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## The Gift of Enron: An Opportunity to Talk About Capitalism, Equality and the Promise of a North American Charter of Fundamental Rights

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SMALL SCHOOL.  
BIG VALUE.

# The Gift of Enron: An Opportunity to Talk About Capitalism, Equality, Globalization, and the Promise of a North-American Charter of Fundamental Rights

LAURA SPITZ\*

*In this Article, Enron—using the word in its largest symbolic sense—is positioned as a promising opening in the debate about economic globalization and the regulation of advanced capitalism in North America. As a contribution to that debate, the author suggests that there are two aspects of advanced capitalism which call for supranational response and regulation. First, advanced capitalism is increasingly transnational (as distinct from international and intranational). This brings unique regulatory challenges to the fore. Second, the regulation of advanced capitalism can be usefully understood as a substantive equality issue (as that concept is understood in Canadian law). In the past, this aspect of capitalism—the fact that it raises substantive equality issues—could be largely dealt with within the borders of the nation-state. But the transnationalization of capitalism makes this increasingly difficult, at the same time that it brings new equality issues to the table.*

*In these circumstances, this Article suggests that a North American Charter of Fundamental Rights might be one answer, or one part of a larger answer. A supranational Charter of Fundamental Rights holds enormous potential for*

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*reasserting government sovereignty over corporate sovereignty, protecting already achieved national rights, introducing and enhancing new rights, shaping the debate about corporate reform, giving us (enforceable) minimum standards, and—perhaps most importantly—providing an opportunity to develop a coherent vision for shaping and managing our evolving North American community under NAFTA and the WTO. In exploring the scope and utility of a supranational Charter, core concepts are explored and predictable objections are canvassed. The author concludes that we should begin the complex discussions about a North American Charter, even if ratification proves impossible or inadvisable.*

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“Using the idea of background conditions it is possible to argue that it is time to rewrite our social contract, to reconsider the viability and equity of our existing social configurations and assumptions.”<sup>1</sup>

“Cultural needs and ideals change with the momentum of time; redefining our laws in keeping with the spirit of cultural flux keeps society alive and humane.”<sup>2</sup>

## I. INTRODUCTION

It seems that one cannot pick up a newspaper, magazine, or law journal these days without reading something about outsourcing, globalization, free trade, the European Union, labor exploitation in developing nations, corporate fraud, privatization, deregulation, Iraqi prisoner abuse, no-bid military contracts, and so on and so forth. There is a sense in which our world is changing in dramatic and untold ways, that the momentum with which it changes is rapidly increasing, and that these changes are natural and inevitable, but—in many cases—discreet, random, or unrelated.

While it is true that the world is rapidly changing—and that one of the most dramatic changes is increasing global economic integration brought about by technological advances, transnational capital movement, and trade liberalization—this Article challenges the position that these changes are natural and inevitable, that their course is predetermined, and that they are unrelated. Instead, I urge us to see and understand the context of these changes and the connections among them, in order that we might better manage them. By acknowledging our role in creating and participating in these changes and the structures that support them, we are able to plan for our future. In law, this means we can create legal norms and legal institutions to shape rather than merely react.

Of course in looking at the potential for reform, law is only one among many possibilities; there are a wide variety of options and strategies available. In this Article, I explore just one. My thesis is that in the context of an increasingly

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<sup>1</sup> Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1431 (2001).

<sup>2</sup> Patricia Williams, *Spirit-Murdering the Messenger: the Discourse of Fingerpointing as the Law's Response to Racism*, in CRITICAL RACE FEMINISM: A READER 229, 231 (Adrien Katherine Wing ed., 1997).

connected and integrated North American economy, a North American Charter of Fundamental Rights holds enormous potential for shifting the balance away from merely reacting to a supposed inevitable globalization of a particular economic model, and towards creating a world which can not only adapt to change, but foster human flourishing.

In Part II of this Article, I begin by positioning recent corporate scandals as a promising opening in the debate about economic globalization and the regulation of capitalism. In order to advance that debate, I suggest there are two aspects of advanced capitalism<sup>3</sup> which call for coordinated intra-, inter-, and supranational response and regulation. First, I note that advanced capitalism is increasingly transnational<sup>4</sup> and that this transnationalism brings unique regulatory challenges to the fore. Second, I suggest that the regulation of capitalism can be usefully understood as a substantive equality issue (as we understand that concept in Canadian law<sup>5</sup>).

Before moving into the substance of my argument, I take the opportunity in Part III to discuss the importance of being clear about the meaning of core concepts. For the purposes of my thesis, I explore the meanings of equality, harmonization, globalization, and capitalism. I acknowledge, however, that there are surely other important terms for consideration (democracy, citizenship, and sovereignty come to mind) in debates about economic globalization and the regulation of capitalism.

In Part IV, I argue that advanced capitalism raises profound questions about the basic nature of our international community, as well as its values and its ability and willingness to acknowledge equality for women, minorities, and other disadvantaged groups.<sup>6</sup> I explore my thesis that advanced capitalism is as much a

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<sup>3</sup> Thank you to Risa Lieberwitz of the Cornell University School of Labor and Industrial Relations for helping me to select a term to refer to capitalism in the twenty-first century. There are different terms available—modern capitalism, post-modern capitalism, laissez-faire capitalism, neo-American capitalism, neo-Conservative capitalism, neo-liberal capitalism, late capitalism, and so forth—but “advanced capitalism” captures both recent changes and traditional meaning, while being sufficiently broad to capture the essence of several alternative terms as well. See *infra* Part III.D (discussing the meaning of “capitalism”).

<sup>4</sup> By using the term transnational, I mean to refer to something that occurs across or without reference to national borders, as distinct from something that occurs inter- (between) nations or supra- (above) nations. I explore the term “transnational” more fully in Laura Spitz, *At the Intersection of North American Free Trade and Same-Sex Marriage*, 9 U.C.L.A. J. Int’l L. (forthcoming 2005).

<sup>5</sup> See *infra* Parts III.A and IV.B (discussing the meaning and application of Canadian equality law).

<sup>6</sup> See generally Kathleen Mahoney, *The Constitutional Law of Equality in Canada*, 44 ME. L. REV. 229 (1992) (observing that the intense debate leading up to the entrenchment of the Canadian Charter raised similar questions for Canadians).

transnational equality issue as any other, and I argue that we need to address this possibility as part of our reform strategies for dealing with corporate fraud.

In Part V, I propose that a North American Charter of Fundamental Rights could act as a guide and as a measure—giving us both aspirations and minimum standards—as we go forward with corporate (and other) reform in the context of capital, trade, and market re-regulation.<sup>7</sup> In Part VI, I reason that a consequence of enacting such a Charter should and would be some resulting uniformity among Canadian, American, and Mexican domestic laws, including immigration, tax, family, labor, and human rights laws. Guided by the principles of substantive equality, my argument is that some uniformity is not only inevitable, but desirable and necessary to advance the interests of diversity and equality.

Finally, in Part VII of this Article, I canvass some predictable objections to supranational governance. I conclude that the transnational equality aspects of advanced capitalism make international and supranational law increasingly relevant to the regulation of what were traditionally considered domestic issues and make consideration of a North American Charter of Fundamental Rights especially promising. We should begin the complex discussions about a North American Charter in any event, even if ratification of such a document proves impossible (or inadvisable) to achieve.

## II. BACKGROUND

### A. *Enron and Advanced Capitalism*

The genesis of this Article was a workshop following the collapses of Enron, Global Crossing, and other corporations.<sup>8</sup> Even at that time it was clear that these scandals were not only a convenient metaphor and important context for

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<sup>7</sup> In the context of the possibilities for a Free Trade Area of the Americas (“FTAA”), Terry Collingsworth argues that both governments and multinational companies should:

accept the reality that the FTAA is not politically viable for the time being unless the issues of labor rights and other social conditions are addressed in a manner demonstrating that these rights are consistent with the commercial rights that are protected in careful detail in the many pages of the draft FTAA agreement. The rage expressed by protestors in Seattle, Quebec, Genoa and Washington, D.C., although extreme, illustrates the united belief that the global economy is out of balance.

Terry Collingsworth, *An Essential Element of Fair Trade and Sustainable Development in the FTAA is an Enforceable Social Clause*, 2 RICH. J. GLOBAL L. & BUS. 197, 197 (2001).

<sup>8</sup> Corporate Citizens in Corporate Cultures: Restructuring and Reform, co-sponsored by the Cornell Law School Feminism and Legal Theory Project, Osgoode Hall Law School, and the University of British Columbia Faculty of Law, held at Osgoode Hall Law School, September 13–14, 2002.

discussion, but that the issues raised by them were much larger and more complex.<sup>9</sup> Implicated by these collapses, for example, were: the rule<sup>10</sup> (and role) of law; the regulation of multinational and other interjurisdictional corporations; the rapid and concomitant forces of privatization,<sup>11</sup> deregulation,<sup>12</sup> and economic

<sup>9</sup> In the Call for Papers, Workshop organizers asked:

Should [recent corporate] collapses be viewed as aberrations in an otherwise well functioning capitalist market structure? Or are Enron and Global Crossing the mere tip of the iceberg, representing only a small portion of the economic realities of decades of deregulated markets, privatization, and global capitalism? How localized are such “scandals”—do the corporate cultures (legal, ethical, professional) of other societies produce better (or worse) corporate citizens?

Call for Papers from May 2002 (on file with author).

<sup>10</sup> The phrase “rule of law” is perhaps overused. In any event, it is used so frequently as to suggest that we all know what we mean when we say it. In fact, it is a contested and debated concept. But for my purposes here, it is enough that whatever the rule of law means, surely it requires that decisions not be placed in the hands of those from whom the rules are meant to protect us. See Ann Scales & Laura Spitz, *The Jurisprudence of the Military-Industrial Complex*, 1 SEATTLE J. FOR SOC. JUST. 541, 542 (2003). For a fuller discussion of possible meanings for ‘rule of law,’ see ANN SCALES, *ACTIVE INGREDIENTS: LAWYERING, FEMINISM, AND LEGAL THEORY* ch. 1 (forthcoming 2005).

<sup>11</sup> Two of the most urgent privatization debates in the United States center around the future of social security and the use of private contractors in the military, particularly in the context of intelligence gathering, security forces, and prison guards. With respect to social security, see Mike Allen, *Congressional Republicans Agree to Launch Social Security Campaign*, WASH. POST, Jan. 31, 2005, at A04; Paul Krugman, *The Bum’s Rush*, N.Y. TIMES, Jan. 4, 2005, at A19; Harold Meyerson, *The ‘Other America’ May Be Coming Back*, WASH. POST, Jan. 5, 2005, at A17; Paul Krugman, *That Magic Moment*, N.Y. TIMES, Jan. 18, 2005, at A21; Ben White, *Labor Presses Case Against Privatizing Social Security*, WASH. POST, Jan. 19, 2005, at E03; Mike Allen & Jonathan Weisman, *New Doubts on Plan for Social Security*, WASH. POST, Jan. 19, 2005, at A01; Jonathan Weisman, *Competing Visions for Social Security*, WASH. POST, Feb. 24, 2005, at A01. With respect to concerns about privatizing critical aspects of the military, see Robert O’Harrow, Jr., *In Age of Security, Firm Mines Wealth of Personal Data*, WASH. POST, Jan. 20, 2005, at A01 (information industry giant transforming itself into a private intelligence service for national security and other law enforcement tasks); Susan Schmidt & Dana Priest, *Civilian Charged in Beating of Afghan Detainee*, WASH. POST, June 18, 2004, at A01; Edward Coty, *Contractor Immunity a Divisive Issue*, WASH. POST, June 14, 2004, at A01.

