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The Future of Enterprise Regulation: Corporate Social Accountability and Human Freedom

ABSTRACT

Free market capitalism is understood by most Americans as instrumental to the American dream, providing ordinary people with the economic means for their pursuit of happiness. The benefits of free enterprise, however, increasingly accrue to a small fraction of already wealthy high income earners, corporate shareholders, and business interests with a long, consistent, and well-documented history of antagonism towards the interests of consumers, workers, society, and the natural environment. Emerging models of geopolitics, the economy, and the corporation suggest that this elitist, anti-regulatory posture of business is fast becoming obsolete as the value of human capital gains currency in the knowledge-driven, creative economy of the market state. The emergence of the market state can be viewed as a movement of economic democracy in which people expect accountability from business and free enterprise as a platform of opportunity for achieving their goals and realizing their dreams.

This Article examines the future of enterprise regulation from the moral perspective of social accountability, arguing that the era of global market states constitutes a new social charter in which business performs as a platform of freedom and opportunity for all. In this arrangement, legal and regulatory mechanisms structure business to reintegrate economic and social goals and capitalize human freedom. The measure of global business and market effectiveness is not just capital generation, but human flourishing. Imaginative business leaders will see this new era of capitalism as an opportunity for collaborative value-creating partnerships among diverse stakeholders in realizing the dream of human flourishing for America and the world.

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INTRODUCTION

FREE MARKET CAPITALISM IS UNDERSTOOD BY MOST AMERICANS as instrumental to the American dream, providing ordinary people with the economic means for their pursuit of happiness.¹ Most of the benefits of free enterprise, however, currently accrue to a small fraction of already wealthy high income earners, corporate shareholders, and business interests with a long, consistent, and well-documented history of antagonism towards the interests of consumers, workers, society, and the natural environment.² Emerging models of geopolitics, the economy, and the corporation suggest that this elitist, anti-regulatory posture of business is fast becoming obsolete as the value of human capital gains currency in the knowledge-driven, creative economy of the market state.³ The emergence of the market state is a movement towards economic democracy in which people expect accountability from business and free enterprise as a platform of opportunity for achieving their goals and realizing their dreams.⁴

This Article examines the future of enterprise regulation from the moral perspective of social accountability, arguing that the era of global market states constitutes a new social charter in which business performs as a platform of freedom and opportunity for all. In this arrangement, legal and regulatory mechanisms structure business to reintegrate economic and social goals and capitalize human freedom. The measure of global business and market effectiveness is not just capital generation, but human flourishing. Imaginative business leaders will see this new era of capitalism as an opportunity for collaborative value-creating partnerships among diverse stakeholders in realizing the dream of human flourishing for America and the world.

I. GLOBALIZATION AND THE AMERICAN DREAM

Drawing on the rich legacy of the U.S. Declaration of Independence, Bill of Rights, and Constitution, James Truslow Adams coined the phrase “the American dream,” described as

1. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 1–6, 7–21, 198–202 (40th anniversary ed., 2002); Charles Murray, *The Pursuit of Happiness Under Socialism and Capitalism*, 11 *CATO J.* 239, 248–49, 257–58 (1991) (demonstrating how a free market economy and limited governmental interference promotes the “Pursuit of Happiness”).

2. See THOMAS I. PALLEY, *PLENTY OF NOTHING: THE DOWNSIZING OF THE AMERICAN DREAM AND THE CASE FOR STRUCTURAL KEYNESIANISM* 1–10, 24–29 (1998) (demonstrating the increasing disparity in the American economy); see also Lisa A. Keister & Stephanie Moller, *Wealth Inequality in the United States*, 26 *ANN. REV. SOC.* 63 (2000) (presenting statistics, trends, and analysis of wealth inequalities in the United States); Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 *Q.J. ECON.* 1 (2003) (presenting statistics, trends, and analysis of income inequality in the United States).

3. See Ludwig von Mises, *The Causes of the Economic Crisis: An Address (1931)*, in *THE CAUSES OF THE ECONOMIC CRISIS: AND OTHER ESSAYS BEFORE AND AFTER THE GREAT DEPRESSION* 155–60 (Percy L. Greaves, Jr. ed., Bettina Bien Greaves & Percy L. Greaves, Jr. trans., Ludwig von Mises Inst. 2006) (1978).

4. See generally *id.* at 158.

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[T]hat dream of a land in which life should be better and richer and fuller for [everyone], with opportunity for each according to [] ability or achievement. It is a difficult dream for the European upper classes to interpret adequately, and too many of us ourselves have grown weary and mistrustful of it. It is not a dream of motor cars and high wages merely, but a dream of a social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position.⁵

While the material aspects of the American dream often have been emphasized, it is clear from Adams' original text that he also considered equality, hard work, and social order as essential elements for people to achieve the full measure of their human potential. The mythology of the American dream has become an emblematic feature of American popular culture, fueling a diverse range of hopes and desires.⁶ Scholars also observe the erosion of hard work and initiative as key elements of the American dream, attributing a more recent "get rich quick" attitude to the combined impact of industrialization that locks many people in low-paying, dead-end jobs, and escapist entertainment glamorizing conspicuous consumption.⁷ Although a substantial cohort of younger generation Americans may be likely to consider *American Idol* or the lottery as a more reliable path to fulfilling their dreams than building a business or pursuing a corporate career, the dream of bettering one's lot in life has broad appeal.⁸ As free enterprise spreads throughout the world, people in developing nations pursue their own dreams of improving their lives and communities by building a business.

Unlike hierarchical regimes ruled by elite social classes, this compelling dream of freedom, prosperity, and security is intimately linked to the social contract that the United States and most western democracies consider their legitimizing foundation.⁹ As people who do not share the historical foundation of secular pluralism and political individualism begin shaping their own dreams of freedom, prosperity, and security, the global dream takes on the character and shape of those cultures.¹⁰

5. JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 404 (1931).

6. See JIM CULLEN, *THE AMERICAN DREAM: A SHORT HISTORY OF AN IDEA THAT SHAPED A NATION* (2003) (conceptualizing the American Dream and offering numerous examples of its manifestations).

7. See, e.g., ROBERT EISENBERGER, *BLUE MONDAY: THE LOSS OF THE WORK ETHIC IN AMERICA* (1989) (criticizing the shift in American attitude from a strong work ethic to a preoccupation with leisure and discussing the factors that have contributed to this shift); DANIEL T. RODGERS, *THE WORK ETHIC IN INDUSTRIAL AMERICA 1850-1920*, at 1-29 (1978) (describing the development of the American work ethic and how the Industrial Revolution negatively effected the ethos).

8. See Matthew Warshauer, *Who Wants to Be a Millionaire: Changing Conceptions of the American Dream*, *AM. STUD. TODAY ONLINE*, Feb. 13, 2003, http://www.americansc.org.uk/Online/American_Dream.htm.

9. See, e.g., U.S. CONST. pmbl.; *THE DECLARATION OF INDEPENDENCE* (U.S. 1776).

10. See, e.g., Kellee S. Tsai, *Adaptive Informal Institutions and Endogenous Institutional Change in China*, 59 *WORLD POL.* 116, 123-35 (2006) (discussing the development of the private sector in socialist China and its shift toward market socialism).

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Scholars now theorize diverse models of capitalism (as in China, for example) rather than a single model of western democratic capitalism,¹¹ these observations cast new light on the American dream and the social contract that upholds it.

II. THE WESTERN SOCIAL CONTRACT: FOUNDATION OF THE AMERICAN DREAM

The western idea of a social contract was theorized by Hobbes¹² and refined by Locke,¹³ Kant,¹⁴ and Rousseau¹⁵ with recent critical enhancements by Buchanan,¹⁶ Gauthier,¹⁷ and Rawls¹⁸ that explain the origins of the State and establish grounds for its legitimacy, moral claims to sovereignty, and allegiance from the citizenry.¹⁹ In an original chaotic state of nature theorized by Hobbes as *bellum omnia contra omnes* (everyone at war with everyone)²⁰ in which human beings have natural rights and freedoms with no guarantees of protection from each other, people understandably are motivated by the inherent risks and dangers of the natural state to relinquish some of their rights and freedoms in exchange for the benefits of the social order that a supreme governing authority imposes.²¹

While there is a range of opinion and controversy about specific aspects of social contract theory and about the concept itself, the following principles are often understood as the foundation of a legitimate social contract:

1. Individuals are equal parties to the social contract.
2. Government is formed by the free consent of the governed.
3. Individuals exchange their natural rights and freedoms for civil rights and freedoms.
4. The contract can be renegotiated.
5. People have a right to rebel if the government is tyrannical.
6. The social contract is among people; the state and social institutions are products and instruments of the social contract.

11. See, e.g., *id.* at 127–40.

12. See THOMAS HOBBS, *LEVIATHAN* (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

13. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* (Ian Shapiro ed., Yale Univ. Press 2003) (1689).

14. IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Allen W. Wood ed. & trans., Yale Univ. Press 2002) (1785).

15. JEAN-JACQUES ROUSSEAU, *DISCOURSE ON POLITICAL ECONOMY AND THE SOCIAL CONTRACT* (Christopher Betts trans., Oxford Univ. Press 1994) (1762).

16. JAMES M. BUCHANAN, *THE ECONOMICS AND THE ETHICS OF CONSTITUTIONAL ORDER* (1991).

17. David Gauthier, *Between Hobbes and Rawls*, in *RATIONALITY, JUSTICE AND THE SOCIAL CONTRACT: THEMES FROM MORALS BY AGREEMENT* 24–40 (David Gauthier & Robert Sugden eds., 1993).

18. See JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999); John Rawls, *The Law of Peoples*, 20 *CRITICAL INQUIRY* 36 (1993).

19. See generally HOBBS, *supra* note 12; LOCKE, *supra* note 13.

20. See HOBBS, *supra* note 12, at 84–85.

21. *Id.* at 86–87.

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7. The state has a duty to protect and defend the civil rights and freedoms of its citizens.
8. The state has a duty to defend citizens from external threats and attacks.
9. The state has exclusive right to the use of force to impose order among its citizens.
10. Citizens have a duty of allegiance to the supreme will of the state.
11. Citizens have a duty to respect and defend the civil rights and freedoms of fellow citizens.
12. Citizens have a duty to respect the rules of society.²²

In sum, a legitimate social contract is undertaken with the free consent of individuals who act as equals to establish a social order for mutual advantage and relinquish sovereign authority to the State to govern according to agreed principles of law.²³

A modern nation state earns its continued legitimacy by providing citizens with 1) social identity, 2) security, and 3) social benefits.²⁴ A social identity may include language, culture, religion, and customs as well as geographic territory; security includes the rule of law and its enforcement to maintain internal social order as well as defense against external threats. Social benefits may include institutions and mechanisms to spread the burdens and risks necessary for shared goods such as arsenals, food supplies, or public treasuries.²⁵ Social contract theory admits the possibility of various forms of sovereignty to achieve these ends, most commonly monarchy, oligarchy, and democracy, all of which are represented in the modern community of nations.²⁶ Each of these may, in turn, take various forms. A monarchy, for example, may vest all authority and power in an absolute ruler, share power with a council or parliament, or establish a feudal system of mutual obligations and rights between lord and vassals.²⁷ Although the “original” social contract largely is understood as a discursive device, contemporary political theorists perpetuate its use as a framework for justice in the modern state.²⁸ Rawls, for example, in his Original Position behind the Veil of Ignorance, reframes and reinvents the State of Nature to posit a universal social contract based on justice to accommodate both democracies and “decent” nondemocratic societies that recognize the moral claims of justice and human rights.²⁹ The United Nations, founded on social con-

22. See, e.g., *id.* at 111–22.

23. See, e.g., *id.*

24. PHILIP BOBBIT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 213–28 (2002).

25. See generally *infra* Part V.

26. HOBBS, *supra* note 12, at 123.

27. J. K. BLUNTSCHLI, *THE THEORY OF THE STATE* 356–59, 382–438 (Oxford Univ. Press 2d ed. 1895) (1875).

28. RAWLS, *A THEORY OF JUSTICE*, *supra* note 18, at 118–23 (defining the veil of ignorance, as assuming persons in the theoretical original position before the social contract is made are unaware of their abilities or social status); Rawls, *The Law of Peoples*, *supra* note 18, at 43–56 (extending the principles of social contract theory and justice to the structure of all hierarchical societies).

