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Rights, Reality, and Utopia

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INTRODUCTION

The topic of John Rawls and international law brings together two of the more hopeful developments of the past, benighted century. As witness this symposium, no modern philosopher has more powerfully advanced the idea of political justice, or done so with a greater global impact, than John Rawls.\(^1\) James Fleming nicely articulated the common wisdom in stating that Rawls's work "inspire[d] people to believe that we can reason and make arguments about justice rather than merely express our subjective opinions."\(^2\) Arguably, as Rawls does in thought, so too the modern international human rights movement does in action.

Out of the Holocaust came a revolution through which people rather than nation-states became the subject of international law, through which civil, political, social, and economic rights took their place alongside such traditional topics as fishing rights and diplomatic immunity, and through which abuse and privation in South Africa, Rhodesia, the Soviet Union, Northern Ireland, China, and the United States became the objects of legitimate global pressure. Thanks in no small part to this movement, our time has become, as Louis Henkin famously proclaimed, the Age of Rights.\(^3\)

It continues to puzzle, therefore, that Rawls and international human rights—two phenomena with such an apparent affinity—have had little to do with one another. In the main, the international human rights movement simply does not make much of Rawls, certainly not to the degree he is utilized in domestic discourse, both in

\(^{1}\) Steven J. Macedo, What Self-Governing Peoples Owe to One Another: Universalism, Diversity, and The Law of Peoples, 72 Fordham L. Rev. 1721, 1722 (2004) (commenting that Rawls is the most important liberal philosopher since John Stuart Mill).


the United States and elsewhere. In part the disassociation must have something to do with the human rights movement's de facto pragmatism. "International human rights," as Henkin observed, "derive from natural rights theories and systems, harking back through English, American, and French constitutionalism." But in part the gap between Rawls and international human rights has to do with Rawlsian thought itself. With signal exceptions, chief among them Thomas Pogge\(^4\) and Charles Beitz,\(^5\) Rawls's "domestic" theories had not been extended to the international arena in any robust way, including and especially by Rawls himself. More problematic still, when Rawls did turn to the topic late in his career, human rights veterans greeted the resulting *The Law of Peoples*\(^6\) mostly with respectful disappointment. Among the work's chief problems, as many in the human rights community saw it, was that Rawls had effectively premised his analysis on the very notions of national sovereignty that international human rights law by definition sought to erode.\(^7\)

All this was doubly puzzling given Rawls's self-proclaimed goals in turning to international law. In *The Law of Peoples*, Rawls states near the outset that "I begin and end with the idea of a realistic utopia."\(^8\) Rawls unpacks the trope, explaining that "political philosophy is realistically utopian when it extends what are ordinarily thought to be the limits of practicable political possibility and, in so doing, reconciles us to our political and social condition."\(^9\) Put another way, as is true of the best of political philosophy, Rawls hoped to provide a theory that would not simply justify the normatively attractive aspects of current practice, but point the way toward further practices to which we can aspire and have a plausible expectation of instituting. To paraphrase Robert Browning, the reach of any theory of international justice should (just) exceed our grasp, or what is a "realistic utopia" for?\(^10\) To the rapidly evolving yet under-theorized human rights movement, the promise of a theory that would consolidate near revolutionary breakthroughs and offer a basis for still further progress created high, but perhaps not unrealistic, expectations.

Assessment of *The Law of Peoples* in fairness begins with asking how well the theory that Rawls offers measures up against his own standard of presenting a realistic utopia. That task in turn requires far

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4. See id. at 6.
10. Id. at 11.
greater attention than has ordinarily been accorded to the second variable in the “Rawls and the Law” equation, here international human rights law. What counts as sufficiently “utopian” sounds primarily in political philosophy itself. What passes for “realistic,” however, cannot be gauged without some notion of how far, and how fast, principles of justice have already been translated into binding norms across international borders. By establishing both obligatory and aspirational norms through recognized systems of consent, international human rights law almost by definition marks the current “limits of practicable political possibility” beyond which a realistic utopia should extend its reach.

Measured against this standard—offering a “realistic utopia” with an eye toward international human rights law—The Law of Peoples fares better than its initial reception might suggest, yet at the end of the day proves to be inadequate nonetheless. The balance of this essay explains the paradox. Part I considers key elements of Rawls’s approach, both by Rawls himself and as enhanced by Steven Macedo. It argues that even though neither version adequately justifies premising transnational obligations upon an idea of “peoples” rather than people, Macedo’s concept of self-government presents at least a plausibly utopian justification, while his emphasis on the preconditions of self-government tracks current international human rights norms in strikingly realistic ways. Part II then considers why even this enhanced account of Rawlsian thought remains insufficient. Drawing upon the critiques offered by Seyla Benhabib and Thomas Pogge, this part contends that the claims of self-governing peoples should not outweigh the prior claims of individuals as a normative matter, and have already too greatly eroded as a descriptive point of international human rights. On both counts, I respectfully conclude, The Law of Peoples approach remains insufficiently utopian and inadequately realistic.

