Should They Honor the Promises of Their Parents' Leaders?

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Should the foreign debt of the world's poorest countries be cancelled? In this essay, I am concerned with whether a generational perspective makes a difference in answering this question. I will show that it does, and that alternative accounts of repayment obligations are possible. I argue that a distributive theory of justice is not only appropriate to address the challenges to justice raised by long-term sovereign indebtedness, but that it is also superior to the solution offered by the odious debt doctrine. Unlike the odious debt doctrine, a distributive view is capable of taking into account the separateness of generations. More specifically, I also argue that the need to preserve creditors' incentives to lend to the poor in order to ensure that the latter keep having access to credit for important development purposes requires the adoption of a narrow, problem-specific view, which focuses on the distributive impact of the loan transaction, rather than a broad distributive view, which looks at the general distributive situation of the two descendent communities.

GENERATIONS AND SOVEREIGN DEBT

Generations are "birth cohorts," or groups of individuals born during the same period. Throughout this essay, I examine the stylized case of two countries, one of which has borrowed money from the other. That is, at a

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particular time—and thus within a single generation—the governments of two countries enter into a contract that entails the immediate, nonrecurring transfer of resources from one to the other. Under the contract, the borrower government promises to repay the borrowed resources, plus some interest, on a particular payment schedule. I refer to these two governments (along with the populations they represent) as "the borrower" and "the lender," and to the governments (and their respective populations) of the nonoverlapping generation that succeeds the borrower's and lender's generation as "the borrower's descendant" and "the lender's descendant."[1] The central question is then: Given that the borrower has borrowed money from the lender, under which conditions (if any) and to what extent would it be fair to cancel the remaining debt owed by the borrower's descendant to the lender's descendant? And if it is the case that debt should be canceled, on which grounds?

The question of canceling the foreign debt of the poorest countries raises issues of both *inter*generational and *trans*generational justice (in addition to *intra*generational issues that will not be addressed here). For an issue of *inter*generational justice to arise, it suffices to have two individuals or communities, each of them being part of a different generation. In contrast, for a question of *trans*generational justice to arise, there need to be at least three individuals or communities—as, for example, in the case of historical emissions of carbon dioxide[2]—and typically four persons or communities, two in each generation—as in the case of reparations for slavery. The question of whether a generation has transferred sufficient resources to the next one is about what one generation owes another, and is thus a problem of *inter*generational justice. In contrast, the question of whether the descendants of one community owe something to the descendants of another one (who are in the same generation) due to what happened between their respective ancestors entails a problem of *trans*generational justice. Arguments regarding the acceptable level and use of the public debt—such as whether it is acceptable for a generation to impose liability on its descendants for a debt if it was not contracted for the purpose of investments that will primarily benefit the members of the later generation—typically belong to the sphere of intergenerational justice. However, they can sometimes be of a strictly intragenerational nature as well, such as when the concern is about the

distributive impact within the current generation of canceling a domestic public debt.[3] In such a case, the concern is with the impact of such cancellation on poverty and inequality within the current generation.

WHAT IS ODIOUS DEBT?

The odious debt doctrine, as formulated by Alexander Sack in 1927, seeks to specify when a government ought to be held liable for debts incurred by preceding governments of the same state. Although this essay is not concerned specifically with odious debt, Sack's doctrine provides a good starting point for two reasons. First, it constitutes a relatively clear doctrine, capturing some of the key intuitions of justice at play in the broad debt cancellation debate. Second, Sack's own intuitions are not primarily concerned with distributive justice questions, such as what the long-term effects will be on the least well-off if the debt was paid or not paid. I use Sack's doctrine in order to render more salient the specificities of the approach I defend—and not as a progenitor of the view developed here or as a possible way of implementing it.[4] Thus, relying on the odious debt doctrine allows me to bracket initially questions of distributive justice in my examination of debt cancellation. I will then move away from it in a stepwise manner, shifting to both a generational and distributive perspective on debt cancellation.

Two Provisos

Sack's odious debt doctrine aims at identifying when a new government is legally obligated by an earlier government's debt contracts. For a debt to be "regular," it must meet two characteristics. First, the debt needs to have been contracted in a regular way by a regular government, which refers to any "supreme power effectively existing within the limits of a given territory" (the so-called *regular government* proviso).[5] Second, the debt "must have been contracted, and the money raised through it used to care for the needs and in the interests of the State" (the *public interest purpose and use* proviso).[6]

On a close examination of the doctrine, it turns out that in order for a debt not to be owed, the violation of the regular government proviso is neither necessary, nor sufficient. First, it is not necessary because even if the

contracting government was regular, a successor government may "provide evidence demonstrating that such or such debts contracted by the former government were not contracted in the interests and to the advantage of the state and—this being important only in this case—that the lenders knew that these sums of money would be meant for 'odious' ends."[7] In such a case, the successor government would not be liable for repayment, despite the regularity of the loan, unless "the lenders, in turn, … prove that, despite such an 'odious' purpose of the loan, a purpose known by them, all or part of its product has in fact been used in a manner useful for the state."[8] That is, even if a loan that was intended for odious purposes nevertheless led to benefits for the state, a successor government would be liable to some extent for its repayment if it led to benefits for the state despite the irregularity of the loan.

Second, while the violation of the regular government proviso may suffice in practice to render the debt not legally binding (because of rules of evidence embodied in Sack's doctrine), it is not always a sufficient condition for freeing the debtor. This is because, even in the case of irregular loans, creditors may still "prove that the state effectively enriched itself as a result of these loans."[9] This possibility also shows that, in theory, the violation of the public-interest-use proviso is both sufficient and necessary to invalidate a debt. Moreover, the word "odious" is not used by Sack to refer to the general quality of the former borrowing government. Instead, it primarily characterizes the purpose and/or the use of the specific loan at stake.[10] Hence, the centrality of the public-interest-use (or "non-odious" use) proviso explains why Sack's doctrine is generally referred to as a doctrine of "odious debt" rather than as one of "irregular debt."[11] A debt will only be referred to as odious in the case of a violation of the public-interest-use proviso.[12]

Three Underlying Intuitions

Three types of justice considerations are present in Sack's odious debt doctrine. First, the implicit ideas of consent to accepting a loan and prior commitment to repaying a debt provide a presumption toward the repayment of debts acquired in "regular" ways. While Sack's notion of a regular government is far less stringent than the idea of a democratic government, his

theory nevertheless rests on the notion of consent and prior commitment: representatives make a promise on the citizens' behalf that a certain debt will be repaid by them. Following this logic, then, the reason why someone has to repay a debt back lies in this very same person's commitment to repayment, in this case expressed through representatives.