29. See *supra* note 31 and accompanying text.

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tract principles,³⁰ therefore includes divergent political foundations to the community of nations, acknowledging the sovereignty of Saudi Arabia, China, and Thailand along with that of democracies such as France and the United States.³¹

For hundreds of years—certainly since the framing of the U.S. Constitution—the modern form of the social contract has been the nation state, originating in the 1648 Peace of Westphalia that ended decades of devastating religious wars in Europe.³² The Peace of Westphalia defined the nation by territorial boundaries and shifted the mechanism of national allegiance from the person of the ruler to the apparatus of the State, laying the foundation of internationally negotiated diplomatic, military, and commercial relationships among sovereign states that characterize the modern system of nation states.³³

Phil Bobbitt describes the modern nation state as a three-dimensional social contract involving security (external defense and internal social order), welfare (social benefits), and culture (social identity).³⁴ In exchange for allegiance to the State and fulfilling the duties of citizenship, citizens are assured of national borders protected from external threats, domestic security protecting people and property within national borders, and social benefits such as a fair judicial system, police and fire protection, public education, public roadways, railways, utilities, and regulation of commerce.³⁵ The autonomy of the nation state enables a high level of differentiated national culture within an international framework of law, diplomacy, and military force that grants legitimacy in the community of nations and supremacy within national borders to those nations capable of demonstrating their ability to fulfill the responsibilities of statehood.³⁶ Hence, the dubiously just consequence wherein the Ukrainians are a nation state, but the Kurds are not.³⁷ It is no wonder that nationless ethnic groups with a strong sense of cultural history and identity are among those questioning the social contract of the nation state.³⁸

30. U.N. CHARTER pmb1., art. 1, *available at* <http://www.un.org/aboutun/charter>.

31. Press Release, U.N. Information Services, United Nations Member States, U.N. Doc. L/37/06 (July 3, 2006), *available at* <http://www.un.org> (containing a complete list of countries party to the U.N. Charter).

32. The Peace of Westphalia of 1648 is actually a series of treaties which were signed in order to bring an end to the Thirty Years' War. The treaties include: Treaty of Peace between Spain and the Netherlands, signed at Munster, Jan. 30, 1648, 1 Consol. T.S. 3; Treaty of Peace between Sweden and the Empire, signed at Osnabruck, Oct. 24, 1648, 1 Consol. T.S. 198; Treaty of Peace between France and the Empire, signed at Munster, Oct. 24, 1648, 1 Consol. T.S. 319. *See also* BOBBITT, *supra* note 24, at 501–08; JAMES VISCOUNT BRYCE, *THE HOLY ROMAN EMPIRE* (Macmillan 1968) (1864) (providing a comprehensive account of the Holy Roman Empire through the Peace of Westphalia).

33. *See supra* note 32.

34. BOBBIT, *supra* note 24, at 214–28.

35. *See generally id.*

36. *See* Rawls, *The Law of Peoples*, *supra* note 18, at 47–48.

37. *See* ANDREW WILSON, *THE UKRAINIANS: UNEXPECTED NATION* 207–33, 279–85 (2d ed. 2002) (discussing the history of Ukraine and issues related to modern statehood); *see also* DAVID McDOWALL, *THE KURDS: A NATION DENIED* (1992) (describing the Kurds and their struggle to form a national identity despite being stateless).

38. *See* McDOWALL, *supra* note 37, at 131–33.

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III. CONDITIONS OF DEMISE FOR THE NATION STATE

In the course of a single lifetime, the world has been transformed by the convergence of disquieting factors, many of which generally are regarded as positive, but which also expose human beings to significantly increased levels of risk and uncertainty. In describing this transformation, Philip Bobbitt argues that the international order of nation states is being supplanted by an emerging political economy of market states, with profound and far-reaching implications for human societies.³⁹ The fundamental moral significance of this transformation is the inability of the nation state to fulfill the obligations of the social contract.⁴⁰ Pervasive, disruptive forces greatly have increased the exposure of people and property to risks and dangers for which the State cannot effectively remedy or respond.⁴¹ The following discussion outlines some of these forces, most of which are discussed by Bobbitt, Fukuyama, and others in some detail, as conditions that threaten and compromise access to human dreams of freedom, prosperity, and security.⁴²

A. *Universal human rights norms*

The nation state social contract is rooted in political philosophies that champion the moral worth, dignity, rights, and equality of all human beings expressed in the United Nations Declaration of Human Rights, which was first promulgated in 1947 and ratified by a majority of nations.⁴³ Many of these nations are consistent in affirming and protecting these rights in their internal laws.⁴⁴ In contrast, however, many individual nations apply exclusions or conditions to the principles of human rights and there is little consensus among nations about the specific circumstances that might warrant intervention in the internal affairs of a sovereign nation for the purpose of protecting the rights of citizens within that nation.⁴⁵ In some instances, such as Darfur, blatant human rights violations are perpetrated amid condition of civil strife.⁴⁶ In others, such as Pakistan, legitimate constitutions allow discrimina-

39. See BOBBITT, *supra* note 24, at 213–42.

40. See *id.*

41. See, e.g., *infra* Parts III.F–G.

42. See *infra* Parts III.A–G.

43. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), available at <http://www.un.org/Overview/rights.html>.

44. See, e.g., John Dugard, *International Law and the South African Constitution*, 8 EUR. J. INT'L L. 77 (1997) (discussing the progressive incorporation of international and human rights law in the South African Constitution); Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633 (2000). But see AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2007: THE STATE OF THE WORLD'S HUMAN RIGHTS 15–42 (2007) (documenting human rights violations throughout the world).

45. See, e.g., Catherine J. Redgwell, *Reservations to Treaties and Human Rights Committee Comment No.24(52)*, 46 INT'L & COMP. L.Q. 390 (1997) (discussing issues related to reservations made to human rights treaties); Jerome Slater & Terry Nardin, *Nonintervention and Human Rights*, 48 J. POL. 86 (1986) (discussing the complex relation between traditional noninterventionism and the protection of human rights).

46. See Comprehensive Peace for Sudan Act, S. 2705, 108th Cong. § 2(1) (2004) (“The Government of Sudan has engaged in an orchestrated campaign of genocide in Darfur, Sudan, and has severely restricted humanitarian and human rights workers’ access to Darfur in an attempt to inflict further harm on the Fur,

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tory religious laws to supersede civil laws.⁴⁷ As a result, the international community is often slow and ineffective in responding to human rights crises and attempting to intervene, while states are subject to increasing external scrutiny for what were once regarded as strictly internal affairs.⁴⁸

B. Scientific discoveries

Human experience itself has become what Fukuyama calls a “posthuman” permutation induced by psychotropic drugs, genetic engineering, cloning, and other biotechnologies that change the essence of embodiment.⁴⁹ Aging, disease, emotional states, and reproduction are subject to choices that were once unthinkable and remain alien to some religious and cultural sensibilities.⁵⁰ States attempting to control the development of biotechnologies, such as the United States’ limits on stem cell research, find the research streams flourishing elsewhere and generating products, markets, and revenue streams for wealthier, more mobile and risk-averse intellectual talent, consumers, and investors.⁵¹

C. Global knowledge economy

The knowledge economy is not just about knowledge. Ideas and intangibles are the value drivers for everything from steel to agriculture, creating and innovating products that are increasingly weightless and adaptive.⁵² The traditional industrial model of value chains has been replaced by a more fluid, e-commerce model of value networks and value webs.⁵³ In this market of virtual conversations and transactions, high value talent is attracted to high value jobs and the competition for human talent puts individuals without education and companies and countries without education facilities at a disadvantage.⁵⁴ As even tangible products (alarm clocks and window glass) and services (fast food and household help) require

Masalit, and Zaghawa people of Darfur and to prevent the collection of evidence of war crimes and crimes against humanity.”)

47. See THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN pmbl., art. 2, art. 31.

48. See Nivedita Ray, Commentary, *Darfur Crisis: A Consequence of Inaction*, 28 STRATEGIC ANALYSIS 611 (2004); Thalif Deen, *U.N. Inaction Threatens “Mass Killings” in Africa, Asia*, INTER PRESS SERV., Feb. 28, 2008, <http://ipsnews.net>; Gambari Defends UN Against ‘Inaction on Burma’ Charge, IRRAWADDY, Sept. 4, 2007, http://www.irrawaddy.org/print_article.php?art_id=8487.

49. FRANCIS FUKUYAMA, *OUR POSTHUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY REVOLUTION* 3–17 (2002).

50. See *id.* at 84–102.

51. Francis Fukuyama, *Gene Regime*, FOREIGN POL’Y, Mar./Apr. 2002, at 57, 58.

52. See Verna Allee, *Reconfiguring the Value Network*, J. BUS. STRATEGY, July/Aug. 2000, at 36, 36–39.

53. *Id.* at 36.

54. See, e.g., Andrés Solimano, *High Value Migrants: Talent Mobility and International Development*, UN CHRON., Dec. 2006/Jan. 2007, at 29, available at <http://www.un.org/Pubs/chronicle/2006/issue4/0406p29.htm#> (discussing the factors influencing international talent mobility).

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skilled technical labor, the brain drain from nations unable or unwilling to compete will exacerbate disparities of global wealth and income.⁵⁵

D. Global capital markets

The wealth of nations is determined by access to capital.⁵⁶ Most countries seeking to promote business and develop markets are unable to ignore or compete with the external capital pools available to their nation's entrepreneurs and investors, and they are unable to keep capital within their borders.⁵⁷ Despite market fluctuations and economic cycles, the world is awash with surplus capital to which no single nation can stake a certain claim.⁵⁸ Capital markets are a global cotillion of nations, cities, communities, and entrepreneurs competing for spots on the dance cards of investors hoping to find at least one partner with a dream they can share.⁵⁹ Critics of capital liberalization point to the financial crises of the 1990s when whole economies in Asia, Latin America, and Russia were submerged along with their trading partners⁶⁰—a scenario threatening to recur with the global subprime lending debacle.⁶¹ Even the advocates of global financial integration and capital liberalization acknowledge the problems of international oversight, adjudication, and no global lender of last resort that make large-scale financial crises difficult to avert and manage.⁶²

55. See Viem Kwok & Hayne Leland, *An Economic Model of Brain Drain*, 72 AM. ECON. REV. 91, 91 (1982). But see Vedran Horvat, *Brain Drain. Threat to Successful Transition in South East Europe?*, 5 SOUTHEAST EUR. POL. 76, 76–91 (2004), available at <http://www.seep.ceu.hu> (offering some socio-political benefits to brain drain).

56. See THE WORLD BANK, *GLOBAL DEVELOPMENT FINANCE: FINANCING THE POOREST COUNTRIES* 55–87 (2002) (demonstrating how increased capital flows have benefitted developing nations).

57. See Jagdish Bhagwati, *Why Free Capital Mobility May Be Hazardous to Your Health: Lessons from the Latest Financial Crisis* (Nov. 7, 1998) (unpublished manuscript), available at http://www.columbia.edu/~jb38/NBER_comments.pdf (discussing the dangers free capital mobility poses to developing nations with weak regulatory controls).

