the form of treaties the validity of at least some of [the traditional] principles of the law of nations. Therefore if a soldier is ordered to engage in certain illicit acts of war, he may refuse if he reasonably and conscientiously believes that the principles applying to the conduct of war are plainly violated. He can maintain that, all things considered, his natural duty not to be made the agent of grave injustice and evil to another outweighs his duty to obey. 181

Rawls appears here to envision a case in which an individual soldier refuses to commit an act because she regards it as inconsistent with the demands of justice. 182 There is no reference to a functioning Society of Peoples that might enforce the principles of justice on all combatants. The requirements related to war, at any rate, are matters of "natural duty." 183 And natural duties "have no necessary connection with institutions or social practices." 184 They "are owed not only to definite individuals, say to those cooperating together in a particular

178 Rawls, Law, supra note 1, at 80–81.
179 Id. at 37.
180 Rawls, Theory, supra note 1, at 333; see also Gregory C. Keating, Reasonableness and Rationality in Negligence Theory, 48 Stan. L. Rev. 311, 321 n.40 (1996) ("Natural duties do not depend on the presence of institutions for their very existence, while artificial duties do.").
181 Rawls, Theory, supra note 1, at 333.
182 Id.
183 See id. (characterizing justice in war).
184 Id. at 98; cf. Jeremy Waldron, Redressing Historic Injustice, 52 Toronto L.J. 135, 138 n.11 (2002) ("Rawls used a contractarian device to illuminate the content of justice; but the duty to be just was understood by him as a categorical natural duty, not as a contractually incurred obligation.").
social arrangement, but to persons generally.\footnote{Rawls, Theory, supra note 1, at 99. This idea might seem more at home in the intellectual world of A Theory of Justice than in that of Political Liberalism. But the political conception of justice as fairness is still, in a limited but important sense, a moral conception. There is no reason a proponent of political liberalism, as Rawls characterizes and defends this idea in his later work, should object to the notion of natural duties (as elaborated in A Theory of Justice) provided that these duties are understood and grounded as part of a political conception. Rawls’s reference to treaty obligations should not be read as implying that the duty to observe the requirements of justice in war depends on the existence of international agreements embodying these requirements. It is apparent that he believes that a soldier might offer a justification rooted in a reasonable political conception of justice for refusing to “engage in certain illicit acts of war.” Rawls, Theory, supra note 1, at 333. His purpose seems to be to note a further justification (superfluous but still important) that the soldier might offer for conscientious refusal. Rawls does not suggest, I think, that a soldier would be free to, say, violate the principle of noncombatant immunity in a given case if no treaty provision constrained her conduct in a particular case.} Rawls’s Law of Peoples thus appears to bind individuals in at least some instances even absent any mechanism designed to secure general compliance with its demands. This implies either that the question whether a fair system of social cooperation exists is relevant to the validity of only some norms of justice, or that transnational society can be a fair system of cooperation absent any global enforcement mechanism. In either case, it does not appear as if Rawls could argue against a cosmopolitan Law of Peoples on the basis that it could not ground a fair system of cooperation.

d. Rawlsian Relativism

If Rawls were a relativist of some sort, as he is sometimes supposed to have become, he might be thought to have a reason to oppose cosmopolitanism apart from the reasons I have already canvassed. He might argue that nonliberals would have no objective reason to endorse a cosmopolitan Law of Peoples. But he is not a relativist and so could not argue on relativist grounds against cosmopolitanism.\footnote{See Rawls, Law, supra note 1, at 62. While Rawls is not a relativist, it is easy to misread him as if he were (“a liberal constitutional democracy is, in fact, superior to other forms of society”). See id. Thus it is understandable that Tesón observes that the post-Theory of Justice Rawls “embraced a more relativistic, context-based conception of justice and political morality, in which rights and liberties no longer had a foundation in higher principles or liberal views of human nature, but were merely the result of the peculiar history and traditions of the West.” Tesón, supra note 101, at 98. My sense is that Rawls believes that the liberal rights he defends happen to have been discovered and defended in the West and that it might prove difficult to construct an overlapping consensus in support of such rights outside the West. But I do not believe he supposes that liberal claims about justice are only “true for” people in the West. Rawls may be a relativist about justification, but he is not a relativist about truth. See Jeffrey Stout, Ethics After Babel: The Lan-}
relativism provides, in any case, no support for an anti-cosmopolitan argument as such.

As I have already suggested, the same argument Rawls offers for the equality of persons domestically seem to entail the equality of persons globally. In *A Theory of Justice*, he defends the equality of the participants in the first original position in general terms that do not depend on substantial background assumptions about persons or political life.\(^{187}\) The equality of persons is not, presumably, an unchallengeable postulate: like other aspects of justice as fairness, it can and must be validated through a process of deliberation leading, ultimately, to wide reflective equilibrium among the deliberators' relevant moral and political beliefs.\(^{188}\) Nonetheless, there is no indication that Rawls regards his argument for equality as valid or objectively reasonable only for those who endorse certain presuppositions (though of course it may as a matter of fact be likely to persuade only those who already hold certain beliefs). To the extent that the Rawls of *The Law of Peoples* endorses the views expressed in *A Theory of Justice*, the same ought to be true globally.

In Rawls's more recent work, however, he appears at first glance to offer a more qualified defense of the norms governing the first original position. It might be tempting now to read him as arguing from within the confines of liberal democracy; if this is, in fact, what he is doing, there might be less reason for him to endorse the global moral and political equality of persons. He suggests that the principles of justice as fairness are meant to answer the question: once we view a democratic society as a fair system of social cooperation between citizens regarded as free and equal, what principles are most appropriate to it? Alternatively: which principles are most appro-

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187 See Rawls, *Theory*, supra note 1, at 507 (“[T]he principles of justice are argued for on the basis of reasonable stipulations concerning the choice of such conceptions. I urged the naturalness of these conditions and presented reasons why they are accepted, but it was not claimed that they are self-evident, or required by the analysis of moral concepts or the meaning of ethical terms.”).

188 See, e.g., id. at 18–19, 42–45, 104, 507–08 (discussing reflective equilibrium). We as citizens engage in deliberation leading to reflective equilibrium as we assess the appropriateness of the norms governing the original position and ask whether these norms adequately reflect of our general sense of fairness and our considered judgments about particular issues. The participants in the original position engage in such deliberation as they evaluate proposed principles of justice. See Rawls, *Liberalism*, supra note 1, at 28.
appropriate for a democratic society that not only professes but wants to take seriously the idea that citizens are free and equal, and tries to realize that idea in its main institutions.\(^{189}\)

This might be understood as implying that Rawls's argument as a whole takes for granted the basic assumptions of freedom, equality, and democracy, and then formalizes these assumptions in the original position. It might appear that he is simply interested in elaborating the implications of what "we here now" believe about these fundamental political issues.

This interpretation might seem to be suggested by Rawls's suggestion that "we look to the public political culture of a democratic society, and to the traditions of interpretation of its constitution and basic laws, for certain familiar ideas that can be worked up into a conception of political justice."\(^{190}\) It might also appear to be supported by his assertions that "the principles of justice provide a response to the fundamental question of political philosophy for a constitutional democratic regime"\(^{191}\) and that "the conception of the person is worked up from the way citizens are regarded in the public political culture of a democratic society."\(^{192}\)

If this broadly relativist reading of Rawls were correct, the freedom and equality modeled in the first original position could only be defended in hypothetical terms. Since we citizens of democratic societies assume that we are both free and equal, we can represent our assumptions as Rawls does in the original position. On this sort of interpretation, someone in an illiberal society who did not view persons as free and equal would have no good reason to accept Rawls's version of the original position. And of course, such a person would have no objective reason to accept a Rawlsian Law of Peoples either. But this would not prevent liberals from acting on the assumption that such principles should guide the foreign policies of their societies.\(^{193}\) They could certainly regard these principles as an appropriate expression.

\(^{189}\) Rawls, Restatement, supra note 1, at 39.

\(^{190}\) Id. at 5.

\(^{191}\) Id. at 7 (emphasis added).


\(^{193}\) It obviously would not do to note that, on this interpretation of Rawls, the principles in question would be ultimately arbitrary and unwarranted, since the sort of relativism implied in this interpretation suggests that all deep normative judgments are similarly relative, including the contention that it is inappropriate for liberals to act with respect to nonliberals on the basis of liberal principles.
of their sense of justice, to which on relativist grounds there could be no objection. They might argue that liberal principles are simply their "can't help[s]," grounded in attitudes which they may regard on reflection as arbitrary but which are, as contingent matters of fact, deeply rooted in their cultures and in their psyches.

But Rawls certainly does not talk as if he is a relativist. He affirms that "[p]olitical liberalism does not question that many political and moral judgments of certain specified kinds are correct and it views many of them as reasonable." He maintains that "a liberal constitutional democracy is, in fact, superior to other forms of society." He believes that illiberal views of religious toleration are less reasonable than liberal alternatives. His suggestions that we begin with the convictions central to liberal, democratic cultures when shaping an understanding of justice need not be read relativistically. Even if he treated the democratic principles of freedom and equality as given and beyond criticism or demonstration, this would not make him a relativist. Indeed, he could simply claim that a democratic culture offers a more satisfactory route to objective truth than any other cultural environment and that he begins with the assumptions that ground such a culture because they are superior, known intuitively, and unequivocally true, even though he cannot demonstrate this in any compelling way. It is better, I think, to understand him as maintaining that the assumption of, for instance, equality, defended with the sorts of arguments offered in A Theory of Justice and Justice as Fairness, shapes the conditions obtaining within the first original position, but not that it is presupposed as an unquestionable given when those conditions are specified.

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194 To use Oliver Wendell Holmes's phrase:

[All I mean by truth is what I can't help believing—I don't know why I should assume except for practical purposes of conduct that [my] can't help has more cosmic worth than any other—I can't help preferring port to ditchwater, but I see no ground for supposing that the cosmos shares my weakness.


195 There are good reasons for them not to do so. See, e.g., Chartier, supra note 91, at 118–21.

196 Rawls, Liberalism, supra note 1, at 62 (emphasis added).

197 Rawls, Law, supra note 1, at 62.

198 Id. at 74–75.

199 The same argument for equality is articulated in Rawls, Theory, supra note 1, at 441–49; Rawls, Restatement, supra note 1, at 19–20.
[Just] because the exposition [of justice as fairness] begins with . . . [certain familiar ideas that can be worked up into a conception of political justice] does not mean that the argument for justice as fairness simply assumes them as a basis. Everything depends on how the exposition works out as a whole and whether the ideas and principles of this conception of justice, as well as its conclusions, prove acceptable on due reflection.\textsuperscript{200}

Focusing on “the leading conceptions of political justice found in our philosophical tradition” is a matter of expediency of limiting the plethora of available options for reflection and selecting a convenient starting point; it is not a relativistic assumption that the conviction that persons are free and equal is only “true for us” (whatever this might mean).\textsuperscript{201} If “[w]e turn to political philosophy when our shared political understandings . . . break down, and equally when we are torn within ourselves,”\textsuperscript{202} then our “can’t help[s]”\textsuperscript{203} and the assumptions dominant in our culture admit of criticism in the light of reason; they must be more than prejudices.\textsuperscript{204}

Rawls must not suppose, then, the assumption that persons are free and equal is simply a democratic instinct. He evidently—and appropriately—regards his arguments for freedom and equality as reasonable and worthy of general endorsement (whether or not widely endorsed).\textsuperscript{205} And his model of international justice is hardly relativist. Many human rights, even if not all those liberals believe important, are integral to the Law of Peoples as Rawls understands it.\textsuperscript{206}

\textsuperscript{200} Rawls, Restatement, supra note 1, at 5 n.5 (emphasis added).

\textsuperscript{201} Id. at 31.

\textsuperscript{202} Rawls, Liberalism, supra note 1, at 44.

\textsuperscript{203} Letter from Oliver Wendell Holmes to John Gray, supra note 194, at 283.

\textsuperscript{204} Rawls, Liberalism, supra note 1, at 44–46.

