

Sustainable Development and Private Global Governance

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I. Introduction: “I’d Like to Buy the World a Coke”

*Water is the basis of life; it is the gift of nature; it belongs to all living beings on earth. It is not a private property but a common resource for the sustenance of all. It is our fundamental obligation to prevent water scarcity and pollution and to preserve it for generations. Water is not a commodity. We should resist all criminal attempts to marketise, privatise and corporatise water. Only through these means we can ensure the fundamental and inalienable right to water for the people all over the world.*¹

The Coca-Cola Company’s regional website for India proclaims that the company “exists to benefit and refresh everyone it touches,” and that the company “strive[s] to deliver on this promise every day, creating a stronger and more sustainable future for our business and for the communities we serve.”² Since 1993, Coca-Cola has invested more than \$1 billion throughout India in production facilities, wastewater treatment plants, distribution systems, and marketing equipment, making it one of the country’s most important international investors. According to its website, the company directly employs around 6,000 people in India and indirectly supports employment for another 125,000 people.³ Also attracting Coca-Cola’s attention is India’s growing consumer class. CEO Neville Isdell has pledged to increase global marketing expenditures by \$350–\$400 million starting in 2005, with particular focus on such high-growth markets as Brazil, China, Russia, and India.⁴ Presently, nearly 80% of the company’s income comes from markets other than the United States,⁵ and Isdell has announced

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1. Declaration, World Water Conference, Plachimada, Karala, India (Jan. 23, 2004) (on file with author).

2. Coca-Cola India, About Us—Our Promise, at http://www.coca-colaindia.com/about_us/abo_our_promise.html.

3. Coca-Cola India, Coca-Cola in India—Introduction, at http://www.coca-colaindia.com/about_us/abo_coca_colaindia_int.html.

4. Kathleen Sampey, *Coke’s Marketing Budget to Rise by \$400 Mil.*, ADWEEK, Nov. 11, 2004, available at http://www.adweek.com/aw/search/article_display.jsp?vnu_content_id=1000718166.

5. Press Release, Coca-Cola Company, The Coca-Cola Company Reports First Quarter Results (Apr. 19, 2005), available at http://www2.coca-cola.com/presscenter/pdfs/first_qtr_results.pdf.

a long-term target of 95%.⁶ Indeed, to underscore the importance of Coke's global growth strategy, Isdell made these announcements during a presentation to Wall Street analysts titled, "The Coca-Cola Manifesto for Change."⁷

Despite these ambitious goals, growing numbers of activists, consumers, and investors seem unwilling to sign on to the Coca-Cola Manifesto and, instead, have launched a concerted effort to undermine the company's international expansion. Hostile campaigns have arisen, for instance, in response to Coca-Cola's bottled water marketing practices in Great Britain,⁸ and its alleged complicity with human rights and labor abuses in Colombia.⁹ A great deal of international attention, moreover, has focused on the company's activities in India, where local citizens' groups charge that Coca-Cola has failed to live up to its promise to "benefit and refresh everyone it touches."¹⁰ Specifically, in addition to persistent claims that Coca-Cola products sold in India fail to meet international safety standards for DDT and other contaminants,¹¹ the company has also faced strong objections from residents in several Indian communities who attribute the groundwater shortages that they are suffering to excessive consumption by local Coca-Cola bottling operations. The most significant of these controversies has taken place at Coca-Cola's largest bottling plant in India,¹² a Plachimada, Kerala facility where protestors in January 2005 marked the 1,000th day of a permanent vigil held outside the property's gates.¹³ This community also marks the location where, one year earlier, protestors issued the Plachimada Water Declaration quoted at the outset of this Introduction.

6. *Coca Cola Looks at India, China for the Fizz*, ECONOMIC TIMES, Nov. 11, 2004, available at <http://economictimes.indiatimes.com/articleshow/922772.cms>.

7. Sampey, *supra* note 4.

8. See Lyn Whitc, *Coke's Water Withdrawn*, FOODWEEK, Apr. 2, 2004 (noting that Coca-Cola withdrew its Dasani bottled water product from the U.K. market following revelations that the product was deceptively marketed and contained bromate, a carcinogen, at twice government acceptable levels), available at 2004 WLNR 77623.

9. See Scott Leith & Matt Kempner, *Coca-Cola Co.: Scuffle, Catcalls Spice Meeting*, ATLANTA J.-CONST., Apr. 22, 2004, at 1F (noting that protestors at Coca-Cola's annual shareholder meeting alleged complicity by the company with the deaths of nine union organizers in Columbia during the past decade), available at 2004 WLNR 6350331.

10. Coca-Cola India, About Us—Our Promise, at http://www.coca-colaindia.com/about_us/abo_our_promise.html.

11. See *India Orders Coke and Pepsi to Warn About Pesticide Content*, INDUS. MAINTENANCE & PLANT OPERATION, Jan. 2005 (reporting that both Coca-Cola and Pepsi "received a setback after a well-publicized test conducted by a Delhi-based environmental group revealed that their products contain large doses of lindane, DDT, chlorpyrifos, malathion and other toxins"), available at 2005 WLNR 1025765.

12. See Mark Williams, *Drought—It's the Real Thing*, GLOBE & MAIL (Toronto), Feb. 12, 2005, at F2.

13. See Press Release, India Resource Center, Community Commemorates Thousand Day Anniversary of Vigil Against Coca-Cola in Kerala (Jan. 13, 2005), at <http://www.indiaresource.org/press/2005/plachimadablockjan.htm>.

Originally opened in 2000,¹⁴ the Plachimada facility was viewed by political leaders as precisely the kind of foreign investment that enables economic growth and, ultimately, sustainable development.¹⁵ Nevertheless, the plant has been shut down since December 2003 in the wake of an adverse court ruling and a suspension order from the state government, both of which were issued following claims by the local Plachimada council that Coca-Cola contributed to water shortages by significantly drawing down groundwater resources and by discharging lead and cadmium-containing sludge into local surface watercourses.¹⁶ While still in operation, the plant consumed somewhere between 500,000 and 1,500,000 liters of water per day to produce a variety of bottled soda and mineral water drinks.¹⁷ Activists have been quick to point out that most of the affected Plachimada people are unable to afford the very beverages that the local groundwater was being used to produce. Instead, village residents—who include primarily landless indigenous *Adivasis* and outcaste *Dalits*—have been forced to carry potable water from neighboring areas back to their homes for drinking and cooking needs.¹⁸

Similar events have been unfolding in at least four other communities within India. In Kaladera, Rajasthan, for instance, the governmental water agency issued a report determining that Coca-Cola's local operations had severely impacted groundwater levels and led to "ecological imbalance" in the area.¹⁹ Numerous protests followed.²⁰ Similarly, in Mehdiganj, Uttar Pradesh, approximately 1,000 community members marched to a Coca-Cola facility that they believed had adversely affected their water supplies. That protest, held on November 24, 2004, led to the arrest of 200 marchers and numerous allegations of injury after "police beat back villagers attempting to break a cordon."²¹ For its part, in each of these cases Coca-Cola strongly disputes the scientific foundation of the claims being made against it. The company insists, for instance, that groundwater shortages in Plachimada are due to drought conditions unrelated to the company's activities, that numerous other water users in the area meet or exceed the plant's consumption levels, and that, in order to mitigate any impact on water

14. John Vidal, *Coke on Trial as Indian Villagers Accuse Plant of Sucking Them Dry*, *GUARDIAN* (London), Nov. 19, 2003, available at 2003 WLNR 4673911.

15. Liz Stuart, *Multinationals Should Face the Same Rules No Matter Where They Set Up Shop*, *THE GUARDIAN* (London), Aug. 11, 2003 (noting Kerala's granting of an investment rebate to Coca-Cola for establishing the plant in an impoverished region), available at 2003 WLNR 4651146.

16. Williams, *supra* note 12.

17. Eva Wrammer, *Fighting Cocacolonisation in Plachimada: Water, Soft Drinks and a Tragedy of the Commons in an Indian Village 30* (2004) (unpublished thesis, Lund University) (on file with author).

18. *Id.* at 29, 33.

19. *Water Board Disputes Coca-Cola's Claim on Ground Water*, *THE HINDU* (India), June 17, 2004, available at 2004 WLNR 10012581.

20. *Marchers Against Coca-Cola Court Arrest*, *THE HINDU* (India), Sept. 29, 2004, available at 2004 WLNR 11891863.

21. Williams, *supra* note 12. HeinOnline -- 83 Tex L. Rev. 2111 2004-2005

availability that the plant does have, the company has engaged in an extensive rainwater harvesting project at the site.²² Whatever their merits, these defenses have failed to satisfy local protestors. Instead, as will be discussed below, the controversy has expanded to include significant international dimensions.²³

The Plachimada groundwater dispute may be seen as a microcosm of what many believe is a coming century of global water conflict.²⁴ The United Nations Population Fund estimates that today more than half of all available freshwater is appropriated for use by the world's 6.1 billion people, and that by 2025, 70% of available freshwater will need to be harnessed simply in order to keep pace with population growth.²⁵ If, instead, all of the world's people consume water in 2025 at the rate presently used by developed world residents, fully 90% of freshwater will need to be appropriated for human consumption.²⁶ Stark as they are, these figures may understate the full extent of freshwater resource constraints, given the great uncertainty involved in estimating groundwater availability and use.²⁷ Some believe that as many as 200 billion net cubic meters of groundwater are being withdrawn from aquifers each year—a practice of aquifer “mining” or “overdrafting” that renders sustainability planning especially problematic.²⁸ In India, where almost 60% of the population relies on groundwater for drinking and sanitation needs,²⁹ aquifer depletion carries particularly severe consequences, often forcing residents to travel long distances for daily water retrieval or

22. See Coca-Cola India, Approach to Water Usage, at <http://www.coca-colaindia.com/water.html>.

23. See discussion *infra* subpart III(A).

24. For instance, United Nations Secretary-General Kofi Annan recently acknowledged “growing concern over a ‘global water crisis’ resulting from increased demand for finite water resources, contamination of water supplies, and degradation of ecosystems due to mismanagement of water.” *Freshwater Management: Progress in Meeting the Goals, Targets and Commitments of Agenda 21, the Programme for Further Implementation of Agenda 21, and the Johannesburg Plan of Implementation: Report of the Secretary-General*, U.N. ESCOR Comm. on Sustainable Dev., 12th Sess., Agenda Item 3(a), at 3, U.N. Doc. E/CN.17/2004/4 (2004) [hereinafter *Report of the Secretary-General, Freshwater Management*], available at http://www.un.org/esa/sustdev/csd/csd12/csd12_docs.htm; see also Sandra L. Postel & Aaron T. Wolf, *Dehydrating Conflict*, FOREIGN POLICY, Sept.–Oct. 2001, at 60, 65 (observing that “[t]he unprecedented degree of water stress is creating more zero-sum situations . . . both within and between countries”).

25. UNITED NATIONS POPULATION FUND, THE STATE OF WORLD POPULATION 2001: FOOTPRINTS AND MILESTONES: POPULATION AND ENVIRONMENTAL CHANGE 11 (2001), available at <http://www.unfpa.org/swp/2001/english/index.html>.

26. *Id.*

27. U.N. FOOD & AGRIC. ORG., RETHINKING THE APPROACH TO GROUNDWATER AND FOOD SECURITY 17 (2003), available at <ftp://ftp.fao.org/docrep/fao/005/y4495E/y4495e00.pdf>.

28. See Payal Sampat, *Uncovering Groundwater Pollution, in STATE OF THE WORLD 2001: A WORLDWATCH INSTITUTE REPORT ON PROGRESS TOWARD A SUSTAINABLE SOCIETY 21, 23* (Linda Starcke ed., 2001).

29. Cent. Pollution Control Bd., Gov't of India Ministry of Env't & Forests, Groundwater, at <http://www.cpcb.nic.in/groundwater/ch150703.htm>.

simply to abandon their homes and communities in search of other places to live.

Unfortunately, such conditions may become more common in the future, not less. The World Health Organization estimates that if present trends continue, two-thirds of the world's population will live under moderate to high water stress by 2025.³⁰ In order to reverse those trends and to instead meet the international development goal of halving the proportion of people without access to water for basic needs by 2015, the United Nations (U.N.) projects that the number of people served by drinking and sanitation water supplies will need to increase by 1.6 billion and 2 billion individuals, respectively.³¹ Such a massive increase in infrastructure obviously will require a massive expenditure of funds; in fact, the U.N. estimates that global spending on water supply and sanitation will need to be at least doubled in order to meet the identified development targets.³² In light of a variety of related forces—including pressure from international financial institutions, growing political momentum behind privatization and deregulation, and the sheer economic clout of multinational corporations—analysts expect much of this increased spending to occur through public-private partnerships of various configurations.³³ Accordingly, many see important economic opportunities ahead for the supply and management of water. A much-quoted article in *Fortune* magazine, for instance, claimed that “[w]ater promises to be to the 21st century what oil was to the 20th century: the precious commodity that determines the wealth of nations.”³⁴

This Article utilizes recent controversy over Coca-Cola's alleged depletion of groundwater resources in India as a vehicle for exploring competing conceptions of global environmental governance and the role of private actors within them. Initially, it uses the Coca-Cola groundwater situation to identify core substantive and procedural meanings that lurk within the otherwise ingeniously ambiguous concept of sustainable development. Through this exercise, it is shown that—when properly understood—the sustainable development paradigm requires at a minimum some collective

30. WHO/UNICEF JOINT MONITORING PROGRAMME FOR WATER SUPPLY AND SANITATION, GLOBAL WATER SUPPLY AND SANITATION ASSESSMENT 2000 REPORT 32 (2000), available at http://www.who.int/water_sanitation_health/monitoring/globalassess/en/.

31. *Report of the Secretary-General, Freshwater Management*, supra note 24, at 21; *Sanitation: Progress in Meeting the Goals, Targets and Commitments of Agenda 21, the Programme for Further Implementation of Agenda 21, and the Johannesburg Plan of Implementation: Report of the Secretary-General*, U.N. ESCOR Comm. on Sustainable Dev., 12th Sess., Agenda Item 3, at 19, U.N. Doc. E/CN.17/2004/5 (2004) [hereinafter, *Report of the Secretary-General, Sanitation*], available at http://www.un.org/esa/sustdev/csd/csd12/csd12_docs.htm.

32. *Report of the Secretary-General, Freshwater Management*, supra note 24, at 20–21; *Report of the Secretary-General, Sanitation*, supra note 31, at 7.

33. PETER H. GLEICK ET AL., THE NEW ECONOMY OF WATER: THE RISKS AND BENEFITS OF GLOBALIZATION AND PRIVATIZATION OF FRESH WATER, at vii (2002), available at http://www.pacinst.org/reports/new_economy_of_water/new_economy_of_water.pdf.

34. Shawn Tully, *Water, Water Everywhere*, *FORTUNE*, May 15, 2000, at 342, 344.

response to the question, “Sustainability of what?”³⁵ This necessity of collective response, however, stands in considerable tension with the premises of market liberalism that drive such political and economic trends as global market integration; privatization and commodification of water and other natural resources; and cost–benefit review of environmental, health, and safety regulations. By clarifying this and other points of normative and empirical disagreement between sustainable development and market liberalism—including points that previously have been unidentified or underappreciated in the literature—this Article aims to provide an impetus and an outline for more searching inspection of both frameworks.

In addition, this Article seeks to describe, and to a lesser extent defend, a growing effort among proponents of sustainable development to adapt their sustainability goals to the framework of market liberalism itself. Specifically, by promoting various methods of downstreaming information regarding social and environmental impacts of production to individuals acting in market capacities, these proponents hope to inspire governance mechanisms that better resonate with the market-liberal *grundnormen* of consumer sovereignty and shareholder supremacy. Again using the Coca-Cola groundwater situation as an example, this Article speculates that promotion of conscientious consumption and socially responsible investment in this manner ultimately may prove more significant than any number of attempts to refine the conceptual meaning of sustainability. Although handicapped in obvious ways by their dependence on altruistic economic gestures to overcome dramatic collective action problems, these campaigns to encourage publicly-oriented market behavior do have the great virtue of avoiding head-on confrontation between the competing theoretical conceptions of sustainable development and market liberalism—a confrontation that observers increasingly seem to suspect would favor market liberalism.

II. Sustainable Development: Sustainability of What?

Water law provides a unique vehicle for exploring conceptions of sustainable development. Its subject matter concerns a natural resource that at any given moment is finite, unevenly distributed, generally nonsubstitutable, and—most critically—essential for the maintenance of life.³⁶ Thus, designers of water law must aspire not only to achieve *efficiency* in the allocation of water resources, but also to ensure *equality* in their distribution

35. Cf. Amartya Sen, *Equality of What?*, in EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES 327–29 (Stephen Darwall ed., 1995) (noting the failure of various moral theories of equality because they do not account for “need” and thereby leave the question—“Equality of what?”—unanswered).

36. Cf. Barton H. Thompson, Jr., *Water Allocation and Protection: A United States Case Study*, in EARTH SYSTEMS: PROCESSES AND ISSUES 476, 476 (W.G. Ernest ed., 2000) [hereinafter Thompson, *Water Allocation and Protection*] (“Water is indispensable to life and to all forms of economic development.”). HeinOnline -- 83 Tex L. Rev. 2114 2004-2005

and *sustainability* in their scale and manner of usage.³⁷ For at least two decades, the international legal community has attempted to harmonize these various aims into a single conceptual framework of sustainable development.³⁸ As defined most famously by the Brundtland Report in 1987, sustainable development is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”³⁹ Following this prominent endorsement, the term has taken on a life of its own, finding diverse expression in all manner of environmental treaties, trade agreements, international aid programs, presidential council reports, state and local planning schemes, corporate mission statements, investment fund charters, NGO policy documents, and so on.⁴⁰

Despite, or perhaps because of, this enormous degree of attention and apparent acceptance, the results of the sustainable development movement have been decidedly mixed, both in terms of conceptual clarity and programmatic success. Nevertheless, some commentators regard sustainable development as having generated a discrete area of international law, consisting of “a corpus of international legal principles and treaties, which address the areas of intersection between international economic law, international environmental law, and international social law.”⁴¹ Several of these principles can be found in the International Law Association’s New Delhi Declaration on Principles of International Law Relating to Sustainable Development, which provides a cumbersome, but relatively complete, statement:

[T]he objective of sustainable development involves a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in

37. This tripartite conceptual division forms the intellectual core of ecological economics, a field that is distinguishable from neoclassical economics based on its insistence that questions of equity and scale should be seen as analytically prior to questions of efficiency. See HERMAN DALY, *BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT* 45–51 (1996).

38. The term “sustainable development” is generally traced to a 1980 report issued by the International Union for the Conservation of Nature in cooperation with the World Wildlife Fund and the United Nations Environment Programme. See Norman J. Vig, *Introduction to THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY* 1, 6 (Norman J. Vig & Regina S. Axelrod eds., 1999) [hereinafter *THE GLOBAL ENVIRONMENT*].

39. THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE (THE BRUNDTLAND REPORT)* 43 (1987).

40. See, e.g., JOHN PEZZEY, *SUSTAINABLE DEVELOPMENT CONCEPTS: AN ECONOMIC ANALYSIS* 55–62 (World Bank Env’t Paper No. 2, Report No. 11425, 1992) (surveying conceptions of sustainability), available at http://www-wds.worldbank.org/servlet/WDSContentServer?WDSPIB/1999/10/21/000178830_98101911160728/Rendered/PDF/multi_page.pdf.

41. MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICES, AND PROSPECTS* 368 (2004). 15 2004-2005

development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations.⁴²

Distilled to its essence, this declaration identifies five aims that one may take to form the core of the still-emerging sustainable development paradigm: integrated policy assessment, environmental sustainability, intragenerational equity, robust political participation, and intergenerational responsibility.⁴³

Simultaneously with the rise of sustainable development thinking, the international community also seems to have tightened its embrace of the tenets of market liberalism—that is, a neoliberal political philosophy of limited government and strong property rights, coupled with what one might call a cultural exaltation of the market, both as a primary locus for individual growth and expression and as a dominant template for policy design and implementation in those few instances where public action is seen as necessary.⁴⁴ Such a framework provides much of the intellectual foundation for the continuing global integration of markets in goods and services, the move toward privatization and deregulation of government functions, and the increasingly prominent role of cost-benefit analysis in environmental, health, and safety standard-setting. Even the “unique” resource of water has been touched by these trends: Consumers worldwide have embraced the commodification of water in branded, bottled form,⁴⁵ the Safe Drinking

42. *Letter Dated 6 August 2002 from the Permanent Representative of Bangladesh to the United Nations and the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations Addressed to the Secretary-General of the United Nations*, U.N. GAOR, 57th Sess., Provisional Agenda Item 89, at 3, U.N. Doc. A/57/329 (2002).

