BETWEEN *COSMOPOLIS* AND COMMUNITY: THE EMERGING BASIS FOR GLOBAL JUSTICE

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"Ubi societas, ibi ius."[1]

"Our post-war institutions were built for an inter-national world, but we now live in a global world."[2]

"[T]here is nothing unjust about international inequalities as such. Such inequalities are a natural feature of a world in which more-or-less independent political communities pursue the aims and purposes of their members, including local conceptions of distributive justice."[3]

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1. "Where there is society, there are laws." Variously attributed to Cicero, Ulpian, Hugo Grotius, or Baron Heinrich von Cocceji. The phrase derives from a philosophical argument, inspired by Aristotle's *Nicomachean Ethics*, usually summarized as follows:

Ubi homo, ibi societas. Ubi societas, ibi ius.

Ergo: ubi homo, ibi ius.

(Where the human being is, there is a society.

Where there is a society, there is law.

Therefore: where the human being is, there is law.)

David Heath-Stade, *Ubi societas, ibi ius*, DAVID HEATH-STADE'S BLOG (June 2, 2012, 10:07 AM), http://davidheithstade.wordpress.com/2012/06/02/ubi-societas-ibi-ius/.

2. KOFI ANNAN, WE THE PEOPLES: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY 11 (2000).

3. David Miller, *Limits of Cosmopolitan Justice*, in INTERNATIONAL SOCIETY: DIVERSE ETHICAL PERSPECTIVES 164, 179 (David Mapel & Terry Nardin, eds., 1998).

I. INTRODUCTION

Globalization is fundamentally transforming economic and social relations, but its impact has yet to be fully realized in jurisprudence and political theory. Accepting for the moment Aristotle's contention that for justice to be possible, there has to be that minimum level of mutual institutionalized relationship he refers to as "having a share in the constitution,"[4] the relevant question is whether we see such relation-

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4. "Of particular justice and that which is just in the corresponding sense, one kind is that which is manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution." ARISTOTLE, NICOMACHEAN ETHICS, bk. V, ch. 2 at 84 (David Ross trans., Oxford University Press 2009) (c. 384 B.C.). Thomas Nagel has characterized this approach as the "political conception" of justice. Thomas Nagel, *The Problem of Global Justice*, PHIL. & PUB. AFF. Spring 2005, at 113, 113–29. By this he means a conception of justice that does not flow from a comprehensive prior system of morality (as with cosmopolitan-

ships emerging beyond our national borders. In Aristotle's time, the conditions he set for justice (allocation of social goods and this "share in the constitution") were met only within a *polis,* or polity, and not across polities. The world has changed remarkably since then, and the single word best capturing the essence of that change is globalization.

Each of the dimensions of globalization discussed in the literature (inter-connectedness,[5] economic de-regulation,[6] in-

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ism), but rather is rooted in social relations and social institutions—in Rawls' famous phrase, justice as "the first virtue of social institutions." JOHN RAWLS, A THEORY OF JUSTICE 8 (1979). On this view, sovereign states are "precisely what give[ ] the value of justice its application, by putting the fellow citizens of a sovereign state into a relation that they do not have with the rest of humanity, an institutional relation which must then be evaluated by the special standards of fairness and equality that fill out the content of justice." Nagel, *supra,* at 120. This view poses special challenges to the possibility of global justice, which this Article addresses.

5. We can readily see how what happens in one country now affects others to an unprecedented degree, in matters ranging from financial markets to tastes in fashion and entertainment to political change and civil unrest. *See, e.g.*, DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE 15 (1999) ("[T]he growing *extensity, intensity* and *velocity* of global interactions may also be associated with a deepening enmeshment of the local and global such that the *impact* of distant events is magnified while even the most local developments may come to have enormous global consequences. In this sense, the boundaries between domestic matters and global affairs may be blurred."). *See generally* Robert O. Keohane & Joseph S. Nye, *Power and Interdependence in the Information Age*, FOREIGN AFF., Sept.–Oct. 1998, at 81–94 (defining globalization in terms of unprecedented degrees of interdependence). This transnationalization is also reflected in the increasing number of cross-border networks formed by non-State actors such as corporations, civic associations, scientific bodies, and individuals. *See generally* Jessica T. Mathews, *Power Shift*, FOREIGN AFF., Jan.–Feb. 1997, at 50, 50–51 (1997) (cataloguing the rise of non-State actors facilitated by telecommunications technology).

6. There is broad consensus that economic de-regulation is one of the principal engines of globalization, though commentators differ widely in their evaluation of the consequences of this fact. The resulting increase in the number of transactions involving goods, services, labor, and capital crossing national boundaries promotes a degree of economic interconnectedness resembling, at least to some commentators, a single market spanning the globe. *See, e.g.*, PETER DICKEN, GLOBAL SHIFT: TRANSFORMING THE WORLD ECONOMY (3d ed. 1998) (documenting the shift to a global pattern of production). *But see* PAUL Q. HIRST & GRAHAME THOMPSON, GLOBALIZATION IN QUESTION (2d ed. 1999) (arguing that an increasingly interconnected interstate economy is not synonymous with a global economy).

ternationalization[7] and homogenization,[8] to name only the most salient) contributes to an understanding of how globalization is changing social relations.[9] However, it is the essence

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7. Internationalization describes the shift in power from States to international systems and institutions. *See* Franz Nuscheler, *Global Governance, Development, and Peace, in* GLOBAL TRENDS AND GLOBAL GOVERNANCE 156, 157 (Paul Kennedy, Dirk Messner & Franz Nuscheler, eds., 2002) (noting that interdependence in a global system narrows the scope of action open to governments). This can also be called regulatory globalization, emphasizing the regulation of markets for goods, labor, capital, and services at new levels that require formalized inter-state cooperation through new and powerful institutions like the WTO, and that may, in certain cases, transcend nation-state control to a significant degree, as with the European Union. *See* Alfred C. Aman, *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEGAL STUD. 379, 379 (2001) (emphasizing change in dynamics of law formation wrought by globalization); *see also* Jost Delbruck, *Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9, 10–11, 17 (1993) (illustrating globalization as signifying changes in the locus of regulation). This aspect of globalization often leads to complaints about globalization as insufficiently democratic, due to the imperfect nature of these institutions from a democratic theory point of view. *See infra* note 160 and accompanying text (discussing the problem of voice in current transnational governance).

8. Globalization is often characterized as homogenization, the unification or harmonization of cultural forms. *See* Jan Aart Scholte, *What is 'Global' about Globalization?, in* THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE 84, 84 (David Held & Andrew G. McGrew eds., 2d ed. 2003). Commentators worry that shared patterns of consumption worldwide tend to break down distinctive cultures and contribute to a collective identity based on that consumption. *See* Kevin Robins, *Encountering Globalization, in* THE GLOBAL TRANSFORMATIONS READER, *supra* at 239, 241; Richard Barnet & John Cavanagh, *Homogenization of Global Culture, in* THE CASE AGAINST THE GLOBAL ECONOMY AND FOR A TURN TOWARD LOCALIZATION 73 (Jerry Mander & Edward Goldsmith eds., 1996). In this view, consumption of products and brands like McDonalds, Coca Cola, and Levi's (and the implicit ratification of the cultural values that such products and brands signify) is a mode of self-expression, and their ubiquity leads to global cultural homogeneity. *But see* Jon Mandle, *Globalization and Justice*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 126, 136–37 (2000) [hereinafter *Globalization and Justice*] (showing how globalization accelerates pace of global cultural change, but not necessarily in a homogeneous manner); John Tomlinson, *Globalization and Cultural Identity, in* THE GLOBAL TRANSFORMATIONS READER, *supra*, at 269, 271 (showing globalization as a significant force in creating and proliferating cultural identity, not destroying it).

9. For a thoughtful recent survey of this rich literature, see generally GLOBALIZATION: CAUSES AND EFFECTS (David Deese ed., 2012).

of globalization—the compression of space[10]—that underlies
the transformative impact of globalization on both global so-
cial relations and the possibility of global justice. This com-
pression intensifies social relations regardless of territorial
boundaries and, indeed, transcends territory itself.[11] Through
globalization, we are interconnected irrespective of time and
space, to a degree never before seen in human history.[12]

Such compression does more than simply facilitate inter-
national business, networking, and information sharing: It
changes the way space enters into social relationships, with
consequent changes at all levels of human experience. Most
fundamentally, globalization intensifies our awareness of the
world as a whole. Geographic constraints on social and cul-
tural arrangements recede, and people become increasingly
aware they are receding. In real terms, boundaries become

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10. The paradigmatic definition of globalization, drawn from political
geography and sociology, asserts that among all the many definitions of
globalization there is one common element: a fundamental change in the
spatial dimensions of human interaction. Scholte, *supra* note 8; Jay R. Man-
dle & Louis Ferleger, *Dimensions of Globalization, Preface*, 570 ANNALS AM.
ACAD. POL. & SOC. SCI. 8, 8 (2000). *See generally* DAVID HARVEY, THE CONDI-
TION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL
CHANGE (1990) (arguing that changes in technology have changed capital
flow, politics, and culture).

11. This compression of space "deterritorializes" social relations, taking
them out of the bounded territory of the nation-state and stretching them
across the globe, allowing ideas, information, capital, goods, pathogens,
power, and criminality to cross boundaries at unprecedented rates. On the
many contemporary pressures on boundaries and our notion of them, see
generally David Miller & Sohail Hashmi, *Introduction, in* BOUNDARIES AND JUS-
TICE (David Miller & Sohail Hashmi eds., 2001) (discussing boundaries be-
tween peoples and how they are being broken down).

12. Earlier waves of transnationalization had been driven by technologies
such as the telegraph, which reduced space but did not virtually eliminate it.
In contrast, contemporary globalization is characterized by networked global
communications, in which satellites and the Internet effectively eliminate
space, or dramatically compress it into a single shared space. *See* A.G. Hop-
kins, *The History of Globalization—and the Globalization of History?, in* GLOBAL-
IZATION IN WORLD HISTORY 12, 20 (A.G. Hopkins ed. 2002) (noting that the
internet is not simply a new, faster telegraph, but a new kind of technology
that effectively shrinks space); Scholte, *supra* note 8, at 86; Mandle &
Ferleger, *supra* note 10, at 8. By speaking in the aggregate and saying "we"
are interconnected I do not mean to ignore the marginalizing effects of
globalization, but only to highlight the collective shift. On the former, see
GLOBALIZATION WITH A HUMAN FACE 31 (UNDP 1999) (noting disparate im-
pact of globalization's time-space compressions).

more porous—we know more about what happens beyond our boundaries, we travel more easily beyond our boundaries, our actions affect others beyond our boundaries in more pronounced ways, we are aware of these effects, and we have new and more profound opportunities to engage in commerce beyond our boundaries.

This phenomenon has a whole range of social, economic, political, legal, and cultural effects, widely catalogued and widely (and justly) debated.[13] In this Article I am focusing on globalization's effects on justice theory, specifically on the nature and possibility of global justice.[14] Some theorists see in globalization evidence of an emerging global *society,* fulfilling cosmopolitan principles[15] and involving global social coopera-

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13. *See, e.g.,* THE GLOBAL TRANSFORMATIONS READER, *supra* note 8 (gathering a variety of views regarding the phenomenon of globalization).

14. *See* AMARTYA SEN, THE IDEA OF JUSTICE 173 n.* (2009) ("The recent transformation of the world into a much smaller place, thanks to innovations in communications and transport, and the ongoing development of global media and transnational organizations, have made it hard not to take note of our extensive connections across the world, which have profound implications not only for the form and content of a theory of justice . . . but also for global politics—and indeed survival.").

15. Cosmopolitanism is derived from the Greek word kosmopolites, a citizen of the world, "familiar with, and at ease in many different countries and cultures . . . ." *See Cosmopolitan Definition,* OXFORD ENGLISH DICTIONARY (2013), http://oxforddictionaries.com/us/definition/american_english/ cosmopolitan?q=cosmopolitan (last visited Mar. 25, 2013). Thus, the etymology of the word reveals its meaning: Cosmopolitanism characterizes a family of views relying on the idea that all human beings are essentially equal and therefore constitute a single world community. Thomas Pogge, *Cosmopolitanism, in* A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 312, 312 (Robert E. Goodin, Philip Pettit & Thomas Pogge eds., 2d ed. 2007). There are two main strands of cosmopolitanism—moral and political (also called legal or institutional). *Id.* at 312–29; *see also* Pauline Kleingeld & Eric Brown, *Cosmopolitanism, in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2006), http://plato.stanford.edu/entries/cosmopolitanism/ (last visited Oct. 1, 2013). Moral cosmopolitanism concerns itself with human equality across national political boundaries, and our resulting individual duties to others, to be realized through existing institutional structures. Charles Beitz, *Social and Cosmopolitan Liberalism,* 75 INT'L AFF. 515, 515–29 (1999). Political cosmopolitanism concerns itself with the implications of moral cosmopolitanism for the nature of institutions, and generally includes calls for institutional reform along cosmopolitan lines and even the creation of new global institutions. From the point of view of a cosmopolitan, global justice is not a problem. We owe all human beings justice in our social relations, simply because they are human beings. For this reason, many of the most ambitious

tion around an emerging normative priority for the individual through human rights.[16] Nevertheless, cosmopolitans are often criticized by communitarians[17] and others for their moral psychology: failing to take into account how human beings actually form their identities and moral commitments (within specific communities),[18] and failing to take into ac-

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and elegant arguments for global justice at the institutional level are cosmopolitan in nature, for example, in the work of Simon Caney, and stretching all the way back to Kant himself (though Kant refrained from what for most political cosmopolitans is the ultimate step—world government). Simon Caney, Justice Beyond Borders: A Global Political Theory 2–4 (2005). *See generally* Immanuel Kant, Perpetual Peace: A Philosophical Essay (Mary Campbell Smith trans., Motley Press 1903) (1795).