58. See LESTER O. BUMAS, *INTERMEDIATE MICROECONOMICS: NEOCLASSICAL AND FACTUALLY-ORIENTED MODELS* 81 (1999) (explaining that “[c]apital is more unused than used in manufacturing . . . [a]nd worldwide surplus capital is not uncommon”).

59. Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061, 1062 (1984).

60. J. Bradford DeLong, *What Have We Learned from the International Financial Crises of the 1990s?*, <http://www.j-bradford-delong.net/TotW/learned.html> (last visited Feb. 10, 2008).

61. See Sharon L. Secor, *A Global Contagion: The Sub-Lending Crisis and the Burst of the Housing Bubble*, AM. CHRON., Oct. 30, 2007, <http://www.americanchronicle.com/articles/41613>.

62. See Paul Martin, Minister of Fin., Can., *Address at the Commonwealth Business Forum* (Sept. 29, 1998), available at <http://www.fin.gc.ca/news98/98-093e.html>.

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E. Global communication networks

As the French have learned, even l'Académie française cannot completely eliminate American slang from their daily vocabulary.⁶³ Nations seeking to wall themselves off from external influences may find themselves not only economically disadvantaged, but unsuccessful in their censorship as well. Although fears about globalization range from resistance to a monoculture of McCulture⁶⁴ and Coca-Colonization⁶⁵ to environmental concerns about large-scale materialism⁶⁶ and commodification of indigenous cultures,⁶⁷ there also are counterarguments suggesting that pluralism and diversity have become permanent geopolitical values.⁶⁸ Whatever stance a state takes vis-à-vis globalization, its emergence as an object of thought, action, and discourse has transformed its meaning in the political imagination beyond its origins in State.

F. Proliferation of global and transnational threats

Acid rain, holes in the ozone layer, and the Chernobyl disaster alerted nations everywhere to the impossibility of containing assaults to Earth's environment.⁶⁹ Disease pathogens know no boundaries and efforts to secure boundaries against pathogens are notoriously ineffective.⁷⁰ Famines and natural disasters induced by climate change illustrate not only the fragility of ecosystems but the vulnerability of individual nations where they occur.⁷¹ Most nations are unprepared to manage the mass migrations spurred by war, civil strife, climate change, and poverty.⁷²

63. See French Journal, L'Académie française, http://frenchjournal.typepad.com/french_journal/2007/09/lacadmie-franai.html (Sept. 11, 2007, 11:28 EST) (describing the function of the l'Académie française to preserve the French language).

64. Urban Dictionary, McCulture, <http://www.urbandictionary.com/define.php?term=McCulture> (last visited Feb. 14, 2008).

65. Thalif Deen, "Coca-Colonization" of the Third World, GLOBAL POL'Y F., June 2, 1999, <http://www.globalpolicy.org/globaliz/special/cocacola.htm> (explaining how corporate giants are seen as the modern economic colonialists); see also Globalizing Products Through Advertising, Cocacolonization, <http://cocacolonization.com> (last visited Feb. 14, 2008) (describing coca-colonization as Coca Cola's successful use of advertising in the 1950s).

66. See International Center for Technology Assessment, Global Warming & the Environment, <http://www.icta.org/global/index.cfm> (last visited Feb. 13, 2008).

67. David A. King & William P. Stewart, *Ecotourism and Commodification: Protecting People and Places*, 5 BIODIVERSITY & CONSERVATION 293, 296 (1996).

68. See AMARTYA SEN, DEVELOPMENT AS FREEDOM 247 (Anchor Books 2000) (1999) (claiming that recognizing diversity in different cultures is important in today's world).

69. E.g., International Center for Technology Assessment, *supra* note 66.

70. F.K. Käferstein, Y. Motarjemi & D.W. Bettcher, *Foodborne Disease Control: A Transnational Challenge*, 3 EMERGING INFECTIOUS DISEASES 503, 503-04 (1997).

71. See, e.g., SEN, *supra* note 68, at 165, 168 (discussing the Bangladesh famine in 1974 in which flooding caused unemployment and, as result, people could not afford to purchase food, even though there was no shortage of food).

72. See Michael Braun, *Italy—An Emigrants' Nation Discovers Immigration*, 2 SOUTH-EAST EUR. REV. FOR LAB. & SOC. AFF. 17, 19 (1999) (demonstrating how Italy was unprepared for immigration in the 1990s); Hanno (J H) van Gemund, *From Somalia to Yemen: Great Dangers, Few Prospects*, 27 FORCED MIGRATION REV. 67, 69 (2007), available at <http://fmreview.org/FMRpdfs/FMR27/full.pdf> (describing the large numbers of

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G. *Threat of WMD deployment*

Rogue nations are even less of a danger than terrorist groups with access to nuclear and chemical weapons.⁷³ The most robust defense systems may lessen but not eliminate these threats.⁷⁴ Even in the United States, where public health disaster preparedness is a high priority, frontline health professionals only recently have been trained to recognize and manage deadly biochemical pathogens, but even that training is incomplete and inconsistent.⁷⁵

The sheer scale and complexity of these challenges overwhelms the capacities of individual nations for effective response in a way that protects national identity and autonomy in providing for the security and social welfare of their citizens. This marks a critical juncture for the familiar nation state arrangements that have served many generations as a foundation of national peace and prosperity in an age where the autonomy of individual nations was possible. As expansion of commerce and markets create wealth and opportunities beyond the imagination of previous generations, citizens of all nations define their identity less completely by their nationality, understand the limited capacity of their governments in providing security, and see their governments as one of many sources of social benefits.⁷⁶ There is little evidence, however, that citizens of nation states are relinquishing their claims to social security and safety nets provided by the nation state; rather, they are expanding their expectations to include business as instrumental in the infrastructure of social welfare.⁷⁷ In consequence, the roles of and relationships among the state, civil society, and business have changed, setting the stage for the market state.⁷⁸

Somalis and Ethiopians fleeing to Yemen to escape poverty, conflict, and persecution, and the negative effects it has created in Yemen); Atta El Moula, *Migration: Causes and Effects—The Case of Omodiat Burush, Northern Darfur, Sudan*, 25 GEOJOURNAL 47, 47 (1991) (discussing how drought, desertification and lack of development caused a famine in Darfur that caused a mass migration within Sudan); Globalization101.org, Migration, <http://www.globalization101.org/issue/migration/> (last visited Feb. 14, 2008) (listing reasons for migration including escaping “civil strife, persecution, and environmental disasters,” and to improve ones economic situation).

73. John R. Bolton, Under Sec’y for Arms Control & Int’l Sec., The International Aspects of Terrorism and Weapons of Mass Destruction, Remarks to the Second Global Conference on Nuclear, Bio/Chem Terrorism: Mitigation and Response (Nov. 1, 2002), available at <http://www.state.gov/t/us/rm/14848.htm>; see also Steven Schultz, *Nuclear Threat Remains Long After the Cold War*, PRINCETON WKLY. BULL., Apr. 8, 2002, <http://www.princeton.edu/pr/pwb/02/0408/1b.shtml>. See generally Ronald A. Greenfield et al., *Microbiological, Biological, and Chemical Weapons of Warfare and Terrorism*, 323 AM. J. MED. SCI. 326, 326 (2002).

74. David Cortright & George A. Lopez, ‘War on Terror’ or Real Security?, SOJOURNERS MAG., Jan. 2004, at 31, available at <http://www.sojo.net/index.cfm?action=magazine.article&issue=soj0401&article=040123>.

75. CHRISTINA CATLETT ET AL., JOHNS HOPKINS EVIDENCE-BASED PRACTICE CTR., TRAINING OF CLINICIANS FOR PUBLIC HEALTH EVENTS RELEVANT TO BIOTERRORISM PREPAREDNESS 4 (2002), available at <http://www.ncbi.nlm.nih.gov/books/bv.fcgi?rid=hstat1.chapter.76478>.

76. See *infra* Part V.

77. See *infra* note 93 and accompanying text.

78. See *infra* Parts IV–V.

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IV. THE RISE AND FALL OF THE AMERICAN “WELFARE STATE”

Social welfare, or the provision of social benefits, is one of the defining duties of a nation state.⁷⁹ The 20th century rise and demise of what has come to be known, often pejoratively, as “the welfare state” was spurred in most industrialized nations by conditions of extreme distress such as the Great Depression and World War II.⁸⁰ Far from being a grandly engineered scheme, however, the apparatus of social welfare programs and policies emerged over time in response to political, social, and economic conditions that varied over time and among nations in creating needs for which people expected a response from their governments.⁸¹ Sometimes social welfare extends beyond an individual state to other nations as with the U.S. Marshall Plan, funding European reconstruction after World War II with far-reaching programs designed to rebuild material infrastructure and reboot economic, social, and political institutions.⁸² While the United States is remarkably less welfare-oriented than other industrialized nations, the combination of the Great Depression and Keynesian economics provided the social, political, and economic impetus for increased social spending on income security, health, education, and housing during the mid-twentieth century.⁸³ Nobel economist Gunnar Myrdal was among the strongest proponents of a global welfare system that was fueled by the rising prosperity of industrialized nation states.⁸⁴

Critics of the welfare state, particularly in the era of Ronald Reagan and Margaret Thatcher, warned of a looming crisis when public treasuries would be unable to support the rapid increase of social spending for entitlement programs, yet very few American legislators were willing to touch the biggest social entitlement program of all—the income tax deduction for home mortgage interest.⁸⁵ Others suggested that there was, in fact, no looming crisis and that the myth of the welfare state was in reality an array of distinct programs that constantly are being created, recreated, and reconfigured in response to changing circumstances.⁸⁶ Even more startling is Stein Ringen’s more recent conclusion that—for the most part—the

79. See GUNNAR MYRDAL, *BEYOND THE WELFARE STATE: ECONOMIC PLANNING AND ITS INTERNATIONAL IMPLICATIONS* (1960).

80. See *id.* at 21–22, 25, 62–63.

81. See *id.* at 21–25.

82. JOEL SPRING, *EDUCATION AND THE RISE OF THE GLOBAL ECONOMY* 93 (1998); Carl B. Kress, *The United States Government and Post-Conflict Economic Reconstruction*, 11 U. C. DAVIS J. INT’L L. & POL’Y 75, 77–78 (2004).

83. Alvaro J. de Regil, *Keynesian Economics and the Welfare State*, JUS SEMPER GLOBAL ALLIANCE, Apr. 2001, at 1, available at <http://www.jussempere.org/Resources/Economic%20Data/The%20Neo-Capitalist%20Assault/Resources/KeynesianEconomics.pdf>.

84. But see MYRDAL, *supra* note 80.

85. See STEIN RINGEN, *THE POSSIBILITY OF POLITICS: A STUDY IN THE POLITICAL ECONOMY OF THE WELFARE STATE* 41 (1987); Edward L. Glaeser & Jesse M. Shapiro, *The Benefits of the Home Mortgage Interest Deduction*, 17 TAX POL’Y & ECON. 37 (2003) (describing the misguided policy intentions of the income tax deduction for home mortgage interest).