\textsuperscript{205} Further, even if the validity of claims for democracy and liberal equality were ultimately grounded in nothing more than a Western consensus, this would have no implications for the particular foreign policy choices of liberal societies. If all norms are culturally dependent, liberal states remain perfectly free to act on the norms prescribed by their culture; relativism affords no support for tolerance. If liberalism dictates that its adherents pressure other societies to create democratic institutions and foster social and economic equality, the fact that liberalism is understood as a Western idiosyncrasy gives liberals no reason to ignore their “can’t helps” when determining how best to interact with illiberal societies. However, if liberal principles demand effort and sacrifice from liberals, recognizing that these principles were fundamentally arbitrary might lead liberals to choose less strenuous alternatives. But this would be a reflection of liberals’ preference for sloth, not of the support for tolerance purportedly provided by relativism. Cf. Bernard A.O. Williams, Morality: An Introduction to Ethics 14–37 (1972).

\textsuperscript{206} See Rawls, Law, supra note 1, at 37, 65, 80–81.
Outlaw states are not allowed to behave as if their opposition to human rights and norms of global amity were true "for themselves," even if not for well-ordered societies.\(^{207}\)

In any case, in a Theory of Justice, before he had begun to articulate his understanding of justice as fairness as a political conception rather than comprehensive moral doctrine, Rawls maintained that societies should be treated as equal for purposes of determining norms of transnational justice. Once the principles of justice have been determined at the societal level, he wrote, "one may extend the interpretation of the original position and think of the parties as representatives of different nations who must choose together the fundamental principles to adjudicate conflicting claims among states."\(^{208}\)

At a point when he evidently regarded justice as fairness as a comprehensive moral doctrine, he also believed that peoples, rather than persons, should be treated as equal for purposes of formulating international moral and legal norms. That he argued as he did suggests that his growing understanding of justice as fairness as a political conception—even if it were mistakenly taken as a sign of a shift to some sort of relativism—isn't responsible for his preference for a Rawlsian over a cosmopolitan Law of Peoples.

Rawls's post-Theory of Justice formulations are not best read as implying that he is a relativist in any sense that might make it impossible for him to endorse universally valid claims about democracy and human rights. If he were, his relativism wouldn't necessitate tolerance for illiberal regimes. And he had decided to treat peoples, rather than persons, as equal for purposes of formulating norms of international justice before his purported turn to relativism took place. Relativism cannot, therefore, account for his preference for Rawlsian rather than individual deliberators in the second original position.

e. Allocated Responsibility

Perhaps we should see Rawls as emphasizing that someone needs to be given responsibility for the world's tangible and intangible resources in the absence of a global government and thus as opting for individual peoples as the remaining possible loci of responsibility.\(^{209}\) However, an

\(^{207}\) See id. at 80–81.

\(^{208}\) Rawls, Theory, supra note 1, at 331.

\(^{209}\) See Tushnet, supra note 96, at 1074; see also Frank J. Garcia, The Law of Peoples, 23 Hous. J. Int'l L. 659, 667 (2001) (book review) [hereinafter Garcia, Peoples] ("[Rawls's] approach is statist not because he is necessarily enamored of states or their track record
argument from the need for allocated responsibility would not warrant basing norms of global justice on the conclusions of Rawlsian rather than individual deliberators. 210 Such an argument would succeed only if individual deliberators would opt for a world government and such a world government weren’t viable. I don’t think the cosmopolitan should concede either of these points. As I’ve already noted, a world government need not be problematic in the ways or for the reasons Rawls suggests, and any arguments against the creation of such a government that would commend themselves to Rawls and others could be considered by cosmopolitan deliberators. Thus, the argument shows at most why it makes sense to take peoples seriously. The argument does not show why, from a normative perspective, peoples, rather than persons, should be the building blocks of the transnational order.

E. The Equality of Persons in the Second Original Position

Rawls has advanced good reason to believe that the equality of persons should be a bedrock feature of domestic political morality. He is unpersuasive when he maintains that it should not similarly be a fundamental aspect of global morality. And, in the absence of a strong argument against the global equality of persons, which Rawls fails to offer, it would be rational for liberals to accept his arguments for the domestic equality of persons as entailing the equality of persons globally as well as domestically. 211 Rawls offers no such argument. His own defense of the equality of peoples in the second original position is unpersuasive. And a variety of broadly Rawlsian arguments that might

(he clearly is not), but because they remain the primary delivery vehicles for domestic justice, which is for Rawls the sine qua non of international justice.

Similarly, Charles Beitz, supra note 2, at 682, suggests that Rawls may be arguing “that a people should be treated as having special ethical significance because its flourishing as a people is essential to its capacity to manage its human, material, and cultural resources, and, thus, to sustain its institutions, for the benefit of present and future members.” But again, even if a world state were impossible or undesirable, a cosmopolitan could justify treating peoples as having “special ethical significance” without conceding that the principles of international justice should reflect the conclusions of Rawlsian rather than individual deliberators. See id. at 683.

210 Cf. Pogge, Justice, supra note 56, at 248.

211 I mean “rational” here in its ordinary sense—consistent with reason—rather than in the increasingly popular sense associated with the “theory of rational choice” (a sense not attested at all in the 1989 Oxford English Dictionary), which Rawls seems to endorse. See Rawls, Theory, supra note 1, at 123–25, 359–72; Rawls, Restatement, supra note 1, at 6–7, 81–82. For a recent philosophical example of the use of “rational” with its ordinary meaning, see generally Faith and Rationality: Reason and Belief in God (Alvin Plantinga & Nicholas Wolterstorff eds., 1983).
be offered in support of a Rawlsian Law of Peoples are similarly unconvincing. A cosmopolitan Law of Peoples could achieve Rawlsian legitimacy. Such a Law of Peoples need not entail the formation of a world government, which need not, in any case, be undesirable. A cosmopolitan Society of Peoples could be a fair system of cooperation, and a cosmopolitan Law of Peoples could bind even if it were not. There is no plausible relativist argument for preferring fairness to peoples over fairness to persons on the global stage—and Rawls's own views are not, in any case, relativist. There is good reason, therefore, to prefer an egalitarian, cosmopolitan Law of Peoples to a one that is fair to peoples rather than persons.

II. HUMAN RIGHTS, TOLERATION, AND THE LAW OF PEOPLES

Concerned for themselves and those they represent, individual deliberators would frame a cosmopolitan Law of Peoples that protected a range of human rights. "Following the kind of reasoning familiar in the original position for the domestic case," they "would . . . adopt a first principle that all persons have equal basic rights and liberties," in a "way [that] would straightforwardly ground human rights in a political (moral) conception of liberal cosmopolitan justice."212 These rights would presumably be those that justice as fairness would safeguard at the domestic level—including

political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.213

A cosmopolitan Law of Peoples would likely also ensure "fair equality of opportunity."214 In short, it would safeguard the full array of basic

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212 Rawls, Law, supra note 1, at 82 (footnotes omitted).
214 See Rawls, Liberalism, supra note 1, at 291; Rawls, Restatement, supra note 1, at 42. It would also probably incorporate a global version of Rawls's difference principle, or something similar. On the difference principle globally applied, see infra Part III ("The Duty of Assistance and the Just War").
liberal human rights. While a Rawlsian Law of Peoples would guarantee some human rights, Rawlsian deliberators would endorse a Law of Peoples containing more limited human rights protections. Full equality of citizens without respect to gender and religion would not be guaranteed under the Law of Peoples, there would be no assured right of democratic participation, and limits on public debate would be acceptable.

On Rawls's view, respect for human rights serves as a marker that indicates which peoples are well-ordered and which are not and thus plays a key role in determining which peoples liberal societies should tolerate. At the same time, disrespect for (some) human rights justifies humanitarian intervention by well-ordered peoples. In Part II, I detail the somewhat limited character of the human rights protections afforded by the Law of Peoples. Then, I examine the ways in which Rawls does, and Rawlsian deliberators might, identify the rights deserving such protections, contrasting Rawlsian and cosmopolitan conclusions. Finally, I consider the appropriate responses of liberal societies to human rights violations by nonliberal regimes, suggesting that Rawls's view is overly tolerant of such regimes. A cosmopolitan Law of Peoples, I argue, would encourage liberal peoples to take a more active role than a would Rawlsian Law of Peoples in fostering the recognition of the full panoply of liberal human rights by nonliberal societies.

A. The Minimal Nature of the Explicit Human Rights Norms Contained in a Rawlsian Law of Peoples

Rawls acknowledges "the many difficulties of interpreting ... [human] rights and [their] limits," but says he regards "their general meaning and tendency as clear enough." In the context of the Law of Peoples, the expression human rights denotes "a special class of urgent rights," including guarantees of the "security of ethnic groups from mass murder and genocide" as well as

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216 See Rawls, Law, supra note 1, at 65, 78–80.
217 Id. at 80. Rawls also identifies a third function: to set a limit to "the pluralism among peoples." Id. (footnote omitted).
218 Id. at 27.
219 Id. at 79.
220 Id.
the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly). 221

Rawls indicates that the class of “human rights proper” includes the rights protected in Articles 3 through 18 of the Universal Declaration of Human Rights. 222 Along with “human rights that are obvious implications of . . . [this] first class of rights,” the rights are “the human rights connected with the common good,” which Rawls’s Law of Peoples guarantees to all persons. 223 The class of human rights evidently does not include rights to full equality, freedom of expression, or democratic participation. It is not surprising, then, that Rawls distinguishes between “human rights” on the one hand and, on the other, “constitutional rights,” “the rights of liberal democratic citizenship,” and “other rights that belong to certain kinds of political institutions, both individualist and associationist.” 224

Distinguishing them from “human rights proper,” Rawls describes the rights guaranteed in, for instance, Articles 22 and 23 of the Declaration as “presuppos[ing] specific kinds of institutions.” 225 It is easy to see why this might be true of “the right to social security,” guaranteed by Article 22; but why is it true of “the right to equal pay for equal work,” secured by Article 23? 226 Paid employment does not seem to be a “specific kind[] of institution[].” 227 While a right to social security could be enjoyed only in some societies, it appears as if a right to equal pay for equal work could be enjoyed in all societies. The point is not, I think, that some societies lack the institution of paid

221 Rawls, Law, supra note 1, at 65 (footnotes omitted).
223 Rawls, Law, supra note 1, at 79–81.
224 Id. at 79–80. Recall that the members of “associationist” societies “are viewed in public life as members of different groups, and each group is represented in the legal system by a body in a decent consultation hierarchy.” Id. at 64.
225 Id. at 80 n.23.
226 See id.
227 See id.
work, but that some societies fail to provide women with opportunities for paid employment. But patriarchy is hardly a "specific kind[] of institution[", except, perhaps, in the sense that American slavery was a "peculiar institution."228

Most obviously absent from Rawls's list are the rights contained in Articles 19 through 21 of the Universal Declaration, which guarantee freedom of expression, freedom of association, freedom of assembly, and freedom to participate in the governance of one's country "directly or through freely chosen representatives."229 These are hardly "liberal aspirations,"230 in the sense of vague statements of principle capable of realization, if at all, only imperfectly through legislation: they are rights with sufficient specificity to permit, if necessary, their judicial enforcement.

It is of course quite comprehensible that Rawls's Law of Peoples does not safeguard such rights. Some of the peoples represented by Rawlsian deliberators are not democratic and will presumably regard their political structures as valuable and worth preserving. These representatives will not, therefore, consent to the inclusion of rights to democratic participation among the norms of global justice embodied in the Law of Peoples, since their societies do not protect these rights and do not wish to do so.231

B. Identifying Rawlsian Human Rights Norms

While Rawls describes the differences between these classes of rights, he does little to justify the distinctions he makes. What justifies excluding "freedom of peaceful assembly and association"232 while including "the right to own property alone as well as in association with others"?233 Why is "freedom of thought, conscience and religion"234 protected, but not "freedom of opinion and expression"?235 It is difficult not to see Rawls's prime motivation as the articulation of a set of rights a nonliberal society could endorse. Instead of defining a well-

228 See id.
229 Univ. Dec. Hum. Rights, supra note 222, arts. 19–21. "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." Id. art. 21.
230 Rawls, Law, supra note 1, at 80 n.23.
231 See id.
233 Id. art. 17.
234 Id. art. 18.
235 Id. art. 19.
ordered society as one which accepts a set of human rights justified on other grounds, Rawls may have chosen to identify the human rights protections contained in the Law of Peoples by asking, implicitly, what the government of a decent nonliberal people could—in fact, and not merely when speaking for public consumption—accept.