<sup>12</sup> For example, in 1999 the U.S. Congress repealed the Glass-Steagall Act (1933) that prohibited commercial banks from owning brokers and underwriters. See Martin Mayer, *Banking’s Future Lies in the Past*, N.Y. TIMES, Aug. 25, 2002, § 4, at 9.

Deception is invited by “structured finance,” in which a bank’s loans are broken into different marketable assets—each with its own risks, repayment schedules, accounting treatment, tax consequences, even names. Organizing these arrangements, as Citibank and J.P. Morgan Chase did for Enron, facilitates other deceptions. If an institution is both a

globalization; the realization that relatively few laws were broken;<sup>13</sup> the implications for professional ethics and regulation;<sup>14</sup> the apparent transfer of some aspects of sovereignty from nations to corporations; and the need for some organized self-reflection by the United States on its role in the international community,<sup>15</sup> including attention to how the United States' responses to Enron<sup>16</sup> might change or improve that community. It quickly became clear that Enron could not be credibly viewed as an aberration in an otherwise well-functioning market,<sup>17</sup> but was instead the veritable tip of the iceberg.<sup>18</sup> The problems presented and illuminated by Enron were, and remain, systemic.<sup>19</sup>

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bank lending its own resources and a broker selling its loans to the public—and also includes an insurance company with premium income to invest—its senior officers and its favorite clients are forever under the temptation once felt by the railway conductor who took in cash fares.

*Id.*

<sup>13</sup> Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 9 (2002) (“As Senator Fred Thompson has rightly noted, ‘the real scandal here may be from not what is illegal, but what is totally permissible . . . .’”) (quoting *The Fall of Enron: How Could This Have Happened: Hearing Before the Comm. on Governmental Affairs*, 107th Cong. (Jan. 24, 2002) (statement of Sen. Fred Thompson, Senate Governmental Affairs Comm.), at [http://www.senate.gov/~gov\\_affairs/012402thompson.htm](http://www.senate.gov/~gov_affairs/012402thompson.htm) (last accessed July 29, 2002)). *But see* Barnaby J. Feder, *Report Says WorldCom Could Be Sued for Back Taxes*, N.Y. TIMES, Jan. 27, 2004, at C5; Kurt Eichenwald, *Ex-Enron Figure Reportedly Near a Plea of Guilty*, N.Y. TIMES, Jan. 8, 2004, at A1.

<sup>14</sup> *See, e.g.*, Rhode & Paton, *supra* note 13, at 25–37 (arguing that Enron presents an opportunity for lawyers to consider their professional conduct, roles, and rules).

<sup>15</sup> Alan Cowell reports that speakers at the January 2004 World Economic Forum in Davos, Switzerland were asked what advice they would give the next president of the United States. “Listen to others,” responded Thierry de Montbrial, head of a French policy research institute; Irene Khan, secretary general of Amnesty International, said: “Look around the world. And remember the impact of your power.” Alan Cowell, *Anti-Americanism May Be Fading, but Forum Is No Love Fest*, N.Y. TIMES, Jan. 24, 2004, at A2.

<sup>16</sup> For ease of discussion, I sometimes refer to the corporations involved in recent corporate scandals as “Enron” or “Enrons.” I do not mean to suggest that Enron is the only one, or even the worst one—merely representative.

<sup>17</sup> Notwithstanding the seeming obviousness of this claim, we were daily bombarded with statements following the collapse of Enron (by both government and private actors) that the Enron situation could be laid at the feet of a few individual executives. I agree that some individual Enron executives are responsible for some of what happened to all of the shareholders and stakeholders (both in Enron and the market generally) who have lost so much in the past few years. But I disagree with their contention that the entire system of advanced capitalism has not been implicated.



It is precisely the systemic nature of the problem that has made Enron such a rich topic for discussion. Its richness and value have been enhanced by the fact that the effects of its collapse were widely felt and well publicized.<sup>20</sup> The word “Enron” has now become part of everyday language in the United States.<sup>21</sup> It is a form of shorthand for some of what the American public perceives as wrong with corporations and securities laws and, to a lesser extent, the government’s role in regulating business. It offers the public a window into the social, political, legal, and economic system of advanced capitalism (the “System”) in a way that few other economic issues have.<sup>22</sup>

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<sup>18</sup> See Almar Latour & Kevin J. Delaney, *Outside the US, Executives Face Little Legal Peril*, WALL ST. J., Aug. 16, 2002, at A1 (discussing corporate misconduct in Asia, Europe and Latin America).

<sup>19</sup> That the System was implicated was a point reaffirmed by Paul Krugman in *Enron and the System*, N.Y. TIMES, Jan. 9, 2004, at A19. Mr. Krugman made the point that as of the date of his writing, the System had not changed any since the Enron scandal first broke. *Id.* Indeed, “[y]ears after Enron made financial reports look less reliable than a preschooler’s math, public companies are still having trouble getting their numbers right.” Jonathan D. Glater, *Restatements and Lawsuits Are on the Rise*, N.Y. TIMES, Jan. 20, 2005, at C2.

<sup>20</sup> Newspaper articles continue to this day. See, e.g., Ben White, *Former Directors Agree to Settle Class Actions*, WASH. POST, Jan. 10, 2005, at E01; Ben White, *Directors Run Risk of Paying Penalties Out of Their Pockets*, WASH. POST, Jan. 20, 2005, at E01. An on-line search, February 23, 2005, for the word “Enron” appearing in articles in the Washington Post in the last two years produced 922 hits. Expanding that search to include the last three years produced 2498 hits. Expanding that search back to the October 16, 2001 announcement that marked “the beginning of formal confirmations that matters had gone awry,” Rhode & Paton, *supra* note 13, at 16, produced 3145 hits.

<sup>21</sup> On February 23, 2004, for example, it was reported that Donald Walker from the General Accounting Office described President Bush’s new budget as using “Enron-type accounting.” *Democracy Now!: Spoiler or Exposer of a Spoiled System: Nader Announces Presidential Bid* (N.P.R. radio broadcast, Feb. 23, 2004), <http://www.democracynow.org/article.pl?sid=04/02/23/1524247> (last visited Jan. 18, 2005). In saying that, he can assume that a large segment of the public knows what he means, at least in general terms.

<sup>22</sup> The tenth anniversary of the North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296, 32 I.L.M. 605 [hereinafter NAFTA], is probably a better reason to start talking about a North American Charter of Fundamental Rights, but NAFTA is something that happened with very little understanding by the general public, and it is something that has continued with very little knowledge and understanding. Most people do not seem to know, for example, that private entities (i.e., corporations and investors) may enforce NAFTA against the member-state signatories. See generally Chantell Taylor, Note, *NAFTA, GATT, and the Current Free Trade System: A Dangerous Double Standard for Workers’ Rights*, 28 DENV. J. INT’L L. & POL’Y 401 (2000) (suggesting that corporations maintain far greater protection than workers). The slow erosion of environmental protections and labor

To my mind, that is the primary gift of Enron. It is not so much about the bankruptcy of a single corporation or about executive wrongdoing—although it is about those things, too—but an opportunity to engage in a discussion about the System in a context that has captured the public imagination. It is impossible to separate the collapse of Enron from the broader social, economic, and political context which facilitated it. Taken together with the recent economic downturn,<sup>23</sup> the seemingly unforeseeable end to the U.S. war in Iraq,<sup>24</sup> the mounting suspicion that U.S. foreign policy may be increasing its exposure to future terrorist attack,<sup>25</sup> looming U.S. deficits,<sup>26</sup> the emerging strength of the European Union,<sup>27</sup> the

guarantees does not capture the public imagination in the way that the huge and rapid collapse of a giant corporation does, particularly when so many people were hurt by it in such measurable ways. *But see* Charles H. Brower II, *NAFTA's Investment Chapter: Initial Thoughts About Second Generation Rights*, 36 VAND. J. TRANSNAT'L L. 1533 (2003) (The application of NAFTA's investor chapter has revealed an astonishing level of support for economic and social rights in North America.).

<sup>23</sup> See Adam Nagourney & Janet Elder, *Public Voicing Doubts on Iraq and the Economy, Poll Finds*, N.Y. TIMES, Jan. 20, 2005, at A1. "On the eve of President Bush's second inauguration, most Americans say they do not expect the economy to improve or American troops to be withdrawn from Iraq by the time Mr. Bush leaves the White House . . ." *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., Timothy Heritage, *Four More Years of Bush Makes the World Anxious*, REUTERS, Jan. 19, 2005, available at <http://www.reuters.com> ("Some 58% of people surveyed in a British Broadcasting Corporation poll in 21 countries said they believed Bush's re-election made the world a more dangerous place.").

<sup>26</sup> I pluralized "deficits" because I mean to include both the federal and trade deficits. For basic information about the trade deficit, see Elizabeth Becker, *'04 Trade Deficit Sets Record, \$617 Billion*, N.Y. TIMES, Feb. 11, 2005, at C1. For basic information about the federal deficit, see Edmund L. Andrews & David E. Rosenbaum, *The President's Budget: The Bottom Lines; The Big Picture May Seem Rosy, But the Deficit is in the Details*, N.Y. TIMES, Feb. 8, 2005, at A1.

<sup>27</sup> The EU now comprises 25 member-states, is a member of the World Trade Organization, and more often than not negotiates in the United Nations and other global arenas on behalf of its members. The EU traces its history back to the Treaty of Paris, Treaty Instituting the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 140, and the Treaty of Rome, Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11. These treaties have been amended and modified several times, the most important being the Treaty on European Union, Feb. 7, 1992, art. 3b, O.J.C. 224/1 (commonly referred to as the Maastricht Treaty of 1992). For a summary of how the EU functions, including descriptions of institutional actors such as the Council of Ministers, the European Parliament, the European Court of Justice, and the European Commission, see *Europe in 12 lessons and History of the European Union*, both at <http://europa.eu.int> (last visited Jan. 19, 2005). See also <http://european-convention.eu.int> (last visited Jan. 19, 2005); Richard Burchill, *The EU and*

disappointments of the North American Free Trade Agreement (“NAFTA”),<sup>28</sup> and the failure of the United States, Brazil, and others to resolve significant points of disagreement about several aspects of the Free Trade Area of the Americas (“FTAA”)<sup>29</sup> by the deadline set for its negotiation,<sup>30</sup> one can literally feel (some) Americans falter.<sup>31</sup> The seemingly relentless momentum of U.S. dominated

*European Democracy—Social Democracy or Democracy With a Social Dimension?*, 17 CAN. J. L. & JURIS. 185, 185 n. 2 (2004).

<sup>28</sup> See Joseph E. Stiglitz, *The Broken Promise of NAFTA*, N.Y. TIMES, Jan. 6, 2004, at A23; c.f. Charles Schumer & Paul Craig Roberts, Editorial, *Second Thoughts on Free Trade*, N.Y. TIMES, Jan. 6, 2004, at A23; Erika Kinetz, *Who Wins and Who Loses as Jobs Move Overseas?*, N.Y. TIMES, Dec. 8, 2003, § 3, at 5.