86. See MYRDAL, *supra* note 80, at 21–22.

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sum of “welfare state” programs and policies work.⁸⁷ Twenty years after his 1980s Organisation for Economic Co-operation and Development (OECD) study of welfare programs and politics, Ringen repeated his study and again concluded that although the mix of social welfare programs and policies had realigned somewhat, most of them were providing tangible social benefits and stood on their own merits of documented achievements and results.⁸⁸

Although anti-welfare rhetoric has continued into the 21st century, with the mythic U.S. welfare state symbolically put to rest by the Clinton Administration welfare reform initiatives,⁸⁹ the reality of government responding to the needs and concerns of citizens continues its political currency with job loss due to outsourcing, the subprime mortgage fallout, and the lack of health insurance ranking high on the agendas of both Democrats and Republicans.⁹⁰ Citizens still expect government to work with them to solve problems through programs and policies that often involve choices about values, costs, and benefits.⁹¹ In the United States, where anti-welfare sentiment is the strongest and the social safety the weakest among wealthy nations, majority sentiment reflects a strong and unwavering approbation of public spending for social welfare even as the rhetoric of social welfare has become unpopular and politically untenable.⁹² The complexity of problems and the range of solutions that can be accomplished by one nation’s government alone also have changed. Increasingly, citizens and government have turned to business and the mechanism of markets to solve problems and create opportunities targeted to social welfare outcomes.⁹³

V. THE EMERGENCE OF THE MARKET STATE

By the beginning of the 21st century, much of the world has come to recognize the value of human freedom, realizing as well that freedom includes not only the affirmation and exercise of political and civil rights, but also the expansion of economic rights and opportunities that support the full range of human capabilities for a rich

87. See RINGEN, *supra* note 86, at 207.

88. See generally RINGEN, *supra* note 85.

89. Bill Clinton, Op-Ed., *How We Ended Welfare, Together*, N.Y. TIMES, Aug. 22, 2006, at A19.

90. Republican National Committee, Issues, <http://www.gop.com/Groups/?Type=Issues> (last visited Feb. 3, 2008); The Democratic Party, The 110th Congress and the Democratic Agenda, <http://democrats.org/agenda.html> (last visited Feb. 3, 2008).

91. Leonard Silk, *Economic Scene; Is Liberalism Back in Saddle?*, N.Y. TIMES, Apr. 17, 1992, at D2; see also JAMES A. STIMSON, *TIDES OF CONSENT: HOW PUBLIC OPINION SHAPES AMERICAN POLITICS* 24 (2004) (describing the historical shift in public opinion in the 1960s toward favoring government intervention to solve social and economic problems).

92. See RINGEN, *supra* note 85, at 41.

93. See, e.g., Shruti Rana, *From Making Money Without Doing Evil to Doing Good Without Handouts: The Google.org Experiment in Philanthropy*, 3 J. BUS. & TECH. L. 87, 87–88 (2008) (identifying Google.org as a philanthropic foundation aimed at solving problems and creating opportunities typically addressed through social welfare); Bill & Melinda Gates Foundation, About Us, <http://www.gatesfoundation.org/AboutUs/> (last visited Feb. 3, 2008) (aiming at reducing inequities in the U.S. and around the world).

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and fulfilling quality of life.⁹⁴ The corporation, originally created as a legal entity for generating and distributing wealth among multiple stakeholders, was instrumental in the creation and dissemination of technology, ideas, social practices, and information that permanently has altered the relationship of people and the State. In realizing the opportunities available through business, they also realize the limitations of the State. The State can provide an identity, facilitate benefits of military protection and internal security, regulate internal commerce, and even provide a social safety net. But unlike free enterprise, the State does not create wealth that gives concrete traction to human dreams.

A. The social contract of the market state

In this new age of freedom and opportunity, the apparatus of the State, with its governing and political institutions, continues to play a role in defining social identity, providing external and internal security, and providing social benefits. In much of the world, the State uses the rule of law to legitimize national identities infused with diverse ethno-religious cultures and pluralist politics; but the understanding of social identity and national allegiance also is becoming more complex. Europeans, for example, are no longer simply Germans or Italians; they are German and Italian members of a European Community.⁹⁵ With this new identity comes the new challenge of renegotiating individual and collective responsibilities as well as renegotiating how responsibility for providing security and social benefits should be apportioned among governments (federal, state, and local), civil society, and perhaps to existing supranational agencies and institutions such as North Atlantic Treaty Organization (NATO), North American Free Trade Agreement (NAFTA), the United Nations (UN), and to others yet to be imagined and created.⁹⁶ States continue to provide security through defense, law enforcement, and the courts, but these functions are not infrequently outsourced to private business.⁹⁷ As in the past, people expect benefits as members of a society, but the State's role as a

94. See SEN, *supra* note 68, at 3–4 (relating development to the expansion of freedom and the removal of “unfreedom”).

95. Treaty Establishing the European Community art. 17, e.g., 2002 O.J. (C 325/1) 44.

96. See Charles Gore, *The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries*, 28 WORLD DEV. 789, 789 (2000). See generally William R. Pace & Nicole Deller, *Preventing Future Genocides: An International Responsibility to Protect*, WORLD ORDER, Dec. 2005 at 15, 16 (alleging that governments have opposed intrusion into internal affairs, resulting in no collective security mechanisms being developed by the international community).

97. See Office of Program Policy Analysis & Gov't Accountability, *Law Enforcement Program Should Pursue Outsourcing, Track Case Outcomes, Integrate Information Systems* (2003), available at <http://www.oppaga.state.fl.us/reports/pdf/0301rpt.pdf> (concluding that the Law Enforcement Program of the Florida Department of Environmental Protection should outsource park patrol services to improve efficiency); Thomas Claburn, *States Hire Bill-Collecting Partner*, INFORMATIONWEEK, May 17, 2004, <http://www.informationweek.com/shared/printableArticle.jhtml?articleID=20300901> (explaining how some courts have determined it is more efficient to hire private companies to collect overdue fines); Blackwater Worldwide, *Company History*, http://www.blackwaterusa.com/company_profile/comp_history.html (last visited Feb. 20, 2008) (describing how the company provides “private sector solutions” for U.S. government security needs).

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direct provider of those benefits has shifted to one of brokering and regulating a host of institutions and mechanisms to achieve those ends.⁹⁸ States serve as a policy forum, fiscal agent, contractor, and financial broker for competing multi-sector stakeholders in the negotiation, design, and delivery of social benefits.⁹⁹ Nations and societies throughout the world are engaging in similar reinventions of themselves and their social contracts as they build their own versions of the market state.

B. Business and economic implications of the market state

In the new geopolitical vision of the market state, the role of business is transformed from an engine of wealth creation and profit maximization for owners and shareholders to a platform of opportunity maximization for the mass of individual citizens, thus engaging business in an unprecedented and instrumental way providing social benefits that have traditionally been understood as the responsibility of the State as part of its legitimating social contract.¹⁰⁰

The shift to business as a provider of social benefits heightens the contradiction between human rights norms constituting the modern State and the historical devaluation of human beings and human labor by a market focused more on profits than on people.¹⁰¹ In a community of nations that espouses the supreme moral worth of the human person and the universality of human rights, how is it possible that the moral claims of personhood are not sufficient to assure that humans do not sell their labor for less than the value of decent food and shelter? How is it possible that there is not enough work to employ everyone? And how is it possible that free enterprise does not measure wealth in metrics of human flourishing? If business is to be a credible platform of human opportunity for all, it will need to participate in providing affirmative answers to these questions.

One of the major economic challenges of the market state is developing the wealth-creating potential of global markets by reorienting poor and disadvantaged states to more competitive positions in a market economy.¹⁰² Some of the experiments in this reorientation process emerged as part of a prototypical blueprint of market state policies.¹⁰³ The Washington Consensus was drafted in 1989 by economist John Williamson in collaboration with Latin American states and policy experts to relieve the severe economic stagnation and fiscal crisis of hyperinflation plaguing Latin America in the 1980s.¹⁰⁴ This policy consensus included 10 recommendations:

98. See *supra* note 96 and accompanying text.

99. See *supra* note 96 and accompanying text.

100. See *supra* note 96 and accompanying text.

101. See Karl Marx, *The Economic and Philosophical Manuscripts*, in *CLASSES, POWER, AND CONFLICT: CLASSICAL AND CONTEMPORARY DEBATES* 13 (Anthony Giddens & David Held eds., 1982).

102. See Gore, *supra* note 96, at 789.

103. See Grzegorz W. Kolodko, *Transition to a Market Economy and Sustained Growth. Implications for the Post-Washington Consensus*, 32 *COMMUNIST & POST-COMMUNIST STUD.* 233, 233 (1999).

104. *Id.* at 236–37.

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1. Fiscal policy discipline
2. Redirection of public spending away from regressive subsidies to investment in human development programs such as primary education, health care, and infrastructure
3. Tax reform to broaden the tax base and moderate marginal tax rates
4. Market-benchmarked interest rates
5. Competitive exchange rates
6. Liberalized trade with less protective tariffs
7. Liberalized inflows of direct foreign capital investment
8. Privatization of state enterprises
9. Deregulation to spur market entry and competition (with exceptions for public health, safety, environment, or consumer protection) and prudent financial services oversight
10. Legal protection of property rights¹⁰⁵

Although the Washington Consensus was controversial from the start due to extremely negative criticism, particularly from antiglobalization critics such as Noam Chomsky and Naomi Klein, and had a mixed record of achievement, it exemplifies a growing reorientation to free market mechanisms and practices as a path towards realizing broad-based social benefits.¹⁰⁶ As economists and international policy experts evaluated its outcomes, some viewed it as incomplete and others judged it a flawed failure.¹⁰⁷ Others applied lessons from the Latin American experiment to the transitional economies of Eastern Europe to argue for a new, “post-Washington consensus” to emphasize the role of strong institutions as the key to liberalization and privatization for a path of sustainable, equitable growth with a supportive role for the State.¹⁰⁸ These examples demonstrate that the features of the market state developing over the past several years will continue to develop as lessons are learned from applying principles in practice.

C. *Operating principles of the market state*

In observing the trends of the emerging market state, Bobbitt outlines a set of core understandings that the community of market states are adopting as the new “economic orthodoxy.”¹⁰⁹ These principles are replacing the regulatory regime of the nation state to achieve levels of growth required to support the goals of market

105. *Id.* at 237.

106. See Interview by Tony Avirgan with Noam Chomsky, (Jan. 26, 2006) (quoting Chomsky as indicating that the Washington Consensus has been “one of the most dramatic disasters in economic history”); Michelle Chihara, *Naomi Klein Gets Global*, ALTERNET, Sept. 25, 2002, <http://www.alternet.org/story/14175> (labeling Klein as the “unofficial spokesperson for the anti-globalization movement”).

107. See Kolodko, *supra* note 103, at 234–35; Global Policy Network, *supra* note 106.

108. Gore, *supra* note 96, at 799; Kolodko, *supra* note 103, at 234.

109. BOBBITT, *supra* note 24, at 667.

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societies in establishing business as a platform of opportunity.¹¹⁰ In this view, the market state's wisdom asserts that:

1. Capital markets should be less regulated to attract capital investment.
2. Capital should be more global to maximize returns on investment.
3. Labor markets should be more flexible to compete effectively with foreign labor markets producing comparable products at lower costs.
4. Access to all markets and less regulated trade should be assured to grow the world economy.
5. A state's trade policy should be free to promote growth by enabling its goods to penetrate foreign markets.
6. Government spending should manage subsidies and welfare to invest in infrastructure and promote private saving (which will lower the cost of investment).
7. Tax policy should promote growth through incentives for domestic capital formation and retention that attract enterprise and maximize innovation.¹¹¹

This is an attractive, compelling picture of market state economic orthodoxy: as States with developed economies open up borders to trade, liberalize labor markets, incentivize business investment through tax policies, and efficiently manage public welfare subsidies, they become destinations for capital to create new businesses, products, and jobs that will in turn generate higher tax revenues at lower tax rates to continue the cycle of growth and contribute to greater wealth and opportunities for all. On the other hand, industrial workers in developed economies such as the United States will find their labor devalued by competition from workers in developing economies able to achieve comparable or even greater productivity levels for a fraction of the cost. To manage the disruptive effects of the global market state economy, American workers will demand a more robust safety net of universal health care, unemployment income, job retraining, and retirement support as the U.S. economy adjusts by creating new avenues of productivity for them.¹¹²

Despite the social and cultural disruption of globalized markets (such as challenges to traditional social hierarchies that subordinate lower castes, women, and dependent family members), States with developing economies, however, will find little economic downside in the path to a faster growth cycle of higher wages providing more tax revenue for spending on public education, bringing more educated men and women into the paid workforce, leading to lower birthrates to enhance political stability and macroeconomic prudence, which attracts foreign investment to finance more growth, liberalize authoritarianism, and encourage personal autonomy.¹¹³ Unless American business and government can collaborate effectively to

110. *Id.*

111. *Id.*

112. See generally Posting of Mark Thoma to Economist's View, http://economistsview.typepad.com/economistsview/2006/11/worker_security.html (Nov. 6, 2006, 3:33 EST).