43. These various aims of the sustainable development framework tend to reappear in subject-specific ways once the framework is used to generate policy recommendations. With respect to water, for instance, the Johannesburg Plan of Implementation calls for the adoption of integrated water-resources management, an approach that “involves allocation of water among those competing uses, and among users within each sector, promoting productive and efficient uses of the water, and protecting water quality, so as to promote long-term economic growth, social development, and environmental protection.” *Report of the Secretary-General, Freshwater Management*, *supra* note 24, at 13–14. Within the United States, the well-respected Long’s Peak Working Group on National Water Policy produced a report in the early 1990s that similarly sought to integrate water use efficiency and conservation, ecological integrity and restoration, clean water, and equitable participatory decisionmaking, all within a framework of sustainability. See Reed D. Benson, *Recommendations for an Environmentally Sound Policy on Western Water*, 17 STAN. ENVTL. L.J. 247, 255 (1998) (describing the Group’s report, AMERICA’S WATERS: A NEW ERA OF SUSTAINABILITY).

44. See generally Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 526 (2004) (discussing “the effort by regulatory cost-benefit analysts to ground public policies on the values revealed by individuals acting in their roles as market actors”).

45. See ROBERT GLENNON, *WATER FOLLIES: GROUNDWATER PUMPING AND THE FATE OF AMERICA’S FRESH WATERS* 1–2 (2002) (noting that bottled water usage is prevalent throughout Europe, South America, and the United States). An increasingly significant share of Coca-Cola’s revenue, for instance, comes from bottled water products. See Paul Simao, *Bottled Water War Cuts Into Profits*, CALGARY HERALD, Jan. 31, 2004, at D8 (noting that “Coca-Cola and PepsiCo are struggling with sluggish soft-drink sales in North America, their largest market, and are therefore keen to protect their burgeoning water businesses”). Rev. 2116 2004-2005

Water Act in the United States has attempted to rationalize the setting of health and safety standards through the discipline of economic cost-benefit analysis;⁴⁶ governments in South America and other areas of the world have experimented with private management and ownership of municipal water facilities;⁴⁷ and growing numbers of private bulk water transfers have raised the prospect that water may be brought firmly within the international trading rules, including especially those governing export restrictions.⁴⁸

Proponents contend that this “market-liberal order is both natural and ethical”⁴⁹ and, in fact, represents the most powerful vehicle available to achieve the aims of sustainable development.⁵⁰ Using the five identified core principles of sustainable development, however, this Part argues that the two frameworks appear to be deeply inconsistent, once one begins to attach specific content to the notion of sustainability and to look more closely at the embedded normative assumptions of market liberalism. As will be seen, market liberalism offers a more substantively detailed program for analysis than sustainable development, no doubt at least partially due to its close association with the technically sophisticated discipline of welfare economics. Much of this Part therefore consists of burrowing deep within various aspects of market liberalism in order to excavate assumptions or ideals that, once revealed, appear to be in tension with sustainable development’s less textured, but still widely endorsed prescriptions. The fundamental purpose of this discussion is not to endorse one paradigm over the other, but rather to force proponents of market liberalism and sustainable development alike to grapple with the profound questions that are raised by these underappreciated differences between them.

Sustainable development in particular might benefit from such a confrontation. To date, one could argue that the conceptual failings of the sustainable development paradigm—chiefly its vagueness and inability to guide concrete policy choices—have been driven by the reluctance of sustainability proponents to admit the full extent of incompatibility between their paradigm and that of the market-liberal order. On the other hand, much of the sustainable development paradigm’s international salience is no doubt attributable to its underdetermined nature: Amorphous and ill-specified, the concept allows various parties with potentially conflicting agendas to coexist

46. See Cass R. Sunstein, *Arithmetic for Arsenic*, 90 GEO. L.J. 2255, 2267–69 (2002) (describing the statutory scheme).

47. See generally WORLD BANK, *PRIVATIZATION AND BASIC INFRASTRUCTURE SERVICES FOR THE URBAN POOR* (2001) (reviewing infrastructure privatization projects in Latin America), available at <http://econdev.forumone.com>.

48. See *infra* text accompanying notes 157–159.

49. James A. Dorn, *The Case for Market Liberalism*, Cato Institute, available at <http://www.cato.org/dailys/01-20-04.html> (Jan. 20, 2004).

50. See generally WILFRED BECKERMAN, *A POVERTY OF REASON: SUSTAINABLE DEVELOPMENT AND ECONOMIC GROWTH* 52–56 (2003) (discussing the market’s role in environmental policy).
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under the same big tent. A basic premise of this Article is that the tensions among these various parties ultimately need to be addressed and resolved in order for significant policy progress to be achieved in the areas of environment and development.⁵¹ Toward that end, this Part identifies some of the more troublesome inconsistencies lurking beneath the tent.

A. *Intergenerational Equity and the Discount Rate*

Perhaps the most widely accepted meaning of sustainable development is that there is some obligation to consider and protect the interests of future generations in relation to the natural environment.⁵² This responsibility usually is translated as a “need to preserve natural resources for the benefit of future generations.”⁵³ Sustainable development therefore obligates present generations not to exhaust or impair certain natural resources, such as unique wilderness areas or endangered species, that are viewed as part of the

51. This point should not be overstated. International law scholars have waged a sophisticated debate regarding the degree of precision that is optimal in order to obtain broad participation within international legal regimes while still fostering substantively useful norms of conduct. For an overview of this debate and an important contribution using evidence regarding the processes of acculturation as applied to states, see Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, Harvard Law School Public Law & Legal Theory Research Paper Series Research Paper No. 95, The University Of Chicago Law School Public Law & Legal Theory Working Paper Series Research Paper No. 62 36-45, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=519565. Along these lines, one might argue that sustainable development’s conceptual “thinness” has achieved the goal of widespread, indeed near universal endorsement, but that the concept must now begin to “thicken” in order for it to promote an acculturation process that has real normative bite. Support for this argument can be inferred from the recent experience of delegates to the Thirteenth Session of the United Nations Commission On Sustainable Development (CSD), which was held earlier this year in New York City. See International Institute for Sustainable Development, *Earth Negotiations Bulletin CSD-13 Final*, Apr. 25, 2005, available at <http://www/iisd/ca/csd/csd13>. This session was intended by conveners to constitute a “Policy Session” meeting during which delegates would develop specific, practical plans for implementing the substantive goals that they had negotiated during the previous year’s “Review Session.” However, many delegates reported that “there was little continuity between the two CSD sessions,” and that the negotiations were bogged down by “repetitions, redundant discussions and inefficiencies.” *Id.* at 9. This arguable failure of the CSD’s two-year “Implementation Cycle” process may have much to do with the degree of imprecision and false consensus that characterizes even basic discussions oriented around sustainability.

52. As Edith Brown Weiss has put it, “[t]he mandate for sustainable development is inherently intergenerational.” Edith Brown Weiss, *The Emerging Structure of International Environmental Law*, in *THE GLOBAL ENVIRONMENT*, *supra* note 38, at 98, 106. See also Edith Brown Weiss, *Intergenerational Equity: A Legal Framework for Global Environmental Change*, in *ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW* 385, 385 (Edith Brown Weiss ed., 1992) (“Sustainable development rests on a commitment to equity with future generations.”). Such concern predates formal recognition of the sustainable development framework. For instance, the first tenet of modern American environmental law’s first major statute, the National Environmental Policy Act of 1969, underscored “the responsibilities of each generation as trustee of the environment for succeeding generations.” National Environmental Policy Act of 1969 § 101, 42 U.S.C. § 4331(b)(1) (2000).

53. PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 253 (2d ed. Cambridge Univ. Press 2003) (1995).
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“common heritage of humankind.”⁵⁴ More broadly, the framework also demands that present generations avoid disrupting the basic integrity of those ecological systems upon which all life and human activity are thought to depend. Recognizing that the earth’s vital biophysical processes are characterized by uncertainty, irreversibilities, critical thresholds, and other hallmark features of complex, dynamic systems, proponents of sustainable development argue that present generations should establish “safe minimum standards . . . for protecting Earth’s life-support systems in the face of virtually inevitable unpleasant surprises.”⁵⁵

Not only does this characterization of sustainable development seem to presuppose the existence of some collective community of interest beyond the mere agglomeration of individual interests—for how else is one to conceptualize obligations between generations?—but it also seems to necessitate the specification and imposition of a particular conception of the good. That is, because the “developmental and environmental needs of . . . future generations” must be honored by the presently living, collective decisionmaking must be undertaken concerning what those “needs” will include—a process that seems unavoidably to entail some degree of endorsement or condemnation of particular technologies, preferences, and values.⁵⁶ Indeed, even if proponents of sustainable development attempt to reduce the perceived illiberal impact of their framework by resting the

54. Presently, the “common heritage” concept has a somewhat more narrow, technical meaning within international environmental law. See COMMITTEE ON LEGAL ASPECTS OF SUSTAINABLE DEVELOPMENT, INTERNATIONAL LAW ASSOCIATION, SEARCHING FOR THE CONTOURS OF INTERNATIONAL LAW IN THE FIELD OF SUSTAINABLE DEVELOPMENT, FINAL CONFERENCE REPORT 10 (2002) [hereinafter ILA, SUSTAINABLE DEVELOPMENT] (explaining the notion of the “common heritage of humankind” in which global commons that lie beyond national jurisdiction, such as the deep-sea bed, celestial bodies, and Antarctica, are regulated and controlled through principles such as nonappropriation, nonexclusive and peaceful use, and equitable sharing of benefits), available at http://www.ila-hq.org/html/main_listofcomm_sustdev.htm. However, proponents of sustainable development often seek to expand the notion beyond strictly extraterritorial resources, given the enormous degree of global ecological interdependence that they believe characterizes even those activities or life forms that appear to exist exclusively within state borders. See SEGGER & KHALFAN, *supra* note 41, at 120 (noting compromise position under the United Nations Convention on Biodiversity, in which delegates identified the preservation of biological diversity as a “common concern” of humankind).

55. Paul R. Ehrlich, *Ecological Economics and the Carrying Capacity of Earth*, in INVESTING IN NATURAL CAPITAL: THE ECOLOGICAL ECONOMICS APPROACH TO SUSTAINABILITY 38, 49 (AnnMari Jansson et al. eds., 1994).

56. The Johannesburg Plan of Implementation, for instance, identifies “changing unsustainable patterns of production and consumption” as an “overarching objective[] of, and essential requirement[] for, sustainable development.” U.N. DEP’T OF ECON. & SOCIAL AFFAIRS, DIV. OF SUSTAINABLE DEV., PLAN OF IMPLEMENTATION OF THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT 2 (2002), available at http://www.un.org/esa/sustdev/documents/WSSD_POL_PD/English/WSSD_PlanImpl.pdf. See also Sir Aaron Klug, *Foreword* to TOWARDS SUSTAINABLE CONSUMPTION: A EUROPEAN PERSPECTIVE iii (Brian Heap & Jemifer Kent eds., 2000) (noting that evidence on the environmental sustainability of present patterns of consumption suggest a necessity of “major changes in the lifestyles of the most developed countries—something that none of us will find easy”).

“needs” determination on a primarily empirical and scientific basis, collective moral decisionmaking still will need to enter into the equation, if nowhere else than in the specification of an appropriate degree of risk aversion to adopt in response to scientific uncertainty.⁵⁷

Proponents of the market-liberal paradigm, in contrast, generally regard self-interested personal decisionmaking within the market as the surest route to overall well-being and a just society. The problem with this conception in the intergenerational context, of course, is that the unregulated market insufficiently registers the needs and preferences of the unborn.⁵⁸ To be sure, members of present generations do exhibit some altruistic regard for members of the generations that follow them, in particular for their own children and grandchildren. But this is not the same as a market paradigm in which each generation’s complete set of interests receives simultaneous expression.⁵⁹ Similarly, firms do have an incentive to anticipate future profit opportunities that might include the resource needs of future generations, but only insofar as those opportunities are measured against the best available alternative use of resources. Thus, while firms may engage in some level of anticipation of the “needs” of future generations, they will only conserve resources to satisfy those needs if the rate of return from conservation exceeds the market rate of interest. The market rate of interest, however, reflects a confluence of economic and behavioral forces that have little to do with a theory of intergenerational equity, at least not in the absence of some socially imposed constraint such as forced savings of natural resources.⁶⁰

For these reasons, neoclassical economists—whose theoretical work provides market liberalism’s most sophisticated response to the sustainable development challenge—do not support unregulated market allocation as the appropriate mechanism for ensuring sustainability.⁶¹ Nevertheless, they do typically premise their sustainability policy recommendations on an analytically similar notion of discounted utility maximization, which is used

57. See *infra* text accompanying notes 121–123 (describing more fundamental ways in which an objectivist approach to risk regulation remains elusive).

58. See Geoffrey Heal, *Markets and Sustainability*, in ENVIRONMENTAL LAW, THE ECONOMY AND SUSTAINABLE DEVELOPMENT: THE UNITED STATES, THE EUROPEAN UNION AND THE INTERNATIONAL COMMUNITY 410, 422–24 (Richard L. Revesz et al. eds., 2000) (noting that “normal intertemporal economic problems and long-term environmental problems have quite different time scales and involve different issues”).

59. See Jerome Rothenberg, *Intergenerational Ethics, Efficiency, and Commitment*, in DISCOUNTING AND INTERGENERATIONAL EQUITY 103, 103–04 (Paul R. Portney & John P. Weyant eds., 1999) (discussing challenges both to the formation of “general normative principles” of intergenerational ethics and to the establishment of intergenerational asset markets that might render such principles less necessary).

60. See *infra* text accompanying notes 85–97.

61. See P.S. DASGUPTA & G.M. HEAL, ECONOMIC THEORY AND EXHAUSTIBLE RESOURCES 472 (1979) (noting the necessity of effective ways to address environmental externality problems, such as the development and enforcement of private property rights or the control of responsible agents through regulation or taxation).

to identify an “optimal consumption path” across time.⁶² In fact, as several leading researchers observe, “[o]ne interesting aspect of the optimal consumption path according to the [discounted utility maximization] criterion is that it can be linked, theoretically, to the outcome of a decentralized market economy.”⁶³ Specifically, within an idealized society in which all individuals discount utility at a uniform specified rate, all markets are both competitive and free of externalities, and a complete set of futures markets exists, “the time path of consumption will correspond to the optimal consumption path [without regulation].”⁶⁴

At first glance, this vision seems to suggest that, so long as society “gets the prices right,” sustainability can be achieved through market dynamics alone, without any need for collective determinations regarding resource conservation. Nevertheless, care must be taken to distinguish between intergenerational *efficiency* and intergenerational *equity*.⁶⁵ Even in the idealized conception, an “optimal consumption path” does not guarantee any particular level of consumption for a given time period. Put differently, although the “standard policy remedies for improving economic efficiency—like establishing property rights, addressing externalities and so forth”—may help to maximize the net present value of aggregate intergenerational utility, they “do not guarantee sustainability.”⁶⁶ Instead, in order to constitute truly *sustainable* development, society must at a minimum supplement the discounted utility maximization criterion with an additional requirement that discounted utility not be permitted to decrease over time.⁶⁷ Because utility is difficult both to measure and to bequeath, this requirement generally is taken to mean that the aggregate stock of productive capital—whether natural, technological, social, or otherwise—should be maintained at a nondeclining level.⁶⁸

As Robert Stavins, Alexander Wagner, and Gernot Wagner have insightfully explained, the criterion of intergenerational efficiency can be thought of as conceptually analogous to the criterion of Kaldor-Hicks

62. Kenneth Arrow et al., *Are We Consuming Too Much?*, 18 J. ECON. PERSPECTIVES, Summer 2004, at 147, 148 (“Economic analysis has tended to emphasize the criterion of maximizing the present discounted value of current and future utility from consumption . . .”).

63. *Id.* at 150.

64. *Id.*

65. See SUDHIR ANAND & AMARTYA SEN, SUSTAINABLE HUMAN DEVELOPMENT: CONCEPTS AND PRIORITIES § 3.2 (1994) (“[T]here is no *general* presumption that sustainability will be implied by optimality in models of intertemporal allocation.”), available at http://hdr.undp.org/docs/publications/ocational_papers/Oc8c.htm.

66. See Arrow et al., *supra* note 62, at 154–55.

67. See *id.* at 155.

68. Before sustainable development became a pervasive notion, John Rawls similarly argued that “[e]ach generation must not only preserve the gains of culture and civilization, and maintain intact those just institutions that they have established, but it must also put aside in each period of time a suitable amount of real capital accumulation” until an appropriate “steady state” can be achieved. JOHN RAWLS, A THEORY OF JUSTICE 285–87 (1971).

efficiency in the intragenerational context. Just as Kaldor-Hicks efficient policy moves could in theory become both efficient and “equitable” (because the winners from the policy moves could compensate the losers and still come out ahead),⁶⁹ intergenerationally efficient consumption paths could in theory become both efficient and “sustainable” (because the winning generations could transfer enough resources to the losing generations to ensure a nondeclining utility path).⁷⁰ Accordingly, just as Kaldor-Hicks efficiency often is known as potential Pareto efficiency, Stavins, Wagner, and Wagner suggest that intergenerational efficiency should be thought of as “potential sustainability.”⁷¹ The researchers hope that this conceptual clarification will enable proponents of market liberalism and sustainable development to peacefully coexist: Neoclassical growth theorists and other supporters of market liberalism can focus their policy recommendations on the maximization of intergenerational efficiency, while sustainable development advocates can use the “political process” to redistribute the ensuing gains among present and future generations.⁷²

Several important qualifications apply here. First, “equity” is being equated with a standard—Pareto optimality—that has important limitations as a moral benchmark, even if one assumes that the necessary compensatory payments or resource transfers will actually be accomplished. As Amartya Sen has noted in the intragenerational context, because Pareto optimality does not permit inspection of the underlying distribution of initial entitlements, “a society or an economy can be Pareto-optimal and still be perfectly disgusting.”⁷³ The limitations of the criterion are made more troublesome in this context because, even as the researchers endorse a conceptual separation between efficiency and equity in the intergenerational context, they simultaneously express doubt that their hypothesized intergenerational transfers will actually occur. Indeed, Stavins, Wagner, and

69. Robert N. Stavins et al., *Interpreting Sustainability in Economic Terms: Dynamic Efficiency Plus Intergenerational Equity*, 79 *ECON. LETTERS* 339, 341 (2003). Although they are relevant to this Article only insofar as they help to excavate conceptual distinctions between sustainable development and market liberalism, standard criticisms of this welfare economic conception do merit brief acknowledgment here: Willingness-to-pay, the usual preferentialist value criterion adopted by Kaldor-Hicks efficiency analysis, risks privileging the wealthy, ignoring the offer-asking problem, and unduly favoring the status quo; any preferentialist account of welfare is subject to the claim that preference satisfaction and well-being are imperfectly correlated; the goal of maximizing net gains in aggregate welfare masks significant moral, political, and practical reasons that people might have for trumping the maximization goal in particular circumstances; and the individualistic approach of market liberalism denies the existence of shared human values as such, let alone values that might be said to belong to nonhuman interests independently of their contribution to individual human welfare. See Douglas A. Kysar, *Climate Change, Cultural Transformation, and Comprehensive Rationality*, 31 *B.C. ENVTL. AFF. L. REV.* 555 (2004) (reviewing such criticisms in relation to cost-benefit analysis of climate change).

70. Stavins et al., *supra* note 69, at 341–42.

71. *Id.* at 342.

72. *Id.* at 343.