It is difficult to be sure because—apart from the rights he specifically enumerates—Rawls provides us with relatively little guidance in identifying the criteria Rawlsian deliberators would use to determine which rights to endorse. He characterizes these rights as "urgent." But just how "urgent" must rights be to qualify as human rights under the Law of Peoples?

It is clear, for instance, that the comprehensive doctrines endorsed by various societies seem to license or even require the subordination of women and of lesbians, gays, and bisexuals. We know that under the Law of Peoples the "oppression and abuse [of women] ... amount[] to the violation of their human rights." But how would we know that oppressing and abusing women violates their (Rawlsian) human rights had Rawls not so informed us? To be sure, gender equality is a basic principle of political liberalism, a constituent of equal citizenship. Rawls has, however, already told us that the rights of liberal citizenship are not, as such, human rights and has characterized Article 1 of the Universal Declaration of Human Rights—which affirms that "[a]ll human beings are born free and equal in dignity and rights," as an expression of "liberal aspirations"—implicitly distinguishing it from "the human rights connected with the common good." Article 7 of the Universal Declaration provides: "All are equal before the law and are entitled without any discrimination to equal protection of the


237 RAWLS, LAW, supra note 1, at 79.


239 RAWLS, LAW, supra note 1, at 75; cf. id. at 78, 110.

240 Id. at 75.

241 Id. at 159–63.

242 Id. at 80 n.23. Rawls's main focus here may well be on the subsequent claim in Article 1 that all human beings "are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Id.; Univ. Dec. Hum. Rights, supra note 222, art. 1.
law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."243 It falls within the group of articles Rawls says protect human rights proper, and so apparently safeguards rights that fall within the class protected by Rawls's Law of Peoples. But of course Article 7 does not specify what kinds of discrimination are and are not licit, so it provides relatively little check on the behavior of a society whose leaders are convinced that the differences between women and men are as important and worth embodying in law as those between, say, children and adults.

Perhaps some kind of gender justice forms part of a common good conception of human rights because gender equality is an implication of "formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly)."244 But whether this principle accounts for the endorsement of gender equality by the Law of Peoples, it may not help us resolve other difficult questions. Debate will continue to revolve around the issue of which putative similarities are relevant, and so of which cases really are similar to which others. Is the direction of sexual desire a relevant difference between persons or not? What about age? What about socio-economic class?

Rawls makes clear in general which rights will count as human rights.245 But his list isn't exhaustive,246 and it is obviously subject to interpretation.247 It is unlikely that Rawlsian deliberators would adopt a complete list of human rights norms and corresponding interpretation more demanding than the least restrictive list or interpretation upheld by any of the deliberating peoples.248 Since the peoples are equal, none will be have the authority to demand that another accept more rigorous human rights protections. None will deliberate with an awareness of its own preferred comprehensive doctrines or political circumstances or of the human rights guarantees each affords;249 but each will need to

244 Rawls, Law, supra note 1, at 65 (footnotes omitted).
245 See id. at 78-81.
246 Id. at 78-79 ("Human rights in the Law of Peoples ... [are] urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide.") (emphasis added).
247 Id. at 42. ("It is these interpretations, of which there are many, that are to be debated in the second-level original position.").
248 This fact leads, from different premises, to Lipkin's tart observation that "in Rawls' view, some very nasty countries might be reasonable." Lipkin, supra note 236, at 304.
249 Rawls says this explicitly with respect to liberal societies and comprehensive doctrines and says nothing to imply that the same would not be true for decent nonliberal peoples in the original position. Rawls, Law, supra note 1, at 34. That individual delibera-
consider the possibility that its human rights norms are the least protective of citizens and the least restrictive of officials of all those on offer. And presuming that each participating society has adopted the level of human rights protection it offers deliberately, none will want to accept higher standards, given that doing so would force it to act contrary to its considered preferences. Thus, no participating society seems likely to opt for a version of the Law of Peoples that warrants affording more protection to human rights than is offered by the least protective of the participating peoples.250 The human rights norms that form part of the Law of Peoples will flow in part from the prior decision about which peoples to count as well-ordered.251

Thus, a Rawlsian Law of Peoples somewhat underdetermines which human rights standards ought to be protected. A liberal society seeking both to respect human rights and to conduct its foreign policy along otherwise Rawlsianly just lines will have no choice but to decide on some other basis—say, that of Rawlsian justice as fairness—which human rights are essential. On this basis, it can determine which societies count as decent. Having done so, it will then be able to judge to which form of the Law of Peoples Rawlsian deliberators would assent in the original position. (It would not, of course, have to expect perfect compliance with any set of norms from either liberal or nonliberal societies.) What it cannot do is to determine these standards by means of

tors behind the veil of ignorance would be unaware which national human rights norms were theirs seems to flow naturally from Rawls's conception of the function of the veil of ignorance and the original position.

250 This does not mean that human rights protections will not be afforded at all. The level of human rights protection afforded in a given society will not be determined solely by the ideology dominant in that society. Each society has an interest in its own stability, and significant human rights abuses can lead to instability. Each society has some reason to protect human rights simply as a means of promoting stability, even if respect for some of the rights it protects might not be required by—or might even be inconsistent with—the ideology dominant in the society. I owe this point to Seana Shiffrin.

251 Perhaps Rawls intends the claim that "[w]hat have come to be called human rights are recognized as necessary conditions of any system of social cooperation," to provide a basis for a kind of transcendental argument enabling us to distinguish human rights from other kinds of rights. RAWLS, LAW, supra note 1, at 68. He explains: "When they are regularly violated, we have command by force, a slave system, and no cooperation of any kind." Id. Rawls could argue that the quality of being essential to a system of social cooperation is what makes a given guarantee a human right, but it is unclear how this criterion would work in practice. Read as a strong claim about the voluntariness of schemes of social interaction, it seems to impose more limits on decent nonliberal societies than Rawls wishes to suggest are legitimate. Read loosely it seems to require very little in the way of restraint on state power. Rawls provides no guidance for the use of this criterion if he designs it as such. See id.
a direct appeal to the contracting procedure underlying a Rawlsian Law of Peoples.

C. Human Rights and Liberal Toleration of Nonliberal Societies

Outlaw states and benevolent absolutisms violate a range of human rights (in the case of benevolent absolutisms, at least the right to democratic participation and political dissent); burdened societies may do so as well. Decent nonliberal societies protect some human rights, but not others. Their members do not necessarily enjoy full social or legal equality. While diverse religions are tolerated, members of some religious communities may enjoy more privileges than others. Freedoms of expression and assembly may be limited. And while governmental leaders must be responsive to popular questions and challenges, the people do not have the right to decide who will govern them in elections in which each person has equal status.

The practices and institutions of nonliberal societies that violate human rights would be inconsistent with a cosmopolitan Law of Peoples, and cosmopolitan liberals might reasonably wish to employ various forms of pressure and persuasion to minimize or end these practices. By contrast, a Rawlsian Law of Peoples would prohibit the use of sanctions and military force, and discourage the use of economic incentives, to increase human rights protections in decent nonliberal societies. And it would caution against the use of such pressures in response to human rights violations in other societies. In this section, I outline Rawls's rationale for the belief that liberal societies should tolerate decent nonliberal ones. Then, I argue for the superiority of a cosmopolitan view of the treatment of illiberal societies by liberal ones.

1. Rawlsian Toleration of Decent Nonliberal Peoples

Rawls argues both from toleration and for toleration. The importance of toleration serves as a partial justification for a Rawlsian as opposed to a cosmopolitan Law of Peoples. But Rawls also argues directly that liberals should tolerate decent nonliberal peoples. A Rawlsian Law of Peoples would prohibit most attempts by liberal peoples to pressure decent nonliberal peoples to liberalize and would discourage many of the rest. Just as an individual liberal society should tolerate diverse views and lifestyles, so the Society of Peoples should tolerate communities with diverse governance structures and human
rights norms, as long as they meet certain minimum qualifications. Rawlsian deliberators would wish to preserve their peoples' equality and would therefore not sanction rules that would permit coercive intervention into their affairs by other peoples. Further, to use sanctions or military force—or even economic incentives—to influence their policy choices would be to violate the self-respect of decent nonliberal peoples.

Rawls himself believes that "a liberal constitutional democracy is, in fact, superior to other forms of society." He does not maintain "that a decent hierarchical society is as reasonable and just as a liberal society. For judged by the principles of a liberal democratic society, a decent hierarchical society clearly does not treat its members equally." Such a society "does not treat its own members reasonably or justly as free and equal citizens, since it lacks the liberal idea of citizenship." His argument is not that liberal and illiberal societies are morally on a par; it is merely that liberal societies should leave decent nonliberal societies alone.

This is likely to be a largely moot point even given Rawls's version of the Law of Peoples, since no society today qualifies as a decent nonliberal people, and Rawls himself concedes that his "remarks about a decent hierarchical society are conceptual." Most nonliberal societies in the contemporary world do not accord human rights the respect characteristic of decent nonliberal societies (or of benevolent absolutisms). Within the limits imposed both by respect for others and by pragmatic concerns about effectiveness and the efficient allocation of resources, liberal peoples even on Rawls's terms are justified in seeking to encourage these societies to exhibit increasing respect for human rights—if necessary using sanctions and, in extreme cases, military force. On my preferred, cosmopolitan, version of the second original position, in which the contractors are individual persons rather than

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252 Id. at 59–60.
253 Id. at 60.
254 Id. at 84–85.
255 Id. at 61.
256 Rawls, Law, supra note 1, at 62.
257 Id. at 83.
258 Id.
259 Id. at 62.
260 Id. at 75 n.16.
261 Experience, however, suggests that sanctions will often constitute abuses of human rights.
262 See Rawls, Law, supra note 1, at 93 n.6.
peoples, liberal peoples would also presumably be justified in using appropriate means to encourage them to liberalize and to democratize. It seems likely that individual deliberators would regard the promotion of social equality, substantial opportunities for democratic political participation, and the protection of a wide range of personal liberties within nonliberal societies of all sorts as entirely appropriate within reasonable limits.

a. The Analogy of Domestic Freedom of Association

One argument for the generalized toleration of decent nonliberal societies depends on

a straightforward analogy with the domestic situation. In domestic life, a liberal society will fully tolerate illiberal associations as long as they are compatible with the notion that all members of the society are free and equal as citizens. Many liberals would prefer a world in which even private associations reinforced the liberal conception of people as fundamentally free and equal. For example, they would prefer a society in which offices in all religious organizations were equally open to women and men. But they recognize that their liberal commitment to freedom of conscience, of speech, and of association is incompatible with using the power of the state to force their liberal values on those who do not embrace them. Likewise, recognition of the importance of self-determination or autonomy of peoples requires fully tolerating their choice to organize in an illiberal form, at least as long as their organization does not violate core human rights. 263

The analogy is unpersuasive. Liberals may well grant the appropriateness of allowing some private associations to discriminate on the basis of gender, for instance. Such associations must, however, operate within constraints set by law. The societies within which they function guarantee a range of rights to their members which provide the backgrounds for their choices to participate in—or abandon—private associations with potentially discriminatory rules of organization or membership. These societies, even if not the associations themselves, are grounded in commitments to equality and freedom, and they can

create social arrangements that make the costs of exiting oppressive associations relatively low. In the same way, a liberal society whose foreign policy is guided by a cosmopolitan Law of Peoples can grant that nonliberal peoples may seek human flourishing in diverse ways which liberals find unappealing. It need not, however, suppose that norms of justice do not apply to nonliberal peoples or that these norms do not set limits on what they may and may not do. As long as the world's peoples continue to be relatively independent, the cost of leaving a particular people will be much higher than the cost of exiting a private association (presuming that it is possible to leave at all and that there is somewhere for an emigrant to go). Thus, peoples will not regard unjust arrangements within individual societies with the same sort of tolerance with which they might react to, say, a church’s unjust refusal to accept women as ministers.