I. RAWLS REVIVIFIED?

A. Rawls, Foreign and Domestic

Rawls goes nowhere near so far internationally as he does domestically. The differences, moreover, become only more apparent

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12. International law conventionally includes norms, applicable to both nations and individuals, that range from “hard” law that is fully binding, such as treaties, Security Council resolutions under chapter VII of the United Nations Charter, or customary international law, to “soft” norms, that are hortatory but indicative of international consensus, such as General Assembly resolutions or UN declarations. Similarly, systems of consent range from ratification of treaties, to consistent practice out of a sense of obligation in the case of customary international law, to votes cast in the General Assembly. See Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987) [hereinafter Restatement III].
the greater the scrutiny. Among other things, critics immediately commented upon the thinner prescription for basic liberties in The Law of Peoples than in A Theory of Justice or Political Liberalism. As recently as this present symposium volume, Thomas Pogge has further pointed to the similarly thinner processes Rawls offers in the international arena, a thinness that itself works to a comparatively weaker conception of transnational justice.

But by far the most salient difference between Rawls at home and abroad, and from which the other divergences directly and indirectly stem, follow from his starting premise that a theory of domestic justice be based upon "people," or individuals, but that a theory of international justice proceeds from a concept of "peoples." Seyla Benhabib, also in this volume, provides a fresh critique of this premise by focusing on Rawls's affirmative case for this move that implicitly arises from his extended description of what constitutes a "people." Yet also worth considering is the negative case that The Law of Peoples makes against commencing with an original position comprised of individuals throughout the world just as the earlier incarnation of the thought experiment looked to people within a particular society.

Rawls's case against commencing with individuals in the first instance barely addresses utopian concerns because he barely mounted a case. One might well have expected otherwise. As Rawls himself acknowledged, thinkers including Pogge, Beitz, Brian Barty and David Richards "[a]ll seem to have taken th[e] path" preferring people to peoples. Whatever its eclectic foundations, international human rights law has made individuals its centerpiece for fifty years. Yet The Law of Peoples rushes past the question of "why not individuals?" and instead comes at the matter from nearly the other end of the spectrum with what may be an ultimately unsuccessful attempt to answer the query "why not nation-states?"

Altogether, the case against starting with individuals consists of a footnote that references a paragraph, which in turn largely alludes to a discussion of foreign policy that is at best oblique to the issue. The footnote, which comes as Rawls first set the concept of peoples to work, squarely flags the issue, asking: "Why does The Law of Peoples use an original position at the second level that is fair to peoples and not to individual persons?" For the principal explanation, Rawls

15. Thomas Pogge, The Incoherence Between Rawls's Theories of Justice, 72 Fordham L. Rev. 1739, 1739-40 (2004); see infra Part II.C.
18. Id. at 17 n.9.
directs the reader well ahead to a general comments section. Here Rawls again squarely presents the question, only to answer it with a reference and summary of his argument rejecting a liberal people adopting a foreign policy to pressure non-liberal yet decent societies in a liberal direction.9 Such a policy should be rejected, Rawls argues, "since it amounts to saying that all persons [worldwide] are to have the equal liberal rights of citizens in a constitutional democracy," and because "this foreign policy simply assumes that only a liberal democratic society can be acceptable."20 Rawls then concludes:

Without trying to work out a reasonable liberal Law of Peoples, we cannot know that nonliberal societies cannot be acceptable. The possibility of a global original position does not show that, and we can't merely assume it.21

Yet The Law of Peoples appears open to the very criticism that it advances. According to Rawls, the mere possibility of a global original position does not provide a sufficient basis either to know or to assume that illiberal societies cannot be acceptable. Absent such a basis, he argues, we should attempt to work out a law of peoples in order to determine whether such societies can pass muster. But this logic cuts equally in the other direction. The mere possibility of a law of peoples does not provide a sufficient basis either to know or assume that illiberal societies can be acceptable. Absent such a basis, why not attempt a theory premised upon individuals? The problem with either stance is that it begs the question of what counts as acceptable, because this is precisely what a liberal theory of international law is supposed to provide. Starting along one path may produce standards that indicate certain societies are acceptable; starting down the other may produce standards that indicate the opposite. The divergent conclusions, however, tell us nothing about which path to take in the first place. Without more, Rawls no more justifies his denial of a global original position than, on his account, its supporters fail to account for their advocacy of it. And if indeed there is no basis to be offered for taking the first step in one direction rather than the other, at just this point the utopian goal of extending the limits of practical possibility suggests a tiebreaker pointing to the option that promises the more robust conception of justice.

In fairness, Rawls does gesture to a tiebreaker, though one that sounds in the "realistic" more than the "utopian" and invites its own set of questions. Having rejected a global original position based on individuals, Rawls then asserts that, "The Law of Peoples proceeds from the international political world as we see it," asserting further that doing so ultimately permits us to examine questions of

19. See id. at 60-62.
20. Id. at 82-83.
21. Id. at 83.
international justice in "a reasonably realistic way." Steven Macedo therefore rightly worries that *The Law of Peoples* can be seen as "held hostage to the brute facts of global diversity" of a world that is simply not ready for too robust a view of transnational rights.

This concern only grows given Rawls's understanding of that reality. Throughout, the book operates almost entirely within the classic post-Westphalian model of international law as it prevailed in the middle of the last century. On this conception, international law—"the law of nations"—comprised the norms that regulated the conduct of equal and sovereign nation-states as between one another, all but to the exclusion of any rules concerning how nations dealt with individuals within their borders. Rawls reflects this understanding most obviously by devoting an entire chapter to answer the question "why peoples and not states," suggesting that even a nominal departure from the nation-state model requires elaborate justification. Not surprisingly, one of the only international law treatises cited is John Brierly's *The Law of Nations*, the classic mid-century exposition of the classic view.