73. AMARTYA SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 22 (1970).

Wagner explain that the very fact that “utility transfers between generations are difficult to operationalize . . . provides an additional reason why more useful policy statements can be made by being satisfied with potential transfers.”⁷⁴ The mere possibility of intergenerational resource transfers is therefore held to support a particular—and arguably narrow—construction of intergenerational efficiency, even when the likelihood of such transfers is understood to be low. Most advocates of sustainable development will be unsatisfied with this reasoning, given their overriding concern for the *actual* legacy bestowed upon future generations.⁷⁵

Second, even assuming that intergenerational resource transfers could become reliably operationalized, the proposed conception still seems to assume perfect substitutability among the variety of capital resources that generate utility. That is, so long as capital of any description is retained in sufficient amounts to support a nondeclining stream of utility, proponents of this “weak” version of sustainability appear to be indifferent concerning the precise composition of the resource base that is bequeathed to future generations.⁷⁶ For proponents of weak sustainability, any contrary attempt to preserve a particular portfolio of natural capital assets for future generations poses an insurmountable empirical challenge that is destined to cause wasteful or paternalistic resource decisionmaking. In Plachimada, for instance, some 2,000 families allegedly are affected by the groundwater drawdown. The Coca-Cola bottling facility, on the other hand, provides employment for over 200 workers and serves as an important component of the company’s overall Indian operations.⁷⁷ Perhaps the most “sustainable” use under these circumstances is simply to draw the groundwater down and convert it into commodity goods that can be sold for profit, thereby creating a fund of financial capital to be invested in other projects. In order to promote nondeclining utility over time, proponents of weak sustainability simply would require some policy assurance that a portion of the proceeds from resource exhaustion actually was being reinvested in reproducible capital.⁷⁸

74. See Stavins et al., *supra* note 69, at 342 n.8.

75. Cf. William R. Cline, *Discounting for the Very Long Term*, in DISCOUNTING AND INTERGENERATIONAL EQUITY, *supra* note 59, at 131 (“Discounting over centuries at today’s return on capital implicitly makes a commitment that is not credible: that society will keep reinvesting at this rate to compensate distant future generations for damages imposed.”).

76. See Arrow et al., *supra* note 62, at 151 (“Even if some resources such as stocks of minerals are drawn down along a consumption path, the sustainability criterion could nevertheless be satisfied if other capital assets were accumulated sufficiently to offset the resource decline.”); Robert M. Solow, *An Almost Practical Step Toward Sustainability*, 19 RESOURCES POL’Y 162, 168 (1993) (“The duty imposed by sustainability is to bequest to posterity not any particular thing . . . but rather to endow them with whatever it takes to achieve a standard of living at least as good as our own and to look after their next generation similarly.”).

77. See Wrammer, *supra* note 17, at 30.

78. See John Hartwick, *Intergenerational Equity And The Investing Of Rents From Exhaustible Resources*, 67 AM. ECON. REV. 972, 973–74 (1977) (noting that “invest[ing] all net returns from exhaustible resources in reproducible capital . . . implies intergenerational equity”). Even on this weak sustainability conception, analysts face the enormous technical challenge of calculating

Beyond that requirement, however, they would remain largely agnostic regarding the market's preference among competing uses of Plachimada groundwater.⁷⁹

At bottom, this weak sustainability conception depends on a conviction that improved productive efficiency, resource substitution, and technological innovation will be adequate to resolve any particular environmental or natural resource problems that might arise over time.⁸⁰ Such faith is the price paid by market liberalism proponents in order to avoid the prospect of collective decisionmaking regarding appropriate types and volumes of environmentally intensive activities for sustainability planning. Proponents of "strong" sustainability, on the other hand, favor policies that limit natural resource uses and other human activities to *ecologically* determined conditions of sustainability. Under a strong sustainability regime, for instance, renewable resources would be exploited only at a rate that can be repeated indefinitely, such as the natural recharge rate in the case of an aquifer. Nonrenewable resources, on the other hand, would be depleted only at a rate equal to the rate of development of substitute resources.⁸¹ Pollution costs and other environmental externalities also would be addressed through

appropriate shadow prices for exhaustible resources in order to determine the amount of reinvestment required. As P.K. Rao notes, this task in turn may frustrate the goal of avoiding collective decisionmaking about the content and significance of sustainability. Specifically, unless analysts calculate shadow prices on the assumption that some prior sustainability constraints have been imposed on market operations, Hartwick's rule of optimal reinvestment provides no guarantee of sustainability. P.K. RAO, SUSTAINABLE DEVELOPMENT: ECONOMICS AND POLICY 136 (2000). The form and content of such sustainability constraints, moreover, cannot be determined by reference to the Hartwick Rule. Instead, they require precisely the kind of substantive policy judgment that market liberalism generally seeks to avoid. *See, e.g., id.* at 105 (describing a preliminary theoretical model for calculating shadow prices in which "various components of . . . ecological capital" are maintained above "critical threshold levels which are stipulated to be preserved to ensure system resilience").

79. *Cf.* Robert M. Solow, *Sustainability: An Economist's Perspective*, in *ECONOMICS OF THE ENVIRONMENT* 179, 181 (Robert Dorfman & Nancy S. Dorfman eds., 1993) (positing that "[i]f you don't eat one species of fish, you can eat another species of fish," and that "[t]here is no specific object that the goal of sustainability, the obligation of sustainability, requires us to leave untouched").

80. Such a conviction is not limited to proponents of market liberalism, but rather reflects a near-pervasive belief in the inevitability of progress within Western intellectual traditions:

We view ourselves as managers, in trust for future generations, of a sinking fund of non-renewable resources. We balance the call of consumption against the duty of thrift. It is an anxiety founded on an illusion. Necessity, mother of invention, has never yet in modern history failed to elicit a scientific and technological response to the scarcity of a resource, leaving us richer than we were before. If the earth itself were to waste, we would find a way to flee from it into other reaches of the universe.

Roberto Mangabeira Unger, *Nature In Its Place 2* (unpublished manuscript available at <http://www.law.harvard.edu/faculty/unger/english/docs/nature.doc>).

81. *See* DALY, *supra* note 37, at 2 ("The whole idea of sustainable development is that the economic subsystem must not grow beyond the scale at which it can be permanently sustained or supported by the containing ecosystem." 83 Tex. L. Rev. 2124 2004-2005)

widespread application of the polluter-pays principle.⁸² Lest one balk at such seemingly draconian measures, consider the fact that even these principles may not be adequate to ensure environmental sustainability. As Partha Dasgupta and Geoffrey Heal have shown, if particular exhaustible resources are sufficiently important and nonsubstitutable within production and consumption, then indefinite sustainability is simply impossible.⁸³ This finding is particularly sobering in the context of exhaustible groundwater resources, not merely because of the importance that such resources hold for daily human survival in millions of settlements like Plachimada, but also because of the enormous but underappreciated role that groundwater plays in the world's agricultural production.⁸⁴

Finally, even when viewed as an analogue to Kaldor-Hicks efficiency that is to be supplemented by intergenerational transfers of resources that are accepted to be largely substitutable, the notion of an "optimal consumption path" *still* may be conceptually problematic. This is because the intergenerational efficiency model that generates the optimal consumption path in practice requires specification of appropriate discount factors to represent the marginal product of capital and the so-called pure rate of time preference.⁸⁵ These two elements of discounting will be addressed in turn. The first and most significant element reflects an attempt to ensure that opportunity costs are incorporated into intergenerational resource allocation decisionmaking. Defenders of market liberalism argue that this practice serves future generations by ensuring that the stock of resources eventually bequeathed to them will have taken advantage of the best investment opportunities available during intervening time periods.⁸⁶ In their view,

82. See SEGGER & KHALFAN, *supra* note 41, at 376 (noting that the "polluter-pays principle refers to the requirement that the costs of pollution be borne by the person or persons responsible for causing the pollution and the consequential costs").

83. See PARTHA DASGUPTA & GEOFFREY M. HEAL, *ECONOMIC THEORY AND EXHAUSTIBLE RESOURCES* 4–5 (1979) (positing that resource substitution may be sufficient to overcome the otherwise unavoidable decline to zero that occurs when a resource is both essential and exhaustible).

84. See MARK W. ROSEGRANT ET AL., *WORLD WATER AND FOOD TO 2025: DEALING WITH SCARCITY* 155–75 (2002) (exploring the global and country-level impact on future food production that will result from restoration of groundwater sustainability through reduction in groundwater overdraft).

85. In some models, analysts focus instead on the trajectory of the marginal utility of consumption over time, a factor that reflects both the projected rate of growth of per capita consumption and the declining marginal utility of additional consumption. See Thomas Schelling, *Intergenerational Discounting*, in *DISCOUNTING AND INTERGENERATIONAL EQUITY*, *supra* note 59, at 99, 100. In practice, the consumption growth rate depends on many of the same variables, and raises many of the same theoretical complications, as the alternative approach of discounting for the rate of return on capital. Indeed, in an idealized economy, consumer and producer rates of interest would be identical.

86. See Arrow et al., *supra* note 62, at 148 ("[J]ust as earlier generations invested in capital goods, research and education to bequeath to current generations the ability to achieve high levels of consumption, current generations are making the investments that are necessary to assure higher real living standards in the future, despite stresses on the natural resource base.").

society best serves the interests of future generations—in the sense of maximizing the option set available to such generations—simply by ensuring that the overall stock of useful capital is maintained in some appropriate general fashion, while allowing particular resources to be devoted to their most valued uses, free of publicly imposed constraints.

This argument is important, but merits several qualifications. First, to give the argument practical significance, regulators would need to develop a more or less comprehensive system of national accounting to ensure that the aggregate resource base actually is being expanded (or preserved) for the benefit of future generations.⁸⁷ At present, the danger is too great that consumption may be confused for investment, that environmental externalities may be inadequately accounted for, and that many important natural resources may be absent from national ledgers altogether.⁸⁸ Second, if such a system of accounting revealed that the total capital stock was not being preserved adequately for the benefit of future generations, as many scientists expect it would,⁸⁹ then some socially controlled mechanism of intergenerational capital transfer would be required in order to achieve even a minimal definition of sustainability. The task of designing and implementing such an intergenerational transfer mechanism would, in turn, require societal discussion and resolution of the weak-versus-strong sustainability debate described above.⁹⁰

Finally, it bears noting that the opportunity cost argument may suffer from a subtle, but significant, conceptual flaw. Market liberalism proponents contend that the decision whether or not to save natural resources for future generations should be evaluated according to the rate of return for capital in

87. For an overview of attempts to develop such accounting measures, see RAO, *supra* note 78, at 205–28.

88. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 231 (2004) (“Because conventional national accounting practices generally fail to account for the free goods and services provided by nature—such as air, water, forests, mountains—they similarly fail to provide any ready signal when those resources are rapidly depleted or degraded.”).

89. See, e.g., Joint Statement, *The Royal Acad. of London & The U.S. Nat’l Acad. of Sciences, Population Growth, Resource Consumption, and a Sustainable World* (Feb. 1992) (on file with author) (“The future of our planet is in the balance. Sustainable development can be achieved, but only if irreversible degradation of the environment can be halted in time. The next 30 years may be crucial.”).

90. In that regard, it bears noting that most proponents of sustainable development fall between the extremes of weak and strong sustainability, not at all content to believe that “Plastic Trees” and desalination plants will provide a safe and reliable, let alone an optimal, substitute for natural resources, but also not so committed to the ecological worldview to embrace the tight constraints of strong sustainability. Cf. Douglas A. Kysar, *Law, Environment, and Vision*, 97 *NW. U. L. REV.* 675, 719 (2003) (noting the need for debate between proponents of strong sustainability and proponents of weak sustainability). Philosopher Mark Sagoff may be a distinctive hybrid of both extremes. He regards the notion of “ecological limits” to economic expansion to be a weakly supported strategic device of the environmental movement that distracts from the more overtly moral considerations that should govern environmental decisionmaking. See Mark Sagoff, *Do We Consume Too Much?*, in *THE BUSINESS OF CONSUMPTION: ENVIRONMENTAL ETHICS AND THE GLOBAL ECONOMY* 271, 285–87 (Laura Westra & Patricia H. Werhane eds., 1998).

order to ensure optimal investment of resources. But, if the savings rate for natural capital in part determines the rate of return for all capital—if, in other words, the decision whether to conserve natural resources influences the size of the opportunity cost that supposedly determines whether or not it is optimal to conserve—then the justification for discounting by market rates of return seems circular. Indeed, the market rate of interest might be said to presuppose ownership of all natural resources by the presently living. Through discounting, future generations are forced to “outbid” present owners by an amount reflecting not only the strength of their need or desire for resources, but also the implicit “compensation” due to present owners for the alternative uses to which the resources could be put during the intervening time periods. For proponents of sustainable development, this approach is unsatisfactory: The question of which generation “owns” the resource under inspection has been, in essence, predetermined by the discounting exercise, rather than treated as a central question of ethical governance in the manner that sustainable development demands.⁹¹

The second primary element of discounting—the pure rate of time preference—is built on a different (but equally problematic) justification. Through this discounting factor, utility that occurs in the future is weighted less than utility today simply because it occurs later in time, a practice that plainly seems to be in tension with the principle of equal (or at least equitable) regard for future generations. The pure rate of time preference is thought to be an appropriate device because it can be found, as a descriptive matter, in the behavior of individuals.⁹² That is, currently living individuals seem to prefer present consumption to future consumption at some empirically identifiable rate, and thus, analysts tend to assume that a similar degree of impatience should be applied to the intertemporal allocation of consumption between generations. In this context, however, the neoclassical economic lens of methodological individualism—derived from market liberalism’s deep weddedness to individualist accounts of the good—seems to lead to confusion. As Richard Revesz has noted, there is no normatively

91. Such circularity may not be especially problematic for decisions of modest practical impact—in which the ultimate outcome might not be affected by the specification of a different reference case of resource rights and rate of return—but it seems inappropriate for addressing the type of substantial, long-term issues that concern proponents of sustainable development. In part for this reason, P.K. Rao insists that “[t]he discount rate must reflect the rate of return on alternative sustainable uses, and not just any uses, of capital if we are to have a policy consistent with [sustainable development].” RAO, *supra* note 78, at 141. By looking at a rate of return that emerges from a system in which institutional sustainability constraints already have been imposed, Rao examines intergenerational allocative efficiency *assuming* that the analytically prior question of intergenerational distributive equity already has been addressed. This is an important distinction from optimization models that simply rely on after-the-fact resource transfers to address intergenerational equity.

92. See FRANK S. ARNOLD, ECONOMIC ANALYSIS OF ENVIRONMENTAL POLICY AND REGULATION 180 (1995) (“It then seems reasonable to discount the future benefits to the present using the same rate that the affected citizens would use, for it is on their behalf that the project is undertaken.”).

attractive explanation for why the consumption impatience of individual members of one generation should govern the distribution of consumption opportunities between generations.⁹³

Welfare economists at one point expressed the view that any form of discounting is “ethically indefensible”⁹⁴ and that, at best, the practice serves as “a polite expression for rapacity and the conquest of reason by passion.”⁹⁵ Today, however, discounting is widely endorsed.⁹⁶ Geoffrey Heal attributes this change of heart in part to “confusion of the issues of intergenerational equity and efficient use of capital and a lack of clarity on how they interact.”⁹⁷ Through the practice of discounting, the fundamental issue of distributive equity—which resources, as an ethical matter, should be conserved for use and enjoyment by future generations?—is conflated with the issue of allocative efficiency—which generation, as a technical matter based on the current distribution of resource entitlements and the chosen rate of discount, does or will derive more utility from the use of a given resource? Even if after-the-fact transfers of resources to future generations are offered as sustainability “compensation,” this procedure still seems to suffer from a basic flaw in the eyes of sustainable development proponents: The efficiency exercise that determines the level of compensation due will have proceeded on the basis of a discount rate that assumes away much of the hard work of evaluating intergenerational equity.

B. Intragenerational Equity and the Welfare Criterion

A second core meaning attributed to sustainable development is that of intragenerational equity, often expressed as the notion that “overriding priority” must be given to “the essential needs of the world’s poor,” especially when policymakers address issues concerning the environment and natural resources. At the international level, a tentative step toward legal prioritization of resource uses along these lines can be found in the 1997 U.N. Watercourses Convention, which introduces the notion of “equitable utilization” as an attempt to balance state sovereignty over watercourses with

93. See Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 998 (1999) (describing “[t]he ethically compromised status of discounting for time preference at a constant rate” across, rather than within, generations).

94. Frank Ramsey, *A Mathematical Theory of Saving*, 38 ECON. J. 543, 543 (1928).

95. R.F. HARROD, *TOWARDS A DYNAMIC ECONOMICS* 40 (1948).

96. See John Donahue, *Why We Should Discount the Views of Those Who Discount Discounting*, 108 YALE L.J. 1901, 1904 (1999) (noting that “the process of discounting the future costs and benefits to current dollars has become standard”).

97. Heal, *supra* note 58, at 423. Cf. Lawrence H. Goulder & Robert L. Stavins, *An Eye on the Future*, 419 NATURE 673, 674 (2002) (arguing against downward adjustments to the discount rate in the intergenerational context because “[s]uch adjustments . . . blur the distinction between the . . . [efficiency] criterion and other legitimate policy-evaluation criteria, such as distributional . . . equity”). HeinOnline -- 83 Tex L. Rev. 2128 2004-2005

an obligation not to cause “significant harm” to other riparian states.⁹⁸ Similar expressions regarding the exceptional nature of natural resources and the need for their collective management have long appeared in domestic water law.⁹⁹ The familiar “public trust” doctrine, for instance, reflects the notion that private property in water remains subject to the superior demands of the state acting on behalf of the public interest.¹⁰⁰ Such a viewpoint is made profoundly manifest in the South African constitution, which recognizes a fundamental “right to have access to . . . sufficient . . . water” and a corresponding duty on the part of the state to take “reasonable legislative and other measures, within its available resources, to achieve the [right’s] progressive realization.”¹⁰¹ As Robyn Stein has shown in this volume, South Africa has begun to make good on this commitment through the establishment of a state water reserve that must receive allotments under the national water plan for ecological and human rights purposes before any competing uses such as irrigation or industrial applications.¹⁰²

98. Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700, 706. Not surprisingly, the Convention is silent with respect to the ultimate question of which provision—“equitable utilization” or no “significant harm”—prevails in the event of a conflict. Nations instead are encouraged to engage in cooperative joint management of the shared resource, a procedural solution that the drafters hope will provide a realistic framework for resolving conflicts. See Steven G. Ingram, *In a Twenty-First Century “Minute”*, 44 NAT. RESOURCES J. 163, 197 (2004) (describing the Watercourses Convention as a “pragmatic middle-of-the-road solution”). Cf. Judgment in Case Concerning the Gabčíkovo-Nagymaros Project, 37 I.L.M. 162, 195-96, 221 (1992) (finding that “new peremptory norms of environmental law had emerged since [Hungary and Czechoslovakia] signed their original Treaty,” and that the countries’ negotiations over a dam project on the Danube River should “take[] into consideration” the new norms).

99. See Joseph L. Sax, *The Constitution, Property Rights, and the Future of Water Law*, 61 U. COLO. L. REV. 257, 281 (1990) (observing that water law has “always incorporated an intuitive appreciation of the public, common, systemic nature of the resource”) [hereinafter Sax, *The Constitution*]; Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 475 (1989) (“The central and unambiguous message is that water is and always has been a public resource.”).

100. See Nat’l Audubon Soc’y v. Superior Court, 658 P.2d 709, 732 (Cal. 1983) (permitting plaintiffs to challenge Los Angeles’ diversion of water from Mono Lake based on the public trust doctrine); Joseph L. Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (reviving the venerable concept of public trust in the context of environmental and natural resources litigation). Something akin to a social ordering of water uses has long taken place in the riparian water law of the American East, although courts arguably have not faced sufficiently strong conditions of scarcity to test the resilience and legitimacy of the rights system. For an illuminating discussion of the history of water rights in the East, as well as an argument that “reasonable use” property regimes are not necessarily a “transitional stage” on the way to stronger property rights, but rather “may be an independent management style, one that is particularly useful with respect to public goods,” see Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261, 293 (1990).

101. S. AFR. CONST. § 27.

102. Robyn Stein, *Water Law in a Democratic South Africa: A Country Case Study Examining the Introduction of a Public Rights System*, 83 TEXAS L. REV. 2167 (2005). For discussion of the considerable challenges that remain to be overcome in the implementation and effectuation of the South African water right, see Eric O. Brundage, *The Implications of Formulating a Human Right to*

To some extent, this intragenerational aspect of sustainable development is even more in conflict with the market liberalism framework than that of intergenerational equity. Proponents of market liberalism might be willing to concede that the needs of future generations are not adequately registered by the unregulated market and that, therefore, some combination of market-based regulation and aggregate capital preservation is appropriate to protect the interests of future generations. The equitable use doctrine, on the other hand, applies to the presently living—those who, with varying degrees of success, are able to assert their own needs and preferences in the market. Moreover, the doctrine seems to be concerned not merely with wealth inequality in the abstract, but also with inequality of access to particular kinds of resources and entitlements. When ordering the Coca-Cola bottling facility in Plachimada to find alternative sources of water, for instance, a Kerala High Court judge stated that “[g]round water is a national wealth,” and that “the Government [must] protect the resources for the enjoyment of the general public, rather than to permit their use for private ownership or commercial purposes.”¹⁰³ Such a particularized and deliberately public approach to resource allocation contrasts sharply with the tendencies of market liberalism to prefer private bargaining as an allocative mechanism for most resources, and to channel equitable redistributions through ex post monetary transfers, rather than through substantive alteration of legal entitlements.