Second, the idea of public interest implies that the citizens of a country as a group should have benefited to some extent from the loan in order to owe anything back. This could lead in turn to a fully commutative reading of the two provisos—that is, in principle, citizens can only owe repayment if they have consented to the initial transfer and have benefited from that transfer in some sense. In other words, there can be no obligation without prior consent and no obligation without beneficial counterpart. Yet, even if the initial loan was not contracted by a regular government in a regular way, the lender can always try to show that the borrower benefited from the loan. As a result, the obligation to repay the loan could not be grounded on a prior and valid unilateral commitment from the borrowing state. It would derive instead from the need to avoid unjust enrichment.[13] The borrowing country would then owe repayment because canceling repayment would lead to a situation in which, all else being equal, the borrowing state would have enriched itself at the expense of the lending state. There is thus a clear distinction between at least two grounds for insisting upon repayment—consent and enrichment.

Third, for the cases in which only the public-interest-use proviso is violated, no money would be due back provided that the successor government can prove that the lender knew that the purpose of the loan was odious.[14] This translates into an intuition of justice that carries the expectation that lenders should not act with "hostility" toward the borrowing state's population.[15]

It is also relevant to mention two intuitions of justice that are *not* present in the odious debt doctrine. First, the doctrine does not take into consideration the respective wealth of the parties. This essay aims to fill in this absence, by separating considerations of distributive justice from other considerations relevant to determining obligations to repay debts. Second, the doctrine is not concerned with whether the deal struck by the initial lender and borrower was fair at that time. For example, it does not look at

whether there was a gap between the specifications of the contract at stake and the average interest rate or terms of repayment at that time in the market for similar loans.

Amending the Two Key Provisos

For the purpose of addressing the significant debts of poor countries, I introduce two amendments to Sack's doctrine. First, instead of a regular government proviso, I will use a more stringent "legitimacy proviso." Sack explicitly states that a government can be regular without being democratic. I assume that since only a democratic government can be properly regarded as having a mandate from the people, only a democratic government can be said to validly bind the people it represents.

Second, instead of a public-interest-use proviso, the content of which remains relatively undefined in Sack's doctrine, I will rely on a "fair use" proviso, allowing for an explicit reference to substantive theories of justice such as utilitarianism, libertarianism, liberal egalitarianism, sufficientarianism, and so on, as opposed to a commutative approach that would be partly in line with Sack's legal doctrine.[16] This could a priori be significant considering the intergenerational dimension of justice (but will turn out not to be so). Moreover, for the fair use proviso to apply, it is not necessary that the lenders knew that it would be, or would likely be, violated. Dropping the "knowledge by the lender" part of the proviso will fully make sense from a generational perspective, since the lender's knowledge should not be seen as relevant to the responsibility of the lender's descendant, as will become clear below.

CAN THERE BE AN INTERGENERATIONAL MANDATE TO REPAY DEBT?

The fact of generational succession presents an important challenge to the legitimacy proviso, since it implies that some borrowing decisions will necessarily lack the prior approval of people who do not exist at the time of contracting. I argue that such a prior approval is required, and that no currently existing arrangement can be said to grant the consent of future people.

The notion of prior approval begs the question of who is entitled to make decisions for the country. In a democracy, this boils down to the

question of who should be entitled to vote.[17] One possible principle for answering this question is that all those who are potentially affected by a government's decision should be allowed to vote (the all-affected principle). The idea of being affected can be understood in a more or less broad way.[18]

With respect to generations, the problem is that their members will be affected both by decisions taken while they are alive as well as by decisions made before they came into existence, because the validity of laws extends in most cases beyond the lives of those who voted for them.[19] This means that even under a very narrow interpretation of what it means to be affected, such that it entails the exclusion of expatriates from the voting population in their country of origin, the inclusion of future generations among the voting population could still be justified.[20] If they were to have a say in all the decisions that could potentially affect them, members of each generation would have to participate not only in decisions taken while they are alive, but also in those taken by earlier generations (including constitutional decisions). Beside the obvious difficulty of granting a vote to people who are not yet alive (a problem to which I will return), I turn briefly to two possible objections to the desirability of such an extended franchise, assuming it were an available option. The first objection claims that extending the franchise to the next generation is *unfair* since it would be equivalent to granting it a plural vote. The second objection claims that the extension of the franchise is actually *unnecessary* because, were no generation to benefit from it, this would not lead to any inequality in political power among generations.

Would the Enfranchisement of Successor Generations Be Unfair? The Expatriates Analogy

Let us address the first objection. The situation of a given generation with respect to its predecessor is analogous to the situation of expatriates toward their compatriots still residing in the country of origin. Asking whether a generation should be entitled to participate in the decisions taken by its predecessor is analogous to asking whether expatriates should still benefit from a right to vote in their country of origin, in addition to having the right to vote in their host country. The problem with answering in the affirmative is that some people would be entitled to vote in two constituencies

whereas others only in one. Thus some could end up with a more extended franchise than others, globally speaking. This extended entitlement may be problematic from the perspective of equality in the right to vote.

At least two answers can be offered to this objection. The first one consists in the claim that expatriates are more affected than other people, because they are subject to the laws of two constituencies (and to a more significant degree than tourists, for instance). Thus, if they are affected to a larger degree than others, their influence on the decisions affecting them should be proportionally larger. In theory, this would amount to moving away from a strict rule of *one person, one vote* toward an equality of proportional influence, allowing those who are affected by more than one jurisdiction to have a proportionally larger aggregate voting weight than those affected only by the decisions of one jurisdiction.[21] And in practice, this could justify systems such as that extant in the Cook Islands. A Cook Islands expatriate can not only vote in her host country, but also on her island of origin. Her vote on the islands, however, will be valued less than the vote of a citizen who still resides there. The group of expatriates is in fact entitled to elect only a small set of representatives out of a larger assembly. This is a nice way of dealing with a practical problem. Insofar as dual citizenship generally entails the right to vote in two countries, it could appear unfair if only some inhabitants of the planet have dual citizenship and others do not. A Cook Islands strategy, however, will give extra weight to expatriates, albeit a lesser weight than in the case of a full dual vote. What, then, would an intergenerational version of the Cook Islands model amount to? Future people would of course vote for their own representatives in the future. Yet, in addition, they could be given *some weight* in today's decision-making procedure as well, for instance, by being granted 5 percent of the total vote, be it only for some subject matters that are likely to affect them significantly, such as energy policy, research choices, or cultural heritage decisions.