Conversely, *The Law of Peoples* at best barely acknowledges the "revolution" in international law wrought by the emergence of the international human rights movement in the wake of the Holocaust and related atrocities. As noted, the work lacks a considered treatment addressing "why peoples and not individuals," still less one comparable to the chapter justifying the apparent move away from nation-states. And while Rawls does acknowledge the originally aspirational Universal Declaration of Human Rights, he barely acknowledges the thick web of binding treaties, covenants, conventions, customary international law, humanitarian law, and enforcement mechanisms that for half a century have eroded the "law of nations" model.

In the end, or really, still at the beginning, Rawls's assumptions about the brute durability of the nation-state/national peoples model

22. Id.
27. Universal Declaration of Human Rights pmbl. (1948), reprinted in Blackstone’s *International Human Rights Documents* 22 (P.R. Ghandhi ed., 3d ed. 2002) [hereinafter Blackstone’s] (stating that the declaration was meant as a "common standard of achievement" toward which nations were to "strive").
may or may not be sound. Yet, as with his decision to reject a global original position based upon individuals, his implicit reliance on the world's current harsh realities remain assumptions nonetheless.

B. Macedo, Self-Government, and the "Trojan Horse"

Though he might reject the observation, Steven Macedo defends Rawls better than does Rawls. At the very threshold step where *The Law of Peoples* is silent, Macedo offers an affirmative justification for proceeding by way of peoples rather than individuals. As he puts it, "I offer a moral defense for Rawls's conditional accommodation of diversity among peoples: a defense that rests not on the fact of global diversity but on the moral significance of collective self-governance."29 Conversely, and perhaps more directly, the concept of self-governing peoples serves to account for "[w]hy [there is] no analog of the domestic principle of justice that calls for the 'basic structure' of international affairs to be arranged such that inequalities are to the advantage of the least well-off [as individuals]."30

The moral significance of self-governance should not be mysterious, Macedo elaborates, for reasons that sound in "common sense and practice"—if not utopianism and reality.31 In moral terms, citizens of self-governing nations "have powerful obligations of mutual concern and respect to one another because the[ir common] political [and legal] institutions . . . determine patterns of opportunities and rewards for all."32 Practically, such mutual obligations simply do not currently hold true with regard to international society; and, at the very least, are a long way off.

Self-governance on the national level, then, affords the missing reason for proceeding with peoples rather than individuals. Some mystery lingers nonetheless. Macedo could say more about exactly why mutual obligations arise "because" of self-governance. This conclusion appears to be a subset of, in Charles Beitz's words, "moral ties [to those] with whom we share membership in a cooperative scheme."33 That said, Macedo leaves no mystery regarding the mainly practical reasons for privileging social cooperation on the formal, national level. Here the key argument runs that the sovereign nation-

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29. Macedo, *supra* note 1, at 1723 (emphasis omitted).
30. *Id.* at 1727.
31. *Id.* at 1729.
32. *Id.* at 1730 (emphasis added).
33. Beitz, *supra* note 6, at 141. Beitz earlier explains:

> [P]rinciples of justice determine a fair distribution of the benefits and burdens produced by 'social cooperation.' If there were no such 'cooperation,' there would be no occasion for justice, since there would be no joint product with respect to which conflicting claims might be pressed, nor would there be any common institutions (e.g., enforceable property rights) to which principles could apply.

*Id.* at 131.
state remains different, indeed unique. Only in nation-states have a
people ordinarily formed a union understood as perpetual, asserted
permanent control over a given territory, established a constitution
and a shared set of fundamental values, set up political institutions
empowered to make binding law, protect fundamental rights, and
maintain a monopoly over the legitimate use of force—all this and
much more. However much national sovereignty may have eroded in
recent decades, the emergence of meaningful world self-governance
remains remote.34

At least two consequences follow, one well-known and the other
underappreciated. The first determines the threshold question of
whether to build a theory of transnational justice upon a foundation of
individuals rather than peoples. Given that an obligation arises from
the capacity for cooperation, and that the nation-state remains the
primary and qualitatively unique area for social cooperation, it follows
that a theory of justice governs individuals within a nation-state, and
nation-states relations with one another. Here the principal corollary,
which Macedo endorses, calls for a "duty of assistance" to
"burdened societies," but "no principle of distributive justice among
decent peoples,"35 nor anything like Rawls's "difference principle,"
according to which systemic sources of inequalities need to be justified
to the least well off.36

Yet Macedo's reliance on self-governance also prompts him to
emphasize, perhaps more clearly than Rawls, that a people qualifies as
the basic building block for transnational analysis only where self-
governance is genuine. As he puts it, "Decent and well-ordered
peoples qualify for full respect when they are genuinely collectively
self-governing. Their governing structures must provide inclusion and
voice for dissenters, minorities, and the most disadvantaged, and those
who wield power must be genuinely responsive to their voices."37 On
this view, a decent society may institute religious restrictions for
office, retain formal hierarchies, and eschew liberal democracy. They
must, nonetheless, abide by a fairly thick array of human rights
commonly classed as "negative," "first-generation," or "civil and
political."38 These rights include: the right to life, including
subsistence; liberty of religion and thought; personal property; formal
equality before the law; the rule of law; rights of dissent; and genuine,
transparent consultation of all groups within the society.

