

International Tax and Global Justice

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Inequality, as well as the scope of the duty of justice to reduce it, has always been a central concern of political justice. Income taxation has been seen as a key tool for redistribution and the state was the arena for discussions of justice. Globalization and the tax competition it fosters among states change the context for the discussion of distributive justice. Given the state's fading coercive power in taxation and the decreasing power of its citizenry to co-author its collective will due to global competition, we can no longer assume that justice can be realized within the parameters of the state. International tax policy in an effort to retain justice often opts for cooperation as a vehicle to support distributive justice. But cooperation among states is more than a way for them to promote their aims through bargaining. Rather, it is a way for states to regain legitimacy by sustaining their very ability to ensure the collective action of their citizens and to treat them with equal respect and concern. The traditional discussion in international taxation seems to endorse a statist position — implicitly assuming that when states bargain for a multilateral deal, justice is completely mediated by the agreement of the states. In contrast, this Article argues that such a multilateral regime intended to provide the state with fundamental legitimacy requires independent justification. Contrary to the conventional statist position, I maintain that cooperating states have a duty to ensure that the constituents of all cooperating states are not treated unjustly because of the agreement. I argue that not only cosmopolitanism but political justice too requires that a justifiable cooperative regime must improve (or at least not worsen) the welfare of the least well-off citizens in all cooperating states. I

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explain that cooperation alone is no guarantee of improved welfare and that certain transfer payments between rich and poor countries might be required to ensure this.

INTRODUCTION

Inequality, as well as the scope of the duty of justice to reduce it, has always been a central concern of political justice. Income taxation has been seen as a key tool (some may say the only appropriate tool) for redistribution and the state was the key (and for many years the only) arena for discussions of justice. In creating new links between states, as well as competition among them for residents, investments, and tax revenues, globalization has forced both political philosophers and income tax scholars to consider issues of justice beyond the state.

Political philosophers debate the appropriate scope of applicability of the duty of justice: does it apply exclusively at the state level, or should it transcend those boundaries? International taxation scholars and policymakers have engaged substantially in the practicalities of income taxation in a globalized world. They pay particularly close attention to the eroding income tax bases of states and explore potential solutions, placing considerable focus on international cooperation in income taxation in an attempt to sustain states' tax bases.¹ Philosophers, however, have not delved into the actual mechanisms of taxation, and the efforts of international tax experts rarely engage the question of global justice normatively.² This Article seeks to close this gap by considering international tax policy within the framework of global justice.

1 See, e.g., OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, DEVELOPING A MULTILATERAL INSTRUMENT TO MODIFY BILATERAL TAX TREATIES 10 (2014), <http://dx.doi.org/10.1787/9789264219250-en>. For an overview of the multilateral efforts, see Tsilly Dagan, *Community Obligations in International Taxation* (Global Trust Working Papers Series, Working Paper No. wps-2016-01, 2016), <http://globaltrust.tau.ac.il/wps-2016-01-community-obligations-in-international-taxation/>.

2 For some notable exceptions, see, for example, GILLIAN BROCK, *GLOBAL JUSTICE: A COSMOPOLITAN ACCOUNT* (2009); Miriam Ronzoni, *Global Tax Governance: The Bullets Internationalists Must Bite — and Those They Must Not*, 1 *MORAL PHIL. & POL.* 37 (2014); Peter Dietsch & Thomas Rixen, *Tax Competition and Global Background Justice*, 22 *J. POL. PHIL.* 150 (2014); Ilan Benshalom, *The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law*, 85 *N.Y.U. L. REV.* 1 (2010); Kim Brooks, *Inter-Nation Equity: The Development of an Important but Underappreciated International Tax Value*,

In recent years, state tax policies have been seriously challenged. Globalization has intensified tax competition by allowing individuals and businesses more leeway in tax planning their whereabouts and thereby critically undermining the ability of states to promote domestic redistribution. At the same time, globalization — and global inequality — has forced political philosophers to consider the application of distributive justice duties beyond national borders. The debate among political philosophers has focused on the appropriate level of redistribution. Whereas proponents of cosmopolitan justice argue that justice should prevail between individuals irrespective of their national affiliation, institutionalists argue that justice is a duty that is a derivative of political institutions, and statists in particular focus on the state as the primary forum in which duties of redistribution apply. Thomas Nagel in particular has taken a strong statist position, arguing for a sharp distinction between the domestic arena, where the distinctive convergence of states' coercive power and their constituents' co-authorship gives rise to exceptional duties of justice, and the international arena, beyond the state, where no duty of justice other than humanitarianism exists.³ While Nagel, like others, is deeply troubled by global inequality, he asserts that a distributive duty cannot be legitimately extended beyond the co-authored, coercive institution of the state. Many have criticized this strong statist position, supporting a broader duty of justice in the international arena. Cosmopolitans challenge the very political perception of justice;⁴ others, albeit conceding a special duty to redistribute within the state, challenge the lack of any duty of justice beyond the state.⁵

In this Article, I make no attempt to settle the philosophical debate regarding the appropriate level of redistribution, but rather contend that state competition reframes this debate: for state competition represents a new world order that undermines existing political institutions and mandates a reevaluation of the duties of justice under the newly emerging arrangements. State competition goes to the heart of the social contract and possibly requires its renegotiation.

in *TAX REFORM IN THE 21ST CENTURY* 471 (Richard Kreyer & John G. Head eds., 2008); Alexander Cappelen, *National and International Distributive Justice in Bilateral Tax Treaties*, 56 *FINANZARCHIV* 424 (1999); Allison Christians, *How Nations Share*, 87 *IND. L.J.* 1407 (2011); Allison Christians, *Sovereignty, Taxation and Social Contract*, 18 *MINN. J. INT'L L.* 99 (2009); Dimitri Paolini et al., *Tax Treaties with Developing Countries and the Allocation of Taxing Rights*, 39 *EUR. J.L. & ECON.* 1 (2015); Diane Ring, *Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation*, 9 *FLA. TAX REV.* 555 (2008).

3 See *infra* text accompanying notes 15-18.

4 See *infra* text accompanying notes 8-13.

5 See *infra* text accompanying notes 19-33.

The reason for this, in a nutshell, is that competition undermines the ability of states (rich as well as poor) to maintain the domestic background conditions that are necessary to sustain their legitimacy and that make the state a uniquely appropriate candidate for promoting justice. Under tax competition, I argue, the state can no longer unilaterally provide the assurances required for social cooperation. Furthermore, its constituents are no longer independent in jointly co-authoring their collective will. Both coercion and co-authorship are dependent on conditions that transcend state boundaries.

In the international tax market, where states compete for residents, investments, and tax revenues, their sovereignty becomes fragmented. Many residents can now unbundle state's sovereignty and pick and choose from among the public goods other states offer. Under this unbundled sovereignty, states can no longer unilaterally ensure the cooperation of their citizens without either imposing illiberal restrictions on those citizens or else cooperating with other countries. Thus, as far as tax and redistribution are concerned, under globalization, the state can no longer be considered a sovereign endowed with monopolistic coercive power.

Moreover, because states are becoming market actors, redistribution is to a large extent becoming a price that is subject to the supply and demand forces of the global market for sovereign goods. As a result, market rules are increasingly replacing citizens' co-authorship in determining states' redistributive capabilities and, consequently, their tax policies as well. Instead of equally engaging in a deliberative process with their fellow citizens, (some) taxpayers simply exercise their exit power when (redistributive) prices become too high. Thus, the level of redistribution that states can afford under global tax competition — and not what is reached through the collective co-authorship of their citizenry — is what determines their redistribution policies.

The bottom line is that states' monopoly over coercive powers as well as their ability to give expression to the collective will of their constituents is being undermined. The more fragmented sovereignty becomes, the less able it is to enforce its policies; the more marketized it becomes, the less voice it allows its citizens. Thus, in conditions of tax competition, justice is under constant threat.

If the state can no longer provide justice, what entity can? Perhaps there is no such entity, beyond mindful actors who undertake justice obligations voluntarily. For those seeking to promote justice, then, the only option may be to move beyond the state to the international level, where a new form of global cooperation should emerge to ensure the coercive powers necessary for promoting justice, accompanied by a new level of the duty of justice.

Faced with rising domestic inequalities and dwindling tax bases, states are struggling to figure out their next step. Many have argued for cooperation among

states as a solution to these challenges. In fact, in their 2012 declaration,⁶ the G20 finance ministers initiated a search for solutions to the problem (BEPS) and resolving the global economy's difficulties.⁷ The OECD took upon itself what may be the most ambitious international tax challenge yet. It promised to develop a new set of standards on an unprecedented schedule.⁸ The widely anticipated deliverables were indeed delivered on schedule.⁹ Notably, both the G20 and OECD take care not to include justice as one of their main issues of concern, sticking, instead, to the conventional pro-cooperation rhetoric that argues it would benefit all cooperating states towards sustaining their tax bases. However, I contend that this phase of international taxation constitutes a unique opportunity to reevaluate the notion of duties of justice in the international arena. Given the state's fading coercive power in taxation and the decreasing power of its citizenry to co-author its collective will due to global competition, we can no longer assume that justice can be realized within the parameters of the state. In many cases, it would be *only* through a cooperative accord that states could regain these powers. Cooperation in such cases is thus more than a way for states to promote their aims through bargaining. Rather, it is a way for states to regain legitimacy by sustaining their very ability to ensure the collective action of their citizens and to treat them with equal respect and concern.