The second possible answer to this first objection is that there is no problem with granting an extra right to vote to expatriates as long as it is granted to all citizens, including those who remain in the country. In theory, a system of *one person, one vote* is just like a system of *one person, two votes*. Promoters of dual citizenship (or of a double right to vote) would simply need to specify, then, that they are willing to promote dual

citizenship under the condition that *all* would benefit from a right to vote in two constituencies. The specificity of the intergenerational context is that each and every generation is an expatriate in a sense. The intergenerational equivalent of dual citizenship for *all* (or of a double right to vote for all) would then amount to requiring that the rule according to which each generation should have a right to take part in the decisions of the previous generations be enforced across all generations.

Thus, in the generational context, claiming a right to vote for successor generations regarding the decisions taken at the time of their predecessors need not lead to a violation of equal voting rights (be it in its "strict," "double for all," or "proportional" version). One implication is that if state procedures cannot lead to at least the consultation (in some sense) of future generations, the decisions of such a state cannot be seen as deriving from a mandate from both current and future people. As a result, future generations could not be regarded as legitimately bound by decisions from earlier governments.

Is The Enfranchisement of Successor Generations Necessary? The Complete-Life Objection

For those defining the boundaries of the voting population by reference to the idea of being "affected by," it is clear that granting the right to vote to a successor generation whenever the current generation is about to take decisions makes perfect sense. Yet, one may object that if the goal is to guarantee some form of equality of influence (whether strict or proportional), such a scheme would not even be needed. For although each generation is affected by the decisions of its predecessors, disenfranchising each and every generation when it comes to the decisions of its predecessors would not necessarily lead to any inequality of influence, so long as each generation were equally excluded.

In fact, the disenfranchisement of future generations can be compared to the exclusion from the right to vote of those below a certain age (typically sixteen or eighteen) or those above a certain age (such as sixty). Excluding dead people from the right to vote is equivalent to setting an upper (and unavoidably variable) age limit defined by each person's age at death. Thus (leaving aside significant ontological problems) disenfranchising future

generations is equivalent to excluding all those below the age of zero. What the complete-life approach may then claim is that these forms of exclusion do not necessarily lead to any inequalities of influence because they are applied to everyone in reference to their respective complete lives. In principle, this view could consider it acceptable to grant to each individual only a single opportunity to vote during his or her whole life.

A major weakness of such an argument, however, is that some cohorts may suffer more than others from the consequences of choices made by earlier cohorts. These earlier cohorts may be more myopic than others, in the same way as some generations over the age of sixty may come across people under sixty who would be especially gerontophobic. The impact of the exclusion of various classes of people (of the dead, of individuals over sixty years old, of children, of future generations) will thus vary across cohorts, depending on the behavior of their respective neighboring cohorts. Hence, while such exclusions do not seem prima facie discriminatory when we consider equality between people's complete lives, they actually are. Hence, it is not true that excluding future generations from the voting population consistently through time does not generate any differences in impact.[22] It is thus preferable to extend the franchise rather than reduce it, because doing so would better guarantee that equality of influence effectively buffers the effects of disparate behavior among neighboring generations.

Is the Enfranchisement of Future Generations Possible?

Among other possible objections to enfranchising future generations, let me mention two more. First, could a community-based approach dissolve the need for a mandate from future generations? According to a community-based approach, it is because we are a single family or nation that we would have to honor the promises made by our ancestors as our own. Very briefly, this approach raises at least two serious difficulties. First, it would likely lead to an excessively traditionalistic society in which decisions by earlier generations automatically bind later ones (just as one person's consent would bind that very same person at a later time). Moreover, such a community-based view, understood at the moral level, would imply a rejection of the separateness of persons, which does not fit with many people's basic

moral intuitions. Of course, this does not necessarily mean that a legal doctrine of state continuity cannot have other justifications, be they of a prudential or even of a justice-oriented type. Moreover, the rejection of a communitarian approach should not be confused with a generational model that is restricted to nonoverlapping generations. The assumption is simply that all individuals, whether from the same or different generations, should be treated as separate units of moral concern. Moreover, the existence of generational overlap does not change anything due to the fact that decisions made at a given time are still imposed on all those who have not reached the age of electoral majority at that time.

Finally, does the fact that many international loans are repaid within the same generation and/or the fact of serial debt restructuring undermine the relevance of a generational approach to sovereign debt? For example, since most IMF loans must be repaid within five years and most World Bank loans are expected to be repaid within twenty years, one could be tempted to conclude that the generational approach will only be of significance if what we take as a standard length of a generational gap is shorter than the average expected repayment term.[23] If it were so, one would rightly conclude that the intergenerational approach is irrelevant since debts are constantly renegotiated and endorsed by new generations, which entails that this would actually be *their* debt. This objection is not final however, even in cases in which the terms fixed for reimbursement are very short. For, considering the fact of debt restructuring, it is clear that in many of the cases, renegotiations are made against the background assumption that what was promised by our ancestors is still owed in principle. Similarly, new debts are often contracted with the sole aim of repaying earlier debts, in many instances, by earlier generations. Hence, new endorsements of past debts through restructuring or through contracting new debts to repay past ones will always be forced in some sense, and hence not chosen by the new generation that is supposed to pay back.

This being said, I have just argued that future generations should not be seen as democratically bound by the decision of an earlier government if they were not part of the population that granted a mandate to authorities that contracted the debt. And it is yet more serious because such a mandate

can never genuinely obtain in principle (at least beyond generational overlap) because of time's arrow. Let me now add two further remarks.