All this suggests that the "law of peoples," especially as enhanced
by Macedo, may counterintuitively amount to something of a Trojan
Horse. Though Macedo does not develop the connection, his reliance

34. Macedo, supra note 1, at 1729.
35. Id. at 1725.
36. Id. at 1722.
37. Id. at 1723.
on self-governance helps account for Rawls's endorsement of traditional civil and political rights. While some may have independent purchase rights—such as freedom of thought—rights such as adequate consultation, dissent, and rule of law, among others, can be understood as predicates for any meaningful form of self-governance.39 Especially when grounded in this way, Macedo acknowledges that such first-generation human rights present a stringent hurdle however much human rights advocates may view them as inadequate. Following Rawls, Macedo points to the idealized Muslim state of "Kazanistan," as the paradigmatic decent yet not liberal society. A not unfair inference may be that in part the "law of peoples" project rejected proceeding via individuals as a way to reach out to potential candidates in the Muslim world and among non-Western nations more generally. If so, a signal irony of the stringency that Macedo notes is that it remains an open question whether even the most liberalizing Muslim state would qualify under the standards the law of peoples sets forth.

Macedo's contribution may well put "the law of peoples" in its best possible light. From the utopian perspective, self-governance not only furnishes a reason to maintain a post-Westphalian approach, but also a reason with genuine moral weight. Yet Macedo's defense of Rawls fares even better with an eye toward global reality, though not for the reasons that Macedo himself specifies. His account privileging national sovereignty is ultimately unconvincing.40 Macedo's account nonetheless tracks the current state of international human rights law surprisingly well, especially given his implicit explanation of the extent to which Rawls foregrounds one set of rights even as his theory dismisses others.

An enhanced law of peoples mirrors current international human rights law first in its emphasis on civil and political rights. For better or worse, human rights law comes closest to realizing its potential in safeguarding rights in the kinds of negative liberties often associated, directly or indirectly, as the predicates for meaningful self-government. The usual list overlaps neatly with the rights that Rawls and Macedo identify: life, freedom from torture, equality before the law, privacy, personal property, freedom of thought, belief, religion, and expression, and some form of access to government, among others.41

40. See infra Part II.A.
41. Rawls, The Law of Peoples, supra note 7, at 79; Macedo, supra note 1, at 1733. Rawls, as noted, specifically refers to the civil and political rights portion of the Universal Declaration to describe the right to which he would hold decent societies accountable. Rawls, The Law of Peoples, supra note 7, at 80 n.23.
International law favors these rights, moreover, in at least two senses. First, they are "hard law." Not only are they safeguarded by a web of multilateral treaties, those treaties typically assert that the ratifying state "shall" both observe and promote the given rights. Typical here is Article 2 of the International Covenant on Civil and Political Rights, which provides that: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . ." And even when not recognized in binding treaties, the shorter list of liberties well-settled in customary international law and jus cogens are themselves all core negative rights. Second, and in part as a result, the international legal system's most successful enforcement mechanisms have been those charged with the implementation of traditional first-generation liberties. Representative here is the International Covenant on Civil and Political Rights' (ICCPR) Human Rights Committee, which not only clarifies general standards, but reviews individual applications. Better still is the European Court of Human Rights, a body commonly viewed as the most effective transnational human rights tribunal and which, perhaps not coincidentally, enforces treaty obligations primarily civil and political in character. The comparative efficacy of such bodies in turn accounts for part of the emphasis that non-governmental organizations and international civil society tend to concentrate on first-generation rights, arguably to a fault.

Contrast this picture with the conventional understanding of redistributive rights, otherwise known as positive, second-generation, social and economic rights. To begin with, they simply do not exist, at least not as a transnational matter. Instead, to the extent that the international legal system does recognize rights to an adequate standard of living, social security, education, employment, and health care, it does so only within the nations that ratify the relevant treaties, not between them. Even then, the obligations that a signatory state undertakes are progressive and incremental. In these regards the approach developed in the International Covenant on Social, Economic and Cultural Rights has yet to be extended. As the classic Article 2 formulation sets out:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization
of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.\textsuperscript{45}

Not surprisingly, both the enforcement mechanisms, as well as Non-Governmental Organization (NGO) scrutiny, remain notoriously weak, even when compared to civil and political rights implementation at its most problematic.

In these ways, Macedo’s law of peoples supplements Rawls’s \textit{The Law of Peoples}, and better approximates the goal of realistic utopia. Self-governance offers an affirmative justification of retaining a foundation of nation-states. The resulting emphasis on civil and political liberties over social and economic rights reflects the reality of contemporary international human rights law.

\section*{II. \textbf{INSUFFICIENTLY UTOPIAN, INADEQUATELY REALISTIC}}

\subsection*{A. The Primacy of People}

Though Macedo’s supplementation is better than Rawls’s theory, it is not sufficient. More to the point, better does not surpass sufficient in the sense that a realistic utopia should offer a goal that lies within our reach, yet for the moment exceeds our grasp. On this, Rawls’s own yardstick, the “law of peoples” falls short even as enriched by Macedo.

Consider first the central matter of commencing with peoples rather than with people. As noted, Macedo makes explicit a moral principle that Rawls at best assumes in extolling national self-governance. This claim in turn rests on the premise that a genuinely self-governing people represents a special case of the larger moral principle that social obligation flows from social cooperation. Yet however utopian such a foundation may be, it hardly seems to be the only one. At the most fundamental level one might ask, with Beitz, whether there are other bases for social obligation. As Richard Rorty has suggested, the basic capacity for pain and sympathy common to individuals regardless of borders points to a basis of obligation that has little to do with national sovereignty.\textsuperscript{46} At the start of the day, the stereotypical human rights advocate acts first out of a sense of duty to acknowledge the afflicted, no matter how remote or quixotic the task of making a difference might initially seem. To the extent this sort of impulse accounts for moral obligation, there exists a fundamental alternative on which to build a theory of transnational justice—an alternative that

\begin{footnotesize}
\textsuperscript{45} International Covenant on Social, Economic and Cultural Rights art. 2 (1966), reprinted in Blackstone’s, \textit{supra} note 27, at 82.