16. *See, e.g.*, Caney, *supra* note 15 (laying out a defense of cosmopolitanism); Gillian Brock, Global Justice: A Cosmopolitan Account 45–83 (2009) (developing a cosmopolitan account of global justice); David Kinley, Civilising Globalisation (2009) (attempting to define the relationship between globalization and human rights); Anthony McGrew, *A Global Society?*, *in* Modernity and its Futures 61–116 (Stewart Hall et al. eds., 1992) (discussing the developments of the late twentieth century as moving toward a more global society).

17. Communitarianism in its contemporary form emerged in the 1980s as a critical response to the liberal theory of John Rawls's *A Theory of Justice.* While communitarian theory does not present a systematic alternative to liberalism, several main critiques have developed in response to Rawls's de-emphasis on the community and his limited view of government's role in society. *See* Daniel Bell, *Communitarianism, in* The Stanford Encyclopedia of Philosophy (2012) http://plato.stanford.edu/archives/spr2012/entries/communitarianism/ (last visited Oct. 1, 2013). One such critique disputes Rawls's universalist view of justice and instead posits that standards of justice are dependent on the interpretative framework within which individuals view their world. Seyla Benhabib, Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics 23–38 (1992) (discussing the inconsistencies of universalism); Alasdair MacIntyre, Whose Justice? Which Rationality? 1–11 (1988). Several prominent communitarian theorists perceive the political community, and ultimately the nation-state, as necessary for shaping the limits of justice. *See* David Miller, *The Ethical Significance of Nationality,* 98 Ethics 647, 648 (1988) [hereinafter *Ethical Significance of Nationality*]; Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality 82–83 (1983) [hereinafter Spheres of Justice]. A second critique argues that the individualistic conception of the self under Rawlsian liberalism fails to recognize the important relationship between the community and the individual, and the inherent role of the community in defining one's identity. *See* Michael Sandel, Liberalism and the Limits of Justice 55–59 (1982); Charles Taylor, Philosophy and the Human Sciences: Philosophical Papers (1985).

18. Cosmopolitanism can be criticized as simply the global projection of liberal values in an imagined solidarity, which fails to properly account for

count the normative implications of this process, i.e., the moral priority of local or national communities over thinner, more abstract notions of transboundary identity or relationship.[19]

For such communitarian critics, even global society would not be sufficient, since they pose an even more stringent test: what about global *community*? Communitarians argue that one's community (usually identified politically with the nation, and generally expressed in terms of shared traditions, practices, and understandings[20]) is *essentially* tied to one's identity, integral to one's flourishing, and constitutive of the very concept of justice itself, and to whom we owe it.

For communitarians the limits of political community form the limits of justice, and the apex political community is the nation-state.[21] The nation-state is the necessary basis for

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certain key realities about how people reason morally and act politically. *See, e.g.*, Sebastiano Maffetone, *Global Justice: Between Leviathan and Cosmopolis*, 3 GLOBAL POLICY 443, 443 (2012) [hereinafter *Global Justice*] (characterizing the cosmopolitan vision as "excessively blind to the role of shared social and political institutions"). As Gillian Brock—herself a cosmopolitan—puts it, moral cosmopolitanism "highlights the responsibilities we have *to those we do not know and with whom we are not intimate*, but whose lives *should* be of concern to us." BROCK, *supra* note 16, at 9 (emphasis added). Maffetone, himself a liberal but not a cosmopolitan, puts it thus: "When cosmopolitans leave the safety of [a] domestic basic structure, they project themselves into another political situation [in which] we cannot take for granted that our vision of what is reasonable and comprehensive is widely shared." *Global Justice, supra*, at 451.

19. *See* DAVID MILLER, ON NATIONALITY 65–69 (2d ed., 2002) (discussing the variation of relationships and to whom a duty is owed based upon type and closeness of the relationship); SPHERES OF JUSTICE, *supra* note 17.

20. Communitarian theorists differ on the precise nature of these necessary relations, and in general this aspect of communitarianism is under-theorized. Allen Buchanan, *Assessing the Communitarian Critique of Liberalism*, 99 ETHICS 852, 867 (1989).

21. The key lies in the concept of nationality, a subjective concept of identity consisting of the shared beliefs of a set of people: that each belongs with the other; that the association is neither transitory nor instrumental, but rooted in a long shared history of living together that (one expects) will continue into the future; and a sense of loyalty adequate to justify sacrificing individual interests for the group. *Ethical Significance of Nationality, supra* note 17, at 648. To these subjective elements, Miller adds a requirement that a nation should enjoy "some degree of political autonomy," distinguishing it from a mere ethnic group and moving it closer to that of a "people" under international law and political theory, with some right of self-determination not necessarily involving full Statehood. *Id.* In *On Nationality*, Miller joins the

the solidarity or sense of the common good (in Michael Walzer's terms) necessary to support the individual sacrifices which justice demands.[22] Moreover, it is only within particular communities that you can determine what justice consists of, and who owes it to whom.[23] As Walzer puts it, justice as a formal concept requires that a society's "substantive life is lived in a certain way—that is, in a way faithful to the shared understandings of its members."[24] In other words, justice requires a shared understanding of social goods. Only political communities have such shared understandings, and the pre-eminent example is the nation-state.[25] It is only within nations that justice makes sense, and it is only within nations that justice is necessary, indeed, even possible.

Given these limits, what kinds of norms then apply between national communities? Communitarians do recognize what many commentators point out: that international relations today include many regimes that can be characterized as cooperative associations for mutual self-interest, creating the

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concept of nation as ethical community with a notion of self-determination, bringing the idea of "nation" closer to Rawls's notion of a "people"—an interesting resonance. MILLER, *supra* note 19, at 11.

22. MILLER, *supra* note 19, at 90–96; *see also* CHARLES JONES, GLOBAL JUSTICE: DEFENDING COSMOPOLITANISM 157–58 (2001) (noting the connection that Miller draws between nationality and solidarity). In a similar sense, Walzer argues that a shared notion of the common good is necessary for the sacrifices of justice, since almost by definition justice will be invoked when someone has failed, or perceives herself as having failed, to secure her individual self-interest. SPHERES OF JUSTICE, *supra* note 17, at 82–83. This suggests the larger argument that the communitarian sort of ethical particularism is simply more accurate in capturing how we actually reason morally than the universalist attempt at disembodied rationality. *See* BRIAN LEE CROWLEY, THE SELF, THE INDIVIDUAL AND THE COMMUNITY, at v (1987) (". . . liberalism can only achieve its goal of creating a rational world by turning men [sic] into one-dimensional beings."). Thus, underlying the debate about global justice is a disagreement about the proper way to reason about moral obligations, particularly or universally. *See* SANDEL, *supra* note 17, at 54–59.

23. For Miller, it is only within national communities that you can determine which people are to have their needs considered and the necessary consensus over what counts as "need," since these are social and not determined facts. *Ethical Significance of Nationality, supra* note 17, at 661.

24. SPHERES OF JUSTICE, *supra* note 17, at 313.

25. *See* MILLER, *supra* note 19, at 68–73 (noting that it is the shared public culture which defines individual and social goods, and only in the nation-state is that public culture united with the rights, obligations and structures of political cooperation through citizenship and statehood).

possibility of agreed rules or norms (such as international law itself).[26] However, while undeniably important to international relations, such forms of cooperation do not in their view rise to the level of community, and therefore do not generate justice obligations. In David Miller's words:

> [A]lthough in the contemporary world there are clearly forms of interaction and cooperation occurring at the global level—the international economy provides the most obvious examples, but there are also many forms of political cooperation, ranging from defence treaties through to environmental protection agreements—*these are not sufficient to constitute a global community.* They do not by themselves create either a shared sense of identity or a common ethos. And above all there is no common institutional structure that would justify us in describing unequal outcomes as forms of unequal treatment.[27]

Accordingly, this conception of justice offers a specific kind of challenge to the possibility of global justice; namely, that global justice requires a kind of global relationship—Nagel calls it sovereignty;[28] others call it society or community[29]—that we simply do not have, and perhaps cannot have at the level of global interaction. But that is precisely where globalization must be considered.

In this Article, I argue that globalization is creating new normative possibilities for international relations by develop-

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26. Leading examples include the WTO and Bretton Woods institutions and, regionally, the European Union. *See* Jones, *supra* note 22, at 8 (listing international institutions increasingly affecting people's life prospects); Allen Buchanan, *Rawls's Law of Peoples: Rule for a Vanished Westphalian World*, 110 Ethics 697, 705–06 (2000) [hereinafter *Westphalian World*] (discussing the "global basic structure" that includes these institutions).

27. David Miller, *Justice and Global Inequality, in* Inequality, Globalization, and World Politics 190 (Andrew Hurrell & Ngaire Woods eds., 1999) (emphasis added).

28. Nagel, *supra* note 4, at 114. This argument depends on the "nonexistence" of a global basic structure, which this Article challenges. *See also Global Justice, supra* note 18, at 446 (explaining Nagel's view).

29. Mathias Risse subsumes both within his category of "relationalist" approaches to global justice. Mathias Risse, On Global Justice 7–10 (2012). Whether the necessary relationship is "society" or "community" is not as central as their shared emphasis on the necessity of a specific kind of relationship for justice to apply.

ing the social basis for a truly "global" justice, thereby transcending the objections most commonly raised by contractarian[30] and communitarian critics of global justice. This is so because globalization is creating, facilitating, and contributing to the sorts of relationships which communitarians and others cite as necessary for justice, but at a new, transboundary level. As globalization reduces or eliminates the role of time and space in many kinds of interactions, we see emerging the sorts of shared understandings, practices, and traditions capable of supporting obligations of justice at a global level. Members of this global web of relationships are increasingly aware of each other's needs and circumstances, increasingly capable of effectively addressing these needs, and increasingly contributing to these circumstances in the first place. They find themselves involved in the same global market society, and together they look to the same organizations, especially those at the meta-state level, to provide regulatory approaches to problems of global social policy. I argue that these developments are constituting community with respect to different issues, institutions, and sets of social relations within the global social space.

I am not arguing, however, that at this point in our history global social relations constitute the sort of full-blown political community that communitarians find in domestic social relations, or that cosmopolitans posit in their compelling yet vulnerable account. Instead, globalization is creating a third alternative, something between a *cosmopolis* and a global community.[31] Accepting for this purpose communitarian theory's

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30. Contractarians also critique cosmopolitan theories of global justice on related but different grounds. Contractarians also approach justice through its social context, but understand the latter to involve what Rawls calls participation in cooperative ventures for mutual advantage. This relationship is arguably "thinner" than communitarian relationships but essential for justice nonetheless. *See* John Linarelli, *Principles of Fairness for International Economic Treaties: Constructivism and Contractualism, in* TRADE AS THE GUARANTOR OF PEACE, LIBERTY AND SECURITY?: CRITICAL, HISTORICAL AND EMPIRICAL PERSPECTIVES 124 (Padideh Alai, Tomer Broude & Colin Picker eds., 2006) (elaborating a Scanlonian contractualist account in comparison with a Rawslian account).

31. The notion that the global justice debate requires fresh thought and new possibilities "between" or "beyond" existing dichotomous choices is gaining momentum. *See, e.g.*, RISSE, *supra* note 29, at 17 (defending a pluralist view of global justice "'between' two standard views, that principles of justice apply only within States or else apply to all human beings"); *Global*

characterization of both community and justice, I argue that globalization is creating certain *elements* of community at the global level, such as knowledge of inter-connectedness and of the circumstances of others; and creating community in certain *areas* of global social relations such as economic relations, by establishing that degree of social bond necessary to support justice. While global social relations taken as a whole may not rise in all cases at this time to the level of community that communitarians posit, we find *enough* elements of community, and enough *pockets* of community, to support an inquiry into justice even on communitarian terms in at least key areas of global social relations such as fundamental rights and the global economy.[32] Among other implications, this allows for a "Global Basic Package" or "global minimum ethics" approach to global justice, consisting of a basic bundle of political, social, and economic rights safeguarded through global law and delivered in a partnership between global and national institutions. In fact, if the communitarian intuition about the social dimension of justice holds true, and if this article is accurate about globalization, then global justice is no longer simply a debatable possibility—it is a fundamental and organic *necessity* of the emerging global space, in the same way we consider justice a necessary element of domestic social life. I conclude by arguing that globalization is changing not only the content of our substantive norms but also the pace at which communal bonds emerge, allowing us to begin envisioning a "post-global" future.

In order to develop this argument, I examine in Part II how globalization is making justice relevant to this new global

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Justice, supra note 18, at 449–51 (arguing for a third alternative beyond statist or cosmopolitan views). In my view, this development suggests the growing recognition that global justice, by its very nature, requires a comprehensive and pluralist approach that includes a diverse range of normative theory. *See* FRANK J. GARCIA, GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: THREE TAKES (2013) (developing a pluralist approach to global justice theory and discourse); *see also* RISSE, *supra* note 29 (advancing a theory of 'pluralist internationalism'); SEN, *supra* note 14, at 1–27 (defending a 'plural grounding' approach to global justice).