First, various countries have set up institutions aimed at representing the interests of future generations. This is the case, for example, in Israel where the Knesset had a commissioner for future generations.[24] Without denying their usefulness, the status of such institutions should be properly understood. Rather than seen as truly representing future generations, they should be understood as alarm mechanisms, or watchdogs constantly calling the attention of contemporaries whenever the interests of the coming generations are especially at stake. Of course, if guardians for future generations and the like are not to be seen as true representatives, they should not be put in operation to exercise proxy votes, for instance, through an intergenerational version of the Cook Islands expatriates model, nor a veto over present decisions. Given this difficulty, it is much more appropriate to confer to such institutions the right to demand further explanations from parliament or to be heard before certain types of decisions by public authorities are taken. In some cases, they turn out to have real weight in practice. Naturally, it is extremely important for such institutions to base their actions on clear substantive principles of intergenerational justice, especially as those they are supposed to represent are not present to confirm or deny their conjectures, nor to question the principles they may invoke in their name. So much could be done (or not) in the name of future generations that explicit principles should always be invoked and argued for.

This problem, moreover, cannot be alleviated by a move from an actual mandate that could take two forms, as in the example of the Israeli Knesset, to a hypothetical mandate. The predictive version would require the current generation to anticipate what the future generations would want its predecessors (not) to do now. The hypothetical legitimacy test for present decisions would then require asking whether the coming generations *would* have voted for this measure, had they been allowed to do so now. However, even the best attempts at predicting the future will likely amount to wild guesses. Alternatively, one could ask what future generations *should* accept as current decisions. This prescriptive (rather than predictive) test would then consist in asking whether future generations should have voted for a certain measure. This test is much more plausible than the predictive one

because it entails reliance on substantive theories of justice, rather than predictions of future events in the presence of little, if any, available information. In fact, the very idea of a mandate could be dropped altogether and simply replaced by the need to act in an intergenerationally fair way. When actual consent cannot be obtained, rather than invoking a hypothetical consent in support of given policy choices, it is more appropriate to defend on its own merits the set of principles belonging to a substantive theory of justice that we believe should guide our actions. This is also in line with the claim that a hypothetical social contract is no contract at all.[25] Hypotheticals, though useful heuristic devices, should not be considered instruments of real democratic representation.

Implications

Thus, as a matter of principle, although an intergenerational mandate would be needed for a generation to be able to bind the next ones, such a mandate cannot obtain. I consider in turn two types of issues. First, does this impossibility mean that any obligation for a generation to pay back the debts of its predecessors simply becomes meaningless? Second, what follows from the perspective of the odious debt doctrine?

To answer the first question it is useful to consider four basic accounts of justice. According to a commutative account of justice, one owes something to another because one has promised something to that other person. In addition to a promise and its accompanying consent, there should also be some equivalence between the values of what is owed by one party and what has been promised in return by the other.[26] In contrast, according to a rectificatory, or harm-based account of justice, the reason why I owe something to someone does not derive from any specific prior commitment. Rather, it results from the fact that I have worsened a person's condition through my conduct, characterized as harmful and wrongful. To connect these accounts with legal doctrines, commutative justice is very much at home in contract law (contractual liability) whereas rectificatory justice finds its locus in tort law (extra-contractual liability) and in criminal law. Following the harm-based account, one could owe something to someone one has harmed even if one has never been in contact with that person before the harmful conduct took place. This is not the case with respect

to obligations grounded in promise or consent. What matters here is that one needs to be causally responsible, through wrongful conduct, for a harmful situation in order to be bound by an obligation in the rectificatory case.

Contrast these two accounts of justice with two others: distributive and aggregative. A distributive account of justice (such as egalitarianism or sufficientarianism) is concerned with the distribution of wealth (however understood) among people in a society. On such an account, a person may owe something to another even if the former has never promised anything to, nor has harmed the latter. This obligation may be discharged, for example, through the payment of taxes. According to standard accounts of distributive justice, the mere fact of suffering from bad luck due to a strictly natural event (such as a congenital disease or a natural disaster) may generate obligations on the part of those who did not suffer such bad luck. Similarly, an aggregative account will assert the presence of obligations for persons even when they have not made prior promises or engaged in harmful conduct toward those to whom the obligation is owed. However, in contrast to a distributive account, an aggregative one will be concerned with the maximization of wealth (however understood) in society, not with its distribution as such.

What is crucial is that the two former intuitions of justice should only lead to considering someone bound by an obligation if this very same person did something that she should not have done or if she did not do what she committed herself to do. In contrast, if we are primarily concerned with the distribution of wealth among members in a society (as distributive justice would) or with the maximization of wealth in a given society (as aggregative justice would), one can owe something without any prior commitment or action on one's side. This feature is of key importance in the intergenerational context in which the factor that allegedly harms a future generation has to do with the (in)action of an earlier generation.

Promise-based and harm-based intuitions of justice are not fit for resolving the question of obligations for international debts. We should turn to other available criteria, such as the ones offered by distributive or aggregative accounts of justice. For, first, the obligation to compensate for *harms* inflicted by previous generations should not be grounded on rectificatory considerations, since the current generation cannot be held causally

responsible for its ancestors' past (in)actions. This insight is crucial in examining the validity of claims to reparation voiced by descendants of slavery's victims in the United States or of claims to compensation for the damage to the global climate resulting from historical emissions of carbon dioxide.[27] Second, the obligation to honor fully or in part *promises* that were made by ancestors should not be grounded in considerations of commutative justice, since the current generation cannot be said to have granted a mandate to such past representatives. This insight is crucial for the present debate on sovereign debt cancellation, as well as for other sorts of prior commitments by earlier generations, such as in pay-as-you-go pension schemes. In those, one generation (G1), upon retiring, makes a commitment through the policies of its elected representatives to the next generation (G2), which is economically active at that time, that the following one (G3) will pay the pensions of G2 members when they retire. Here as well, obligations regarding pensions cannot be grounded in commutative, promise-based considerations of justice, since G1 is not authorized by G3 to grant consent on its behalf. This does not mean that G3 would have no obligation to pay G2's pension, or, by analogy, that descendants of beneficiaries of the slave system have no obligation to give reparations to African Americans, or that a subsequent generation does not have an obligation to repay the debt contracted by its ancestors. It simply means that the obligation cannot be derived from a promise that manifests consent to be bound. Nevertheless, an obligation may be found in a distributive or aggregative account of justice.