\textsuperscript{46} See Richard Rorty, \textit{Human Rights, Rationality, and Sentimentality}, in \textit{On Human Rights} 111-34 (Stephen Shute & Susan Hurley eds., 1993); Beitz, \textit{supra} note 6, at 141 (“It is possible that other sorts of considerations might come into the justification of moral principles.”).
\end{footnotesize}
cuts dramatically in favor of looking to mutually sentient persons rather than self-governing nations.

Yet the "law of peoples" faces more evident problems that sound in current, fast-evolving realities. The developments speak directly to the claim that sovereign nations are so distinct a form of social organization that they differ in kind from all others, at least for the purpose of underpinning a law of peoples. Macedo rightly implies that the human rights movement tends to overemphasize the extent to which the primacy of national sovereignty has been eroded. That said, the process advances nonetheless, undermining any assertion on the singularity of self-governing nations as both over-inclusive and under-inclusive.

Singling out the nation-state is over-inclusive in the sense that it subsumes smaller units of self-government within a country's borders.\(^47\) Any number of associations entail social cooperation, or at least the possibility of social cooperation, and with it the corollary of obligation. The family, the co-op board, the school board, the congregation, the professional association, not to mention city, county, and state government, are just the more obvious. A number of these, particularly state or provincial governments in devolved federal systems, can make legitimate claims to classic aspects of "sovereignty," such as monopoly power over force or the authority to tax and redistribute wealth.\(^48\) Nor are self-governing sub-units merely endangered curiosities, already having eroded in authority just as nation-states themselves have begun to face the same process. As scholars such as Peter Spiro have argued, national sovereignty has eroded not just in the face of transnational organization, but also because local units of self-government have attained renewed importance both domestically and internationally.\(^49\)

More to the point, Rawls, Macedo, and the "law of peoples," become ever more under-inclusive precisely because they refuse to accord sufficient weight to transnational forms of self-governance eroding national sovereignty from above. This process has proceeded far enough along not only to have become a commonplace, but to prompt a backlash on the streets from the left, and more sedate

\(^{47}\) This is an admittedly quirky use of the term "over-inclusive." But a more literal application if anything challenges the presumption in favor of self-governing nations to the extent that a large number are not self-governing. Despite Rawls's preconditions, this seems to make it an odd unit to presume.


objections from the right. At the U.N. level, chapter VII of the Charter can and has mandated the use of military and economic coercion. Just below that, global multilateral treaty systems have what in many regards amounts to an effective power to compel: the World Trade Organization (WTO) most obviously, but also the International Monetary Fund (IMF), and the International Criminal Court, among others. Even bodies such as the Human Rights Committee under the ICCPR can wield significant persuasive influence on states, both through the review of state reports and individual applications. Add to these formal mechanisms the thick web of organizations and NGOs that constitute what can now fairly be termed international civil society.

Common to these and numerous, less glamorous bodies and arrangements is the relocation of formal governance and informal influence from the national to the transnational and global planes. Among other consequences, this extension of social cooperation beyond national borders undermines any theory that would privilege those borders as analytically unique. The foregoing, to the contrary, suggests that no unit, not even the nation-state, should be so absolutely privileged as to constitute the foundation for a global theory of justice that rests on the relationship between cooperation and obligation. Because, increasingly, mechanisms for cooperation are evolving in transnational fashion, it follows that the most promising way forward is to begin with individuals posited in a global original position. This approach, moreover, seems doubly appropriate as such a device could, without inordinate difficulty, call upon individuals behind the veil of ignorance to think in terms of at what level—local, state, national, regional, international—to assign what authority and in what degree.

To this tack comes an objection, here advanced by Macedo, that reports of the diminution of national sovereignty are premature. Ironically, the ultimate response comes from Rawls himself in articulating his initial standard of theoretical review. Assuming the relocation of power to both sub-units and especially “over-units,” the “law of peoples” will look less and less realistic over time. That consequence, in turn, makes the theory here and now appear not to

52. International Covenant on Civil and Political Rights art. 41 (1966) reprinted in Blackstone’s, supra note 27, at 73-74; see also Optional Protocol to the Covenant on Civil and Political Rights arts. 1-6 (1966) reprinted in Blackstone’s, supra note 27, at 77-78.
53. Macedo, supra note 1, at 1729.
do much more than extend the reach of principles of justice to those already well within our grasp.

B. The Inadequacy of Peoples

Seyla Benhabib suggests that the problems with "peoples" do not end here.\(^4\) Whereas *The Law of Peoples* most obviously may be faulted for failing to make a case against starting with individuals, Benhabib focuses on the affirmative case it makes for starting with peoples. In this regard the justifications offered by Rawls differ from the self-government argument put forward by Macedo, and with good reason. As noted, Macedo offers self-governance precisely in response to the question of why peoples rather than individuals. Rawls himself, however, delineates the virtues of peoples to address the more dated question of why peoples rather than nations. Both Benhabib and Macedo treat Rawls's efforts on this point as ultimately unsuccessful. The question, however, almost certainly led Rawls away from the self-government justification—which nations and his version of peoples implicitly share—to a people's more mystical attributes. These attributes, originally offered in distinction to nations, Benhabib takes also as Rawls's implicit justification to set aside individuals. This move seems entirely fair, especially given *The Law of Peoples*' failure to offer a case for peoples in relation to individuals. In Benhabib's hands, it also makes Rawls's affirmative account of peoples fair game.