32. This development is a key transformation underlying the emergence of global law as well. *See* GIULIANA ZICCARDI CAPALDO, THE PILLARS OF GLOBAL LAW, at xiv–xv (2008) (identifying expansion of the "social base" of international law as a key variable in the emergence of contemporary global law). On the notion of global law, see *infra* notes 141–153 and accompanying text.

social level, using Rawls's concept of the circumstances of justice and applying it to globalization. I then examine in greater detail two particular aspects of globalization—the globalization of knowledge, and the globalization of regulation—in which these changes are salient and go to the heart of the communitarian argument against global justice. In Part III, I outline new possibilities which globalization opens for global justice, extending the work of Walzer, Miller, and others, and suggesting further directions for development. I conclude in Part IV with a few observations on the pace of change and the nature of history in this globalizing environment.

II.   Globalization: The Game Changer

A.   *Globalization and the Global Circumstances of Justice*

As the most influential justice theorist of the twentieth century, John Rawls and his work are a natural point of departure for considering justice theory for the twenty-first century. In this section, I start with Rawls's articulation of the relationship between justice and our social and material environment. I consider in Part III some of the more substantive implications of my thesis for Rawls's seminal theory of Justice as Fairness.[33]

In *A Theory of Justice,* Rawls selects a particular level of social relationships, the nation-State, and conceives of it "for the time being" as a closed system separate from other nation States.[34] It is within this set of social relationships that the need for and possibility of justice arises. Rawls discusses this phe-

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33. Justice as Fairness has a voluminous and learned literature of commentary, critique and elaboration, as befitting the most important political theory of the twentieth century. For a useful entry point, see Reading Rawls (Norman Daniels ed., 1989) (collecting initial critical responses to Rawls's *A Theory of Justice*); for a more recent comprehensive overview see Leif Wenar, *John Rawls, in* Oxford Handbook of Political Theory 393 (D. Estlund ed., 2012).

34. Rawls is often cited as the leading contemporary theorist against the possibility of global justice. However, it is critical to note that in his principal work, *A Theory of Justice,* Rawls never argues that justice could not exist at the global level. In fact, at the theoretical level, Rawls leaves open the possibility of global justice, when he states more generally that justice could apply "whenever there is an allotment of something rationally regarded as advantageous or disadvantageous." Rawls, *supra* note 4, at 8. I will return to this assumption below in Part III.

nomenon through an inquiry into what he calls "the circumstances of justice."[35] The circumstances of justice are those conditions of our situation that make cooperation both possible and necessary. Where they obtain, and they lead to such cooperation, justice is relevant, and where they do not, justice is not.

The circumstances of justice can be divided into two categories. The first category consists of three objective circumstances: a moderate scarcity of resources; a shared geographical territory; and a capacity to help or harm each other. In other words: there is not enough to go around for everything we each want to do; we are all going to be looking for these resources in the same places; and we have the capacity to unite to defeat one another's goals, or work together to achieve many of them. The second category is subjective and includes two circumstances: people are mutually disinterested; and they have conflicting claims. In other words, we are not generally altruistic: We want what we want, and to get it, we go after what each other has.

Because of these five circumstances, we are led to cooperate as the rational means toward achieving our individual ends. This, in essence, is society, which Rawls defines as a cooperative venture for mutual advantage. As a consequence of the circumstances of justice, we are led to form a variety of social arrangements through which we hope to cooperate in the furtherance of our mutual welfare. We need, however, principles by which to choose among the various possible social arrangements, principles that will guide the distribution of the fruits of this venture, and these are the principles of justice.

It is in this sense that society precedes justice. It is our need to cooperate, as a response to the circumstances of justice, which leads us to form and consider a variety of social arrangements for mutual advantage. "Justice," as Rawls famously writes, is the "first virtue" of such social institutions.[36] Absent the circumstances of justice, cooperation, and the development of social mechanisms for the allocation of the fruits of cooperation, there is simply nothing for justice to do.

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35. RAWLS, *supra* note 4, at 126–30 (following Hume's treatment).

36. *Id.* at 3.

Applying these circumstances to the question of global justice and global social relations, one sees that globalization—in particular through its characteristic transnationalization and interdependence—is bringing about the same circumstances of justice at the global level that Rawls described at the domestic level. To begin with, there is of course the same basic scarcity of resources at the global level, and through globalization people are increasingly competing for these resources on a global scale in a shared territory: our planet.[37] That they are mutually disinterested and assert conflicting claims over these resources does not need to be argued.

1.   *Capacity to Help*

Because of globalization and its technical and economic revolutions, we have an increasing capacity to effectively respond to the needs and concerns of others beyond our boundaries through the transnational mobilization of information, power, capital, or public opinion.[38] Commentators have suggested that earlier in our history, talk of global justice was premature, in the sense that our capacity to redistribute resources across the globe was weak.[39] Globalization creates the technical ability to affect global resource distribution, making the question of its justice quite relevant now.[40] For example, global non-governmental networks facilitate the mobilization of capital,[41] labor,[42] and policy expertise[43] largely indepen-

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37. Although it is true that not all resources can be equally well exploited regardless of geographic proximity, and not all persons are equally well-suited to compete globally for resources, such competition is undeniably occurring even with respect to what are traditionally considered the most "local" of resources: arable land and potable water. *See generally* Javier Perez, Myriam Gistelinck & Dima Karbala, *Sleeping Lions: International Investment Treaties, State-Investor Disputes and Access to Food, Land and Water* (Oxfam Discussion Papers, May 2011) (documenting the role of foreign investment in shifting (and privatizing) ownership and access rights to these fundamental resources).

38. This is a particular example of the general interconnectedness that characterizes globalization today. *See* HELD ET AL., *supra* note 5, at 15.

39. *See, e.g.*, JONES, *supra* note 22, at 9 (introducing and addressing the "incapacity objection").

40. *Id.* at 9–10.

41. Anupam Chandler cites the role of diaspora communities in mobilizing capital for homeland governments. Anupam Chandler, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1060–74 (2001).

dent of state action, and thus largely independent of our traditional mechanisms for evaluating their justice and political legitimacy.

By creating a real capacity to respond to another's needs and concerns, globalization contributes to an important element of the rationale for both society and justice—in Rawls' terms, the capacity to help.[44] For communitarians, this is a critical element in the creation of global solidarity as well. But is such solidarity emerging? I elaborate on this point below,[45] but at this juncture would simply note that we see contemporary evidence of such solidarity in our common response to global needs and atrocities.[46] This level of response, even if at times still limited, weak, and inadequate, suggests an emerging sense of solidarity or sense of community at the global level, which for all its weaknesses would not have happened at all 100 years ago.[47]

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42. Transnational NGOs such as Habitat for Humanity mobilize volunteer labor for cross-border projects in human environment restoration. Arjun Appadurai, *Patriotism and its Futures, in* MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION 158, 167 (1996).

43. Wolfgang Reinicke, *The Other World Wide Web: Global Public Policy Networks*, FOREIGN POL'Y, Winter 1999–2000, at 44, 44–45 (discussing global public policy networks experimenting with new ways to gather and distribute knowledge across borders).

44. Even David Miller, a communitarian critic of global justice, acknowledges that the "prosaic observation that the rich countries now have the technical capacity to transfer large quantities of resources to the poorer countries," makes a prima facie case that such transfers have become morally obligatory. *Limits of Cosmopolitan Justice, supra* note 3, at 164. Paradoxically, the speed and scope of recent military interventions abroad also confirm our capacity to bring significant resources to bear on short notice on a global scale. I am indebted to Jim Henle for pointing this out.

45. *See infra* Section C.

46. Put another way, it is also our *sense* of failure when our response to humanitarian crises abroad is inadequate, despite having both knowledge and capacity, which renders such a failure an injustice. *See* PETER SINGER, ONE WORLD: THE ETHICS OF GLOBALIZATION 156–58 (2002) (citing example of 1970's humanitarian crisis in Bangladesh).

47. Bruno Simma and Andreas L. Paulus list Rwanda and Somalia as examples of a weak solidarity, which can suggest either that the concept of global community is either half-full or half empty. They decide it is half full, asking "[a]fter all, who would have cared—and how—a hundred years ago." Bruno Simma & Andreas Paulus, *The "International Community": Facing the Challenge of Globalization*, 9 EUR. J. INT'L L. 226, 276 (1998).

2. *Capacity to Harm*

Because of globalization, we also increasingly find that our State's policies and our own political and consumer choices are influencing the life prospects of others in direct and dramatic ways. The globalization of markets means that in many cases we are directly profiting from the economic and social conditions in other parts of the world through out-sourced services, low wages, multinational production processes, mutual fund and pension plan investment returns, etc. The very fabric of global society—its division of territory and jurisdiction to political entities called States—is a social arrangement for which we are collectively responsible.[48] Thus, completing Rawls's basic conditions, we have the capacity to harm each other as well.[49]

This capacity to harm each other globally is an important element in creating a sense of solidarity, understood as a sense of responsibility for one other. Through our economic inter-dependence, we have to take seriously the possibility that we are contributing to the socioeconomic circumstances of others, a basic criterion of community.[50] Our responsibility over the effects, even attenuated, of our own conduct at the global level is a rationale for global justice that, it has been suggested, transcends the entire cosmopolitan-communitarian divide.[51]

Together, these global circumstances of justice, especially our capacity to both help and harm each other, make justice both possible and necessary at the global level, and begin contributing to the formation of those deeper bonds we call solidarity. I now turn to two further aspects of globalization that

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48. *Globalization and Justice, supra* note 8, at 129–30.

49. Thus globalization extends to the level of the individual as global actor, which is the basic argument Barry and others make about states and transnational harms. *See* Brian Barry, Theories of Justice 185–86 (1989) (if we "take seriously" the circumstances of justice argument at the international level, we must take into account our capacity for inflicting transnational harms through the state system).

50. This is also a basic element of justice in the social contract tradition: Obligations apply when one has accepted the benefits of the social arrangement, or taken advantage of the opportunities it offers to further one's interests.

51. *Globalization and Justice, supra* note 8, at 129; Richard Miller, Globalizing Justice 59–77 (2010).

bring us even closer to meeting the criteria communitarians lay down for justice: a global community of knowledge and shared traditions, practices, and understandings.

B.   *A Global Community of Knowledge*

One of the salient features of contemporary globalization is its effect on information flows. As a result of the global telecommunications revolution, the Internet, and the development of both global media and the capability to organize social concern at a global level (through networks of NGOs, for example), globalization is creating what can be referred to as a global community of knowledge.[52] Such knowledge is both a factor in our increasing interdependence, and—most critically—the essential vehicle through which we come to *understand* our deepening interdependence, with the symbolic, social, and legal ramifications such knowledge brings.

Through globalization, we know a great deal, immediately and intimately, about the suffering of people in other parts of the world; indeed, we are more familiar with their suffering now than we ever were previously.[53] Moreover, this flow of information is not simply about global harms to "poor Others." Globalization—particularly its global security and global finance aspects—is also contributing to a shared sense of vulnerability to "remote" forces even among citizens of wealthy, developed nations.[54]

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52. *See, e.g.*, Dirk Messner, *World Society—Structures and Trends, in* GLOBAL TRENDS AND GLOBAL GOVERNANCE, *supra* note 7, at 46–50 (discussing the centrality of knowledge, its diffusion, and its networks in shaping a global epistemic and cognitive community). This global community of knowledge reflects on a wider scale the globalization of scientific knowledge—a phenomenon that predates and parallels the globalization of other forms of knowledge, and itself contributes to a shared epistemic community and shared knowledge base for key social questions. *See, e.g.*, NATIONAL SCIENCE BOARD, GLOBALIZATION OF SCIENCE AND ENGINEERING RESEARCH (2010) (demonstrating that science and engineering research is increasingly an international endeavor); THE ROYAL SOCIETY, KNOWLEDGE, NETWORKS AND NATIONS: GLOBAL SCIENTIFIC COLLABORATION IN THE 21ST CENTURY (2011) (a review of the globalizing nature of scientific research).

53. HELD ET AL., *supra* note 5, at 58 (asserting that the globalization and telecommunications revolution brings people into other social realities they otherwise would not know).

54. Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 516 (2005) [hereinafter *Law and Globalization*]

One specific type of shared knowledge important to globalization is the growing recognition of the risks we share as human beings on this planet, and the growing recognition of our shared interest in addressing those risks. In this sense, globalization is "de-territorializing" risk, creating what can be called a "community of risk."[55] The literature is remarkably consistent in its listing of common risks facing all human beings: war and security challenges; climate change and environmental degradation; economic crises and increased economic competition and dislocation; infectious disease and global pandemics; natural disasters; and rapid population growth, to name a few.[56] Moreover, the desire for security, environmental well-being, and sustainable development can be found across all cultures.[57]

Although awareness of shared risks is not by itself enough to create community, such international conditions lead to a shared interest in survival and development.[58] It is significant, moreover, that such shared interests exist and are recognized as such, since this creates conditions favoring increased cooperation, which can lead to a sense of common purpose in fighting these risks.

("We [meaning the United States] also may feel the growing significance of 'remote' forces on our lives, whether those forces are multinational corporations, global terrorist organizations, world capital markets or distant bureaucracies such as the European Union."); Rob Waugh, *Does One Super-Corporation Run the Global Economy?: Study Claims It Could Be Terrifyingly Unstable*, THE DAILY MAIL, Oct. 20, 2011, http://www.dailymail.co.uk/sciencetech/article-2051008/Does-super-corporation-run-global-economy.html (documenting financial and economic interconnectedness and potential systemic consequences).

55. Messner, *supra* note 52, at 24 (discussing a 'global risk community'); Nuscheler, *supra* note 7, at 158–59 (citing the interdependent nature of a 'global risk society').

56. Messner, *supra* note 52, at 24; Nuscheler, *supra* note 7, at 158–59. President Obama alluded to this in his September 23, 2009 remarks to the United Nations General Assembly, in which he said the self-interests of states have never been more aligned than they are today. President Barack Obama, First Speech to the United Nations General Assembly (Sept. 23, 2009), *available at* http://www.cnn.com/2009/POLITICS/09/23/obama.transcript/index.html.

