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Debt, Default, and Two Liberal Theories of Justice

By Oisin Suttle[*]

Abstract

There is a fundamental disconnect between the public discourse about sovereign and external debt in comparison to private domestic debt. The latter is predominantly viewed through a Humean lens, which sees economic morality in terms of contingent social institutions, justified by the valuable goods they realize; while sovereign and external debt is viewed through a Lockean lens, which sees property, contract, and debt as possessing an intrinsic moral quality, independent of social context or consequences. This Article examines whether this Lockean perspective on sovereign and external debt is compatible with the dominance of Humean approaches to the domestic economy. It considers and rejects the most plausible argument for reconciling these views, which emphasizes the different qualities of cooperation in the international and domestic economies. It further argues that many standard objections to a Humean approach to sovereign debt suggest, not the Lockean approach, but rather a Hobbesian international moral skepticism. Concluding that the Lockean approach is unmotivated, this Article instead advances a Humean account of sovereign debt and default. It shows how taking seriously the demand for institutional justification and the idea of persons and peoples as free and equal provides an account of the duties of states—whether creditors, debtors or third parties—in sovereign debt crises. It further examines the implications of each approach for democratic choice about sovereign default.

[*] Lecturer in Law, University of Sheffield, o.suttle@sheffield.ac.uk. I am grateful for valuable comments from the editors of this special issue, from participants in the workshop from which this issue derives, including, in particular, Jen Hendry, and from Robert Burrell, and Sagar Deva, who kindly read and commented on earlier drafts.

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A. Introduction

This Article is about the ways that we do, and should, think and talk about the moral status of cross-border debt relations, and, in particular, sovereign and quasi-sovereign debts. It is motivated by a puzzle. There is a fundamental disconnect between recent public discourse about the Eurozone sovereign debt crisis, and the ways we commonly analyze economic affairs within domestic polities. Whereas domestically, we typically think about economic affairs in terms of institutions, outcomes, efficiency, and distributive fairness, Eurozone sovereign debts have been discussed through a dominant lens of responsibility, obligation, and the intrinsic moral duties of debtors, tempered only by duties of charity and humanity on the part of creditors.

This disconnect, and the moralizing of cross-border debt, has substantially limited the options for resolving the debt crisis, including in particular by limiting the scope for restructuring. It has shaped the legal responses to the debt crisis, and to sovereign and external debt generally. It has informed debates within and between democratic polities about the choices that fall to them to make, and about who should make those choices, given competing claims and cross-border relations. How we understand the morality of sovereign debt is thus fundamental to any judgment we might make, about either the democratic credentials or the substantive justice of our legal and political responses to this crisis. Insofar as those responses claim to track underlying moral rights and duties, and particularly given the absence of comprehensive democratic processes and institutions through which they can be legitimized, it is doubly important that we clarify our thinking on the underlying moral issues.

I argue the disconnect expresses a deeper tension between two fundamentally different traditions of liberal thinking about economic affairs, which I label Lockean and Humean. The Lockean understands economic relations as having an intrinsically moral quality, while the Humean sees the economy in institutional and instrumental terms. Notwithstanding the domestic dominance of Humean approaches, discussions of sovereign debt seem clearly to express the Lockean perspective.

The first question that I ask is whether and to what extent it makes sense to adopt these different approaches in analyzing domestic and international debt. In particular, I ask whether differences in the nature of cooperation in international financial markets might explain these different approaches. Notwithstanding the initial plausibility of this position, I conclude that it cannot do so. Nor, I argue, can the differences be explained by any of the other challenges typically posed to theories of global economic justice. In so far as these challenges constitute objections to Humean approaches, they are equally fatal to the Lockean perspective, motivating instead a Hobbesian skepticism.

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I therefore dispense with the Lockean approach and turn to a second question, namely how we might develop a Humean approach to international financial markets, and specifically to sovereign debt restructuring. There are many Humean approaches domestically, each suggesting a different approach internationally. I focus on one, developing what I see as the best expression in the international debt context of Rawls' *Justice as Fairness*. I show how understanding economic justice as concerned with the justification of social institutions can generate specific principles for the governance of debt relations and the resolution of debt crises, and how those principles in turn support conclusions about the duties of debtors and creditors that are quite different to those suggested by the dominant Lockean approaches. Finally, I consider the implications of these diverse approaches for questions of governance, and in particular how claims to democratic choice might be applied to cross-border debts.

B. Two Liberal Perspectives on Economic Morality

We can identify two distinct liberal traditions of thinking about the morality of economic life. The first, deriving from John Locke, finds its most prominent contemporary expression in the right libertarianism of Robert Nozick. The second runs from Thomas Hobbes through David Hume, Jeremy Bentham, and John Stuart Mill to—in modern Anglo-American thought—John Rawls and his successors.

These traditions are distinguished not by the economic institutions they prescribe, but by the ways they understand those institutions as justified. For Lockean liberals, economic relations have an intrinsically moral character. Real and personal property derive from our inherent self-ownership.[1] Contracts bind as promises, the breach of which violates the natural rights of the individuals to whom we make commitments.[2] The move from natural rights to economic morality does not run through consequences, except perhaps at a low threshold level.[3] Humean liberals, by contrast, understand the economy as institutional, instrumental, and ultimately contingent. [4] Property and contract are institutional expressions of the scheme of cooperation that we label society, and it is together with the

[1] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 285 (P. Laslett ed., Cambridge Univ. Press 1988) (1689); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 150 (1974).

[2] LOCKE, *supra* note 1, at 277. Lockeans can most plausibly invoke Kant for this claim, although Nozick understands the self-ownership argument as similarly expressing a Kantian injunction against instrumentalizing persons. NOZICK, supra note 1, at 30.

[3] Thus, in Locke, our natural right to appropriate depends *inter alia* on a claim about what is necessary for persons to make use of the world. LOCKE, *supra* note 1, at 286. Further, the proviso to leave "as much and as good" introduces a potential, if quite limited, consequentialist constraint. *Id*, at 291; NOZICK, *supra* note 1, at 178.

[4] We might equally label this second tradition Hobbesian. Given both Hobbes's moral egoism, and his appropriation by international relations realists, however, Hume seems a more suitable namesake.

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rest of that scheme and—at least in modern iterations—in terms of the volume and distribution of valuable goods that it realizes, that they fall to be justified.[5] Humean liberals need not be consequentialists, but they will likely deny there is any intrinsic moral quality to economic rules, of the kind imagined by Lockean liberals.[6] Indeed, as Nozick's argument suggests, Humeans must necessarily deny this; for if they concede the natural rights account of property, they will find little conceptual space left in which to realize their utilitarian or egalitarian commitments.

The Lockean reasons directly from political morality to just institutions governing economic activity. The Humean, by contrast, must appeal to the human sciences, most prominently economics, but also sociology, psychology, and political science, to identify optimal institutions, as defined by her underlying social welfare function.[7] These might be the same institutions that the Lockean approach favors—security of property, freedom of contract—but how these are justified is quite different. Indeed, despite their popularity among *soi-disant* libertarians, such prominent free-market liberals as Hayek and Friedman fall clearly on the Humean side of this line: They defend market freedoms not for their intrinsic worth, but for their social consequences.[8]

These traditions represent fundamentally different understandings of the relationship between the individual and society. For Lockeans, individuals and their rights are prior to,

[5] *See generally* DAVID HUME, TREATISE ON HUMAN NATURE §3.2 (David F. Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1738); THOMAS HOBBES, LEVIATHAN 90, 125, 170–75 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651); JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE §1.8 (Étienne Dumont ed., 1843); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 114 (Erin Kelly ed., 2001) (1971) [hereinafter RAWLS, RESTATEMENT]. Kant's recognition of property as relational, and in consequence deriving from social contract, most clearly places him in this category. Immanuel Kant, *Doctrine of Right*, *in* PRACTICAL PHILOSOPHY 421–32 (Mary J. Gregor ed., 1999) [hereinafter Kant, *Doctrine of Right*].

[6] They do not deny, of course, that economic rules serve important moral functions, making human society possible, but deny only that they have force or content apart from their function in particular societies. *See, e.g.*, HUME, *supra* note 5, at §§ 3.2.2.12, 3.2.3, 3.2.5, 3.2.6.6. Admittedly, some Humean liberals' accounts of liberty lead them towards a middle-ground. *See generally*, *e.g.*, RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2000).

[7] This comes out clearly from Rawls's discussion of the basic structure and the need to continuously adjust basic institutions to ensure that they realize social justice over time. JOHN RAWLS, POLITICAL LIBERALISM 265 (1996).

[8] *See generally* FRIEDRICH VON HAYEK, THE ROAD TO SERFDOM (2001); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 12–20 (2002). By contrast, while I focus on right-leaning Lockeans, who identify the intrinsic morality of the economy with property and contract, there are also leftist Lockeans, who ground egalitarian prescriptions in the intrinsic moral quality of particular relations. Consider, most prominently, Marx's concerns with exploitation and alienation. *See* WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 180, 190–92 (2d ed. 2002).

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and impose limits on, society.[9] For Humeans, rights derive from society and are defined and justified by the function they play within the social scheme.[10]

The tension between these approaches is a recurring feature of political debate in liberal states. J.M. Keynes, writing in 1926, tells the story of their temporary reconciliation at the hands of nineteenth-century *laissez faire* economists.[11] The efficiency of markets generates a happy coincidence between protecting natural rights and advancing social welfare. Early utilitarians and libertarians thus found an overlapping consensus in support of secure property, free contracting, and the minimal state.

Two World Wars, the Great Depression, and Keynes's own theoretical innovations undermined that consensus, forcing states to choose between natural rights and social welfare. In Roosevelt's New Deal, the United States chose the latter. In the UK, the same choice was made in stages, from the free trade debates of the 1900s through the industrial unrest of the 1920s to post-war nationalizations and the welfare state. As John Ruggie observes, the post-war Atlantic social model was that of embedded liberalism, in which markets are understood as tools, contingently valuable for the realization of social goals.[12]

The Atlantic consensus around the interventionist state lasted, to varying degrees, into the 1970s, when faltering growth and persistent inflation stimulated renewed interest in the free-market models of neo-classical economics. The Reagan/Thatcher revolution was not, on this account, a simple reassertion of the Lockean morality of property. Rather, it was the return of an overlapping consensus between Humean and Lockean liberals on the virtues of markets in both vindicating natural rights and delivering social goods. Admittedly, the language of market freedom and individual responsibility has achieved a new salience in recent decades. In the domestic context, however, any plausible defense of

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[9] Recall that Locke understands government as instituted for the protection of property, and hence denies it can have general authority to interfere with property. *See* LOCKE, *supra* note 1, at 360; *cf.* NOZICK, *supra* note 1, at ix.