Along with such dramatic contexts as domestic takings law¹⁰⁴ and investor protection provisions within international trade agreements,¹⁰⁵ the contrasting approaches of sustainable development and market liberalism are also well-illustrated in the water context by tiered pricing, a demand-side management tool that has generated a great deal of attention and support among water experts.¹⁰⁶ Tiered pricing seeks to harmonize efficiency and

Water, 31 *ECOLOGY. L. Q.* 957 (2004); Anna R. Welch, *Obligations to State and Non-State Actors Regarding the Human Right to Water Under the South African Constitution*, 5 *SUSTAINABLE DEVELOPMENT L. & POL'Y* 58 (2005).

103. *Perumatty Grama Panchayat v. State of Kerala*, 2004 (1) K.L.T. 731 (Kerala H.C., India), available at <http://www.elaw.org/resources/text.asp?id=2551>.

104. See Barton H. Thompson, Jr., *Takings and Water Rights*, in *WATER LAW: TRENDS, POLICIES, AND PRACTICE* 43 (Kathleen Marion Carr & James D. Crammond eds., 1995) (noting that “[u]nder the public resource paradigm, [constitutional] takings protections are troublesome because they can impede necessary regulatory reallocations of resources,” while under the “market paradigm” strong takings protections are necessary because “the market paradigm only works with secure and definite water rights”).

105. See Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 *ENVTL. L.* 851, 852 (2003) (identifying tension between the “guarantees of fair treatment under minimum international standards and of compensation for indirect expropriation of property” and “perfectly standard exercises of the police power that purport to protect public health, safety, welfare, and the environment”).

106. See Benson, *supra* note 43, at 263 (noting that tiered pricing “is a key tool” for water management).
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equity in water usage by charging a low, subsidized rate for the initial quantity of water consumed by a user and gradually increasing the rate as levels of consumption increase. This approach implicitly assumes that the most vital uses of water—for drinking and sanitation—should be the most widely available and, indeed, should be available to all individuals without regard to their ability to pay. Generally speaking, higher volume uses—for irrigation and industrial activities—are less vital and therefore more in need of higher prices to incentivize conservation. In this manner, the efficiency calculus under tiered pricing becomes unhinged from willingness-to-pay as a welfare criterion, and, instead, volume of usage stands in as a proxy for socially determined use priorities. Accordingly, from this perspective, the efficient result—defined not in the sense of maximizing the satisfaction of monetized preferences, but in the sense of maximizing essential conditions for human flourishing—also can be described as the equitable result.¹⁰⁷

In contrast to tiered pricing, a water market in neoclassical equilibrium might well price in the converse manner. That is, so long as producers could practicably and legally engage in some level of price discrimination according to volume of usage,¹⁰⁸ then vital uses might be charged the highest per unit rate, given the high valuation that individuals would express for such uses. Higher volume users, on the other hand, might receive bulk discounts in recognition of their lower willingness-to-pay per unit of consumption.¹⁰⁹ To be sure, this market allocation approach would have the salutary effect of eliminating certain low value uses, such as irrigation for ecologically inappropriate agriculture, that currently persist only through the support of public subsidization. Those same price dynamics, however, also might exclude from the market more vital uses by members of rural communities and the urban poor. As the Organisation for Economic Co-operation and Development (OECD) has noted, water inequality already has become a serious concern for both the developing *and* the developed worlds.¹¹⁰ By

107. See Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1708 (2003) (noting that replacing preferentialist welfare maximization policies with policies based on an “objective list” value criterion may “diminish[] the number and scope of the conflicts between the goal of well-being maximization and the goal of well-being distribution”).

108. Such “second degree” price discrimination is commonplace in market economies. Even if it were instead barred by a well-enforced legal prohibition, the basic market logic of pricing would still be pushing in the opposite direction of tiered pricing.

109. Of course, such a pricing arrangement could also prevail under a poorly conceived regulatory scheme. See Robert N. Stavins, *How to Stop Squandering Water? Raise Its Price*, N.Y. TIMES, Aug. 14, 1999, at A13 (noting that 33% of the public water systems surveyed in 1998 reported offering volume discounts).

110. According to one analysis, in approximately one half of OECD countries, affordability of water charges for low-income households is already or soon will become a significant problem in the absence of policy changes. ORG. FOR ECON. CO-OPERATION AND DEV., SOCIAL ISSUES IN THE PROVISION AND PRICING OF WATER SERVICES 12 (2002), available at <http://213.253.134.29/oecd/pdfs/browseit/983041E.RDF>. 2131 2004-2005

reducing public control over water pricing, the policy reforms of privatization and market allocation may only exacerbate such access problems, even as they bring greater conservation incentives and efficiency to water management overall.¹¹¹

Of course, proponents of market-based water allocation are not unaware of the problem of wealth inequality or of the need to guarantee access to basic drinking and sanitation water. Accordingly, they typically urge some form of publicly funded water assistance for the poor in conjunction with their proposals to introduce market-based allocation.¹¹² This approach, however, reflects the tendency of market liberalism proponents to seek maximization of the overall value obtained from resource uses, while allowing questions of distributive equity to be handled separately through tax and transfer programs.¹¹³ The supposed tradeoff between efficiency and equity is accommodated by allowing the market price for water to rise to its unregulated equilibrium, and by transferring sufficient monetary resources to the poor to enable them to continue to participate in the market. Sustainable development proponents, in contrast, generally deny that the efficiency calculus can be neatly separated from equity or sustainability concerns in this manner. In their view, the effort to account for significant ethical and environmental consequences of efficiency maximization through after-the-fact corrective devices carries with it an unwarranted stigma, particularly in the context of a fundamental resource such as water: The language of “tradeoffs” inappropriately speaks of equity as a “cost” to be balanced against efficiency; it suggests a sacrifice of welfare rather than a promotion of life.¹¹⁴

This perception—that equitable satisfaction of basic water needs is in tension with the efficient use of scarce resources—may be further entrenched

111. Moreover, given the essential nature of drinking and sanitation water, low-income individuals who do retain access to water for basic needs in a market allocation may only manage to do so through transactions that are considerably inequitable. Proponents of market liberalism tend to assume that market exchanges are voluntary and informed, and that exchange participants do not exert power over each other. Such assumptions typically apply even in a subfield such as development economics, which is specifically concerned with the conditions and opportunities of populations characterized by extreme poverty. See Ravi Kanbur, *Economics, Social Science and Development*, 30 *WORLD DEV.* 477, 477 (2002) (observing that “[m]ainstream development economics today is mainstream economics applied to poor countries”). In light of the vast disparities in education, income, and opportunity that presently characterize the world, however, this approach may be unsatisfactory to advocates of sustainable development.

112. See Andrew Lang, *The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry*, 7 *J. INT’L ECON. L.* 801, 808 (2004) (describing the common use of “direct subsidy payments to consumers” in order to address access problems following water market reform).

113. See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 33 (2002). See also Kanbur, *supra* note 111, at 480 (observing that “the separation of ‘efficiency’ from ‘equity’” is part of “the core of mainstream economics”).

114. Cf. MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN* 167 (Penguin Books 1992) (1792) (“It is justice, not charity, that is wanting in the world.”).

by the conventional unwillingness of market liberalism proponents to scrutinize the grounds of consumer preference. When viewed through a critical lens, however, the demand side of market liberalism seems to offer further possibilities for a convergence between the ethical and the efficient. Coca-Cola's primary product, for instance, consists of a mildly addictive stimulant, a nutritionally bankrupt fructose syrup, substantial levels of phosphoric acid, and various artificial coloring and flavoring agents of uncertain character;¹¹⁵ it or its ingredients have been linked with childhood obesity, diabetes, immunological deficiencies, tooth decay, calcification of growing bones, osteoporosis, reduced antibiotic effectiveness, exacerbated pre-menstrual symptoms, hypertension, colorectal cancer, kidney stones, nervousness, sleeplessness, rapid heart beat, and attention deficit syndrome;¹¹⁶ and its consumption is encouraged by advertising that arguably is exploitative of children and that, at a minimum, seems indicative of an oligopolistic arms race that imposes significant deadweight losses on society.¹¹⁷ In short, rather than stigmatize basic water needs as an ethical "constraint" on resource maximization, one might attempt to apply the opposite stigma, condemning the transformation of scarce groundwater into soft drinks for private sale as a practice that carries quite ambiguous implications for overall well-being. A resident of Kaladera, Rajasthan seemed to adopt precisely this view when he argued that "[w]ater should be available for drinking and agriculture, not for industries that have no social use."¹¹⁸

The point is not, of course, to suggest the banning of soft drinks or even to suggest that such products "have no social use." It is instead to unsettle,

115. Although overstated for dramatic effect, this description has long been echoed by more austere observers. For instance, as early as 1942 the American Medical Association's Council on Food and Nutrition noted that, "[f]rom the health point of view it is desirable especially to have restriction of such use of sugar as is represented by consumption of sweetened carbonated beverages . . . which are of low nutritional value." American Medical Association, Council on Food and Nutrition, *Some Nutritional Aspects of Sugar, Candy, and Sweetened Carbonated Beverages*, 120 J. AM. MED. ASS'N 763, 765 (1942). Nevertheless, in the years following this call for the restriction of high-sugar soft drinks, per capita consumption in the United States has increased nine-fold, a result that researchers attribute in significant part to the presence of added caffeine in such drinks. See Roland R. Griffiths & Ellen M. Vernotica, *Is Caffeine a Flavoring Agent in Cola Soft Drinks?*, 9 ARCHIVES FAM. MED. 727, 731 (2000) (reporting that individuals cannot discern whether soft drinks contain caffeine in blind taste tests, and arguing that this finding casts doubt on the industry's contention that caffeine is added solely as a flavoring agent).

116. Much of the relevant research is summarized in American Academy of Pediatrics, *Policy Statement: Soft Drinks in Schools*, 113 PEDIATRICS 152, 152-53 (2004); Griffiths & Vernotica, *supra* note 115, at 728; and Michael F. Jacobson, *Liquid Candy: How Soft Drinks are Harming Americans' Health*, Center for Science in the Public Interest, at http://www.cspinet.org/sodapop/liquid_candy.htm.

117. Cf. Daryl J. Levinson, *Market Failures and Failures of Markets*, 85 VA. L. REV. 1745, 1748 n.13 (1999) (describing social costs of overinvestment in political campaigns and noting that "Coke and Pepsi are engaged in a similar advertising arms-race").

118. Nagraj Adve, *Rising Struggles, Falling Water: Anti-Coca-Cola Agitation Picks up in Kaladera, Rajasthan, India* Resource Center (Sept. 24, 2004), at <http://www.indiaresource.org/campaigns/2004/RisingStruggles.htm>.

however slightly, the notion that consumer preference expressed in market transactions provides the best welfare criterion for public decisionmaking. Proponents of regulatory cost-benefit analysis insist that public demand for environmental, health, and safety regulation suffers from a number of informational and cognitive deficiencies, such that governments should substitute more objectively determined risk priorities as a “correction” for lay error.¹¹⁹ Sustainable development proponents in turn believe that unsustainable patterns of production and consumption reflect, at least in part, the influence of ill-informed, manipulated, or otherwise unwise preferences, such that governments should adopt policies that steer markets toward more ecologically sustainable equilibriums. In light of the long-time horizons associated with sustainable development planning, the conventional market liberalism approach of taking preferences as given works to exclude from consideration many of the most pertinent routes by which sustainability might be attained.¹²⁰ To sustainable development proponents, therefore, consumption patterns should be analyzed and addressed jointly alongside overtly moral questions regarding the *type* of preferences and the *type* of culture that society collectively wishes to promote.

Market liberalism advocates naturally might counter that, unlike their own proposal to correct for informational and cognitive deficiencies in risk regulation, this approach raises special concerns regarding the coercive imposition of particular conceptions of the good by government authorities. To proponents of sustainable development, however, this objection fails for at least three reasons. First, the notion that risk regulation can be placed on

119. See CASS R. SUNSTEIN, *RISK AND REASON* 6–7 (2002) (writing that government specification of “consequences, in as much detail as possible, is an excellent response to the cognitive limitations of individual human beings”). See also Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences are Distorted*, 29 J. LEGAL STUD. 1105, 1107 (2000) (noting that “actual preferences are not necessarily constitutive of welfare because they can be distorted, in various ways” and arguing that certain forms of cost-benefit analysis can redress the distortions); Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1060 (2000) (arguing that “cost-benefit analysis is best defended as a means of overcoming predictable problems in individual and social cognition”); Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 763–65 (2003) (reviewing HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002)) (describing the dual-process theory examined by many academics, which describes two processes humans use to make decisions—one rapid but error-prone and another slow but reflective and statistical—and arguing that legal systems should institutionalize the second type of system whenever possible); Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1123 (2000) (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000)) (examining “the difference between the risk perceptions of experts and those of ordinary people,” and noting that “ordinary people often deal poorly with the topic of risk”); Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 62 (2002) (stating that “when intense emotions are engaged, people tend to focus on the adverse outcome, not on its likelihood”).

120. See Bryan Norton et al., *The Evolution of Preferences: Why ‘Sovereign’ Preferences May Not Lead to Sustainable Policies and What to Do About It*, 24 ECOLOGY ECON. 193, 209 (1998) (“Preference change can be thought of in this context as an alternative to price change. Both influence behavior, and both are subject to imperfections. We may wish to (and need to) influence both prices and preferences in order to achieve our long-term social goals.”).

an “objective” foundation ignores the many ways in which conceptions of risk are themselves pregnant with visions of the good, including the particular technocratic conception of risk that is presupposed by policy approaches such as cost–benefit analysis.¹²¹ Second, rather than a moment of paternalistic overreaching, transparent government participation in preference formation instead may be seen as a desirable counterbalance to the influence of private actors whose own immense concentrations of wealth and political power today pose threats quite parallel to those that originally motivated liberals to be suspicious of government authority. The hope for individuals to develop and express their preferences through disordered, autonomous means seems difficult to maintain, unless one is willing to exclude from concern entire spheres of influence based on an originalist attachment to one particular, and perhaps long outdated, conception of illiberal coercion. Finally, and more narrowly, the phenomenon of endogenous preferences, discussed briefly above,¹²² simply cannot be dismissed as a minor theoretical complication in the sustainable development context. The foundational nature within any market economy of energy, natural resource, agriculture, pollution, transportation, land use, health, housing, and education policies means that governments simply cannot abstain from influencing—directly or indirectly—the content of consumer desires.¹²³

121. See Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1763–66 (2003) (arguing that for most people, risk “is not a purely actuarial concept,” but is rather a “complex, textured assessment of numerous variables,” including some qualitative variables that are generally ignored by cost–benefit analysis).

122. See *supra* text accompanying note 120. See also CASS R. SUNSTEIN, FREE MARKET AND SOCIAL JUSTICE 17 (1997) (“[W]hen preferences are a function of legal rules, the government cannot take preferences as given and . . . the rules cannot be justified by reference to the preferences . . .”); Cass R. Sunstein, *Endogenous Preferences*, *Environmental Law*, 22 J. LEGAL STUD. 217, 234–35 (1993) (noting that “preference-shaping effects of legal rules cast doubt on the idea that . . . regulation should attempt to satisfy or follow some aggregation of private preferences”). Cf. Samuel Bowles, *Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions*, 36 J. ECON. LIT. 75, 75 (1998) (describing conceptual problems created for economic theory when markets “influence the evolution of values, tastes, and personalities”).

123. As a practical matter, moreover, the notion that individual preferences should lie beyond scrutiny has placed environmental regulators in an unstable position. Individual behaviors play an increasingly significant role in the overall incidence of environmental harms, yet regulators largely are limited by existing environmental statutes to addressing industrial actors. See Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 518 (2004) (writing that while “[i]ndustrial sources continue to be major sources of pollution . . . individuals are now the largest remaining source of many pollutants”). Industrial actors, in turn, naturally are growing tired of the disproportionate regulatory focus on their activities, leading to a state of strong political dissatisfaction with the present environmental law regime. See, e.g., Robert J. Klee, *Enabling Environmental Sustainability in the United States: The Case for a Comprehensive Material Flow Inventory*, 23 STAN. ENVTL. L.J. 131, 168 (2004) (noting that “[o]ne major criticism of the [Toxic Release Inventory] is that it exempts a large population of potential polluters, including small businesses, non-point sources, mobile sources, and households or individual contributors to toxic pollutant releases”).

C. Trade Liberalization and the Law of Comparative Advantage

Perhaps the clearest demonstration of the unwillingness of sustainable development proponents to acknowledge the radical strains of their framework appears in their ambiguous stance toward trade liberalization. Proponents of sustainable development usually emphasize the need to foster “green” trade through widespread application of the polluter-pays principle or through allowance of liberal exceptions under trade agreements for domestic policies that aim to maintain society’s ecological impact within sustainable limits. Beyond these efforts to promote and protect environmental regulation, however, sustainable development proponents typically do not challenge the intellectual case in favor of liberalized trade. Indeed, they tend to embrace it as a critical element of the “development” side of their program: “States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries”¹²⁴ In recent years, however, growing numbers of academics, politicians, and civil society members have begun to examine this commitment to liberalized trade more deeply. Their questioning, in turn, has revealed several theoretical complications that suggest a much improved empirical understanding of the effects of trade liberalization is necessary before its role in sustainable development can be adequately characterized.

The original theoretical justification for unfettered trade between nations, David Ricardo’s law of comparative advantage, posited a case in which one nation (Portugal) had an absolute efficiency advantage over another nation in the production of two different goods (wine and cloth), but the second nation (England) had a comparative advantage in one of the goods (cloth).¹²⁵ Thus, because Portugal’s wine was worth more to England in cloth than the amount at which Portugal could produce cloth, both countries stood to gain from specializing in their respective goods. In that manner, the two goods could be produced in amounts sufficient for both nations’ consumption, but with far greater efficiency than when produced separately in both England and Portugal. This seemingly unimpeachable economic logic—which forms a key element of the argument in favor of liberalized trade¹²⁶—also now enjoys strong empirical support, as vast increases in

124. *Report of the United Nations Conference on Environment and Development*, Annex 1, at Principle 12, U.N. Doc. A/CONF.151/26 (1992) [hereinafter *Rio Declaration*], reprinted in U.N. DEP’T OF PUBLIC INFORMATION, AGENDA 21: PROGRAMME OF ACTION FOR SUSTAINABLE DEVELOPMENT, U.N. Sales No. E.93.I.11 (1993), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

125. DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 82–87 (Michael P. Fogarty ed., J.M. Dent & Sons 1962) (1817).

126. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 3 (2d ed. 1999) (noting that, despite subsequent refinements, Ricardo’s theory “continues to form the basis of conventional international trade theory”); David A. Wirth, *The President, The Environment, and Foreign Policy*, *The Globalization of Environmental Politics*, 24 J. LAND

global production over the last fifty years are attributable, in substantial part, to the liberalization of international trade that has been fostered by the General Agreement on Tariffs and Trade (GATT) and subsequent trade agreements.¹²⁷

In developing his argument, however, Ricardo was careful to point out that the principle of comparative advantage does not hold within a single nation and, indeed, only works between nations due to the international immobility of capital. Specifically, he noted that “[t]he difference . . . between a single country and many, is easily accounted for, by considering the difficulty with which capital moves from one country to another, to seek a more profitable employment, and the activity with which it invariably passes from one province to another in the same country.”¹²⁸ If instead capital could flow freely across national borders, then the global situation would become no different than the provincial: Capital would flee England for Portugal where it would take advantage of absolute, rather than merely comparative, advantages in the production of wine and cloth.¹²⁹ England would gain the benefit of cheap prices for wine and cloth imports, but simultaneously would lose the employment opportunities necessary to help support a market for them.