<sup>29</sup> See *New Drive for Americas Trade Zone*, BBC NEWS UK EDITION, Nov. 16, 2003, at <http://news.bbc.co.uk/1/hi/business/3275469.stm> (last visited Jan. 18, 2005); Simon Romero, *Trade Talks in Miami End Early*, N.Y. TIMES, Nov. 21, 2003, at C1; Stephen Evans, *Fighting for Free Trade?*, BBC NEWS UK EDITION, Nov. 18, 2003, at <http://news.bbc.co.uk/1/hi/business/3270189.stm> (last visited May 5, 2004). Points of contention include heavy U.S. agricultural subsidies, South American concerns about letting North American companies bid to do some government work and the concerns of American pharmaceutical companies, which do not want their formulas used by local producers in South America.

At a minimum, it seems that in order for either of these countries to sign on to a FTAA, trade needs to be anything but free. Simon Romero, *Hemisphere Trade Talks Move Slowly*, N.Y. TIMES, Nov. 18, 2003, at C6; see also Editorial, *Free Trade, a la Carte*, N.Y. TIMES, Nov. 22, 2003, at A14; Simon Romero, *Hemisphere Trade Talks in Miami Are Reported to Hit a Bump*, N.Y. TIMES, Nov. 17, 2003, at A5; Simon Romero, *Frustrated, U.S. Will Seek Bilateral Trade Pacts*, N.Y. TIMES, Nov. 19, 2003, at C2.

Interestingly, Brazil and the United States have been dead-locked on the issue of fingerprinting and photographing one another’s visitors. See Larry Rohter, *U.S. and Brazil Fingerprinting: Is it Getting Out of Hand?*, N.Y. TIMES, Jan. 10, 2004, at A5. One cannot help but wonder if this isn’t connected to the larger power struggle in the Americas between these two nations. The editors of the *New York Times* believe that “better ties [for the U.S.] with the rest of Latin America now hinge on a closer relationship with Brazil.” Editorial, *Brazil’s Moment*, N.Y. TIMES, Jan. 24, 2004, at A14.

<sup>30</sup> Negotiations for the FTAA were supposed to conclude by Jan. 1, 2005. See *2005 Outlook, International Trade*, 22 INT’L TRADE REP. 94 (2005).

<sup>31</sup> In response to President Bush’s 2003 State of the Union Address, the editors of the *New York Times* stated: “[A]s [Mr. Bush] heads into his own re-election cycle with a war plan at the top of his agenda, the state of the union that the president leads is clearly laced with anxiety and doubt.” Editorial, *The Nation, The President, the War*, N.Y. TIMES, Jan. 29, 2003, at A23; see also Maureen Dowd, Editorial, *The Empires Strikes First*, N.Y. TIMES, Jan. 29, 2003, at A25 (“The state of the union is skeptical.”). More recently, in its review of 2003 autumn television shows in the United States, the *Canadian Globe and Mail* reported: “If we take the content of American television as a reflection of the state of the American psyche, the United States is one

economic globalization has psychologically slowed<sup>32</sup> and the largely unstated assumptions that made deregulated markets, privatization, and the spread of neo-Conservative capitalism—particularly by force<sup>33</sup>—seem “inevitable”<sup>34</sup> and “natural” are open, if only slightly, for debate.

What is this debate? As will be obvious by my comments so far, I believe that at its most basic level, this is a debate about the regulation of capitalism and how that regulation fits (or does not fit, or might fit) with our stated<sup>35</sup> and evolving societal values and objectives. I also believe that we need to name it as that—a debate about the regulation of capitalism—in order to have it in meaningful and productive ways. As part of that debate, I want to focus on two central features of advanced capitalism in order that we might better manage its regulation.

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nervous, troubled nation looking for answers. There is a subdued air of self-examination.” John Doyle, *The Good, the So-So, and the Don't Go There*, GLOBE & MAIL, Sept. 20, 2003, at R1. Interestingly, Mr. Doyle observes that this was the first full television season written and produced since September 11, 2001. *Id.*

<sup>32</sup> The anti-American sentiment engendered by and organized around the war against Iraq has highlighted international questions about U.S. domination of the global economy. Certainly, the European Union is pressing forward with its goal of restricting the effect of the U.S. economy on Europe by enlarging its power and self-sufficiency.

<sup>33</sup> “Free markets and free trade are key priorities of our national security strategy.” WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 23 (Sep. 17, 2002) [hereinafter NATIONAL SECURITY STRATEGY], available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited Jan. 18, 2005); see also Scales & Spitz, *supra* note 10, at 546–50 (discussing economic policy and national security).

<sup>34</sup> An ironic feature of economic globalization thus advertised is its Marxism! The most controversial aspect of Marx's work was his historicism—his insistence that the stages of economic organization would inevitably follow one after another. Proponents of global capitalism insist on the same sort of historical determinism. I discuss the apparent inevitability of economic globalization *infra* Part III.C.

<sup>35</sup> By “stated” I mean to refer to the constitutions of Mexico, the United States, and Canada. These are documents meant to describe minimum standards, freedoms, and protections. We could look to other public documents as well.

First, there can be no doubt that one of capitalism's modern<sup>36</sup> features is its transnationalism. As every day goes by, capitalism knows fewer and fewer national boundaries. We are in a sort of international Wild Wild West<sup>37</sup> that has been relentlessly cast as natural, just, and inevitable.<sup>38</sup> In fact, the Wild Wild West feature seemingly inherent in the "globalizing trajectories of modern capitalism"<sup>39</sup> is neither natural nor inevitable, but it is likely to persist without coordinated international action.

Second, the regulation of capitalism can be usefully understood as a transnational substantive equality issue. Substantive equality—as a legal concept—concerns itself with remedying the detrimental effects of power

<sup>36</sup> Some commentators have described advanced capitalism as "postmodern." See, e.g., MICHAEL HARTD & ANTONIO NEGRI, *EMPIRE* 150–54 (2000). Those authors observe:

Many of the concepts dear to postmodernists and postcolonialists find a perfect correspondence in the current ideology of corporate capital and the world market. The ideology of the world market has always been the anti-foundational and anti-essentialist discourse par excellence. Circulation, mobility, diversity, and mixture are its very conditions of possibility. . . . Differences (of commodities, populations, cultures, and so forth) seem to multiply infinitely in the world market, which attacks nothing more violently than fixed boundaries: it overwhelms any binary division with its infinite multiplicities.

As the world market today is realized ever more completely, it tends to deconstruct the boundaries of the nation-state. In a previous period, nation-states were the primary actors in the modern imperialist organization of global production and exchange, but to the world market they appear increasingly as mere obstacles.

*Id.* at 150.

At the same time, advanced global capitalism would seem to be "ruthlessly modern, a seeming iron cage delimiting social organization." Gil Gott, *Critical Race Globalism?: Global Political Economy, and the Intersections of Race, Nation, and Class*, 33 U.C. DAVIS L. REV. 1503, 1506 (2000). Gott describes possible solutions as requiring us "to live on the tension between modernist and postmodernist approaches to both identity and political economy." *Id.*

<sup>37</sup> This sense of a Wild West is created in part by the complexities inherent in the increasingly global nature of production and intra-firm trade, and in part by companies' ability to use jurisdictional differences to their enormous and largely unchecked advantage. See Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. DAVIS L. REV. 1451, 1478–79 (2000).

<sup>38</sup> See Michael H. Davis & Dana Neacsu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 U.M.K.C. L. REV. 733, 734 (2001); see also Susan Silbey, "Let Them Eat Cake": *Globalization, Postmodern Colonialism, and the Possibilities of Justice*, 31 L. & SOC'Y REV. 207 (1997) (arguing that under the dominant accounts of globalization, the dynamics of power are obscured so that social relations seem to be produced by "natural" forces).

<sup>39</sup> Lester Edwin J. Ruiz, *In Pursuit of the "Body Politic": Ethics, Spirituality, and Diaspora*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 633, 637 n.16 (1999).

imbalances.<sup>40</sup> Capitalism—like any political economic system—engages us in the organization and allocation of power. One of the most striking features of advanced capitalism is the facilitation and maintenance of power imbalances across national boundaries for the express purpose of concentrating wealth in fewer and fewer hands. In the transnational context, advanced capitalism relies on and perpetuates international and intranational racialized and gendered hierarchies in order to accomplish this in increasingly dramatic and efficient ways.<sup>41</sup>

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<sup>40</sup> To be clear, by using the term “substantive equality” I mean to distinguish it from the formal equality concepts that underpin American equality jurisprudence. Instead, I am referring specifically to the fluid but purposive jurisprudence that has been developed in Canada since the equality provisions of the *Canadian Charter of Rights and Freedoms* took effect. Canada Act of 1982, ch. 11, 1980–83 S.C. Part I, 5–13 (Can.). This probably makes more sense to Canadian than American lawyers and I will come back to it, but where the System presently operates to the advantage of some at the expense of many, and its negative *effects* are felt disproportionately by women, people of color, immigrants, and other minorities, it is properly characterized as an equality issue. I also mean to distinguish the European Court of Justice’s understanding of substantive equality (at least in the context of gender), which is grounded in individualism and an expanded version of formal equality. See generally Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives*, 44 HARV. INT’L L.J. 331 (2003).

<sup>41</sup> Hardt and Negri raise interesting and compelling arguments about shifting configurations of racism in our contemporary societies:

We should note first of all that it has become increasingly difficult to identify the general lines of racism. In fact, politicians, the media, and even historians continually tell us that racism has steadily receded in modern societies—from the end of slavery to decolonization struggles and civil rights movements. Certain specific traditional practices of racism have undoubtedly declined, and one might be tempted to view the end of the apartheid laws in South Africa as the symbolic close of an entire era of racial segregation. From our perspective, however, it is clear that racism has not receded but actually progressed in the contemporary world, both in extent and in intensity. It appears to have declined only because its form and strategies have changed. If we take Manichaeian divisions and rigid exclusionary practices . . . as the paradigm of *modern* racisms, we must now ask what is the *postmodern* form of racism and what are its strategies in today’s imperial society.

HARDT & NEGRI, *supra* note 36, at 190–91.

Étienne Balibar calls the new racism a differentialist racism, a racism without race, or more precisely a racism that does not rest on a biological concept of race. Although biology is abandoned as the foundation and support, he says, culture is made to fill the role that biology had played. We are accustomed to thinking that nature and biology are fixed and immutable but that culture is plastic and fluid: cultures can change historically and mix to form infinite hybrids.

As a theory of social difference, the cultural position is no less “essentialist” than the biological one, or at least it establishes an equally strong theoretical ground for social separation and segregation. . . . The hierarchy of the different races is determined only a

However, because the ways in which we presently regulate and subsidize markets—domestically and internationally—diminish substantive equality interests,<sup>42</sup> they could be reshaped to advance those interests.

*B. My Thesis: Enron Provides an Opportunity to Consider the Regulation of Capitalism and the Promise of a North American Charter of Fundamental Rights*

My thesis is that Enron—using the word in its largest symbolic sense as a promising opening in the debate—gives us examples of capitalism’s transnational features and equality implications. As such, it presents an historical opportunity to talk *contextually* about the regulation of capitalism. It is an occasion to explore solutions that speak directly to the transnational equality implications of advanced capitalism, and to see that the connections between equality and capitalism hold enormous potential for remedying injustices wrought by the latter. Most importantly, Enron is a useful contemporary example—one among many—of the importance of problem-solving in broad, purposive ways rather than narrow, reactionary, and incomplete ways. We cannot talk legitimately about Enron (securities regulation, privatization, the Welfare State, economic globalization, etc.) without acknowledging that we are talking about a System. Emerging solutions which fail to take account of this will fall far short of achieving meaningful and necessary changes.