[10] This holds as much for deontological left-liberals, such as Rawls, as it does for utilitarian liberals, such as Mill. Recall, Rawls's basic liberties are themselves products of social cooperation, rather than a remainder of pre-social natural rights. For Hume, there are natural virtues, which we can understand apart from social cooperation; but the virtues of economic justice, including property and contract, are firmly social and conventional. HUME, *supra* note 5, at §§ 3.2.1.17-19, 3.2.2.9-11, 3.2.6.4. Natural rights play a role in Hobbes's theory, but these are limited to liberty rights in the state of nature. A small residue remain under the commonwealth, but impose no duties on others, whether individuals or the state. Any claim rights, which we can assert against others, are purely institutional.

[11] *See generally*, John Maynard Keynes, *The End of Laissez Faire*, *in* THE ESSENTIAL KEYNES (R. Skidelsky ed. 2015) (1926).

[12] *See generally,* John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982).

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property and markets must still be, at minimum, supported by a claim about their social efficiency, rather than relying exclusively on the natural rights of individuals.[13]

It is this dominance of Humean reasoning in domestic politics that makes discourse about the Eurozone crisis, and indeed sovereign defaults generally, so puzzling. In contrast with the domestic case, the Lockean morality of debt plays a prominent role here.[14] In Germany in particular, the language of responsibility has been central.[15] However, those more open to flexibility similarly express underlying assumptions of responsibility and obligation.[16] Nor is this attitude limited to politicians, whose statements might be explained by the dynamics of negotiations and elections. Substantial majorities of Europeans have been willing to impose substantial social costs in order to maintain the principle that debts must be repaid.[17] Domestically, we are all Humeans, but external debt is a wholly other matter.[18]

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[13] *See, e.g.*, G. A. Cohen, *Freedom, Justice and Capitalism*, 126 NEW LEFT REV. 1, 6 (1981). Many would argue these stories have again diverged since 2008 and that austerity policies pursued in various countries represent the prioritizing of property and contract at the expense of liberal equality and indeed social stability. This may be true, but for my purposes the more important point is that these domestic policies have continued to rely on both individual and social arguments for their legitimacy. Recall, for example, prominence invocations of the ostensible inverse correlation between sovereign debt and economic growth.

[14] A comprehensive overview of these public debates, and the different moral claims invoked therein, is beyond the scope of this Article. I have included examples of the kinds of discourse with which I am concerned. As examples, they are open to challenge on their representativeness. It would require another paper entirely to rebut these. I can only hope the points made here will sound familiar to anyone who lived through, and paid attention to, Europe's public debates since 2008, including on the Fiscal Compact, banking union, Eurozone bail-outs and, most dramatically, Greek sovereign default.

[15] *See, e.g.,* Heather Steward & Helena Smith, *Greek and German Finance Ministers Clash at Debt Relief Talks,* THE GUARDIAN (Feb. 5, 2015), http://www.theguardian.com/business/2015/feb/05/greek-german-finance-ministers-clash-debt-relief-talks (quoting German Finance Minister Wolfgang Schäuble's insistence that "we must say that the reasons, the cause for the difficult journey to be undertaken by Greece, that the reason for this is to be found in Greece, and not outside Greece, and definitely not in Germany"). *Thomas Piketty: "Germany has never repaid its debts. It has no right to lecture Greece*," THE WIRE (July 8, 2015), http://thewire.in/5851/thomas-piketty-germany-has-never-repaid-its-debts-it-has-no-right-to-lecture-greece/ (providing contemporary criticism of this aspect of German public discourse).

[16] *See, e.g.*, *"France to Stand by Greece to Lighten Debt Burden," Says Hollande*, FRANCE 24 (Oct. 23, 2015), http://www.france24.com/en/20151023-france-grece-hollande-tsipras-support-renegotiate-bailout-terms-creditors (quoting French President Francois Hollande's statement that, "Of course Greece must honor its commitments. But they are not contesting that . . . . What Greece is asking for is flexibility—that's understandable").

[17] *EU Citizens Hold Greek Government Responsible for Debt Crisis*, IPSOS EUROPEAN PULSE (Aug. 28, 2015), https://www.ipsos-mori.com/researchpublications/researcharchive/3616/EU-citizens-hold-Greek-government-responsible-for-debt-crisis.aspx (finding, in the immediate aftermath of the Greek referendum, sixty-one percent of Europeans agreed that austerity was harming the Greek economy, while seventy-three percent believed Greece should still repay all debts); IPSOS PUBLIC AFFAIRS, THE CRISIS IN GREECE 6, 10 (2015), https://www.ipsos-na.com/download/pr.aspx?id=14813. Admittedly, the latter judgment referred to the risk of other countries

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Institutional and sociological explanations might be offered for these divergent judgments. Politicians, responsible to domestic electorates, have little incentive to consider the interests of outsiders, leading creditors to insist on repayment of debts regardless of costs to debtors. Different degrees of mutual visibility and identification lead citizens to favor debt relief for compatriots, while showing less concern for outsiders. My goal is different, however. I want to examine whether there is a principled justification for this divergence. Are there good reasons why we *should* take a Lockean view of cross-border debts, while understanding our domestic economic relations in Humean terms? And if not, then how should we think about these debts?

C. Financial Markets, Default, and Cooperation

My starting point, then, is the prominence of a Lockean morality of debt in the discourse of sovereign and quasi-sovereign restructuring, and how, if at all, this can be reconciled with Humean, and specifically left-liberal, approaches domestically. A successful reconciliation must highlight some difference between the domestic and international contexts, some feature that is present in one but not the other, and explains their different moral structures. Morally significant differences do, of course, exist, many of which are canvassed in the existing global justice literature. [19] The question is whether these differences can explain the Lockean tone of sovereign debt discourse.

The most plausible candidate for this purpose is the nature of cooperation across these two domains. Hobbes, Hume, and Kant each understand rights as a function of social institutions.[20] Rawls goes further, characterizing rights and entitlements—including those to economic goods—as products of social *cooperation*.[21] It is only through cooperation that these goods become possible, and the problem of social justice is substantially the

defaulting, and so is not a pure case of the Lockean perspective. Nonetheless, the overall impression is not of citizens understanding debt as a social institution serving shared purposes.

[18] It is perhaps no coincidence that David Graeber opens his book criticizing the moralizing of debt with an anecdote about sovereign lending. DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 1–4 (2011).

[19] There are ongoing debates between cosmopolitan and anti-cosmopolitan liberals about how far their domestic theories commit them to egalitarian or other economic duties beyond the state. Rawls himself, for example, denies economic egalitarianism is appropriate across borders. However, his international view remains Humean in its underlying structure. JOHN RAWLS, THE LAW OF PEOPLES WITH THE IDEA OF PUBLIC REASON REVISITED 37 (1999) [hereinafter RAWLS, THE LAW OF THE PEOPLES]; *cf.* Thomas Pogge, *An Egalitarian Law of Peoples*, 23 PHIL. & PUB. AFF. 211, 195 (1994).

[20] HOBBES, *supra* note 5, at 124–25, 147–54, 200; IMMANUEL KANT, KANT: POLITICAL WRITINGS 73 (H.S. Reiss 2d ed. 1991) (1793); Kant, *Doctrine of Right*, *supra* note 5, at 136–38; HUME, *supra* note 5, at § 3.2.6.

[21] *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 10 (rev. ed. 1999) [hereinafter RAWLS, A THEORY OF JUSTICE].

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problem of how we justify the institutions that distribute the products of that cooperation.[22] The image of society as a fair scheme of social cooperation is central to Rawls's domestic theory, and the idea of production as social and cooperative, rather than individualistic and transactional, is essential to his rejection of libertarian entitlement. If international financial markets are not cooperative in the required sense, this might explain why they are subject to distinct principles of justice.[23]

Why does cooperation matter? It matters because, in Rawls' account, it is the fact that social primary goods are a product of social cooperation that gives rise to problems of distributive justice in the first place.[24] The libertarian challenge to liberal equality understands property as owned by individuals, and hence sees distributive justice as inevitably violating those individuals' rights.[25] Rawls, by contrast, understands social primary goods as coming into existence through cooperation amongst all of those individuals who comprise society, and coming to individuals through, and contingent upon, social institutions.[26] Each of us cooperates in the production of those goods. None of us could have access to them in the absence of the cooperation of others. In consequence, none of us has a pre-social entitlement to them.[27] The problem of distributive justice is the problem of how to distribute such cooperative goods among those who cooperated to produce them. Our claims arise as participants in the scheme of social cooperation, and are justified to other participants under Rawls's model of hypothetical consent.[28] It is only because there is cooperation that distributive questions arise at all.

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[22] RAWLS, RESTATEMENT, *supra* note 5, at 50.

[23] In fact, Rawls understands cooperation in two distinct senses. The first explanatory sense sees cooperation as the source of, and prerequisite for the production of, social primary goods, including the basic liberties and economic goods. The second normative sense understands *social* cooperation as free cooperation on fair terms for the rational advantage of each participant. This Article focuses, in what follows, on the first explanatory sense. Samuel Freeman has argued against the extension of Rawls's difference principle internationally on the basis that the international system is not cooperative in the second, normative, sense. SAMUEL FREEMAN, JUSTICE AND THE SOCIAL CONTRACT 266 (2007); *cf.* Andrea Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 PHIL. & PUB. AFF. 3 (2007). As this argument does not support the Lockean approach that I challenge, I do not discuss it here. *Cf.* Arash Abizadeh, *Cooperation, Pervasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice*, 35 PHIL. & PUB. AFF. 318, 318–58 (2007) (criticizing Freeman's work).

[24] RAWLS, RESTATEMENT, *supra* note 5, at 50.

[25] NOZICK, *supra* note 1, at 185.

[26] Rawls, A THEORY OF JUSTICE, *supra* note 21, at 62.

[27] It is for this reason that, *pace* Nozick, Rawls understand social primary goods as being society's to distribute.

[28] For a discussion of the extent to which Rawls's theory is based on participation, rather than luck egalitarianism, *see* FREEMAN, *supra* note 23, at 111.

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Brian Barry challenges the relevance of this story to the international economy, which he suggests is characterized not by cooperation in this sense, but by "mere exchange."[29] Rather than being produced through cooperation amongst peoples, this implies we should understand goods in the international economy in the libertarian mode: They come into existence already owned by one people or another; and any scheme of distributive justice must therefore involve taking from some to give to others.

I have argued elsewhere that Barry's challenge is implausible in the case of international trade. [30] As domestic economies adjust production to focus on areas of comparative advantage, increased production becomes possible that could not have been achieved by individual peoples acting alone. This increased production constitutes a cooperative surplus, and institutions governing international trade determine its distribution. But is the same true of international financial markets, international investment, and cross-border debt? In these latter cases, we might think, what is at stake is the potential expropriation by one people of resources produced exclusively by, and hence the pre-cooperative entitlement of, another.

To explore this suggestion, I next sketch two hypothetical examples, of a physical and a financial asset, showing how different understandings of the facts lead to different normative conclusions.