113. BOBBIT, *supra* note 24, at 668.

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create a strong social safety net, these conditions will fuel fulfillment of the global dream for developing nations while dimming the dreams of Americans.

VI. U.S. BUSINESS AND THE AMERICAN DREAM

In an era of unprecedented wealth accompanied by the rhetoric of “the ownership society,”¹¹⁴ American business does not work for most Americans as a platform for realizing their dreams.¹¹⁵ In fact, U.S. business interests represented by the Business Roundtable, corporate lobbyists, free market think tanks (e.g., the American Enterprise Institute, the Heritage Foundation, and the Cato Institute) and publications such as *The National Journal*, *The Public Interest*, and Fox News, have systematically worked to shape the business and public policy norms that have widened disparities in wealth and income distribution by funneling capital to the wealthy while excluding low-wage workers from reaping comparable benefits for their labor inputs.¹¹⁶ Although standards of living for low-wage workers are better than in the 1920s, economic inequality matches that of the Gilded Age.¹¹⁷ Economic inequality is a serious potential risk of a market state economy; the invisible hand of the market does not promote equality.¹¹⁸

Incidents of severe market disruption, distortion, and corruption pose fundamental questions about the process of marketization and privatization, particularly in the provision of public or collective goods (e.g. military support, prison systems, education, public safety, disaster management, and health care) where market efficiency may conflict with social goals such as equity or care.¹¹⁹ When the profit potential for essential vaccines offers insufficient market incentive for stimulating production even with substantial public subsidies,¹²⁰ it is clear that the market does not function effectively in providing a necessary social benefit. The risks of market insufficiency and distortion are compounded by globalization when the underlying

114. See generally Matt Martin, *Bush's Legacy: The Great Ownership Society*, STAN. REV., May 20, 2005, available at http://www.stanfordreview.org/Archive/Volume_XXXIV/Issue_9/Opinions?Opinions7.shtml.

115. Warshauer, *supra* note 3.

116. See, e.g., David P. Goldman, *Growth Economics vs. Macroeconomics*, 105 PUB. INT. 78, 90 (1991) (arguing that traditional Keynesian macroeconomics, which relies on rigid mathematical formulas, should be replaced by a less scientific but more accurate model that centers on human innovation, showing among other things why the capital gains tax should be eliminated); John Maggs, *Minimum-Wage Wars*, NAT'L J., Apr. 28, 2007, at 42 (suggesting that economists' arguments in favor of the minimum wage are ideologically based); *The Cost of Freedom: Cashin' In* (Fox News broadcast Nov. 25, 2006), available at <http://www.foxnews.com/story/0,2933,232148,00.html> (criticizing efforts to limit executive compensation).

117. See Keister & Moller, *supra* note 2, at 63 (pointing out that “[t]he top 1% of wealth owners owned nearly 40% of net worth and nearly 50% of financial assets in the late 1980s and 1990s”).

118. See *id.* at 70 (noting that market fluctuations can intensify the concentration of wealth).

119. See, e.g., Thomas Pogge, *World Poverty and Human Rights*, 19 ETHICS & INT'L AFF. 1, 4–6 (2005) (pointing out that the current “global economic order” protects the interests of national markets of highly developed nations, but harms those who would benefit from cheaper generic medication).

120. Sebastian Buckup, *Global Public-Private Partnerships Against Neglected Diseases: Building Governance Structures for Effective Outcomes*, 3 HEALTH ECON., POL'Y & L. 31, 35–36 (2008) (arguing that public funds are necessary to make investment in research to combat infectious diseases).

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ethics driving a product's value are contested among key stakeholders, such as the use of tobacco by children, lead paint in toys, or adoption of vehicle emission standards.¹²¹ American business has a long way to go in becoming a reliable platform of human opportunity for all stakeholders. Attempts by free market devotees to privatize health care and Social Security illustrate the reluctance of American citizens to relinquish their claim to state-sponsored social welfare benefits despite the popular rhetoric of marketization.¹²² It is unlikely that their minds will change in an era of growing risk.

Even the most ardent free market proponents acknowledge the problems of economic losers in the disruptive cycle of creative destruction and the need for society to provide safety nets. In fact, as Rajan and Zingales warn, successful capitalism can be its own worst enemy when incumbents seeking to suppress competition align with market losers embittered by their fall without a safety net to create a political agenda for limiting capital growth and investment.¹²³ U.S. business is only beginning to explore the value-creating possibilities of integrating profitability and social welfare goals, while facing the greater challenge of overcoming its historical track record of obstructive resistance to concrete measures of accountability for its social performance in value creation, preferring the comfortably narrow measures of short-term profitability.¹²⁴ This well-documented history does not serve the interests of most Americans and seriously undermines their opportunities to realize the American dream for themselves.

A. Economic inequality and the fading American Dream

A long history of wealth and income inequality among American households has been well documented by economic and social researchers such as Picketty and Saez.¹²⁵ Economic inequality acquired a new meaning during the last century, however, as social equality and human rights movements moved women, blacks, and ethnic minorities into the mainstream of American life.¹²⁶ While low-paid workers at the dawn of the 20th century may have mutely suffered inequity as their lot in

121. See, e.g., Bruce I. Bertelsen, *Future US Motor Vehicle Emission Standards and the Role of Advanced Emission Control Technology in Meeting Those Standards*, 16/17 TOPICS IN CATALYSIS 15 (2001) (discussing the upcoming vehicle emission standards and the gradual expectations of improved private-sector technology).

122. See, e.g., THE WHITE HOUSE, STRENGTHENING SOCIAL SECURITY (2005), available at <http://www.whitehouse.gov/infocus/social-security/index.html> (arguing that "younger workers" should be allowed "to put part of their payroll taxes in personal retirement accounts").

123. RAGHURAM G. RAJAN & LUIGI ZINGALES, *SAVING CAPITALISM FROM THE CAPITALISTS: UNLEASHING THE POWER OF FINANCIAL MARKETS TO CREATE WEALTH AND SPREAD OPPORTUNITY* 276-77, 293 (Princeton Univ. Press 2004) (2003).

124. See John Mackey, *Rethinking the Social Responsibility of Business*, REASON, Oct. 2005, <http://www.reason.com/news/show/32239.html> (citing Milton Friedman's famous article *The Social Responsibility of Business Is to Increase Its Profits*).

125. See Picketty & Saez, *supra* note 2.

126. See, e.g., National Organization for Women, *Ask Your Senators: Support Fair Pay for Women*, <http://www.now.org/lists/now-summary/msg00150.html> (last visited Feb. 4, 2008) (women's equality group advocating the passage of the Fair Pay Restoration Act, as a way to achieve fair pay for women).

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life, the economic “losers” of the early 21st century believe themselves to be the social and political equals of the rich, raising the possibility of far more disquieting questions about the structural causes of economic inequality.¹²⁷ If all Americans—and, indeed, all of global humanity—are equal, then why is the economy structured to deny equal economic opportunity? When there is so much wealth in the world, why is public investment in education and social infrastructure—a key element of the Washington consensus—so lacking in U.S. urban centers and in whole nations locked in poverty? Even the continuous streaming of mindless reality show distractions cannot totally divert public concern from these questions.

B. Business and the welfare state

U.S. business interests—the think tanks, lobbyists, and press noted above¹²⁸—consistently have projected a negative imagery of the “welfare state” as a threat to American domestic and international interests.¹²⁹ This imagery has been adopted as well by Republican Party leaders to focus on the poor, tacitly understood as Black, as objects of ridicule, blame, and hostility.¹³⁰ The famously hyperbolized “Chicago Cadillac welfare queen” touted by Ronald Reagan in 1976 brilliantly captured the venomous indignation of hard-working Americans exploited by welfare cheaters.¹³¹ The campaign against Aid to Families with Dependent Children (AFDC), Job Corps, and other publicly funded programs for the poor was extremely effective, creating a popular wisdom of eliminating welfare by creating “workfare” and “welfare-to-work” programs.¹³² Ironically, U.S. spending on income transfers and subsidies to the poor historically have lagged far behind those of other wealthy nations, a fact often attributed to American mythology of individualism and self-sufficiency¹³³ but also, by some, to racism with the observation that white Americans resist economic investment in Blacks.¹³⁴ Moreover, the more costly Medicare and Social Security programs, benefitting all older Americans, remain highly popular despite repeated attempts to downsize or privatize them.¹³⁵ Business-oriented rhetoric

127. See generally John Edwards 08, A National Goal: End Poverty Within 30 Years, <http://www.johnedwards.com/issues/poverty/> (last visited Feb. 4, 2008) (outlining a plan to increase rights of the poor and to end poverty).

128. See *supra* note 116 and accompanying text.

129. See, e.g., *Free Schools Bill, 1995: Hearing on S. 890 Before the S. JUDICIARY COMM. Subcomm. on YOUTH VIOLENCE*, 104th Cong. (1995) (statement of Michael Tanner, Dir. of Health and Welfare Studies, the Cato Inst.), available at <http://www.cato.org/testimony/ct-wc67.html> (arguing that welfare contributes to crime).

130. Kenneth J. Cooper, *Welfare Reform Debate Opens on Partisan Note*, WASH. POST, Mar. 22, 2007 at A1 (quoting Ways and Means Committee Chairmen Bill Archer (R-Tex.) that “the welfare overhaul would ‘reverse the decades-long federal policy of rewarding unacceptable and self-destructive behavior’”).

131. Franklin D. Gilliam, Jr., *The ‘Welfare Queen’ Experiment: How Viewers React to Images of African-American Mothers on Welfare*, NIEMAN REP., Summer 1999, at 49, 50.

132. See, e.g., *From Welfare to Workfare*, ECONOMIST, July 29, 2006, at 27.

133. Alberto Alesina et al., *Why Doesn’t the US Have a European-Style Welfare State?* 3, 5 (Harvard Inst. of Econ. Res., Discussion Paper No. 1933, 2001).

134. See *id.* at 28.

135. See *supra* note 122 and accompanying text.

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about “trickle down,” the work ethic, and the invisible hand are convenient hooks for biased public opinion and the politics of corporate greed.

C. *Business and taxation*

Under the free market banner of “smaller government” and “privatization,” pro-business interests effectively have argued that a light tax burden for business benefits everyone increase business investment, jobs, and economic growth.¹³⁶ In reality, however, the flow of untaxed capital is less clearly directed towards benefits for the masses of enterprise stakeholders than towards elite enterprise owners and executives.¹³⁷ Corporate spending on C-Suite salaries, bonuses, entertainment, and lavish headquarters are of little benefit to other stakeholders.