For a liberal people in particular, this affirmative case emphasizes three features: "[A] reasonabl[e] just constitutional democratic government that serves [a people's] fundamental interests; citizens united by what Mill called 'common sympathies'; and finally, a moral nature."\(^5\) As Benhabib points out, this emphasis on commonality, both in terms of sympathies and "a moral nature," do not require but help explain Rawls's earlier postulate in *Political Liberalism* that "a democratic society, like any political society, is to be viewed as a complete and closed social system" entered only by birth and exited only by death.\(^6\)

These self-contained foundations result in restrictive legal principles. As Benhabib emphasizes, Rawls would afford a people extensive powers to restrict immigration. Such authority would be conditioned on, but more apparently follow from, the need to protect precisely the commonalities that set a people apart, the concern for scarce resources, and be offset only by the "law of peoples[']" somewhat cryptic "duties of well-ordered societies to those societies

\(^5\) Rawls, *The Law of Peoples* *supra* note 7, at 23.
burdened by unfavorable conditions."  As Benhabib does not emphasize, no less striking are related rights that Rawls does not address at all, including the right to emigrate, the right to seek asylum, and the right to non-refoulement. None of these presumably have a place in the "law of peoples," nor given Rawls's premises, is there much reason to suppose that they would.

While Benhabib generally places The Law of Peoples assertions in their worst possible light, her critique hits home nonetheless. Indeed given Rawls's realistic utopian goals, that his claims can plausibly be placed in such light may effectively be taken as one of her points. More explicitly, Benhabib as an initial matter also faults Rawls for mixing the real with the utopian in convoluted ways. As she puts it, "difficulty arises from Rawls's stringing together normative stipulations with sociological characteristics," a conflation that "creates a series of problems that reverberate throughout the subsequent argument." Putting this criticism aside, Benhabib finds more than enough problems when considering the normative and sociological independently.

Benhabib's most telling criticisms go to Rawls's stipulations that a people reflect common sympathies and a moral nature, concepts which she collapses without material harm to either one. This emphasis on homogeneity, she notes, has the flavor of nineteenth century nationalism in much the same way as Rawls's affinity for the "law of nations" framework. Several unfortunate features result. Most importantly, the commonality requirement masks internal power struggles along lines of class, race, gender, ethnicity, and religion. Overlooked as well is the predicament of the losers in such struggles, who contested the society's dominant ethos. Still another fundamental problem involves Rawls's other precondition, the contradiction between commonality and constitutional democracy—or for decent peoples, self-governance. Here, as Benhabib points out, liberal and democratic norms depend on exactly the type of contention and disunity that the commonality requirement discourages.

With democracy, however, Benhabib's critique runs into problems of its own. Initially, she rightly points out that Rawls's precondition of constitutional self-government in effect undermines his effort to distinguish peoples from nations, praising him nonetheless for making national sovereignty contingent on democracy, or at least adequate consultation. Benhabib even so views this laudable effort as doomed to failure because the acceptance of national sovereignty at the end of the day means democratic preconditions inevitably must bow to the

59. Id. at 13.
more entrenched principle of territorial control. Why this should be, however, is unclear. Nothing conceptually forecloses the idea of states that control territory but which are illegitimate. Thanks in part to the human rights movement, moreover, recent history confirms this theoretical possibility, as witness rogue regimes such as the Taliban or the Republika Srpska.

Benhabib's principal critique, however, remains that Rawls's requirements of commonality ultimately undermine the requirement for constitutional self-government. Yet, just as insisting upon homogeneity can undo democracy, so too can requiring democracy, or a colorable stand-in, undo commonality. At just this point, Macedo's elaboration of self-government and all the civil and political rights that this entails provides a powerful reason to think that Rawls's conception of common sympathies and a moral nature are too thin to generate the problems about which Benhabib worries. To this, however, Benhabib would have several responses, some already seen elsewhere. A world of more pluralistic, robustly self-governing peoples of this sort still would have very little to say about cross-border social and economic obligations. It also would do little to advance theory beyond current realities. The clincher, however, must be the closed borders that are at the center of Benhabib's project. That relatively closed borders appear as a corollary to Rawls's definition of a people suggests that the virtues of commonality trump those of self-government when these conflict. Put another way, indifference to migration demonstrates that "the law of peoples" errs on the side of too thick a conception of commonality, and too thin a vision of meaningful self-government.

For all this, Benhabib takes The Law of Peoples to task even more pointedly on sociological grounds. At numerous points Benhabib rings changes on the stark theme that Rawls's vision of closed and complete societies simply has no grounding in reality. Cross-border migration has been a central feature of human history, in part, because people leave one society and adopt another precisely to further their conception of the good. Conversely, societies based upon "common sympathies" cut across membership in a geographic people, including churches, professions, and unions. Here Benhabib might also have pointed out that modern international civil society, including especially the international human rights movement, provides a signal example. More specifically, Benhabib demonstrates that Rawls's views on the effects of immigration on a society's common values is woefully one-sided. For every new group that may destabilize a society's common values—bracketing whether that is a bad thing in itself—others come in and embrace, enrich, and

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60. Id. at 7-8.
strengthen those values. Here, too, Benhabib might have added the enormous debate concerning whether immigration in material terms likewise drains a society's resources or instead replenishes them.