Consider, first, an oil drillship, manufactured and owned in Industria, that drills for oil in the territorial waters of Extractia. The drillship need never dock in, or otherwise physically interact with, Extractia. It receives supplies from, and sends oil directly to, Industria. It thus starkly illustrates the idea of a valuable productive asset that is brought into a state that plays no role in its creation or maintenance. Assuming *arguendo* that we recognize states' claims to the natural resources within their territories, we might agree that the oil produced, and the revenues flowing therefrom, constitute a cooperative surplus. Neither Industria nor Extractia could have obtained these without the contribution of the other.[31] We might think, in consequence, that questions of distributive justice, in Rawls' sense,

[29] Brian Barry, *Humanity and Justice in Global Perspective*, 24 NOMOS: ETHICS, ECON. & L. 219, 232–33 (1982).

[30] Oisin Suttle, *Equality in Global Commerce: Towards a Political Theory of International Economic Law,* 25 EUR. J. INT'L L. 1043, 1059-1060 (2014).

[31] Of course, it is possible another ship could have extracted the oil, or that this ship could have extracted other oil elsewhere, but what matters is that these goods and profits were produced through cooperation of both drillship owner and territorial state. That I could have cooperated with someone else does not alter the fact that I actually cooperated with you, giving you a claim on our joint production. An alternative line of thought emphasizing the marginal contribution of particular cooperators and the possibility of replacing them with others leads to Gauthier's contractarianism rather than Rawls' contractualism. *See generally* DAVID GAUTHIER, MORALS BY AGREEMENT (1986).

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arise with respect to that oil and revenue, and that Extractia's and Industria's claims on that oil and revenue fall to be justified in distributive terms. However, we might think, Industria's claim to the ship itself is different: It derives not from cooperation in the extraction of oil, but rather from prior rights under the distinct scheme of social cooperation in Industria.[32] There may still be bases on which Extractia might be justified in expropriating it, but they cannot run through any account of cooperation in the production of social goods.

I will return to and further problematize this story in a moment. However, before doing so, let's consider how it might translate to a second example involving financial assets and financial markets. Where money is loaned across borders, we might analogize this to the drillship in the above example.[33] The lender presumably holds the money to be loaned before the loan is made and, as such, that money cannot be regarded as a product of cooperation with the borrower. We might regard the interest payable as a cooperative surplus, analogous to the oil revenue in the first example.[34] This might lead us to distinguish between the justification appropriate to an amendment of interest rates or maturity dates and that required to disclaim repayment of principal. Economically, including from the perspective of investors, such distinctions are irrelevant.[35] They have, however, played a prominent role in the Eurozone debt crisis, suggesting that policymakers' underlying moral assumptions reflect something like this view.[36]

This argument, however, ignores an important feature of the debt relationship, namely the relation between default risk and interest rate. Interest rates are not simply a function of the profits that a borrower expects to derive from the borrowed funds, and hence of the

[32] Similarly, the territorial state's claim on the oil still in the ground is distinct from its cooperation with the drillship.

[33] We might distinguish these cases based on the legal form employed. The drillship owner has a property right, while the lender has a contractual claim. Certainly, for Locke, property and promise have distinct bases. However, these questions of legal form are not relevant to my present concern, namely whether the relevant transaction is cooperative in the required sense.

[34] The symmetry is unsurprising. We might retell the oil exploration story as involving a foreign loan to a domestic company to purchase a foreign manufactured ship, with the loan being serviced through revenues from the oil extracted.

[35] This does not need to imply lenders are unconcerned with repayment, although in practice their main interest may be in a revenue stream rather than a future capital sum. Rather, it is because an appropriate amendment of maturity and interest rate can have exactly the same impact on a lender's financial interest as a default on principal.

[36] *See, e.g.*, Jan Strupczewski, *Greek Bid for Debt Relief Faces Euro Zone Skepticism*, REUTERS (June 7, 2015), http://www.reuters.com/article/us-eurozone-greece-debt-idUSKBN0ON0QW20150607 (commenting on the insistence on distinguishing adjusting terms from writing down principal).

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production enabled by the cooperation between lender and borrower. Rather, they are a function of, *inter alia*: (1) The lender's cost of capital, which, in an efficient market, is likely to closely track; (2) the returns available from other possible investments; and (3) the lender's and the market's perception of the risk associated with the loan, including, in particular, the default risk posed by the borrower.[37] This suggests a number of implications.

Most obviously, it suggests that default is internal to the scheme of cooperation constituted by lender and borrower. The possibility that the borrower will default is part of the basis on which the returns from that cooperation are apportioned. More importantly, assuming (perhaps naively) that the lender has accurately priced the default risk, the borrower—together with other members of the class of borrowers—has paid for the asset itself through this risk premium.[38] The asset is thus itself a product of the lending relation. Focusing on another component—the lender's cost of capital—leads to a similar point. For a loan, or any investment, to be economically rational, the borrower must at least offset the lender's cost of capital.[39] In the context of financial markets, lenders are often intermediaries; they borrow in one market and lend in another. Their title to the assets loaned is thus itself a function, not of some property relation that is prior to social cooperation, but rather of the lending relation itself. It is only because the borrower seeks to borrow that the lender has any assets to lend. Cooperation is thus logically, and often temporally, prior to entitlement.

The image of cross-border financial transactions as transfers of assets that are prior to cooperation thus seems irretrievably flawed. This need not mean the analogy between financial and physical assets fails, however. Instead, it suggests we further problematize the drillship case, and the many others for which it here stands. We might first observe that non-financial investors must make the same trade-offs between risks and rewards that we observe in financial transactions. It is for this reason that the cost of capital, and hence returns on investment, are higher in many developing countries. We might also observe that the drillship owner, no less than the financial investor, needs returns to cover both business risk and capital cost. Insofar as this is the case, we again find that the asset itself can be understood as a product of cooperation, rather than existing prior to it.

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[37] *See, e.g.*, Robert C. Merton, *On the Pricing of Corporate Debt: The Risk Structure of Interest Rates*, 29 J. FIN. 449, 449–70 (1974).

[38] In this view, the part of the interest covering the lender's cost of capital or opportunity cost constitutes payment for the temporary use of the capital borrowed, while the risk premium covers any potential loss of that capital.

[39] *See, e.g.,* Franco Modigliani & Merton H. Miller, *The Cost of Capital, Corporation Finance and the Theory of Investment*, 48 AM. ECON. REV. 261, 263–65 (1958).

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The upshot, then, is that cross-border investment—whether through transfers of financial or physical assets—is properly regarded as cooperative; and that the goods resulting from that cooperation include not only revenues deriving therefrom, but also the invested assets themselves.[40]

We might inquire whether this story holds equally for government borrowing to fund a current budget deficit, rather than investment.[41] This is less obviously a productive cooperative endeavor. Rather, the lender's resources support the borrower's present consumption. Again, however, we can see the relation as cooperative insofar as it serves, from the perspective of both borrower and lender, to time-shift consumption and, from the perspective of the lender, to convert present surplus production into future revenue. It is only international borrowing, private and public, that makes it possible for countries as a whole to save. Indeed, as Locke himself recognizes, money and its equivalents are in this sense inherently cooperative. It is only through our joint agreement to regard money as a thing of value that we can derive any value from production that goes beyond our own immediate needs, and thereby avoid Locke's own proviso against waste.[42]

It is important to note that the fact that financial markets and property claims are cooperative does not mean that the investor has no better claim on assets than does the territorial state. There may be many reasons to recognize the continuing validity of their property right. The argument supporting that right, however, is internal to the relevant cooperative scheme, the ends it pursues, and the mutual justification of claims as between the participants therein. It is not a natural rights claim of the kind imagined by libertarians, and perhaps implicitly accepted by anti-cosmopolitan Rawlsians.

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[40] We cannot push this argument too far. It requires a sufficiently stable long-term practice of investment to allow investors to cover risk and capital costs through returns on successful investments. If all or substantially all debtors defaulted, the situation would be more plausibly one of expropriation by debtor peoples of creditors' assets. That said, this would rapidly undermine the practice of cross-border lending itself. The fact that creditors commonly come to terms with defaulting debtors, who in turn regain access to capital markets, suggests this is generally not the case.

[41] This is a difficult distinction to draw in practice. Borrowing to support current expenditure on, for example, public salaries, might still be understood as investment, whether because of public services' long-term economic value, such as health, education, or because financing these through debt may facilitate capital spending elsewhere in the economy. Non-investment deficit borrowing may thus be largely illusory; but to the extent it exists, this paragraph suggests how we should think about it.

[42] LOCKE, *supra* note 1, at 293. Long-term trade imbalances and corresponding financial flows reflect surprisingly closely Locke's account of money as a cooperative institution.

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D. Three Models of Justice Beyond the State

It appears, then, that international investment and debt concern the distribution of benefits and burdens from cooperation, rather than simply the protection or abrogation of pre-existing rights. Yet, before we can conclude that they are matters for distributive justice, we must acknowledge a prior question, of whether relations across borders are relations of justice at all. Might it be that relations between persons across borders, and between persons in one state and the institutions of another, simply are not relations of a kind to which judgments of justice are appropriate? While I will not argue for an answer to this question here, it is worth highlighting the implications different possible answers would have for the specific puzzle posed in this Article.

The key point to highlight is that, if relations across borders are not relations of justice, then the upshot is not the Lockean natural rights morality of property. Rather, in that case, no judgments of justice are appropriate thereto. If I do not stand in a relation of justice towards another person or institution, then I can have no claim of justice against them in respect of their actions. This is Hobbes' position, as expounded today by international relations realists.[43] The Lockean morality of property is itself a theory of economic justice, supporting claims about the justice or injustice of particular acts. The debate between Lockeans and Humeans is a debate about the appropriate standard of justice; but those who deny that insiders and outsiders stand in relations of justice deny that *any* standard is appropriate.[44]

Section C focused on the discontinuity between the domestic Humean and international Lockean approaches, as representing what appeared to be the dominant structure in contemporary discourse. But, the possibility of thoroughgoing international moral skepticism suggests that there are various other ways we might understand the relationship between our domestic and international principles of economic justice.[45] Let me therefore sketch a typology of these, before examining their implications for the discontinuous international Lockean that is my main target at this stage.

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[43] HOBBES, *supra* note 5, at 110–19; JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 30–36 (2d ed. 2014). While more institutionalist than realist, similar moral skepticism appears in JACK GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2007).

[44] While Thomas Nagel recognizes this distinction, he nonetheless assumes a Lockean morality will apply in the absence of other duties of socio-economic justice. *See generally* Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113 (2005). Rawls is at least clearer that his quasi-libertarian principles represent a substantive account of justice, rather than the absence thereof. For an excellent overview, *see* SIMON CANEY, JUSTICE BEYOND BORDERS 125–29 (2005) (highlighting the differences between Rawls's minimalism and genuine skepticism).

[45] While Hobbes's arguments are not the only ones motivating such skepticism, for convenience I label all such views Hobbesian.