It is in this context—the implication of a transnational System—that I suggest a reworking or rethinking on a multi- and supranational level is essential.<sup>43</sup> Indeed, I am suggesting that these discussions should focus on or aim for something on the scale of a North American Charter of Fundamental Rights—broadly stating and guaranteeing those rights and freedoms integral to human flourishing—because anything less cannot meet the challenges posed by the twin

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posteriori, as an effect of their cultures—that is, on the basis of performance. According to imperial theory, then, racial supremacy and subordination are not a theoretical question, but arise through free competition, a kind of market meritocracy of culture.

*Id.* at 192–93.

<sup>42</sup> Governments at all levels are “deeply and directly implicated both in economic globalization and in the distribution of benefits and costs that globalization creates.” Thomas, *supra* note 37, at 1454.

<sup>43</sup> *But see* Saskia Sassen, *The Participation of States and Citizens in Global Governance*, 10 *IND. J. GLOBAL LEGAL STUD.* 5, 5 (2003) (“The pursuit of global democratic governance cannot be confined to global institutions; national state institutions and nation-based citizens need to be part of this project.”).

forces of economic globalization and deregulation<sup>44</sup> in an increasingly integrated North American economy. I imagine it to be a sort of supranational constitutional treaty<sup>45</sup> or Social Charter.<sup>46</sup> To be sure, I am not suggesting that the existence of

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<sup>44</sup> I am not entirely comfortable with the word “deregulation” in this sentence. Deregulation “does not scale back the state’s involvement with corporations; it simply changes its nature.” JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 155 (2004). And “deregulation” may not be adequate to convey the regulatory deficiencies driving the difficulties discussed in this Article. Using the term “deregulation” I mean to convey a number of simultaneous forces. One is deregulation in the United States and other industrialized nations, as a rolling back of social welfare and other regulations meant to mediate the negative effects of capitalism. Another is the gap in regulation (or regulatory deficit) created by the concurrent and interconnected operation of national, regional, transnational, and international markets without matching regulatory authority and schema—the Wild Wild West to which I refer in this Article. And the last is re-regulation in the United States and elsewhere, where the rolling back of important social welfare (and labor and environmental and anti-discrimination) regulations has been accompanied or replaced by regulations favoring capital. Adelle Blackett uses the term “re-regulate” in one of her articles, noting that “many developing countries have been forced to re-regulate their social sectors, sometimes to the detriment of labor relations machinery.” Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 *IND. J. GLOBAL LEGAL STUD.* 401, 425 (2001).

<sup>45</sup> Proposals for a European Constitution, although different from what I propose for North America, make an interesting comparison. See Memorandum from The Secretariat, The European Convention, to the Members of The European Convention (July 18, 2003), at <http://european-convention.eu.int/docs/Treaty/cv00650.en03.pdf> (last visited Mar. 3, 2005) (distributing Draft Treaty establishing a Constitution for Europe, as submitted to the President of the European Council in Rome). English Foreign Secretary Jack Straw has discussed the benefits of a European Constitution:

There is a case for a constitution which enshrines a simple set of principles, sets out in plain language what the EU is for and how it can add value, and reassures the public that national governments will remain the primary source of political legitimacy. This would not only improve the EU’s capacity to act, it would help reconnect European voters with the institutions that act in their name.

Phillip Webster, *Labour ‘on road to joining EU superstate,’* *TIMES* (London), Aug. 28, 2002, at 4. In an interview with BBC Radio 4 on Aug. 27, 2002, Straw noted that

there is already a body of law to which we signed up when we joined the European Community, European Common Market as it then was in 1973, which is super-national. There is already what amounts to a constitution with a small c for the European Union, but it is to be found in quite a large number of treaties, protocols and amendments.

*Reforming the European Union: Edited Transcript of An Interview Given By the Foreign Secretary, Jack Straw* (BBC Radio 4 radio broadcast, Aug. 27, 2002), available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&c id=1007029391629&a=KArticle&aid=1030455754232> (last visited Aug. 16, 2004) (transcript on file with author).



North American Social Charter would prevent all future Enrons. It is more that the process of achieving such a Charter, combined with a meaningful commitment to its effective implementation, would require us to think about the System in which Enron was created in slightly different ways than we presently do. It acknowledges the increasingly inter-, trans-, and supranational nature of our apparent commitment to a particular kind of capitalism. More importantly, it provides a “role for the state vis-à-vis global actors and processes,”<sup>47</sup> including the ability to participate in the regulation of global capitalism, demand accountability from non-state global actors, and mediate the participation of individuals in the global economy.<sup>48</sup> And it addresses the gap in the rule of law—

Interestingly, it has already been suggested by a handful of scholars and politicians that a similar process is occurring in North America—that a constitution is slowly being assembled through a variety of treaties. See, e.g., Howard Shapiro, *Interview With James Gardner*, 4 INT’L LEGAL PERSP. 135, 143. (1992); Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT’L & COMP. L 401 (1995); Alexandra Maravel, *Constructing Democracy in the North American Free Trade Area*, 16 NW. J. INT’L L. & BUS. 331, 335–39 (1996); Frank H. Easterbrook, *Alternatives to Originalism*, 19 HARV. J.L. & PUB. POL’Y 479, 484 (1996); Ari Afilalo, *Constitutionalization Through the Back Door: A European Perspective on NAFTA’s Investment Charter*, 36 REV. JUR. U.P.R. 117, 120 (2001), reprinted in 34 N.Y.U. J. INT’L L & POL. 1, 7–8 (2001); Jost Delbrück, *Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the States*, 11 IND. J. GLOBAL LEGAL STUD. 31, 34 (2004).

<sup>46</sup> The focus of my discussion and the primary reason for my suggestion of a Social Charter is a substantive equality guarantee as an overriding principle (i.e., one that would inform the interpretation, scope, purpose, and development of other rights and freedoms). Nevertheless, a Charter of Fundamental Rights would obviously include guarantees of other rights and freedoms. Freedom of expression and freedom of association, for example, are essential to substantive equality in the labor context. What other guarantees might be included will require negotiation and discussion, drawing on the constitutional experiences and histories of the participating parties, as well as lessons learned elsewhere. The European Union Charter of Fundamental Freedoms may provide guidance, as might the Canadian Charter of Right and Freedoms. Whether or not the Charter structure would parallel domestic legal systems is an open question.

<sup>47</sup> Sassen, *supra* note 43, at 5. Sassen posits that the detection of specific types of authority or power that participation in governing the global economy might entail for the state vis-à-vis global actors and processes is interesting, central, and crucial. *Id.*

<sup>48</sup> Our present conception of the nation-state may be insufficient to the task of these sorts of roles. But if it is to be the source of legitimacy and effectiveness for redistributing the costs and benefits of the global economic “project,” it may need to be theorized and understood in slightly (or radically?) different ways. Sassen notes that the state is the “ultimate guarantor of the ‘rights’ of global capital” and has negotiated the intersection of national law and foreign actors. *Id.* at 13. It seems to me that there is a role—if not a responsibility—for the state in guaranteeing and negotiating a global substantive equality right as well.

those international and interjurisdictional inconsistencies which contribute to the Wild Wild West nature of the changing System—by giving us a considered and coherent vision,<sup>49</sup> guide, plan, and measure.

A discussion about supranational governance and the possibilities for a North American Charter of Fundamental Rights is made both possible and essential by timing. NAFTA came into effect over ten years ago; we are therefore at a point in time when empirical research into its effects is both possible and necessary.<sup>50</sup> Similarly, we have the evolving European Union model to study and compare.<sup>51</sup> The configuration, import, and role of the United Nations have been sorely challenged by the U.S.-led war against Iraq.<sup>52</sup> American foreign policy has moved sharply and aggressively into new waters.<sup>53</sup> And we are engaged in and committed to the negotiation of the FTAA. Indeed, the United States and five Central American countries have formed a new regional trade pact, known as the Central American Free Trade Agreement (“CAFTA”).<sup>54</sup> It would seem obvious

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<sup>49</sup> Discussion of vision, or common principles, has been central to the European debate. See Communication from the Commission to the Council and the European Parliament, COM (03)606 final (Oct. 15, 2003) (on file with author).

<sup>50</sup> See, e.g., JOHN J. AUDELY ET AL., *NAFTA'S PROMISE AND REALITY: LESSONS FROM MEXICO FOR THE HEMISPHERE* (2003); Tim Weiner, *Free Trade at Age 10: Growing Pains Are Clear*, N.Y. TIMES, Dec. 27, 2003, at A1; Manuel Fuentes Muniz, *The NAFTA Labor Side Accord in Mexico and its Repercussions for Workers*, 10 CONN. J. INT'L L. 379 (1995). Clarence Lusane describes the effects of NAFTA on African American workers in the U.S., relying on some early empirical research. Clarence Lusane, *Persisting Disparities: Globalization and the Economic Status of African Americans*, 42 HOW. L.J. 431, 439–47 (1999). The need for further empirical research is critical. See Thomas, *supra* note 37, at 1499.

<sup>51</sup> See, e.g., Daniela Caruso, *supra* note 40.

<sup>52</sup> “Iraq has shattered any global consensus on handling security issues . . . .” Felicity Barringer, *U.N. Senses It Must Change, Fast, or Fade Away*, N.Y. TIMES, Sept. 19, 2003, at A3. For one description of U.N. difficulties caused by the Bush Administration, see Editorial, *A Wounded United Nations*, N.Y. TIMES, Jan. 2, 2004, at A16.

<sup>53</sup> Editorial, *supra* note 52; see also Scales & Spitz, *supra* note 10, at 545 (stating that the “Bush Doctrine” for the first time in U.S. history declares a preemptive strike policy).

<sup>54</sup> The parties to the agreement are the United States, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. The agreement is anything but “free,” however. For example, the U.S. demands for protection of its intellectual property rights may limit the availability of inexpensive medicines. Elizabeth Becker, *Costa Rica to Be 5th Country in New Trade Pact With U.S.*, N.Y. TIMES, Jan. 26, 2004, at A6. *But see 2005 Outlook, supra* note 30, at 94 (“[T]he Office of the U.S. Trade Representative . . . is expected to face fierce congressional battles over approval of free trade agreements with five Central American and three Andean countries.”).

that the time for engaging in multinational discussions about an increasingly integrated North (and Central and South) America is sooner rather than later.<sup>55</sup>

I want to acknowledge up front that one result of implementing a North American Charter will be some movement towards harmonization and uniformity among American, Canadian, and Mexican legal and social norms. *This will happen, however, with or without a Charter.* It is already happening.<sup>56</sup> The risks of harmonization and uniformity include the erosion of important cultural and other differences, although I argue later that this need not necessarily be the case. The risks of harmonization in the absence of a collective and coherent plan (i.e., in a haphazard and unprincipled way), however, are disastrous.<sup>57</sup> It will surely be the case that the lowest common denominator prevails,<sup>58</sup> and that means the worst of the laws of each of the member states or, even worse, huge gaps where there are no laws at all. We need to aim higher than that if we are to preserve the social, political, and legal achievements of the last century in Canada, the United States, and Mexico. A Social Charter has the potential to protect already achieved rights, work to advance substantive equality intra-<sup>59</sup> and internationally, and ensure harmonization on a more desirable level. These, I believe, are the only sorts of solutions that will ultimately be adequate to respond to global corporate excess and its gendered and racialized consequences.