One additional, and large, reality check supporting Benhabib's critique comes from international law. Far more than the ostensibly utopian "law of peoples," human rights standards have long addressed aspects of transnational migration. Among other things, the Universal Declaration of Human Rights proclaims that "[e]veryone has the right to leave any country, including his own," that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution," and that "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

More concretely, binding treaties have implemented at least some of the Declaration's aspirations. The Convention Relating to the Status of Refugees ("Refugee Convention"), in particular, defines who shall qualify for political asylum and enjoins ratifying states to accord consequent protections to bona fide applicants. Likewise, the Refugee Convention further codifies the customary international law principle of non-refoulement, whereby a nation to which a person has fled from persecution may not under any circumstances return that person to the country from which he or she has escaped. Ratifying nations such as the United States, moreover, have ordinarily attempted to implement the resulting obligations to realize their rights in domestic law, at least on paper. This is not to say that the reality falls well short of the ideal, especially post 9/11. It is to say, however, that the existing international standards with regard to certain aspects of cross-border movement go beyond the theoretical goals set out in The Law of Peoples.

Benhabib herself alludes to the Refugee Convention, but as a theorist she brings things full circle to political philosophy with an appeal to Kant. As she points out, Kant—the father of modern "cosmopolitan justice" among other things—sketched aspects of migration rights in his overall attempt to balance state sovereignty and obligations to which states are accountable. From this, Benhabib notes, specifically springs a "temporary right of sojourn"

61. Id. at 13.
62. Universal Declaration of Human Rights art. 13(2) (1948), reprinted in Blackstone's, supra note 27, at 23.
63. Id. art. 14(1).
64. Id. art. 15(2).
66. Id. art. 33(1).
68. Id.
69. Id. at 28.
(Besuchsrecht) that approximates the principles of non-refoulement.\(^{70}\) In addition follows a related right of hospitality (Wirtbarkeit), which means "the right not to be treated as an enemy in the land of another," which anticipates the various duties on the fair treatment of asylees under the Refugee Convention.\(^{71}\) That said, Kant's proscriptions do remain partial and tentative. Kant does, nonetheless, go further than Rawls. Though *The Law of Peoples* does follow "Kant's legacy" insofar as it conditions recognition of a people's sovereignty on human rights and non-belligerence, "the more robust Kantian vision of cosmopolitan justice which regards individuals as moral agents in the international area to whom states owe obligations of justice, and in the first place the obligation to respect cross-border movements, is absent from Rawls's vision."\(^{72}\) Through her "humble" project, Benhabib has thus shown *The Law of Peoples* to appear dated in its own time, after the post-Holocaust erosion of sovereignty was well underway. She has also suggested additional ways in which its framework was not sufficiently utopian, if not realistic, when the "law of nations" was at its height.

### C. Problems of Process

However much may be said on either side, the threshold people-versus-peoples problem hardly presents the only question. Thomas Pogge here moves beyond the initial debate to consider what he views as the procedural asymmetries between Rawls's domestic and transnational theories.\(^{73}\) These asymmetries Pogge deems both understudied and even more important than Rawls's differential treatment, foreign and domestic, of individuals.\(^{74}\) Such an assessment is striking coming from someone acknowledged, by no less than Benhabib and Rawls himself, as a founder of modern cosmopolitan justice theory and so a more genuine claimant to Kant's legacy. This is not to say Pogge resists noting his previous criticisms of the subordination of individuals that *The Law of Peoples* premises.\(^{75}\) Here, however, Pogge turns his attention to what he argues is the next misstep.

For Pogge, that misstep lies in forsaking the domestic theory's "three-tiered and institutional" procedures for the international frameworks "two tiered and interactional" prescription.\(^{76}\) In Rawls's domestic vision: (1) parties in the original position (2) select public criterion of the two basic principles of social justice, which (3) informs

\(^{70}\) *Id.* at 27.

\(^{71}\) *Id.*

\(^{72}\) *Id.* at 31-32.

\(^{73}\) Pogge, *supra* note 15, at 1745-51.

\(^{74}\) *Id.*

\(^{75}\) *Id.* at 1745.

\(^{76}\) *Id.*
selection of actual basic structures in specific empirical contexts. By contrast, his international theory calls for (1) parties in the original position who (2) select the eight specific “laws of peoples.” As Pogge notes, the most obvious institutional consequence lies in the great flexibility that the domestic scheme offers. There, citizens may respond to empirical changes by reorganizing basic structures and institutions to maintain fidelity to such basic commitments as the difference principle. The international “two-layer construction,” he points out, “provides no such flexibility.”

Not without some bows to global reality, Pogge questions the likely substantive consequences of the resulting global “utopia” for the very reasons that Rawls sought to head them off on the domestic front. Lack of institutional flexibility, for example, increases the possibility that parents will unjustly pass along the costs of their failure to save to children in Rawls’s international framework than in his domestic one. But by far the most troubling consequence that Pogge highlights arises from the unequal bargaining position that countries will inevitably have in directly working out transnational rules. As Pogge remarks, Rawls rejects unmediated bargaining in the domestic case unless the rules and institutions of the game prevent oligopoly and insure some degree of fairness. Thanks to the two-tiered process, the possibility of such protections does not obtain in the international context. Predictably, rich countries will get richer without benefit to poor nations, the poor will become more corrupt, and their domestic governments will become less representative.