57. *See* Simma & Paulus, *supra* note 47, at 272 (listing bases for a dialogue on a minimal set of common values).

58. Even a realist like Stanley Hoffman acknowledges this much. STANLEY HOFFMAN, DUTIES BEYOND BORDERS 37 (1981).

Taken together, these various types of knowledge also satisfy a basic requirement for community: the effective capacity to know one another's needs, concerns, and preferences.[59] This knowledge forms the basis for Miller's social determination of "need" and "whose needs count," as well as the basis for Walzer's shared understandings. This goes beyond the global circumstances of justice argument I outlined above:[60] We not only have the capacity to help or harm each other at a global scale, but we *know* that we do, and we know what such help or harm looks like. Further, globalization is eliminating, or at least reducing, the spatial and temporal barriers to our knowledge of one another's needs, preferences, and situations, making it possible to recognize, develop, and exercise effective responsibility for one another's well-being in a similar manner to that which communitarians cite as essential to national community.

Nevertheless, the mere fact that we are increasingly aware of one another's situation and increasingly capable of responding to it across vast distances of time and space is not by itself enough to create solidarity or community. Put another way, the existence of the basis for solidarity is not sufficient to create solidarity itself. Can we say that such solidarity is emerging at the global level? This becomes a key question for any communitarian argument about global justice.

C. *Globalization and Shared Traditions, Practices, and Understandings*

In order to more fully evaluate whether solidarity or community is emerging from our mutual knowledge and the recognition of our shared risks, we need to look more carefully at *how* we are responding. The community of knowledge and risk I outlined above is increasingly becoming a community of shared traditions, practices, and understandings concerning how we respond to such knowledge and risks. These responses grow, both spontaneously and institutionally, out of our per-

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59. *See Ethical Significance of Nationality*, *supra* note 17, at 653–54 (citing BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1991) (noting the importance of media in allowing dispersed bodies of people to think of themselves as belonging to a single community)).

60. See *supra* Section A.

ception of shared needs and interests, our capacity to help and to harm, and our awareness of each other's plight—in short, our understanding of globalization as interlocking our fates.

Globalization has been a powerful force for supporting the development of shared practices at many levels. At the superficial level of popular culture, many have noted (often with concern) the harmonizing tendencies of globalization through mass consumption of Western cultural products.[61] More fundamentally, the "de-territorialization" associated with the cross-border human and cultural migrations characteristic of contemporary globalization is breaking down the notion of territorially distinct, epistemically unique "cultures" or "communities" due to "social and economic processes that connect . . . even the most isolated of local settings with a wider world."[62] At the associational level, enterprises such as multinational corporations, NGOs, and global scientific cooperation bodies build and constitute their own epistemic communities across national boundaries, which also contribute to the development of shared traditions and practices.[63] Finally, at the regulatory level, the post-war growth of universally recognized international human rights has played a particularly im-

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61. *See, e.g.*, Barnet & Cavanagh, *supra* note 8, at 71–77 (noting the homogenizing effect that Western products are having on cultures globally).

62. *See Law and Globalization, supra* note 54, at 512 (citing Akhil Gupta & James Ferguson, *Culture, Power, Place: Ethnography at the End of an Era, in* Culture, Power, Place: Explorations in Critical Anthropology 1, 1 (1997)). Of course, as I noted above, not all are engaged, or equally engaged, in this new global space, even as all may in some sense be affected by it and therefore "within" it. *See* Globalization with a Human Face, *supra* note 12, at 31 ("Economic integration is thus dividing developing and transition economies into those that are benefiting from global opportunities and those that are not.").

63. *See Law and Globalization, supra* note 54, at 500 (noting the role of institutional bureaucracies in implementing international norms); Gunther Teubner, Networks as Connected Contracts (Hugh Collins ed., Michelle Everson trans., 2011) (discussing the important emergence of networks as cooperative business arrangements); Messner, *supra* note 52, at 22, 31 ("One of the effects of international joint ventures between companies as well as of various forms of coordination and cooperation between the different levels of action of the global governance architecture is that actor orientations and modes of action are mutually intertwined, influenced, altered, and reconstituted across international borders.").

portant role in international law's status as a global set of shared practices and understandings.[64]

In the next section, I take a closer look at two fundamental sets of widely shared practices: the social significance of markets as an economic structure ("market society"), and our shared approaches to regulating markets ("institutions"). Markets and our regulation of them are not only central to our contemporary way of life, but they also highlight the interplay between globalization and our structural, community-building responses to the fundamental interconnectedness that permeates twenty-first century social reality.

1. *Shared Understandings and Practices about Markets*

The global market society created through globalization results in a complex shared practice or set of practices that contributes to a global community of shared understandings about socioeconomic organization.[65] At this point in world history, it is possible to say that virtually all people live in some form of organized market economy. Globalization has been both a facilitator and accelerator of this trend, and not without significant controversy.[66] However, for our purposes here, it is

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64. Terry Nardin, *Legal Positivism as a Theory of International Society, in* INTERNATIONAL SOCIETY: DIVERSE ETHICAL PERSPECTIVES, *supra* note 3, at 17–35.

65. *See generally* Andrew Hurrell, *Global Inequality and International Institutions*, 32 METAPHILOSOPHY 34 (2001) (arguing that the increasing interconnectedness of global society has made global justice more realistic).

66. One way to view globalization is as the world-wide extension of the transition to market society that European culture went through in the seventeenth to nineteenth centuries. *See* Anthony Giddens, *The Globalizing of Modernity, in* THE GLOBAL TRANSFORMATIONS READER, *supra* note 8, at 60, 60–65 (citing globalization as the global spread of modernity, with all of its characteristic features and complications). This can lead to two kinds of tensions. First, since market society's patterns of contractual exchange are corrosive of old status-based patterns and the power that flowed from them, globalization will be viewed as threatening to the old social order and challenged by those who benefited from entrenched social patterns or are less favored by the new dispensations. Giddens considers this an aspect of the cultural globalization that, together with industrialization and the rise of global media, has "torn the modern away from the traditional." *Id.* at 65. Second, to the extent that globalization is understood as extending a particular version of market society—under-regulated capitalism or the "Washington Consensus," for example—globalization will be resisted as partisan by those who view this particular ideology as inimical to the interests of the non-capital classes. This complaint is more a normative judgment about the

the ubiquity of the market itself that is significant from the perspective of shared understandings and practices, not its controversial nature.

The widespread use of the market does not, of course, mean that all countries have identical interests with respect to markets or identical forms of market society. To take just one example, the United States and Germany (two of the world's most developed countries) practice advanced capitalist forms of market economy which differ in important ways such as competition policy, labor-management relations, tolerance level for economic inequality among citizens, and social welfare policies.[67] The contrast is even more marked when one ventures beyond comparison between the United States and Western European market societies and looks at Asian capitalism, even Chinese capitalism.[68] In fact, markets have been touted on instrumental grounds precisely because they can facilitate efficient transfers among people who do *not* necessarily share identical conceptions of the good.[69]

Nevertheless, *market society* has certain attributes—the need for bureaucratic regulation, recognition of private property, and functioning civil courts, to name a few—which by virtue of their significant spill-over effects, contribute to the formation of important shared interests among participants.[70]

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global spread of under-regulated capitalism than a judgment on the global economy per se. *See* Hopkins, *supra* note 12, at 42–43 (discussing dangers posed by weakened regulatory power over capitalist system).

67. *See* POLITICAL ECONOMY OF MODERN CAPITALISM (Colin Crouch & Wolfgang Streeck eds., 1997) (comparing Anglo-American, European and Asian models of capitalism). For a nuanced account of the role of national economies—and their differences—in the global economy, see ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER (2001).

68. Crouch & Streeck, *supra* note 67. *See generally* YASHENG HUANG, SELLING CHINA: FOREIGN DIRECT INVESTMENT DURING THE REFORM ERA (2003); DALI YANG, BEYOND BEIJING: LIBERALIZATION AND THE REGIONS IN CHINA (1997); DAVID ZWEIG, INTERNATIONALIZING CHINA: DOMESTIC INTERESTS AND GLOBAL LINKAGES (2002); MINXIN PEI, CHINA'S TRAPPED TRANSITION: THE LIMITS OF DEVELOPMENTAL AUTOCRACY (2006).

69. *Globalization and Justice, supra* note 8, at 130. This is one of the more promising aspects of a global market. The more sinister is a global race to the bottom through deregulation.

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

Such liberal pro-market norms have been called the "germ of a universal consciousness" insofar as they have come to be held in common by developed and developing market states.[71]

One category of shared practices around markets is particularly significant for the purposes of this article: the practice of regulating the market through institutions. Most market societies have experience in developing domestic institutions capable of supplementing and mitigating the rigors of capitalism, for example by compensating the "losers" through some form of wealth transfer. But what is truly distinctive about the emerging global economy is the shared recognition of the need for institutions regulating the market at a trans-national level.[72] This is but one aspect of a larger move toward meta-state institutions at a global level.

2. *Shared Understandings, Meta-State Institutions, and a Global Basic Structure*

Perhaps the strongest evidence of an emerging global community involves our recognition of a shared need to look to institutions beyond the State in order to frame an adequate social response to many of the problems and challenges we face.[73] This shared need is more than an intensification of prior trends toward internationalization, just as meta-state institutions are not just a specialized regulatory tool of States for certain problems in international relations. The need for increased global governance, rather, is itself a shared understanding characteristic of this new social space, and the reality

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71. Stanley Hoffman, *Clash of Globalizations*, *in* THE GLOBAL TRANSFORMA-TIONS READER, supra note 8, at 106 (citing Raymond Aron).

72. This does not mean, of course, that there is agreement on the nature of such institutions or on what ideology should guide their market regulation. *See, e.g.,* Deborah James, *Who Should Run the Global Economy?*, AL JAZEERA, Apr. 23, 2012, http://www.aljazeera.com/indepth/opinion/2012/04/2012422104847102233.html.

73. Keohane and Nye refer to this as an aspect of "complex interdependence": "More and more issues are up for grabs internationally, including regulations and practices—ranging from pharmaceutical testing to accounting and product standards to banking regulation—that were formerly regarded as the prerogatives of national governments." ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE 246 (2001).

of global governance by its nature constitutes a shared practice.[74]

Globalization's many facets are together pushing us toward increased cooperation at the meta-state level. Returning to Rawls's account of the circumstances of justice, the rational human response to these circumstances is to enter into systems of social cooperation for mutual advantage. Through this cooperation we create "society," in particular the "basic structure"—i.e., the institutions we employ to allocate resources and opportunities, and which thereby directly affect our life prospects.[75]

By leading us to create new institutions and shift responsibility for many social allocations to the meta-state level, globalization is creating a global basic structure.[76] Through globalization, we find ourselves in precisely the sort of cooperative venture for mutual advantage that is the subject of justice; we also share the fruits of social cooperation (trade opportunities, for example) through meta-state institutions such as the World Trade Organization (WTO) and the European Union.[77] These organizations, in addressing such needs, are involved in allocating the benefits and burdens of social cooperation—such as rights, opportunities, privileges, membership, and resources—activities that have been traditionally understood in the do-

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74. *See, e.g.,* RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) [hereinafter RULING THE WORLD] (surveying global institutions and cataloguing the emerging constitutionalization of global governance). It is useful at this juncture to recall the point I discussed earlier, that understandings and practices can be debated and contested without necessarily rendering them not "shared"—this has to be so or there are in fact no communities at all.

75. *See* RAWLS, *supra* note 4, at 8.

76. THOMAS W. POGGE, REALIZING RAWLS 240–80 (1989); JONES, *supra* note 22, at 8; *Westphalian World, supra* note 26, at 705–06.

77. CHARLES BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 166–67 (1979) [hereinafter POLITICAL THEORY]; JONES, *supra* note 22, at 8; *Westphalian World, supra* note 26, at 705–06. Thomas Eskelinen warns us, however, that while such institutions doubtless comprise a global basic structure, they cannot be fully understood nor reformed toward a more just arrangement without proper consideration of the agendas pursued by powerful individual governments within their frameworks. Thomas Eskelinen, *Global Basic Structure and Institutions: The WTO as a Practical Example,* 7 J. GLOBAL ETHICS 47, 47 (2011).

mestic sphere to make justice both relevant and necessary.[78] In fact, global social regulation today is increasingly conducted through a complex partnership consisting of such meta-state institutions, States and their constituent units, international organizations, and non-State actors, through mechanisms such as the market, all regulated through international law.[79] In Rawlsian terms, such global level institutional arrangements "define men's [sic] rights and duties and influence their life prospects, what they can expect to be and how well they can hope to do."[80]

This global basic structure could be seen as *merely* tending toward the creation of global society, which in the communitarian view does not go far enough for global community. There are, however, at least four ways in which this shift toward a transnational and meta-state partnership has profound communitarian consequences.

First, this shift suggests that the communitarian assumption of bounded distributive communities no longer holds at the nation-state level, necessitating a shift to a "higher" or "more inclusive" level of community in which relevant distributive decisions are also taken. This "higher" level is the transnational level. Walzer describes the political community of justice as one "capable of arranging [its] own patterns of division and exchange, justly or unjustly."[81] When a community is no longer capable of fixing its own patterns of division and exchange, it is no longer sufficient to analyze the justice of that

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78. " . . . [T]here is a global basic structure, which, like the domestic basic structure, is an important subject of justice because it has profound and enduring effects on the prospects of individuals and groups . . . ." *Westphalian World, supra* note 26, at 700–01.