The traditional discussion in international taxation seems to endorse a statist position — implicitly assuming that when states bargain for a multilateral deal, justice is completely mediated by the agreement of the states. Contrary to this traditional view, this Article argues that such a multilateral regime intended to provide the state with fundamental legitimacy requires independent justification. Under these circumstances, the duty of justice cannot be assumed to be entirely mediated through the cooperating states. Thus, contrary to the conventional statist position, maintaining that the contents of multilateral duties are exhausted by the agreements or conventions as “the relations themselves do not trigger norms, only the agreements do,”¹⁰ I maintain that cooperating

6 G-20 Leaders' Declaration (June 18-19, 2012), http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/131069.pdf.

7 *Id.* § 48 (“We reiterate the need to prevent base erosion and profit shifting and we will follow with attention the ongoing work of the OECD in this area.”); see Yariv Brauner, *What the BEPS?*, 16 FLA. TAX REV. 55, 59 (2014).

8 OECD & G20, BASE EROSION AND PROFIT SHIFTING PROJECT INFORMATION BRIEF 4 (2014), <http://www.oecd.org/ctp/beps-2014-deliverables-information-brief.pdf>.

9 See *BEPS 2015 Final Reports*, OECD, <http://www.oecd.org/ctp/beps-2015-final-reports.htm> (last visited Sept. 5, 2016).

10 Joshua Cohen & Charles Sabel, *Extram Republicam Nulla Justitia?*, 34 PHIL. & PUB. AFF. 147, 162 (2006).

states have a duty to ensure that the constituents of all cooperating states are not treated unjustly as a result of the agreement. Contrary to the statist position that bargaining between states must conform only with duties of humanitarianism, I argue that not only cosmopolitanism but political justice too requires that for a multilateral regime established through cooperation to be justified it must improve (or at least not worsen) the welfare of the least well-off citizens in all the cooperating states. I explain that cooperation alone is no guarantee of improved welfare and that certain transfer payments between rich and poor countries might be required to ensure this.

Part I begins by reviewing the political philosophy literature discussing global justice and the debate between statist and cosmopolitans. Part II explains the centrality and uniqueness of the state as a locus for justice and the challenges it faces under the market forces of globalization. Part III raises the following question: if the state cannot provide justice under globalization, how can justice nevertheless prevail?

I. THE GLOBAL JUSTICE DEBATE IN POLITICAL PHILOSOPHY

Political philosophers have devoted considerable attention to the question of international distributive justice and have offered a wide range of approaches to what global justice means. The main point of controversy has been over the relevant scope of redistribution. Should distributive justice be promoted solely on the national level or on a global scale as well? Cosmopolitans and advocates of political justice represent the two polar ends on the spectrum of ideas supporting global justice.¹¹

Proponents of the cosmopolitan view (such as Brian Barry, Charles Beitz, and Thomas Pogge) argue that principles of distributive justice should be

11 There are other variants of the conceptions of global distributive justice. See Simon Caney, *Review Article: International Distributive Justice*, 49 *POL. STUD.* 974 (2001). Caney divides the varying approaches into four categories: cosmopolitan, nationalist (political), society of states, and realists. Realists (or skeptics) view global justice as an unattainable ideal and, hence, leave distributive justice to the only arena capable of promoting it — the state. The society-of-states approach rejects this skepticism and holds that, although states are, indeed, responsible for their residents' welfare, the global community bears responsibility for ensuring adequate conditions for states to be able to achieve distributive justice. Under this view, outsiders to the state have a duty to contribute only in special circumstances. See Charles R. Beitz, *International Liberalism and Distributive Justice: A Survey of Recent Thought*, 51 *WORLD POL.* 269, 272-73 (1999).

applied universally: to all human beings across the globe.¹² Their reasoning, as Simon Caney summarizes it, is that “given the reasons we give to defend the distribution of resources and given our convictions about the irrelevance of people’s cultural identity to their entitlements, it follows that the scope of distributive justice should be global.”¹³ Cosmopolitans (or left institutionalists, as Michael Blake and Patrick Smith refer to them¹⁴) who follow Rawls’s concepts of justice tend to criticize his distinction between domestic and international duties of justice. Pogge, for example, regards nationality as just another deep contingency (similar to race, social class, and gender) that is “inescapable from birth.”¹⁵ Thus, following Rawls’s conception, Pogge argues, international institutions can only be justified “if the inequalities they produce optimize (against the backdrop of feasible alternative global regimes) the worst social position.”¹⁶

Proponents of political justice, in contrast, assert the duality of a justice regime and firmly distinguish between the national and global levels.¹⁷ Under this approach, justice is a good provided by social institutions. As Nagel explains:

On the political conception, sovereign states are not merely instruments for realizing the pre-institutional value of justice among human beings. Instead, their existence is precisely what gives 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

12 There are many strands to the cosmopolitan view. See Caney, *supra* note 11, at 975-76 (referring to radical cosmopolitanism (principles of distributive justice apply only on the global level, not on the national level) and mild cosmopolitan (distributive principles apply on the global and national level), institutional global justice (i.e., justice within institutions) and interactive institutionalism (in the context of individuals), and distribution among individuals and distribution among states). Moreover, the measures of distribution vary from approach to approach.

13 *Id.* at 977.

14 Michael Blake & Patrick Taylor Smith, *International Distributive Justice*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2013), <http://plato.stanford.edu/archives/win2013/entries/international-justice>.

15 THOMAS POGGE, *REALIZING RAWLS* 247 (1989).

16 *Id.*

17 Supporters of the national approach emphasize the moral relevance of membership in a nation. Again, national approaches vary. For a survey of these approaches, see Caney, *supra* note 11, at 980-83.

relation which must then be evaluated by the special standards of fairness and equality that fill out the content of justice.¹⁸

Strong statist like Nagel insist not only that special duties of justice exist within the state, but that “[j]ustice is something we owe through our shared institutions *only* to those with whom we stand in a strong political relation. It is, in the standard terminology, an associative obligation.”¹⁹ Outside the framework of the state, in the absence of such unique relations and, in particular, of the state’s coercive power, justice does not impose distributive duties, for “[m]ere economic interaction does not trigger the heightened standards of socioeconomic justice.”²⁰ In the international arena, Nagel argues, only duties deriving from simple humanitarianism are binding.

Unlike proponents of classic cosmopolitanism, contemporary left institutionalists generally concur that the state gives rise to especially stringent demands of distributive justice. However, they reject the bifurcated distinction between national and international institutions and argue for more robust distributive obligations on the international level than those imposed by humanitarianism.²¹ They also reject the statist emphasis on coercive power to activate claims of distributive justice and point, instead, to various reasons for supporting a less dichotomous rendition of global justice. Joshua Cohen and Charles Sabel, for example, argue that “a political morality can be political in a capacious sense, that is, sensitive to the circumstances and associative conditions, to the ‘different cases or types of relation’ for which it is formulated, without being statist.”²² In lieu of Nagel’s strong statist position, according to which normative requirements beyond humanitarianism only emerge in the framework of the state, Cohen and Sabel advocate a more flexible concept of justice.²³ “We think,” they explain, “that global politics does implicate more

18 Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 120 (2005).

19 *Id.* at 121 (emphasis added; emphasis omitted).

20 *Id.* at 138.

21 Blake & Smith, *supra* note 14, at 11-12.

22 Cohen & Sabel, *supra* note 10, at 149 (2006).

23 The concern that Cohen and Sabel criticize Nagel for ignoring “is not distinctively egalitarian: not that some people are better off than others, nor that some improvements are larger than others; nor is there any assumption that all inequality requires an especially compelling justification.” *Id.* at 154. Instead, they stress *inclusion*: “Some people are treated by consequential rule-making processes as if, beyond the humanitarian minimum owed even in the absence of any cooperation, they count for nothing.” *Id.* Their concept of inclusion matches the kind of respect and concern (e.g., human rights, standards of fair governance, and norms of fair

demanding norms, and think that the rationale lies in a mix of the factors.” Such factors, they suggest, include strong interdependence, cooperativism, and institutionalism, as well as “a degree of involvement of will on the global scale that is more extensive than Nagel’s argument suggests.”²⁴

Sangiovanni, for his part, downplays Nagel’s reliance on coercion.²⁵ Instead of focusing on how the state “engages, constrains or thwarts the will,” Sangiovanni suggests focusing on “what the state does — on the object of our authorization.” He argues that

equality as a demand of justice is a requirement of reciprocity in the mutual provision of a central class of collective goods, namely those goods necessary for developing and acting on a plan of life. Because states . . . provide these goods rather than the global order, we have special obligations of egalitarian justice to fellow citizens and residents, who together sustain the state, that we do not have with respect to noncitizens and non-residents. This does not imply that we have *no* obligations of distributive justice at the global level, only that these are different in both form and content from those we have at the domestic.²⁶

Darrel Moellendorf agrees that duties of justice are owed only to co-members of institutions and not universally to all, but disagrees with the claim that citizenry is the only kind of co-membership that generates duties of social justice. He argues that “the inherent dignity of persons constrains

distribution) “that is owed by the variety of agencies, organizations, and institutions (including states) that operate on the terrain of global politics.” *Id.* at 149.

24 *Id.* at 164. By *strong interdependence* they mean whenever the fate of people in one place depends substantially on the collective decisions taken by people in another place and vice versa. *Cooperativism* is the existence of a consequential scheme of organized, mutually beneficial cooperation under rules, and *institutionalism* refers to the existence of an institution with responsibilities for distributing a particular good.

25 Andrea Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 PHIL. & PUB. AFF. 3, 15 (2007) (“[A]lthough Nagel often speaks of coercion . . . all that is required is that the system of societal rules be nonvoluntary for those subject to it.”). Sangiovanni further suggests that while with voluntary associations (e.g., tennis clubs) one has a viable option to leave, non-voluntary organizations provide no such option and hence require a more stringent justification. The state must give each of us special reason to accept its laws, strong enough to rebut any objection we might have to them. The justification, in turn, must show that the law could reasonably be seen as acceptable from each person’s individual point of view, although no one consents to it. *Id.* at 18.