Thus, the critical footnote to the comparative advantage theory in a world of internationally mobile capital is that nations are not necessarily *all* better off under liberalized trade, as is commonly argued.¹³⁰ Instead, only the aggregate wealth of nations is certain to be enhanced, while any particular nation may come out ahead or behind. Proponents of sustainable development, who believe that the distributive impact of economic activity deserves utmost attention within policy formation, cannot ignore this capital mobility wrinkle in the way that the most ardent proponents of free trade

RESOURCES & ENVTL. L. 393, 399 (2004) (noting that “[t]he Ricardo theory of comparative advantage is alive and well today in modern trade agreements”). For a review of important theoretical arguments in favor of liberalized trade in addition to the Ricardian efficiency argument, see Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. PA. J. INT’L ECON. L. 347 (1998).

127. See J. Patrick Kelly, *Foreword: Globalization and Global Governance*, 7 WIDENER L. SYMP. J. i, ii (2001) (“Globalization has led to greater productivity, the more efficient location of production facilities, decreased production costs, and higher incomes and world Gross Domestic Product.”).

128. See RICARDO, *supra* note 125, at 83. The relative lack of attention devoted to the assumption of international capital immobility in trade debates has driven some commentators to engage in rather unusual efforts to underscore its importance to Ricardo’s thinking. See Roy J. Ruffin, *David Ricardo’s Discovery of Comparative Advantage*, 34 HIST. POL. ECON. 727, 734 (2002) (noting that “of the 973 words Ricardo devoted to explaining the law of comparative advantage, 485 emphasized the importance of factor immobility”).

129. RICARDO, *supra* note 125, at 136.

130. Cf. James Gustave Speth, *International Environmental Law: Can It Deal With the Big Issues?*, 28 VT. L. REV. 779, 791 (2004) (“With ‘trade, not aid’ as their motto, many U.S. policymakers have seen the globalization (market) paradigm as supplanting the need for the Earth Summit’s sustainable development (partnership) paradigm.”).

have.¹³¹ Nor can they be satisfied in this context with the conventional market-liberal response of separating questions of efficiency and equity. In light of the absence of strong, representative institutions of redistribution at the global level—as well as the relatively meager amount of voluntary redistribution that tends to occur in the place of such institutions—sustainable development proponents must feel somewhat ambivalent toward trade liberalization when it occurs under conditions of international capital mobility.¹³² Just as awareness of the fundamental ecological interdependence of the planet has challenged the Westphalian concept of territorial sovereignty, the increasing permeability of national borders to capital migration challenges the Ricardian notion of universally desirable free trade.¹³³

In addition to this important distributive qualification, some leading commentators have argued that free trade in an economy of internationally mobile capital may be even more deeply in tension with the goals of environmental and social sustainability. For instance, along with the desire to ensure equitable access to particular kinds of natural resources and ecosystem services, sustainable development proponents also desire to ensure the survival of particular human communities, languages, and traditions.¹³⁴ Some argue, however, that this desire to preserve local cultural heterogeneity may be undermined by the global integration of markets, particularly as trade

131. Cf. Paul A. Samuelson, *Where Ricardo and Mill Rebut and Confirm Arguments of Mainstream Economists Supporting Globalization*, 18 J. ECON. PERSP. 135, 143 (2004) (noting that the assumption of “zero net capital movements” underlying the conventional free trade model “smacks of Hamlet without the Gloomy Dane”).

132. Such ambivalence would place sustainable development proponents in notable company. For instance, in developing his “invisible hand” passage, Adam Smith was careful to point out that the capitalist tends to “prefer[] the support of domestic to that of foreign industry,” even if more generally he is driven by “only his own gain.” ADAM SMITH, *WEALTH OF NATIONS* 423 (Edwin Cannan ed., Random House 1937) (1776). Similarly, Ricardo noted with approval that feelings of nationalist loyalty cause “most men of property to be satisfied with a low rate of profits in their own country, rather than seek a more advantageous employment for their wealth in foreign nations.” Ricardo, *supra* note 125, at 83. More recently, John Maynard Keynes emphasized that the “divorce between ownership and the real responsibility of management” becomes “intolerable” when “applied internationally.” John Maynard Keynes, *National Self-Sufficiency*, *NEW STATESMAN & NATION*, Jul. 8 & 15, 1933, reprinted in 21 *THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES* 233, 236 (Donald Moggridge ed., 1982).

133. A host of theoretical and empirical points remain to be addressed here. For instance, the simplified two-goods economy of Ricardo’s example may understate the extent to which England could diversify its production to remain an attractive location for investment even in a context of internationally mobile capital. Whether absolute production advantages are distributed sufficiently evenly among nations to render the capital mobility objection moot in this manner is an important issue to be addressed. Similarly, the fact that *overall* welfare gains may be expected to flow from appropriately regulated trade liberalization remains an important argument in its favor, just as discounted utility maximization remains an important normative goal in the intergenerational context, even if not a sufficient one.

134. The Rio Declaration on Environment and Development, for instance, observes that “[i]ndigenous people . . . and other local communities have a vital role in environmental management and development” and that states therefore must “recognize and duly support their identity, culture and interests.” *Rio Declaration on Environment and Development*, Principle 22.

expands in culturally inflected products such as media and consumer goods, and as relevant trade authorities drift from a legal standard of nondiscrimination to one more affirmatively in favor of market access.¹³⁵ Although it would be a mistake to equate human culture crudely with consumption patterns, it also would be a mistake to believe that the two are unrelated. Thus, to the extent that trade liberalization fosters not only enhanced efficiency in the satisfaction of existing preferences, but also enhanced opportunities to participate in the evolution of new ones, the goals of trade liberalization and cultural heterogeneity may well be in tension.¹³⁶

A variant of this concern appears in domestic water law, where subsidized irrigation policies are sometimes defended in light of the support that they provide to economically imperiled farming communities. Although most water policy analysts in the market liberal tradition agree that “[w]ater should not remain permanently tied to marginally profitable farms when it could be used more valuably elsewhere,”¹³⁷ they also recognize that such efficiency improvements may impose substantial transition costs on affected farmers and their communities.¹³⁸ Analysts therefore sometimes urge the

135. See Chi Carmody, *When “Cultural Identity Was Not At Issue”: Thinking About Canada—Certain Measures Concerning Periodicals*, 30 LAW & POL’Y INT’L BUS. 231, 239 (1999) (describing a WTO dispute panel’s “famously self-absolving language [which said] that ‘cultural identity was not at issue’” when it addressed a challenge by the United States to a Canadian excise tax and import regulation scheme that was defended as an effort to promote original content among periodicals circulated in Canada (quoting WTO Panel Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/R (Mar. 14, 1997), available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1997)).

136. Recent modeling work by two international economists suggests that, in a bilateral trade context where preferences evolve and two countries are of disparate size, the long-run pattern of preferences in the smaller nation will evolve to match that of the larger. In other words, to the extent that preferences for goods are equated with culture, “the small economy will lose its cultural identity.” Vankatesh Bala & Ngo Van Long, *International Trade and Cultural Identity: A Model of Preference Selection* 5 (July 2004) (unpublished working paper, Center for Economic Studies and Ifo Institute for Economic Research), at <http://ssrn.com/abstract=573263>. This is an especially significant finding given that multinational product marketers seem prepared to incur substantial costs in order to “develop” a market for their wares, even in the face of strong cultural obstacles. A favorite example among scholars of consumer culture is the decades-long advertising campaign that Western breakfast cereal manufacturers have been waging to alter the traditional Japanese breakfast of rice, miso-soup, salted fish, natto, and other decidedly noncereal items. Survey—Breakfast in Japan, [japan-guide.com](http://www.japan-guide.com/topic/0007.html), at <http://www.japan-guide.com/topic/0007.html> (May 2000). After years of steadfast promotion, the campaign finally appears to be paying off: Although 2003 per capita annual consumption of packaged breakfast cereal in Japan was only 0.24 kg, compared with 4.81 kg in the United States and 6.72 kg in the United Kingdom, sales volume growth in Japan stood at 10%. Analysts attribute this growth to the “undeveloped nature of the [Japanese] cereal market.” LEATHERHEAD FOOD INTERNATIONAL, *GLOBAL FOOD MARKETS: BREAKFAST CEREALS INTERNATIONAL OVERVIEW* 4 (2004), available at <http://www.foodlineweb.co.uk/globalfoods/images/breakfastcereals.pdf>. More enticingly, analysts expect enormous sales potential in China, “if the concept of breakfast cereals can be established.” *Id.* at 3.

137. Thompson, *Water Allocation and Protection*, *supra* note 36, at 487.

138. See, e.g., Joseph L. Sax, *Understanding Transfers: Community Rights and the Privatization of Water*, 1 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 13, 15 (1994) [hereinafter Sax, *Understanding Transfers*] (noting that water transfers from agricultural to urban areas create

payment of compensation to affected parties, both out of a concern for distributive equity and out of an awareness that compensation may be necessary as a political expedient to overcome vested interests in the present state of water allocation.¹³⁹ Along precisely these lines, the recent and monumental agreement to transfer water between Southern California's Imperial Irrigation District and the San Diego County Water Authority includes a socioeconomic mitigation fund to compensate adversely impacted third parties in rural communities.¹⁴⁰ Similarly, a newly enacted water management law in Alberta, Canada, includes a compensation mechanism for indigenous communities that are negatively affected by water reallocations under the new scheme.¹⁴¹ Even these unusual efforts to make good on the Pareto potentiality of Kaldor-Hicks efficiency, however, do not fully address the concern of advocates of social sustainability: Their interest lies in preserving the *actual* uniqueness and diversity of human cultures, not in compensating for their loss.

An additional and somewhat related source of tension between trade liberalization and sustainable development lies in the familiar fear that international competition for capital may cause an unraveling of national production standards, including labor, environmental, and social safety-net standards.¹⁴² Because production cost is not simply a function of labor

significant losses for people in the agricultural community who did not own, but whose income depended on, the transferred water).

139. See, e.g., Megan Hennessy, *Colorado River Water Rights: Property Rights in Transition*, 71 U. CHI. L. REV. 1661, 1664 (2004) (proposing a liability rule to allow damage payments to parties impacted negatively by water reallocation).

140. Dean E. Murphy, *Agreement in West Will Send Farms' Water to Urban Areas*, N.Y. TIMES, Oct. 17, 2003, at A1.

141. David R. Percy, *Responding to Water Scarcity in Western Canada*, 83 TEXAS L. REV. 2091 (2005).

142. See generally Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039 (1993) (arguing that the combination of environmental regulatory constraints and liability exposure in the United States places it at a comparative disadvantage in international competition and suggesting that domestic policy changes and international efforts to harmonize national environmental standards are a more appropriate response than insulation, bans on products, or stringent duties); Richard B. Stewart, *International Trade and Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329 (1992) (recognizing the global scope of environmental externalities created by economic activity as well as the "worldwide competitiveness externalities" generated by pollution-reduction measures and drawing lessons from "federal-type" systems for effectively responding to these externalities). A similar line of analysis has featured prominently in domestic debates regarding the proper allocation of environmental lawmaking authority between states and the federal government. See, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (challenging the "race-to-the-bottom" rationale as the basis for federal environmental regulation); Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 747 (1977) (suggesting that a federal nondegradation policy might be justified to force states to adopt environmental protections they would have adopted voluntarily but for the competition to acquire new development); Richard B. Stewart, *Pyramids of Sacrifice?: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1212

hours, as was believed in Ricardo's time, but rather a function, inter alia, of wages, taxes, and regulatory burdens, internationally mobile capital may be expected to flock to nations that offer the most attractive package of inexpensive but productive labor, low taxes, and lax regulations. Of course, this "race to the bottom" argument is hotly contested, both as a theoretical and an empirical matter.¹⁴³ Some have argued, for instance, that equalization of regulatory standards eventually will occur upward as more nations undergo the process of development and experience its tendency to increase public demand for environmental amenities and to decrease dependence on environmentally intensive industries.¹⁴⁴ To proponents of strong sustainability, however, this argument rings hollow: Barring extraordinary and unforeseen technological advances, resource-intensive activities must occur *somewhere* in order for more developed nations to maintain the standard of living that they currently do.¹⁴⁵ Thus, proponents of strong sustainability harbor real concern that regulatory competition already may be creating barriers to sustainability and, in any event, certainly may do so in the future as environmental regulation compliance costs rise and create much stronger incentives for capital to forum shop.

Quite apart from this question of whether regulatory jurisdictions can be expected to race to the bottom or to the top is a difference of viewpoint on the merits of racing at all. To proponents of sustainable development, regulatory standards should be designed specifically for the environmental and socioeconomic context to which they pertain.¹⁴⁶ Such particularity is thought to be desirable in light of the extraordinary diversity and complexity of local environmental conditions, cultural practices, and other determinants

(1977) (opining that a state might unilaterally decline to adopt high environmental standards out of fear that the concomitant costs to industry and economic development would encourage capital to move to states or communities with lower standards).

143. For recent contributions, see Jeffrey A. Frankel & Andrew K. Rose, *Is Trade Good or Bad for the Environment? Sorting Out the Causality*, 87 REV. ECON. & STAT. 85 (2005) (finding that trade decreases air pollution); Mathew A. Cole, *Trade, the Pollution Haven Hypothesis and the Environmental Kuznets Curve: Examining the Linkages*, 48 ECOLOGICAL ECON. 71 (2004) (finding that the effect of pollution havens is relatively minor); Mathew A. Cole & Robert J.R. Elliott, *Do Environmental Regulations Influence Trade Patterns? Testing Old and New Trade Theories*, 26 WORLD ECON. 1163 (2003) (positing that environmental regulations have a significant impact upon trade); Daniel C. Esty, *Bridging the Trade-Environment Divide*, 15 J. ECON. PERSPECTIVES 113 (Summer 2001) (exploring why market liberalism and environmental protection appear to be at odds); and Werner Antweiler et al., *Is Free Trade Good for the Environment?*, 91 AM. ECON. REV. 877 (2001) (assessing environmental consequences of international trade and providing a theoretical model that suggests that free trade is good for the environment).

144. See, e.g., Douglas A. Kysar, *Some Realism About Environmental Skepticism: The Implications of Bjorn Lomborg's The Skeptical Environmentalist for Environmental Law and Policy*, 30 ECOLOGY L.Q. 223, 249–52 (2003) (reviewing studies).

145. Suggestive evidence along these lines can be found in COREY L. LOFDAHL, ENVIRONMENTAL IMPACTS OF GLOBALIZATION AND TRADE 48 (2002). More conclusive evidence remains elusive given the general lack of adequate national accounting for natural capital and environmental externalities. See *supra* text accompanying notes 87–90.

146. *Rio Declaration*, *supra* note 124, at Principle 11.
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of sustainability. Moreover, proponents tend not only to advocate substantive tailoring of regulatory standards to locally heterogeneous conditions, but also to favor local control over the standard-setting process itself. The international legal principle of *subsidiarity*, which often is associated with sustainable development, counsels that “governmental tasks are best carried out at the level closest to those affected by them.”¹⁴⁷

Within India, the Plachimada groundwater controversy is seen as an important test of the government’s commitment to this subsidiarity principle. As noted above, the local Plachimada council, or *panchayat*, has refused to renew the Coca-Cola bottling facility’s license following several seasons of acute water shortages,¹⁴⁸ an action that in turn has triggered intervention on behalf of the facility by state government officials who had supported Coca-Cola’s entrance into the Kerala market.¹⁴⁹ A case presently pending before the High Court of Kerala challenges the state government’s action and will therefore require the court to determine which level of government has final authority over the Plachimada groundwater dispute.¹⁵⁰ To supporters of the local *panchayat* and its indigenous and outcaste constituents, however, the case represents much more than simply a dispute over intergovernmental decisionmaking authority. As one Indian protester put it, “Rights over water have to be linked to the broader struggle of marginalized people.”¹⁵¹

In contrast to the preference for local tailoring and local control of environmental, health, and safety regulation, market liberalism tends to favor international regulatory harmonization on the ground that it lowers transaction costs and facilitates trade.¹⁵² Moreover, according to market

147. Orley Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 382 (2004). See also Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumpiness*, 89 MINN. L. REV. 471, 490 (2004) (referring less strongly to a preference for lawmaking and governance at “the most localized level appropriate to the problem”).

148. See *supra* text accompanying note 16.

149. See *Perumatty Grama Panchayat v. State of Kerala*, 2004 (1) K.L.T. 731, § 5 (recounting the state government’s argument that it “is sensitive to the concern of the people in the locality and of the Panchayat, but, at the same time, the interest of industrialization has also been borne in mind”), available at <http://www.elaw.org/resources/text.asp?id=2551>.

150. On December 16, 2003, however, a Single Bench of the High Court of Kerala overturned the state government stay, ruling that the *panchayat* had authority to suspend Coca-Cola’s license under the public trust doctrine, unless the company obtained alternative sources of water or limited the volume of its groundwater use to that of a local farmer of equivalent real estate holdings. *Perumatty*, 2004 (1) K.L.T. 731. Coca-Cola appealed this ruling to the Division Bench of the High Court, which ordered a governmental investigation into the groundwater shortage in order to determine whether Coca-Cola’s activities in fact were causing the dire water situation in Plachimada. As of this writing, no further rulings have been issued and the plant remains offline. See Williams, *supra* note 12.

151. Williams, *supra* note 12 (quoting C.R. Bijoy, an advocate for indigenous populations).

152. See Daniel Kalderimis, *Problems of WTO Harmonization and the Virtues of Shields Over Swords*, 13 MINN. J. GLOBAL TRADE 305, 339 (2004) (noting the conventional trade view that “national laws and standards should be standardized internationally so as to maximize economic efficiency in cross-border trade” (quoting Lon M. Wach, *Accountable Governance in the Era of*

liberalism proponents, the problem with highly devolved, participatory decisionmaking is not only that it leads to cumbersome heterogeneity in the standards governing commerce, but also that it creates an increased possibility of protectionist or alarmist lawmaking.¹⁵³ Accordingly, the value of disciplining regulatory standards according to cost-benefit analysis or scientific risk assessment lies not only in standardizing and rendering predictable the results of regulation, but also in tempering irrational public demands, interest group distortions, and other perceived dysfunctions of participatory governance.¹⁵⁴ To proponents of sustainable development, in contrast, such centralized regulatory approaches are undesirable both because they risk descent toward a lowest common denominator for environmental and social sustainability planning, and because, more generally, they disrupt the goals of regulatory diversity and sensitivity to particularized conditions.

Finally, some observers worry that liberalized trade may exacerbate the already considerable challenge of maintaining economies within environmentally sustainable limits: “[B]y making supplies of resources and [pollution] absorption capacities anywhere simultaneously available to demands everywhere, free trade will tend to increase . . . the rate of environmental degradation.”¹⁵⁵ To holders of this concern, environmental sustainability already presents data and governance challenges of a Herculean magnitude on the national level; allowing importation of natural resources and exportation of wastes across the globe may mean that nations face even duller incentives to monitor resource consumption, pollution loading, and other ecological consequences of their activities.¹⁵⁶ Moreover, if trading regimes eventually include sharp limits on the ability of countries to preserve natural resources for domestic consumption, as some observers expect they will, then the issues of intragenerational distributive equity and weak-versus-strong conceptions of sustainability will be raised in an even

Globalization: The WTO, NAFTA, and International Harmonization of Standards, 40 U. KAN. L. REV. 807, 829 (2002)).

153. See generally John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000) (identifying protectionist interest groups as the “common enemy” of international free trade and domestic democracy and arguing that so long as regulatory authority is not granted to the WTO, the WTO will not threaten the national sovereignty of its members, but rather will promote local democracies by restraining interest group pressures).

154. For an argument that “least restrictive means” analysis in the WTO context is roughly functionally equivalent to regulatory cost-benefit analysis, see Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403 (2003).