Moreover, the distributive account is likely to be able to incorporate the intuition at play in concerns for avoiding unjust enrichment, insofar as some have become rich in a way that carries costs for others. More specifically, the very fact that the enrichment of one party results from a morally objectionable action by an earlier generation is not as such necessarily relevant. However, if such a harmful (past) action led to some losses for members of the current generation, then this may be considered as relevant. For example, it is fair to presume that the descendants of slave owners would be relatively worse off today had their parents not taken advantage of the labor of slaves.

Finally, since obtaining a mandate from future generations is impossible, the legitimacy proviso of the odious debt doctrine, as modified above, will

thus never be met whenever it is not the same generation that borrows and pays back. Hence, in such a version of the odious debt doctrine, any such debt may end up not having to be paid back, unless the lenders can prove that the borrowers' descendants enriched themselves at the lender's descendants' expense. Thus, it is necessary to ascertain whether the other proviso, i.e., the public-interest-use proviso of the odious debt doctrine, can be incorporated into a distributive approach.

A SPECIAL CASE FOR A NARROW DISTRIBUTIVE VIEW

What can we say about the borrower's descendants' obligation to the lender's descendants in regard to the debt contracted by the borrower from the lender? Having excluded both the harm-based and the promise-based accounts as possible intuitions to deal with a problem of transgenerational justice, I look at the possibility and implications of a distributive account, leaving aside a close examination of the aggregative option. Initially, I assume that the relative wealth of the two groups of descendants is unknown—that is, that the background distribution is unknown, rather than that the borrower's descendants are poorer overall than the lender's descendants—though I will then relax it. The central issues to decide will then be whether a narrow or a broad distributive view is most adequate in the case of canceling sovereign debt.

The Narrow (Problem-Specific) Distributive Approach

The unknown background distribution assumption helps illuminate the importance of examining whether, on which ground, and to what extent the borrower's descendants should pay back the lender's descendants, despite not being bound on commutative grounds by the borrower's promise. Adopting such an assumption has two consequences. The mere possibility of the lender's descendants being overall poorer than the borrower's descendants sheds a different light on the problem than usual, the general case in the political debate on the matter being generally that the borrower's descendants are much poorer than the lender's descendants.[28] Hence, *first*, the unknown background distribution assumption encourages the adoption of a symmetric approach that is concerned not only with how the borrower's descendants fare, but also with how the lender's descendants do. This makes

sense since, from a generational perspective, the lender's descendants are no more responsible for the lender's actions than the borrower's descendants are for the borrower's conduct. Hence, adopting a generational perspective that emphasizes the lack of actual consent by a subsequent generation raises serious concern with rigid contracts that allocate the risk in such a way as to impose the full burden on the lending side in case of default by the borrower. This also means that the standard justifications for putting the burden on lenders, namely that the lenders are in a better position to avoid or absorb the costs of default because they would have an incentive to verify from the start the ability of the borrower to repay or because they tend to be overall richer than borrowers, do not hold in this case. This is so because the incentives would not be felt by the lender's descendants and would thus be unable to influence the lender's conduct, or because it is not prima facie apparent that the descendants of the borrower would be less well-off than the descendents of the lender. *Second*, the unknown background distribution assumption requires the adoption of a narrow (or also interactive or problem-specific) distributive approach since we only know about the transfers directly connected with the borrowed money, and nothing about the general distributive situation of the two descendent communities involved. In other words, the narrow approach rests on the premise that had the lending and borrowing exercise not taken place, the borrower's descendants and the lender's descendants would find themselves in a distributively fair situation.

Due to the lending action of the lender, were the borrower's descendants not to repay anything to the lender's descendants, the latter would find themselves worse off than in the counterfactual baseline situation (absence of loan) that we have assumed to be distributively fair. The fact that the lender's descendants would thus have to bear the opportunity cost arising from the lender's lending does not necessarily entail, however, that interactive justice always requires that the borrower's descendants should then transfer something back to the lender's descendants.[29] Actually, *three* typical cases can be envisaged, assuming that the lender's descendants are worse off due to the lending than in the counterfactual situation, that the opportunity cost they suffer equals in current value the money that was lent, and that the populations of the two groups of descendants are equal in size.

First, setting aside any possible unfairness of the initial deal between the borrower and lender, imagine a situation in which the borrower's descendants inherited at least some durable goods that were realized from the loan. Note that merely dividing this gain by two and requiring the borrower's descendants to transfer the equivalent of half of it to the lender's descendants would ignore the *net opportunity cost* from lending suffered by the lender's descendants—that is, the difference between the opportunity cost of making the loan and the actual benefit derived from lending the money. Interactive justice would instead demand that the borrower's descendants transfer to the lender's descendants the equivalent of half of the lender's descendants' *net* opportunity cost as it results from the lender's lending *plus* half of the gain from borrowing that the borrower's descendants benefited from as a result of the borrower's borrowing action. If the size of what the borrower's descendants inherited as a result of the loan is equal in current value to the net opportunity cost to the lender's descendants, then the borrower's descendants should reimburse fully the lender's descendants in the same way as the naive, generation-blind commutative approach would require—that is, half of the net opportunity cost, plus half of what the borrower's descendants actually inherited as a result of the borrowing. But this would be the case only in the very specific circumstances that have been assumed here, as well when the opportunity cost suffered by the lender's descendants equals in current value the money that was lent. The gain to the borrower's descendants may, of course, be larger than the value of what was borrowed, in which case the sum to be transferred to the lender's descendants will have to be larger than the opportunity cost suffered by the latter. And if the gain is smaller than the value of what was borrowed, the borrower's descendants will be entitled to transfer to the lender's descendants less than the latter value. These scenarios illustrate two clear divergences from the generation-blind commutative approach.