26 *Id.* at 4.

institutional power. Institutions express respect for persons only if they are such that persons whose lives are lived within the institutions could reasonably endorse.”²⁷ Thus, the positions of these left institutionalists are less egalitarian on the global level than the stance of early cosmopolitans, ranging from “reciprocity,”²⁸ to “inclusion,”²⁹ to support for equal sharing only of the public goods supplied by the international system.³⁰

Competition, however, has dramatically changed the ability of states to sustain the background conditions necessary for the provision of justice. Below, I argue that state competition in the era of globalization has stripped states of their status as a unique forum for duties of justice. Specifically, states can no longer unilaterally enforce justice-promoting cooperation, nor are they a unique locus of independent co-authorship for their citizens. Thus, the ability of states (rich and poor alike) to sustain the domestic background conditions necessary for their legitimacy and that make them an exceptional candidate for promoting justice is being undermined. Part II expands on this perceived uniqueness of the state and explain why — in a marketized and fragmented competitive market of states — this distinctiveness is being eroded.

II. THE LOST STATE

A. Why the State?

The key challenge for statist like Nagel is to explain their dichotomization of duties of justice into expansive duties at the state level and minimal humanitarian duties at the supranational/international level. According to Nagel, justice should be national because “[t]he state makes unique demands on the will of its members . . . and those exceptional demands bring with them exceptional obligations, the positive obligations of justice.”³¹ What creates these exceptional obligations? Nagel points to the complex combination of

27 Darrel Moellendorf, *Cosmopolitanism and Compatriot Duties*, 94 *MONIST* 535, 538 (2011) (arguing that social justice exists between persons if those persons are co-members in an association that is “(1) relatively strong, (2) largely (individually) non-voluntary, (3) constitutive of a significant part of the background rules for the various relationships of their public lives, and (4) governed by norms that can be subject to (collective) human control”). In “respect” he refers to this as “justificatory respect.” *Id.* at 537.

28 *Id.*

29 Cohen & Sabel, *supra* note 10.

30 Sangiovanni, *supra* note 25.

31 Nagel, *supra* note 18, at 130.

coercively enforced, co-authored rules as the source of the transcendence above simple humanitarianism. As Cohen and Sabel explain, “Nagel argues that a normative order beyond humanitarianism’s moral minimum emerges only within states whose central authority coercively enforces rules made in the name of everyone subject to those rules: only, that is, when individuals are both subjects in law’s empire and citizens in law’s republic.”³²

Nagel offers two answers to the question of what can “move us past humanitarianism.”³³ The first is social cooperation, for which the state functions as a third-party enforcer.³⁴ Assurance of this cooperation is necessary, according to Nagel, as an “enabling condition of sovereignty to confer stability on just institutions.”³⁵ The only way to provide that assurance, Nagel argues,

is through some form of law, with centralized authority to determine the rules and a centralized monopoly of the power of enforcement. This is needed . . . both in order to provide terms of coordination and because it doesn’t take many defectors to make such a system unravel. The kind of all-encompassing collective practice or institutions that is capable of being just in the primary sense can exist only under sovereign government.³⁶

Coercion is, of course, a fundamental component of the state. It both ensures cooperation and, at the same time, requires legitimation. In Nagel’s words,

adherence to . . . [political institutions] is not voluntary: Emigration aside, one is not permitted to declare oneself not a member of one’s society and hence not subject to its rules, and other members may coerce one’s compliance if one tries to refuse. An institution that one has no choice about joining must offer terms of membership that meet a higher standard.³⁷

32 Cohen & Sabel, *supra* note 10.

33 *Id.* at 160.

34 Nagel, *supra* note 18, at 116 (extending the Hobbesian idea of the sovereign as the one providing assurances for cooperation to the non-self-interested motives of justice and arguing that “even if justice is taken to include not only collective self-interest but also the elimination of morally arbitrary inequalities, . . . the existence of a just order still depends on consistent patterns of conduct and persisting institutions that have a pervasive effect on the shape of people’s lives.”).

35 *Id.*

36 *Id.*

37 *Id.* at 133.

Nagel's second explanation for limiting expanded duties of justice to the sphere of the state is "that states not only foster cooperation by coercively enforcing rules but implicate the will of those subject to their coercive authority by making, in the name of all, regulations that apply to them all."³⁸ According to Cohen and Sabel, will-implication is significant since "it is impermissible to speak in someone's name . . . unless that person . . . is . . . given equal consideration in making the regulations."³⁹ Regulations made by the state must therefore be justified to their co-authors. "And not just any justification will do . . . the justification must treat each person . . . in whose name the coercion is exercised — as an equal."⁴⁰

Unlike the state, Nagel claims, the international system does not embody such a complex combination of co-authorship and coercive implication of will. The relationship of individuals to the supranational bodies, he maintains, is completely mediated by governments. Hence, as Cohen and Sabel clarify,

those bodies do not speak in the name of all, their conduct is not authorized by individuals, and the wills of those individuals are not implicated. . . . Intergovernmental agreements or other forms of supranational arrangement can give rise to new normative requirements but the content of those requirements is exhausted by the agreements or conventions: the relations themselves do not trigger norms, only the agreements do.⁴¹

Nagel explains that "[i]f the default really is basic humanitarianism, permitting voluntary actions for the pursuit of common interests, then something more is needed to move us up to the higher standard of equal consideration. It will not emerge merely from cooperation and the conventions that make cooperation possible."⁴² Since global regulation does not speak in the name of individuals, it can settle for humanitarian obligations only and is not obligated to apply the standard of equality. Cooperation alone and the voluntary conventions signed by the countries that make such cooperation possible are not enough to move us up to the higher standard of equal consideration.

Nagel's critics focus on his claim that duties on the international level do not exceed humanitarianism. Even if the international duties do not amount to full duties of justice, they are more than humanitarianism, argue critics. Blake and Smith query whether left institutionalists are in fact begging the

38 Cohen & Sabel, *supra* note 10, at 160.

39 *Id.*

40 *Id.*

41 *Id.* at 162.

42 Nagel, *supra* note 18, at 142-43.

question by assuming that the international system is “indeed coercive, will remain coercive and is coercive in precisely [the] way needed to generate obligations of distributive justice.”⁴³ They contend that “left institutionalists are quite adept at identifying injustices in the international arena, but they are less persuasive at showing that the appropriate normative response to these wrongs is to have the international system be governed by principles of distributive justice.”⁴⁴ Yet even these critics admit that duties of justice (should) exist within the state. Cosmopolitans posit that states should uphold pre-political rights to justice. Institutionalists, in turn, hold that the legitimacy of the state’s use of its coercive powers is contingent on its treating its subjects-citizens with equal concern and respect, but some nonetheless assert that, for a variety of reasons, duties of justice should apply beyond the state.

In what follows, I focus on the state and argue that globalization is challenging the underlying conditions not only for the feasibility of the state’s cooperative efforts but also its very legitimacy. Under globalization, I assert, both coercion and co-authorship are dependent on what happens beyond state boundaries. The state’s coercive power is reliant on other states’ cooperation, and the design of its tax rules is increasingly determined by global supply and demand rather than the co-authored collective will of its constituents. Thus, for those seeking to sustain states’ legitimacy (and for those interested in promoting justice), the international arena may be the only viable recourse.

B. A Fragmented and Marketized (Tax) Sovereignty

For Nagel, sovereignty is the key: “[t]he kind of all-encompassing collective practice or institutions that is capable of being just in the primary sense can exist only under sovereign government.”⁴⁵ For Nagel, who stresses the coercive nature of the state and the co-authorship of its constituents, sovereignty would seem nothing like a consumer good.⁴⁶ Globalization, however, is significantly transforming the nature of sovereignty. If we zoom out to the international level, we will find that the all-powerful sovereign, as traditionally envisioned, is but one of two-hundred or so sovereigns that compete with one another. Competition increasingly is turning states into market players that offer their goods and services to potential “customers.” In this market for sovereignty goods, states compete for capital and residents, while (at least some) individuals

43 Blake & Smith, *supra* note 14, at 13.

44 *Id.*

45 Nagel, *supra* note 18, at 116.

46 See MICHAEL J. SANDEL, *WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS* (2012); MICHAEL WALZER, *SPHERES OF JUSTICE* (1983).

“shop around” for sovereign-provided privileges, public goods, and social and cultural goods. This competition seems to be percolating into the interaction between sovereigns and their subjects as well. Competition is altering the traditional roles of sovereigns and constituents alike. It impacts the kinds and quantities of public goods and privileges offered by the state to its constituents;⁴⁷ it affects the meanings and values underlying the sovereign-subject interaction; and, most relevant to our purposes, it alters modes of political participation and schemes of distribution.

Two forces steer this market. First and foremost is the mobility of residents and capital; second is the ability of constituents/stakeholders (often with the encouragement of governments) to unbundle the “packages” of sovereignty. Consider mobility first: taxpayers — both individuals and businesses — are becoming increasingly mobile and can therefore select from alternative jurisdictions to relocate their places of residence, investments, business activities, or even citizenship.⁴⁸ States often foster such mobility by offering certain privileges and incentives to desirable potential residents.⁴⁹ Residents-in-demand relocate to more appealing jurisdictions, as states lure away talented individuals, potential investors, and young and productive individuals to salvage their collapsing social security systems.⁵⁰ This has put states in an unfamiliar position: they no longer strictly impose compulsory tax and regulatory requirements on their subjects. Instead, the tax policymaking process has gradually transformed under competition, and states increasingly

47 See, e.g., Tsilly Dagan, *The Tragic Choices of Tax Policy in a Globalized Economy*, in TAX AND DEVELOPMENT 57 (Yariv Brauner & Mirnada Stewart eds., 2013).