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First, in moving to the international, we might remain within our preferred Humean approach, whichever that may be, deriving principles by analogous reasoning to that used domestically. If our domestic principles are based ultimately on welfare maximization, then we would expect international principles to be similarly grounded.[46] We would need, presumably, to address such challenges as the population across which welfare required to be maximized, the difficulties of interpersonal comparison beyond the state, the efficiency effects of national responsibility, and so on.[47] Our reasoning would, however, be recognizably analogous to that used domestically. If, instead, we derived our domestic principles through social contract reasoning, we would apply similar procedures internationally. Again, we will face questions, about the identity of the parties to any such contract, and the appropriate way to model their interests,[48] but we will recognize a meta-ethical continuity between domestic and international theory. This is the approach that I adopt in the later parts of this paper.

Second, we might agree with the Hobbesian approach that the international economy is not a suitable object for evaluation in terms of justice. On this view, it is not simply that our approach—whether utilitarian, contractualist or otherwise—has different implications in the international context. Rather, some fundamental premise that is required to get our method going does not hold internationally. We might think, for example, that a degree of mutual sympathy was a prerequisite to judgments of justice, and that this sympathy was absent beyond the state;[49] or that the coercive power of the state was required to make it rational to act on reasons of justice;[50] or, perhaps, that justice was itself a virtue internal to coercive political institutions that are absent beyond the state.[51] The upshot, in each case,

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[46] For the classic statement of this position, *see generally* Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 299 (1972).

[47] FRANK J. GARCIA, TRADE, INEQUALITY AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE 89–90 (2003) (discussing the first challenge); DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE 56 (2007) (discussing the second challenge); *id.* at 71 (discussing the third challenge).

[48] RAWLS, THE LAW OF PEOPLES, *supra* note 19, at 23 (for Rawls's approach to both) and *see generally* KOK-CHOR TAN, TOLERATION, DIVERSITY, AND GLOBAL JUSTICE (2000) (criticizing that approach).

[49] *See generally* David Miller, *Justice and Boundaries*, 8 POL. PHIL. & ECON. 291 (2009) (advancing elements of this view); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983) (offering a stronger statement thereof).

[50] *See generally* Nagel, *supra* note 44; HOBBES, *supra* note 5, at 91–92, 96, 100–01; *cf.* AARON JAMES, FAIRNESS IN PRACTICE: A SOCIAL CONTRACT FOR A GLOBAL ECONOMY, Ch. 3 (2012).

[51] *See generally, e.g.*, Nagel, *supra* note 44; Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHIL. & PUB. AFF. 257 (2005); MATHIAS RISSE, ON GLOBAL JUSTICE (2012); LAURA VALENTINI, JUSTICE IN A GLOBALIZED WORLD: A NORMATIVE FRAMEWORK (2012) (suggesting this idea in a more qualified form).

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would be to distinguish two contexts: (1) A domestic context, in which actions, institutions, and relations are appropriately subject to judgments of justice; and (2) an international context, in which they are not. This would not mean, however, that states' policies towards outsiders were not subject to any judgments of justice. Rather, their justice would fall to be judged in terms of their implications for insiders, who are in relations of justice amongst themselves.[52]

Third, we might conclude that, while the international economy is indeed subject to judgment in terms of justice, reasoning about justice beyond the state has a different structure to reasoning about justice domestically. Perhaps domestically justice is utilitarian, but internationally it is contractualist. Or, domestically, justice is based on natural rights whereas internationally it is based on hypothetical agreement. Or, domestically, it is understood in Humean terms, but internationally it is Lockean. This last approach is the discontinuous view that I suggested earlier was evident in the discourse of sovereign debt, and against which I argued in Part C.

I should say, before proceeding, that I find the first approach more plausible than the second, but I find both first and second far more plausible than the third. To hold, as the first approach might, that the *content* of justice is different internationally and domestically, seems easier to accept than, as the third requires, that the *grounds* of justice, and the *structure of ethical reasoning*, are different in each context. Certainly, we should place the burden of argument on the proponent of such a discontinuity. Further, it makes little sense to adopt this third approach by default, as some seem to, because we disagree about the conclusions of the first approach. Disagreement seems more plausibly to motivate the skepticism of the second approach than the equally controversial, and domestically disfavored, intrinsic morality of the third.

Beyond this intuitive skepticism, the third approach faces daunting challenges in reconciling the two—by assumption incompatible—sets of principles, where the two interact. How is this the case? Assume, first, that as among members of a society, whether these be citizens, residents, or some other class, the morality of markets is understood in Humean terms. Property and contract are justified as elements of an institutional scheme that is, in turn, justified by the goods it realizes for members—whether understood in utilitarian, egalitarian, prioritarian, or other terms. Unless this society is completely closed, those property and contract rules will necessarily impact on, and may often be applied to, outsiders. How should they be applied and justified in such cases?

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[52] FREEMAN, *supra* note 23, at 304 (highlighting the ways principles of domestic distributive justice may determine policies affecting outsiders). Similarly, realists emphasize how duties to insiders restrict statesmen's freedom to pursue cosmopolitan goals. HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 235–49 (4th ed. 1966); George F. Kennan, *Morality and Foreign Policy*, 64 FOREIGN AFF. 205, 205–18 (1985).

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The first approach, which reasons in the same way *vis-à-vis* insiders and outsiders, can answer this question in a relatively straightforward way. It might mandate applying the same principles to outsiders and insiders, albeit this might require broadening the outcomes over which those principles are justified. For example, we might justify property and contract rules as optimizing some function defined over the outcomes for insiders, subject to a side constraint in terms of their impact on the basic rights and self-determination of outsiders. There is no fundamental discontinuity between moral reasoning with regard to insiders and outsiders, so resolving conflicting claims is internal to the relevant theory.

The second approach is also relatively straightforward. If we do not understand insiders as standing in relations of justice towards outsiders, then we need not worry about how outsiders are treated under, or affected by, the principles we adopt domestically. We might apply the same rules to outsiders, or we might discriminate against them. In either case, this will be determined by how our choices affect outcomes for insiders, who are the class towards whom justification is required. Because outsiders have no claims of justice, there are no conflicting claims to adjudicate.

The third approach, however, is more difficult. If we understand the claims of outsiders in Lockean terms, but those of insiders in Humean terms, then we are likely to struggle wherever insiders and outsiders participate in the same institutions. In the Humean mode, we will presumably support taxation of individual and corporate income, with revenues applied towards social goals. Yet, if outsiders' claims have a distinct, Lockean, form, then such taxation will constitute a rights violation towards them.[53] Similarly, while the property rights of insiders can be restricted for the benefit of others, such restrictions will not be justifiable vis-à-vis outsiders. We are thus led towards a two-tier structure, where outsiders enjoy additional protections beyond those claimed by insiders.[54] Such inequalities, where different classes of persons enjoy different legal rights and duties, will strike many as objectionable in themselves, but they also raise formidable practical challenges where insiders and outsiders interact and compete in the same markets.[55]

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[53] *See* LOCKE, *supra* note 1, at 362; NOZICK, *supra* note 1, at 169–71 (on the limits of taxation in the Lockean mode). The Lockean might avoid this worry by suggesting that outsiders implicitly accept limits on economic rights, in line with those applied to insiders, as a condition of participation. The problem with this argument, however, is that it can be applied to qualify the Lockean position in any situation where two views conflict. The Lockean thus saves the structure of his view, but at the cost of any practical significance.

[54] Such two-tier protection is already evident, albeit for particular political and historical reasons, in investment treaties and the customary law of aliens' rights.

[55] Consider, for example, how a state's power to regulate particular property changes when transferred from insider to outsider and the perverse incentives this sets up.

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E. Justice and Institutions in a Global Economy

There seem, then, to be various reasons to reject the Lockean turn in international morality. First, insofar as it depends on an absence of cooperation, the Lockean approach is unmotivated. Second, insofar as it reflects doubts about international economic justice generally, Hobbesian skepticism seems a better response. And third, whatever its merits at an abstract level, the challenges of applying it in practice make it unattractive. So where do we go from here? Given the deficiencies of the Lockean approach, the challenge must be to elaborate a plausible Humean alternative for international economic law, and, specifically, external and sovereign debt. It is to that task that I now turn, building from what I see as the best interpration of Rawls' theory of *Justice as Fairness*.[56]

Justice, as Rawls understands that concept in his domestic theory, is concerned with the evaluation of non-voluntary institutions that allocate basic rights and duties, and determine the distribution of the benefits and burdens of social cooperation.[57] The fact that we share the world with others, in whom we recognize some basic equality, and with whom we cannot avoid interacting, is sufficient to give rise to problems of personal morality. But when we solve the problems of our mutual interactions through the constitution of political institutions, through which the options open to some are made subject to the choices of others, we require a different category of principles, under which the restrictions imposed on individuals can be justified to them, through the mechanism of hypothetical consent in the original position. I may not in fact have consented to the rules subject to which I live, but my hypothetical consent means that those rules can at least be reconciled with my continuing claim to be regarded as free and equal. Therefore, it is with institutions that we begin.

The international economy is characterized by such non-voluntary institutions. These include formal international institutions, such as the IMF and WTO, to which states formally consent, but which, in practice, they have little choice but to accept;[58] they include informal international institutions, such as the globalized economy and the relations of trade, investment, and debt comprised therein;[59] and they include the political

[56] While the argument is Rawlsian, it is not Rawls's own view. Rawls denies that questions of distributive justice arise in the international economy. Two assumptions drive that conclusion, both of which I reject: First, that productive cooperation is substantially limited to the state; and second, that the international system is not itself coercive. *See generally* RAWLS, THE LAW OF THE PEOPLES, *supra* note 19, at 105–20.

[57] RAWLS, A THEORY OF JUSTICE, *supra* note 21, at 6.

[58] Pietro Maffettone, *The WTO and the Limits of Distributive Justice,* 35 PHIL. & SOC. CRITICISM 243 (2009).

[59] Eric Cavallero, *Coercion, Inequality and the International Property Regime,* 18 J. POL. PHIL. 16 (2010).

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institutions of other states, which restrict the options of individuals and communities both within and outside their borders.[60] It is the existence of these non-voluntary institutions, and the fact that they play a distributive role across borders that creates the need for principles of distributive justice in the Rawlsian mode. Just as the institutions of the state require to be justified through the hypothetical consent of those insiders subject to them, so the plural institutions governing the international economy require to be justified to all of those, whether inside or outside, whose rights and entitlements they determine.[61] On this view, it is the fact of being subject to non-voluntary institutions that gives rise to claims of justice, and the fact of participation in socially productive cooperation that gives those claims a distributive character.[62]

While it is thus clear that there are non-voluntary institutions of the relevant kind, how exactly we specify these, and how we understand the relations between them, may have important implications for thinking about the justice thereof. There are at least two ways we might do this for the purpose of theory building.