Peoples are not voluntary associations. They exercise a degree of power over their members' lives that makes analogies with private associations in liberal societies problematic. Liberal societies can tolerate such associations precisely because it is characteristically easy for their members to exit and because the sanctions they can impose on the recalcitrant are usually not (at least in liberal terms) very costly. A liberal society must obviously take a different view of nonliberal peoples, even decent ones. It must recognize that members of a nonliberal society are deprived of what, by its lights, are significant rights, and it has good reason, within appropriate limits, to pursue policies designed to help them acquire opportunities to exercise these rights.

If it is easy not only to leave such a people but also to join another people with a more congenial political, legal, and social order in which one can enjoy a comparable quality of life, a liberal might have more reason to be sanguine about decent nonliberal peoples' failures to enforce (some) human rights norms. But she would not therefore have reason to regard the failure of nonliberal peoples to protect human rights with equanimity or to abandon efforts to influence such peoples to protect the full panoply of liberal rights. Persons whose human rights are violated in decent nonliberal societies are not just as well-off if they immigrate to liberal societies as they would be if they did not. Leaving a people, especially a nonliberal one whose members have a rich sense of communal identity, is unlikely to be cost-free: it may in-

264 Such associations can, of course, impose sanctions that are exceptionally costly from the standpoints of their members; consider, for example, a religious community that claims the right to determine its members' ultimate destinies. Cf. BRIAN BARRY, CULTURE AND EQUALITY: AN Egalitarian Critique of Multiculturalism (2001).
volve—in addition to significant logistical difficulties—the abandon­
ment not only of a valued community but also of valued relationships
with particular persons. The price of living in a society that respects
human rights should not be the abandonment of important identity-
conferring communal and interpersonal relationships.265

Suppose liberals were prepared to regard the costs of emigration
as acceptable and therefore to view decent nonliberal peoples as com­
parable to illiberal associations within liberal states, at least where those
persons whose rights are violated by such peoples are concerned. Even
so, not all persons whose rights are violated by nonliberal peoples will
be free to emigrate. Many persons with limited resources will not be
able to relocate even if they wish to do so—even presuming that no
immigration restrictions prevented them from joining new peoples. For
them, immigration will not be an option. Thus, the possibility of emi­
gration would not give cosmopolitan deliberators reason to endorse
rules that authorized liberal peoples to ignore denials of human rights
even by decent nonliberal peoples.

Further, while liberal societies rightly tolerate illiberal voluntary
associations, they need not regard the oppressive policies and prac­
tices of these associations as morally appropriate. Liberals remain free
to use various sorts of pressures short of legal sanctions to affect the
behavior of illiberal associations. They would remain free to do the
same thing in the transnational arena. Even if the costs of exiting de­
cent nonliberal societies were minimal, so that those who wished to

265 Thanks to Seana Shiffrin for helping me to see the need to stress this point. As
Rawls himself observes:

By contrast with associations within society, the power of the government
cannot be evaded except by leaving the state's territory. . . . [N]ormally, leav­
ing is a grave step: it involves leaving the society and culture in which we have
been raised, the society and culture whose language we use in speech and
thought to express and understand ourselves, our aims, goals, and values; the
society and culture whose history, customs, and conventions we depend on to
find our place in our social world. . . .

The state's authority cannot, then, be freely accepted in the sense that the
bonds of society and culture, of history and social place of origin, begin so
early to shape our life and are normally so strong that the right of emigration
. . . does not suffice to make accepting its authority free, politically speaking,
in the way that liberty of conscience suffices to make accepting ecclesiastical
authority free, politically speaking.

RAwLs, REStATEmENT, supra note 1, at 93–94 (footnotes omitted). "[I]t is," says Rawls, "no
defense of the principles of political justice to say to those protesting them: You can always
leave the country. The analogue of this may hold for associations but not for political soci­
ety itself." Id. at 94 n.15; see also RAwLs, LIBERALISM, supra note 1, at 136 n.4.
leave were free to do so, liberals might still, similarly, employ propa-
ganda and other means to persuade such peoples to protect the com-
plete array of liberal human rights.

b. Tolerance for Decent Nonliberal Societies Under a Cosmopolitan Law of
   Peoples

If there were a decent nonliberal society, individual deliberators
would agree that its denial of the freedom and equality associated with
democratic citizenship to all citizens and its denial of equal status to
diverse religious or ideological groups would violate the human rights
of its citizens. Individual deliberators would also agree, however, that
these violations of human rights need not—and probably should not—
warrant the use of sanctions or armed invasion to force it to alter its
policies. From the fact that decent hierarchical societies are wrong
about matters of considerable importance, it does not follow that
they should be banished from the global system or treated as transna-
tional pariahs. There are perfectly good reasons from a cosmopolitan
perspective for accepting some limits on routine liberal interference
with such societies. Cosmopolitan liberals might reasonably oppose
routine interventions for several reasons: (1) military action and sanc-
tions can lead to substantial harms to both persons and property;
(2) intervention may be counterproductive if it breeds resentment and
ultimately gives illiberal forces more credibility; and (3) a general pol-
icy supporting routine intervention might encourage governments to
use military or economic pressure to pursue selfish agendas while pre-
tending to seek global justice. But liberals can decline to intervene on a
routine basis in the affairs of decent nonliberal societies without pre-
tending that such societies are necessarily on a par morally with liberal
ones and while reserving the right to encourage them in appropriate
ways to guarantee their members more freedom and equality.

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266 As, of course, are many would-be liberal societies; consider the widespread use in
the United States of execution as a tool of public policy.

267 I'm not sure one could reach the conclusion that decent nonliberal regimes were
legitimate on the basis of arguments that "take the interests of persons as morally funda-
mental," Pogge, Justice, supra note 56, at 248, in a cosmopolitan second original position.
Cosmopolitan deliberators might well recognize the appropriateness of more communi-
tarian variants of liberalism, but—provided they accepted Rawlsian canons of public rea-
son—it is not obvious that they would have any reason at the global level to avoid protect-
ing the rights of expression, association, assembly, and democratic participation, which
they would regard as essential components of justice at the domestic level. They might
well, of course, regard the tolerance of nonliberal regimes as appropriate, but that would be
quite different from affirming the legitimacy of such regimes.
Rawls is also right that were the liberal members of a global association of liberal and decent peoples to use, or seek to use, the association’s resources to offer economic incentives to decent nonliberal societies to become more liberal, conflict within the association might well result. Decent nonliberal societies will not want to subsidize propaganda efforts on behalf of ideologies they do not share. But a cosmopolitan Law of Peoples would allow, and quite possibly encourage, propaganda efforts by individual governments designed to affect the culture and institutions of decent nonliberal societies. Liberal societies would obviously be open to peaceful challenges from nonliberal peoples to their dominant views, and individual deliberators would regard it as a requirement of fairness that nonliberal societies be open to similar challenges.

c. The Use of Subsidies to Influence Nonliberal Peoples

Pragmatic and respectful individual deliberators would presumably rule out the use of military force against decent nonliberal societies and would presumably agree about the use of sanctions most or all of the time. But I think they would disagree with Rawls that it is “not reasonable for a liberal people to adopt as part of its own foreign policy the granting of subsidies to other peoples as incentives to become more liberal.” Rawls offers two reasons for claiming that such incentives are inappropriate—neither persuasive.

i. Alternate Foreign Aid Priorities

First, Rawls suggests that the foreign aid programs of liberal peoples should give priority to helping peoples burdened by unfavorable conditions to achieve an appropriate level of economic development. Doubtless this is true, but unless this were the only focus of

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268 Rawls, Law, supra note 1, at 84–85. I ignore in the text Rawls’s treatment of the International Monetary Fund (IMF) or its equivalent in his imagined Society of Peoples. He notes that the IMF often does attach conditions to loans that have the effect of promoting liberalism and democracy, but I suspect even the IMF’s practice can be made consistent with his general point on the thesis that its putative goal is not to promote democracy but to foster political conditions that seem to conduce to loan repayment, an economic objective which any country supporting the Fund would presumably share. See id. at 85 n.30. In any event, not all countries belong to the IMF and there might be less ideological conflict of the sort to which Rawls alludes within a less inclusive organization.

269 Id. at 85.
270 Id.
271 Id. at 84–85.
liberal societies, they could also provide support for liberalization and democratization efforts in nonliberal societies, whether or not burdened. Further, social equality and democratic accountability are likely to promote the economic growth of burdened societies.\textsuperscript{272}

ii. Self-Determination

Rawls also urges that because self-determination is valuable, liberal societies should avoid appearing to coerce nonliberal societies (other than outlaw states and—perhaps—benevolent absolutisms). But whether attaching legal or political conditions to an aid offer is or appears to be coercive will depend on the economic circumstances of the prospective recipient people and its relationship with the donor people. Since \textit{ex hypothesi} a decent nonliberal society is not burdened by unfavorable conditions, and so enjoys relative economic well-being, a donor society will not be taking advantage of great economic vulnerability on the part of the recipient people if it conditions aid to a decent nonliberal society on some political or legal reform. It would be perverse, in any case, to maintain that encouraging a government, whether burdened or not, to establish democratic institutions violates the right to self-determination of the society for which it was responsible: such institutions are designed to enhance self-determination.

"Decent [nonliberal] societies," Rawls says in defense of his position, "should have the opportunity to decide their future[s] for themselves."\textsuperscript{273} But what is it for a society to decide its future for itself? Decent nonliberal societies are not authoritarian; that is why it is wrong to invade them and probably wrong to sanction them. Because they do not guarantee political equality, however, their decent consultation hierarchies may tend to give disproportionate weight to the interests or views of some sectors of society. (Presumably they do. Decent nonliberal societies would have little reason to object to the establishment of institutions marked by democratic equality and accountability if these institutions served the same interests as their existing social institutions.)

While Rawls envisions a consultation hierarchy as made up of groups representing the various estates in a society, a somewhat at-

\textsuperscript{272} Rawls notes that ensuring "equal justice for women" is among the simplest ways to address the problem of population growth. \textit{Id.} at 110. And he stresses the importance of "prevent[ing] violation[s] of [t]he human rights of women." \textit{Id.} But the kind of consultation procedure he imagines would not ensure the equality of women.

\textsuperscript{273} \textit{Rawls, LAW, supra} note 1, at 85.
tenuated sense of representativeness seems to be acceptable. While acknowledging that nonliberal societies have often failed to protect women’s human rights, Rawls is clear that a society must respect such rights if it is to qualify as decent. It is somewhat disturbing, however, to read that “[o]ne step to ensure that their claims are appropriately taken into account may be to arrange that a majority of the members of the bodies representing the (previously) oppressed be chosen from among those whose rights have been violated”\(^\text{274}\) and that “any group representing women’s fundamental interests must include a majority of women.”\(^\text{275}\) Why only a majority? It does not follow that an entity justly representing women’s interests in an associationist society would not include men.

Indeed, men might understand women’s concerns and defend them vociferously. Recognizing the patriarchal character of their society, strong and politically adept women might even choose to include men committed to justice for women in a body designed to represent their interests because these men might be able more effectively to defend their interests in dialogue with their society’s patriarchal leaders.\(^\text{276}\) However, if the society in question is a patriarchal one in which women continue to be subordinated in various ways to men and may be inclined to defer to men’s opinions, the presence of men in a body intended to distill and articulate the concerns of women might tend to reduce the likelihood that women’s needs and desires will be adequately expressed. These men might—even with the best of intentions—be tempted to speak too quickly for their female colleagues when communicating with national leaders. And patriarchal government officials might be inclined to listen more readily to male than to female members of bodies designed to represent women, even if these men failed adequately to understand the positions of their female colleagues or the needs of their country’s women.

The leaders of decent nonliberal societies must respond to dissent without repressing dissenters but apparently need not alter their policies in light of what dissenters allege;\(^\text{277}\) leaders’ accountability to the people, even as organized in the syndicates Rawls imagines, may be relatively limited. To be sure, Rawls emphasizes that the government of a decent nonliberal society must enjoy moral legitimacy. Nonetheless, widespread popular moral endorsement of a country’s leaders is com-

\(^{274}\) Id. at 75.  
\(^{275}\) Id. at 110.  
\(^{276}\) Thanks to Seana Shiffrin for challenging my thinking on this point.  
\(^{277}\) Rawls, Law, supra note 1, at 72, 78.
patible with the disproportionate impotence of a disfavored minority. (Again, a Rawlsian Law of Peoples will find it difficult to take the concerns of such a minority into account, since it views each people as a unitary entity.) Leaders’ lack of accountability and the subordinate political standing of women and other potentially marginal groups provide reasons, then, for individual deliberators to doubt that the views and interests of all members of decent nonliberal societies are necessarily being taken adequately into account when these societies are said to “decide their future[s] for themselves.”\(^{278}\) Individual deliberators would not regard Rawlsian consultation hierarchies as adequate substitutes for democratically accountable institutions.