It is not possible in an article this size to visit each of these points in anything other than incomplete and partial ways. Central to my thesis, however, is an acknowledgement that in trying to theorize and problematize current debates about Enron, global capitalism, and inequality, input from many sources is and will be necessary. My primary goal is to suggest and advance a conversation that

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<sup>55</sup> See, e.g., Tim Canova, *Fix NAFTA Before Stretching It Hemisphere-Wide*, ALBUQUERQUE J., Nov. 18, 2003, at [http://albuquerquejournal.com/opinion/guest\\_columns/111677opinion11-18-03.htm](http://albuquerquejournal.com/opinion/guest_columns/111677opinion11-18-03.htm) (last visited Feb. 15, 2005) (noting existing and pressing problems with NAFTA). John Foster challenges the “headlong move into agreements like [NAFTA] without thorough reviews of their human rights implications.” John Foster, *Candide at Large: Canada, Human Rights, and Hemispheric 'Integration,'* 62 SASK. L. REV. 595, 597 (1999).

<sup>56</sup> For a discussion about how this might be inevitable in certain contexts, see Spitz, *supra* note 4.

<sup>57</sup> For a contrasting view supporting “informal harmonization,” see H. Patrick Glenn, *Conflicting Laws in a Common Market? The NAFTA Experiment*, 76 CHL-KENT L. REV. 1789 (2001).

<sup>58</sup> *But see* Spitz, *supra* note 4 (arguing that the potential exists for harmonizing at something other than the lowest common denominator, at least in the context of same-sex marriage).

<sup>59</sup> In Northern Ireland, for example, progressive advocates are having some success with bypassing the Parliament of the United Kingdom and seeking redress directly from the European courts and parliament.

is a “constantly provisional analysis in the process of being made by the social realities that produce(d) it.”<sup>60</sup>

In advancing my thesis, I walk a fine line between idealism and *realpolitik*.<sup>61</sup> I do not agree with those who believe that the proliferation of increasingly liberalized trade zones is all good,<sup>62</sup> nor do I agree that it is all bad.<sup>63</sup> I certainly do not agree with those who believe that recent trade liberalization and economic globalization are beyond moral criticism. However, I share common ground with those who believe that at this historical moment, it may be “more beneficial to examine the problems raised by this process and to seek remedies rather than vociferously . . . denying it.”<sup>64</sup>

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<sup>60</sup> I am borrowing this wonderful description from Catharine MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 695 (2000).

<sup>61</sup> For a thoughtful account of the traditional dichotomy between “utopian (or progressionist) and cynical (or realist)” views of the significance, relevance, and aspirations of international law, and why the tension between these perspectives “offers important explanatory and predictive insight,” see Note, *Developing Countries and Multilateral Trade Agreements: Law and the Development of Promise*, 108 HARV. L. REV. 1715, 1716 (1995).

<sup>62</sup> For an argument that “globalization” (by which the author means economic globalization through the elimination of trade and market barriers) deserves credit for “its role in alleviating poverty and human suffering,” see Peter Marber, *Globalization and Its Contents*, 21(4) WORLD POLICY J. 29 (2004–05).

<sup>63</sup> Clarence Lusane states it thus: “Globalization is neither inherently bad nor good.” Lusane, *supra* note 50, at 450; see also Jeffrey M. Brown, *Black Internationalism: Embracing an Economic Paradigm*, 23 MICH. J. INT’L L. 807, 810 (2002).

Given the complexities of the global economic order, determining precisely what strategies might best ensure the viability of historically marginalized people has proven challenging. . . . [T]he complexities and uncertainties of the emerging global economy suggest the need to approach problems of race, class, and international law from a more flexible ideological perspective, one that eschews unproductive categorical generalities in favor of a more nuanced interpretative methodology. Such a methodology would neither embrace nor reject economic globalization out of hand.

*Id.*

<sup>64</sup> Maurizio Del Conte, *The Workers in the Globalized Economy: The European Way to the Foundation and Enforcement of the Social Rights*, 2 RICH. J. GLOBAL L. & BUS. 213, 213 (2001). I think Richard Rorty would also agree—particularly to the extent that if social democracy is to be preserved in the face of globalizing forces—that we need to be part of the debate and, ideally, active in problem-solving towards that preservation. See generally RICHARD RORTY, *PHILOSOPHY & SOCIAL HOPE* (1999); RICHARD RORTY, *ACHIEVING OUR COUNTRY* (1998).

### III. DEFINITIONS: THE INTERPRETIVE COMPETITION

In this debate, there are four words—equality, harmonization, globalization, and capitalism—that are frequently used, often undefined, and easily manipulated.<sup>65</sup> There are surely others. Being clear about meaning is essential. Core concepts in our political and moral vocabulary “are not merely descriptions of the social world; they are an integral part of its fabric. They help to construct the world.”<sup>66</sup> Core concepts are normative; frequently, they are aspirational. We cannot usefully talk about any of these concepts without being honest and explicit about meaning; and we must not continue as if we all agree on meaning, when the potential for manipulation of misunderstanding is so high. Two people can each believe and state that “globalization is good,” and proceed to act together on that basis, but mean very different things. Exposing and understanding those differences is critical to reaching meaningful and feasible solutions.

#### A. Equality

Equality can be used to mean many things, but the two most often evoked legal conceptions of equality are formal equality and substantive equality. When I use the term equality in this Article, I mean substantive equality as we have recently understood the term in Canadian law.<sup>67</sup> In Canada,<sup>68</sup> “[t]he meaning of

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<sup>65</sup> Clearly the “interpretive competition” implicates many partially theorized or newly important concepts. Others might include “citizenship,” “deregulation,” “nation,” and “sovereignty” (to name a few). In the context of voluntary Corporate Codes of Conduct, which purport to hold corporations to “local standards,” Adelle Blackett notes that the “effective redefinition of ‘local standards’ is itself at stake.” Blackett, *supra* note 44, at 426.

<sup>66</sup> Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 451 (2000).

<sup>67</sup> This is not to say there is complete agreement in Canada about the exact meaning and application of “substantive equality,” but there are sufficient points of agreement that we can talk about it in general and useful terms.

<sup>68</sup> The equality provisions of Canada’s *Charter of Rights and Freedoms* are contained in sections 15 and 28. Section 15 of the Canadian Charter provides:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

equality as sameness in treatment has been rejected in favor of an effects-based approach.<sup>69</sup> The nature of differences is relevant and interrogated. Differential treatment is permitted, facilitated—and even encouraged—when it is necessary to produce equality in a substantive sense.<sup>70</sup> Although he does not use the term “substantive equality,” I believe this is what Boaventura de Sousa Santos means to capture when he describes his “fundamental meta-right: the rights to have rights.”<sup>71</sup> He puts it this way: “We have the right to be equal whenever difference diminishes us; we have the right to be different whenever equality decharacterizes us.”<sup>72</sup> Formal equality—which is what I believe de Sousa Santos means when he uses “equality” in this sentence—is theoretically and practically unable to deal adequately with the balancing of interests required by a substantive equality view.

Substantive equality derives its meaning and scope from its purpose.<sup>73</sup> In Canada, the purpose of a substantive equality guarantee has been defined as the promotion of a society in which all are secure in the knowledge that we are recognized as human beings, equally deserving of concern, respect, and consideration.<sup>74</sup> It is a guarantee against the evil of oppression “designed to remedy the imposition of unfair limitations” upon actual achievement.<sup>75</sup> To that end, Canadian courts apply the same level of scrutiny—strict—to all allegations of discrimination. The hierarchy of discriminations in the United States, created by different standards of scrutiny for different 14<sup>th</sup> Amendment violations, is thus avoided. Importantly, in order to advance an equality claim, there is no need to

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Canada Act of 1982, ch. 11, 1980–83 S.C. part I, 8 § 15 (Can.). Section 28 provides: “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” *Id.* at 12 § 28. The Supreme Court has extended Section 15 to include analogous grounds such as sexual orientation. *See Egan v. Canada*, [1995] 2 S.C.R. 513, 528; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 553; *M. v. H.*, [1999] 2 S.C.R. 3, 26.

<sup>69</sup> Mahoney, *supra* note 6, at 244.

<sup>70</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 164–69, 180–81 (per McIntyre J.); *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 517, 519 (per Iacobucci, J.).

<sup>71</sup> Boaventura de Sousa Santos, *Nuestra America: Reinventing A Subaltern Paradigm of Recognition and Distribution*, 54 RUTGERS L. REV. 1049, 1059 (2002).

<sup>72</sup> *Id.* de Sousa Santos continues: “We have here a normative hybrid: it is modernist because it is based on an abstract universalism, but it is formulated in such a way as to sanction a postmodern opposition based both on redistribution and recognition.” *Id.*

<sup>73</sup> *Law*, [1999] 1 S.C.R. at 518–19, 524; *Andrews*, [1989] 1 S.C.R. at 180–81.

<sup>74</sup> *Law*, [1999] 1 S.C.R. at 525; *Andrews*, [1989] 1 S.C.R. at 171.

<sup>75</sup> *Law*, [1999] 1 S.C.R. at 525; *see also Andrews*, [1989] 1 S.C.R. at 180–81.

demonstrate an intent to discriminate—only a discriminatory effect.<sup>76</sup> Finally, not every instance of discrimination gives rise to a constitutional claim.<sup>77</sup> Differential treatment or effect which does not engage the purpose of the equality guarantee—that is, to remedy disadvantage—does not attract constitutional scrutiny. Affirmative action is one obvious example, but there are others.<sup>78</sup>

To be clear, I reject American equality jurisprudence which requires complainants to satisfy a “similarly situated” requirement<sup>79</sup> and to prove an intention to discriminate against them in order to advance an equality claim.

<sup>76</sup> *Law*, [1999] 1 S.C.R. at 518–19.

<sup>77</sup> *Id.*; *Andrews*, [1989] 1 S.C.R. at 180–81.

<sup>78</sup> *See, e.g., Law*, [1999] 1 S.C.R. at 561–62. In *Law*, the Court found that although Ms. Law was treated differently because of her age (she was denied a government benefit because she was too young), young people are not traditionally disadvantaged (i.e., she was not a victim of oppression) and therefore she did not satisfy her burden of proving “discrimination” as required by section 15 of the Charter. The failure to engage the purpose of section 15 is determinative—the claim will fail. *Id.*

<sup>79</sup> The words of Canadian Supreme Court Justice McIntyre in *Andrews* are particularly apt:

It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.

. . . .

The similarly situated test is a restatement of the Aristotelian principle of formal equality—that “things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood” (*Ethica Nichomacea*, trans. W. Ross, Book V3, at p. 1131a-6 (1925)).

*Andrews*, [1989] 1 S.C.R. at 164–66. Justice McIntyre further stated:

The [similarly situated] test as stated, however, is seriously deficient in that it excludes any consideration of the nature of the law. If it were applied literally, it could be used to justify the Nuremberg laws of Adolf Hitler. Similar treatment was considered for all Jews. . . .

. . . .

This approach was rejected in this Court by Ritchie J. in *R. v. Drybones*, [1970] S.C.R. 282, in a . . . case involving a provision of the *Indian Act* making it an offence for an Indian to be intoxicated off a reserved. He said, at p. 297:

. . . I cannot agree with this interpretation pursuant to which it seems to me that the most glaring discriminatory legislation against a racial group would have to be construed as recognizing the right of each of its individual members “to equality before the law”, [sic] so long as all the other members are being discriminated against in the same way.