79. JONES, *supra* note 22, at 8 ("[T]he institutions and quasi-formal arrangements affecting persons' life prospects throughout the world are increasingly international ones—international financial institutions, transnational corporations, the G8, the World Trade Organization . . . ."). *See also* SEN, *supra* note 14, at 409 ("The distribution of benefits of global relations depends not only on domestic policies but on a variety of international social arrangements . . . .").

80. RAWLS, *supra* note 4, at 7; *but see Global Justice, supra* note 18, at 447 (Maffetone, a Rawlsian, arguing that empirical evidence of a global basic structure is inconclusive).

81. SPHERES OF JUSTICE, *supra* note 17, at 31.

community with sole reference to itself.[82] In other words, unable to fix its own distributions entirely itself, the community is not capable of delivering its own justice. We must therefore look to that further level of institutions that is affecting that community's distributions, and to its justice as well.

The drive toward a higher level of institutions is precisely the effect of globalization.[83] In Andrew Hurrell's words, "[I]ntegration and globalization have eroded and undermined the boundedness of political communities whose particular cultures, traditions and ways of living are given so much weight by communitarians."[84] From a distributive justice perspective, globalization is revealing domestic society to be an incomplete community (even as it is also an agent rendering domestic society increasingly less complete), incapable of securing the overall well-being of its members by itself, thus prompting us to look to a higher level of community as part of group efforts to secure well-being.[85] Even the many anti-globalization protests focused on Bretton Woods institutions indicate the growing awareness that these institutions increasingly constrain allocative decision-making at the national level, even as these institutions engage in positive distributive functions as well (such as the allocation of trade benefits, crisis financing, and development aid), though often falling short in this role.[86]

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82. This also echoes criticisms made about the validity of Rawls's assumption of self-contained national distributive communities in his analysis of domestic justice.

83. *See* Alberto Tita, *Globalization: A New Political and Economic Space Requiring Supranational Governance*, 32 J. WORLD TRADE 47, 49 (1998) (globalization leads to internal pressures on States as traditional macroeconomic policy tools "becom[e] less and less capable of being determined at a national level by democratically elected governments.").

84. Hurrell, *supra* note 65, at 36.

85. *See also* Robert P. George, *Natural Law and International Order, in* INTERNATIONAL SOCIETY: DIVERSE ETHICAL PERSPECTIVES 54–69 (Davd Mapel & Terry Nardin, eds., 1998) ("[T]he national state can no longer (if it ever could) secure the conditions of its citizens' overall well-being (that is, their common good) without more or less systematically coordinating its activities with other nation states and, indeed, without the active assistance of supranational institutions.").

86. It is in this sense that Teubner characterizes such protest movements as "parasitic" (though I would choose a different word): "They presuppose specialized institutions with high problem-solving potential, which they accuse of over-specialized tunnel vision and can provoke into innovations." Gunther Teubner, *Global Private Regimes: Neo-Spontaneous Law and Dual Con-*

Second, the fact that globalization is forcing us to look to international institutions such as the United Nations and the WTO for global policy solutions has an inherent community-building effect. The role played by common institutions sharing a common language in building polities out of disparate peoples has long been recognized in international relations as well as domestic politics as "nation-building."[87] Our increasing tendency to look, at least in part, to meta-state institutions for responses to social and environmental problems globally, reflects a shared understanding that such institutions play an increasingly prominent role in formulating or channeling social policy decisions and orchestrating social welfare responses, and that few States can act without them on any important social issue.[88]

Third, the role of institutions in global regulation—economic and otherwise—is itself increasingly recognized as a source of norm-creation and shared understandings. "Once created, institutions act as platforms for on going normative debate, for the mobilization of concern, and for debating and revising ideas about how international society should be organized."[89] For this reason, such institutions themselves can

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stitution of Autonomous Sectors in World Society?, in GLOBALIZATION AND PUBLIC GOVERNANCE 71, 81 (Karl-Heinz Ladeur ed., 2000). On the re-distributive potential of the Bretton Woods Institutions see, e.g., Frank J. Garcia, *Global Justice and the Bretton Woods Institutions, in* THE FUTURE OF INTERNATIONAL ECONOMIC LAW 23 (William J. Davey & John Jackson eds., 2008).

87. Will Kymlicka, *Territorial Boundaries: A Liberal Egalitarian Perspective, in* BOUNDARIES AND JUSTICE, *supra* note 11, at 249, 256; *see also* Hurrell, *supra* note 65, at 39 (on how state institutions are tremendously important in the creation and development of national communities). We in the United States are no strangers to this phenomenon: We reinforce our shared identity as a nation when we look to the Federal level for resource allocations and policy responses, as in the case of natural disasters or security crises.

88. Hurrell, *supra* note 65, at 39. In this sense, even the anti-globalization protests contribute to the community globalization is creating, insofar as they take up one part of a larger global debate over the most humane ideology for global market society. According to Sen, "Even our shared frustrations and shared thoughts on global helplessness can unite rather than divide." SEN, *supra* note 14, at 173.

89. Hurrell, *supra* note 65, at 42. A current example of this idea is reflected in the critique of the United Nations for failing to interfere in the Syrian crisis. *See, e.g.*, Saira Mohamed, *The UN Security Council and the Crisis in Syria,* INSIGHTS (AM. SOC'Y INT'L L.), Mar. 12, 2012.

"move different States and societies towards 'shared under-standings of the meaning of social goods.'"[90]

Fourth, this shift toward meta-state institutions represents the emergence of a shared understanding with respect to regulating global social conflict. When responding to the fact of social conflict, particularly conflict over what are purportedly "shared" understandings, communitarians shift the level of analysis to a secondary set of practices and understandings, a system for managing conflicts over understandings and their application. For example, Walzer suggests that disagreement over the meaning of social goods—where a given social understanding is controversial—triggers a sort of "second order" set of understandings concerning how disputes are to expressed, managed, and adjudicated, and even mechanisms for "alternative distributions."[91] In addressing a similar problem concerning the relation between nationality and ethnicity in an ethnically plural nation-state, Miller creates a similar distinction, between public and private culture.[92] Both approaches suggest a hierarchy of shared understandings, reminiscent of H.L.A. Hart's distinction between primary and secondary legal rules.[93]

This approach to social conflict—shifting the level of analysis to "understandings about understandings," or "shared public cultures"—casts a community's identity in a different light. It seems communitarians are linking justice at the national level to a kind of shared institutional culture, rather than a simple community of shared primary beliefs; what communitarians are identifying when they speak of the common good is really a commitment to the second-order set of under-

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90. Hurrell, *supra* note 65, at 42–43 (citing WALZER, SPHERES OF JUSTICE, *supra* note 17, at xiv.). This may or may not also reinforce the cultural homogenization tendencies many commentators note with alarm about globalization. *See supra* note 8. However, my point here is about social goods in a distributive sense, not consumer goods.

91. SPHERES OF JUSTICE, *supra* note 17, at 313.

92. Noting that nationality as a fact is often created out of disparate ethnic groups and even forced upon minority ethnic groups with prior existing identities of their own, Miller posits a bifurcation of national culture, between a shared public culture and differing private cultures. *Ethical Significance of Nationality, supra* note 17, at 657–58.

93. H.L.A. HART, THE CONCEPT OF LAW (1961) (primary rules are those that actually govern conduct whereas secondary rules are those that govern primary and secondary rules).

standings about disputes, the rules about rules or "public culture."[94] If this is so, then what we are talking about when we discuss community at the national level is something more like *governance*: shared social institutions for conflict management, decision-making over resource allocation, and the administration of justice, operating according to shared understandings and standing astride a range of smaller normative communities.

This move to a second or public set of shared understandings about justice is important for the question of global justice because it suggests a location for understandings about global justice that are independent of primary understandings or nationality-based commitments, which are understandably plural and divergent. If we understand Walzer and Miller to say that shared understandings of justice involve agreements over the priority of public over private culture in certain cases, or agreements about the institutional management of conflicting claims, then we can look for global justice and the *a priori* community for global justice by looking at the emerging meta-state or public culture for shared understandings concerning conflicting global claims. In other words, global community, as far as justice is concerned, may look less like a single global community in the national sense of shared identity, culture, and history (to the degree even those are commonly shared in a modern, complex nation State), and more like a global set of shared understandings about claims and conflicts, or a global public culture.[95] We may find more of a consensus over this public culture and these secondary understandings than a simple survey of the diverse range of primary understandings and private cultures would suggest.[96]

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94. Thus framed, the sense is closer to what Maffetone calls a second, "less intuitive," but valid reading of Rawls's "priority of right," namely a restriction of comprehensive conceptions of the good to the "political" conception. *Global Justice, supra* note 18, at 445.

95. This might resemble, for example, what Sebastiano Maffetone calls the creation of a global public reason. Sebastiano Maffetone, *The Fragile Fabric of Public Reason, in* THE DIALOGUE, VOL. 3: REASON AND REASONABLE-NESS 407, 407–10 (Ricardo Dottori ed., 2005).

96. This starts to look more like the liberal commitment to institutions for managing social conflicts among people with differing visions of the good, and suggests more common ground with communitarians than may at first be apparent.

If so, the ongoing shift to meta-state institutions has profound consequences for global justice. Quoting Hurrell's excellent analysis:

> [T]he density, scope and complexity of the agreements, norms, and rules in which states and societies are already enmeshed provide some basis for positing a community interest or an agreed set of purposes and values against which new substantive norms may be judged—the idea of an objective community interest or of the common interest of global society.[97]

When global social relations involve conflicts between incomplete national communities of justice over allocative decisions, globalization can bump us up a level, invoking a new shared understanding that the meta-state level is the place to resolve this conflict, according to new understandings regarding appropriate distributions, and norms in general, at the global level. Insofar as these global practices deepen and extend, we see stronger shared traditions and practices of global social policy formation and allocative decision-making.[98] In the development of new forms of meta-state institutional governance, we are developing a new form of shared understanding, or rules about rules, at the global level.

These changes have significant communitarian consequences regarding justice, based on new meta-national claims for our loyalty. For example, Miller defends our partiality to compatriots in part on the basis of the many fundamental roles that the nation plays in the identity and flourishing of its members. To the extent that global meta-state institutions both constrain the nation's role, and arrogate elements of this role to themselves, they can create corresponding transnational claims on our loyalties, supporting new transnational distributions of goods and resources. In a similar way, Richard Miller also attempts to justify a limited form of partiality on the basis of shared institutions and mutual expectations: If we are relying on people's loyalty in a shared enterprise, we had bet-

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97. Hurrell, *supra* note 65, at 41.

98. Recent examples of this include the transformation of the GATT into the WTO system in tandem with the globalization of the world economy and the emergence of the Basel Committee on Banking Supervision as a key source of global financial accords in the wake of the global financial crisis.

ter be loyal to them.[99] At the global level, this means that to the extent we share institutions, we owe each other some degree of partiality at the global level.

This kind of shared participation goes beyond mere participation in a cooperative scheme. Quoting Walzer, "Over a long period of time, shared experiences and cooperative activity of many different kinds shape a common life."[100] It is precisely such a common life that globalization, the global economy, and global regulation are developing among all of us who share this planet.

III.   New Global Possibilities

I have argued that in global social relations today we see, both inter-subjectively and at the regulatory level, the constitutive elements of a limited global community emerging. In this manner, traditional contractarian and communitarian objections to the possibility of global justice are being weakened by globalization itself. My goal thus far has been to suggest why globalization is itself changing the very nature of the phenomena that moral and political theories of global justice seek to explore. Therefore, my main effort has been to establish a link between our evaluation of the claims of contractarian and communitarian theory, and our empirical evaluation of the social changes of globalization.

Now I will turn to some substantive suggestions as to the shape of global justice as informed by globalization and its effects on contractarian and communitarian approaches, and I will examine how this analysis of globalization might suggest new possibilities. The challenge—and the opportunity—are clear: Paraphrasing Domingo, society is globalizing, but States (and international law) *and* contractarian and communitarian theories of justice are merely internationalized.[101]

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99. Richard Miller, *supra* note 51, at 43–46.

100. Michael Walzer, Just and Unjust Wars 54 (2006).

101. Rafael Domingo, The New Global Law (2010). As a general matter, global justice theory has assumed social and inter-State relations as they were "pre-globalization" even as they have discussed globalization as a phenomenon, that is, either looking at universal normative or legal obligations on strictly theoretical or positivist grounds (as cosmopolitans and human rights advocates do) or at social relations on a national level (as contractarian or communitarian critics do), but seldom looking at the transformed social basis for transnational normative obligations, as I am suggesting.

A.   *Shifting the Transnational Justice Frontier*

In much the same way that changes in technology can shift production possibility frontiers for a given economy,[102] globalization has shifted the "transnational justice frontier" for theories which limit justice according to underlying social relations.

1.   *Rawls and* Global *Justice as Fairness?*

Globalization, including the global economy and the emergence of global regulation, allows us to definitively move beyond Rawls's limitation of Justice as Fairness to domestic society to a more concrete conception of a global Justice as Fairness. The developments in globalization, the global economy, and global regulation discussed here have rendered Rawls's assumption of a closed domestic society untenable today even at the level of theory.[103] Simply put, global economic interdependence makes it impossible for any one domestic society to completely deliver and safeguard for its citizens the conditions necessary for just allocations of social goods. Instead, Justice as Fairness should be constructed with inter-dependent societies in mind, and then evaluated as it applies generally to global issues of social justice.

The fact of economic interdependence among the world's societies is a key element in establishing the possibility of any contractarian argument for international distributive obligations.[104] A primary motivating force behind the need for justice, according to Rawls, is that some mechanism is needed

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102. Paul A. Samuelson & William D. Nordhaus, Economics 11–15 (2010).