Moving from the ideal—or more accurately, the probable non-ideal—to the real, the stark realities of the “actual world” dramatically confirm Pogge’s predictions. As he notes, under one-fifth of the globe lives in affluent societies, while the rest make do in poor ones. These affluent societies control eighty-two percent of the global product and have used their bargaining power to skew international institutions and rules that do exist in their favor. Not surprisingly, the global income gap has increased. While just a bare, initial sketch of the necessary empirical analysis, these figures further work to belie the assumptions that lead Rawls to be blind to such inequalities. Poor domestic governance alone would not seem to

77. Id.
78. Id.
79. Id.
80. Id.
81. Id. at 1746.
82. Id.
83. Id.
84. Id. at 1750.
85. Id.
86. Id.
87. Id.
88. Id.
account for them; still less would the idea that outside factors play no role.

In process as in substance, international law provides a further reality check that goes considerably beyond The Law of Peoples. Procedurally, the erosion of national sovereignty since the Second World War has to a significant extent already yielded just the missing "third-tier" on which Pogge focuses.

Here, consider only human rights law, the area in which sovereignty is strongest. Virtually every multilateral treaty that deals with the subject, including the U.N. Charter, creates a transnational body meant to be charged with implementing the standards the parent treaties set out amidst changing circumstances in the real world. Despite important differences, human rights bodies that fit this bill to a greater or lesser extent include: the Human Rights Commission under the U.N. Charter, the Human Rights Committee under the ICCPR, and the Committee on Social Economic and Cultural Rights under the ICESCR among others. Add to these global bodies more effective regional institutions such as the European Court of Human Rights and the Inter-American Court and Commission on Human Rights. Each of these brings together individuals from a range of different nations for fixed terms, usually sitting in their capacity as individuals. Again to varying degrees, they also fulfill the role of the third tier in at least two respects. First, they apply the usually vague standards, which nations have already agreed upon directly in a context-specific manner through the review of periodic country reports and through review of specific claims that the treaties have been violated. Second, they clarify, adapt, and even extend these standards through the mechanism of general comments.

Beyond human rights, moreover, the account becomes even thicker. The WTO, North American Free Trade Alliance, the IMF, and international arbitration agreements all establish institutional players that replicate their human rights counterparts. The main difference is that the bodies set up in these areas usually have far more clout, formally and informally, than their human rights cousins. As Laurence Helfer has pointed out, the global landscape is dense with

89. International Covenant on Civil and Political Rights arts. 28-45 (1966), reprinted in Blackstone's, supra note 27, at 70-75.
overlapping and competing “regimes” that possess the qualities of Pogge’s missing tier.93

Whatever their current deficiencies, these transnational institutions provide powerful support for Pogge’s critique. Their emergence demonstrates that some version of the missing tier is actually feasible without amounting to a straw man of world government. A fortiori, their existence refutes the almost anti-utopian claim that well-ordered peoples would see no reason to depart from the principle of sovereign equality or to propose alternatives. To the extent that, say, the ICCPR Human Rights Committee relocates national sovereignty by legitimately considering a particular nation’s domestic human rights record, an alternative is already appearing.

That said, utopia—or at least the missing tier—has not realistically arrived quite yet. In one sense, the foregoing array of transnational bodies challenges Pogge’s critique precisely because of their vulnerability to capture by rich and powerful nations. As Pogge himself stresses, this problem has been especially pronounced in areas outside human rights narrowly defined, especially trade, finance, copyright and the like.94 In these and related contexts, a formal principle of sovereign equality paradoxically can work to safeguard the majority of poor and developing societies on the basis of their numbers. Simply put, any transnational rulemaking authority premised on majority rule of its sovereign members can theoretically better resist the influence of a minority of affluent ones. Wealthy nations realize as much, privileging their position with such devices as the veto in the Security Council or weighted voting in the WTO. It was to counter imperial power that the great founding jurists of the “law of nations” extolled sovereign equality in the first place.95

Pogge’s larger point prevails nonetheless. If third-tier transnational bodies behave unjustly in certain contexts, the trick would be to respond accordingly and reform them and related structural rules. Sometimes that might entail paradoxical approaches such as retaining aspects of sovereign equality. More often the task may require relocating national sovereignty still further in ways that better take into account the desires and interests of individuals regardless of by which borders they find themselves encompassed. Either way, the three-layer process provides the opportunity to respond with just the flexibility that the two-layer model lacks. The Law of Peoples

94. Pogge, supra note 15, at 1750.
notwithstanding, the thicker process predictably facilitates the pursuit of justice in theory. As international law and relations indicate, the world has already been groping toward such processes in fact.

CONCLUSION

From the viewpoint of a human rights advocate, this most recent colloquy on *The Law of Peoples* confirms that Rawls’s foray into international justice deserves its disappointing reputation. Even when fortified, the theory at the end of the day remains too tentative in its conception of what may be, and too conservative in its assessment of what might be.

Yet the current exchange also offers reasons to temper this judgment as well. With a little help, the “law of peoples” approach proves to be surprisingly utopian and realistic with regard to the most traditional set of international human rights. And Rawls himself, in his justly celebrated domestic theory, ironically provides many of the most powerful bases for critiquing his international effort. In these ways Rawls offers ways of thinking that transcend any particular work and that assist us in extending our reach.