155. DALY, *supra* note 37, at 149.

156. See Mathis Wackemagel, *Can Trade Promote an Ecologically Secure World?: The Global Economy from an Ecological Footprint Perspective*, 5 BUFF. ENVTL. L.J. 179, 195 (1998) (“[B]y encouraging all regions to exceed local limits, by reducing the perceived risk attached to local natural capital depletion, and by simultaneously exposing local surpluses to global demand, deregulated and ecologically unbalanced trade eventually reduces global carrying capacity, increasing the risk to everyone.”) Online -- 83 Tex L. Rev. 2143 2004-2005

more contentious form.¹⁵⁷ Many civil society organizations fear that global market integration for natural resources ultimately will lead to a situation in which water and other basic means to life are subjected to competitive economic bidding with little or no public oversight.¹⁵⁸ Their concern, in essence, is that the disputes over Coca-Cola's bottling operations in India—in which protestors claim that scarce groundwater is being transformed into bottled soda products for sale to affluent urban consumers while local residents struggle to satisfy even basic drinking needs—ultimately will be magnified onto a global scale. Thus, to some observers, the ability of countries to ensure distributive equity and environmental sustainability in their activities at the national level—the primary level at which effective, participatory regulatory controls currently exist—may be threatened by even the most nascent of steps toward a global water market.¹⁵⁹

In sum, critics worry that liberalized trade with internationally mobile capital disrupts just distribution by promoting aggregate gains in wealth without a realistic prospect of accompanying compensation to losing participants; endangers local and national communities by constricting the sphere of public influence over capital and by empowering multinational corporations to market culturally inflected goods on a global level; confounds environmental, health, and safety protection by making regulatory policies a handicap in international trade competition or by insisting that such policies be applied in an inappropriately standardized fashion; and, finally, stymies efforts to maintain environmentally sustainable national economies by obscuring domestic resource scarcities through global transfers of natural capital. Of course, it must be noted that these criticisms cut considerably against the grain of mainstream economic thought,¹⁶⁰ and that many proponents of sustainable development have remained more optimistic in their views of trade liberalization. Nevertheless, all proponents of sustainable development insist at a minimum that issues of environmental and social sustainability should be addressed concurrently with economic development

157. For an analysis of this issue under the GATT, see Robert J. Girouard, *Water Export Restrictions: A Case Study of WTO Dispute Settlement Strategies and Outcomes*, 15 GEO. INT'L ENVTL. L. REV. 247 (2003). For an argument that water is a "heritage resource" that states constitutionally may withhold from interstate commerce in the domestic context, see Sax, *Understanding Transfers*, *supra* note 138, at 14.

158. See Rona Nardone, Note, *Like Oil and Water: The WTO and the World's Water Resources*, 19 CONN. J. INT'L L. 183, 188–92, 204–06 (2003) (noting that many public interest groups reject the commodification of water because private entities are thought to lack consideration of the public's interest).

159. Ongoing controversy over proposed bulk water transfers by Canadian distributors raises this concern, albeit in a seemingly premature form. See GLEICK ET AL., *supra* note 33, at 18–19 (detailing the actions taken by the Canadian government to prevent the trading of bulk water).

160. See Paul Krugman, *Is Free Trade Passe?*, ECON. PERSPECTIVES, Fall 1987, at 131 ("If there were an Economist's Creed it would surely contain the affirmation[] . . . 'I believe in free trade.'"); Paul B. Stephan, *Has Globalization Gone Too Far?*, 18 NW. J. INT'L L. & BUS. 246, 246 (1997) (book review) ("The theory of comparative advantage, which celebrates the potential gains from trade, is as close to being an unassailable orthodoxy as anything gets in economics.").

planning.¹⁶¹ Accordingly, even if sustainable development does not compel the more radical critiques of trade liberalization that are described in this subpart, the program's demand for integrated analysis still stands in sharp contrast with the separationist tendencies of trade specialists,¹⁶² much as the demand for integrated analysis of efficiency and equity stands in sharp contrast with the desire of welfare economists to remain agnostic on issues of distribution.¹⁶³

D. Summary

By its nature, sustainable development assumes some responsibility on the part of present generations to collectively identify an ecological baseline beyond which human economic activity that impairs ecosystem functioning should stop. In turn, this task entails both an adequate moral account of intergenerational equity and a trans-scientific judgment regarding the conceptual and operational meaning of environmental sustainability. To most proponents of sustainable development, intergenerational equity in practice entails a duty not only to maintain the stock of useful capital in the aggregate, but also to ensure the integrity of vital ecological processes and the availability of particular kinds and amounts of natural resources. Equally urgent and expansive obligations flow from sustainable development's requirement that "[a]ll states and all people shall cooperate . . . in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world."¹⁶⁴ Finally, proponents of sustainable development maintain that these intertwined aims of environmental sustainability and of distributive equity are best pursued through widely

161. See, e.g., *Rio Declaration*, *supra* note 124, at Principle 4 ("In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."); I.L.A., *SUSTAINABLE DEVELOPMENT*, *supra* note 54, at 7 (describing the principle of integration as "the very backbone of the concept of sustainable development"); John C. Dernbach, *Sustainable Development: Now More than Ever*, 32 ENVTL. L. REP. 10,003, 10,010 (2002) (referring to integration as "the bedrock principle for sustainable development"); Dominic McGoldrick, *Sustainable Development and Human Rights: An Integrated Approach*, 45 INT'L & COMP. L.Q. 796, 818 (1996) ("The critical importance of sustainable development is that it is an integrationist principle.").

162. The WTO's Committee on Trade and Environment, for instance, is premised on the notion that "the competence of the multilateral trading system . . . is limited to trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members." Marrakesh Ministerial Decision on Trade and Environment, MTN.TNC/45(MIN) (Apr. 14, 1994), 33 I.L.M. 1267, 1267 (1994). See also Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739, 856 (2001) (observing that "the WTO disavows any competence on environmental policy," but arguing that "[i]t is impossible to develop an integrated and mutually supportive trade-environment policy by considering only the trade dimension"); Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 701 (1996) (describing a "myopic view of trade relations [in which dispute] panels do not take into account social, historical, cultural, or economic factors that may explain a country's behavior").

163. See *supra* text accompanying note 113.

164. *Rio Declaration*, *supra* note 124, at Principle 5. HeinOnline 24, 83 Tex J. Res. 2145 2004-2005

participatory governance structures that operate at the most local level practicable, and that display a steadfast commitment to integrated policy assessment.

Although it is worthwhile asking whether sustainable development so understood is consistent even on its own terms, this Part instead has been concerned with sustainable development's relationship to the framework of market liberalism. One certainly can point to a variety of policy contexts that suggest harmony, rather than discord, between the two approaches: Subsidy reform in the agricultural and energy sectors would advance not only economic efficiency, but also environmental sustainability and intragenerational equity; greater attention to underappreciated benefits such as ecosystem services or nonpriced harms such as climate disruption also might help to discipline market activity toward greater environmental sustainability;¹⁶⁵ some empirical evidence suggests that trade liberalization and economic growth are associated with a greater "taste" for environmental "goods"; and on certain assumptions regarding income distribution and natural resource constraints, liberalized trade can be expected to expand overall access to fundamental resources such as drinking and sanitation water. As an exercise in political pragmatism, therefore, sustainable development and market liberalism proponents might well choose to align themselves in these various contexts. The remaining question, however, is whether such alliances would come at the long-term cost of conceptual clarity, particularly with regard to the less analytically mature notion of sustainable development.

At bottom, market liberalism reflects the "dream that a fully just and efficient state can be attained without the exercise of collective judgment."¹⁶⁶ The normative attractiveness of this "dream" is at its apex when social and economic conditions are not unduly inequitable and when particular resources are scarce but resources in the aggregate are not. Under such conditions, the market provides an unparalleled mechanism for allocating scarce resources among diverse and competing uses, while society as a whole can remain confident that "enough, and as good"¹⁶⁷ resources remain available in the aggregate to satisfy the needs and desires of individual members. Proponents of sustainable development, however, do not believe that contemporary socioeconomic and environmental conditions meet these criteria, nor do they believe that the interests of future generations are adequately accounted for—even under the most idealized conceptions of

165. See, e.g., Heal, *supra* note 58, at 411–21 (describing ways in which improved information and stronger economic incentives could align market dynamics with environmental sustainability objectives).

166. Mark Kelman, *The Necessary Myth of Objective Causation Judgments in Liberal Political Theory*, 63 CHI.-KENT L. REV. 579, 636 (1987).

167. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 291 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

market liberalism.¹⁶⁸ In addition, the market-liberal tendency to accommodate goals of distributive equity or environmental sustainability through after-the-fact corrective devices strikes proponents of sustainable development as particularly weak medicine in light of the enormity of the actual tasks at hand.¹⁶⁹ Instead, they seek to replace the perceived “tradeoff” between efficiency and equity with an integrated standard of “equitable use”—a basic intellectual reform that eschews the value agnosticism of market liberalism in favor of what John Ruskin called the “one great fact,” that “[t]here is no wealth but life.”¹⁷⁰

III. Private Global Governance: Regulation-Based Markets

The inconsistencies between market liberalism and sustainable development described in the previous Part suggest that achievement of the latter will require significant alteration of the institutions supporting the former.¹⁷¹ Nevertheless, even granting the argument of sustainable development proponents that collective decisionmaking regarding resource uses is theoretically necessary, society still might agree—collectively—that the political process is so clumsy, costly, and corrupt as to make deliberate public attempts to define and implement a program of sustainable development more harmful than an unregulated market or a public policy focused only on efficiency maximization.¹⁷² To many observers, collective decisionmaking regarding sustainability not only threatens coercive imposition of particular values, preferences, and technologies, but also invites a host of practical difficulties, such as the creation of black markets, the promotion of resource waste, and the exacerbation of transaction costs. From this perspective, the acts of legislators and other representatives are

168. See *supra* subpart II(A).

169. Consider, for instance, a report by the International Atomic Energy Agency that an estimated 1.2 billion people currently lack adequate access to safe drinking water, 2.5 billion lack proper sanitation, and more than 12 million people die from water pollution, water shortages, and poor sanitation each year. Consider also the report’s estimate that approximately 5 billion people will face severe or difficult conditions of water scarcity by 2025 if present consumption patterns continue unabated. Press Release, International Atomic Energy Agency, World Water Day 2002: Water for Development (Mar. 22, 2002), at <http://waterday2002.iaea.org/English/PressReleaseE.html>.

170. JOHN RUSKIN, “UNTO THIS LAST”: FOUR ESSAYS ON THE FIRST PRINCIPLES OF POLITICAL ECONOMY 88 (Lloyd J. Hubenka ed., Univ. of Neb. 1967) (1862).

171. Cf. A. Dan Tarlock, *Ideas Without Institutions: The Paradox of Sustainable Development*, 9 IND. J. GLOBAL LEGAL STUD. 35, 42 (2001) (noting that “environmental regulation is a modest overlay on the liberal institutions of private property and consumer sovereignty,” and observing that the achievement of sustainable development will require deep structural changes to those institutions).

172. See Richard A. Epstein, *Justice Across the Generations*, 67 TEXAS L. REV. 1465, 1466 (1989) (“A classical liberal regime of limited government, low taxation, personal liberty, and private property benefits future generations more than an alternative regime that consciously enlists large government to restrain liberty and to limit the present use of property for the benefit of future generations.”). HeinOnline -- 83 Tex L. Rev. 2147 2004-2005

best explained, not as good faith efforts to pursue the public interest, but as plainly bargained transactions in which public advantages are sold to private rent-seekers.¹⁷³ Regulators in turn are viewed as overburdened, hapless, or weak-willed bureaucrats who are likely to overlook unintended consequences of their rules or to be “captured” by powerful interests with a stake in regulatory outcomes.¹⁷⁴

To some extent, water policy in the United States bears out this skepticism, as heavily subsidized, inefficient water users represent textbook examples of the kind of rent-seeking behavior found in public choice models.¹⁷⁵ Nevertheless, the hardnosed realism of public choice accounts stands in stark contrast to the political optimism that is displayed in much of the sustainable development law and literature. From Stockholm¹⁷⁶ to Rio¹⁷⁷ to Johannesburg,¹⁷⁸ proponents of sustainable development have urged the enhancement of opportunities for citizens to participate in environmental decisionmaking—a preference that sits uncomfortably beside the denigration of the political sphere that is commonly associated with market liberalism and that, at least to some observers, has worked to undermine public life and public institutions in the United States since the last heyday of social and

173. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 25 (1991) (summarizing various economic theories of legislation that describe how politics is “dominated by ‘rent-seeking’ special interest groups”).

174. *Id.*

175. See Barton H. Thompson, Jr., *Water Law as a Pragmatic Exercise: Professor Joseph Sax’s Water Scholarship*, 25 *ECOLOGY L.Q.* 363, 374 (1998) [hereinafter Thompson, *Water Law as a Pragmatic Exercise*] (“Existing water users enjoy significant political power; they are the victors of the transformative economy and have the resources and connections necessary to kill off serious legislative threats.”). In fact, it often seems to be the existence of these failures of public resource decisionmaking that provides much of the practical urgency behind the case for market water allocation. Cf. Robert Glennon, *Water Scarcity, Marketing, and Privatization*, 83 *TEXAS L. REV.* 1873 (noting problems of water distribution through the political process and arguing that privatization offers a more desirable alternative); Sax, *The Constitution*, *supra* note 99, at 278 (questioning water markets “as a matter of equity,” but noting that they may be desirable based on “the practical desire to get the job of conservation underway with as much dispatch as possible”); Barton H. Thompson, Jr., *Markets for Nature*, 25 *WM. & MARY ENVTL. L. & POL’Y REV.* 261, 262–63 (2000) [hereinafter Thompson, *Markets for Nature*] (noting that “markets may reduce opposition to regulatory initiatives both by reducing the economic cost of regulation and by reducing tension between interest groups fighting over who will bear the regulatory cost”).

176. See *Stockholm Declaration of the United Nations Conference on the Human Environment*, G.A. Res. 2997, U.N. GAOR, 27th Sess., at Preamble 7, U.N. Doc. A/CONF.48/14/Rev/1 (1972) (“To achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts.”).

177. See *Rio Declaration*, *supra* note 124, at Principle 10 (“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment . . . and the opportunity to participate in decision-making processes.”).

178. See *Report of the World Summit on Sustainable Development*, Res. 1, Annex: *Johannesburg Declaration on Sustainable Development*, Principle 26, U.N. Doc. A/CONF.199/20 (2002) (“We recognize that sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels.”).

environmental legislation during the 1970s. Political theorist Benjamin Barber, for instance, feels that “the instruments of democracy . . . have been weakened by three decades of market fundamentalism, privatization ideology and resentment of government.”¹⁷⁹ In his view, this “ascendant market ideology . . . robs us of the civic freedom by which we control the social consequences of our private actions.”¹⁸⁰

Before touching on Barber’s central concern, this Part first argues that the theorist may have overlooked certain pockets of progressive activity that have opened up within the “ascendant market ideology” itself. Specifically, given the apparently widespread perception that sustainable development proponents would lose any attempt to press the deep incompatibilities between their framework and that of market liberalism,¹⁸¹ a growing number of civil society organizations, government leaders, and academics have begun to adapt their sustainability goals to better fit the prevailing political and cultural reverence for markets. Such adaptation is evident in the Plachimada groundwater controversy, as protestors have become highly effective at exploiting Coca-Cola’s own cultural salience and multinational economic network for their political purposes. It also is evident in the activities of a broader coalition of public and private parties who are seeking to institutionalize more formal market incentives for corporate social and environmental responsibility. As will be explained, the activities that they increasingly promote—such as conscientious consumption and socially responsible investment¹⁸²—can be seen as attempts to pursue sustainable development policy goals through the unlikely medium of private economic transactions.

Because a more complete normative assessment of such governance mechanisms is beyond the scope of this Article,¹⁸³ this Part instead will

179. Benjamin R. Barber, *A Failure of Democracy, Not Capitalism*, N.Y. TIMES, July 29, 2002, at A19.

180. *Id.*

181. See George (Rock) Pring, *The 2002 Johannesburg World Summit on Sustainable Development: International Environmental Law Collides With Reality, Turning Jo'Burg Into 'Joke'Burg*, 30 DENV. J. INT'L L. & POL'Y 410, 410–11 (2002) (noting that at the most recent Earth Summit in Johannesburg, the strong commitment to sustainable development articulated at the Rio Earth Summit in 1992 “ran headlong into the hard reality of the world’s existing economic order, and the economic order did not give . . . much”).

182. For more detailed accounts, see Kysar, *supra* note 44, at 636 (discussing the role of consumer decisionmaking in the contemporary global economy); Cynthia A. Williams, *Civil Society Initiatives and “Soft Law” in the Oil and Gas Industry*, 36 N.Y.U. J. INT'L L. & POL. 457, 461 (2004) [hereinafter Williams, *Civil Society Initiatives*] (stating that “citizens’ demands for corporate social responsibility . . . are changing the norms of appropriate industry action”).

183. Brief mention should be made of the most important criticisms raised against private governance mechanisms, which focus on a perceived lack of representativeness and accountability in the organizations that develop and enforce such mechanisms. More specifically, critics worry: that private governance entrepreneurs purport to represent a “global civil society,” but instead seem to reflect a narrow, largely Western and elitist range of interests; that they replace mechanisms of formal democratic equality with channels of voice and influence that seem likely to

conclude simply by noting that the mechanisms may provide an important but underappreciated option value—one that exists quite apart from whether the mechanisms are desirable or necessary as policy tools for achieving sustainable development, and even apart from whether the framework of sustainable development itself is desirable or necessary. Whatever else they may do, the tools of consumer and investor disclosure work to preserve space for public-regarding sentiment within a market-liberal order that otherwise tends to deny the wisdom of such sentiment and, indeed, that seems capable of investing in political and cultural institutions that specifically aim to erode such sentiment.¹⁸⁴ Thus, at least until the deeper normative and empirical disputes between sustainable development and market liberalism are resolved, states may be wise to deploy their “interdependence sovereignty”¹⁸⁵ in support of these emerging efforts to infuse the consumer and investor market roles with expanded social and environmental meaning. By doing so, they will help to preserve public belief in the mere possibility of “civic freedom [to] control the social consequences of . . . private actions,” in case such collective moral freedom turns out to be as essential as sustainable development proponents claim.¹⁸⁶

A. *From Plachimada to “Where It Hurts Coca-Cola the Most”*

Coca-Cola complains that the agitation against it seems driven more by an antiglobalization agenda than by specific concern for the groundwater resources of Plachimada and other rural Indian communities. The company’s Indian website, for instance, describes its opponents as “politically motivated groups [who] have . . . chosen to target just The Coca-Cola Company, using the Coca-Cola brand name for the furtherance of their own anti-multinational agendas.”¹⁸⁷ To some extent, of course, this view must be correct. Protestors themselves attempt to link the groundwater dispute to broader debates over international economic integration and the role of multinational corporations in developing countries: They liken the company’s actions to

disproportionately benefit the wealthy and well-educated; that they threaten to become a sort of public choice run amok at the global level, in which interest groups promote governance schemes that are protectionist or otherwise harmful to the broader public interest; and that they unduly interfere with the sovereign interests of foreign nations by conditioning participation in governance schemes on unrelated or inappropriate concerns. See, e.g., John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205, 218 (2000) (arguing that “the civil society idea . . . is dramatically troubling for democracy theory because it posits ‘interests’ (whether NGOs or businesses) as legitimate actors along with popularly elected governments”).

184. See *infra* text accompanying notes 219–34, 240–45.

185. See STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 4 (1999) (defining interdependence sovereignty as “the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state”).

186. *Id.*

187. Coca-Cola, Coca-Cola India’s Approach to Water Usage, at <http://www.cocacolaindia.com/water.html>.

“Cocacolonisation”¹⁸⁸ and invoke Mahatma Ghandi’s memory by shouting “Coca-Cola: Quit India.”¹⁸⁹ They also expand the scope and meaning of their protests by forming global alliances with other organizations that are targeting Coca-Cola for independent reasons.¹⁹⁰ Finally, they deliberately promote their concerns to individuals far beyond the communities or even the nations that are specifically affected by Coca-Cola’s allegedly objectionable practices. As Amit Srivastava of the India Resource Center promised, “[w]e will take this battle to where it hurts Coca-Cola the most—the US and the European Union, its largest markets.”¹⁹¹

But Coca-Cola should hardly be surprised by these activities. Both in light of the company’s marketing materials, which seem to invite broad debate by appealing to India’s development aspirations,¹⁹² and in light of the sheer magnitude of the company’s present operations and its “Manifesto” for further global growth,¹⁹³ Coca-Cola provides a natural target for otherwise dispersed and disparately situated political actors. Like no other institutional force in the world today, multinational corporations such as Coca-Cola “individualize the global system.”¹⁹⁴ That is, through their expansive operations, they offer one of the few direct relationships—and perhaps the only such relationship that is common across diverse cross sections of international societies—that individuals have with the larger economic, political, and cultural currents that are dramatically reshaping the planet. As such, multinational corporations and their iconography offer unparalleled global communicative power—power that Coca-Cola itself exploits when it speaks out on issues that extend beyond its core marketing function, and that anti-Coca-Cola NGOs implicitly acknowledge when they seek to recode the company’s iconography to reflect instead their social concerns.¹⁹⁵ Similarly, the fact that other industrial water users in Plachimada besides Coca-Cola

188. Wrammer, *supra* note 17, at 28.

189. Williams, *supra* note 12, at F2.

190. See *supra* text accompanying notes 8–9.

191. Environmental News Service, *Indian Marchers Protest Coca-Cola Pollution, Water Use* (Nov. 15, 2004), at <http://www.ens-newswire.com/ens/nov2004/2004-11-16-05.asp>.