103. In his study of the concept of fairness in international law, Franck concludes that the requisite level of community has emerged at the international level to sustain a fairness analysis. Thomas M. Franck, Fairness in International Law and Institutions 12–13 (1998). For similar reasons, Pogge argues that Rawls's bifurcation of the choice problems into separate domestic and international ones is untenable, because the international environment in which States actually operate will significantly affect the nature of domestic societies, something representatives should know in the original position if they are to ratify their choices post-veil of ignorance. Pogge, *supra* note 76, at 255–56.

104. Political Theory, *supra* note 77, at 166–67; *Westphalian World, supra* note 26, at 705. In a similar sense, Pogge argues that the emergence of a single global institutional scheme involving both international law and territorial States has made all human rights violations "at least potentially every-

to allocate the advantages that arise from social cooperation. One can argue, therefore, that wherever social cooperation has created some wealth or advantage which otherwise would not exist, the social predicate exists for the application of justice.[105] As Charles Beitz puts it in his seminal study of political philosophy and international law: "[T]he requirements of justice apply to institutions and practices (whether or not they are genuinely cooperative) in which social activity produces relative or absolute benefits or burdens that would not exist if the social activity did not take place."[106]

Trade and international economic relations satisfy this condition because they lead to increases in individual and national wealth through the operation of comparative advantage and principles of efficiency in general. As the international trade regulatory system has grown in scope and institutional capacity with the creation of the WTO, the gains from such social cooperation increase, as does the institutional capacity for allocative decision-making and enforcement of resulting norms. One might say, therefore, that at a minimum, international economic relations in the contemporary global system satisfy the minimum requisites for a consideration of the claims of justice, which would apply to the allocation of the social goods that are the subject of the treaty in question.

In this sense, international economic relations and international economic law can be said to involve the creation of benefits from social cooperation. The need to allocate such benefits raises precisely the same sort of issues raised in domestic society when such benefits stand to be allocated. Therefore, even if there is a justifiable distinction between domestic and international society for some purposes, with regard to the ap-

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one's concern." Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 51 (1992).

   105. Put another way, people so cooperating and benefiting thereby, have the requisite "share in the constitution" for contractarian obligations. ARISTOTLE, *supra* note 4.

   106. POLITICAL THEORY, *supra* note 77, at 131. Beitz has subsequently limited the scope of this argument from the strong claim that such cooperation makes necessary a global difference principle, to a more limited claim that such relationships render such a principle feasible. Charles R. Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 J. PHIL. 591, 595 (1983). I am using this argument in a similar restricted sense to address the contractarian objection to such a principle, and not to argue for the principle itself.

plicability of justice theory, the same basic predicate is present in both.[107] If global economic relations establish the necessary predicate for contractarian obligations, then there is no theoretical bar to international distributive obligations patterned along Rawlsian principles—in fact, global social relations demand such principles.[108]

2. *An Emerging Communitarian Account of Global Justice?*

These developments also allow us to begin to speak in important ways of limited degrees of community, or "spheres of justice" to borrow Walzer's phrase, with respect to different issues, institutions, or sets of social relations within the global social space. Thus we can speak of "limited global community" as embracing that level of "community" necessary to support relations of justice, even if it does not manifest that level of community necessary to speak of "global community" in the fullest communitarian sense.[109] Although globalization is fundamentally changing global social relations, I am not arguing that global community has emerged fully formed, with the richness and force of national community.[110] However, we can

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107. *See generally* FRANK J. GARCIA, TRADE, INEQUALITY AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE (2003) (developing the argument that transnational distributive justice resembles domestic distributive justice in key parameters). Barry's objection to the extension of justice as fairness obligations to international society on the basis of the absence of such economic relations can thus be seen as 'pre-global.' Brian Barry, *Humanity and Justice in Global Perspective, in* NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 219, 229–34 (J. Roland Pennock & John W. Chapman eds., 1982).

108. *See* ONORA O'NEILL, BOUNDS OF JUSTICE 121 (2000) (given the nature of contemporary international economic relations, "[q]uestions of transnational economic justice cannot now be ruled out of order"); *Westphalian World, supra* note 26, at 706 ("It is therefore unjustifiable to ignore the global basic structure in a moral theory of international law—to proceed either as if societies are economically self-sufficient and distributionally autonomous . . . .").

109. When Domingo speaks of "global community" he intends it in this latter, totalizing, aspirational sense. DOMINGO, *supra* note 101, at 102–03.

110. Hurrell cautions that "whilst the idea of a global moral community is not entirely illusory, the elements of deformity [in contemporary global social relations] provide good grounds for arguing that it is certainly fragile and cannot bear too much weight." Hurrell, *supra* note 65, at 46. Nevertheless, with Berman we can at least say "[t]hese ideas of space and community [do] complicate the presumed naturalness of nation-state communities." *Law and Globalization, supra* note 54, at 516.

say (with Hurrell) that "[s]hared and institutionally embedded understandings as to what constitutes justice and injustice are no longer confined within national communities. In examining the changing structure of international society we surely are dealing with 'an identifiable set of institutions whose impact on the life chances of different individuals can be traced' (quoting Miller)."[111]

These changes have begun to influence even communitarian theorists. Recently, Miller has been willing to acknowledge a collective responsibility to protect basic human rights in response to grave injustice outside our borders.[112] With respect to our negative duty to refrain from rights violations, Miller is at his most cosmopolitan: This duty admits of no special preference for compatriots. However, with respect to positive duties and resources, our responses can be weighted in favor of compatriots under the majority of circumstances.[113] Miller's conception of a global response to injustice thus remains inherently both nationalistic and static: We evaluate injustice with respect to the national communities responsible for it, and we respond to it out of a sense of collective national responsibility, presuming the pre-eminence of national communities throughout.[114]

Even Walzer's approach in *Thick and Thin*,[115] in which he tries to demonstrate a zone of overlap among different theories of justice at least with respect to grave injustices, misses a

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111. Hurrell, *supra* note 65, at 43.

112. DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE 12–17 (2007) [hereinafter NATIONAL RESPONSIBILITY]. At the transnational level, Miller recognizes a negative duty to refrain from basic rights violations ourselves and a positive duty to prevent rights violations by others; and a positive duty to secure the basic rights of people we are responsible for (and we are *not*, in a cosmopolitan sense, responsible for everyone), or when another has failed in their responsibility toward these people. *Id.* at 44–47.

113. *Id.* at 48–49. The reason such weighing is justified has to do with the basis for these duties, which for Miller remains the nation. "By virtue of identifying with compatriots, sharing their values, and receiving the benefits that national communities provide, we are also involved in collective responsibility for the things that nations do." *Id.* at 265. In many situations, our individual responsibility to our collective "at home" outweighs our collective responsibility to other collectives than our own.

114. *Id.* at 263–65.

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

critical conclusion implied by globalization: The zone of overlap is not static, and globalization itself intensifies the process of convergence. There is now a dynamic process of emerging consensus around shared understandings in a newly constituting global social space, something Walzer does not contemplate.

B. *A New Justice Architecture for a New Social Reality*

If one is willing to accept that globalization is leading in some manner or degree to the emergence of a global community of some kind, then the stage is set for an examination of the nature of such a community or communities and the substance of a communitarian approach to global justice. However, this undertaking poses quite a complex set of questions. If the central tenet of communitarianism is that justice flows from community norms, practices, and understandings, then what exactly are the norms, practices, and understandings of the partial or limited communities I am positing here?

At least two basic approaches are possible. First, we might find that insofar as there is a "partial" global community around a specific set of issues and practices, it shares a clearly identifiable set of robust normative commitments within its scope, even if that scope is not comprehensive. Perhaps the foremost example of this possibility is the global economy and its regulatory framework.

A second alternative is something along the lines of Walzer's "thin" approach to global justice, covering only those areas of overlap among normative communities, but in a new, dynamic and evolutionary sense: The overlap is not coincidental, but constitutive of an emerging global consensus. This approach assumes that a communitarian theory of global justice at this juncture will be truly global in scope, yet not be as comprehensive as a domestic theory of justice, since there is still no comprehensive community at the global level.

1. *The Global Economy, a Global Basic Structure, and Global Justice*

Given its evolution and contours, it seems relatively clear that the global economy meets contractarian criteria for justice as a cooperative scheme for mutual benefit with socially

produced goods and an allocative scheme.[116] The global economy as a collective social enterprise has perhaps the most widespread adherence of any such enterprise at the global level to a set of shared traditions, practices, and understandings—here, centered around markets, economic regulation, and market society.

What are the normative commitments of this global economic community? One often hears the view that the global market reflects principles of economic liberalism, due to the relationship between liberalism and markets, and the liberal ideology of its core institutions and key actors.[117] If this is so, we might find that a liberal theory of economic justice such as Justice as Fairness, generally considered a domestic theory of justice within liberal States, might be sustainable with regard to *all* participants—States and institutions alike—in the specialized partial global community of the global market.[118] In other words, we might find that a liberal theory of economic justice is an appropriately pluralistic theory of global economic justice for the global economic community. Because the global economy is built on a market model and regulated along liberal lines by global institutions, near-universal participation in this market and these institutions reflects, at least in part, a consensus among participants that a liberal approach

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116. POGGE, *supra* note 76, at 238–80; JONES, *supra* note 22, at 8; POLITICAL THEORY, *supra* note 77, at 166–67; *Westphalian World, supra* note 26, at 705–06; Eskelinen, *supra* note 77, at 48.

117. Thus extending at a global level Polanyi's Market Society argument. *See, e.g.*, KARL POLANYI, THE GREAT TRANSFORMATION (1944) (discussing the triumph of liberalism in economic theory). Whether or not optimally performing markets naturally reinforce liberal principles is a debate at least as old as Adam Smith. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, ch. II (1778) (arguing that the economic and political potential of the French-British relationship was best served by freeing—not regulating—trade between the two rivals).

118. We might even find, in the end, that communitarian changes in global social relations make cosmopolitanism sustainable bit by bit—a sort of creeping cosmopolitanism—insofar as we see emerging pockets of liberal community. In a related sense, Risse suggests that we already live on "a cosmopolitan plateau"—that cosmopolitanism has already won its most important victory in establishing that moral equality is an essential part of any credible theory of global justice, whatever the disagreement about the implications of this view and its consequences for institutional structures. Mathias Risse, *Global Justice, in* THE OXFORD HANDBOOK OF POLITICAL PHILOSOPHY (David Estlund ed., 2012).

to socioeconomic organization is appropriate.[119] Thus, for this partial global community, justice would be robust even if its scope was confined to economic relations among participants.

What might such justice look like? While a full discussion of such a conception of justice is outside the scope of this Article, I suggest an international difference principle to guide institutions involved in allocating the outcomes of global cooperative schemes, drawn directly from Rawls's own domestic elaboration: International social and economic inequalities are just only if they result in compensating benefits for all persons subject to them, and in particular for the least advantaged persons.[120] This would mean as a general matter that the institutions of this partial community such as the WTO, the World Bank, and the International Monetary Fund (IMF), which make significant allocative decisions involving the benefits and burdens of global economic cooperation among participants, must be guided by the difference principle in their institutional decision-making.[121]

The global economy as a "specialized" community within global social relations represents one possibility opened by globalization: partial communities emerging around a specialized set of traditions, practices, and understandings and developing norms of justice for that community. Such a community is global in terms of membership but limited in terms of responsibilities. Implicit in such an approach is a kind of "moral federalism," to borrow Wilfried Hinsch's concept, a structure within which different principles of justice do different but complementary kinds of work at different levels within the sys-

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119. Of course, when a market is truly global, participation reflects at some level simply the recognition that there is no other game in town, though the fact that abstention is possible (North Korea, for example), and a high degree of volitional behavior among States (the long list of countries queuing to join the WTO or the EU, for example), suggests that at some point the distinction between motives loses meaning.

120. "[T]he second [principle] holds that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society." RAWLS, *supra* note 4, at 13.

121. Frank J. Garcia, *Justice, the Bretton Woods Institutions and the Problem of Inequality, in* DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM 475, 486–87 (Chantal Thomas & Joel P. Trachtman eds., 2009).

tem (in particular, the national and the transnational).[122] On this view, justice between members of the global economic community might be along the lines of a robust global difference principle *within* their economic relationship, but different among these same States when they act outside this particular economic community on other matters of shared interest.

2. *A Global Basic Package: Building on a New Base*

A second possibility involves a truly global community in terms of both membership and scope, albeit with possibly "shallower" sets of norms or commitments. Although it is not possible to offer a definitive account of such a community and its norms here, nevertheless I will offer some preliminary observations on its possible dimensions.[123]

a. *Rethinking Boundaries and the Role of the State*

The developments in globalization discussed here are challenging and transforming traditional political and legal concepts that have hitherto organized social relations at an in-

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122. Wilfried Hinsch, *Global Distributive Justice*, 32 METAPHILOSOPHY 58, 59 (2001). For Hinsch, there is no reason in principle why domestic and transnational principles of distributive justice need to be identical. Indeed, allowing for divergent but compatible conceptions of justice may be more consistent with the pluralist nature of global society, and with liberal values of autonomy. *Id.* at 60. Thus, for example, the United States can pursue one kind of distributive justice through its domestic social welfare and tax legislation, a different kind of distributive justice through WTO Special & Differential Treatment, and yet a third kind of distributive justice through USAID, without there necessarily being a conflict. Or, to put it more precisely, the simple fact of their difference does not by itself create a justice problem—the question is whether in each case the principle of justice is the appropriate one and the implementation adequate. On the possibility of plural approaches to global justice, see generally GARCIA, *supra* note 31(applying the three approaches to Rawlsian liberalism, communitarianism, and consent theory to global justice).