## B. Harmonization

Arguments for and against international harmonization, particularly economic and legal harmonization, are being increasingly deployed in scholarship<sup>80</sup> and the media, with the apparent assumption that we all agree on the meaning of the term. Reclaiming the term “harmonization” is central to my thesis.

In recent political and legal discourse about globalization, harmonization is often used to mean the process by which we make everything the same, a sort of rush to the bottom to further facilitate the globalization of advanced capitalism.<sup>81</sup> Harmony and diversity are cast in terms of a deadening, binary opposition. The anti-harmony forces accept this definition and rely on old “state of nature” arguments about conflicting self-interest to suggest that we cannot harmonize because there are so many voices that the best we will end up with will be a hugely watered-down, lowest common denominator of interests that actually serves no one.<sup>82</sup>

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*Id.* at 166–67.

<sup>80</sup> A Westlaw search of “harmonization or harmonisation” in the Journals and Law Reports database on January 27, 2005 came up with 8878 hits (up from 7500 hits on June 17, 2003; 7164 hits on Jan. 30, 2003; and 6819 hits on Aug. 11, 2002). Of those, 6716 were published in the last ten years; 3640 were published in the last five years. Even taking account of the fact that few articles before the early 1980s are available on-line, this suggests a dramatic increase in focus.

<sup>81</sup> See Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards*, 50 U. KAN. L. REV. 823, 829 (2002). But see David Leebron, *Lying Down with Procrustes: An Analysis of Harmonization Claims*, in 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?—ECONOMIC ANALYSIS 41, 43 (Jagdish Bhagwati et al. eds., 1996).

[I]t is difference, not sameness, that makes for musical harmony. In the context of international trade relations, harmony in the musical sense is provided by the variations that lead to different comparative advantages among nations. The claim for the harmonization of laws has come to mean something quite different—indeed almost the exact opposite of the musical notion of harmony—namely, that international economic relations will not function smoothly, or properly, unless the laws and policies of different jurisdictions are made more similar. Of course, it is not every difference that makes for musical harmony; one must distinguish between harmony and cacophony.

*Id.*; see also Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1, 27 (1999).

<sup>82</sup> Of course, if we do nothing, we arguably end up at the lowest common denominator anyway, because gains already achieved will be eroded. Countries’ incentive to alter domestic regulations to attract business has undermined and will continue to undermine political support



This understanding of harmony is unnecessarily depressing and narrow. *The Concise Oxford Dictionary* defines harmony as “a combination of simultaneously sounded musical notes to produce chords and chord progressions, especially as having a pleasing effect; . . . an apt or aesthetic arrangement of parts.”<sup>83</sup> Harmonize is defined as: to “add notes to (a melody) to produce harmony; to make or form a pleasing or consistent whole.”<sup>84</sup> *Roget's International Thesaurus* suggests the following synonyms for harmony: peace, cooperation, accord, good terms, agreement, not discordant, rapport, fellowship, kinship, understanding, community, community of interests, mutuality, sharing, reciprocity, mutual supportiveness, collaboration, consensus, teamwork, alliance, association, partnership.<sup>85</sup> For harmonize, it suggests: get along, be harmonious, compose, organize, concur, symmetrize, cooperate, reconcile, be pleasant, be in accord, be balanced.<sup>86</sup>

When I use the terms harmony and harmonization, I mean to invoke these broader meanings. “Harmony” is by definition diverse. “Harmonization” is by definition layered. Like “globalization,” harmonization is not necessarily a normative claim,<sup>87</sup> but rather a tool. There is no reason why international or transnational harmonization could not mean different laws in different jurisdictions aimed at creating a workable/sensible whole. “As with music, the difficult question is which aspects should be similar, and which different, in order to create a pleasing or appropriate relationship.”<sup>88</sup>

### C. Globalization

“Globalization” has been described as “the process of increasing interconnectedness between societies such that events on one part of the world more

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for existing human rights and labor standards and protections. See Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 992–93 (1995). I agree with Lori Wallach that “[t]heoretically, international harmonization could occur at the lowest or highest levels of public health or environmental protection or somewhere in between.” Wallach, *supra* note 81, at 831.

<sup>83</sup> THE CONCISE OXFORD ENGLISH DICTIONARY 538–39, (8th ed. 1990) (emphasis added).

<sup>84</sup> *Id.* at 538.

<sup>85</sup> ROGET'S INTERNATIONAL THESAURUS 916 (5th ed. 1992).

<sup>86</sup> *Id.*

<sup>87</sup> Leebron, *supra* note 81, at 50.

<sup>88</sup> *Id.* at 43. Note, however, that Leebron argues that this definition of harmony no longer has any place or meaning in the context of global markets. *Id.*

and more have effect on people and societies far away.”<sup>89</sup> It is “a consequence of increased human mobility, enhanced communications, greatly increased trade and capital flows and technological developments.”<sup>90</sup> It represents “a new state of affairs which embraces the social, economic and cultural areas,”<sup>91</sup> and it describes a world “in which political, economic, cultural and social events become more and more interconnected.”<sup>92</sup> What these descriptions share is the conceptualization of globalization as increasing interconnectedness and a process by which something becomes more global.<sup>93</sup>

“Globalization” is increasingly used, however, to mean the inevitable<sup>94</sup> internationalization of a particular brand of capitalism and trade policy<sup>95</sup>—an independent phenomenon to which we can react, but not shape or slow down. A crucial part of this globalization propoganda is the legitimization of an international “free” market through legalization.<sup>96</sup> The proponents of this version of globalization attempt to hide the normative aspects of the process, not to mention the consequences. Susan Silbey eloquently makes this point:

If we take social theory more seriously, we cannot exempt our own role in the social organization of power and our complicity in the globalization narratives. Stories are not read or told, they are made. By entitling our narratives ‘globalization’ rather than ‘capitalism,’ ‘late capitalism,’ or ‘postmodern colonialism,’ we camouflage the organization of power and thus misrepresent the targets of, and impede the struggles for, justice.<sup>97</sup>

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<sup>89</sup> Jurgen Basedow, *The Effects of Globalization on Private International Law*, in LEGAL ASPECTS OF GLOBALIZATION 2 (Jurgen Basedow et al. eds., 2000), cited in Elisa Westfield, Note, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT’L L. 1075, 1076 n.2 (2002).

<sup>90</sup> *Report of the World Summit for Social Development*, U.N. World Summit for Social Development, ¶14, U.N. Doc. A/CONF.166/9 (1995), available at <http://www.visionoffice.com/socdev/wssdco-2.htm> (last visited Feb. 23, 2005).

<sup>91</sup> Del Conte, *supra* note 64, at 213.

<sup>92</sup> Westfield, *supra* note 89, at 1076 n.2, quoting Basedow, *supra* note 89, at 2.

<sup>93</sup> See, e.g., de Sousa Santos, *supra* note 71, at 1054 (“What we call globalization is always the successful globalization of a given localism.”).

<sup>94</sup> Blackett, *supra* note 44, at 426 (“Economic globalization is also considered to be an inevitable, inalterable process, beyond the control of public policy.”).

<sup>95</sup> See THOMAS L. FRIEDMAN, *THE LEXUS & THE OLIVE TREE* 8 (1999) (“The driving idea behind globalization is free-market capitalism . . . . Globalization means the spread of free-market capitalism to virtually every country in the world.”).

<sup>96</sup> See Davis and Neacsu, *supra* note 38, at 733–34; see also Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 382 (1983).

<sup>97</sup> Silbey, *supra* note 38, at 233.

This is how inequality is normalized and made to feel so inexorable.

By situating itself as the only and natural version,<sup>98</sup> the hegemonic effect of this version of globalization is to foreclose debate about the possibility for globalizing any other idea or system, particularly one that might reduce disparities and inequities.<sup>99</sup> “It is not . . . what it makes people think but what it makes them not think.”<sup>100</sup> And, “[m]ore often than not, the discourse on globalization is the story of the winners as told by the winners.”<sup>101</sup> Here is an obvious juncture with a fundamental tenet of feminist jurisprudence: if it presents itself as natural, inevitable, neutral, and point-of-viewless, watch out for it—it is somebody’s point-of-view in disguise.<sup>102</sup>

Unfortunately, the United States appears committed to exporting its particular version of capitalism—the very same version that made Enron possible in the first place—to developing nations, emerging markets, and potential trade partners as part of its National Security Strategy.<sup>103</sup> Indeed, it would appear that the necessity of developing nations accepting neo-American capitalism as the “single sustainable [economic] model”<sup>104</sup> is both a U.S. security interest and a military

<sup>98</sup> See Douglas Litowitz, *Reification in Law and Legal Theory*, 9 S. CAL. INTERDISC. L.J. 401, 401 (2000) (“As applied to law, reification represents a kind of infection within legal doctrine and legal theory because it is essentially an error, a delusion, and a mystification that blinds people to alternative legal arrangements by ‘naturalizing’ the existing legal system as inevitable.”).

<sup>99</sup> An ideology is “‘hegemonic’ if its practical effect is to foreclose imagination of alternative orders.” Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 641, 648 (David Kairys ed., 1998).

<sup>100</sup> Davis & Neacsu, *supra* note 38, at 740. “[O]ne of the hegemonic and legitimating features of globalization is the exclusion of parts of the debate as unworthy, in fact foreclosing what might be the most meaningful parts of the debate as meaningless.” *Id.* at 73. For an interesting account of the effects of U.S. hegemony internationally, see Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL L. STUD. 383, 434–35 (2003) (“[F]rom the efficiency perspective, the dismantling of proactive [government] institutions of the social model of capitalism should be questioned. Such questioning does not occur because of the process of cultural influence and hegemonic rule that the American model has been able to create.”).

<sup>101</sup> de Sousa Santos, *supra* note 71, at 1054.

<sup>102</sup> This percept of feminist jurisprudence has been aptly described by Catharine MacKinnon in reference to male dominance: “Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality.” Catharine MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 638–39 (1983). On the problems of objectivist law and politics, see generally Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

<sup>103</sup> NATIONAL SECURITY STRATEGY, *supra* note 33, at v.

<sup>104</sup> *Id.* at iii.

goal. The Administration clearly means to intimidate other countries and insulate its foreign economic agenda from domestic review by invocation of patriotism and fear.<sup>105</sup>

But globalization of a particular economic model is no more inevitable and natural than it is an autonomous phenomenon.<sup>106</sup> Consider President Clinton's remark that the "technology revolution and globalization are not policy choices, they are facts."<sup>107</sup> In actuality, they are both. It is simply not true that governments have not played a role in initiating, subsidizing, and shaping the technology revolution and increasing economic globalization and integration.<sup>108</sup> Professor Chantal Thomas contrasts President Clinton's remarks with those of Oliver Wendell Holmes' criticisms of "the Supreme Court's attempts to portray an 'unregulated' market and its outcomes as natural and inevitable,"<sup>109</sup> and convincingly demonstrates that "legal rules, and therefore legal decisionmakers, are deeply and directly implicated both in economic globalization and in the distribution of benefits and costs that globalization creates."<sup>110</sup>

In this Article, I use globalization to mean the process of making something increasingly global, at the same time that I mean to invoke the concept of increasing interconnectedness. I urge us to be specific and clear about meaning,<sup>111</sup> while requiring others to be explicit and honest about what they mean when they use the word.<sup>112</sup>

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<sup>105</sup> See generally Scales & Spitz, *supra* note 10.

<sup>106</sup> See Thomas, *supra* note 37, at 1479–82; see also Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 226, 256 (1999).