Further divergences come to light once we consider a second type of case, in which the borrower's descendants gained nothing from the borrower's operation—for example, because the latter spent it all in nondurable goods or in funding events with no positive spillover effects for the borrower's descendants. In such a case, the borrower's descendants should transfer to the lender's descendants half of the lender's descendants' opportunity cost from making

the loan. The transfer would have to be directed toward the lender's descendants despite the fact that the borrower's descendants gained nothing from the borrower's borrowing. This illustrates the way in which the narrow distributive account differs from the unjust enrichment account: unlike the latter, the former is equally concerned with the impoverishment suffered by the lender's descendants as with the one suffered by the borrower's descendants.

A third type of case arises when the borrower's descendants are worse off than if the borrower had not borrowed anything, due for example to the fact that the borrower's leaders would have used that money for sustaining their illegitimate power or for advancing their position in a civil war that only became worse as a result. Even in such a case, the borrowers' descendants may still have to transfer money to the lender's descendants if the losses they incurred as a result of the borrowing are smaller than the opportunity cost incurred by the lender's descendants as a result of the lender's lending. If, on the contrary, the loss to the borrower's descendants resulting from the borrowing action is larger than the lender's descendants' opportunity cost, the direction of transfer would be reversed, and the lender's descendants will have to compensate the borrower's descendants (on top of not being reimbursed at all). This would be done on purely distributive grounds, and not on the ground that the lender's descendants would somehow be responsible for what the borrower's descendants had to suffer as a result of the borrowing.

Clearly, these outcomes are different from the ones that would obtain under the presently operating naive, generation-blind commutative approach. The narrow distributive principle that would govern a just transfer can be therefore stated as follows:

> If the borrower's descendants gained from the borrower's taking out the loan, they should transfer to the lender's descendants the equivalent of half of the lender's descendants' net opportunity cost from the lender's making out the loan plus half of the additional gain that the borrower's descendants realized as a result of the borrower's borrowing. If the borrower's descendants lost from the borrower's taking out the loan, the community with the smaller loss should transfer to the other half of the difference between their respective losses.

Thus, a narrow distributive approach to the problem may require less from the borrower's descendants on some occasions than would a naive,

generation-blind commutative approach. Yet, it may also be more demanding of the borrower's descendants. This would be the case whenever the additional benefit to the borrower's descendants resulting from the borrower's borrowing was larger than the opportunity cost for the lender's descendants of the lender's lending. And it will definitely require more from the borrower's descendants than a non-naive commutative view that takes generations into account, which would maintain that the borrower's descendants owe nothing to the lender's descendants since they did not promise anything in the first place.

The Broad Distributive Approach[30]

The narrow approach may initially appear attractive because it allows us to adopt a distributive approach, especially in a context in which neither a promise-based nor a harm-based one seem to be appropriate. And still, it preserves a focus on a specific problem, which may be politically crucial in cases in which negotiators are unwilling to take advantage of a specific issue to deal with general injustices. As a second-best distributive approach, it might thus look like the right approach.

Still, as a first-best approach, such a problem-specific distributive approach is quite unattractive. For there is no good reason, political feasibility aside, to restrict the focus to the distributive impact of the loan transaction, rather than to the general distributive situation of the two descendent communities. Why be concerned about the opportunity cost of lending for the lender's descendants if the lender's descendants inherited more generally from the lender much more than what the borrower's descendants inherited from the borrower, with a gap significantly larger than the size of the opportunity cost of the loan? If the lender's descendants incur losses from the lender's loan, it can be seen as bad luck. However, the fact that the borrower's descendants inherited less on the whole than the lender's descendants is also brute bad luck for the borrower's descendants—be it due to the borrower's intergenerationally unfair use of what it inherited from a still earlier generation, to the borrower's intergenerationally unfair spending of the money raised through borrowing, to the fact that, despite full dedication to intergenerational justice, the borrower itself had inherited

comparatively little from earlier generations, or to natural events that during the borrower's lifetime affected its wealth.

To put things differently, if the actions of the borrower and the lender are to be treated as if they were natural events with causal impacts on the respective situation of the borrower's descendants and the lender's descendants, it is hard to see why other natural events and more generally *all* the circumstances inherited by each of the communities should not also be considered relevant. A global evaluation of what the borrower's descendants and the lender's descendants inherited is thus required. Both the size and direction of transfers between the borrower's descendants and the lender's descendants would then have to be determined exclusively on the basis of the ability of such transfers to cancel out the general distributive injustices arising between the borrower's and lender's descendants. Hence, the broad distributive principle can be stated as follows:

> The borrower's descendants should keep paying the debt to the lender's descendants until the per-capita wealth inherited by the borrower's descendants from the borrower equals the per-capita wealth that the lender's descendants inherited from the lender and acquired from the borrower's descendants' debt repayment. And the same holds conversely for possible transfers between the lender's descendants and the borrower's descendants.

Under this principle, the borrower's descendants may sometimes have to transfer more than what they would owe on naive, generation-blind commutative grounds, in order to end up with a situation in which the lender's descendants benefit from general circumstances equivalent to those of the borrower's descendants. This does not mean that such a theory of distributive justice should operate without any commutative component. When it comes to relationships among contemporaries, it is clear that commutative justice leads to autonomous obligations, as when one set of individuals promises to complete some actions to the benefit of some of its contemporaries. But whenever (and to the extent that) the necessary requirements of a non-naive commutative theory are not met (as in the transgenerational context), there is obviously no room for commutative obligations.

It is worth noting that not only is such a distributive approach able to face the problem of impossibility of an intergenerational mandate, required

by an intergenerational interpretation of the legitimacy proviso. It also proposes a criterion that does not require any *direct* attention to whether the money has been used in a fair way. Of course, how much benefit ends up in the hands of the borrower's descendants will matter—but whether this is the outcome of a fair use is irrelevant here. Finding out whether the borrowed money has been used in an intergenerationally fair way is insufficient because what really matters are overall intergenerational transfers. As a matter of fact, it is even meaningless to state that the money has been used in an intergenerationnally fair way if we do not take into consideration the size and nature of the rest of the intergenerational transfers. Think about a state that cares about reducing its external debt while totally disregarding its environmental obligations toward the members of its next generation. Similarly, investing this borrowed money into something that will only benefit the current generation is not necessarily incompatible with intergenerational justice if other transfers take place that compensate for it.