123. A complete account of the extent of such shared global norms, practices, and understandings would require combining traditional domestic political theory with the many innovative ongoing studies of our new global social and legal reality, and constitute nothing short of a legal anthropology of global justice. Interesting and promising beginnings of such an account include SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006); DOMINGO, *supra* note 101; PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS (2012) [hereinafter GLOBAL LEGAL PLURALISM].

ternational level—in particular, the role of States and the nature of boundaries.[124] Historically, the dominant view of the role of the State in international relations has been as a sovereign actor acting in its unitary self-interest.[125] Beginning with the post-War human rights movement and intensifying through globalization, social processes and, increasingly, regulation are occurring on a transboundary networked basis. These dynamics have been challenging and transforming this understanding of the State as actor on the international stage, to the State as agent in the sense of one who acts on behalf of another, in an increasingly rich multipolar and networked environment.[126] That "other" consists of the range of individuals, groups, and national communities that States represent on the international level.[127]

These changes have implications throughout domestic and international politics and social relations as they have been conventionally understood.[128] Because of globalization, the very notion of what is "national" and what is "international" or "global" is undergoing a change, as even "national" institutions can now be sometimes understood more accurately as horizontally integrated components of a transnational

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124. *See, e.g.*, DOMINGO, *supra* note 101, at 55–57 (noting the globalization of social relations forcing a globalization of law). *See generally* KENICHI OHMAE, THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES (1995) (arguing that the state is an inefficient unit of organization in a globalized environment). *But see* Hopkins, *supra* note 12, at 19 (and sources cited therein) (globalization is itself the product of nation States and can flourish only if nation States remain strong).

125. *See* POLITICAL THEORY, *supra* note 77, at 3, 35–50 (critiquing the dominant, Hobbesian view of the State in international relations).

126. Indeed, insofar as the new global rulemaking transcends the State, the questions of agency and accountability extend beyond the State as well, to the accountability of a new global administrative process. *See* Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. INT'L L. & POL. 763, 765–66 (2005) (noting shift in accountability models necessitated by emergence of global politics).

127. Hurrell, *supra* note 65, at 41. Or, depending on one's view, that "other" is the transnational capitalist class. *See* B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L. L. 1, 4 (2004).

128. *See, e.g.*, Cohen & Sabel, *supra* note 126, at 763 (" . . . something new is happening politically beyond the borders of individual states and irreducible to their voluntary interactions. To distinguish these developments from what is commonly called 'international law and politics,' we use the term 'global politics.'").

system, than as vertically accountable components of a traditional "State."[129] Globalization emphasizes the arbitrariness of many contemporary territorially-based allocative principles such as citizenship, because it allows us to be aware of the plight of others as never before, forcing us to ask whether the traditional way of allocating rights, opportunities, and resources is really adequate in a globalizing world.[130]

If global community is possible and emerging, as I have argued, then we have to rethink the discretion given to States to use boundaries as primary determinants of global justice.[131] We need to develop a model for the international delivery of justice—a conception of effective global citizenship—in which the accident of birthplace, or the vagaries of naturalization law, do not fundamentally affect each person's life prospects.[132] Particularly insofar as globalization involves the global spread of market society, each person's access to basic social rights becomes more important, as they increasingly face the local disruptive effects of market society while living

129. *See* Saskia Sassen, *The State and Economic Globalization: Any Implications for International Law?*, 1 CHI. J. INT'L L.109, 110 (2000) (". . . the [transnational] system also lies, to a far higher degree than is usually recognized, inside particular components of national states.").

130. *See* Thomas W. Pogge, *An Egalitarian Law of Peoples*, 23 PHIL. & PUB. AFF. 195 (1993) (borders have tremendous distributive impact which requires justification); Cohen & Sabel, *supra* note 126, at 795 ("The emergence of global rulemaking, with direct consequences for individuals and firms as well as States of course, puts pressure on existing national arrangements, unsettles the delicate compromises of decades past, and requires national actors to justify what were once sovereign choices to a world of foreigners.").

131. As things stand, there is a pernicious anomaly: free movement of capital but no free movement of persons, which could be seen as a deliberate attempt to keep labor costs from equalizing. A global economic space demands something approaching the free movement of persons, subject to some notion of carrying capacity or assimilation rate. The very idea conjures images of unsupportable mass migrations, which are not inevitable, nor are they the necessary result of changes in border policies. The primary reason for such shifts would be economic inequality, a subject that poses a central challenge to global public law.

132. *See, e.g.*, Barbara Arneil, *Global Citizenship and Empire*, 11 CITIZENSHIP STUD. 301 (2007) (proposing an alternative view of global citizenship based on our shared fate and on the protection of basic social rights). *But see* NATIONAL RESPONSIBILITY, *supra* note 112, at 167 (distinguishing any minimum set of 'global' rights from citizenship, and reserving the latter for national political communities).

under territorial units increasingly unable to effectively ame-
liorate these effects on their own.[133]

This does not, however, mean that global institutions
must be modeled on domestic institutions to form a world
State. Rather, we must see that, in normative terms, global in-
stitutions must be justifiable according to the same principles
we apply in domestic political theory. The legitimacy of global
institutions can no longer rest entirely on their creation by
States along duly authorized treaty lines, but will require some
increased form of public participation, reflecting normative
principles of political theory in the same way that domestic in-
stitutions must.[134]

Global community demands a new view of the role of the
State, in which the State no longer holds a monopoly on the
delivery of basic public goods, but rather, as the guarantor of
last resort, plays a central role in their delivery.[135] It is increas-
ingly common to understand the State as co-existent with a
variety of cross-border networks.[136] Indeed it has been argued
that one key shift in the role of the State in globalization is as

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133. This can be conceived as a global version of the welfare net that ad-
vanced economies offer their members as a means to soften the rigors of
market society and minimize the adverse political consequences of job turn-
over. To the extent that globalization involves creation of a global market
society, it points to the gap in this welfare net at the global level. Mandle &
Ferleger, *supra* note 10, at 14. One way to address the ethical consequences
of global market society, and the social disruption it causes, is to establish
the kinds of compensation mechanisms that have long been recognized as
essential in domestic economies. *Id.* at 15.

134. *See* Lea Brilmayer, Justifying International Acts (1989) (compar-
ing international ethics and domestic political theory).

135. *See* Saskia Sassen, *The State and Globalization: Denationalized Participa-
tion*, 25 Mich. J. Int'l L. 1141, 1150–58 (2004) (States are *engaging* globaliza-
tion as offering new ways to deliver basic public goods such as law through
what she terms "legalities"—statutes, regulations, other legislative output,
court decisions, etc.—in ways that are neither exclusively "global" nor exclu-
sively "national"). On the changing role of the State and its relationship to
both law and power, see generally Anne-Marie Slaughter, *Filling Power Vacu-
ums in the New Global Legal Order*, 54 B.C. L. Rev. 919 (2013).

136. *Law and Globalization*, *supra* note 54, at 500–07. On the subject of
networks in general, the place to begin is Anne-Marie Slaughter, A New
World Order (2004) (analyzing the emergence of new kinds of regulatory
partnerships not necessarily mediated through the State, such as those
among financial regulators, police, judges, insurance regulators, even legisla-
tors).

manager of these networks.[137] In governance terms, networks do have their darker side, involving risks to transparency and accountability.[138] States retain a fundamental backstop role in protecting us from these risks while they maximize opportunities for us as our agents.

This implies, among other things, that a State's legitimacy will increasingly depend on its ability to successfully deliver social goods to the people and groups it represents by managing, not resisting, emerging transboundary networks.[139] When a State exercises such agency, it is increasingly to be guided by emerging notions of an international public good.[140] All of this is profoundly changing our understanding of boundaries: They are to be managed by the State for the good of the individuals and groups it represents, according to some emerging notion of the global public good.

b.   *Global Public Law*

This notion of the global public good has fundamental implications for international law and its role and makes it possible to ask what sorts of rights and institutional structures can be said to exist in this transboundary space. This will require a profound re-examination of core international legal doctrines and institutions such as boundaries, sovereignty, legitimacy, citizenship, and the territorial control of resources.[141] If a global community or a global basic structure with some notion of global public good is emerging, at least in a limited form, then it needs something like a global public

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137. Manuel Castells has argued that globalization is bringing about a new form of nation-State, the "network State," whose principle duty is to successfully manage on our behalf this web of networks. Manuel Castells, *The Network Society: From Knowledge to Policy, in* THE NETWORK SOCIETY: FROM KNOWLEDGE TO POLICY 15, 15–16 (Manuel Castells & Gustavo Cardoso eds., 2005).

138. *Law and Globalization, supra* note 54, at 502–03.

139. Castells, *supra* note 137.

140. *Id.*

141. Other doctrines that must be reexamined from the perspective of global justice include the basic notion of territorial sovereignty as a virtually unlimited right over resources and the combination of soft human rights and hard rules of economic deregulation and competition. *See* THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS 147–48 (2002).

law for its structure.[142] Globalization is fundamentally trans-
forming international law from the public law of inter-state re-
lations to the public law of a global community.[143] This change
works in both directions, as international law is itself a force
facilitating regulatory globalization and the interconnection of
disparate legal communities.[144] Such a shift at the global level
resembles the emergence at the regional level of a "European"
law and a "European" economic community out of the many
disparate States involved in the European integration process;
a new legal order both facilitates, and emerges out of, a recon-
stituted (and constitutive) set of socioeconomic and political
relationships.[145]

What can we say about the content of such a global public
law? Answering this question will require much work, along
the lines of a comparative study of public law.[146] Here I can

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142. Global public law can be conceptualized as the organization of the
structure of powers, duties, and limits of meta-state governance and its of-
ficers; relations of the meta-state levels of governance (International Organi-
zations) to the midrange (States) and to individuals; and the definition and
exercise of powers of meta-state governance for the public good. Alterna-
tively, one can think of it as the regulatory system for delivery of global pub-
lic goods. *See generally* PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBAL-
IZATION (Inge Kaul et al. eds., 2003) (providing a series of analyses to create
a fuller understanding of the provision of public goods).

143. *See* DOMINGO, *supra* note 101, at 121 ("Global law. . .does not yet con-
stitute a legal order in the strictest sense, but it is called to become one.");
GIULIANA ZICCARDI CAPALDO, THE PILLARS OF GLOBAL LAW, at xvii (2008)
("[T]oday's international legal order is developing into a truly global system
of law."). *See generally* Benedict Kingsbury, *International Law as Inter-Public
Law, in* MORAL UNIVERSALISM AND PLURALISM 167 (Henry S. Richardson &
Melissa Williams eds., 2009) (arguing that international law should be theo-
rized as the law between public entities outside of the state); *Law and Global-
ization, supra* note 54 (emphasizing law and globalization, rather than tradi-
tional international law).

144. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155,
1157–58 (2007).

145. Indeed, Hurrell cites the European Union's evolving *acquis* as an ex-
ample of the sort of shared community-building understandings that trans-
national institutions can build. Hurrell, *supra* note 65, at 43. The founda-
tional treatment of this is of course J.H.H. Weiler, *The Transformation of Eu-
rope*, 100 YALE L.J. 2403 (1991). For a recent overview of this process that
emphasizes the role of legal institutions, see Vlad Perju, *Reason and Authority
in the European Court of Justice*, 49 VA. J. INT'L L. 307 (2009).

146. Benedict Kingsbury's global administrative law project has, of course,
been central to this kind of development. *See, e.g.*, BENEDICT KINGSBURY,
NICO KRISCH & RICHARD B. STEWART, THE EMERGENCE OF GLOBAL ADMINIS-

suggest that if we begin with the traditional functions of public law, we can see that a global public law will set out the basic governance structure of this new space. This may mean new institutions, or it may simply mean new roles and levels of co-ordination among institutions. However the scope of the project is defined, it will mean reflection along fundamental public law lines concerning the shape of this emerging new order.

The tasks of a new global public law will include the regulation of the global economic space.[147] The burgeoning literatures on the constitutionalization of international economic law,[148] the fragmentation of the international legal regime,[149] the social responsibility of corporate actors,[150] and the effect of investment treaties on social welfare,[151] to take but a few examples, constitute the deepest contemporary exploration of a global public law in its economic regulatory dimension. The key paradigm shift is to recognize that these literatures are not simply scholarly reflection on existing problems within existing disciplines; they are, if not the disaggregated constitutional convention of this new global public order, then at least its *Federalist Papers.*[152]

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TRATIVE LAW (2005) (outlining Kingsbury's work); *see also* Alfred Aman, *Globalization, Democracy and the Need for a New Administrative Law,* 10 INDIANA J. GLOBAL LEG. STUD. 125 (2003) (arguing that a new global administrative law should fill some of the gaps created by globalization).

147. The current model of inter-State cooperation (such as the OECD approach to global competition law) is inadequate. Tita, *supra* note 83, at 50.

148. *See, e.g.*, ERNST-ULRICH PETERSMANN, INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY: CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS (2012); RULING THE WORLD, *supra* note 74.

149. *See, e.g.*, REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION (Margaret Young ed., 2012); JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW (2009).

150. *See, e.g.*, JOHN RUGGIE, REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, PROTECT, RESPECT AND REMEDY: A FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS (2008).

151. *See, e.g.*, HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre Dupuy et al. eds., 2009); Julie Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach,* 54 VA. J. INT'L L. (forthcoming 2014), *available at* http://ssrn.com/abstract=2144019.