Promoting respect for those human rights that safeguard the liberty and equality of the individual members of a nonliberal society may not be defensible as a means of directly enhancing societal self-determination. But individual deliberators would not regard the society’s right to self-determination as authorizing it to deny equality to its individual members or to restrict their expressive and associational freedoms unduly. The importance of self-determination wouldn’t justify ignoring illiberal intolerance or regarding it as acceptable.

2. Active Responses to Human Rights Violations by Nonliberal Societies

Individual deliberators might endorse principles permitting more aggressive responses to human rights violations by illiberal societies in some cases. Decent nonliberal societies that observed only the rights Rawls has delineated and ones similar to them might obviously violate other rights (and not merely the political ones) which individual deliberators would endorse. What if an otherwise decent nonliberal society criminalized the sexual conduct of lesbians, gays, and bisexuals? What if it excluded them from public employment or the armed forces?\(^{279}\) Individual deliberators would regard the rights in question as significant enough to justify using positive economic incentives to promote ame-

\(^{278}\) *Id.* at 85.

\(^{279}\) According to Rawls, “a religion cannot claim as a justification for its subjection of women that it is necessary for its survival. Basic human rights are involved, and these belong to the common institutions and practices of all liberal and decent societies.” *Id.* at 111 (footnote omitted). It may well be that the same is true of an ideologically motivated marginalization of those involved or disposed to be involved in same-sex romantic or romantic-and-sexual relationships. I have no doubt that Rawls’s inclination would be to say that it is, but he provides no reason in the text for assuming that the human rights protected by his Law of Peoples include the rights of sexual minorities.
lieration. But if they were violated on a regular basis, individual deliberators might perhaps regard at least some sanctions, though probably not military action, as appropriate.

In a well-ordered, decent nonliberal society, internally motivated political and social change is—by definition—possible. In a society in which large numbers of people have genuine, even if imperfect, opportunities to participate in shaping public institutions and policies, changes brought about as a result of internal pressures will often be more deeply-rooted and stable than ones fostered by external pressure. There will thus be good pragmatic reasons for avoiding overt military or economic pressures in preference to ongoing dialogue and intercultural exchange as means of fostering the democratization and liberalization of decent nonliberal societies. A cosmopolitan Law of Peoples will thus likely preclude military interventions into illiberal societies, whether decent or not, except in extreme cases. It will also raise serious questions about the use of economic pressure as a spur to change such societies, especially if they qualify as decent. But democratic freedom and equality would be absent in decent nonliberal societies to such an extent that individual deliberators would regard not only the enthusiastic advocacy of liberal values but also the employment of economic "carrots" to foster democratization and liberalization as appropriate (just as decent nonliberal societies might presumably offer incentives to liberal societies to adopt their ways of life).

Liberals should respect decent nonliberal societies and acknowledge that example and dialogical persuasion will often be the most effective means of fostering liberalization and democratization. They have every reason to be concerned about what is pragmatically possible. And on moral as well as pragmatic grounds, they have good reason to avoid ham-fisted incursions into the affairs of nonliberal societies. But they ought not to confuse what is pragmatically efficacious for them to do with what is just for those who govern nonliberal societies to do. Liberals will not regard tolerance for societal differences as a sufficient reason to disregard the rights of people in both decent

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280 Cf. Mortimer Sellers, The Law of Peoples, 6 Int'l Legal Theory 44, 48–49 (2000) ("There may well be nonliberal states that deserve the protection of Rawls' eight principles of international law, but their governments should be tolerated (in the ordinary sense of the word), not praised. Contrary to what Rawls' [sic] believes, states that disenfranchise their peoples should be stigmatized as wrong, even when they must be tolerated, for prudential reasons. . . . Rawls' conception of toleration betrays the oppressed by denying the reality of their oppression. It encourages liberal peoples to collude with foreign injustice.")
and burdened nonliberal societies who may be unfairly affected by the public policies of these societies.281

The focus on decent nonliberal societies might obscure the fact that there are no such societies in our world. Most societies in our world that are not in some broad sense liberal are authoritarian regimes with some of the features of benevolent absolutisms, some of the features of liberal societies, and some of the features of outlaw states. (Many are, of course, burdened in one or more ways as well, and some may share characteristics with decent nonliberal societies.) Even if, for pragmatic and moral reasons, liberals thought it appropriate to avoid pressuring decent nonliberal societies to liberalize, they would have far less reason to refrain from encouraging the actual nonliberal societies in the real world to do so. And liberals can and should rightly regard nonliberal societies as in some measure unjust—indeed, illegitimate—even as they make careful choices about the kinds of pressures they can appropriately employ to foster the empowerment of those to whom nonliberal societies—decent and otherwise—deny proper autonomy and opportunities for self-government.

III. THE DUTY OF ASSISTANCE AND THE JUST WAR

Rawls argues for a “duty of assistance” to what he calls “burdened societies” on the part of well-ordered societies. And he details a set of just war principles that societies or sub-societal groups contravene the Law of Peoples by engaging in aggressive violence. The principles he identifies are, in general, relatively appealing. But because (among other things) he treats the interests of peoples rather than individual persons as primary, the norms he argues should govern international aid and warfare are inadequate. In Part III, I explain and criticize these principles.

A. The Duty of Assistance

Burdened societies are peoples that “lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be well-ordered.”282 That they do is obviously among the most pressing moral and political concerns

281 For an extended critique of Rawls’s notion of toleration, see id. at 48–51.
282 RAWLS, LAW, supra note 1, at 106. I will assume in the text that a burdened society is also economically deprived.
facing the global community. A natural Rawlsian response to the difficulties faced by such societies would be the redistribution of global resources to benefit them. Cosmopolitan deliberators would favor such redistribution.

Presuming Rawls is right that individual deliberators at the level of a particular society would agree that the difference principle should govern the allocation of wealth in their society, individual deliberators on a global scale would likely reach a similar conclusion. Rawls assumes that they would. As he maintains forthrightly, "[t]he cosmopolitan view . . . is concerned with the well-being of individuals, and hence with whether the well-being of the globally worst-off person can be improved." In light of their concern for individual well-being, cosmopolitan deliberators would opt for significant global wealth transfers designed to benefit the societies Rawls describes as "burdened," as well as marginalized persons in other societies.

A global norm of redistribution in accordance with the difference principle could guide a system of transnational institutions, whether or not a world government existed. It could not, presumably, provide direct guidance for the behavior of an individual liberal state in the absence of institutions that ensured the cooperative participation of other societies. Rawlsian justice would not make an individual people unilaterally responsible for rectifying the imbalance in global wealth distribution, or, in other words, for providing burdened societies with all of the resources to which they would be entitled if all peoples were to contribute the funds needed to implement the difference principle on a global basis. In the absence of a functioning Society of Peoples, a cosmopolitan Law of Peoples would, however, dictate that each well-ordered people use a significant portion of its wealth to aid burdened societies. No single arrangement might be required, but each people

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284 This presumption has been questioned by, e.g., James Fishkin, Tyranny and Legitimacy: A Critique of Political Theories 105–20 (1979).

285 Rawls, Law, supra note 1, at 120.
would be responsible for making wise choices appropriately responsive to the needs of others with limited resources.

Rawls’s response to the problem of global poverty is not, however, rooted in a global application of the difference principle. Rather, he maintains that well-ordered peoples have a limited duty of assistance to such societies that requires wealth transfers more limited than those that would be entailed by a globalization of justice as fairness.\textsuperscript{286} Well-ordered societies, he says, have only a responsibility to bring burdened societies (as well as outlaw states, with which they may sometimes be forced to engage in military conflict) into full membership in the Society of Peoples and to help them become well-ordered. The non-cosmopolitan starting point for his reflections on global justice helps to explain his stance; to accept a cosmopolitan Law of Peoples would presumably be to accept a global application of justice as fairness. But it seems clear that even Rawlsian deliberators would be more inclined than he supposes to opt for significant global wealth transfers. I explain below what Rawls believes the purpose of duty of assistance to be and how recognition of this purpose imposes an upper limit on the aid well-ordered societies must provide. I indicate what seem to me to be some key problems with the assumptions Rawls makes about the wealth and poverty of nations. Then, I argue that Rawlsian deliberators would reach conclusions closer to those at which individual deliberators would arrive than Rawls evidently supposes.

1. The Limits of a Rawlsian Duty to Assist

Rawls is anxious to avoid the conclusion that fulfilling the duty to assist means adhering to an egalitarian standard of global distributive justice.\textsuperscript{287} Such a standard may well lack “a defined goal, aim, or cut-off

\textsuperscript{286} See id. at 106.

point, beyond which aid may cease"288 and might thus, presumably, be both oppressively demanding and difficult to implement. By contrast, Rawls says, the duty of assistance that forms part of the Law of Peoples has a goal: it is designed to foster the self-sufficiency of the recipients and guarantee their capacity to participate fully in the Society of Peoples. In turn, because it ceases when this goal is reached, it has a target.289 A Rawlsian Law of Peoples entails neither the equalization of the conditions of those who belong to different peoples nor the globalization of Rawls's difference principle, according to which inequalities are permissible only to the extent that they benefit the worst-off.290 Instead, Rawls proposes that the goal of the aid rendered in fulfillment of the duty of assistance should be "to realize and preserve just (or decent) institutions."291 Such institutions will enable burdened societies to overcome economic hardship and become self-sufficient members of the Society of Peoples. Once a previously burdened society becomes a well-ordered society and can "manage [its] own affairs reasonably and rationally[,] . . . further assistance is not required, even though the now well-ordered society may still be relatively poor."292

Rawls justifies this cut-off point by arguing that well-ordered societies should "not act paternalistically"293—the implication apparently being that they should not inadvertently induce dependence by giving aid—and that sufficiency rather than unlimited growth and accumulation is all that is required for satisfactory life in community.294 He also defends his position by maintaining

that the causes of the wealth of a people and the forms it takes lie in their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the

288 Garcia, Peoples, supra note 209, at 660. Rawls, LAW, supra note 1, at 106.
289 See Rawls, LAW, supra note 1, at 119. Rawls suggests that there may be little difference between Thomas W. Pogge's global egalitarian principle and his own conception of a duty of assistance. See id. at 118 n.53 (citing Thomas W. Pogge, Human Flourishing and Universal Justice, 16 Soc. PHIL. 333 (1999)). Earlier, Rawls says he doesn't endorse a version of the egalitarian principle offered by Pogge as an attempted internationalization of the account of distributive justice offered in A Theory of Justice. See id. at 116.
290 Id. at 113–20.
291 Id. at 107.
292 Id. at 111. It is perhaps not surprising that one commentator implies that for Rawls's position, "the existence of injustice between individuals in different states" may seem to be a consequence of "a deep theoretical stance on the nature of justice." Thomas Christiano, Secession, Democracy and Distributive Justice, 37 ARIZ. L. REV. 65, 68 (1995).
293 Rawls, LAW, supra note 1, at 111.
294 Id. at 107, 107–08 n.33.
industriousness and cooperative talents of its members, all supported by their political virtues.\textsuperscript{295}

He highlights population pressures,\textsuperscript{296} and thus gender justice,\textsuperscript{297} as well as human rights more generally,\textsuperscript{298} as particularly significant factors.