<sup>107</sup> *A Closer Look at Globalization*, 144 CONG. REC. E1660–61 (daily ed. Sept. 9, 1998) (remarks of Rep. Lee. H. Hamilton of Indiana), *cited in* Thomas, *supra* note 37, at 1453.

<sup>108</sup> The General Agreement on Tariffs and Trade ("GATT"), for example, provided for six rounds of trade-liberalizing negotiations between 1948 and 1979 that reduced the average level of tariffs imposed by its member states by more than half. Thomas, *supra* note 37, at 1480 n.145. Other examples include NAFTA, the World Trade Organization, and the European Union, not to mention changes to domestic tax legislation, labor (de)regulation, and finance regulation in each of the participating states (and the United States in particular). See *id.* at 1481 nn. 149, 150, 172, 178.

<sup>109</sup> *Id.* at 1453 (discussing Oliver Wendell Holmes' dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905)).

<sup>110</sup> *Id.* at 1454.

<sup>111</sup> For a wonderful discussion about possible meanings of the word "globalization", and the wide variety of uses for which it is deployed, see Peter Thomas Muchlinski, *Globalization and Legal Research*, 37 INT'L LAW. 221 (2003). Professor Muchlinski suggests that there are at least five approaches to defining globalization outside of law: geographical, economic, business management, sociological, and political science. *Id.* at 222.

<sup>112</sup> Chantal Thomas, for example, carefully sets out the increasingly complex economic characteristics of globalization in her article, *Globalization or Global Subordination?: How*

### D. Capitalism

*The American College Dictionary* defines capitalism as: “1. a system under which the means of production, distribution, and exchange are in large measure privately owned and directed. 2. the concentration of capital in the hands of a few, or the resulting power or influence. 3. a system favoring such concentration of wealth.”<sup>113</sup> Capitalism is conventionally defined in economic terms,<sup>114</sup> but is more accurately and fundamentally understood as a political or philosophical term.<sup>115</sup> So, while capitalism is an economic system in which the means of production and distribution are privately owned and “development is [allegedly] proportionate to the accumulation and reinvestment of profits gained in the free market,”<sup>116</sup> capitalism is in fact a political and “social system based on the principle of individual rights.”<sup>117</sup> In practical terms, in order to have an economic system in which production and distribution are privately owned, you must have enforceable individual rights, and more specifically, private property rights.<sup>118</sup>

For the purposes of this Article, I want to make four points about the use and meaning of the term “capitalism.” First, people sometimes use the term *laissez-faire* or free-market capitalism to describe a “true” capitalist system. That phrase, however, seems redundant. A better way to talk about something less than “true” capitalism is to simply talk about regulation and modification. In Canada, for example, the economic and political system is something less than capitalist; that

*LATCRIT Links the Local to Global and the Global to the Local: Globalization and the Reproduction of Hierarchy*, so that we know what she means when she talks about globalization. Thomas, *supra* note 37, at 1476–79. de Sousa Santos is also clear: “Here is my definition of globalization: it is the process by which a given local condition or entity succeeds in extending its reach over the globe and, by doing so, develops the capacity to designate a rival social condition or entity as local.” de Sousa Santos, *supra* note 71, at 1054. Annelise Riles is similarly careful. See Riles, *supra* note 106, at 222. It is interesting that these authors mean slightly different things by the same term. Foster notes that “‘globalization’ is a very malleable and ubiquitous word and can mean many things. It is also *not* many things; most importantly, it is not an *end state*.” Foster, *supra* note 55, at 598.

<sup>113</sup> THE AMERICAN COLLEGE DICTIONARY 178 (C.L. Barnhart & Jess Stein eds., 1964).

<sup>114</sup> *The Concise Oxford Dictionary* explicitly defines capitalism as “an economic system in which the production and distribution of goods depend on invested private capital and profit-making.” THE CONCISE OXFORD DICTIONARY 165 (8th ed. 1990).

<sup>115</sup> See <http://www.capitalism.org> (last visited Feb. 23, 2005).

<sup>116</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 276 (4th ed. 2000).

<sup>117</sup> See <http://www.capitalism.org> (last visited Mar. 1, 2005).

<sup>118</sup> *Id.*

is, Canada regulates capitalism in an effort to lessen some of its negative effects. This is sometimes described as welfare state<sup>119</sup> or social<sup>120</sup> capitalism. This is true, although to a different degree, in the United States as well. None of the North American countries is truly or purely capitalist.

Second, the fact that the United States engages in regulating and modifying capitalism is something that should and can be talked about. My experience, particularly as a lawyer, is that many people are afraid to talk about the regulation of capitalism, as if merely to *talk* about regulation is to identify oneself as a Marxist, or worse yet, a Communist.<sup>121</sup> This fear, and the characterization of the debate as between capitalists (good) and Communists (bad),<sup>122</sup> evokes Cold War fears, is dishonest, and does not advance the debate.<sup>123</sup> Rather, it forecloses it. It tells us that regulation or modification is a marked departure from what presently exists in the United States and other industrialized nations, when that is simply not the case.<sup>124</sup> The question is not *whether* to regulate, but *how*.<sup>125</sup>

<sup>119</sup> Richard Rorty uses this phrase in *PHILOSOPHY AND SOCIAL HOPE*. See RORTY, *supra* note 64, at 17.

<sup>120</sup> See, e.g., Mattei, *supra* note 100, at 432; MICHEL ALBERT, *CAPITALISM VS. CAPITALISM: HOW AMERICA'S OBSESSION WITH INDIVIDUAL ACHIEVEMENT AND SHORT-TERM PROFIT HAS LED IT TO THE BRINK OF COLLAPSE* 127–90 (Paul Haviland trans., Four Walls Eight Windows 1993).

<sup>121</sup> See, e.g., Robert M. Hardaway, *Taxis and Limousines: The Last Bastion of Economic Regulation*, 21 *HAMLIN J. PUB. L. & POL'Y* 319, 353 (2000) (comparing contemporary regulatory commissions to “the commissars of the old communist regimes”).

<sup>122</sup> For example, United States Secretary of Defense Donald Rumsfeld has cast the choices for the Iraq economy as being between “market systems” or “Stalinist command systems,” the former of which is favored. Daphne Eviatar, *Free-Market Iraq? Not So Fast*, *N.Y. TIMES*, Jan. 10, 2004, at B9.

<sup>123</sup> This distracting duality is similarly frustrating in the context of international trade. The debate is cast as between those who support trade (good) and those who do not (bad). Countries have been trading for hundreds of years. Again, the question is not whether countries will engage in trade, but *how*? Criticisms of the current regulations (or lack thereof) are not necessarily criticisms against trade generally, nor even against liberalized trade. The FTAA presently on the table has many critics, not the least of whom believe that it is not the right solution to Central and South America's deepening poverty. Many of these critics, however, object not to the fact of liberalized or free trade, but to the fact that the FTAA is *not a free* trade agreement; the U.S., for example, refuses to reduce agricultural subsidies. *Americas Leaders 'Overcome' Rifts*, *BBC NEWS UK EDITION*, Jan. 14, 2004, at <http://news.bbc.co.uk/1/hi/world/americas/3394731.stm> (last visited Mar. 1, 2005).

<sup>124</sup> See generally Thomas, *supra* note 37.

<sup>125</sup> Blackett would add “*who*” to the important question of regulation: “To accept that [multinational enterprises] are indeed acting as regulators over particular places puts the normative question—who should regulate—in stark relief.” Blackett, *supra* note 44, at 432; see also Thomas, *supra* note 37, at 1454–55.

Third, in this Article I sometimes use the term “advanced capitalism.”<sup>126</sup> The theory of capitalism, of course, has not changed. What have changed are the means of production and some features of the market.<sup>127</sup> Two of the most significant features of contemporary capitalism are its transnationalism and the informalization (or “downgrading” or “casualization”) of work relations in low-skilled sectors of the job market.<sup>128</sup> This has allowed employers to hire more temporary and part-time employees, at lower wages and with fewer benefits, increasing the disparities between labor and capital. I use the term “advanced capitalism” to include these changes.

Finally, the loudest voices in the “free” market globalization effort would have us believe that they think markets are efficient and just, and should thus function without any government interference. The role of the state is to protect the system from interference.<sup>129</sup> At the same time, they would have us believe that “politics is different from business.”<sup>130</sup> I would make three points. First, the American market (and the NAFTA market and the European market) do not operate without interference. In the United States, the government actively subsidizes business interests and deliberately protects some interests at the expense of others.<sup>131</sup> Notwithstanding NAFTA, there is no such thing as free

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If logic compels the conclusion that legal rules are partially responsible for creating this problem [the harms imposed by economic globalization on poor urban minorities], justice compels holding lawmakers accountable for resolving it. There is no question of whether the government should intervene to reduce the problematic impact of globalization on certain populations, because . . . government has always and already had been involved. Consequently, there is only the question of what kind of intervention is most just.

*Id.*

<sup>126</sup> See Thomas *supra* note 37.

<sup>127</sup> For a discussion about market and other changes related to technological developments, see NICK DYER-WITHEFORD, *CYBER-MARX: CYCLES AND CIRCUITS OF STRUGGLE IN HIGH-TECHNOLOGY CAPITALISM* (1999).

<sup>128</sup> Thomas, *supra* note 37, at 1490–95; see also SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, AND TOKYO* 282 (1991).

<sup>129</sup> See <http://www.investorwords.com/cgi-bin/getword.cgi?713> (last visited Mar. 1, 2005).

<sup>130</sup> Simon Romero, *War and Abuse Do Little to Harm U.S. Brands*, N.Y. TIMES, May 9, 2004, § 1 at 1 (quote of Fred Erwin, president of the American Chamber of Commerce in Frankfurt, Germany).

<sup>131</sup> See, e.g., Elizabeth Becker, *Visiting Europe Trade Chief Warns of Sanctions Monday*, N.Y. TIMES, Feb. 27, 2004, at C5 (“[T]he United States will face \$4 billion in sanctions starting on [March 1, 2004], because Congress has failed to eliminate overseas tax shelters for American exporters that were declared illegal by the World Trade Organization.”); Laurie J.

trade in North America.<sup>132</sup> Secondly, we had this debate in the 19th and early 20th centuries, and many countries—the United States among them—recognized, correctly in my view, that capitalism had to be regulated in order to protect other important interests and liberties. We must not pretend that this debate is no longer relevant simply because of globalizing forces. Third, to suggest that politics is different from business—that the state is separable from the economy—is absurd in a capitalist system. The very meaning of capitalism encompasses a political, social, and economic system, in which the means of production and distribution are privately owned, and private property rights are enforceable against and by both the state and individuals. With the advent of large multinational corporations (many larger and much more powerful than entire countries<sup>133</sup>) the alleged distinction between business and politics becomes even more difficult to sustain.

#### IV. ENRON (ADVANCED CAPITALISM) AS A TRANSNATIONAL EQUALITY ISSUE

##### A. *The Transnational Nature of Advanced Capitalism*

It would be disingenuous to claim that Enron was merely a domestic issue. Enron was a huge corporation, whose performance on the stock exchange affected trading in other companies.<sup>134</sup> Trading on American stock exchanges directly affects the international economy, not to mention the American economy. The American economy affects the international economy. Enron's collapse, as

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Flynn, *U.S. Leads Suit to Stop Oracle Bid for PeopleSoft*, N.Y. TIMES, Feb. 27, 2004, at C1 (The Justice Department and seven states filed a lawsuit to block Oracle's \$9.4 billion hostile takeover of PeopleSoft Inc., saying "the deal would violate federal antitrust laws, reduce competition and lead to higher prices for customers.").