First, we might understand the international economy as a single cooperative institution, albeit one with many different elements, in which all persons and peoples participate in an at least formally symmetrical manner. That institution comprises rules and practices that do not reduce to the rules and practices of individual states. States are themselves subject to those markets, having no choice but to respond to their demands. The relation in which peoples, and indeed persons, stand towards the international economy is thus analogous to that in which individual persons stand towards their own states; and the terms in which it falls to be justified are symmetrical as regards each people.

By argument parallel to that which Rawls deploys domestically, this suggests that the international economy *as a whole* should be organized so as to be to the greatest advantage of the least advantaged representative person or people.[63] A subsequent argument might determine whether the appropriate focus was on one or the other. Further, we might argue about the role that self-determination should play in that justification. Rather than emphasize access to economic advantage, as Rawls does

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[60] DANIEL W. DREZNER, ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES (2007); Andreas Follesdal, *The Distributive Justice of a Global Basic Structure: A Category Mistake?,* 10 POL. PHIL. & ECON. 46 (2011).

[61] The fundamental assumption that justification is owed to both insiders and outsiders is substantially cosmopolitan. But depending on how institutions and justification are understood, the prescriptions flowing from it may leave significant room for the autonomy of states as well as for inequalities between them.

[62] Suttle, *supra* note 30, develops in greater detail the points in the foregoing paragraphs.

[63] For two accounts that derive a global difference principle using this route, *see* CHARLES BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979) and THOMAS W. POGGE, REALIZING RAWLS (1989).

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domestically, we might argue that the international economy should maximize the capacity of individual peoples to pursue their own chosen paths.[64] Or, we might adopt a two-limbed principle, equalizing economic advantage subject to a self-determination side constraint. Regardless of how these questions are answered, we would require a justification that applies symmetrically to each people; it does not license preferring the interests of some over others.

Second, we might understand the international economy, and, in particular, international debt markets, as the convergence of a plurality of diverse economic and legal institutions, including various international institutions—the IMF, the Basle Committee, the European Union, etc.—and the domestic law and institutions of individual states, insofar as these affect or purport to govern outsiders. First among these will be states themselves. Debt obligations, after all, are governed by the national law of individual states, whether creditor state, debtor state, or a third state subject to whose law the debt contract is negotiated. There is some coordination among national rules, but to regard these as constituting a unitary whole seems implausible. Further, insofar as there are international rules, these are commonly mediated through domestic law, or reflect agreements amongst, or are reducible to decisions of, individual states.[65] This is not to deny the importance of international rules and institutions. These clearly play an important role, but that role does not eclipse the continued importance of states' domestic institutions.

We are not, on this second view, concerned with the justification of the international economy, or the international debt market, as a whole, because no such institution exists. Rather, there are plural institutions, each of which falls to be considered, and justified, separately. Depending on how we understand the basis of individuals' claims against institutions, this might not make a difference: We might think that justification is owed for national institutions to both insiders and outsiders in precisely the same terms, leading to the same outcomes as the first, unitary, model.[66] But, if we understand the demand for justification as contingent on the particular relation between agent and institution, then the different relations of insiders and outsiders towards particular institutions will likely lead to quite different justificatory demands.[67] Michael Blake, for example, suggests that

[64] For prominent approaches highlighting how self-determination might temper distributive equality, *see generally* MILLER, NATIONAL RESPONSIBILITY, *supra* note 47; RAWLS, THE LAW OF THE PEOPLES, *supra* note 19.

[65] Freeman follows this line to argue that the institutions of the international economy "supervene upon" those of particular states, and that there is in consequence no institutional structure to which an international difference principle can be applied. *See* Freeman, *Distributive Justice and the Law of Peoples*, *in* RAWLS'S LAW OF PEOPLES: A REALISTIC UTOPIA 243–60 (Rex Martin and David A. Reidy ed., 2006), at 246-248.

[66] For an argument towards this view, *see* Abizadeh, *supra* note 23, at 318.

[67] *See generally* Suttle *supra* note 30.

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this focus will lead us to understand the justification of states to insiders in egalitarian terms, while viewing the claims of outsiders in sufficientarian terms.[68]

These represent fundamentally different images of the international economy, with very different implications for what justice demands in its organization. How then can we adjudicate between them? This is not simply an empirical question. Rather, the answer turns on why we are interested in institutions in the first place.

One answer is that we focus on institutions because of the pervasive effects they have on individuals' lives.[69] It is these that make institutions objects of urgent moral concern. That the international economy, considered as a whole, has such pervasive effects on the lives of individuals seems hard to deny. No state can simply shrug off the international economy and chart its own course, except at prohibitive cost.[70] Nor can any other component institution assure particular outcomes independent of the others. The upshot, for many strong cosmopolitans, is that we should adopt the first, unitary, perspective, and in consequence that the international economy demands justification in globally egalitarian terms.[71]

There is, however, a danger in this approach. If we understand the object of moral criticism to be the international economy *as a whole*, we may struggle to find plausible prescriptions for its reform, or to apportion responsibility for implementing such prescriptions. The rhetoric of globalization and the eclipse of the state often leads, not to progressive critique, but to a sense of powerlessness. In the absence of a global political authority, focusing on an amorphous "global basic structure" may absolve more concrete agents and institutions of responsibility.[72]

This suggests a second way we might explain the focus on institutions, and, hence, choose between these perspectives. [73] Moral language is normative, in the sense of action guiding. It is not simply because particular institutions have significant effects that we focus on

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[68] *See generally* Blake, *supra* note 51.

[69] *See, e.g.*, ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS OF INTERNATIONAL LAW 18 (2007).

[70] It is disagreement on this point that leads Rawls to reject global egalitarianism. RAWLS, THE LAW OF THE PEOPLES, *supra* note 19, at 108–11.

[71] *See generally, e.g.*, BEITZ, *supra* note 63; POGGE, *supra* note 63; DARREL MOELLENDORF, COSMOPOLITAN JUSTICE (2001).

[72] For an analogous point, *see* Saladin Meckled-Garcia, *On the Very Idea of Cosmopolitan Justice: Constructivism and International Agency,* 16 J. POL. PHIL. 245 (2008).

[73] This paragraph draws on arguments in FREEMAN, *supra* note 23, at 290, 305–07, 314–17.

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them, but because those effects are a function of political agency expressed through those institutions.[74] When we criticize an institution in terms of justice, we seek to guide those agents with power to change it. An obvious objection to the first, globalist, perspective is that there is no individual or collective agent with authority over the unitary global economy that it identifies. That economy is a human creation, but there is no particular person or persons in a position to reconstruct it *as a whole*, such that it can reliably deliver specific distributive outcomes. Simply put, the international economy is complicated. Its outcomes cannot be understood as a function of any specific intentionality. It seems unlikely that any institution lacking the bureaucratic and coercive capacities of the modern nation state could sustainably assure particular distributive outcomes to persons or peoples. It seems equally unlikely that any institution with those capacities could—or indeed should—be constituted on a global scale.[75] Yet, in the absence of such an institution, distributive principles for the global economy *as a whole* lack any plausible addressee.[76]

In contrast, the second pluralist perspective identifies not only the institutions that require to be justified, but also the agents to whom criticism is appropriately addressed. In the case of national institutions and legal systems, those agents will be national governments. In the case of formally constituted international institutions, they will be those with effective political control over them. Where informal institutions are subject to effective direction from one or a number of agents acting, or capable reliably of acting, jointly, then we can address questions of their justice to them. Rather than asking who is responsible for the justice of international financial markets as a whole, we ask a more tractable question: Who is responsible for the justice of each of the specific national, regional, and international institutions whereby those markets are constituted?[77] And rather than asking

[74] Recall the suggestion above that justice is about situations where our options are subject to the *choice* of another: We do not enquire about the justice of the weather.

[75] This is important in pre-empting the following objection. We might accept that outcomes in the international economy, as presently organized, are not attributable to definite agents and so not directly criticizable in terms of justice. Yet this might suggest a duty to bring into being institutions that would make such criticism possible. Indeed, this would seem an obvious implication of Rawls's duty "to further just arrangements not yet established." RAWLS, THEORY OF JUSTICE, *supra* note 21, at 99. But if, as Rawls himself holds, a global state is implausible or undesirable, then there can be no duty to bring such an institution into being. RAWLS, THE LAW OF THE PEOPLES, *supra* note 19, at 36.

[76] Some might object that this function can be fulfilled by one or a subset of leading states, coordinated through formal or informal international organizations. I do not deny that such coordinated action is possible in particular instances. But there clearly is not, nor is there likely in the foreseeable future to be, any individual or collective agent able to determine outcomes in the international economy, or international financial markets, as a whole.

[77] A similar point might be made in the language of positive and negative responsibilities. For such a strategy, albeit applying quite different standards, *see* Thomas Pogge, *Are We Violating the Human Rights of the World's Poor?,* 14 YALE HUM. RTS. & DEV. J. 2 (2011).

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whether the outcomes of the economy, all things considered, are just, we inquire whether the impacts specific institutions have on those outcomes are justifiable to those on whom they are imposed.[78] By focusing on agency, we are thus led to prefer the second, pluralist, perspective on the institutions of the international economy.

A further benefit of this pluralist approach is its flexibility. We do not assume that there is a single institutional scheme to which a set of independent standards may be applied. Nor do we assume that outcomes are exclusively a function of states themselves. Rather, we examine the institutions that in fact exist and affect outcomes in a particular domain, the extent to which these are a function of responsible moral agents, and how they do and should affect outcomes in order to be justifiable to those persons and peoples subject to them. This allows us to accommodate not only global institutions, such as the IMF and the Basel Committee, and national institutions, such as particular countries' systems of financial regulation and private law, but also intermediate institutions, such as the European Council, Eurozone, and ECB, which may exhibit both varying degrees of agency, and varying relations with diverse persons and peoples.

To see this flexibility in action, consider the case of the European Union (EU). It seems plausible that, at least in some fields, the EU has substantial agency. It has highly developed decision-making processes. Its decisions enjoy a high level of compliance among those to whom they are addressed. As a consequence, without aspiring towards unitary political authority, it constitutes an effective mechanism for solving collective action problems and assuring particular outcomes from the various legal and economic institutions over which it exercises authority.[79] We can thus demand justification for those institutions.

The form that justification takes will depend on the ways those institutions affect morally relevant outcomes in the international economy, and the relation in which the EU stands to those affected thereby. This will include European citizens and residents, and European peoples, but also outsiders, whether individuals or groups. These relations may be in some ways analogous to those between a national government and its citizens and foreigners

[78] This does not mean coordination problems are entirely avoided. Clearly, to judge whether a given institution is just, we must consider how its effects interact with those of other institutions; and we might conclude there were duties on various institutions to coordinate, including potentially by constituting new overarching institutions. But we will in all cases be working outwards, from existing institutions and *loci* of political authority, rather than beginning with a set of desirable outcomes and imagining into being institutions capable of bringing these about.