The Incentive-Compatibility Argument in Favor of the Narrow Distributive Approach

In fact, the broad distributive approach raises a serious problem. Once we adopt a generational perspective, it entails in practice that if a country is overall very poor (poorer than its lenders), it is unlikely that it will have to pay back its debts, whereas if it is overall richer than its lenders, justice will require that it pay them back. If this were the theory to be institutionalized, lenders would systematically tend not to lend to the poor, or to do so at very high interest rates. This would be very problematic since access to credit is crucial to the poor, whether at the individual level or at the country level. Hence, in order to preserve the access to credit for the poor, we should adopt such a criterion according to which the overall wealth of the borrowing country would not necessarily be relevant. And this requires that the scheme proposed be to some degree incentive-compatible—that it be such so as not to produce strong disincentives for potential lenders to lend to poor borrowers.[31] It should be made clear, however, that the main concern with incentive-incompatibility is the lack of access to credit for the poor under such a system, and not that it would make

ignoring incentive-compatibility less profitable for lenders to lend to poor countries.

We need a solution to outstanding debts that would not discourage lending to poor countries while remaining as close as possible to the general distributive approach. One possible solution, which exists at the domestic level in inheritance law regimes, is "acceptance under the benefit of inventory." This principle allows a successor to avoid liability for the decedent's debts by declining to accept any inheritance from the decedent. Similarly, a generation could have the right to decline accepting an inheritance from its predecessors in order to avoid liability for their debts, and it would have an interest in exercising it whenever the debts exceed the benefits. Yet, this approach, which could be coupled with a sovereign bankruptcy mechanism—the possibility for states to rely on the institution of bankruptcy as it is already applicable to firms or individuals—is problematic to the extent that it is one-sided. Avoiding liability for a debt means that others will have to suffer the consequences of its nonrepayment. Such a perspective thus contrasts with the symmetric approach advocated earlier. Note however that, as it applies as well in domestic inheritance law, wherein children inherit the assets but not the debts of their parents, while it is a non-symmetric approach case, the approach is one that is to some degree insensitive to the creditors' background circumstances.[32] Alternatively, among the possible candidates for guiding principles, we could move back to a strict *pacta sunt servanda*, if we could show that the interests of the least well off were best served in that way, whether or not combined with international distributive mechanisms such as foreign aid.

Yet, the narrow distributive principle presented above should certainly also be taken seriously as one of the incentive-compatible options, together with some set of legal institutions and conditionalities that would lead in practice to analogous outcomes while allowing for some degree of legal predictability. In other words, it may turn out that the narrow distributive principle would offer the best possible incentive-compatible approximation of what the broad distributive view would otherwise require, were the latter incentive-compatible. For example, we could certainly consider the insertion of the narrow distributive view as one ingredient in a more general state bankruptcy regime, as an *ex post* avenue, or, as an *ex ante* avenue,

include conditions in making the loan that ensure that the situation in which the narrow distributive approach dictates nonrepayment would not arise. What matters is that the narrow distributive view would certainly not lend itself to problems of access to credit for the poor as much as the adoption of the broad distributive view would.

Two important remarks should be added here. First, the predictability of the borrower's behavior is probably an essential element of incentive-compatibility. All else being equal, whatever the principle adopted internationally, the very fact that the borrowing side pledges to act in accordance with some principle of repayment (which need not be equivalent to a mere *pacta sunt servanda*) would limit disincentives for lenders and help establish or bolster the reputation of the borrower. Second, the case for a narrow distributive approach does not directly have to do with the fact that it would be less demanding on lenders than a broad distributive one, hence politically easier to adopt. Rather, it has to do with the fact that, once put into place, the former's dynamic impact would not end up being detrimental to the least well off.

TAKING GENERATIONS SERIOUSLY

We have shown that some of the grounds for justifying an obligation to repay foreign debts do not survive an analysis that takes the separateness of generations (and hence of persons) seriously. This is certainly the case for harm-based or promised-based grounds in all cases where the harm or the promise was done by members of earlier generations. Still, such accounts of justice are present in, and indeed sometimes seem to dominate, the debt cancellation debate. This constitutes a sociological puzzle, and is surprising given that distributive views for debt cancellation are clearly available. Though the narrow distributive approach is relatively complex, it nevertheless turns out to be more defensible as a practical set of rules than a broad distributive one—not for reasons of political feasibility, but rather because it offers a way to avoid problems of disincentives on the lending side.

The odious debt doctrine is very different from both the broad and the narrow distributive approaches. Its regular government proviso is likely to be violated in most cases once the generational dimension is taken into account. As to its public interest proviso, while the doctrine certainly implies an assessment

of the benefits to the borrower's descendants, it does not seem to be concerned at all about the costs to the lender's descendants. Hence, while Sack's doctrine could have radical consequences when it comes to a generational reading of its regular government proviso (redefined here as a legitimacy proviso), its more central public interest proviso may only lead to merely accidental convergences with the requirements of a distributive approach. For its underlying intuition is quite different from the distributive one.

Those endorsing general distributive goals while taking problems of incentive-compatibility seriously may thus want to give flesh to a view such as the narrow distributive one. It is beyond the scope of this essay to propose a practical approximation of what the narrow distributive approach would amount to in practice. Calculation problems may be quite significant, for example when it comes to assessing opportunity costs. Yet, there are reasons to believe that they will also be present in most of the other methods, including those that require the identification of unjust enrichment, as in the context of the odious debt doctrine, since actual benefits are not easier to trace back than opportunity costs on the lender's side.

NOTES

[1] Thus, I limit the analysis to bilateral interstate relationships. I believe, though I cannot show it here, that the argument of this essay could be applied *mutatis mutandis* to cases involving private lenders as well. One significant difference, however, is that membership in a country is usually not a choice whereas being, for instance, a shareholder in a private lending firm, is much more voluntary. In addition, as I show later, the conclusions will apply to the more typical case of overlapping generations as well.

[2] See Axel Gosseries, "Historical Emissions and Free-Riding," in Lukas Meyer, ed., *Justice in Time: Responding to Historical Injustice* (Baden-Baden: Nomos, 2004), pp. 355–82.