48 For example, in recent years, many ultra-rich individuals have expatriated in order to avoid high taxes, shifting not only their residencies but also their citizenship to another jurisdiction. See Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 490 (2007).

49 ALEX EASSON & ERIC M. ZOLT, WORLD BANK INST., TAX INCENTIVES AND TAX BASE PROTECTION ISSUES 3-8 (2003); LOUIS T. WELLS ET AL., USING TAX INCENTIVES TO COMPETE FOR FOREIGN INVESTMENT: ARE THEY WORTH THE COSTS? 27-31 (2001).

50 Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for Talent*, 120 YALE L.J. 2088 (2011); Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148 (2006). Multinational enterprises are also, of course, mobile. They can incorporate or re-incorporate in their jurisdiction of choice and move their production, marketing, and research and development (R&D) activities to more favorable locations. Michael P. Devereux & Rachel Griffith, *The Impact of Corporate Taxation on the Location of Capital: A Review*, 9 SWEDISH ECON. POL'Y REV. 79 (2002).

operate as recruiters of mobile investments and residents from other states, while at the same time striving to retain their own residents and investments.

The legal rules that apply in a certain jurisdiction and the applicable tax rules and rates are important considerations for the mobile when weighing their residency options and where to locate their economic activities.⁵¹ Hence, tax rules and rates have become, to a large extent, the currency of state competition. In these conditions of tax competition, states attempt to attract (and keep) investors and residents by offering, among other things, appealing taxing and spending deals.⁵² This means, on the one hand, lowering taxes on the most mobile⁵³ while, on the other hand, offering the public goods and services that are most attractive to them.

Such competition could have problematic distributive effects if, as seems plausible, residents who benefit from the welfare state have a stronger preference for it than those who do not derive any benefit therefrom (or are at lower risk of requiring welfare benefits).⁵⁴ Indeed, rich taxpayers who are supposed to be on the contributing side of redistribution will likely prefer less distribution over more distribution (and even if they are altruistic, they may prefer to fund charities of their own choice rather than government-determined redistribution). Taxpayers on the receiving end of redistribution will presumably have a preference for greater redistribution. However, higher taxes, which are required

51 Devereux & Griffith, *supra* note 50.

52 Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

53 For a detailed analysis of the phenomenon of tax competition, see Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1575-603 (2000). It has been argued that tax competition will drive tax rates down to a suboptimal level, where states are forced to under-provide public goods. For a formal model supporting this argument, see George R. Zodrow & Peter Mieszkowski, *Pigou, Tiebout, Property Taxation, and the Underprovision of Local Public Goods*, 19 J. URBAN ECON. 356 (1986). Although it is unclear what exactly constitutes the “optimal” level of public goods, see John Douglas Wilson, *Theories of Tax Competition*, 52 NAT’L TAX J. 269, 270 (1999), it is pretty clear that redistribution would be reduced.

54 The federal system had interesting issues with regard to welfare at the state level. Unlimited mobility of residents posed a risk of turning states with an extensive welfare system into “welfare magnets.” This significantly decreased their ability to sustain their welfare systems. For discussion of whether this trend actually exists, see William D. Berry, Richard C. Fording & Russell L. Hanson, *Reassessing the “Race to the Bottom” in State Welfare Policy*, 65 J. POL. 327 (2003). See also Roderick M. Hills Jr., *Poverty, Residency, and Federalism: States’ Duty of Impartiality Toward Newcomers*, 119 SUP. CT. REV. 277 (1999).

to finance the welfare state, might drive the wealthy away. If this turns out to be the case, the government will be forced to choose between either keeping taxes high and risking losing the wealthy or lowering taxes and reducing redistribution. In the extreme case, lowering tax rates on mobile residents and the mobile factors of production could shift the tax burden to the less mobile residents and factors (most importantly, lesser-skilled labor⁵⁵) and lead to a reduction in tax revenues. This will, accordingly, undermine the ability to sustain the welfare state and, in particular, redistribution.

There are, of course, several factors that function as counterweights to competition's downward pressure on redistribution.⁵⁶ One central factor is the fact that the mobility of residents and even of investments is not entirely elastic. People must shoulder costs — economic and otherwise — in shifting their residences, families, cultural ties, and jobs and switching their domestic loyalties.⁵⁷ Businesses may have to contend with costs entailed by moving their physical activities and workers and applying for new permits, for example. States might also find shifting their policies costly. An entrenched tradition of pro-welfare policies, a committed and highly involved civil society, or even interest groups could all push in favor of pro-redistribution policies. Some states could have more leeway in effecting such change. If a state offers an attractive residential environment, particular affinities (e.g., a strong sentiment in favor of a specific residential location due to historical, cultural, or national ties), a unique commitment to the welfare of fellow members of the community,⁵⁸ natural resources, network externalities, or any other comparative

55 Avi-Yonah, *supra* note 53, at 1624 (“[A] shift in the tax burden from capital to labor tends to render the tax system more regressive. Such a tax system is also less capable of redistributing resources from the rich to the poor.”).

56 *See, e.g.*, Vivek H. Dehejia & Philipp Genschel, *Tax Competition in the European Union*, 27 *POL. & SOC'Y* 403, 409 (1999); Thomas Plümper, Vera E. Troeger & Hannes Winner, *Why Is There No Race to the Bottom in Capital Taxation? Tax Competition among Countries of Unequal Size, Different Levels of Budget Rigidities and Heterogeneous Fairness Norms*, 53 *INT'L STUD. Q.* 761, 764 (2009) (“No doubt, the prediction of zero capital tax rates was not in line with reality when it was first formulated and it did not come true since.”); Sijbren Cnossen, *Tax Policy in the European Union* (CESifo, Working Paper No. 758, 2002).

57 Renouncing citizenship entails identity-related costs. *See, e.g.*, Ruth Mason, *Citizenship Taxation*, 89 *S. CAL. L. REV.* 101, 124 (2015) (and authorities therein) (“Americans who renounced their citizenship . . . in order to escape tax (or tax compliance) obligations described the process as ‘emotional,’ ‘hard,’ ‘super stressful’ and ‘extremely troubling.’”).

58 Albehto F. Alesina & Paola Giuliano, *Preferences for Redistribution* (NBER, Working Paper No. w14825, 2009), <https://www.econstor.eu/bitstream/10419/>

advantage, it should be able to collect higher taxes and thereby enable greater redistribution. Such factors might well explain how some states continue to collect above-zero taxes and achieve a certain level of redistribution even under the pressure of global competition. Yet with mobility in the background, states — even those that traditionally support redistribution — are seriously constrained in setting their redistributive policies.⁵⁹ Increasing taxation on investments and capital owners in order to sustain the welfare state induces the relocation of both residents and investments and thereby erodes the tax base. Consequently, increasing taxes beyond a certain point could undermine, rather than sustain, the welfare state.⁶⁰ It is therefore widely acknowledged that even if competition does not completely thwart redistribution, it seriously restricts the ability of states to redistribute wealth.⁶¹

Furthermore, the variance in taxpayers' mobility makes it more difficult for states to treat their constituents equally. Mobility increases the market power of some individuals. The opportunities open to them in other jurisdictions create a need for their present jurisdiction to treat them favorably in order to retain them and thereby maximize the collective welfare pie. Thus, even if decision makers were to focus solely on the interests of the poorer segments of society, ensuring those interests entails a tradeoff between treating them equally and increasing that welfare. If the state were to tax immobile and mobile taxpayers equally, it would risk exit by the latter, which could reduce the welfare of those left behind.

The ability of individuals and businesses to relocate and opt for preferable packages of public goods and services at a better price is only part of the story. No less significant and too often overlooked is the ability of (certain) individuals and businesses to unbundle and then reassemble packages tailored to their specific needs. The current market of states enables individuals and businesses not only to shop for their jurisdiction of choice but also to buy “a-la-carte” fractions of such regimes under different state sovereignties. This

35647/1/59783086X.pdf.

59 This is particularly acute given that there tends to be (although not always) a correlation between wealth and mobility. The wealthiest people (as well as their capital) are often the most mobile people. Therefore, broad-brush rules seeking to treat the mobile more leniently will tend to limit redistribution via tax laws. Since redistribution targets the wealthiest, mobility limits states' ability to redistribute. Taxing the mobile rich might push them away; taxing the less mobile (and not as rich) will yield less efficient redistribution.

60 See, e.g., Avi-Yonah, *supra* note 53, at 1624.

61 *Id.* at 1575-603.

fragmentation of sovereignty occurs in many areas of state regulation,⁶² but tax — although once the quintessential example of a coercive legal regime that covers all bases — seems particularly amenable to tailoring by expert tax-planners.

Tax rules were traditionally applied on both a territorial basis (i.e., to all income-producing activities sourced within a jurisdiction) and a personal basis (i.e., to all the worldwide income produced by a state's residents and sometimes even its citizens). This presumably enabled states to use their coercive power of taxation on local residents (and citizens), foreign investors, and people with business connections to the taxing jurisdiction. Arguably, this sweeping applicability of national tax laws empowered states to impose duties to pay redistributive taxes without taxpayers' having any legal ability to opt out.