There are three basic reasons for reducing domestic inequalities, Rawls maintains. Each applies transnationally by analogy, and each suggests the appropriateness of the upper limit on necessary aid he has proposed. Domestic inequalities must not prevent people from making "intelligent and effective use of their freedoms and . . . lead[ing] reasonable and worthwhile lives."\textsuperscript{299} Similarly, transnational inequalities must not prevent any people from becoming a well-ordered society.\textsuperscript{300} Inequalities within a society may lead to shame for individual poor persons and discrimination against them; the same may be true for poor peoples.\textsuperscript{301} Discrimination and feelings of inferiority thus warrant measures designed to reduce poverty within both particular societies and the global community.\textsuperscript{302} Domestic inequalities may preclude equal participation in public life by all citizens, and transnational inequalities might hamper full participation by some societies as equal members of the Society of Peoples. Thus, international aid must be sufficient to ensure the independence and equality of peoples.\textsuperscript{303}

Provided that a people has become a well-ordered society (which means, among other things, that it need not feel ashamed or inferior in relation to other peoples) and that the Law of Peoples ensures the equality of all members of the Society of Peoples, the global objectives analogous to the goals of domestic anti-poverty programs will have been met and further redistributive aid will be unnecessary.\textsuperscript{304} Once a society is well-ordered, feelings of inferiority in relation to other peoples "are unjustified. For then each people adjusts the significance and importance of the wealth of its own society for itself. If it is not

\textsuperscript{295}Id. at 108, 117 (citing DAVID S. LANDES, THE WEALTH AND POVERTY OF NATIONS: WHY SOME ARE SO RICH AND SOME SO POOR (1998)).

\textsuperscript{296}Id. at 108.

\textsuperscript{297}Id. at 109–10.

\textsuperscript{298}RAWLS, LAW, supra note 1, at 109.

\textsuperscript{299}Id. at 114.

\textsuperscript{300}Id.

\textsuperscript{301}See id.

\textsuperscript{302}See id.

\textsuperscript{303}See RAWLS, LAW, supra note 1, at 114–15.

\textsuperscript{304}See id. at 113–15.
satisfied, it can continue to increase savings, or, if that is not feasible, borrow from other members of the Society of Peoples.\footnote{305}{Id. at 114.}

Rawls recognizes that objections to his proposed duty of assistance are conceivable and he attempts to meet them directly. He begins by examining a scenario in which every society depends “entirely on its own labor and resources without trade of any kind.”\footnote{306}{Id. at 116 (summarizing a state of affairs that provides the basis for an argument in Beitz, Political Theory, supra note 287, at 137–42).} A people’s natural resources would thus arguably be responsible for its wealth or poverty. Its possession of these resources in virtue of its territorial location would be arbitrary, not linked in any obvious way with merit. Why should the wealth derived from these resources not, therefore, be treated as common stock, to be allocated in accordance with some principle of global justice to ensure that each society can protect human rights and establish just institutions?\footnote{307}{Id. I have attempted to spell out the premises of an argument Rawls presents in elliptical form.} Rawls argues against the principle of global distributive justice suggested by considerations like these by maintaining that natural resources are not primarily responsible for wealth or poverty. Resource-poor societies (he cites Japan as an example) may be wealthy and resource-rich societies (he instances Argentina) may be poor.\footnote{308}{Rawls, Law, supra note 1, at 108.} Because “the crucial element in how a country fares is its political culture—its members’ political and civic virtues—and not the level of its resources, the arbitrariness of the distribution of natural resources causes no difficulty.”\footnote{309}{Id. at 117.} Alternate approaches to saving and investing (resulting, presumably, from differences in political culture) are especially important.\footnote{310}{See id.}

Substantial redistribution of global wealth makes sense, Rawls acknowledges, given the contemporary world’s “extreme injustices, crippling poverty, and inequalities.”\footnote{311}{Id.} But applying such a principle once “the duty of assistance is fully satisfied” is unnecessary, he believes.\footnote{312}{Id.} To provide intuitive support for this contention, he offers two examples of varying rates of societal development: in each case, one country makes choices that improve its economic position when compared with that of another less-well-off society that is not impoverished.\footnote{313}{Rawls, Law, supra note 1, at 117–18.}
each example chooses freely to grow economically while the other regards economic growth as less preferable than other values, why should global wealth transfers be required to make up for the effects of the second society's reasonable and uncoerced choice, given that this choice leaves it in satisfactory economic condition?2314

2. Problems with Rawls's Account of the Duty of Assistance

There are a number of reasons to be doubtful about Rawls's arguments for the view that it is not resources, but culture and institutions, that determine whether a society is well-ordered. Appearing relatively inattentive to empirical evidence that the transnational system is a significant contributor to domestic poverty,315 Rawls seems to underestimate the significance of the global political, legal, and economic environment. He evidently assumes that the culture and institutions of burdened societies can be changed more readily by deliberate public action than I suspect they can. Rawls seems willing to treat individuals and groups within burdened societies as responsible for the economic conditions of their societies even when they lack a significant ability to shape those conditions. And he gives insufficient attention to the lack of control a burdened society may have over the presence of individual skills and talents within its population.

a. The Significance of the Global Environment

Factors outside the control of particular societies may have more to do with their wealth or poverty than Rawls is prepared to admit.316 The design of global financial institutions and trade rules and the manipulation of some societies' political systems by others may continue to limit the economic well-being of poorer peoples in a variety of ways.317 Of course, equality-inhibiting institutions and manipulative interventions are inconsistent with the Law of Peoples and would not exist were the Society of Peoples in place. But to the extent that the Law of Peo-

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2314 The limit Rawls proposes here is, it is fair to note, arguably consistent with some of our moral intuitions. Cf. Michael J. Graetz, Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies, 26 Brook. J. Int'l L. 1357, 1399 (2001) (noting, after a reference to Rawls, that "accepting that the international obligations required by justice, or by simple humanity, are less than those domestically does not render them nonexistent").


316 Cf. Pogge, Justice, supra note 56, at 251–53.

317 See Beitz, supra note 2, at 690; Buchanan, supra note 17, at 705–09.
ples is meant to guide the foreign policies of well-ordered societies under nonideal conditions, features of the transnational scene that perpetuate poverty or compromise autonomy\(^{318}\) deserve to be taken into account by such societies in formulating their aid policies; the notion that a society’s level of well-being is largely its own responsibility has especially limited application under present nonideal conditions.

Rawls’s hypothetical cases of two countries derive much of their plausibility from the assumption that the two countries under consideration in each case begin at the same level of prosperity.\(^ {319}\) The fact that one outstrips the other economically seems therefore to be purely a function of the choices of each. But even in a world in which all societies endorsed the Law of Peoples, countries would not be this exclusively responsible for their own fates. Some societies will have much more wealth than others will. Achieving parity with these societies will demand a disproportionate amount of effort on the part of other societies, whatever the sources of the wealth gap. And the prior wealth of the better-off societies may have been gained in part through past exploitation, including exploitation of those societies now struggling to prosper. Whatever the responsibility of societies for the value they add to their economies once the Law of Peoples is in place, the distribution of wealth in today’s world is to some degree a product of imperialism and neo-colonialism.

b. The Relative Immobility of Political Culture

Further, even if cultural factors were primarily responsible for a society’s level of well-being, it would be excessively voluntarist to assume that the members of a society could alter their society’s political culture at will and that they were therefore responsible in any straightforward sense for the economic circumstances shaped by that culture. While people are not the puppets of the cultures into which they are born, dominant social institutions and cultural patterns do determine in large measure what will count as genuinely live social, economic, and political options. Citizens may be unable to envision, much less realize, some alternatives to current arrangements; but they may nonetheless be adversely affected by the economic consequences of their political culture. It is not clear why, in fairness, they should be required to bear the cost of these consequences, for which they are not responsible. This problem will be most evident in the case of bur-

\(^{318}\) See Beitz, supra note 2, at 691.

\(^{319}\) Rawls, LAW, supra note 1, at 117.
dened societies, but it will also affect some well-ordered societies. Even, then, if Rawls is right that political culture is a prime determinant of economic well-being, it does not follow that the economically deprived are responsible for their own deprivation.

c. The Non-Responsibility of Marginal Individuals and Groups Within Burdened Societies

In addition, Rawls's model sometimes seems unrealistically to treat a people as a unitary entity marked by commonality of purpose when in fact there will almost certainly be serious disagreement among the members of a given people regarding appropriate economic and political policies. Even in democratic societies, individuals may not in any meaningful sense be responsible for the choices made by their governments. Individuals who actively protest proposed policies may be unable to keep these policies from being enacted and may suffer because these policies have been adopted. Their suffering, at any rate, seems hard to justify on the basis that peoples must be free to pursue alternate savings and investment strategies.320

Related to this point is the observation that the consequences of (what may turn out to have been) poor policy choices may well be evident only a generation or more after they are made. It looks, then, as if Rawls needs to treat the members of a given people as constituents of a unitary subject not only across space but across time. Otherwise, it will make no sense to say that those alive at a given time are somehow responsible for choices made by their predecessors which have resulted in their present impoverishment.321

d. The Role of Individual Talent

Similarly, the level of individual talent on which a society can draw may not be exclusively within its control, either. Assume that no nutritional or other biological factors resulting from the actions of other peoples inhibit the development of the society's citizens and that there is no significant genetic influence on the abilities relevant to economic productivity. (If this assumption is false, of course, my argument will be stronger.) It must then be the case that a range of political and cultural factors must be significantly responsible for the

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320 But see id.
321 See id. at 692 (noting that successive generations always bear the costs and reap the benefits of the choices of their predecessors, but they are not always treated as responsible for those choices).
development of children and determine what options they have for contributing to their society's well-being. But as I have already suggested, these factors are not wholly within a society's deliberate control. So, presuming that the level of talent in a society influences its prosperity significantly, there is further reason to doubt that any society is exclusively responsible for its own level of well-being.

3. A Rawlsian Law of Peoples Would Contain a Non-Rawlsian Duty of Assistance?

Considerations like these would likely influence Rawlsian as well as individual deliberators. I do not think, therefore, that Rawls's account of the duty of assistance would be endorsed in toto even by Rawlsian deliberators. Presuming they acknowledged the arbitrariness of the factors that conduce to resource accumulation, they might be suspicious of the view that free choices alone accounted for societies' relative levels of economic growth. They might acknowledge that factors outside their exclusive or primary control might inhibit the growth of even well-ordered societies. They might also recognize that the duty of aid proposed by Rawls ends when a society becomes well-ordered, when its institutions achieve a certain shape. This may occur at a point at which, as Rawls notes, a society is still relatively poor. Thus, some peoples will be expected to exert much more effort than others to reach the same economic level.

Recognizing the link between present wealth and past exploitation, as well as the problem of differential effort and the influence of arbitrary factors on wealth, Rawlsian deliberators might well opt for a more egalitarian duty of aid than the one Rawls proposes. It is reasonable to suppose they might choose some version of Rawls's own

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322 See Pogge, Law, supra note 14. I believe Todd Adams is still ultimately correct that "[g]rounding the law of peoples on a social contract between peoples and not individuals raises the danger of a just society making foreign policy without regard to how it affects the least favored members of the societies involved." Adams, supra note 57, at 368. The point is even clearer, as I have tried to suggest, in connection with international violence.

323 They might also, of course, opt for a variety of related or similar but nonetheless distinct principles more demanding than the one Rawls endorses; Buchanan suggests that Rawlsian deliberators would opt for "at least three types of principles of global distributive justice that go far beyond the duty to aid burdened societies: a principal of global equality of opportunity, a principle of democratic participation in global governance institutions, and a principle designed to limit inequalities of wealth among societies." Buchanan, supra note 17, at 711.
difference principle. If examples like Rawls's hypothetical cases swayed Rawlsian deliberators, they might prefer rules that set a ceiling on required redistributive aid. But they would, I suggest, set the ceiling higher than Rawls does. They would be more inclined than he, I

[Foley argues that they would do no such thing. Foley, supra note 111, at 264–65. He suggests that, having opted for independent states (even if continent-wide ones), they would opt against substantial global redistributive measures (aside from a resource extraction tax). See id. at 258–60.]

[T]he parties in the original position would recognize that the responsibility for distributive justice must lie with the separate, sovereign nation-states and not with any unified global regime. Each nation-state must be free to determine its own population growth and education policies, as well as other policies concerning savings rates and capital investments, and thus each must be free to establish its own separate income-sharing programs. Id. at 264 (footnote omitted).