Tax policy for corporations and high net worth and high income individuals is admittedly a complex, value-laden challenge involving a myriad of competing stakeholder claims.¹³⁸ While few would argue for a return to the highly progressive tax rates of the Eisenhower years,¹³⁹ the direction of tax burden apportionment increasingly has been skewed to fall on the middle classes with readily accessible exceptions, exclusions, and loopholes for corporate, high income earners, and wealthy taxpayers.¹⁴⁰ A simple comparison of the 1979 and 2006 U.S. tax rates, for example, illustrates the long-term regressive trend in taxation:¹⁴¹

	<i>Top tax rate on earned income</i>	<i>Top tax rate on LT capital gains</i>	<i>Top tax rate on corporate profits</i>
1979	70%	28%	48%
2006	35%	15%	35%

136. See Stephen Moore & Dean Stansel, *The Great Tax Revolt of 1994*, REASON, Oct. 1994, at 20, available at <http://www.reason.com/news/show/29530.html>. (noting tax cuts throughout the country in and around 1994 and pointing out beneficial effects of these cuts).

137. See James Parrot, *Freelancers Inc.*, N.Y. TIMES, June 3, 2007, at 14.11.; AFL-CIO: America’s Union Movement, 2006 Trends in CEO Pay, <http://aflcio.org/corporatewatch/paywatch/pay/index.cfm> (last visited Feb. 8, 2008).

138. See Editorial, *A Boost for the Economy*, N.Y. Times, Dec. 14, 2001, at A38 (criticizing the congressional Republicans for accelerating tax cuts for families making over \$150,000 per year).

139. Marc Linder, *Eisenhower-Era Marxist-Confiscatory Taxation: Requiem for the Rhetoric of Rate Reduction for the Rich*, 70 TUL. L. REV. 905, 917 (1996).

140. See *infra* note 141 and accompanying text.

141. See Internal Revenue Service, Data Release: Corporation Income Tax Brackets and Rates 1909–2002, <http://www.irs.gov/pub/irs-soi/02corate.pdf> (last visited Feb. 4, 2008) (charts showing top tax rate on corporate profits for 1979); Internal Revenue Service, U.S. Individual Income Tax: Personal Exemptions and Lowest and Highest Bracket Tax Rates, and Tax Base for Regular Tax, Tax Years 1913–2006, <http://www.irs.gov/pub/irs-soi/histaba.pdf> (last visited Feb. 4, 2008) (charts showing top tax rate on earned income); see also Citizens for Tax Justice, Top Federal Income Tax Rates on Regular Income and Capital Gains since 1916, <http://www.ctj.org/pdf/regcg.pdf> (last visited Feb. 4, 2008) (chart showing top tax rate on capital gains); Organization for Economic Co-Operation and Development, OECD Tax Database, Taxation of Corporate and Capital Income, http://www.oecd.org/document/60/0,2340,en_2649_37427_1942460_1_1_1_37427,00.html (last visited Feb. 4, 2008) (chart showing corporate profits tax rate 2006).

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Corporations are especially heavy-handed in pursuing local and state tax benefits and subsidies in exchange for doing business in particular communities. The result is that business does not have to share its tax burden and is given the lion's share of benefit in an extremely business-friendly public policy environment. While most businesses are honest, the general feeling is that business is entitled to evade and avoid as much tax as possible¹⁴²—and that taxation should not be the responsibility of business. Moreover, the business-friendly tax environment frequently does not extend to the thousands of small businesses that are the backbone of American business communities and hire most of the workers.¹⁴³

D. Business and the valuation of human capital

American economic interests initially were framed from the perspective of property owners who viewed labor as an input cost of business to be contained as much as possible to generate profit.¹⁴⁴ Slavery was just one institutional expression of this viewpoint. It was not until 1914 that the Clayton Antitrust Act affirmed that labor was not a commodity.¹⁴⁵

American workers' early efforts in the 19th century to assert their economic interests were met with strong resistance from American business—sometimes using methods that were unsavory, calloused, and violent. American government frequently has aligned with business in its consistent historical opposition to initiatives by workers to organize in promoting their collective interests. The Philadelphia Journeyman Cordwainers' campaign for wage increases in 1806, for instance, was met with a criminal conviction on conspiracy charges brought by their trade master employers.¹⁴⁶ Eighteen more conspiracy cases were brought to trial until the Massachusetts Supreme Court ruled in 1842 (*Commonwealth v. Hunt*¹⁴⁷) that labor unions were not *de facto* criminal conspiracies.¹⁴⁸ The AFL was founded by Samuel Gompers in 1886 at the height of campaigns to protect workers in the American economy's shift to industrial production.¹⁴⁹

Critics of organized labor see it as a declining institution, citing the loss of union membership, diminished influence in both Democrat and Republican parties, the failure of unions to stand unequivocally for the equality of women and minority

142. See Edmund L. Andrews, *Paulson Says U.S. is Hurt by High Tax Rates*, N.Y. TIMES, July 25, 2007, at C5.

143. Megan Kamerick, *Small Businesses Miss Out on Most Fed Tax Incentives*, NEW ORLEANS CITYBUSINESS, May 6, 2002, at 32.

144. ADAMS, *supra* note 5, at 181–82.

145. ch. 323, 38 Stat. 730 (1914) (codified in as amended at 15 U.S.C. §§ 12–27 (2000)).

146. Omar Swartz, *Defending Labor in Commonwealth v. Pullis: Contemporary Implications for Rethinking Community*, 8 HOLY CROSS J.L. & PUB. POL'Y 79, 80 (2004).

147. *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (1842).

148. *Id.* at 136.

149. AFL-CIO: America's Union Movement, Samuel Gompers 1850–1924, <http://aflcio.org/aboutus/history/history/gompers.cfm> (last visited Feb. 12, 2008).

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workers, and recurrent scandals among its leadership and member unions.¹⁵⁰ Once a vocal and visible champion of American workers, organized labor no longer attracts members in a post-industrial economy rapidly shifting from manufacturing to service, technology, and knowledge.¹⁵¹ From a high of 32.7% in 1953, union membership among American workers has dropped steeply to the current 13%, or 15.7 million workers.¹⁵² While losing membership among its industrial base of mining and manufacturing industries, the young, and in most occupational groups, however, the AFL-CIO has successfully organized teachers, government employees, and protective service workers (firefighters, law enforcement, security, and corrections).¹⁵³ Despite these gains, however, labor unions have failed to attract workers among the emerging technology, professional, and service sectors.¹⁵⁴

Although organized labor achieved a high level of influence in the mid-20th century to establish new legal protections for workers, these gains since have diminished. Fueled by Cold War and anti-globalization fears that the slightest hint of economic solidarity among workers would toll a death knell for U.S. competitiveness in a free market economy, corporate and business interests have continued their campaign against organized labor, often citing statistics such as the high cost of labor compensation and benefits in the pricing of U.S. automobiles.¹⁵⁵ The majority of U.S. workers are employed in small businesses that are not unionized, however, and the decimation of labor unions have helped keep compensation of U.S. workers suppressed while corporate profits have soared.¹⁵⁶ As a result, the majority of low-to-middle-wage U.S. workers have not benefitted proportionally from their contribution to value creation in a growing economy of increasing economic inequality.¹⁵⁷

150. See, e.g., Paul Krugman, Op-Ed., *State of the Unions*, N.Y. TIMES, Dec. 24, 2007, at A17 (although supporting unions, noting that “[t]oday . . . the American union movement is a shadow of its former self . . .”); Carol D. Leonnig, *Ex-City Worker Guilty in D.C. Union Scandal*, WASH. POST, Oct. 16, 2003, at B6.

151. E.g., Matt Richtel, *Unions Struggle as Communications Industry Shifts*, N.Y. TIMES, June 1, 2005, at C1.

152. Bureau of Labor Statistics, *Union Members’ Summary*, <http://www.bls.gov/news.release/union2.nr0.htm> (last visited Feb. 4, 2008) (noting that in 2007, unions had 15.7 million members); see also Leo Troy, *Trade Union Membership, 1897–1962*, REV. ECON. & STAT., 1965, at 2, available at <http://www.nber.org/chapters/c1707.pdf> (noting that in 1953, 32.7% of workers were members of unions).

153. Bureau of Labor Statistics, *supra* note 152.

154. See *id.*

155. See, e.g., Wendy Zellner, *How Wal-Mart Keeps Unions at Bay*, BUSINESS WEEK, Oct. 28, 2002, at 94.

156. See Bureau of Labor Statistics, *supra* note 152 (noting that “[u]nion members accounted for 12.1 percent of employed wage and salary workers . . .”); see also Bob Herbert, Op-Ed., *We’re More Productive. Who Gets the Money?*, N.Y. TIMES, Apr. 5, 2004, at A21.

157. See Eric Dash, *Compensation Experts Offer Ways to Help Curb Executive Salaries*, N.Y. TIMES, Dec. 30, 2006, at C1 (noting that while the average CEO’s compensation “has increased more than 600 percent” in the last 25 years, “the ratio between the average pay for a top executive and a worker . . . has more than quadrupled, to a multiple of 170 . . .”).

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E. Business and the regulatory environment

U.S. business is against regulation.¹⁵⁸ If regulation is inevitable, then attorneys and economists representing business interests position themselves to be deeply involved in the drafting of law and regulations. From an economic efficiency perspective, business functions best when it is relatively unconstrained.¹⁵⁹ This attitude resonates with American individualism yet it fails to account for the cost of providing the social environment and infrastructure necessary for a thriving free market economy. From the robber barons to the Enron debacle, U.S. business has demonstrated the downside of too little regulation.¹⁶⁰ More importantly, the anti-regulatory stance of business fails to acknowledge the inherent inefficiencies in the human purpose of enterprise wherein human beings, with imperfect knowledge and rationality, determine the value of products and services.¹⁶¹

While the anti-regulatory position of business is understandable, it frequently fails to acknowledge or account for the public interest, seeking solely to maximize profitability.¹⁶² The profit maximization mantra has justified deregulatory decisions that have proved disastrous for consumers, the environment, society in general, and even for business.¹⁶³ The deregulation of telecommunications, energy, and financial services preceded some of the biggest cases of corporate fraud and scandal in U.S. history.¹⁶⁴ The recent Federal Communication Commission (FCC) deregulation of media industry, despite overwhelming protest from the public, threatens to undermine the integrity of news and information throughout the country.¹⁶⁵ The dismantling of regulation removes the structures of social accountability that guide business strategy and decision-making in the creation of value and, in the long term, alienates capital from value.

VII. HUMAN MORAL CLAIMS IN THE CREATION OF VALUE

Business in democratic societies operates from a foundation of principles affirming justice and human worth. The moral claims of those principles are well understood

158. See, e.g., Kim Dixon, *Pfizer Anti-Smoking Drug Needs Warning: FDA*, REUTERS, Feb. 1, 2008, <http://www.reuters.com/article/governmentFilingsNews/idUSN0145002720080201> (describing Pfizer's gradual compliance with FDA regulations for certain drugs).

159. See James C. Miller III & Bruce Yandle, *Benefit-Cost Analyses of Social Regulation: Case Studies from the Council on Wage and Price Stability 1* (1979).

160. See Anthony H. Catanach, Jr. & Shelley Rhoades-Catanach, *Enron: A Financial Reporting Failure?* 48 VILL. L. REV. 1057, 1057 (2003).

161. See H.L.A. HART, *THE CONCEPT OF LAW* 197–98 (2d ed. 1997) (explaining that some of the fundamental characteristics of humans are “[l]imited understanding and strength of will”).

162. See *supra* note 158 and accompanying text.

163. See Annys Shin, *Recall of Toy with Dangerous Chemical Prompts Support for Mandatory Testing*, WASH. POST, Nov. 9, 2007, at D1.