[79] Obviously, in many cases political constraints in individual countries will preclude any effective action. But such cases reflect a failure of will, rather than an absence of agency. Assuming we can identify the changes that are required to the relevant institutions, no agent can claim that they do not know what they must do to bring these about, or that they lack assurance that others will play their part if they do themselves. This analysis would obviously be quite different if members' respect for EU law were substantially to decline.

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respectively. But, the intervening institutions of European states are likely significantly to complicate the analysis, including, in particular, the content and currency of their justification. Individuals have many identities, and are commonly members of multiple and overlapping groups; but the liberal state relates to each simply as a citizen, with rights and claims identical to those of other citizens.[80] Yet, from the perspective of European institutions, it may be appropriate to act towards individuals not only in their capacity as Europeans, but also in their capacities as Irishmen, Germans, or Greeks.[81] This might manifest in the kinds of distributive claims that individuals can make against those institutions. It might also, and relatedly, manifest in claims made by groups, that in turn affect the claims of their members. Most obviously, standard models of the liberal polity include nothing analogous to the claims to self-determination that individual European peoples might have against European institutions. Indeed, the salience of self-determination may mean that the justifications European institutions owe towards insiders have much in common with the justifications national institutions owe towards outsiders who are similarly organized in, and make claims in their capacity as, peoples.

Much more might be said about the EU in terms of relevant features. The key point, for my purposes, is that beginning with particular institutions, and the particular agents with authority over them, allows us to acknowledge and accommodate these diverse features more effectively than if we simply assumed a unitary structure and symmetrical relations.

F. One Humean Take on Eurozone Sovereign Debt

The discussion up to this point has been quite schematic. The reader could be forgiven for wondering what the practical implications are for thinking about sovereign and quasi-sovereign debt restructuring in the Eurozone. Before developing these, it may be helpful to recall the argument so far.

I have argued for a number of claims. First, I outlined the distinct Humean and Lockean approaches to economic justice, arguing that the former was the dominant mode of understanding domestic economic questions, while the latter played a prominent role in discussions of cross-border and especially sovereign and quasi-sovereign debt. Second, I considered and rejected what seemed like the most plausible principled explanation of this disconnect, namely the claim that international debt was not cooperative in the required sense. I also highlighted the extent to which arguments for limiting the scope of justice to the state motivated, not the Lockean morality of debt, but rather a Hobbesian

[80] Of course, in practice, many states are not unitary and many ostensibly liberal states act towards their citizens as members of groups. Whether this constitutes a failure of liberal theory or political practice is beyond the scope of this paper.

[81] Communitarian critiques of liberal neutrality might offer inspiration here.

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international moral skepticism, as well as the practical problems of combining Lockean and Humean elements in a single scheme. This led me to reject the Lockean approach, focusing instead on elaborating the Humean approach internationally.

The goal of these earlier sections was to clear away the conventional wisdom of cross-border debt in order to open space for an alternative analysis. Those already working within a Humean framework might find these earlier sections unnecessary, but the prominence of Lockean perspectives in practice means they at least need to be addressed. This done, in the previous Section I began my constructive project, inquiring how an approach focusing on institutional justification should translate to international financial markets, and suggesting that we recognize the plurality of international economic institutions, rather than seeking to apply any single principle of justice to the global economy as a whole.

This Section continues that constructive project, elaborating its implications under one specific account of international economic justice, which I label Equality in Global Commerce (EGC).[82] I contrast the prescriptions of EGC with the Lockean view criticized above. While I do not find that Lockean perspective plausible, contrasting its prescriptions with EGC highlights the implications of taking seriously the international implications of our domestically entrenched Humean commitments.

I. From Equality in Global Commerce . . .

EGC is broadly Rawlsian in its content and methods, drawing on elements from Rawls's domestic and international theories. It understands justice in terms of the hypothetical consent of both persons and peoples. Persons are modeled as concerned with individual freedom, operationalized in terms of basic liberties, and access to economic advantage. Peoples are modeled as concerned with collective self-determination, operationalized in terms of their capacity effectively to determine the course of their shared lives, to pursue valued projects, and to realize their domestic conceptions of justice.

As regards national institutions, the upshot is that these are domestically just—they satisfy the justice claims of insiders—to the extent they comply with Rawls' two principles of justice, including the difference principle, which identifies the extent of permissible inequalities. They are, in most cases, internationally just—they satisfy the justice claims of outsiders—provided they do not undermine basic rights or the capacity of other peoples to become or remain self-determining in the sense sketched above. But, where peoples, through their national institutions, pursue goals specifically through their effects on the international economy, these require more stringent justification, in globally egalitarian

[82] For a detailed account of the arguments supporting EGC, *see generally* Suttle, *supra* note 30.

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terms, or in terms of the protection—as opposed to the exercise—of self-determination. For our purposes, the key distinction is that in the case of most domestic measures, states are free to focus on their domestic priorities, provided they do not jeopardize the capacity of others to do the same. Where their domestic institutions are outward-oriented, however, justification must be symmetrical between insiders and outsiders.

As regards international institutions with universal or near-universal membership, justification will necessarily be symmetrical. It will focus, in the first instance, on preserving the self-determination, as sketched above, of each people subject thereto. To the extent that an institution could take one of a number of forms, each of which will effectively preserve that self-determination, it will select among these to maximize the economic position of the economically least advantaged people, with a view to in turn maximizing the economic advantage of less advantaged persons therein.

In the case of regional or other non-universal international institutions, the position is somewhat complicated. Among members, justification will take the same form as universal institutions. But this will be subject to the same side constraint, as to the self-determination of outsiders, as applies to national institutions. The self-determination of peoples, both insiders and outsiders, thus constitutes the first criterion for assessing the justice of such institutions. As with universal institutions, however, where a number of candidate institutions meet this threshold, EGC mandates choosing among these based on their impact on the economic position of the least advantaged people directly subject thereto. This will, in the normal course, mean the least advantaged member country. This standard differs from universal institutions in applying this criterion over the set of member peoples only.

It is worth highlighting one limit on this approach: It is an account of the justification of *non-voluntary* institutions. The voluntariness or otherwise of institutions is a relational quality; an institution may be voluntary from the perspective of some agents, but not of others. It seems plausible, for example, that many institutions are, in their early years, voluntary from the perspective of their members. States choose for themselves whether to participate in such institutions. Where they choose to do so, we may regard this as a free choice and an exercise of their self-determination. The goals states pursue through international cooperation are diverse, so the goals of international institutions are similarly diverse. In particular, nothing in EGC denies that states are free to bind themselves in pursuit of goals other than those of individual freedom and collective self-determination.[83] In the case of such institutions, where membership is genuinely voluntary, EGC has little to

[83] What exactly those goals are is an open question, the answer to which will depend on the domestic theory of justice adopted. If that domestic theory is Rawls's political liberalism, then the list will be very short. RAWLS, THE LAW OF THE PEOPLES, *supra* note 19, at 34–35.

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say about the relations among members. It will, however, highlight the ways these voluntary institutions are experienced by *non-members* as non-voluntary. Where two states choose freely to coordinate their policies in a particular area, third states experience this coordination as a non-voluntary—and potentially very significant—feature of the environment in which they must now act. For this reason, even genuinely voluntary institutions will be subject to the same side-constraint as to their effects on the self-determination of outsiders.[84] And where initially voluntary institutions become non-voluntary over time, EGC will come to apply among their members.

This point is well illustrated by the EU. In its early years, the then European Communities plausibly constituted a voluntary membership institution. At least from the establishment of the EEC Customs Union, however, it was non-voluntary from the perspective of outsiders, for whom the reorganized European economy was an objective feature of their economic environment.[85] Over time, its voluntariness for members also receded, as European institutions achieved greater salience for members and their citizens. Among long-standing members, the EU today is non-voluntary, in the sense that the costs of exit are prohibitive, particularly where other members remain.[86] For more recent members, including especially post-Communist states, it is non-voluntary in the sense that for these states' membership was an important step in constituting and securing their democratic transitions, and, to that extent, giving substance to their self-determination.[87] Similarly, arguments might be made for the earlier democratic transitions in Spain, Portugal, and Greece.[88]

[84] We need not identify this as a separate obligation. Insofar as such institutions coordinate the policies of individual states, the side-constraint on national institutions translates into a side-constraint on non-universal international cooperation. Insofar as non-voluntary institutions have their own executive capacities, the reasons for imposing this side-constraint on national policies will apply equally to international executive capacities.

[85] Consider, for example, the ways trading relations with colonies and former colonies were reorganized on a community-wide basis.

[86] These costs and uncertainties are painfully illustrated by the UK's exit vote.

[87] On some connections between EU membership and democratization, *see* Atoaneta Dimitrova & G. Pridham, *International Actors and Democracy Promotion in Central and Eastern Europe: The Integration Model and Its Limits,* 11 DEMOCRATISATION 5, 91–112 (2004).

[88] On the complexities of the Iberian cases, *see* Robert M. Fishman, *Shaping, Not Making, Democracy: The European Union and the Post-Authoritarian Political Transformations of Spain and Portugal,* 8 SOUTH EURO. SOC'Y & POL. 31–46 (2003).

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II. . . . To the Justice of Sovereign Debt

These, then, are the principles I label EGC, as they apply to national, international, and non-universal or regional institutions. How do we apply these to the case of sovereign and quasi-sovereign debt restructuring?

First, recall that no institution, whether national or international, will be just if it undermines self-determination, understood as a people's capacity effectively to determine the course of their shared lives, to pursue valued projects, and to realize their domestic conceptions of justice. Clearly, where a state's debts can be serviced only through politically constraining and economically debilitating taxation and austerity over decades, that state's self-determination is substantially impaired. Constraints on economic policies may preclude the state from realizing its domestic conception of economic justice, or from vindicating the basic rights of its citizens, for example to healthcare. The external oversight of economic policies that commonly accompanies such circumstances may prevent a people from taking effective charge of their shared life, or from making decisions of any importance about how their community develops. No institution that avoidably brings about such consequences can be regarded as just.

This implies the need for a mechanism for restructuring sovereign debt in such circumstances, allowing peoples to disclaim unsustainable debts, and thereby to regain effective control over their own institutions, and over their shared lives. The only justification for opposing such restructuring would be that this would lead to worse outcomes in terms of the value—self-determination—that is at issue. Empirical questions arise at this point; but given the fact of sovereign defaults in the past, it seems implausible that any particular default would undermine other states' capacity to become or remain well-ordered. The fact—as does seem plausible—that it might increase the financing costs of other states in similar positions cannot justify sacrificing the self-determination of some peoples for the benefit of others.[89]

Where does this argument locate the relevant restructuring mechanism? This depends on where we locate the threat to self-determination. Insofar as we are concerned with

[89] The assumption here is that arguments invoking the systemic effects of restructuring and the effects on the financing costs of others involve sacrificing the interests of the already disadvantaged for the benefit of those more advantaged. It does not mean that restructuring cannot be made conditional on policies to ensure it, in fact, leads to the borrower's effective self-determination. The creditor's obligation is to facilitate the borrower's self-determination, not simply to forgive the debt. Concerns for self-determination will also be relevant in deciding how far lenders or the international community can dictate the specific content of the required reforms. This further suggests that, where restructuring is contingent on domestic reforms, we carefully examine whether these are for the long-term benefit of the borrower, or rather serve to deter future defaults by others or to maximize recovery by creditors.