In the era of globalization, however, tax laws have become notorious for being virtually elective (at least for some). The conditions that can trigger the application (or non-application) of international tax laws in different countries' jurisdictions vary widely, which has produced a fragmented international tax landscape with a diversity of mix-and-match components: differing residency rules, a wide assortment of source rules, different variations of allowable deductions and tax and withholding rates, and a vast number of tax treaties between various jurisdictions. Sophisticated and well-advised taxpayers can assemble these different components into a tax regime that is preferable to them and does not necessarily overlap with any of the regimes governing their other affairs.⁶³ As a result, these taxpayers can simultaneously reside in one jurisdiction (and consume its publicly provided goods and services), do business in another (and use the local court and banking systems), invest in an industrial plant in a third (and reap the benefits of a publicly-educated workforce), vote in a fourth, and pay the tax rates, if any, of a fifth.⁶⁴

62 Tsilly Dagan, *Tax Me if You Can, The Global Market for Tax & Legal Rules* (Feb. 6, 2016) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506051.

63 Cf. Wolfgang Schon, *Playing Different Games? Regulatory Competition in Tax and Company Law Compared*, 42 *COMMON MKT. L. REV.* 331, 336 (2005) (describing tax competition as competition between bundled goods whereas company law competition concerns only one particular good).

64 The reason this is possible is that different factors trigger the application of different duties and rights. Some rights and duties are extended in certain countries to residents; others apply to property owners, investors, or citizens of certain states. Many of these rights and duties are related to a person's key place of business. Others are connected to citizenship, a specific registry (such as the registration of a corporation, financial instrument, vessel, or vehicle).

Assembling such a tax package may or may not involve actually relocating resources, for tax matters are well-known for the “paper shifting” style of complex planning they involve. Tax planners employ a host of techniques to de facto opt out of a tax jurisdiction, without actually relocating their clients’ residency or activities. Tax planners often incorporate subsidiaries in tax havens to defer the taxation of their income (such as worldwide royalties or service income) to when the profits are repatriated, if at all.⁶⁵ They siphon off income through beneficial tax treaties to and from low-tax jurisdictions, thereby avoiding taxation at source.⁶⁶ They use hybrid entities to take advantage of a deduction in a high-tax jurisdiction, while avoiding taxation in the jurisdiction where the income was produced,⁶⁷ or even take advantage of deductions twice,⁶⁸ and they use transfer pricing to allocate revenue to low-tax jurisdictions, for example, by setting transaction prices between related entities to increase taxable income in low-tax jurisdictions and increase deductions in high-tax jurisdictions. Tax planners also employ earning stripping to erode the tax base within the country where the income was produced⁶⁹ and construct creative derivatives that are treated as loans in one country and equity

65 Anecdotal data regarding investments via famous tax havens is telling:

[B]y searching through the IMF Co-ordinated Direct Investment Survey (CDIS), it emerges that in 2010 Barbados, Bermuda and the British Virgin Islands received more FDIs (combined 5.11% of global FDIs) than Germany (4.77%) or Japan (3.76%). During the same year, these three jurisdictions made more investments into the world (combined 4.54%) than Germany (4.28%). On a country-by-country position, in 2010 the British Virgin Islands were the second largest investor into China (14%) after Hong Kong (45%) and before the United States (4%). For the same year, Bermuda appears as the third largest investor in Chile (10%). Similar data exists in relation to other countries, for example Mauritius is the top investor country into India (28%), the British Virgin Islands (12%), Bermuda (7%) and the Bahamas (6%) are among the top five investors into Russia.

OECD, ADDRESSING BASE EROSION AND PROFIT SHIFTING 17 (2013) [hereinafter BEPS REPORT].

66 *Id.* at 10 (explaining the technique).

67 If, for example, a subsidiary is considered transparent in jurisdiction A but opaque in jurisdiction B, payments (e.g., interest payments or royalties) from B to A will be deductible in A (thus reducing taxable income and tax liability in A) but not considered income in B.

68 By attributing the deductions to an entity that could be jointly considered for tax purposes with two different entities in two different countries.

69 A typical case involves setting up a finance operation in a low-tax country to fund the activities of the other group companies. The result is that the payments are deducted against the taxable profits of the high-taxed operating companies while being taxed favorably or not being taxed at all at the level of the recipient,

investment in another.⁷⁰ They oftentimes use a combination of these techniques,⁷¹ along with others, to reduce the total tax liability of individuals and businesses.

The end result is that citizens and residents do not necessarily have to leave their home country in order to avoid paying its taxes. Skilled and sophisticated tax planning enables them to pay lower taxes than they would have otherwise been forced to pay in their home jurisdiction. It is important to note that this is not merely an enforcement issue, nor is it a matter of states' being unaware of their tax system's vulnerabilities. Some of the tax-planning techniques are so deeply entrenched that they are not even considered planning. Often states knowingly allow for the use of instruments by residents (and, obviously, investors) to lower their tax rates. Exotic tax shelters may be infamous for the generous tax benefits they offer and creative tax planning they facilitate, but the distinction between these tax havens and (presumably) legitimate countries providing tax benefits to attract or retain economic resources is far from clear. In many cases, international competition prevents states from applying their full taxing capacity. In fact, states often adopt a territorial taxing system or deferral of taxes for business income produced by domestically-held foreign corporations so as to protect their residents in the competition with foreign businesses.

Similarly, some would argue that states refrain from applying general anti-avoidance rules as a means of price-discriminating among their own residents,

thus allowing for a reduction of the total tax burden. See BEPS REPORT, *supra* note 65, at 9-10.

- 70 If, for example, country A classifies a transaction as equity investment (and hence the payments as dividend distributions) and country B classifies the same transaction as a loan (and the payments as interest), then payments from B to A will be considered interest (and hence deductible), while considered dividends by country A. If country A exempts dividend income or provides it with preferential treatment — there is a tax gain.
- 71 Google's Double Irish Dutch Sandwich is a good example of such a structure: Google's worldwide income is channeled to an Ireland subsidiary (thus reducing Google's income in high-tax jurisdictions because the fees paid are deductible at source). The Ireland Corporation's income is reduced by royalties payments to another subsidiary — Google BV (thus enjoying the exemption from withholding taxes within the EU). Google BV's income is stripped using almost identical royalties payments to a Bermuda company. The Netherlands impose no withholding taxes and Bermuda is famous for no income tax. The result is a near zero tax on Google's income from customers in Europe, the Middle East and Africa. For a detailed description, see Edward Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699, 706 (2011).

thereby keeping their jurisdiction hospitable to current as well as future residents.⁷² Moreover, states use generous exemptions, deductions, and subsidies to attract foreign investments as well as foreign residents. Multilateral efforts to curtail such policies or even to determine what constitutes legitimate policy under a state's sovereignty and what amounts to "harmful tax competition" have failed. Even when states do not attempt to use tax policies as vehicles of competition, uncoordinated rules may give rise to arbitrage opportunities. Thus, innocent rules such as allowable deductions, unique forms of incorporation (such as limited liability companies), conflicting source rules, and differing interpretations of certain types of transactions (e.g., a lease versus a loan) all open the gates to tax planning aimed at profiting from inconsistencies across jurisdictions. Interestingly, due to this fragmentation, taxpayers can even avoid domestic taxes without waiving membership in their state. Thus, rather than a pathology requiring stricter enforcement, fragmentation — and the planning opportunities it breeds — is a natural outcome of the decentralized nature of international taxation.

In any event, the reality of tax competition is that income taxation is no longer an archetypical example of a forum where states exercise coercive power; instead, it more closely resembles a menu of options for (mostly wealthy and well-advised) taxpayers to select from. When tax policies are competitive and elective rather than the product of political deliberation coerced by state power, they represent a very different vision of the state as a locus for the duties of justice from what political philosophers traditionally conceived. The next Section discusses this transformed role of the state.

C. The Market of States as Undermining States' Legitimacy

State competition for residents and mobile factors of production and the fragmentation of states' sovereignty both challenge the conception of the state as the key forum for applying duties of justice. If the state can no longer use its coercive power to provide assurances of its constituents' mutual responsibility, can it still legitimately impose duties of justice? If it no longer equally implicates the will of its constituents in a political dialogue among themselves, but rather conforms to their relative market value (most significantly their mobility), can it genuinely speak in the name of them all? And if the state allows (some of) them to pick and choose among its various functions, does it still constitute the political institution envisioned by statisticians when

72 Benjamin Alari, *Price Discrimination in Income Taxation* (Jan. 30, 2012) (unpublished manuscript), <http://ssrn.com/abstract=1796284>.

they designate it *the* political institution where socioeconomic justice can and should prevail?

The decline in the power of states to provide and enforce assurances for the collective action of their constituents undermines the legitimacy of their use of coercive power. The shift away from political participation and towards market norms in formulating regulation calls into question the state's ability to give equal consideration to all its constituents in the regulation. Treating some constituents (those with other available options) more favorably than others, I argue, undermines the state's unique position as speaking in the name of all. With the state no longer able to provide assurances of the provision of justice and its capacity to equally pronounce its constituents' collective will diminishing, its ability to provide justice and thus its legitimacy in applying its coercive power wanes.

To clarify this, recall Nagel's first explanation for "why the state": "[t]he state makes unique demands on the will of its members . . . and those exceptional demands bring with them exceptional obligations, the positive obligations of justice."⁷³ In conditions of tax competition, however, the state's demands of its constituents are asymmetrical and potentially regressive — that is, inherently unjust. Whereas some taxpayers can pick and choose among their duties, others enjoy less leeway and must comply strictly with the state's coercive authority, meaning that this coercion is effective only in relation to some of the state's members. Some taxpayers — those who are more mobile or who can more effectively opt out of the state's jurisdiction — are able to escape its coercive power. Hence, the state does not equally impose demands (including the duty to pay taxes) on all taxpayers. In these circumstances, is it still legitimate for the state to make such demands?