152. *See* RULING THE WORLD, *supra* note 74, at 3 ("As a historical matter, constitutional discourse has predominantly—but not exclusively—occurred in the domestic setting. However . . . recent years have witnessed an intensifi-

Global public law must also include regulation of basic social welfare issues at the global level. In my view, the dynamics analyzed here with respect to emerging globally shared understandings about market society and its regulatory framework also justify a global approach to human social welfare. Drawing on the work of Walzer, Miller, and Dirk Messner regarding what Messner calls a "global minimal ethics,"[153] a global consensus has emerged that every human being has a right to have his or her vital interests met, regardless of nationality or citizenship, through the allocative local and global institutions that affect his or her particular life prospects.

c.   *The "Global Basic Package"*

This allocation of resources may be discussed through reference to terms of a "basic package" that encompass the core necessities for human life. I call this minimum core the "Global Basic Package": a basic bundle of political, social, and economic rights, safeguarded through global law and delivered in a partnership between global and national institutions, in much the same way that political, social, and economic rights are safeguarded by federal law and delivered through a variety of federal/State partnerships in the United States.[154]

This list can be drawn in a variety of ways—I suggest that at a minimum, the Global Basic Package as it is emerging consists of the following four elements: security, subsistence, liberty, and voice.[155] These are widely recognized in human

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cation of constitutional discourse in many sites of transnational governance.").

153. Walzer, *supra* note 17, at 1–19; NATIONAL RESPONSIBILITY, *supra* note 112; Messner, *supra* note 63, at 33. Here I am thinking in more general terms, along the lines of what sorts of norms, albeit 'thinner' ones, could reflect the broadest possible support from a limited 'global' community. A particular, deeper, 'sub-community' of globalization, such as the global market, might be able to support a 'thicker' set of norms, as suggested above.

154. This substantive approach complements but differs from a more procedural approach such as Berman's collection of tools for managing a global legal pluralism. *See* GLOBAL LEGAL PLURALISM, *supra* note 123, at 152–90.

155. Charles Jones offers three core values: subsistence, liberty, and physical security. *See generally* JONES, *supra* note 22. Brian Barry adds to this a list of "vital interests" such as clean drinking water, sanitation, clothing, shelter, medical care, and primary education. Brian Barry, *International Society from a Cosmopolitan Perspective, in* INTERNATIONAL SOCIETY 144, 148 (David R. Mapel & Terry Nardin eds., 1998); *see also Global Justice, supra* note 18, at 450 ("natu-

rights instruments and multilateral treaties of various kinds,[156] are supported across the full range of normative theory,[157] and are implemented (to varying degrees, of course) throughout global and domestic political relations by States, civil society, and other institutions.[158]

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rally, these basic rights include a few socioeconomic human rights, including the right to subsistence and good health"). Importantly, Deacon adds political participation to this list. BOB DEACON, GLOBAL SOCIAL POLICY & GOVERNANCE 136 (2007); *see also* Chimni, *supra* note 127, at 3. More recently, Rafael Domingo has placed dignity, liberty, and equality (including addressing economic inequalities) at the center of global law. DOMINGO, *supra* note 101, at 139–42. Similarly, Andrew Hurrell cites emerging norms around safeguarding peace and security, managing common challenges (such as the environment or the global economy), and promoting common values (such as self-determination, human rights, and democracy). Hurrell, *supra* note 65, at 41.

156. *See generally* RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW (Sarah Joseph & Adam McBeth eds., 2010) (surveying a range of human rights instruments, fora, and policy issues). There is, moreover, evidence of the interpenetration of the human rights regime into hitherto fragmented regimes such as international economic law, a critical development in an integrated approach to protecting basic rights. KINLEY, *supra* note 16 (integrating human rights, economic law, and globalization); Holger Hestermeyer, *Economic, Social and Cultural Rights in the World Trade Organization: Legal Aspects and Reality, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: CONTEMPORARY ISSUES AND CHALLENGES (E. Riedel et al. eds., 2014) (forthcoming) (noting complex but evolving interaction between these regimes).

157. *See, e.g.*, Sen, *supra* note 14, at 172 (arguing that enough grounds exist in the major normative traditions to more than adequately compel action to address grave injustice); David R. Mapel, *Justice Diversity and Law in International Society, in* INTERNATIONAL SOCIETY: DIVERSE ETHICAL PERSPECTIVES, *supra* note 3, at 247 (The world's leading religious and philosophical traditions can be said to converge around the triad of human rights, democracy and distributive justice.). These different traditions offer, of course, varying degrees of support for different elements of this consensus, but the net overall effect is strikingly consistent. Drawing on Scanlon, Sebastiano Maffetone suggests that the "urgency" of core human needs (subsistence and security in particular) requires and permits global action independently of theoretical arguments as to the justifiability of such action under different rubrics. *Global Justice, supra* note 18, at 449–52.

158. *See, e.g.*, RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 156 (reviewing a range of implementation models and pathways). Katherine Young has recently suggested an entirely new and emerging conversation around economic and social rights that transcends the traditional divide between such rights and civil and political rights, and unites all of them in an evolving and pluralist framework of implementation through many levels and actors. KATHERINE YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 1–2 (2012).

Nevertheless, there continue to be what Hurrell characterizes as "deformities" in the global legal framework.[159] Most glaringly, there is uneven support for democratic voice at the State and transnational levels, implying consequent problems of legitimacy;[160] and, we still lack an effective mechanism for global wealth transfers at the scale necessary to support the Global Basic Package.[161] Jay Mandle and Louis Ferleger refer to these deformities as the absence of mechanisms of control and compensation, both necessary for the regulation of a global market society.[162] These limitations reflect the emergent nature of any consensus on a global community of justice, even at the partial or limited levels posited here.

In order to take the next step, global public law needs to tackle distributive and legitimacy issues both between and within States. The non-globalization view of international law traditionally put the question of justice outside the realm of international law. Globalization makes inequality and legitimacy central problems of global social relations—and therefore central problems for international law—in the same way they are central problems of justice at the domestic level.

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159. Hurrell, *supra* note 65, at 43 (listing problems of distributive fairness, governance, postcolonialism, and the international rule of law).

160. Chimni notes "strong resistance from powerful States to put in place a transparent and democratic decision-making process." Chimni, *supra* note 127, at 3. On the general problem of protecting and deepening democratic participation in a globalizing framework, see Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization and International Law*, 15 Eur. J. Int'l L. 885 (2004) (providing an overview of different European theories regarding democracy and statehood in globalization and their interaction).

161. Hurrell attributes this to the unresolved tensions between globalist norms and statist enforcement models: We still need to rely on effective State power to manage economic crises and effect global wealth transfers—hence, their underdevelopment at the global level. Hurrell, *supra* note 65, at 44.

162. Jay R. Mandle & Louis Ferleger, *Dimensions of Globalization, Preface*, 570 Annals Am. Acad. Pol. & Soc. Sci. 8, 16 (2000). Interestingly, Chimni also sees the two as linked: The more democratic the system, the greater would be the pressure for wealth redistribution, as those facing massive inequalities far outnumber those more fortunate (or powerful)—hence their underdevelopment. Chimni, *supra* note 127, at 3.

IV.   CONCLUSION: GLOBALIZATION AND THE PACE OF HISTORY

Thus far, I have not commented on the role of shared history in forming communities of justice. Communitarians like Walzer and Miller cite "time" and "historical continuity" as key ingredients in the formation of community out of a hodge-podge of shared experiences and cooperative activities, the raw material of mutual self-interest.[163] One objection to the claim that the changes discussed above are forming some kind of global community is simply that it may take more time: At the global level, even granting the changes I have suggested above, there has simply been too little shared history for these changes to ripen into communitarian-style solidarity.[164]

One effect of globalization's transformation of time and space may be to change the role of time in the creation of community, making global community possible at a relatively fast pace. Time or history may be necessary ingredients for community in part because a period of time has generally been considered necessary for social contact and social knowledge to attain the sort of cumulative intensity necessary for the creation of more intimate bonds. Because of globalization, it may well be that the process of building intense social bonds can occur at a much faster rate, meaning that a common life might be shaped more rapidly during periods of globalization than otherwise thought possible. Therefore, it may be quite possible to see global community emerge in a matter of decades.[165]

Another consequence may be that globalization narratives themselves function as the sort of constitutive myth, which historians cite as essential in actually creating the identity these myths already assert. As Miller points out in his discussion of nationality, the very concept of nationality in the operative sense depends upon a "*myth*" of shared history, often masking

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163. SPHERES OF JUSTICE, *supra* note 17, at 48; MILLER, *supra* note 19, at 23–24.

164. There has been plenty of history (colonialism comes to mind) but little of it "shared" in the sense communitarians mean.

165. We find a hint of this changing nature of the pace of change itself in Walzer's comparison of the fall of communism with the "fall" of medieval Christendom: The time span of the former is much shorter than that of the latter, "as befits the rhythms of modernity." SPHERES OF JUSTICE, *supra* note 17, at 47. I am suggesting, in this sense, that the rhythms of globalization may be even faster.

actual social processes of domination and conquest.[166] This invention of a "communal national past" is an essential element in the formation of a national identity and becomes part of the identity itself once established.[167]

Using the literature of imagined communities,[168] Berman argues that the very fact that our national community "identities" have been constructed suggests that changes in global social relations can, in the same way, lead to new imagined communities at the meta-state or global level.[169] The many divergent globalization narratives at work in the present historical moment can play a vital role in creating a globalized world as a matter of identity. The globalization debate itself—even the contestation of globalization—reinforces the subjective formation of a globalized identity sharing many of the same features of national identity already discussed: We discover ourselves to be together in an ineluctable social-historical process, in which our interests are bound up with each other's interests.[170]

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166. *Ethical Significance of Nationality, supra* note 17, at 654–55 (emphasis added). The mythological aspect of national histories is one basis for objecting to nationalism as justified partiality. JONES, *supra* note 22, at 159–60. Here I would like to accept for the time being this mythological aspect of historical narratives (as Miller does for nationalist narratives) and explore its relation to globalization narratives.

167. MILLER, *supra* note 19, at 122–23 (citing ANTHONY DAVID SMITH, THE ETHNIC ORIGIN OF NATIONS 42 (1986)); *see also Law and Globalization, supra* note 54, at 516 n.123 (citing ERNEST GELLNER, THOUGHT AND CHANGE 168 (1964) ("nationalism is not 'the awakening of nations to self-consciousness:' it invents nations where they do not exist . . . .")).

168. *See, e.g.*, BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM 6 (1991) (nation-states are "imagined communities" because "the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.").

169. *See Law and Globalization, supra* note 54, at 516–18 (discussing states as "imagined communities" and the shift through globalization to community "imagined" at the global level).

170. *See* Cohen & Sabel, *supra* note 126, at 796 (suggesting that the emergence of global politics, global rulemaking, and a global public sphere could create among dispersed peoples "a new identity as common members of an organized global populace" whose "fates as human beings would—despite our cultural and linguistic differences—be deeply and self-consciously shaped by mutually accountable rulemaking that depends on local debate, is informed by global comparisons, and works in a space of public reasons").

Moreover, as an identity this new form of inclusion would continue to distinguish us from "Others."[171] However, and this is the crucial difference, because social membership in a global community is by nature comprehensive,[172] the "Other" we would be distinguishing from in globalization narratives is not the Other of a rival contemporary political community, but the Other of a pre-global past. In other words, our identity would no longer be based solely on nation versus nation, but on global versus pre-global.[173] Viewed in this light, the present debate over the possibility of global justice itself reflects the development of a new global identity, and a communal process of deliberation over possible shared understandings and shared institutions, which are themselves both evidence of and constitutive of such community.

In this sense, we find ourselves at a historic moment in the emergence of a consensus over global justice. This moment has been actively building for the past half-century at least, and has been foreseen even earlier by thinkers as diverse as Hume and Kant. A quarter of a millennium ago Hume wrote that if we "suppose that several distinct societies maintain a kind of intercourse for mutual convenience and advantage, the boundaries of justice still grow larger, in proportion to the largeness of men's views, and the force of their mutual connections."[174] Because of globalization the connections have never been more forceful. Indeed, almost as long ago Kant made what may be the first globalization argument when he argued for the universal right of decent treatment for all persons on the basis of the curved nature of the planet's surface: "Since it is a globe, they cannot disperse indefinitely, but must

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171. *See Law and Globalization, supra* note 54, at 500.

172. I am speaking here in a structural sense—as I mentioned above, I recognize that globalization currently marginalizes certain people and populations, which is part of the equity problem in contemporary globalization that must be addressed.

173. *See* Jens Bartelson, Visions of World Community (2009) (arguing that nationalist thinkers have trapped the idea of community into bounded national polities, but that history suggests an alternative vision that allows for a world community based on a diversity of views within a shared planetary space).

174. David Hume, An Enquiry Concerning the Principles of Morals 26 (J.B. Schneewind ed., Hackett Publishing Co., 1966) (1777).

tolerate each other."[175] Kant could not have foreseen, but would recognize, how globalization has dramatically tightened the curve of this space into a single point within which *all* persons are present, bringing us into deeper sustained contact with each other than the mere surface of the planet ever could. We have, in a sense, cut right through the heart of the globe.

We must recall, however, that the progression toward globalization is not inevitable or linear,[176] nor is the achievement of a *just* globalization. Its evolution will be incremental and will involve work at the theoretical, doctrinal, political, and institutional levels. Recalling Hume, the "largeness" of people's views is central to the *community* of globalization, and it is the largeness of our views, and our own recognition of their scale, that this Article has sought to both chronicle and foster. Continuing the work of "thickening" this model of global justice in economic and non-economic matters is a task for all of us.

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175. Immanuel Kant, *Perpetual Peace, in* THE PHILOSOPHY OF KANT 446 (Carl J. Friedrich ed., The Modern Library, 1977) (1795).

176. Hopkins, *supra* note 12, at 36.