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national institutions and the ways the institutions of one state—the creditor, market, or governing law state—may undermine the self-determination of another—the borrower—it suggests that states should provide, in their national laws, mechanisms for other states to restructure debts subject to those laws. To take a prominent example, the laws of New York should provide mechanisms for states issuing bonds in New York, and subject to New York law, to restructure the resulting debts. States should also ensure their laws are not used to enforce debts that a borrower has a good claim to restructure, even where the debts themselves are not issued subject to those laws. They should, for example, decline to enforce orders in respect of such debts against property within their jurisdictions.[90]

A similar obligation to facilitate restructuring will arise for formal regional and international institutions, and for national institutions that are oriented towards the international economy. A further complication arises here, however. In the case of genuinely domestic institutions, I have suggested that states should apply as their principal yardstick their own domestic conceptions of justice, subject to a self-determination side-constraint. Outsiders have a different, and secondary, moral status in considering such institutions. In contrast, when it comes to outward-oriented national and formal international institutions, their claims are symmetrical. We can thus inquire, in respect of such institutions, whether they are themselves organized and act so as to equally vindicate the self-determination of all states subject to them, and to the extent they do so, whether they further seek to maximize the economic position of the least advantaged such state. We might ask, for example, not only whether the IMF's lending vindicates the self-determination of heavily indebted countries, but also whether it facilitates less advantaged countries' access to finance on the most favorable terms possible. We might judge the ECB's monetary policies not only in terms of price stability, which is plausibly a pre-requisite to effective self-determination for all, but also in terms of growth effects on the least advantaged Eurozone states. How we identify when national institutions are outward-oriented is not straightforward. But, to the extent we can identify national institutions designed to facilitate international—as opposed to domestic—debt markets, we might conclude that these were outward-oriented in the relevant way, and so subject to this additional requirement.[91]

A further upshot of this approach merits mention. The story that I have told is about unsustainable debt as a threat to the effective self-determination. It is not about the relative economic positions of borrowers or lenders. It does not claim, as more

[90] On the various mechanisms whereby sovereign debt is enforced, *see* U. Panizza, F. Sturzenegger & J. Zettelmeyer, *The Economics and Law of Sovereign Debt and Default,* 47 J. ECON. LITERATURE 651 (2009).

[91] We might thus distinguish states that have organized their capital markets and private law with an eye to becoming global centers from those for whom participation in international debt markets is largely limited to offering the state's own debt, currency reserve activities, and citizens' purchasing of domestic and foreign bonds.

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straightforwardly egalitarian cosmopolitans might, that economically less advantaged peoples should be entitled to default on debts to more advantaged peoples, because it does not assume that those more advantaged peoples have any general obligation, through their own institutions, to maximize the economic position of the globally least advantaged. Rather, it assumes that the more advantaged pursue their own goals through their own institutions, and that the effects these have on outsiders are justified provided they allow those outsiders to do the same. It is not because I am poor, but because my debts undermine my self-determination, that I have a claim to default on them. That may happen at high or low levels of national income. The corollary is that, in many cases, those economically less advantaged may need to facilitate restructuring by those more advantaged: The poor may have to bail out the rich.[92] This may seem perverse, but it is a function of understanding self-determination and economic advantage as distinct categories of good, and subordinating the latter to the former.[93]

The relation between self-determination and economic advantage also matters for answering the obvious objection, that this approach will increase financing costs for borrowers, without giving them any greater freedom of action. They could, after all, issue debt in their own currencies, and make such debts subject to their own laws if they wanted to protect their freedom to restructure. That they do not do so suggests that they prefer to accept greater discipline in exchange for lower interest rates.

This may be true,[94] but it mistakes the reasons why, as Humean liberals, we value states' freedom to contract debts and constitute institutions under which those debts are repayable. We do not do this because we regard either debt or contracting as expressions of an intrinsic moral power. Rather, we value them as elements in a scheme that realizes particular valuable goods—in this case, self-determination and economic advantage. Now

[92] A parallel might be drawn to personal bankruptcy laws, which do not necessarily reduce bankrupts to the lowest acceptable economic position but rather allow them to retain many economic advantages, such as tools of trade. If the function of bankruptcy is to give individuals back control of their own lives, which are continuous both before and after bankruptcy, then it may be necessary to allow them to keep some of the advantages that accrued to them in their "former" life. To do otherwise might be to irreparably disrupt whatever ongoing projects they had, which are central to their continuing agency/identity. Of course, economic rationales can also be offered for these provisions.

[93] The priority of self-determination over economic advantage is a function of conceiving self-determination as extending to economic choices. If economic advantage took priority, the upshot would be continuous redistribution from more- to less-advantaged and a consequent denial of any meaningful economic self-determination; *see* for this problem MILLER, NATIONAL RESPONSIBILITY, *supra* note 47, at 68 and RAWLS, THE LAW OF THE PEOPLES, *supra* note 19, at 117.

[94] While plausible, this objection finds little empirical support. Bond prices seem largely unaffected by including restructuring clauses. *See* Torbjorn Becker, A. Richards & Yunyong Thaicharoen, *Bond Restructuring and Moral Hazard: Are Collective Action Clauses Costly?*, 61 J. INT'L ECON. 127–61 (2003).

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let us imagine a state seeking to borrow money. Assuming restructuring terms affect financing costs, the state has two options: First, the state could borrow under a regime requiring strict enforcement in all circumstances, at an interest rate of *x*. Second, it could borrow under a regime permitting restructuring where necessary, at a rate of *x + y*. *y* is thus the price that the borrower pays for the restructuring option. Now consider two scenarios: *y* might be the difference between the borrower being able or unable to borrow funds necessary for it to become or remain effectively self-determining. In this case, requiring an interest rate of *x + y w*ould itself undermine the borrower's self-determination. Yet, the borrower has a good claim in justice against the institutions of the international financial market to the vindication of its self-determination. We might reasonably inquire how that duty should be vindicated[95] but it cannot be done by requiring restructuring terms that will themselves undermine that self-determination.[96] If, on the other hand, *y* is simply the difference between the borrower achieving a higher or lower level of economic advantage, then advocating the strict enforcement regime requires sacrificing a good with greater priority—self-determination—in pursuit of one with lesser priority—economic advantage.

It might here be further objected that it is the borrowing state that is making that choice. Three replies occur: First, the mere fact of prior choice does not necessarily license imposing on an agent all the consequences of that choice; the extent to which we bear consequences depends on a subsequent argument about the normative extent of responsibility.[97] Second, allowing some borrowers this choice may impose significant negative externalities on others; where there is an option to borrow on strict terms, lenders may be less willing to lend on terms that allow restructuring, as compared to a situation where all lending must allow restructuring.[98] Third, the issue is not the borrower's freedom to agree to strict terms, but rather whether non-voluntary institutions should

[95] For a further discussion, *see infra* pp. 829-831.

[96] The objection here recalls Joan Robinson's observation that "the misery of being exploited by capitalists is nothing compared to the misery of not being exploited at all." JOAN ROBINSON, ECONOMIC PHILOSOPHY 46 (1962). It is no objection to a proposal to say that it would make it more difficult for states to obtain financing, if their needing that financing itself constitutes an injustice for which those in whose name the objection is raised are themselves responsible. Some might object to this allocation of responsibility, but a plausible reply highlighting states' dependence on international markets, and others' constitution of those markets through their domestic institutions, supports it.

[97] For this point in another context, *see* Serena Olsaretti, *Choice, Circumstance and the Cost of Children, in* HILLEL STEINER AND THE ANATOMY OF JUSTICE (S. de Wijze, M. H. Kramer & I. Carter eds., 2009). We might further emphasize that, for Humean liberals, economic choice is valued for the goods it in turn realizes. To the extent that imposing the consequences of a choice undermine those goods, the mere fact of being chosen is no argument for it.

[98] But *see supra* note 94 (discussing contrary empirical evidence).

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enforce such agreements. Thus, at the stage of enforcement, it is a question of some undermining the self-determination of others.[99]

The role of choice highlights the difference between the Humean and the Lockean account of sovereign debt. For the Lockean, the promise to repay constitutes a freestanding moral obligation grounded in the joint choice, and the joint self-ownership, of borrower and lender. It is neither here nor there, on this view, that repayment may substantially undermine the good of the borrower, including the fundamental good of the self-determination of peoples. To the extent the Lockean acknowledges the good of self-determination, he is likely to find its expression in the choice to borrow, rather than the consequences of repayment. In contrast, the Humean understands debt, and the duty to repay, as internal to, and dependent on, a scheme of institutions which themselves require to be justified in terms of the good of those subject to them. The moral obligation of debt is thus limited to the extent such limitation in turn facilitates the realization of that good.

Two questions arise at this point about the role of non-market lending, in the form of "bail-outs" by states or regional or international institutions. The first is whether there is a duty to provide such bail-outs. The second is whether the resulting debts have a different moral status to commercial debts.

The answer to the first question will depend on what is required to prevent an institution undermining the effective self-determination of a borrowing state. Where a distressed borrower—notwithstanding reasonable steps to reform a dysfunctional economy—is running a primary budget deficit, or requires to recapitalize a financial system, or otherwise requires access to additional short-term funds in order to become or remain effectively self-determining, an institution that denied access to those funds, on terms themselves compatible with the borrower's self-determination, would be unjust.[100] If we understand the cross-border debt relation as—at least in part—a function of the political institutions of the creditor or market state, then the justification of those institutions will extend not only to facilitating the denunciation of debts to the extent necessary, but also to the provision of funds where necessary to address the negative effects that interaction with those institutions has had for the borrowing state.[101] Viewing the bail-out obligation as an aspect of the justification of the institutions of the lending state has the additional

[99] For the analogous argument against slavery contracts, *see* Samuel Freeman, *Illiberal Libertarians: Why Libertarianism Is Not a Liberal View,* 30 PHIL. & PUB. AFF. 105 (2001).

[100] This is the scenario anticipated in the text accompanying *supra* note 95.

[101] The claim here is that the creditor has facilitated the debtor's reliance on international funding, and cannot simply withdraw that funding without allowing the debtor some reasonable period to restructure its economy away from that reliance. *Cf. generally* JAMES, *supra* note 50, (for an account of the international economy as a practice of mutual reliance on common markets).

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benefit of providing a clear basis for allocating that obligation to specific agents. This does not mean, of course, that those agents cannot themselves delegate that responsibility to, for example, the IMF.