Furthermore, as explained above, the state's ability to ensure justice is critically diminished if the stronger segments of society are able to opt out of its tax system. Consequently, while the state's demands of taxpayers with lesser tax-planning capacity are still sound, its demands on taxpayers who can plan must be adjusted to the elasticity of their planning opportunities. The rules of the market dictate that the more elastic constituents will get what they pay for, whereas the others — albeit bound to comply with the state's demands — will trail behind. The bottom line is that states make coercive demands on their less-elastic constituents without being able to assure them of the justice they deserve, namely: the justice that legitimates the coercive demands. Making demands without conferring the benefits of state duties

73 Nagel, *supra* note 18, at 130.

undercuts state legitimacy as conceived by Nagel.⁷⁴ The state is thus able to uphold only a very thin conception of justice: one that is based on people's goodwill and sense of loyalty and not on the coercive co-authored nature of the state.

To better understand this, recall that Nagel gives two distinct rationales for the unique duties of the state. Both become debatable in conditions of state competition. First is the state's ability to ensure social cooperation. The state's centralized monopolization of the power of enforcement is necessary, Nagel explains, to ensure the terms of coordination and because it doesn't take too many defectors for such a system to unravel. Although it would be inaccurate to claim that states' authority has completely eroded, their inability to enforce taxation equally due to competition certainly undercuts their ability to enforce their redistributive schemes. While immobile taxpayers, low-demand taxpayers, and taxpayers with little or no tax-planning leeway are "stuck" with the state's coercive power, the better-off taxpayers (i.e., those who could actually support the state's duties of justice were they to shoulder their full tax burden) can often avoid state taxing duties. Thus, states can de facto enforce their tax laws predominantly on the immobile segments of society and on those segments that are incapable of effectively tax-planning. Coercion of this kind cannot provide the necessary assurances for redistribution and is thus flawed in terms of legitimacy.

Nagel's second explanation for "why the state" is will-implication: the state "mak[es], in the name of all, regulations that apply to them all."⁷⁵ Since it is illegitimate to speak in someone's name without giving her equal consideration, regulations made by the state must be justified to their co-authors as equals. As explained above, however, under competition, state regulation does not apply equally to all. When — especially in the tax context — (some) people can choose between their loyalties and their tax liabilities and states are increasingly under pressure to recruit desirable constituents, the norms controlling the state-citizen relations inevitably change. Competition between states introduces market valuation into the state-citizen relationship. The competitive context emphasizes the level of a taxpayer's attractiveness to the state, as well as her level of mobility. In highlighting attractiveness and mobility, competition also brings to the forefront the exit power and use-value of taxpayers. These

74 Moreover, since the better-off parts of society are often those that are less coerced *and* granted more effective voice in co-authoring the collective will — the competitive state regime is really a mixture of the political and the market spheres where state coercion and people's voice are adjusted to their ability to opt out of the system.

75 Nagel, *supra* note 18, at 116.

market features infuse the traits of market relations into the relationship between individuals and their state, thus reshaping both individuals as well as national valuation schemes. Instead of the political sphere's valuation scheme, under which individuals (at least ideally) enjoy equal respect and concern, with market valuation, some citizens — those with effective exit power — are accorded greater value than others (i.e., more than those who enjoy voice but not exit).

Instead of a tax system based on principles of distributive justice, the market setting imposes a price-based taxing system. The market-based criteria clash with the idea of what it means to be an equal member and viable part of the community. Potential as well as existing residents are evaluated according to whether or not they are beneficial to the state, and their provisional status is focused on and rewarded. The more in-demand and impermanent taxpayers are the better deal they can expect in terms of their tax liability and the public benefits they enjoy. As is often the case, in this context too, the market tends to take over other scales of valuation. Global competition for residents and resources pushes the state to consider the relative market value and elasticities of its constituents and to prioritize those who are in high demand rather than adhere to the requirements of justice. Market value, in highlighting constituents' use-value and exit, crowds out equal respect and concern for constituents. Hence, the state can no longer claim to genuinely implicate the will of all of its constituents, nor, accordingly, to legitimately speak on their behalf.

If states' coercive power is eroding due to competition and if they now find it difficult to treat their citizens justly, what, if anything, can be done to promote justice? Can we still expect states to uphold principles of justice even if they can no longer do so unilaterally? Can we expect them to cooperate in order to ensure justice? And if they have to rely on the cooperation of other states in order to sustain their sovereign power, does this give rise to a new level of justice duties, across state boundaries? Part III discusses some of the possible responses to these questions.

III. WHERE ARE WE HEADED?

The diminishing capacity of sovereign states to collect tax revenues has led many to view global cooperation amongst states as a way of restoring state sovereignty and, hopefully, promoting justice. Tax competition has been blamed for states' decreased ability to collect tax revenues and for the decline of the welfare state.⁷⁶ Many have asserted that cooperation and/or coordination

76 See, e.g., Avi-Yonah, *supra* note 53, at 1575-603.

amongst states is crucial for countries to preserve their tax bases and realize the traditional goals of tax policy.⁷⁷ Some scholars have even asserted that a new global regime of international taxation has de facto emerged and now sets both the customary and treaty-based international taxation norms that countries (should) adhere to.⁷⁸ Moreover, it has been claimed, such a (cooperative) global regime should be praised for promoting justice, as (only) cooperation enables states to sustain their domestic redistributive systems.⁷⁹ The idea of multilateral cooperation has not been restricted to the sphere of theoretical debate. In recent years, impressive international efforts have been directed at enhancing such cooperation, culminating in the recent G-20 call for coordinated action to strengthen international tax standards, which resulted in the OECD's BEPS Report and Action Plan.⁸⁰ These efforts, however, have not centered on considerations of justice but, rather, on ways to improve states' ability to collect taxes in light of increasing tax competition. Yet justice is often raised as a rationale for cooperation in general. Thus the question I now ask is whether cooperation is just and, if so, under what terms.

A. Is Cooperation the Answer?

As explained above, tax competition has resulted in the erosion of states' legitimacy by diminishing their coercive power, ability to equally implicate the will of their constituents, and thus also the ability to treat their constituents justly. It therefore seems to make sense for states to cooperate to jointly

77 See, e.g., *id.* at 1675

78 See REUVEN S. AVI-YONAH, INTERNATIONAL TAX AS INTERNATIONAL LAW: AN ANALYSIS OF THE INTERNATIONAL TAX REGIME (2007); Yariv Brauner, *An International Tax Regime in Crystallization*, 56 TAX L. REV. 259 (2003).

79 *Id.* Other writers were more skeptical about the feasibility and desirability of such cooperation. See, e.g., TSILLY DAGAN, THE COSTS OF INTERNATIONAL TAX COOPERATION (2004); Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261 (2001); Julie Roin, *Competition and Evasion: Another Perspective on International Tax Competition*, 89 GEO. L.J. 543 (2001). Others pointed to its highly problematic implementation, stressing the role of national interests. See DANIEL N. SHAVIRO, FIXING US INTERNATIONAL TAXATION (2014).

80 See OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 25, 29-40 (2013), <http://www.oecd.org/ctp/BEPSActionPlan.pdf>; *BEPS 2015 Final Reports*, *supra* note 9. For a recent review of the cooperative efforts on international taxation, see Tsilly Dagan, *Community Obligations in International Taxation*, in COMMUNITY OBLIGATIONS IN INTERNATIONAL LAW (Eyal Benvenisti & George Nolte eds., forthcoming 2017), <http://ssrn.com/abstract=2736923>.

structure an enforceable regime beyond the state. As Miriam Ronzoni has claimed, “[t]o restore the capacity of state institutions to tax ‘as they see fit’ (or, better still, as their citizens see fit), a structured institutional response is required.”⁸¹ Yet I argue that mere cooperation among nations is not enough to ensure justice. A multilateral regime established through cooperation is just, I contend, if and only if it improves (or at least does not worsen) the welfare of the least well-off constituents in all the cooperating states.⁸²

A variety of proposals for international cooperation have been put forth within international organizations and in the scholarly literature. These include proposed schemes to increase transparency by facilitating exchanges of information between states (in order to prevent tax evasion),⁸³ proposals

81 Ronzoni, *supra* note 2, at 13. Ronzoni makes a forceful case for the need for an international tax governance to sustain states’ self-determination. She suggests that the occurrence of tax competition mandates an enhanced obligation of states towards one another. She argues that competition challenges states’ fiscal self-determination (since it decreases the budget and curtails redistribution) and thereby impairs their capacity to be just. Thus, she argues, even non-cosmopolitans are bound to agree to an international regime that would constrain sovereign power in order to enable states to regain their self-determination and justice-providing capabilities. Dietsch & Rixen, *supra* note 2, propose an international tax organization that would enable national polities regain the capacity to make collective fiscal choices about the size of the budget and the level of domestic redistribution.

82 Nagel qualifies his uncompromising statist position, where “there are good reasons, not deriving from global socioeconomic justice, to be concerned about the consequences of economic relations with [other] states.” One is where the cooperation supports an *internally* egregiously unjust regime. The other is considerations of humanity demand that we “allow poor societies to benefit from their comparative advantage in labor costs to become competitors in world markets . . . for example, when subsidies by wealthy nations to their own farmers cripple the market for agricultural products from developing countries, both for export and domestically.” Nagel, *supra* note 18, at 143.