164. Alex Berenson & Richard A. Oppel Jr., *Once-Mighty Enron Strains Under Scrutiny*, N.Y. TIMES, Oct. 28, 2001, at 3.1.

165. Michelle Turcotte, *Media Deregulation Will Limit Essential Freedoms*, DAILY CARDINAL, Nov. 5, 2007, <http://www.dailycardinal.com/article/1023>.

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in terms of political and civil rights. In the United States especially, the economic foundation of democracy and human rights is less fully understood.

A. *Democracy and the economy of freedom*

Nobel economist Amartya Sen asserts that the moral measure of the economy—and of business as a major economic driver—is human freedom, defined as the development of specific and uniquely human individual and collective capabilities that are both the ends and the instrumental means of freedom.¹⁶⁶ Sen defines fundamental human capabilities, the functional essence of human freedom:

1. Political freedoms:

[T]he opportunities that people have to determine who should govern and on what principles . . . ; the possibility to scrutinize and criticize authorities, to have freedom of political expression and an uncensored press, to enjoy the freedom to choose between different political parties . . . ; political entitlements . . . (encompassing . . . dialogue, dissent, and critique as well as voting rights and participatory selection of legislators and executives.)¹⁶⁷

2. Economic facilities:

[O]pportunities that individuals respectively enjoy to utilize economic resources for the purpose of consumption, production, or exchange. The economic entitlements that a person has will depend on the resources owned or available for use as well on conditions of exchange, such as relative prices and the working of markets. Insofar as the process of economic development increases the income and wealth of a country, they are reflected in corresponding enhancement of economic entitlements of the population. It should be obvious that in the relation between national income and wealth, on the one hand, and the economic entitlements of individuals (or families), on the other, distributional considerations are important, in addition to aggregative ones The availability and access to finance can be a crucial influence on the economic entitlements.¹⁶⁸

3. Social opportunities:

[A]rrangements that society makes for education, health care and so on, which influence the individual's substantive freedom to live better.¹⁶⁹

166. SEN, *supra* note 68, at 3.

167. *Id.* at 38.

168. *Id.* at 38–39.

169. *Id.* at 39.

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4. Transparency guarantees:

*[T]he need for openness that people can expect: the freedom to deal with one another under guarantees of disclosure and lucidity*¹⁷⁰ *These guarantees have a clear instrumental role in preventing corruption, financial irresponsibility and underhand dealings.*¹⁷¹

5. Protective security:

*[The] social safety net for preventing the affected population from being reduced to abject misery, and in some cases even starvation and death. The domain of protective security includes fixed institutional arrangements such as unemployment benefits and statutory income supplements to the indigent as well as ad hoc arrangements such as famine relief or emergency public employment to generate income for [the poor].*¹⁷²

B. *The moral claims of human capabilities*

Aligning closely with Sen, Martha Nussbaum repeatedly and elegantly has argued the moral claims of justice and human worth in concrete economic terms.¹⁷³ In examining the collective responsibility for human rights in relation to human capabilities, Nussbaum emphasizes the ability of people to be and choose rather than simply the negative liberty of noninterference.¹⁷⁴ In practice, this understanding of justice and human worth establishes the moral basis for political and civil rights; for example, the right to practice one's religion and lifestyle without interference.¹⁷⁵ It also establishes the moral basis for a right to education, health care, law enforcement, transparent contracts, access to credit, and a host of facilities required for living a fully human life.¹⁷⁶ These rights are available to relatively affluent people in states with developed economies, but they are not readily available to poor people in those same countries or to the majority of people in poor nations.¹⁷⁷ Understanding the moral claims of justice and human worth in this way establishes a high

170. *Id.*

171. *Id.* at 40.

172. *Id.*

173. MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 11–13 (2000); Martha Nussbaum, In Defense of Universal Values, Lecture at The Fifth Annual Hesburgh Lectures on Ethics and Public Policy 33–34 (Feb. 1999), available at http://kroc.nd.edu/ocpapers/op_16_1.pdf.

174. See Nussbaum, In Defense of Universal Values, *supra* note 173, at 34.

175. *Id.* at 40.

176. See *id.* at 40–41.

177. See *id.* at 42–43.

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bar for assuring that the opportunities of the market will be distributed equitably to promote human flourishing.¹⁷⁸

C. *The problem of inequality and injustice*

From the perspective of justice and human worth, human flourishing is the moral measure of wealth. In an era of stupendous wealth, millions of human beings fail to flourish because of extreme poverty, subject to its ravages of disease, deprivation, and despair. The familiar facts are posted by the UN as part of its Millennium and Global Compact initiatives:

- Half the world—nearly three billion people—live on less than two dollars a day.¹⁷⁹
- The GDP of the poorest 48 nations (i.e. a quarter of the world's countries) is less than the wealth of the world's three richest people combined.¹⁸⁰
- Less than one per cent of what the world spends every year on weapons [we could have put] every child into school by the year 2000[—but we didn't].¹⁸¹
- The wealthiest [country in the world] has the widest gap between rich and poor.¹⁸²
- Long-term trends show a widening wealth ratio between richest and poorest countries:

1820: 3 to 1
1913: 11 to 1
1950: 35 to 1
1973: 44 to 1
1992: 72 to 1.¹⁸³

Moral discussions of inequality and injustice begin with poverty because of the inseparable link between economics and human flourishing. Much has been written about the moral responsibility that wealthy people and nations have for relieving the poverty and suffering of poor people and nations, but astonishingly, little has been done to solve the problem.¹⁸⁴ Thomas Pogge challenges the moral thinking of the world's wealthier people by rejecting the notion that our moral failure is a lack of generosity.¹⁸⁵ Instead he questions why “955 million citizens of the affluent countries are morally entitled to their 81 percent of the global product” when their

178. *Id.* at 46.

179. Anup Shah, *Poverty Facts and Stats*, GLOBAL ISSUES, Nov. 24, 2006, <http://www.globalissues.org/TradeRelated/Facts.asp>; see also KOFI A. ANNAN, “WE THE PEOPLES”: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY 19 (2000).

180. Shah, *supra* note 179.

181. *Id.*

182. *Id.*

183. *Id.*

184. See, e.g., Pogge, *supra* note 119.

185. *Id.* at 2.

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consumption is the direct cause of so much human suffering and deprivation.¹⁸⁶ If, as democratic principles proclaim, all people are created equal, then why is that equality not understood as more than equal voting and jurisprudence?

With economic inequality and injustice increasing proportionally to the growth in world wealth created by the expansion of enterprise, markets, and capital, what is the moral case for the market state? The economic arguments for economic growth are compelling, but unless real and measurable progress is made in alleviating extreme poverty and correcting wealth and income inequality, the case for economic growth will fail to persuade on moral grounds. As Rajan and Zingales warn, perhaps the market winners with their lion's share of wealth will champion their victories, but in democracies, they do not have a majority of votes.¹⁸⁷

The moral claims of justice and human worth establish the economic as well as political aspects of human freedom. Understanding global economic development as both the instrumental means and the end of human freedom calls for concrete measures to evaluate the investment of capital in human beings and their capabilities. Undercapitalized people are not only un-free, they represent a moral failure of society in addition to their disruptive drag on its economy.¹⁸⁸ The economic cost of undercapitalized people is well understood—they do not pull their productive weight in the workplace; they get sick; they fill up prisons and homeless shelters; they default on the loans they take out to buy basic necessities; as angry, hopeless adolescents their drugs, gangs, and violence are a menace to decent people. But the real failure is moral.

Any society—from the Main Street village to the global village—that fails to take responsibility for capitalizing its human beings is morally culpable for the damage done to those individuals and to the society. Virtue theory defines morality by the integrity of persons in fulfilling their purpose.¹⁸⁹ When human lives lack integrity because people are deprived of the means to realize their capabilities and fulfill their purpose, it is a moral failure.¹⁹⁰ And when that failure is attributable to society's concentration of capital among the rich at the expense of basic social benefits such as education, public safety, and living wages, the moral failure is shared by everyone, especially those who made policy decisions directing the structure of markets and flow of capital.¹⁹¹

D. Human values and the moral economy

Questions about the moral economy, a research domain of economic historians, anthropologists, classicists, and political scientists, have been the object of renewed

186. *Id.*

187. RAJAN & ZINGALES, *supra* note 123, at 164.

188. *See* SEN, *supra* note 68, at 3–4.

189. *See* KANT, *supra* note 14, at 22–23.

190. Nussbaum, In Defense of Universal Values, *supra* note 173, at 33–34.

191. *Id.* at 34, 46.

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attention in international studies since the terrorist attacks in New York, Washington, Madrid, and London.¹⁹² Prior to this time, moral concerns raised about the economy centered around the concept of “embeddedness” and “disembeddedness” introduced by Polanyi to distinguish between societies in which the process of providing for the material welfare of people was integrated in social institutions of kinship, religion, and politics, and market economies, in which the economy is a separate, autonomous sphere.¹⁹³

Booth describes the pervasive commodification nature, persons, and human activity in the modern market economy as the embedded economy “turned inside out, and now a whole society becomes embedded in the self-regulating mechanism of its own economy; the economy envelops society, refashioning its ethos and relations after its own image.”¹⁹⁴ Moral economists question the morality of marketized society for its privileging of qualities considered immoral—or at least undesirable—in most traditional communities: material gain, calculation, atomism, and selfishness.¹⁹⁵ The project of globalization—understood as bringing the entire world into the vortex of competitive free markets—is met with skepticism by those who are reluctant to see their valued traditions, relationships, and social practices subsumed into the market. Leaders of Islamic nations, for example, face complex challenges in attempts to develop modern market structures that do not conflict with explicit principles and injunctions of Islam.¹⁹⁶ These concerns are not trivial; they undoubtedly represent a majority of the world’s people who remain firmly identified with religious, ethnic, and cultural traditions where the embedded economy is still prevalent.

E. Business and the market valuation of human capital

Western democracies are champions of human rights, yet that value stands in stark contrast to the devaluation of human labor in the marketplace. A geopolitical order based primarily on the wisdom of the Invisible Hand carries increased human exposure to risks along with its opportunities. As Amartya Sen also demonstrates, capitalism, with its drive to efficiency, can be incompatible with human freedom.¹⁹⁷ And the drive for efficiency does not account for inefficiencies of human worth—or the fact that value is subjectively determined by humans who prefer the ineffi-

192. See generally Timothy P. Roth, *Consequentialism, Rights, and the New Social Welfare Theory*, 28 J. SOCIO-ECON. 95 (1999). See also William James Booth, *On the Idea of the Moral Economy*, 88 AM. POL. SCI. REV. 653 (1994).

193. Karl Polanyi, *On the Comparative Treatment of Economic Institutions in Antiquity, with Illustrations from Athens, Mycenae, and Alalakh*, in CITY INVINCIBLE: A SYMPOSIUM ON URBANIZATION AND CULTURAL DEVELOPMENT IN THE ANCIENT NEAR EAST 329 (Carl H. Kraeling & Robert M. Adams eds., 1960); KARL POLANYI, *THE GREAT TRANSFORMATION* 56–77 (1957).

194. Booth, *supra* note 192, at 656.

195. *Id.* at 657.