[3] See, e.g., Jean-Marie Monnier and Bruno Tinel, "Endettement public et redistribution en France de 1980 à 2004," in Rémy Pellet, *Finances publiques et redistribution sociale* (Paris: Economica, 2006), pp. 329–50.

[4] Moreover, the uncertainties as to the legal status of Sack's doctrine do not need to worry me here since I am not asking what the state of international law is but what its content should be.

[5] Alexander N. Sack, *Les effets des transformations des Etats sur leurs dettes publiques et autres obligations financières* (Paris: Sirey, 1927), p. 6. Sack explicitly specifies that whether this power is of a monarchic nature (absolute or limited), whether it is derived from the will of God or from the will of the people, and so on are irrelevant considerations here.

[6] Ibid., p. 157 (translation by the author).

[7] Ibid., p. 30 (translation by the author).

[8] Ibid., p. 30 (translation by the author).

[9] Ibid. (translation by the author).

[10] See, e.g., ibid., pp. 27, 30, and 157.

[11] Ibid., pp. 26–27.

[12] Note that while a careful reading of Sack's evidentiary proposal indicates the theoretical centrality of the public-interest-use proviso, he downplays its practical importance, treating it as "too arbitrary and too vague" because whether a given use can be considered as being in the public interest is unlikely to give rise to a consensus at the time of signing the contract, the borrower is generally free to dispose of the money in the way it finds most appropriate, and it is budgetarily hard to trace an

odious spending back to a given source of income (foreign debt being only part of it). See ibid., p. 157.

[13] This is clear from Sack's own writing as well as from authors he refers to, such as Gaston Jèze. See ibid., p. 28.

[14] This also means that the borrower's side will have to carry the full burden of its own inappropriate use if the lender did not know, a problem to which I return below.

[15] Ibid., p. 157.

[16] Ibid., pp. 162–63.

[17] Recent accounts on this include Gustaf Arrhenius, "The Boundary Problem in Democratic Theory" (2004, unpublished), p. 12, available at people.su.se/~guarr/; Claudio López-Guerra, "Should Expatriates Vote?" *Journal of Political Philosophy* 13, no. 2 (2005), pp. 216–34; and Robert Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy & Public Affairs* 35, no. 1, pp. 40–68.

[18] For a narrow interpretation, see López-Guerra, "Should Expatriates Vote?" Cf. Arrhenius, "The Boundary Problem in Democratic Theory."

[19] I have dealt with the mirror problem of taking the past generations' wishes into account in Axel Gosseries, *Penser la justice entre les générations: De l'affaire Perruche à la réforme des retraites* (Paris: Aubier-Flammarion, 2004), ch. 2. The reasons not to do so here are different. The problem is not only that we do not always know what they wanted (actually this is a less serious problem than in the future generations case) but that they can less easily be said to be harmed if we do not care.

[20] For the exclusion of expatriates, see López-Guerra, "Should Expatriates Vote?"

[21] For a similar proposal, see Harry Brighouse and Marc Fleurbaey, "On the Fair Allocation of Power" (February 2006), p. 28; available at mora.rente.nhh.no/projects/EqualityExchange/Portals/o/articles/brighousefleurbaeymarch2006.pdf. Note that rather than relying on a principle of equality of influence (or of political weight) or equality of proportional influence, one may rely on the idea of protecting potentially vulnerable minorities, here understood as future generations. When minority members are granted a larger weight per capita than majority members—for example, through mechanisms of qualified majority—it may be because we believe minority members will, by definition, be more affected by the majority's decisions. This would remain in line with the idea of equality of proportional influence. However, a principle granting special weight to minorities may also be grounded on distinct intuitions, such as giving special importance to seriously taking into account the diversity of opinions and arguments in an electoral district. Moreover, granting the status of a minority to the potentially large and at least indefinite amount of future generations is problematic as well for this "numerical" reason.

[22] For a detailed treatment of the complete life argument along these lines, see Axel Gosseries, "Are Seniority Privileges Unfair?" *Economics & Philosophy* 20, no. 2 (2004), pp. 279–305.

[23] Thanks to one referee for pressing me on this point.

[24] On existing institutions and proposals, see Jörg Tremmel, "Establishment of the Rights of Future Generations in National Constitutions," in Jörg Chet Tremmel, ed., *Handbook of Intergenerational Justice* (Cheltenham, UK: Edward Elgar, 2006), pp. 187–214; and Shlomo Shoham and Nira Lamay, "Commission for Future Generations in the Knesset: Lessons Learnt," in Tremmel, ed., *Handbook of Intergenerational Justice*, pp. 244–81. This Knesset commission has now ceased its activities.

[25] See, e.g., on Rawls's contractarianism, Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), pp. 168ff.

[26] For some commutative theories, the very existence of consent should be seen as a sufficient sign of equivalence.

[27] On carbon dioxide emissions, see Gosseries, "Historical Emissions and Free-Riding."

[28] Compare this to the historical emissions case where a priori the case is the reverse. Rich countries are also often larger polluters. To that extent, they can be said to "borrow" from poor countries an addition to their share of the environment's cleaning capacity. In the case of historical emissions of air pollutants, it is those who are generally poorer that are the "lenders" of cleaning capacity.

[29] I will not attempt to provide here a detailed methodology as to how to assess such opportunity costs. However, assessing what could or would happen, or have happened, in the absence of a given action is an extremely common problem, including at the international level. To provide just one illustration from another field, see the methodologies used to assess additionality (of emission-reduction projects) in the context of the Kyoto Treaty's Clean Development Mechanism, at cdm.unfccc.int/methodologies/PAmethodologies/approved.html.

[30] For an example of a broad distributive approach, see Lode Berlage et al., "Prospective Aid and Indebtedness Relief: A Proposal," Center for Operations Research and Economics Discussion Paper no. 2000/0032, University of Louvain, Belgium (2000), p. 42.

[31] To take an analogy with employment policy, the broad distributive approach would amount, in the absence of other redistributive schemes than employment regulation, to expect that less fortunate workers be paid more than more fortunate workers, which would certainly discourage employers from hiring these less fortunate workers. To the contrary, the narrow distributive view on wages would disregard people's background level of fortune. I owe this analogy to Eric Schokkaert.

[32] This is also true about the operation of the principle in domestic law. I am indebted to Jacques Drèze for pointing this to out me.