As to the second question, we might wonder whether the moral status of bail-out loans, *ex hypothesi* provided otherwise than for commercial gain, is different from commercial loans. As a matter of practice, international institutions financing sovereign bail-outs, including the IMF and European institutions, insist that their loans have priority over commercial loans, and cannot be subject to restructuring.[102] Certainly, the stories told above about the relation between debt, interest, and cooperation do not easily map onto bail-out loans. But two slightly modified stories can be told, which suggest these loans are equally subject to justification in distributive terms.

First, note that while bail-out loans may be provided for moral rather than commercial reasons, the moral obligation to provide them is itself contingent on the lending people's constitution of, or participation in, institutions through which that people pursues cooperative gains. The provision of these loans, just like the cost of default when it occurs, is thus a cost of mutually beneficial cooperation through international financial markets. States, rather than lenders, bear the cost, but that is simply a function of the lending people's organization of its own economy. There is nothing to stop the lending state from passing it on to lenders through a suitable financial sector tax.

Second, note that bail-outs are—at least sometimes—provided for the benefit of lending institutions, or to protect the stability of the international financial system, rather than simply for the benefit of the borrowing state. This was very clearly the case in Eurozone bail-outs, which served in part to isolate international financial markets from the risk of default by distressed sovereigns and banking systems. The loans thus served to protect, for the benefit of lending states, the scheme of mutually beneficial international cooperation. Thus, again, these loans appear as simply one more cost of that mutually beneficial cooperation.

The upshot is that bail-out loans cannot claim any privileged moral status over and above that due to commercial loans. This does not of course answer whether they should be accorded a higher legal or political status. I suggested above that it was implausible to assume facilitating sovereign defaults posed a greater threat to the self-determination than enforcing unsustainable debts. It seems more plausible, however, that facilitating default on non-commercial bail-out loans, other than in the most extreme of

[102] Although for doubts about how far this insistence translates into practice, *see* Jeremy Bulow, Kenneth Rogoff & Alfonso S. Bevilaqua, *Official Creditor Seniority and Burden-Sharing in the Former Soviet Bloc,* 1 BROOKINGS PAPERS ECON. ACTIVITY 195–234 (1992).

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circumstances, would undermine the continued availability of such loans. Witness the political opposition in Eurozone lender countries to repeated bail-outs. It may be that a creditor government, called upon to lend good money after bad or to recapitalize an international financial institution tasked with doing so, would face insuperable domestic political opposition, notwithstanding any moral obligation to act in these circumstances.[103] It may therefore be necessary, for practical reasons of incentives and political will, to treat such loans as a legally privileged category.

G. From Relations of Justice to the Scope of Democratic Community

My focus thus far has been questions of justice. I want, in this final section, to shift that focus somewhat, to highlight the implications of this approach for thinking about democracy in financial markets, and specifically in respect of sovereign debt restructuring. In recent debates, different players have advanced as self-evident a range of claims about what democracy demands in the context of debt restructuring. On examination, many of these reflect an underlying commitment to one or other of the perspectives discussed above.[104] With a view to making those commitments explicit, I develop in this section the implications for democratic choice of three perspectives: The Lockean received wisdom, Hobbesian international moral skepticism, and EGC.

Because it understands property, contract, and debt as prior to political institutions, the Lockean approach suggests a quite limited role for democratic choice. The lender has a right to repayment of the debt, and no democratic choice on the part of any other person can license depriving him of it. Democracy might play a role in circumstances, such as the current Greek case, where the lender is itself a democratic political community. If there is any question, this view suggests, of releasing the Greek polity from an obligation that is owed to Finland or Germany—taking two particularly vocal examples—then it is a matter for the Finnish and the German polities to decide. Debts are rights, and rights can be waived, but only the right holder gets to make that decision.

A complication arises where, as again appears in the Greek case, debts are owed to international institutions at whatever level. A question arises as to which polities are to make decisions about waiving such liabilities. There are at least three stories we might tell here. The first "looks through" the relevant institutions, understanding their claims as delegated from their sponsoring states, and hence looking to those states, as distinct polities, to authorize any waiver. The second relies on decision-making procedures in the

[103] Whether such constraints fall properly under the concept of justice is not a question I propose here to explore. *See generally* G. A. COHEN, RESCUING JUSTICE AND EQUALITY (2008).

[104] For an example including elements of each, *see* Buttonwood, *More on Debt and Democracy*, THE ECONOMIST (Feb. 20, 2015), http://www.economist.com/blogs/buttonwood/2015/02/greece-and-eu.

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relevant institutions. This conventionalist response has obvious weaknesses as an answer to questions of political morality, as opposed to legal formality. To the extent it is normatively attractive, it depends on a combination of normative legal positivism and an implicit commitment to the first, look-through, story. A third alternative understands the unit of political choice as the whole of the sponsoring community. Subsequent questions, about the units whereby democratically expressed choices fall to be aggregated, whether at the level of individuals or peoples, would need to be addressed. But at a minimum, this third story suggests little reason for demanding democratic authorization at the level of individual lending states.

The Hobbesian moral skeptic, like the Lockean, will emphasize democratic choices of lending states. But this approach also sees room for democracy in the borrowing polity. Recall, the Lockean sees no role for borrower democracy because he does not perceive any choice that falls to be made by the borrower. The borrower must pay his debt unless the lender chooses at his sole discretion to waive it. In contrast, the skeptic denies that any such obligation exists. Whether to pay is always a matter of political choice for the borrower. Importantly, however, the borrower has only a liberty right to make that choice; lenders are under no obligation to accept it. Just as the borrower is free to default, the lender is free to reject that default and to press for repayment using whatever means are at its disposal. There may be many reasons the borrower might choose to repay, notwithstanding this free choice. At a minimum, he can expect to pay a penalty for default in the form of exclusion from international debt markets for some period of time.[105] What is important for my purposes, though, is that the skeptic must counsel a borrower to weigh the likely consequences of these various factors for the borrowing people itself, in accordance with the principles of political morality properly applying domestically. The effects of this choice—to repay or default—for outsiders are relevant only insofar as they affect likely outcomes for insiders, as it is only insiders who have moral claims on the state's decision. Similarly, the lending state's democratic choice about whether to accept a default and to agree an orderly reorganization of the borrower's debts, falls to be made in terms of its interests, and the claims of political morality made by its citizens. In a highly integrated international financial market characterized by ongoing interaction and cooperation, it may be rational to facilitate reorganization, but rationality here is the self-interested instrumental rationality of the lender, giving no independent weight to the interests of the borrower.

[105] In the pre-charter period, the prospect of gunboats in their harbors, foreign seizure of assets and revenues, and similar "super-sanctions" might deter borrowers. In the Eurozone context, unpredictable consequences for the stability of the defaulter's banking system and their continued membership in the currency union provide further disincentives.

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The third—Humean—approach does not so easily generate an account of the constituencies entitled to make choices affecting international debt and debt markets. That outsiders have claims of justice against states' institutions implies that national democratic choice alone cannot legitimize those institutions towards them.[106] The role of self-determination in this story, however, suggests national democracy should continue to play a central role. Perhaps the most plausible response is that decisions fall to be made by the individual polities concerned, but that they should make those decisions with due regard for the justice-claims of outsiders.[107] In the same way the Lockean sees the borrower's choice as constrained by the duty to repay, the Humean sees the lender as constrained from seeking to enforce their debt, or in appropriate circumstances from refusing to advance further loans.[108] This mismatch—between those making choices and those with claims on those choices—might lead us to seek institutional innovations that might improve the quality of such decisions, making them more likely accurately to track the reasons of justice that apply. Giving outsiders voice in the community's political process is one obvious suggestion. Another is to create impartial expert agencies, whether judicial or non-judicial, authorized to find the relevant economic facts, and perhaps to articulate the relevant duties of justice.[109] We might go further, advocating binding international legal obligations in this regard. But the obvious difficulties in specifying the exact content of those obligations, in a form susceptible to judicial application, and the substantial epistemic resources required to determine with any certainty whether and to what extent they arise in a particular case, might lead us away from that suggestion, particularly given its implications for the self-determination of creditor/market states. I do not claim to have good answers to these questions of institutional design. The foregoing discussion, however, should at least give the reader an idea of the kinds of considerations that should be relevant to it.

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[106] For a similar point, albeit invoking a different account of economic justice, *see* Mathias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law,* 20 INDIANA J. GLOBAL LEGAL STUD. 605 (2013). *Cf. generally* Matthias Goldmann & Silvia Steininger, *A Discourse Theoretical Approach to Sovereign Debt Restructuring: Towards a Democratic Financial Order*, in this issue.

[107] Incorporating such moral constraints on democratic choice is not a novel suggestion. *See, e.g.*, Jeremy Waldron, *Rights and Majorities: Rousseau Revisited,* 32 NOMOS: MAJORITIES MINORITIES 44 (1990); RAWLS, POLITICAL LIBERALISM, *supra* note 7, at 216.

[108] We might express the same idea by suggesting that decisions by national polities may be internationally legitimate, given available alternatives, without being internationally just. This problem of democratic mismatch is not limited to whether to facilitate default but also such questions as what conditions, as to domestic reforms, can appropriately be attached to bail-out lending.

[109] This raises similar problems of democratic legitimacy to judicial review under human rights treaties and domestic constitutions. That said, if we accept these latter practices, I see little reason in principle to exclude similar review against principles of global economic justice.

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H. Conclusion

I began with a puzzle and two questions. The puzzle was that the discourse of sovereign debt seemed to express a fundamentally different view about the structure of moral obligation in economic affairs to that found in liberal domestic polities. The first question was whether there were good principled explanations for this divergence. The second was whether we could construct an account of the morality of sovereign debt that was a better fit with the ways we think and talk about economic morality domestically. In Parts C and D, I answered the first question in the negative. In Parts E and F, I advanced an answer to the second question, deriving from the principles that I label Equality in Global Commerce, and emphasizing the relation between self-determination and economic advantage in the justification of international economic institutions. I argued that taking seriously our commitments in the domestic context required facilitating orderly defaults on unsustainable debts and more liberal bail-out lending, where this was necessary to vindicate the self-determination of borrowing countries. Finally, in Part G, I examined the different implications that the various approaches to international economic justice canvassed in earlier sections have for questions of democratic choice, including in particular who should decide the terms of any restructuring of sovereign debt. I contrasted the simplistic answers of the Lockean and the Hobbesian, with the more nuanced, and in consequence more institutionally challenging, implications of EGC.

Much more might be said about liberal justice and sovereign debt. For example, I have said nothing about historic injustices or non-democratic borrowing governments as alternative grounds for denying the moral force of international debt. These were prominent concerns in earlier debt crises, but they seem less relevant to contemporary problems in the Eurozone. More relevant for my purposes are questions about the forms that institutions might take to vindicate the demands of the Humean perspective, both as to substantive outcome and democratic control. It may be that these concrete questions of institutional design and political possibility are where the real challenge lies. But meeting that challenge at least requires identifying the kinds of demands we should make of those institutions. It is towards clarifying that question that this Article is offered.

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