192. For instance, Coca-Cola’s primary marketing slogan for India—“Partners in Progress”—attempts to promote not only the company’s products, but also the broader economic and employment effects of its operations.

193. See *supra* text accompanying notes 3–7. The company’s 1993 annual report sounded similarly revolutionary tones: “All of us in the Coca-Cola family wake up each morning knowing that every single one of the world’s 5.6 billion people will get thirsty that day. If we make it impossible for these 5.6 billion people to escape Coca-Cola, then we assure our future success for many years to come.” ANITA RODDICK, *TROUBLED WATERS: SAINTS, SINNERS, TRUTH AND LIES ABOUT THE GLOBAL WATER CRISIS* 10 (2004) (quoting the 1993 annual report).

194. Lee A. Tavis, *Corporate Governance and the Global Social Void*, 35 VAND. J. TRANSNAT’L L. 487, 540 (2002).

195. For instance, campaign materials developed by the People’s Forum Against Coca-Cola subvert Coca-Cola’s logo by depicting a bottle labeled “Toxic-Cola” in the company’s familiar red script lettering.

may be contributing to groundwater shortages, as the company claims,¹⁹⁶ is of little moment to international campaign organizers. The Plachimada controversy provides a focal point for mobilization precisely because it involves the world's most recognized brand. As such, it links Indian *Adivasis* populations, Columbian union members, British consumers, European environmentalists, American student groups, Canadian cultural preservationists, and a host of other civil society interests that might otherwise experience the global political landscape in isolation.¹⁹⁷

In addition to highlighting what might be called *consumption communities* within global politics,¹⁹⁸ the Coca-Cola controversy also demonstrates a growing sophistication among NGOs in relation to the tools of consumer and investor market pressure. For instance, the Polaris Institute, a Canadian organization "designed to enable citizen movements to re-skill and re-tool themselves to fight for democratic social change in an age of corporate driven globalization,"¹⁹⁹ has published a lengthy Coca-Cola resource guide containing a compilation of information regarding the company's social and environmental history, as well as details concerning Coca-Cola's executives, board of directors, principal shareholders, bottling contractors, political affiliates, campaign contribution recipients, lobbyists, key suppliers, institutional customers, and outside professional services firms.²⁰⁰ Armed with this information, anti-Coca-Cola NGOs have engaged

196. Coca-Cola maintains that other industrial users, as well as environmental factors such as drought, are responsible for the water shortages in the area. See *supra* text accompanying note 22.

197. In this regard, it is significant that Corporate Accountability International, a United States-based NGO formerly known as Infact, has recently announced that it will be mounting an aggressive international campaign against corporate water interests, focusing especially on Coca-Cola. Corporate Accountability International, *Infact Changes Name to Corporate Accountability International, Expands Organizing: Leading Campaign Organization Challenges Abuses by Water, Food and Agribusiness, and Oil Industries* (2004), at <http://www.stopcorporateabuse.org/cms/page1189.cfm>. This organization has extensive experience in such campaigns, having waged a decade-long challenge to Nestlé S.A.'s infant formula marketing practices in developing nations that ultimately ended in the adoption of a code of marketing for infant formula products by the WHO. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1464-65 (1999) (discussing marketing practices that gave rise to this campaign). The group also coordinated strong consumer campaigns as part of an antitobacco effort, contributing to the eventual breakup of the RJR Nabisco consumer goods conglomerate and playing a not-insignificant role in the development of the WHO Framework Convention on Tobacco Control. See INFACT, GLOBAL AGGRESSION: THE CASE FOR WORLD STANDARDS AND BOLD U.S. ACTION CHALLENGING PHILIP MORRIS AND RJR NABISCO (1998), available at http://www.stopcorporateabuse.org/files/pdfs/Global%20Aggression_2005.pdf.

198. Cf. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1 (1992) (explaining that "epistemic communities" (networks of experts who have superior policy-oriented knowledge) facilitate the circulation of new ideas within societies and throughout the world).

199. Polaris Institute, About Us: The Origins of the Polaris Institute, at http://www.polarisinstitute.org/about_us/about_us_index.html.

200. Richard Girard, *Coca-Cola Company: Inside the Real Thing*, (Oct. 2004), available at http://www.polarisinstitute.org/corp_profiles/public_service_gats_pdfs/coca_cola.pdf.

in a variety of pressure and awareness campaigns, such as a consumer-focused “Coca-Cola Accountability Tour” that was held throughout the United Kingdom, a number of student initiatives in the United States that have sought cancellation of university soft drink contracts, and a series of boycott campaigns that have targeted various institutions with far more attenuated connections to Coca-Cola than traditional boycott subjects. The Royal Bank of Canada, for instance, has found itself the subject of a pressure campaign simply because it shares a common board member with Coca-Cola.²⁰¹

Perhaps the most intriguing development in the Coca-Cola controversy takes the form of a hedge fund that has been designed specifically to profit from a decline in the company’s stock price.²⁰² Founders of the fund have selected Coca-Cola as their initial target in what will become a broader effort to identify companies that they believe are vulnerable to boycotts and protest campaigns based on the companies’ social and environmental records. According to the founders, any profits above the rate of return for long-term treasury bonds earned by the hedge fund’s short position on Coca-Cola will be donated to affected farmers in India, AIDS relief efforts in Africa, and human rights organizations in Central and South America.²⁰³ In addition, the fund will actively seek to promote boycotts and campaigns against Coca-Cola and other targeted companies by supporting an affiliated website, dubbed “KarmaBanque.” On this site, activists compile traditional corporate financial information and relate it to new indicators, such as a measurement of the degree of “ill will” expressed by KarmaBanque community members toward a company, and a “Boycott Vulnerability Rating” that seeks to identify prime boycott targets based on the ratio of a company’s market capitalization to its trailing annual sales.²⁰⁴ In justifying these actions, the founders explain that they are “simply picking up on a trend and giving people the tools to use. The Internet allows people, activists, from all over the world to gather, or swarm, and hit a company where it hurts most—in their stock price.”²⁰⁵

201. CAMPAIGN TO STOP KILLER COKE, ROYAL BANK OF CANADA: ‘DUMP REINHARD FROM YOUR BOARD OR WE’LL DUMP YOU!’, available at http://www.polarisinstitute.org/polaris_project/water_lords/campaigns/rbc11.pdf.

202. Thomas M. Kostigen, *Hedge Fund Banking on Social and Moral Issues*, WASH. POST, Dec. 25, 2004, at D7.

203. *Id.*

204. <http://www.karmabanque.com>. Such measures help consumer boycotters achieve the most bang for their (withheld) buck by identifying those companies whose stock price is most dependent on consumer sales.

205. Kostigen, *supra* note 202, at D7. HeinOnline -- 83 Tex L. Rev. 2153 2004-2005

B. Consumption, Investment, and Disaggregated Democracy

The Coca-Cola controversy instantiates a series of dramatic developments that have been occurring as part of a global shift from “government to governance.”²⁰⁶ The latter concept may be thought to include all “processes and institutions, both formal and informal, that guide and restrain the collective activities of a group.”²⁰⁷ It may be distinguished from the former concept based chiefly on the number and diversity of actors, both public and private, that contribute to its formation, operation, and evolution. From the governance perspective, the much-noted exponential increase in the number, variety, and sophistication of NGOs active in global politics²⁰⁸ reflects deep changes at work in the relationship between individuals and their governments. Rather than vertically aligning themselves within conventional hierarchical types of political structures, individuals and entities increasingly seem to view themselves as participants in a horizontal form of democracy.²⁰⁹ Principles of behavior emerge on this horizontal plane, not from top-down edicts by elected representatives or bureaucratic officials, but rather from bottom-up interactions among relevant

206. Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014, 1018 (1996–1997) (stating that “there has been a shift from ‘government’ to ‘governance,’ as the central political institutions of the state have found it increasingly difficult to resolve social conflicts or to reconcile the diversity of social interests”).

207. ROBERT O. KEOHANE & JOSEPH S. NYE, JR., *Introduction to GOVERNANCE IN A GLOBALIZING WORLD* 1, 12 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000).

208. See U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1999, at 35 (1999) (“One big development in opening opportunities for people to participate in global governance has been the growing strength and influence of NGOs—in both the North and the South.”). For illuminating accounts in the context of international environmental law, see John McCormick, *The Role of Environmental NGOs in International Regimes*, in THE GLOBAL ENVIRONMENT, *supra* note 38, at 52, 55–57 (describing the history, influence, and complex structure of international environmental NGOs); Thomas Princen et al., *Nongovernmental Organizations in World Environmental Politics*, 7 INT'L ENVTL. AFF. 42, 46 (1995) (attributing the growth of NGOs to the opening of a “critical niche created by the global ecological crisis, the need for a new politics, and the inadequacies of scientific management”).

209. See Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041, 1071–72 (2003) [hereinafter Slaughter, *Global Government Networks*] (describing “an emerging horizontal conception of democracy, which imagines self-government as the product of a much richer set of interactions among individuals and groups in both public and private fora”). More recently, Dean Slaughter has focused her treatment of “disaggregated democracy” on the interactions that occur between various sub-units of the state across international reaches, as opposed to the more dramatically cosmopolitan pastiche of interactions among public and private actors that attracts the attention and support of many other governance scholars. See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 5 (2004) [hereinafter A NEW WORLD ORDER] (inviting her readers to “[s]tart thinking about a world of governments, with all the different institutions that perform the basic functions of governments . . . interacting both with each other domestically and also with their foreign and supranational counterparts”). In this manner, she hopes to offer a compromise position between the extremes of a radically public vision of “world government,” which strikes her as “infeasible and undesirable,” and a radically private vision of “global governance,” which strikes her as raising significant concerns of accountability and representativeness. *Id.* at 8–10.

stakeholders.²¹⁰ Distinctions between public and private carry far less weight in this context, as do distinctions between citizen and consumer, or voter and investor. Indeed, a critical component of this “disaggregated” democracy viewpoint is the notion that individuals express “multiple selves operating in multiple parallel fora to advance their interests and develop their identities.”²¹¹

Because conventional channels of government are seen as too narrow and too rigid to accommodate the variety of ways in which people identify themselves and associate with each other—not to mention the variety of ways in which their interactions generate normative and practical disputes—new forms of regulation have arisen. In particular, “self-organizing, self-transforming, and de-territorialized” networks or communities of actors have begun to “compile and cumulate knowledge, problem-solving capacity, and normative frameworks.”²¹² The state does not disappear on this view, but rather shifts its role to a more passive one of facilitation, not regulation.²¹³ Enabling the flow of information, for instance, becomes a critical means by which states support the effective formation and operation of private governance networks. Similarly, intergovernmental organizations play a critical role on the international plane by defining vital policy issues, identifying key decisionmakers and constituencies, and catalyzing substantive policy progress through the creation of dialogue channels among the identified parties.²¹⁴ In short, both domestically, where deregulation, privatization, and a steady campaign of government skepticism have contributed to a rise of alternative governance mechanisms, and internationally, where such mechanisms fill an otherwise sparsely occupied regulatory terrain, scholars have been forced to modify their political theories to reflect “the empirical fact of mushrooming private governance regimes in which individuals, groups, and corporate entities . . . generate the rules, norms, and principles they are prepared to live by.”²¹⁵

210. Cf. HAROLD K. JACOBSON, NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL POLITICAL SYSTEM 386 (1984) (noting that at the global level, “[d]ecentralization has been essential to satisfy the desire for participation and also to deal more adequately with complexity”).

211. Slaughter, *Global Government Networks*, *supra* note 209, at 1068. See also MICHAEL EDWARDS, FUTURE POSITIVE: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 178 (1999) (describing a similar notion of “multiple citizenship”).

212. Slaughter, *Global Government Networks*, *supra* note 209, at 1072.

213. *Id.* at 1072–73 (observing that the state’s role may become “not to regulate directly, but rather to manage [governance] processes by facilitating problem solving and information pooling”). Cf. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 286–89 (1998) (offering a conception of democratic experimentalism in which “[t]he chief role of Congress . . . would be to authorize and finance experimental reform by states and other subnational jurisdictions”).

214. SLAUGHTER, A NEW WORLD ORDER, *supra* note 209, at 6.

215. *Id.* at 194. See also Kal Raustiala, Note, *The “Participatory Revolution” in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 572 (1997) (“The sovereign state is perceived as possessing diminishing importance, while conversely NGOs are increasingly connecting citizens

An important manifestation of these trends can be found in various public and private efforts to promote what might be called *regulation-based markets* for consumer products and capital investments. The practice of infusing market elements into public policy has received great attention within environmental law and natural resources law literatures, as evidenced by the pervasiveness of the term *market-based regulation*.²¹⁶ The converse notion of infusing public policy elements into markets, however, has attracted comparatively little notice, perhaps because such a notion appears undesirable or even paradoxical from within the market liberalism framework.²¹⁷ Nevertheless, efforts to engage in collective, public-regarding action through private market behavior have been a longstanding feature of the mass consumer marketplace²¹⁸ and, as the Coca-Cola controversy indicates, seem to have intensified in scope and significance in recent decades.²¹⁹ Moreover, in addition to the type of negative campaigns described in the previous Part, a growing number of civil society organizations, business leaders, and government actors also are seeking to institute more affirmative means of promoting corporate social responsibility. Because these campaigns aim to promote environmental and social policy goals through decentralized market transactions, they offer an interesting theoretical bridge between the frameworks of sustainable development and market liberalism.

Within consumer product markets, for instance, the practice of *eco-labeling* seeks to distinguish certain goods based on their superior environmental production or performance characteristics, such as sustainable harvesting in the case of renewable resources or relative energy efficiency in

to problems and policy, often usurping governance functions traditionally associated with governments.”).

216. Much of the relevant literature is summarized in Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 94–127 (2001).

217. In domestic water law, for instance, courts long refused to uphold conservation easements or to recognize retirement of water rights as an acceptable use. In such cases, the altruistic preferences of preservationists did not fit the expectations of the legal system, even though the system was otherwise inclined to promote property rights and individual autonomy within resource decisionmaking. See Thompson, *Water Allocation and Protection*, *supra* note 36, at 484 (“Under the prior appropriation doctrine . . . people interested in preserving instream flows for fishing, environmental, or other purposes were not permitted to ‘appropriate’ water themselves for use in the stream.”); Thompson, *Markets for Nature*, *supra* note 175, at 286–91 (describing legal impediments to private acquisition of instream rights).

218. Indeed, in an important recent book, historian T.H. Breen argues that American colonists’ experiences as consumers provided critical cultural resources and forms of effective social action that ultimately helped to enable full-scale revolution. See generally T.H. BREEN, *THE MARKETPLACE OF REVOLUTION: HOW CONSUMER POLITICS SHAPED AMERICAN INDEPENDENCE* (2004).

219. See generally Kysar, *supra* note 44 (documenting the rise of various forms of public-regarding activity among consumers, as well as political and legal controversies raised by such activity).
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the case of appliances and electronic goods.²²⁰ Similarly, *fair trade labeling* seeks to identify goods that have generated a premium above market prices for the original producer, often defined as an amount sufficient to constitute a “living wage.”²²¹ Other certification schemes concern such process-related issues as child labor, occupational safety, and collective bargaining opportunities; animal testing and animal confinement practices; organic farming, integrated pest management, and other specialized agricultural techniques; and incidental effects of production on dolphins, migratory birds, and other wildlife. Although such product labels may be organized as government programs,²²² they more commonly take the form of private schemes that are developed collaboratively by civil society organizations, industry representatives, scientific experts, and other nongovernmental actors.²²³ In either case, they properly may be viewed as a form of private governance in that the achievement of a public policy outcome is made to depend on the voluntary, decentralized decisions of countless individual consumers.

Similar efforts can be seen within capital markets, where socially responsible investment funds, activist pension fund leaders, watchdog NGOs, farsighted insurance companies, and a variety of other groups have combined to exert pressure on large commercial enterprises to engage in so-called “triple bottom line reporting.”²²⁴ The Global Reporting Initiative, for instance, is a multi-stakeholder coalition that seeks “to create and refine a consistent, comparable format for companies to use to voluntarily report on the economic, environmental, and social impact of their actions.”²²⁵ Originally organized by the Coalition for Environmentally Responsive Economies as a partnership involving social and environmental NGOs, industry members, accounting groups, and government agencies, the Global Reporting Initiative now exists as an independent institution that works in

220. See JAMES SALZMAN, *ORG. FOR ECON. CO-OPERATION & DEV., ENVIRONMENTAL LABELLING IN OECD COUNTRIES* 11–14 (1991) (defining “environmental labeling” as “the voluntary granting of labels by a private or public body in order to inform consumers and thereby promote consumer products which are determined to be environmentally more friendly than other functionally and competitively similar products”).

221. See Errol E. Meidinger, *The New Environmental Law: Forest Certification*, 10 *BUFF. ENVTL. L.J.* 211, 247 (2002–2003) (describing “a whole set of ‘fair trade’ products for which primary producers are certified to have been paid a living wage, and accorded locally appropriate labor standards”).

222. Particularly when established as government programs, such process-based labeling raises challenging issues under the GATT/WTO trading regime. See Kysar, *supra* note 44, at 541–47 (“Although the history of international trade reveals many examples of trade restrictions based on the manner in which foreign goods are produced, in recent years the legitimacy of such measures has come under intense scrutiny.”) (internal citation omitted).

223. See, e.g., Meidinger, *supra* note 221, at 237–41 (providing an extended analysis of the Forest Stewardship Council, a worldwide coalition of representatives from the forest industry, environmental NGOs, indigenous people, community groups, labeling organizations, and other bodies formed to provide an overall system for monitoring and assessing international forest certification systems).

224. Williams, *Civil Society Initiatives*, *supra* note 182, at 468–69.

225. *Id.* at 471. HeinOnline -- 83 Tex L. Rev. 2157 2004-2005

close cooperation with the U.N. Environment Programme and the U.N. Global Compact.²²⁶ Through its collaborative processes, the Initiative develops corporate reporting guidelines that cover the entire range of issues relevant to sustainable development. Its protocol for water management reporting, for instance, seeks to present a comprehensive view of how an organization interacts with the local environment through its withdrawal, use, and discharge of water.²²⁷ Indeed, if the Coca-Cola bottling facility in Plachimada were to comply with this protocol, then it would be required to disclose precise details regarding its groundwater use as a percentage of the annual renewable supply,²²⁸ the very information that presently eludes village residents in their attempt to hold Coca-Cola accountable for groundwater scarcity.

The European Union and a variety of its member countries regard this kind of social and environmental reporting to be a key policy tool in the pursuit of sustainable development. They have accordingly moved to formalize disclosure obligations as a matter of corporate law.²²⁹ Even when imposed by regional or national law in this manner, corporate social and environmental reporting still constitutes a significant departure from

226. Global Reporting Initiative, GRI at a Glance, at <http://www.globalreporting.org/about/brief.asp>.

227. GLOBAL REPORTING INITIATIVE, WATER PROTOCOL 1-6 (2003), available at <http://www.globalreporting.org/guidelines/protocols/WaterProtocol030501.pdf>.

228. *Id.* at 5, 17.