Foley's argument appears to be that if the members of one group are responsible for providing financially for the well-being of the members of another, they will understandably demand the right to ensure that the members of the group they are supporting are prevented from making choices that will worsen their circumstances and require more support than would otherwise be necessary. Because no group could exercise this right without possessing dictatorial or near-dictatorial power, and because actors in the original position would not wish to invest anyone with such powers, they would opt against an extensive aid requirement because it would require giving some global actors excessive authority (and perhaps the creation of a global state that could use taxation to effect global wealth redistribution). Id. at 254–56. Focusing on two imagined nations, Barbaria and Acadia, Foley says: "The implication of this conclusion is that the Acadian children may be left in misery, but this misery is the price of the freedom that Acadia must have to choose its own destiny, without the imposition of Barbarian colonialism." Id. at 255. The knowledge that their misery is the price of national independence may not provide much comfort to the children of Acadia. Nor should it. This is not the place to provide a detailed response to Foley. But it seems to me that individual deliberators might prove less troubled by the prospect of global governance than he believes they would be. See infra Part I.D.3.a ("The Rejection of a World Government"). In any case, individual deliberators would presumably preclude unjust impositions on those receiving public assistance when framing the rules governing institutions in particular nation-states; they would presumably do the same when designing an international legal and political order.

Even absent a global government, significant wealth redistribution would obviously, in any case, be possible. If Foley's proposed resource tax is viable, a variety of other redistributive measures would be as well, cf. Pogge, Law, supra note 14, including trade regulations designed to change the global allocation of wealth. See Frank J. Garcia, Building a Just Trade Order for a New Millennium, 33 Geo. Wash. Int'l L. Rev. 1015 (2001). Garcia elaborates an account of the version of Rawls's difference principle he believes would be chosen by global individual deliberators in Trade and Inequality: Economic Justice and the Developing World, 21 Mich. J. Int'l L. 975, 1015–18 (2000).
think, to require the alleviation of even relative poverty and not merely the establishment of just institutions.\footnote{325}{They might well also impose requirements on aid recipients to ensure that they acted responsibly to do their part in reducing their own and others' economic deprivation.}

Rawlsian deliberators would not, I suspect, choose \textit{absolute} economic equality, which is probably not required among or within societies. But they would not regard the acquisition of the resources necessary to become well-ordered as sufficient either. If the disparities in wealth among societies are too great, it will be difficult for those with limited resources truly to participate as full members of the Society of Peoples. The Law of Peoples may guarantee that they will not be politically disfranchised (though even a system of just institutions like those Rawls proposes may not be able to prevent wealthier societies from exerting a disproportionate degree of influence). But even if societies with limited resources are relatively equal politically, they may find it hard to join in the cultural and economic life of the Society of Peoples or to feel as if they truly belong.\footnote{326}{Rawls might say that the feeling of not belonging would be illusory in such a case. \textit{See Rawls, Law, supra} note 1, at 114.} These considerations are not decisive. They might nonetheless add to the discomfort of Rawlsian deliberators with any proposed norm for global justice that seems relatively tolerant of significant wealth disparities.

Given the vast disparities in wealth among peoples in the contemporary world, the acknowledgement of \textit{any} duty of aid is salutary. A commitment on the part of well-ordered societies to fulfill the duty Rawls has proposed would itself make a dramatic and positive difference in the world. But Rawls's proposed duty of international economic aid is inadequate. It is inconsistent with the demands of a cosmopolitan Law of Peoples; but it is also likely inconsistent with the demands of a Rawlsian Law of Peoples. A global difference principle, or a similar standard, seems required by either.

Though Rawls suggests it would not, a global version of the difference principle would, of course, feature a cut-off of the kind he believes necessary. Just as wealth redistribution in accordance with the difference principle would cease at the domestic level when it ceased to benefit the least well-off, it would also do so at the global level. This may not be the sort of cut-off Rawls has in mind, but it is still a cut-off. Similarly, it would feature a target: the maximum empowerment and solidarity of the members of the global community. No more specific target is required at the domestic level, and it is unclear why one should be necessary globally.
B. The Just War

A cosmopolitan Law of Peoples would impose stringent limitations on the conduct of war. A Rawlsian Law of Peoples would contain such limits as well. But it would also allow a “supreme emergency” exception to just war norms permitting the targeting of noncombatants and the potential use of nuclear weapons against outlaw states. Both would be ruled out by a cosmopolitan Law of Peoples.

1. Cosmopolitan Just War Norms

A cosmopolitan Law of Peoples, framed by individual deliberators, would be fair to individual persons. It would thus likely provide them with the full range of protections traditionally afforded by so-called “just war” norms. In particular, it would preclude direct attacks on noncombatants and require minimizing damage caused by direct attacks on combatants, as well as foreseen but unintended harms to noncombatants. Individual deliberators would not wish, if they were noncombatants, to be targeted as sacrifices for the greater good of “civilized life” and “constitutional democracy.” They would presumably, therefore, refuse to accede to a rule permitting direct attacks on noncombatant individuals. On the assumption that the Law of Peoples should contain such a rule, adhering to it would be a matter of justice, and so, in turn, of maintaining a society’s political-moral integrity, as also the integrity of individual actors within the society.

A cosmopolitan Law of Peoples would thus impose severe limits on, among other things, the use of nuclear weapons against outlaw or other states. As devices of terror, strategic nuclear weapons are charac-

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327 Rawls speaks explicitly only of the retention, not of the use, of nuclear weapons. I assume throughout, however, that he regards the use of such weapons against outlaw states as at least potentially appropriate. Nuclear weapons will not restrain outlaw states, as Rawls says they will, see Rawls, LAW, supra note 1, at 9, if they are retained as museum pieces. And if their use were prohibited without exception by a Rawlsian Law of Peoples, outlaw states aware of this fact and inclined to assume that well-ordered societies would adhere consistently to their own norms of international justice would not be restrained by their mere possession. Rawls’s position does not make sense, therefore, unless it implies that, in a limited number of circumstances, nuclear weapons might licitly be used against outlaw states.

328 Id. at 99.

329 Darrell Cole, 09.11.01: Death Before Dishonor or Dishonor Before Death: Christian Just War, Terrorism, and Supreme Emergency, 16 NOTRE DAME J. L. ETHICS & PUB. POL’y 81, 93–98 (2002) (arguing provocatively that a putative democracy’s disregard for the demands of justice when faced with a “supreme emergency” renders its morals almost indistinguishable from those of many modern terrorist movements).

330 Cf. Rawls, THEORY, supra note 1, at 333.
teristically designed for attacks on civilian population centers, which would clearly be precluded by the principle of noncombatant immunity. Because of the indiscriminate character of such weapons, they would almost certainly cause excessive and unjustifiable harm to noncombatants even if used against military targets. While the principle of noncombatant immunity does not preclude foreseen but unintended harm to noncombatants, it would surely rule out the use of high-yield weapons against military targets, which are characteristically limited in size, given that weapons posing little or no threat to surrounding civilian populations could deliver all the firepower necessary to disable any ordinary military target. A cosmopolitan Law of Peoples would likely rule out the ordinary use of tactical nuclear weapons as well, even against military targets, because of, among other things, the effects of fallout on noncombatants in the vicinity of military targets and a variety of long-term environmental effects.331

2. Rawlsian Just War Norms

Rawls’s own version of the Law of Peoples embodies much of traditional just war doctrine.332 It precludes wars of aggression and requires that a just peace be acknowledged as a central goal of any war and that well-ordered societies wage war where possible in ways that “foreshadow . . . the kind of peace they aim for and the kind of relations they seek.”333 Those who plan aggressive wars are criminals, but civilians and low-ranking soldiers are not and should not be treated as responsible for their leaders’ decisions. The human rights of opponents should be respected, and efficiency considerations may ordinarily be used to justify military action only if all of the other norms for warfare have been observed.334 Thus, Rawls’s Law of Peoples would condemn the use of nuclear weapons against Japan as well as the firebombing of Tokyo during World War II.335 Similarly, the Allied
bombing of Dresden resulted from a "failure of judgment" caused by "the passion and intensity of the conflict." However, a Rawlsian Law of Peoples would contain a "supreme emergency" exception that permits direct attacks on noncombatants under limited circumstances. And Rawls would allow the use of nuclear weapons "to keep . . . [outlaw] states at bay." A cosmopolitan Law of Peoples, as I have already implied, would not include this exception, which reflects an inappropriate priority of peoples over people. And it would not allow the use of nuclear weapons against outlaw states.

a. The "Supreme Emergency" Exception

In broad terms, Rawls's "supreme emergency" exception to traditional just war norms "gives any nation a right to use any means whatsoever to save itself." Rawls does not spell out in detail when a supreme emergency might be said to occur, and he makes clear that disregarding the principle of noncombatant immunity "cannot be justified by a doubtful marginal gain." But he maintains that intentional, deliberate attacks on German civilian populations during the early years of World War II, for instance, were justified for two reasons:

First, Nazism portended incalculable moral and political evil for civilized life everywhere. Second, the nature and history of constitutional democracy and its place in European history were at stake. . . . This kind of threat . . . justifies invoking the supreme emergency exemption, on behalf not only of constitutional democracies, but of all well-ordered societies.

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336 Id. at 101. Rawls is explaining Churchill's own self-assessment here and criticizing him for allowing passion to cloud his insight and moral sensitivity. So Rawls does not say unequivocally that the assault on Dresden violated the Law of Peoples as he understands it. But his characterization of Churchill's remarks—in a paragraph reflecting on other "violations of the principles for the conduct of war" (vis-à-vis Japan)—makes me confident that Rawls shares Churchill's retrospective assessment. Id. at 100.

337 As Rawls notes, this expression comes from WALZER, supra note 332, at 255–65.

338 RAWLS, LAW, supra note 1, at 98.

339 Id. at 9. Rawls does not say whether the mere possession of nuclear weapons would keep outlaw states at bay; it is unclear whether they might in principle be detonated for this purpose. He notes that "[t]here remains . . . the great moral question of whether, and in what circumstances, nuclear weapons can be used at all," before referring the reader to his later discussion of the just war. Id.

340 Cole, supra note 329, at 90.

341 RAWLS, LAW, supra note 1, at 98.

342 Id. at 99.
The implication, though Rawls does not spell it out clearly, is that targeting German civilians was essential to the defeat of Nazism and the preservation of civilization and constitutional democracy.\textsuperscript{343} It is surely at least an open question whether this was so; how could anyone know? But even supposing it was, we may still ask whether this warranted the evil of direct attacks on civilians.

A cosmopolitan Law of Peoples, as my description of it has already suggested, would not be likely to contain Rawls's supreme emergency doctrine. Adopting a cosmopolitan starting point would be enough, therefore, to rule out this exception as unjust. But it may be worth attending to the limited arguments Rawls actually offers for his position to highlight their untenability.

Rawls rejects the more rigorous traditional just war requirement that (as he has it) "the innocent" or (as I should prefer) noncombatants may never be directly targeted. He concedes that the traditional just war view, familiar from Augustine and Aquinas, "is intelligible doctrine"; he dismisses it, however, as "contrary to the duties of the statesman in political liberalism."\textsuperscript{344} He tells us that "[t]he statesman [and, presumably, the stateswoman] must be prepared to wage a just war in defense of liberal democratic regimes."\textsuperscript{345} The problem, of course, is that we do not know simply because Rawls has told us so that the supreme emergency exception is just. He does not provide a great deal of argument for the conclusion that it is. He simply asserts that "the principles for the conduct of war in the social contract conception include the supreme emergency exemption."\textsuperscript{346}

Perhaps Rawlsian deliberators would regard the principle that the survival of their societies must be ensured as non-negotiable. Operating from the perspective of peoples viewed as cohesive wholes, Rawlsian deliberators might accept rules that permitted military forces to target noncombatants or subject them to enormous risks, just as an individual might endorse a rule permitting the infliction of a non-lethal injury as a way of saving a life. But Rawls does not discuss their possible reasoning. He simply offers a conclusory judgment about what the "social contract" model implies while dismissing the traditional just war norm of noncombatant immunity. He characterizes the principle as an element of Christian doctrine grounded in theological conviction. He argues that the rule of double effect—tra-

\textsuperscript{343} Id. at 98.
\textsuperscript{344} Id. at 105.
\textsuperscript{345} Id.
\textsuperscript{346} Rawls, Law, supra note 1, at 104.
ditionally invoked to warrant the distinction between justified and unjustified killing in war—derives from "the divine command that the innocent must never be killed." According to Rawls, “[p]olitical liberalism allows the supreme emergency exemption; the Catholic doctrine rejects it, saying that we must have faith and adhere to God’s command.”