83 OECD COMM. ON FISCAL AFFAIRS, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL sec. I-1 (1997) (2010); OECD, TAX: OECD UPDATES OECD MODEL TAX CONVENTION TO EXTEND INFORMATION REQUESTS TO GROUPS (2012), <http://www.oecd.org/ctp/taxoecdupdatesoecdmodeltaxconventiontoextendinformationrequeststogroups.htm>; OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS (2014); OECD Convention on Mutual Administrative Assistance in Tax Matters (1988), <http://www.oecd.org/tax/exchange-of-tax-Information/conventiononmutualadministrativeassistanceintaxmatters.htm> (with amendments as adopted in 2010).

to harmonize taxing mechanisms (to avoid tax arbitrage),⁸⁴ and a (highly hypothetical) notion of a coordinated effort among all states to preserve a certain level of taxation (to prevent tax competition).⁸⁵ Proposals aimed at promoting justice are less common, in fact. International organizations rarely if ever refer to justice as a reason for promoting their initiatives, but from time to time, justice is invoked as a consideration in support of international cooperation on tax matters. The distributive outcomes of the various proposed cooperative regimes could also differ: cooperation could benefit all stakeholders; it could be regressive; or it could have asymmetrical effects for residents of different countries.

If successful, such cooperative regimes might optimally restore states' coercive power as well as their ability to uphold justice for their constituents. However, this seemingly commendable convergence of state efforts is not free of either justice or legitimacy concerns. Absent cooperation, the state loses its unique status as a locus for justice, but a multilateral regime does not necessarily replace it as such. The reason for this, I hold, is that although coercive power is leveraged through this mechanism, co-authorship is not. Thus, if Nagel is correct that the unique combination of coercive and co-authored power in a political institution both demands justification and imposes a duty of justice on that institution, then both the state and the multilateral regime each lack some crucial ingredient. Without multilateral cooperation, the state lacks coercive force: it is incapable of providing its co-authoring constituents with assurances of justice without deferring to a multilateral regime. The multilateral regime, for its part, although capable of providing enforcement if successful, lacks collective co-authorship. Hence, at least in the context of

84 E.g., the proposal regarding transfer pricing, digital economy and permanent establishments in the recent BEPS reports. See *BEPS 2015 Final Reports*, *supra* note 9.

85 Despite the use of the term "preventing harmful tax competition," proposals rarely rise to suggestions to actually coordinate tax rates across countries and settle for tackling tax rates that are "too low" and other policies (such as ring fencing) that are perceived as "harmful." OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 14 (1998), <http://www.oecd.org/tax/transparency/44430243.pdf>. The European Union as well introduced a code of conduct aimed at tackling harmful tax competition and coordinating action on the European level. In 1996 the European Economic and Financial Affairs Council (ECOFIN) decided to try to seek a coordinated solution for harmful tax competition. In 1997 The Code of Conduct for business taxation was adopted. Conclusion 98/C 2/01 of the COFIN Council Meeting (Jan. 12, 1997), http://eur-lex.europa.eu/resource.html?uri=cellar:d2cdddef-e467-42d1-98c2-31b70e99641a.0008.02/DOC_1&format=PDF.

tax, there seems to be no “natural” locus for pursuing justice under Nagel’s political conception — i.e., where coercion and co-authorship converge. For those interested in the promotion of justice (or sustainability of the state as a legitimate institution), the question that arises is, which is the right way to go?

1. A Global State

One (extreme) option would be to facilitate co-authorship on a larger scale: to demand, in the name of justice, the imposition of duties of justice on the multilateral level. To some, even sheer cooperative efforts and interdependence of states in a multilateral regime would be sufficient to give rise to a supranational duty of justice. But proponents of strict political justice would assert that this is not enough to justify such a duty of justice,⁸⁶ for only the institution of a global or multilateral state (or something close thereto) would be thus obligated. Surely multilateral cooperation establishing a global state or federation of states would have to adhere to principles of justice in its treatment of its constituents in order to acquire legitimacy. Such a regime could, indeed, be the best response to the justice concerns of cosmopolitans and statist alike; however, it is not only an unfeasible solution but probably also an unwarranted one. A global state would likely not be particularly responsive enough to its constituents’ preferences, suffer from an excessive concentration of power, and be lacking in accountability, as well as have a serious efficiency problem.

2. Re-empowering Sovereign States

A solution often advocated in international tax discussions for overcoming the justice deficiency is to use the multilateral cooperation to re-empower states to domestically pursue justice within their borders.⁸⁷ Yet can such a

86 Nagel, *supra* note 18, at 140, would probably see even tax cooperation as not demanding political justice:

Justice applies, in other words, only to a form of organization that claims political legitimacy and the right to impose decisions by force, and not to a voluntary association or contract among independent parties concerned to advance their common interests. I believe this holds even if the natural incentives to join such an association, and the costs of exit, are substantial, as is true of some international organizations and agreements. There is a difference between voluntary association, however strongly motivated, and coercively imposed collective authority.

87 See, e.g., Brauner, *supra* note 7:

The BEPS project’s most fundamental insight to date has been noting the failure of this paradigm. Countries, even those with the strongest economies, are not powerful enough to satisfactorily enforce their tax laws pursuant to the current regime. By definition, unilateral action, regardless of its substance,

hybrid bi-level model for implementing duties of justice in itself be justified and, if so, under what terms? The path to answering this question seems to lead back to Nagel's basic inquiry: Should we view cooperation as essentially a matter of "bargaining," or has "a leap . . . been made to the creation of collectively authorized sovereign authority"?⁸⁸ The former option seems to infer that cooperation is justified per se (at least as long as it is not coerced). The latter implies an autonomous duty of justice that is imposed beyond state boundaries, but on the condition that a sovereign authority has emerged on the multinational level. The conventional discourse in international taxation implicitly takes the former view, namely, that these are sovereign states bargaining over cooperation — and, hence, presumably unencumbered by any duty of justice that transcends state duties. Under this view, the proposed cooperative regime seems like the perfect statist solution: each of the states is responsible for justice among its own constituents, and they all cooperate to achieve the mutually beneficial goals of domestic redistribution. They do not owe each other or the constituents of other states anything beyond the express agreement reached through the bargaining.

This position also seems to accord fully with Nagel's position on international institutions:

[International institutions] are not collectively enacted and coercively imposed in the name of all the individuals whose lives they affect; and they do not ask for the kind of authorization by individuals that carries with it a responsibility to treat all those individuals in some sense equally. Instead, they are set up by bargaining among mutually self-interested sovereign parties. International institutions act not in the name of individuals, but in the name of the states or state instruments and agencies that have created them. Hence, the responsibility of those institutions toward individuals is filtered through the states that represent and bear primary responsibility for those individuals.⁸⁹

By taking a statist-like position, the rhetoric of international tax cooperation obviates the desirability of cooperation, endorsing it as an obviously right thing to do in terms of justice (since it presumably promotes domestic justice), and regards lack of cooperation by any single state to be opportunistic: as taking a hardball bargaining position rather than a principled call for justice amongst states. After all, the argument goes, if a state has the option of increasing its

cannot succeed, and consequently, international coordination of tax policies is required as a condition for any chance to implement substantial reform.

88 Nagel, *supra* note 18, at 141.

89 *Id.* at 138.

tax collection (and thereby presumably affording domestic redistribution) by cooperating with other states, why would it pass it up? Distributive disparities between states or between their constituents are presumed to be irrelevant to this discussion, since states have an obligation of justice only towards their own constituents — not towards other countries or their constituents. Hence, calls for a more level playing field between developed and developing countries, for example, are not seriously addressed, or rather, addressed as a plea for charitable treatment rather than a duty of justice.

B. Justice for All (States)

The statist position presented above could hold were each state to have independent legitimacy in imposing its own tax system — that is, could successfully provide assurances for its collectively co-authored regime. However, as has been explained, this is not the case under tax competition, where individual states struggle to enforce their own tax systems and where the rules of taxation are, to a large degree, determined by market conditions, including the elasticities of supply and demand for mobile residents and factors of production. I challenge this conventional view, arguing that a multilateral regime that enables states to retain their legitimacy can only be legitimate itself if it ensures domestic justice for the constituents of all the cooperating states. Specifically, to comply with this requirement of justice, the multilateral regime must set terms that ensure the welfare of the weakest segments in poor countries that might otherwise be harmed by this cooperation.

To understand why, we can return again to Nagel and the traditional view: Nagel suggests that a supranational duty of justice arises only if the multilateral cooperation leads to the creation of a collectively authorized sovereign authority. Otherwise, no such duty of justice arises for the multilateral regime. The cooperative regime derives its legitimacy from the legitimacy of the cooperating states. As Nagel puts it,

a global or regional network does not have a similar responsibility of social justice for the combined citizenry of all the states involved, a responsibility that if it existed would have to be exercised collectively by the representatives of the member states. Rather, the aim of such institutions is to find ways in which the member states, or state-parts, can cooperate to better advance their separate aims, which will presumably include the pursuit of domestic social justice in some form. Very importantly, they rely for enforcement on the power of the separate sovereign states, not of a supranational force responsible to all.⁹⁰

90 *Id.* at 139-40.

Recall, however, that because of competition, states have lost a significant extent of their coercive power and, in particular, their ability to unilaterally provide equal treatment to their constituents (at least insofar as tax is concerned). In many cases, it would be *only* through the cooperative accord that they could regain these powers. Cooperation in such cases is more than a sheer preference of the states or a way to promote their aims through bargaining. Rather, the cooperation goes to the heart of states' legitimacy. Without the ability to ensure the collective action of its citizenry and to treat them with equal respect and concern, the state can no longer legitimately employ its coercive powers. Notably, furthermore, without cooperation with other states, the state cannot even achieve such enforcement. In such cases, I argue, the question of the legitimacy of the multilateral regime itself arises: can a regime intended to provide the state with fundamental legitimacy be legitimate based solely on the — in itself deficient — legitimacy of the (other) state? And if so, does such a cooperative regime — which transcends the state in order to preserve the cooperating states' legitimacy — require independent justification?