229. See, e.g., COMMISSION OF THE EUROPEAN COMMUNITIES, A SUSTAINABLE EUROPE FOR A BETTER WORLD: A EUROPEAN UNION STRATEGY FOR SUSTAINABLE DEVELOPMENT (COMMISSION'S PROPOSAL TO THE GOTHENBURG EUROPEAN COUNCIL) 8 (2001) (inviting large companies "to publish a 'triple bottom line' in their annual reports to shareholders that measures their performance against economic, environmental and social criteria"), available at http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0264en01.pdf; Commission Recommendation of 30 May 2001 on the recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies, 2001 O.J. (L 156) 33, 33-35 (recommending standardized corporate environmental reporting procedures). Although typically phrased in terms of relevance to understanding a company's position from an investment perspective, the scope of such disclosure obligations is understood to encompass a broad range of nonfinancial factors. For instance, newly adopted regulations in the United Kingdom require expansive social and environmental disclosure on the theory that, from an "enlightened shareholder" perspective, risks such as climate change, persistent organic pollutants, nonrenewable resource use, biodiversity loss, unfair labor practices, involvement in government corruption, and so on might affect a company's long-term financial position. See The Companies Act 1985 (Operating and Financial Review and Directors' Report etc.) (2005) SI 2005/1011 (requiring that a company's operating and financial reviews contain information on social issues and on the company's impact on the environment), available at <http://www.hmso.gov.uk/si/si2005/20051011.htm>; U.K. DEP'T OF TRADE AND INDUSTRY, THE OPERATING AND FINANCIAL REVIEW WORKING GROUP ON MATERIALITY: A CONSULTATION DOCUMENT 15 (2003) (noting that "issues that are of significant interest to customers, to employees, to suppliers and to society more widely are, or will very likely become, matters of concern to shareholders too"), available at <http://www.dti.gov.uk/cld/ofrwgcon.pdf>. See also Cynthia A. Williams & John M. Conley, *An Emerging Third Way?: The Erosion of the Anglo-American Value Construct*, 38 CORNELL INT'L L.J. (forthcoming 2005) (describing European Union and United Kingdom disclosure law developments).
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conventional regulatory approaches to public policy goals such as environmental sustainability or social equity. Unlike conventional approaches, the state in a disclosure regime mandates nothing beyond the provision of information to interested nonstate actors who, in turn, are believed likely to utilize such information in ways that promote collectively desirable standards of behavior.²³⁰ As Orly Lobel has noted, governance approaches of this nature offer “a vibrant, alternative ethos to two oppositional orthodoxies—regulation and deregulation.”²³¹ They also might be said to offer a useful conceptual linkage between the otherwise irreconcilable paradigms of sustainable development and market liberalism.

By leaving intact the basic norms of private property, consumer sovereignty, and shareholder supremacy, disclosure obligations do little violence to the framework of market liberalism, yet they simultaneously offer individuals a vehicle for pursuing collective goals that the framework tends to discount or exclude.²³² The investor who channels her funds to socially responsible firms engages in a private economic act that is of foundational importance to market liberalism, yet her act simultaneously seems to express a judgment that market rates of return should not come at the expense of workers, the environment, or future generations. She seeks, therefore, to self-impose the very type of sustainability constraint that neoclassical economic growth theory has been slow to recognize as necessary within its vision of an intergenerational free market.²³³ Similarly, the consumer who purchases sustainably harvested, fairly traded products in one sense

230. See COMMISSION OF THE EUROPEAN COMMUNITIES, COMMUNICATION FROM THE COMMISSION CONCERNING CORPORATE SOCIAL RESPONSIBILITY: A BUSINESS CONTRIBUTION TO SUSTAINABLE DEVELOPMENT 6 (2002) (noting that enhanced disclosure enables consumers to “reward socially and environmentally responsible firms” and financial stakeholders to identify the “success and risk factors inherent in a company and its responsiveness to public opinion”), available at http://europa.eu.int/comm/employment_social/soc-dial/csr/csr2002_en.pdf. See also Giandomenico Majone, *The New European Agencies: Regulation by Information*, 4 J. EUR. PUB. POL’Y 262, 265 (1997) (noting that regulation by information operates by attempting “to change behavior indirectly, either by changing the structure of incentives of the different policy actors, or by supplying the same actors with suitable information”); John M. Conley & Cynthia A. Williams, Engage, Embed, and Embellish: Theory and Practice in the Corporate Social Responsibility Movement 55 (Mar. 23, 2005) (unpublished manuscript) (“Even in the U.K., where the national government has taken an overt, top-down regulatory role, what is regulated is disclosure, not behavior; behavior will be determined through a private discourse in which markets will presumably have the ultimate say.”), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=691521.

231. Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498, 499 (2004). See also Slaughter, *Global Government Networks*, *supra* note 209, at 1065 (noting that the “basic paradigm for global regulatory processes is the promulgation of performance standards, codes of best practices, and other aspirational models based on compiled comparative information”).

232. Cf. Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1694 (2003) (noting that “cosmopolitan action by [civil society organizations] is, all things equal, more legitimate than cosmopolitan action by liberal democracies precisely because centralized coercion is not needed in the former case”).

233. See *supra* subpart II(A).

reinforces the primacy of market transactions; yet, her purchase also seems to condemn the ideas that particular living species or natural resources are not worth preserving for future generations, or that after-the-fact transfer payments are adequate to achieve intragenerational distributive equity. In short, by adopting an integrationist approach to investor and consumer preference—in which individuals are empowered and encouraged to evaluate personal desires jointly alongside expected impacts of market activity on other parties and other life forms—the practices of responsible investment and ethical consumption accept market liberalism's placement of individual choice as the central welfare criterion for societal decisionmaking, but simultaneously reject its view that efficiency, equity, and sustainability are separable goals requiring separate instruments of satisfaction and control.

C. *The Self-Reinforcing Primacy of Market Liberalism*

As one can see, the effort to promote sustainable development through market pressure assumes a variety of forms, ranging from campaigns by civil society organizations to devalue a firm's reputational capital through boycotts, counteradvertisements, and other purely private means, to publicly-imposed legal requirements that firms disclose social and environmental information to consumers and investors. Because environmental law in general has evolved from a system of "centralized planning to a more decentralized, inclusive system that increasingly relies on markets and on voluntary compliance with environmental norms,"²³⁴ it is only natural that civil society groups would shift much of their attention to influencing market incentives and market structures in this manner. By linking consumer product sales and securities investments with broader social and environmental issues, these groups attempt to close the critical gap that they believe exists between the aims of shareholder wealth maximization and *stakeholder welfare maximization*. The founders of the anti-Coca-Cola hedge fund, for instance, pledged to continue their brand of guerilla capitalism "until Coca-Cola's share price fully reflects the damage done by the corporation."²³⁵

Naturally, many observers are displeased with these developments. In a well-publicized example earlier this year, the chairman of Shell acknowledged that climate change threatens "disaster" for the world, but insisted that "a regulatory environment has to be determined by government," rather than by market-based efforts to extract voluntary commitments or behavioral changes from corporations.²³⁶ Similarly, a recent

234. Tarlock, *supra* note 171, at 41.

235. Max Keiser, *KarmabanQue . . . It's Time to Take Down Coca-Cola*, THE ECOLOGIST, Dec. 2004–Jan. 2005, at 14.

236. He continued: "Whether you like it or not, we live in a capitalist society. If we at Shell ceased to find and extract and market fossil fuel products while there was demand for them, we

survey in *The Economist* objected to the growing corporate social responsibility movement by arguing that properly structured and regulated markets serve the public good without need for any additional constraints on corporate decisionmaking.²³⁷ Although the editors recognized the importance of “public intervention” in order to ensure sustainable development,²³⁸ they nevertheless sought to preserve the dominant conception of corporate governance by deploying the now-familiar separationist tendency of market liberalism: Private corporations should be permitted—indeed required—to pursue the single maximand of shareholder value, while concerns regarding distributive equity, environmental harm, and other consequences of corporate activity should be left to the “political process.”²³⁹

This separationist approach to policymaking assumes that the success or failure of public action is independent of the behavior of those private actors who are sought to be charged with duties of social and environmental responsibility. However, the same economic forces that discipline firms and managers to pursue the maximization of shareholder value also might lead them to seek the minimization of regulatory burdens.²⁴⁰ Shell’s long-time membership and support of an energy industry lobbying group, for instance, goes a long way toward explaining why the international community until recently lacked even the rudiments of the “regulatory environment” that its chairman now acknowledges is necessary.²⁴¹ Similarly, Coca-Cola in recent years has focused its direct U.S. political contributions on congressional representatives who exercise oversight of federal nutrition policy, and who support legislation to protect the food industry from obesity-related tort lawsuits.²⁴² The company also has spent millions of dollars in the United States on more specific lobbying efforts, such as a successful campaign to block state legislation in Texas that would have financed public water

would fail as a company.” Saeed Shah, *Shell Boss Warns of Global Warming “Disaster”*, THE INDEPENDENT, Jan. 26, 2005, available at 2005 WLNR 1770807.

237. Clive Crook, *The Good Company: A Survey of Corporate Social Responsibility*, THE ECONOMIST, Jan. 22, 2005, at 4 (“[G]etting the most out of capitalism requires public intervention of various kinds, and a lot of it: taxes, public spending, regulation in many different areas of business activity. It also requires corporate executives to be accountable—but to the right people and in the right way.”).

238. *Id.*

239. *Cf. supra* text accompanying note 72. See also Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 52–58 (2004) (describing arguments that “shareholder primacy” improves corporate management performance and that making corporations responsible for social concerns would actually create opportunities and incentives for management to self-deal).

240. See Chen & Hanson, *supra* note 239, at 111–21.

241. See Douglas A. Kysar & James Salzman, *Environmental Tribalism*, 87 MINN. L. REV. 1099, 1123–25 (2003) (describing oil companies’ efforts to influence public debate about global warming by funding NGOs).

242. Girard, *supra* note 200, at 32.

infrastructure improvements through a five cent tax on bottled water.²⁴³ In light of such activities, proponents of sustainable development justifiably might fear a whipsaw effect from the insistence that shareholder wealth maximization and public policy goals must be pursued independently.

One can go further. The regulated community might have an interest not only in defeating or distorting particular policy initiatives, but also in promoting a cultural and ideological climate in which public action more generally is viewed with derision. For instance, in crude historical outline, one might say that Milton Friedman's legendary 1970 essay extolling the shareholder maximization model of corporate responsibility,²⁴⁴ which was later famously applied by William Simon and Irving Kristol to the exercise of corporate philanthropy,²⁴⁵ gradually led large commercial enterprises in the United States to view charitable support of educational, cultural, and political institutions as a form of investment that, like all other aspects of their business, should produce an adequate return. Moreover, a veritable guidebook for philanthropic investment consistent with this view was provided by an influential memorandum written to the leadership of the U.S. Chamber of Commerce by soon-to-be Supreme Court Justice Lewis Powell in 1971, right at the height of an extraordinary bipartisan binge of environmental lawmaking.²⁴⁶ As journalism historian Jerry Landay notes, Powell's call for long-term intellectual investment was answered by several prominent, wealthy conservatives who proceeded to fund think tanks, research centers, endowed professorships, scholarly journals, student groups, media organizations, and other tools for promoting the ideology of "American Free Enterprise."²⁴⁷ The efforts of these various individuals and organizations to consolidate conservative power and to reshape American politics were so successful that, by the mid-1990s, "[f]or the first time in the

243. *Id.*, § 3.4.

244. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM17.

245. WILLIAM E. SIMON, A TIME FOR TRUTH 230 (1978) ("[F]unds generated by business . . . must rush by multimillions to the aid of liberty . . . to funnel desperately needed funds to scholars, social scientists, writers and journalists who understand the relationship between political and economic liberty."). See FRANK KOCH, THE NEW CORPORATE PHILANTHROPY: HOW SOCIETY AND BUSINESS CAN PROFIT 129 (1979) ("[W]hen you give away your stockholders' money, your philanthropy must serve the longer-term interest of the corporation. Corporate philanthropy should not be, cannot be disinterested.") (quoting Irving Kristol).

246. Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, U.S. Chamber of Commerce Education Committee (Aug. 23, 1971), published as The Powell Memorandum, Washington Rep., Supp. No. 2900 (U.S. Chamber of Commerce 1971), available at <http://www.mediatransparency.org/stories/powellmanifesto.htm>. As Oliver Houck notes, Powell's confidential memorandum was published by the Chamber of Commerce after it was leaked to a syndicated newspaper columnist. Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 31 n.178 (2003).

247. See Jerry M. Landay, *The Powell Manifesto: How a Prominent Lawyer's Attack Memo Changed America*, at <http://www.mediatransparency.org/stories/powell.htm> (Aug. 20, 2002).

three-decade long history of modern environmental law, consensus legislation was no longer a politically viable option.”²⁴⁸

Although vastly oversimplified,²⁴⁹ this account is generally corroborated by commentators who are both critical and laudatory of the late twentieth century rise of popular conservative intellectualism in the United States.²⁵⁰ For purposes of this Article, the important point simply is that the historical and cultural contingency of preferences should be taken seriously, not only because it confounds attempts to remain agnostic regarding the content of preferences in the public sphere,²⁵¹ but also because it highlights possible self-reinforcing tendencies within the framework of market liberalism itself. Whatever one’s view regarding its normative implications, the long-term investment in ideological change championed by Powell and others seems to have yielded precisely the desired return: “An opinion poll taken in 1964 showed 62 percent of the respondents trusting the government to do the right thing; by 1994 the number had dwindled to 19 percent.”²⁵²

In essence, market liberalism seems to give rise to its own forces for reasserting and strengthening the perception of its dominance. Accordingly, the growing effort of sustainable development proponents to seek mechanisms of private global governance might simply reflect a concession to, or even a consequence of, market liberalism’s self-reinforcing primacy. If that claim is accurate, then the most pertinent question arising out of ethical consumption and socially responsible investment is not whether such governance mechanisms will be sufficient to ensure sustainable development, but instead whether they can be maintained long enough to generate economically benefited constituencies that, in turn, will be capable of investing in the mechanisms’ long-term political and cultural success. Here again, the state cannot maintain a neutral position. For a variety of reasons—because markets frequently cannot be relied on to generate appropriate levels of

248. LAZARUS, *supra* note 88, at 153.

249. For a much more extensive treatment that couples historical details with a social psychological account of how certain schemas have come to dominate policymaking, such as the shareholder wealth maximization schema of corporate governance and the efficiency-equity separation schema of law and economics, see generally Chen & Hanson, *supra* note 239.

250. See JOHN MILLER, STRATEGIC INVESTMENT IN IDEAS: HOW TWO FOUNDATIONS RESHAPED AMERICA 5–7 (2003) (describing the “remarkable achievement[s] of the modern intellectual conservative movement with focus on the Olin and Bradley Foundations); James Piereson, *You Get What You Pay For: Conservative Philanthropists Invested In Ideas, And The Payoff Was Huge*, WALL ST. J., July 21, 2004, at A10 (describing successes of the conservative foundation movement of the 1970s and calling for a “new generation of conservative philanthropists”).

251. See *supra* text accompanying notes 110–16.

252. Lewis H. Lapham, *Tentacles Of Rage: The Republican Propaganda Mill, A Brief History*, HARPER’S MAGAZINE, Sept. 2004, at 31, 39. One can tell a similar tale regarding post-war investment by commercial interests in the development and maintenance of an American culture inclined to view commodified purchase as a primary means of expression, identity formation, and civic engagement. See generally LIZABETH COHEN, A CONSUMER’S REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA (2005), *Harvard Law Rev.* 2163 2004-2005.

disclosure regarding social and environmental impacts of production, because various parties have begun to seek government aid in discouraging even the voluntary disclosure of such information, and because, in any event, disclosure regimes cannot be determined by reference to preferences, but instead partially determine preferences²⁵³—the public role will be both critical and unavoidable.

IV. Conclusion: The Real Thing?

During the lead-up to the U.N. World Summit on Sustainable Development, which was held in Johannesburg, South Africa in 2002, two points of consensus emerged among delegates and observers: first, “that progress in implementing sustainable development ha[d] been extremely disappointing since the 1992 Earth Summit, with poverty deepening and environmental degradation worsening”²⁵⁴; and second, that little if any formal multilateral action was likely to be achieved or even agreed to in principle at Johannesburg, despite the overwhelming sense that necessary progress had been lacking.²⁵⁵ The reason for the second of these grim assessments had to do with the perceived obstructionist position of the United States, which had forced negotiators to abandon more ambitious goals for the Summit and to instead embrace what became known as “Type II deliverables”²⁵⁶—essentially uncoordinated, voluntary projects and agreements among individual nations, private corporations, NGOs, and other actors that in some fashion were thought to contribute to the pursuit of sustainable development. All told, 280 “public-private partnerships” along these lines were announced before or during Johannesburg,²⁵⁷ including 25 U.S. partnerships representing total investments of \$125 million.²⁵⁸

253. See Kysar, *Regulation of Consumer Choice*, *supra* note 44, at 625–32 (summarizing evidence that consumer preferences, and in particular altruistic consumer preferences, are context-dependent, such that regulators cannot determine product information disclosure policies solely by reference to preferences, and instead must make independently reasoned normative judgments).

254. Pring, *supra* note 181, at 413–14.

255. *Id.*

256. See Partnerships/Initiatives to Strengthen the Implementation of Agenda 21 (To be elaborated by interested parties in preparation for the World Summit on Sustainable Development for launching at the Summit): Explanatory note by the Chairman of the Preparatory Committee, U.N. 2002 World Summit on Sustainable Development, *at* http://www.johannesburgsummit.org/html/documents/prep2final_papers/wssd_description_of_partnerships2 (“These ‘second type’ of outcomes would consist of a series of commitments and action-oriented coalitions focused on deliverables and would contribute in translating political commitments into action.”).

257. United Nations, *Johannesburg Summit 2002*, at 4 (Sept. 2002), *at* http://www.johannesburgsummit.org/html/documents/summit_docs/2009_keyoutcomes_commitments.doc (stating that one of the key outcomes was “[a]ctively promot[ing] corporate responsibility and accountability, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships, and appropriate national regulations”).

258. Pring, *supra* note 181, at 415.

As the conference sponsors noted, these developments represented something of a sea change in the practice of international environmental law: Whereas previous global environmental summits had produced important multilateral declarations, treaties, and other international law documents, Johannesburg's more narrow, practical approach represented "a major departure . . . that could have a major effect on the way the international community approaches problem solving in the future."²⁵⁹ In one sense, the Summit's central focus on public-private partnerships and other bottom-up approaches to achieving sustainable development simply reflects the vision of disaggregated democracy that political theorists have offered in recent years to explain the overall shift from government to governance.²⁶⁰ In a more challenging sense, however, Johannesburg also seems to reflect the creeping influence at the global level of market liberalism, particularly with respect to the framework's exaltation of the private sphere and corresponding denigration of the public sphere. The United States crisply projected such a view at Johannesburg when it emphasized the need to prefer the "concrete projects" of private actors over the "paper agreements" of states in the pursuit of sustainable development.²⁶¹ Many observers regarded this U.S. stance as awkwardly opportunistic: In their view, having contributed to the failure of numerous international "paper agreements" in the past, the United States and its constituents now sought to benefit from the perception of those agreements' inefficacy.²⁶²

This Article has suggested that similar self-fulfilling prophecies may be at work within the political philosophy of market liberalism and that, accordingly, certain emerging mechanisms of private global governance may represent an important compromise position for states to support while the deeper struggle between sustainable development and market liberalism continues. Undoubtedly, the practices of conscientious consumption and socially responsible investment will appear to be modest or inadequate policy devices to most proponents of environmental sustainability and distributive equity. Such regulation-based market approaches depend on voluntary, altruistic behavior in the context of what conventionally are seen as profound collective action problems that necessitate strong, coordinated public

259. Johannesburg Summit 2002, What's New, Feature Story, The Johannesburg Summit Test: What Will Change?, at http://www.johannesburgsummit.org/html/whats_new/feature_story41.html. See also Edith Brown Weiss, *The Emerging Structure of International Environmental Law*, in THE GLOBAL ENVIRONMENT, *supra* note 38, at 98, 102 ("In international environmental law, the most important development for the next century may be the emerging interaction of intergovernmental environmental law with transnational environmental law developed primarily by the private sector . . .").

260. See *supra* subpart III(B).

261. Pring, *supra* note 181, at 414.

262. *Id.* HeinOnline -- 83 Tex L. Rev. 2165 2004-2005

action.²⁶³ Nevertheless, such practices remain significant because they provide individuals with an outlet for expressing public values through mediums that simultaneously appear within market liberalism as central theaters of choice, opportunity, and responsibility. Indeed, given that the framework of market liberalism appears to exert a powerful and perhaps self-reinforcing influence over political and cultural life, individuals may well come to view acts of public-regarding consumption and investment as their most appropriate mechanisms for influencing the policies and conditions of a deregulated, privatized, and globalized world. The primary importance, therefore, of environmental and social disclosure programs may lie not in their ability to fulfill the actual policy functions of more traditional regulatory approaches, but rather in their capacity to preserve the kind of space for public-regarding sentiment that sustainable development regards as minimally necessary, and that market liberalism regards as maximally suspicious.

263. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968) (famously using the example of pasture overgrazing to illustrate the problem of overuse of common pool resources).
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