Perhaps the implication is that “the statesman” does not appropriately invoke religious reasons of this kind at all. But this kind of argument would be ineffective against the most uncompromising contemporary statement of the traditional just war view, John Finnis, Joseph Boyle, and Germain Grisez’s *Nuclear Deterrence, Morality, and Realism,* which is grounded in a purely philosophical argument that does not depend on any sort of divine command.

In any case, Rawls says the “statesman must look to the political world, and must, in extreme cases, be able to distinguish between the interests of the well-ordered regime he or she serves and the dictates of the religious, philosophical, or moral doctrine that he or she personally lives by.”

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347 Id.
348 Id. at 105 (footnote omitted).
349 According to Rawls, “political liberalism does not say that the values articulated by a political conception of justice, though of basic significance, outweigh the transcendent values (as people may interpret them)—religion, governmental, philosophical, or moral—with which the political conception may possibly conflict. To say that would go beyond the political.” Rawls, *Restatement,* supra note 1, at 37. Rawls might be inclined to argue that the stateswoman is free to regard certain religious norms as overriding the claims of her society, and that she might even be right, but that she should resign if faced with a conflict between her principles and the obligations associated with her office.
350 See generally John M. Finnis et al., *Nuclear Deterrence, Morality, and Realism* (1987). To be sure, Finnis, Boyle, and Grisez are theologically conservative Catholics. But it does not follow that their argument depends on Catholic theological premises; indeed, the moral position they collectively defend is offered in deliberate opposition to divine command views of ethics.


351 Rawls, *Law,* supra note 1, at 105 (emphasis added). Rawls also maintains that someone who “oppose[s] all war” cannot “in good faith, in the absence of special circumstances, seek the highest offices in a liberal democratic regime.” Id. at 105. But is it so obvious that a liberal democratic regime must be prepared, if necessary, to go to war under some circumstances? No doubt political liberalism on its own is compatible with a variety of answers to this question, but it cannot, I think, be reasonably understood as imposing a
Rawls's remarks in "The Idea of Public Reason Revisited," which is appended to *The Law of Peoples*—that liberal political leaders are not bound as a matter of course to bracket their religious convictions, though they must offer "public justification[s]" for their actions that draw on appropriate political, as opposed to religious, values.352

So the conclusion cannot be that the stateswoman is required to ignore her philosophical or religious convictions as such. But she is apparently required to give pride of place in her loyalties to the well-ordered society she serves.353 The very survival of that society and of the way of life it embodies are important enough that the society, if threatened by an unjust aggressor, may violate persons in ways that would otherwise contravene their rights. Or so Rawlsian deliberators might be thought to conclude. But the political leader who declines directly to attack noncombatants need not choose to treat the claims of some comprehensive doctrine as trumping those of her society. Instead, she is better understood as refusing to allow the claims of her society to override the rights of the noncombatants she refuses intentionally to attack. She is not treating her society as less important than an abstract ideal; she is instead refusing to give it absolute allegiance, to treat it as if its interests justified her disregard for the rights of all persons.354

And there's another problem. Let's grant that the survival of a liberal society is important. Let's grant that the survival of a transnational liberal culture is important. Let's grant that the survival of liberal ideals is important. We may still ask whether the survival of a liberal society, of a liberal civilization, or of liberal ideals warrants the violation of the rights of particular persons. The judgment that it does may be built into the contracting procedure Rawls has outlined. If so, however, I think this provides us with a reason to question this procedure. I think, indeed, that one might claim just as readily that the seriousness with which a society regards its ideals is evident precisely when it refuses to disregard them in its own interests, even in the interests of its own sur-

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353 See id.
354 I am therefore uncomfortable with Darrell Cole's way of putting the matter. Cole maintains that "Rawls's liberalism makes liberal society, if not an absolute good, then certainly a good to be sought above God." Cole, *supra* note 329, at 91. I understand why Cole frames matters as he does, but it seems just as true, and more to the immediate point, to stress Rawls's disregard for persons.
vival. This is even truer when what is at issue is disregard not merely for an aspirational ideal but for a requirement of justice.

Rawls does not argue directly for the judgment that the Law of Peoples should include a supreme emergency exception to the ordinary just war rule precluding the targeting of noncombatants. He implies, without demonstrating, that Rawlsian contractors would approve such an exception and that they would authorize well-ordered societies to retain, and perhaps to use, nuclear weapons. If they would in fact do so, those skeptical of consequentialist disregard for particular persons may judge that Rawls has provided further—unintended—evidence for the attractiveness of a cosmopolitan Law of Peoples.

b. Nuclear Weapons and Outlaw States

A cosmopolitan Law of Peoples would leave little or no room for the use of nuclear weapons against human targets. It would therefore impose stringent constraints on the rights of well-ordered societies to retain "nuclear weapons . . . to keep [outlaw] states at bay and to make sure they do not obtain and use those weapons against liberal or decent peoples."\(^{357}\) A cosmopolitan Law might, in principle, legitimate deception of outlaw states, so the fact that the use of nuclear weapons was inconsistent with such a Law of Peoples would not imply that societies with such weapons were prohibited from threatening their use without intending actually to use them. However, if an outlaw state knew that a society adhered to the cosmopolitan Law of Peoples and knew that the cosmopolitan Law of Peoples prohibited the use of nuclear weapons, it would understand that any threat by that society to use nuclear weapons would be a bluff it could afford to ignore. The bluff would therefore likely be ineffectual. In addition, if a society retains nuclear weapons, there is always the risk that they will be misused by members of the society's government or stolen, and potentially detonated, by terrorists or outlaw states. Given this risk, together with the fact that a cosmopolitan Law of Peoples would pre-

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\(^{355}\) Cf. id. at 92 (noting that the proponent of traditional just war norms "argues that it is better to be occupied by a people such as the Nazis than to behave like Nazis").

\(^{356}\) I avoid the question of the stateswoman's responsibility should her conscience simply dictate action contrary to her duties as a leader of a liberal state, since my concern here is with the demands of liberalism itself. On the responsibilities of public servants with dissenting consciences, see Arthur Isak Applbaum, Ethics for Adversaries: The Morality of Roles in Public and Professional Life 207–39 (1999).

\(^{357}\) Rawls, Law, supra note 1, at 9.
clude almost any actual use of nuclear weapons, well-ordered societies would retain few if any such weapons.

A cosmopolitan Law of Peoples would contain no supreme emergency exception. It would prohibit the use of nuclear weapons under almost all circumstances and would likely impose severe limits on the rights of societies and transnational organizations to acquire or retain them at all. Such a Law of Peoples is defensible on its own terms. But the fact that it tracks traditional just war norms better than Rawls’s alternative may be seen as an additional reason to prefer it to his view.

**Conclusion**

The arguments Rawls offers for individual freedom and equality at the domestic level remain attractive. They apply with as much force to persons across our planet as they do to persons in particular societies already committed to liberal democracy. In virtue of the freedom and equality to which these arguments give us reason to believe all persons are entitled, a cosmopolitan second original position provides a more appropriate means of identifying suitable principles of global justice than its Rawlsian alternative. As Rawls himself acknowledges, his proposed Law of Peoples “is fair to peoples and not to individual persons.”

His arguments—and those he might have offered but didn’t advance—for a model of global justice that is not fair to persons are unpersuasive. Especially given his own account of domestic justice, persons should be regarded as equal globally as well as domestically, and all principles of global political morality should be assessed in light of the equality and distinctness of persons.

To be sure, Rawls’s Law of Peoples provides an attractive framework for the international relations of a reasonably just liberal society. Although it is not altogether satisfactory as an account of global justice, its adoption by even one major power would bring about remarkable wholesale improvement in the state of the world. Nevertheless, it is inadequate. It unduly limits the efforts of liberal societies to promote democracy and social equality. It leads to unduly minimal global human rights norms. It might justify an inappropriate level of transnational economic aid. And it seems to license some unwarranted disre-

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358 *Id.* at 17 n.9.

359 For one example, compare Adams, *supra* note 57, at 369 (asserting that the standards articulated “in The Law of Peoples provide a promising method for addressing equity in setting the baseline for greenhouse emissions”).
gard for particular persons in time of war and to give too much latitude to those who might wish to retain and use nuclear weapons.

Rawlsian deliberators might not accept all the conclusions Rawls thinks they would. In particular, they would likely choose rules stipulating a higher cut-off point for the duty of transnational economic aid than Rawls does. Some of Rawls's unsatisfactory conclusions do seem, however, to follow from the procedure he has adopted. Rawls has provided no persuasive argument for this procedure. It appears as much as anything to be a consequence of an attempt to make room in the sympathies of liberals for an imaginary species: the decent non-liberal society. It is unfortunate that Rawls's sense of what is possible and appropriate is expressed in a transnational norm designed to be acceptable to deliberators representing decent nonliberal societies when he grants that there are no such societies. He does not suggest, after all, that the Law of Peoples needs to appear attractive from the standpoint of benevolent absolutisms, outlaw states, or burdened societies. His choice to structure a Law of Peoples acceptable to decent nonliberals seems to be responsible both for the specific content of his proposed transnational norm—for instance, the limited nature of the human rights protections it affords—and for its underlying assumption that peoples rather than persons should be treated fairly at the global level. Presuming separate peoples should be preserved as at least somewhat independent entities, individual deliberators would decide on a regime of justice with which their continued existence would be consistent. So it cannot be the need to preserve independent peoples that is primarily responsible for Rawls's assumption of the equality of peoples in the second original position. It must rather be the fact that individual deliberators would opt for norms, which the public policies and cultural standards of decent illiberal societies would violate, that accounts for Rawls’s preference for the starting point he adopts.

In his discussion of tolerance, which offers some insight into his rationale for adopting a peoples-based account of international law, Rawls fails satisfactorily to distinguish between the question, *What rights should liberals seek to enforce?* and the related but distinct question, *What rights do the world's people in fact have?* The denial that, for pragmatic reasons, liberals might not wish to compel illiberal societies to enforce the full panoply of liberal rights need not entail the denial that the members of these societies are entitled to those rights. And Rawls himself must believe this, since he affirms that a liberal political order
is better in some important sense than a nonliberal one.\textsuperscript{360} To say this is presumably to say, among other things, that the claims liberals make about human rights are more nearly correct than those made by nonliberals—to say that people do, in fact, have the rights liberals say they do. But in what sense is this so?

The simplest account Rawls could give of these human rights seems to me to be precisely that they are the guarantees that would be endorsed in a global version of his domestic original position. He would need, in any case, to argue for some process of reasoning, valid across cultures, to justify the assertion that liberal institutions are superior \textit{simpliciter} to illiberal ones. It seems, then, that Rawls is committed to the validity of something like a global original position as the basis for an account of global \textit{justice}. His own proposed second original position might really best be understood, then, not as an account of global justice, but as a means of capturing largely pragmatic intuitions about the most effective way for liberal societies to structure their foreign policy, given that global justice as liberals understand it cannot be immediately achieved.

Rawls has failed satisfactorily to defend not only his starting point but the specific normative recommendations that follow from it. The account of justice he offers in \textit{A Theory of Justice} remains more appealing as a model for decision-makers at the global level than his own preferred transnational alternative. I believe, then, that liberal societies may confidently opt for a cosmopolitan account of global justice. Doing so would mean adopting a more inclusive conception of human rights and a foreign policy more aggressive about human rights than would be the case under a Rawlsian Law of Peoples. It would also mean acknowledging a greater responsibility for transnational economic assistance (at least in principle, since under present circumstances versions of the Law of Peoples supported by Rawlsian and individual deliberators would likely have relatively indistinguishable implications). And it would mean refusing to allow fears for national survival to justify direct attacks on noncombatants or the use of strategic (and, in almost all cases, tactical) nuclear weapons against human targets. It would mean, in short, making a significant contribution to the creation of a global society governed by a Law of Peoples that embodies a commitment to justice for \textit{persons}.

\textsuperscript{360} See \textsc{Rawls, Law, supra} note 1, at 62; cf. \textsc{Rawls, Liberalism, supra} note 1, at 62 ("Political liberalism does not question that many political and moral judgments of certain specified kinds are correct and it views many of them as reasonable. ").