When states initiate multilateral cooperation to restore their legitimacy, they each entrust the multilateral regime with the authority to act on their behalf so as to enable them to provide their constituents with justice. This is the *sine qua non* for their legitimacy. They incorporate their otherwise impaired individual coercive power into a collective regime that encompasses more power than the sum of its components' power. Hence — arguably — they can each treat their own citizens justly.⁹¹

But what if the agreement undermines justice within some of the countries? On the face of it, according to the statist rationale, the countries gaining power should not even consider whether the agreement brings about injustice in another country, as long as all the states agree to the multilateral agreement. Recall that according to the statist position, justice is considered to be completely mediated by the states, and the agreement between states raises no independent duty of justice beyond humanitarianism.

But does such an agreement truly completely mediate justice even under the statist rationale? I believe it does not. Absent the ability to ensure justice for their constituents, states lack the legitimacy to act on behalf of their constituents. Their very ability to act as sovereigns — for our purposes — is undermined. Hence, they cannot be trusted to mediate justice when contracting with other states. Thus, although it is true that states do not have an independent duty of justice towards the citizens of other countries (that is, they are under no duty

91 Non-statists will probably argue that this type of cooperation, in and of itself, imposes a duty of justice beyond the state. Here, however, I would like to focus on the statist position.

to treat such constituents with equal concern), I believe they cannot ignore the duty of their contracting partners to treat their own citizens with equal concern either. In other words, even though the intergovernmental agreement does not give rise to new normative requirements, it cannot purport to act justly by relying on their partner-states to completely mediate justice if such states purport to implicate the will of their own people without treating them with equal concern.

Unlike other agreements between legitimate sovereigns, a multilateral arrangement that provides legitimacy in one country by increasing illegitimacy in another cannot provide the necessary justification since, although officially based on the consent of the two countries, such consent is no guarantee for justice. For justice to prevail, I argue, a multilateral regime should be bound by the ability of each state to supply domestic justice. A regime that does not actually support states' ability to provide domestic justice is illegitimate because the states — on which the regime's legitimacy is grounded — similarly lack legitimacy in the absence of such justice. This position will probably be endorsed by non-statists (who may argue that the multilateral accord in itself imposes increased such duties of justice), but — I argue — statist as well cannot hide behind the alleged state-mediated justice, when the multilateral accord in itself creates injustice within some of the cooperating states.

The rhetoric of multilateral cooperation makes it sound as though any cooperation will inevitably be justice-promoting and, therefore, desirable. However, the fact of the matter is that this is not necessarily the case, for not all states are cut from the same cloth. Hence, cooperation that may be unquestionably justice-promoting for some states could result in completely different outcomes for other states. To demonstrate this, I consider an admittedly hypothetical version of harmonization and examine whether cooperation among nations designed to sustain domestic justice does, indeed, necessarily produce a just solution.

Imagine a multilateral regime in which the cooperating states agree to impose a unified tax of X% above the value of the public goods each state provides, in order to facilitate redistribution (that is, the X% collected by each state will be progressively distributed among its constituents). Proponents of harmonization present this result as indisputably just, as it allows states to redistribute wealth domestically by taxing mobile capital.

Such a scheme could, however, entail asymmetric results for residents of different countries. While in some countries (call them "rich countries"), which are mainly *capital-exporting countries*, the government will, indeed, be better able to collect taxes from capital owners (and thus able to redistribute wealth), this will not be the case in what we would call "poor countries," which are primarily *capital-importing countries* and, I would assume, more typically

developing countries. In these latter countries, local factors of production (most importantly labor) benefit the most from foreign investments.⁹² The increased tax imposed by a universal regime on cross-border investments (and the tax wedge it creates) could reduce the level of foreign investment in such capital-importing countries and, with it, the demand for local labor. This regime therefore comes at a cost to local labor. True, a harmonized tax regime may allow host countries to collect more tax revenue from incoming investments and to collect taxes from their own capital owners investing overseas. Such taxes, however, will not necessarily compensate local factors of production for the lost inbound investments, for a number of reasons. First, the amount of outbound investments (and tax revenues collected therefrom) might be small relative to the inbound investments being lost. Second, the enforcement abilities of such countries on foreign-source income might be limited. Thus, even if they have the right to tax foreign-source income, they might not be able to enforce this. Third, these countries might rely on consumption taxes rather than income taxes; thus, again, the right to tax income will not necessarily be translated into greater or more progressive tax revenues. And fourth, they might suffer from capture by the rich as well as by multinational corporations or even from corruption; thus, the taxes that do get collected may be used to benefit interest groups rather than the public at large. If host countries are, in fact, unable to collect enough taxes to compensate labor for their lost wages, cooperation might not be a good idea from a distributive perspective. Although in residence countries, governments may be better able to tax capital owners in order to redistribute wealth to labor, in host countries, labor may be harmed by the coordinated regime, with labor in those countries paying for the redistribution to labor in residence countries.

Of course, residence countries could give a larger share of the increased revenues to host countries and thereby balance the gains and losses across national borders. But should they? Assuming the residence countries wish to do the right thing, is there a duty of justice for them to (re)distribute these benefits? This, of course, is the question at the heart of this Article: Does the cooperation in itself impose a duty of justice on the cooperating states? Cosmopolitans will surely support such redistribution between states. In fact, they would likely recommend completely ignoring any state-structured cooperation and have the multilateral mechanism directly redistribute wealth among the people of all countries.

92 By contrast, local capital owners in poor countries may actually lose from a higher supply of capital from foreign investments (since the return to capital within the country may fall).

For statist, however, the answer is more complex. I believe that even statist would not deny that such a multilateral regime is no more than a bargaining move by sovereign states and therefore entails no duty of justice. When harmonization helps (some) states to promote domestic justice, it seems desirable. If, however, it impairs justice in other countries, the cooperation agreement itself loses legitimacy. When the regime promotes domestic justice within some of the states but does injustice in others, it seems that the cooperating states cannot hide behind the argument that the will of the people of such states is completely mediated by the state. As stated above, the cooperating states cannot entrust the multilateral regime with anything short of the power to enable them to treat their constituents justly. The (legitimate) power to help other states regain their coercive power is accompanied by a requirement that this bargained-for power is not used to treat domestic constituents unjustly. Otherwise, (rich) states will be using other (poor) states' illegitimate coercive powers in order — allegedly — to gain legitimate power to promote justice within their own borders.

If the multilateral regime undermines domestic justice in some states, other states cannot legitimately gain coercive powers with the help of that regime. Thus, an international regime would not be legitimate, even when it brings justice to some states, if it renders injustice in other states.⁹³ My argument suggests that when (rich) states need the cooperation of other (poor) states in order to promote domestic justice, their bargaining position is constrained by the requirement that justice within their cooperating partners not be compromised. It is — I argue — unjust for a state to promote domestic justice at the expense of justice in other states.

A regime that is built on injustice in some states cannot resort to the theory of bargaining to claim that justice is completely mediated by sovereign states. The states that operate unjustly are illegitimately using their sovereign powers (i.e., their coercive as well as their bargaining power). The rich states cannot legitimize their justice-based domestic coercive power on an agreement that causes domestic *injustice* within their cooperating states. A multilateral regime established through cooperation is justified in promoting justice *if and only if* it improves (or at least does not worsen) the welfare of the least well-off in all cooperating states.⁹⁴ Consequently, a multilateral agreement that pursues harmonization will only be valid if it ensures domestic justice in all states involved.

93 Nagel considers a similar arrangement (allowing poor countries to preserve their comparative advantage in low-cost labor in trade agreements) to be humanitarian in nature rather than a duty of justice.

94 See *supra* note 82.

CONCLUSION

Although in theory, states could cooperate to maximize global welfare and justly distribute it by transferring wealth from richer to poorer countries, the prevailing decentralized nature of international taxation creates some serious coordination problems. Assuming transfer payments between states to be utopian and that promoting redistribution in rich countries at the expense of the poor in poor countries (without such transfer payments) is unjust, I suggest (in my forthcoming book⁹⁵) a third and, I believe, more viable option, namely, to perfect, rather than curtail, tax competition. I propose that countries work together in an effort to perfect tax competition by targeting market failures such as externalities, information asymmetries, and strategic behavior. These classic inhibitors of competition translate, in international taxation, into issues of tax avoidance and tax evasion, local corruption, and governmental cartels.

Some of these issues (particularly tax evasion and avoidance) are currently being given serious attention in international tax policy circles (notably the BEPS report); others (corruption and cartels) less so. Although avoidance, evasion and corruption could encourage the flow of more capital into certain host countries, both create externalities, so that instead of paying the “real” competitive price for public services, taxpayers are free-riders who enjoy the benefits of their countries of residence (in the case of evasion) and/or of their host countries (in the case of corruption) at little or no cost. Evasion and corruption also increase transaction costs and entail information asymmetries. Hence, cooperatively fighting corruption and evasion through such measures as a global exchange of information could bolster efficient competition.

To avoid cartelistic behavior among states, a multilateral antitrust agency could be created. Ideally, such an agency would work to disband cartels of states that are crowding out competitors, to prevent them from increasing cartel profits at the expense of less powerful actors, and to reduce governmental waste. The likelihood of securing such a limited and perhaps less glorious type of cooperation is unclear. Yet there is certainly some room for optimism: such a regime would potentially increase the global welfare pie by diminishing transaction costs, free-riding, and other market failures, as well as more justly distribute this added value. Although this type of cooperation would also come up against strategic challenges, I believe a careful design of the governance of these cooperative mechanisms could help to secure this more modest, but more distributively-just regime.

95 TSILLY DAGAN, *INTERNATIONAL TAX POLICY: BETWEEN COMPETITION AND COOPERATION* (forthcoming 2017).