196. See CHARLES TRIPP, *ISLAM AND THE MORAL ECONOMY: THE CHALLENGE OF CAPITALISM* 103 (2006).

197. SEN, *supra* note 68, at 117; see also Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970).

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ciency of their own preferences, and that efficiency itself is not value-free but embedded with values, or that corruption is efficiency-enhancing.¹⁹⁸

The problem of efficiency is especially glaring in the labor market, where human labor is valued as an input to production with no relation to the cost of a human life and the dignity of its worth.¹⁹⁹ The contradictions between the espoused moral valuation of human beings and the market valuation of their labor raise disquieting, thorny questions for which market state proponents have yet to find answers: From the moral perspective of justice and human worth:

- What is the moral basis for apportioning ownership of production profits?
- What is the moral basis for determining the value of human labor as a factor of production?
- What should be done about people who are market failures—whose market value income cannot cover the cost of a life of basic dignity?
- Who makes up the gap? How?
- How much surplus should individuals be able to claim if their market value far exceeds the cost of their lives?
- How is the “surplus” of capital determined? If the market value of human labor is below the real cost of a decent human life, then why is the productive capital considered “surplus” rather than wage entitlement?
- Why isn’t the funneling of capital to “surplus” considered theft from the people whose labor is valued below the cost of their lives?
- Why is it morally acceptable (or efficient) for financial institutions to earn money off loans for basic necessities (housing, cars, health care) from people whose labor is undervalued?

At a time when productivity, profitability, and capital generation are dependent on human input that is not only increasingly valuable but increasingly portable, it may be a good time to rethink the value of human capabilities driving economic growth. While there will always be the need to accommodate individuals who are not market-competitive, the broader question of the moral valuation of human labor has far-reaching implications for a creative economy of knowledge and innovation. For most of history, productive labor has been relatively cheap and abundant; but that is no longer the case.²⁰⁰ Well-developed and highly functioning human capabilities are the currency of wealth creation and global economic growth.²⁰¹ That is the economic argument for human development. In a society that champions human rights, a moral argument for human development as the flourishing of human freedom through development and exercise of their capabilities should be made as well.

198. See SEN, *supra* note 68, at 117–19.

199. See POLANYI, *supra* note 193, at 69–70.

200. ADAMS, *supra* note 5, at 52.

201. See LAWRENCE MISHEL ET. AL., THE STATE OF WORKING AMERICA 1998–99, at 214 (1999).

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VIII. THE PLATFORM OF OPPORTUNITY: A NEW CHARTER FOR BUSINESS

Envisioning business as a platform of opportunity establishes a new understanding of the role of free enterprise in providing for human needs. The principles of human worth and justice and the moral claims of human capabilities establish a legitimating moral framework for expanding the mission of business beyond profit maximization to human opportunity creation. While this introduces new challenges in a business climate historically resistant to the concrete consequences of human moral claims, it also introduces new opportunities which enterprising business leaders have begun to explore. Business already is beginning to redefine its role in response to conditions that pose new demands on them. Corporate citizenship and social responsibility have become prominent features in business press,²⁰² and some of the theoretical work of redefining business is being done in business schools by faculty with both business and academic experience and expertise.²⁰³ Many companies already have developed ways of doing business that align with the goals of human development. What is most significant, however, is the reorientation of purpose from strictly profit-oriented to a broader mission of what some call the Triple Bottom Line: People, Planet, and Profits.²⁰⁴

A. *Defining the platform of opportunity*

What does it mean for business to be a “platform of opportunity?” In concrete terms, it means that people will look to business as a primary means of assuring themselves of social benefits and, on the other hand, that business will be ready to provide a rich array of opportunities that compensate people according to the real value of their lives and enable them to achieve at least a threshold standard in realizing their human capabilities.²⁰⁵ The major barrier for business to function as a true platform of opportunity, as it is currently oriented, is the singularity of the profit motive.²⁰⁶ To some extent, the Milton Friedman profit maximization principle has been distorted to excuse all manner of casualties in the name of profit.²⁰⁷ Nevertheless, rebalancing the motivations of business to account for multiple stakeholders and compensate them for the value of their contributions to productivity requires a revised understanding of the corporation (and by extension, all of busi-

202. See, e.g., *Big Issues (A Special Report)—Corporate Social Responsibility: Good Citizenship or Investor Rip-off?*, WALL ST. J., Jan. 9, 2006, at R6; *Cisco: Giving Back Is “Good Business,”* BUSINESSWEEK, Aug. 11, 2005, http://www.businessweek.com/technology/content/aug2005/tc20050811_6009_tc057.htm?chan=search.

203. Robert Weisman, *Redefining the MBA*, BOS. GLOBE, Oct. 14, 2007, http://www.boston.com/business/globe/articles/2007/10/14/redefining_the_mba/.

204. Darrell Brown et al., *Triple Bottom Line: A Business Metaphor for a Social Construct* 20 (Dep’t of Bus. Econ., Universitat Autònoma de Barcelona Working Paper No. 06/2, 2006), available at <http://selene.uab.es/dep-economia-empresa/documents/06-2.pdf>.

205. See *supra* note 93.

206. Douglas K. Smith, *Exploding Mortgages V*, http://www.douglasksmith.com/2006/08/exploding_mortgages_v.htm (Aug. 17, 2006, 11:25 EST).

207. MILTON FRIEDMAN, *ESSAYS IN POSITIVE ECONOMICS* 21 (1953).

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ness) and its charter. A focus on profitability for owners may be appropriate when there is a robust apparatus of social benefits provision available through the State, but it is not appropriate or just when social benefits are defined in large part by the opportunities available to individuals through business.

B. Stakeholder views of the corporation

The traditional American view of the corporation has focused on shareholders and management's fiduciary responsibility to their claims.²⁰⁸ Academic business leaders have begun to theorize corporate business as a nexus of stakeholders with common interests. James Post, Lee Preston and Sybille Sachs, for example, raise probing questions about the current ownership model of the corporation, suggesting that a stakeholder model is much more appropriate to the way business is conducted and wealth is created in the current economy.²⁰⁹ While not uncontested, Post's stakeholder view of the corporation aligns well with the moral claims of human values: "The corporation is an organization engaged in mobilizing resources for productive uses in order to create wealth and other benefits (and not to intentionally destroy wealth, increase risk, or cause harm) for its multiple constituents, or stakeholders."²¹⁰

C. Corporate citizenship

Corporate citizenship and social responsibility have become important concepts and practices in contemporary business.²¹¹ While there is much variation in how these concepts are understood and practiced among businesses, there is growing commitment and consensus around basic principles.²¹²

Jeffrey Garten proposes a five-point corporate citizenship agenda to guide CEOs and corporate boards to fulfill their obligations in promoting human flourishing in the global economy:

1. "CEOs must be proactive and transparent when it comes to issues of corporate citizenship and social responsibility."²¹³
2. "Business leaders should expand the work of industry associations."²¹⁴
3. "Business leaders should expand engagement with public and nonprofit institutions."²¹⁵

208. See Jeffrey E. Garten, *Globalism Without Tears: A New Social Compact For CEOs*, STRATEGY & BUS., 2d Quarter 2002, at 4.

209. JAMES E. POST ET AL., REDEFINING THE CORPORATION: STAKEHOLDER MANAGEMENT AND ORGANIZATIONAL WEALTH 17 (2002).

210. *Id.*

211. Garten, *supra* note 208, at 4–5.

212. See *id.* at 3, 5.

213. *Id.* at 5.

214. *Id.* at 7.

215. *Id.* at 8.

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4. "Business leaders should develop more rigorous strategies in dealing with antiglobalization protest groups."²¹⁶
5. "CEOs should press governments and international organizations to develop global rules of conduct."²¹⁷

D. Business initiatives and social accountability

Business can and does work in collaboration with stakeholders to promote human freedom and opportunity. For example, many businesses already have adopted corporate codes of citizenship that prohibit child labor and discriminatory employment practices and support environmental stewardship.²¹⁸ Some companies go beyond this with health clinics, education programs, material infrastructure development, and social initiatives that supplement and reinforce the states in which they conduct business.²¹⁹ Businesses operating in wealthy countries also promote global justice when they pay their fair share of taxes as well as when they pay decent wages allowing employees to support themselves.²²⁰ Businesses contribute to economic development in poorer nations through taxes and philanthropy.²²¹ The extensive lobbying power of business can be used to promote justice through foreign aid and international development policies and programs targeted to human development in poor nations.²²² Some companies already work in partnership with non-governmental organizations (NGOs), supranational bodies such as the United Nations, and multinational alliances such as the European Union to create effective structures for managing global challenges beyond the power of any one nation to resolve.²²³ Many businesses have adopted work-life policies that enable working adults in all countries the flexibility to provide for the care of dependent family

216. *Id.* at 9.

217. *Id.* at 10.

218. See Microsoft Corporation, About Microsoft Corporate Citizenship, <http://www.microsoft.com/about/corporatecitizenship/default.aspx> (last visited Feb. 3, 2008); Mitsubishi International Corporation, Corporate Citizenship—Corporate Social Responsibility, http://www.micusa.com/corporatecitizenship_socialresponsibility.shtml (last visited Feb. 3, 2008); PriceWaterhouseCoopers, Code of Conduct: Corporate Citizenship, <http://www.pwc.com/extweb/aboutus.nsf/docid/2770CFAD10FE87AA80256D6A00343FE1> (last visited Feb. 3, 2008).

219. See Milt Freudenheim, *Company Clinics Cut Health Costs*, N.Y. TIMES, Jan. 14, 2007, § 1, at 1; Nazia Khan, *Make it a Better Place*, BUSINESS TODAY, <http://www.apexstuff.com/bt/200602/corpi.asp> (social responsibility); The Coca-Cola Company, Local Initiatives: Education, <http://www.thecoca-colacompany.com/citizenship/education.html> (last visited Feb. 3, 2008) (education programs).

220. See HOLLY SKLAR & PAUL H. SHERRY, A JUST MINIMUM WAGE: GOOD FOR WORKERS, BUSINESS AND OUR FUTURE (2005), available at <http://www.letjusticeroll.org/pdfs/AJustMinimumWage.pdf>.

221. See Lesley Wroughton, *World Bank Chief Sees Bigger Role for Private Sector*, REUTERS, Oct. 18, 2007, <http://www.reuters.com/article/latestCrisis/idUSN18426612>.

222. See Carol C. Adelman, *The Privatization of Foreign Aid: Reassessing National Largesse*, FOREIGN AFFAIRS, Nov./Dec. 2003, at 9.

223. Yvonne Asamoah, *NGOs, Social Development and Sustainability*, FOREIGNAID RATINGS LLC, Sept. 12, 2003, <http://www.foreignaid.com/thinktank/articles/NGOsAndSocialDevelopment.html>.

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members.²²⁴ Companies also invest in education, not only for their own employees, but for the children and communities in which they do business.²²⁵

CONCLUSION

The key regulatory focus for considering business as a platform of opportunity is the degree to which it is effective for everyone—not just shareholders and owners, but whole communities around the world—in building and sustaining a richly authentic human life. Future regulatory initiatives will be driven by questions such as:

- Are there opportunities for ordinary people as well as brilliant entrepreneurs?
- Can a person, at any location in a firm's payscale, work a full-time job and support herself in a way that fulfills all of her capabilities at least to a minimal level?
- Can small businesses generate enough capital to provide effectively for the social benefits of their stakeholders?
- Is there work for everyone who needs to work?
- If, as Rajan and others insist, a market system is risky and has losers, is business helping to retool workers and continually invest in their ongoing productive capabilities?
- Is business helping communities accustomed to large-scale employment make the transition to self-sufficiency when a plant relocates or an industry is downsized?

From any perspective of human worth and justice, business needs to reframe its purpose to accommodate the true value of human lives and human labor in their business models and value networks. Although business has a long way to go in becoming a fully developed and effective platform of opportunity for all, the journey already has begun.

224. Reference for Business, Work-Life Balance: The Changing Workforce and Growing Corporate Interest, <http://www.referenceforbusiness.com/management/Tr-Z/Work-Life-Balance.html> (last visited Feb. 2, 2008).

225. See, e.g., The Coca-Cola Company, Local Initiatives: Education, *supra* note 219.