<sup>132</sup> See generally Thomas, *supra* note 37; Timothy A. Canova et al., *Labor and Finance as Inevitably Transnational: Globalization Demands a Sophisticated and Transnational Lens*, 41 SAN DIEGO L. REV. 109 (2004). In the context of the pharmaceutical industry, "the Bush Administration is hoping to use a combination of aggressive inspections and pointed political advice to persuade local officials to back away from the border drug trade [from Canada]." Gardiner Harris & Monica Davey, *U.S. Steps up Effort Against Drug Imports*, N.Y. TIMES, Jan. 24, 2004, at C1. "Free" trade is apparently antithetical to the interests of U.S. pharmaceutical companies.

<sup>133</sup> See Claire Moore Dickerson, *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers*, 53 FLA. L. REV. 611 (2001); see also BAKAN, *supra* note 44, at 25 ("Corporations now govern society, perhaps more than governments themselves do; yet ironically, it is their very power, much of which they have gained through economic globalization, that makes them vulnerable.")

<sup>134</sup> Rhode & Paton, *supra* note 13, at 10.



well as the collapses of other market giants, affected and continues to affect the confidence of investors in the United States and worldwide.<sup>135</sup>

Similarly, the regulation of capitalism more generally cannot be understood as only a domestic issue. In fact, the globalization of advanced capitalism is challenging and changing the way we think about borders. Trade and investment liberalization, human mobility, and new technologies have increasingly meant that many large corporations are multinational, both in ownership and business, and the world's largest corporations dominate international trade and business.<sup>136</sup> The free movement of capital across national borders and increasing foreign direct investment have been essential aspects of regional trade agreements. Traditional protectionist regulations aimed at preserving the nation state as the primary economic unit are being dismantled. So, while economic transactions have occurred internationally for some time, the transnational nature of capitalism has grown exponentially in the last three decades.

### B. *Advanced Capitalism and Equality*

Perhaps slightly more difficult to grasp is why Enron or advanced capitalism is a substantive equality issue.<sup>137</sup> It may help to begin my description of the equality implications from a doctrinal perspective. As I use the term in the same way it is used in Canadian equality jurisprudence, I will start there.

In order for a law or a policy to present an equality claim in Canada, it must draw a distinction between two protected groups or have a disproportionate impact on a person because of his or her membership in a protected group.<sup>138</sup> This can happen even when the law or policy is facially neutral. We must keep in mind that intrusions on equality interests may be justified in certain

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<sup>135</sup> *Id.*

<sup>136</sup> "In 1995, almost 70 percent of world trade was controlled by 500 companies, and one percent of all multinationals owned half of the foreign direct investment." Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L.J. 215, 226 (2001); see also DAVID KORTEN, WHEN CORPORATIONS RULE THE WORLD 79, 124 (1995). "Consolidations crossing national boundaries have accelerated in the late 1990s . . . [A]bout 'a third of the \$3.3 trillion in goods and services traded internationally in 1990 consisted of transactions within a single firm.'" Mayer, *supra* note 136, at 226.

<sup>137</sup> The connection between material well-being and equality has been long made. For example, the Declaration of Philadelphia, adopted by the International Labor Organization in 1944 states: "All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being, and their spiritual development, in conditions of freedom and dignity, of economic security and equal opportunity." CONSTITUTION OF THE INTERNATIONAL LABOR ORGANIZATION, Annex 2 (1944).

<sup>138</sup> *Law v. Canada*, [1999] 1 S.C.R. 419, 497.

circumstances.<sup>139</sup> We must also keep in mind, of course, that even in Canada private actors do not generally have a constitutional duty not to discriminate.<sup>140</sup> Thus, I am not talking about any potential constitutional liability for Enron as a corporation, but am again using the term “Enron” in its largest symbolic sense to denominate how the System raises equality issues. As another important limitation on this analysis, I do not regard “equality” as a panacea for any perceived unfairness in the world.<sup>141</sup> It is not enough that something be unfair in order to attract equality considerations. Rather, I am referring to a legal principle. I refer the reader back to my earlier definition of equality and suggest that, drafted properly, a supranational equality right would raise questions such as those raised here.

Rather than setting out an exhaustive list of equality issues raised by advanced capitalism, I only wish to give a flavor of the sorts of situations that could raise equality claims under a supranational regime. Equality issues raised by advanced capitalism range from laws that permit or facilitate employment discrimination and harassment, to banking and finance rules that facilitate capital movement and accumulation, to the distribution of costs and benefits of economic growth and economic globalization. The inequalities created and exacerbated by existing legal norms and structures are compounded by the systemic and transnational nature of the problems.<sup>142</sup> Discrimination and inequality are layered and complex, so that certain already disadvantaged populations are more likely to

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<sup>139</sup> Section 1 of the *Charter* provides that certain limitations on rights and freedoms may be necessary in a free and democratic society. Nevertheless, the government’s burden under section 1 is extremely high and difficult to meet. The “section 1 test”—as it is commonly called—was set out and then developed in a line of cases beginning with *R. v. Oakes*, [1986] 1 S.C.R. 103.

<sup>140</sup> Their duty not to discriminate is legislative. Each of the ten provinces, as well as the federal government, has human rights legislation governing, among others, corporations.

<sup>141</sup> Ann Scales makes a similar point about feminist legal method in *Law and Feminism: Together in Struggle*, U. KAN. L. REV. 291 (2003).

Legal feminism is not “political correctness” or victimology or untrammelled subjectivity or fluffy-headedness or anarchy or barnyard equity. Just as importantly, it is not a practice that makes claim to objective, universal truth in the way that, for example, some of the wilder versions of “law and economics” theory do.

*Id.* at 291.

<sup>142</sup> See Patricia Williams, *Disorder in the House: The New World Order and the Socioeconomic Status of Women*, in *THEORIZING BLACK FEMINISMS: THE VISIONARY PRAGMATISM OF BLACK WOMEN* 118 (Stanlie M. James & Abena P.A. Busia eds., 1993) (“We have to look at discrimination not simply as a deviation from law in the USA; rather we must see it as part of a larger, international norm, and as consistent with a worldwide corporate culture that transcends national boundaries.”); see also Lusane, *supra* note 50, at 439–40.

face some combination of employment and housing discrimination, discrimination by lenders that precludes capital purchase and accumulation (often linked to employment, housing, and geographical location),<sup>143</sup> and tax and welfare policies that constrain their actions and subsidize other communities at their expense. At the same time, these same populations disproportionately bear the high costs of economic globalization as compared to those who benefit from it. Intersections of race, class, sex, sexuality, disability, and nation are complicated and complicating. It is therefore somewhat artificial to talk about examples of inequality as if they are discreet, and as I talk about examples of systemic inequalities, I ask the reader to bear in mind the connections among them.

One of the most troubling inequalities presented by Enron in particular, and advanced capitalism in general, is the fact that the costs are concentrated on populations already socio-economically disadvantaged.<sup>144</sup> For example, the financial collapse of Enron had a disproportionate impact on low-skilled and office employees, who lost their jobs and retirement savings. Racial minorities disproportionately occupy the low-skilled ranks of the workforce.<sup>145</sup> Women disproportionately occupy office support positions. Arguably, then, women and racial minorities suffered disproportionately as compared to others. These same employees were and remain less likely to find comparable work elsewhere, or to make up lost retirement savings in the future. While highly-skilled employees also lost jobs and retirement savings, their future job prospects were and are better.<sup>146</sup> Similarly, they are better able to make up retirement savings in the future as they can expect higher salaries and stable employment opportunities. Non-employee shareholders (who did not cash out before the collapse) also lost

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<sup>143</sup> Thomas, *supra* note 37, at 1456–76, 1486–99.

<sup>144</sup> Thomas makes this point about economic globalization. *Id.* at 1451.

<sup>145</sup> *Id.*

<sup>146</sup> *But see* Bob Hebert, *The Other America*, N.Y. TIMES, Jan. 23, 2004, at A23. He reports that the Economic Policy Institute released a report on January 21, 2004, describing a nationwide shift of jobs from higher-paying to lower-paying industries; and on January 26, 2004, Mr. Hebert reported a conference held “discreetly in the Westin New York hotel,” titled “Offshore Outsourcing: Making the Journey Work for Your Corporation.” Bob Hebert, *Education is No Protection*, N.Y. TIMES, Jan. 26, 2004, at A23. In attendance were representatives from Proctor & Gamble, Motorola, Cisco Systems, and Gateway. *Id.* The California firm that co-hosted the conference, NeoIT, helped clients move about one billion dollars’ worth of projects offshore in 2003. *Id.* The outsourcing (or moving offshore) of “white-collar” jobs is clearly an emerging concern for Americans. *See, e.g.*, Jacques Steinberg, *Reuters Takes Outsourcing to a New Level With Journalists*, N.Y. TIMES, Feb. 9, 2004, at C6; Saritha Rai, *Indians Fearing Repercussions of U.S. Technology Outsourcing*, N.Y. TIMES, Feb. 9, 2004, at C4; Daniel Gross, *Who’s Problem Is Health Care?*, N.Y. TIMES, Feb. 8, 2004, § 3, at 6.

money. To the extent that these were largely through mutual funds, however, the costs of collapse were shared among fund-holders.

It is possible to take this observation—that costs are concentrated on populations least able to pay—from Enron out to the broader market. First, as between those who control capital and those who do not, the former have benefited from liberalized trade regimes, while the latter have disproportionately borne the costs.<sup>147</sup> Second, because economic globalization is reorganizing industrialized economies into hierarchies in which income is more directly related to skill level,<sup>148</sup> the gap between employees in high-skill occupations and low-skill occupations is increasing. Among those without capital, employees in low-skill occupations have disproportionately borne the costs of economic globalization as compared to employees in high-skill occupations.<sup>149</sup>

The hierarchical nature of benefit and cost allocation is obviously troublesome. Even more troublesome are correlations between race,<sup>150</sup> sex, and class in the hierarchies just described. For example, in developing countries capital is often concentrated in a wealthy ethnic minority population who, for a variety of reasons, “tend under market conditions to dominate economically, often to a startling extent, the ‘indigenous’ majorities around them.”<sup>151</sup> Professor Amy Chua’s book, *World on Fire*, recounts the explosive collision between markets, democracy, and ethnic hatred, demonstrating that “[m]arket-dominant minorities are the Achilles’ heel of free market democracy.”<sup>152</sup>

At the same time, long-existing barriers to entry into high-skill (i.e., better paid) occupations for minorities and women have not subsided in the United States and elsewhere. Indeed, a whole host of federal, state, and local laws have entrenched inequality between men and women, and between white and minority populations in the U.S., so that minorities and women are more often relegated to low-skilled jobs (with less pay and fewer benefits) and ill-equipped to benefit from the economic gains brought about by recent economic globalization.<sup>153</sup>

<sup>147</sup> S. PRAKASH SETHI, *SETTING GLOBAL STANDARDS: GUIDELINES FOR CREATING CODES OF CONDUCT IN MULTINATIONAL CORPORATIONS* 5 (2003); see also Karla Shantel Jackson, *Is Anything Ever Free?: NAFTA’s Effect on Union Organizing Drives and Minorities and the Potential of FTAA Having a Similar Effect*, 4 SCHOLAR 307 (2002).

<sup>148</sup> Thomas, *supra* note 37, at 1451.

<sup>149</sup> *Id.* at 1451–55.

<sup>150</sup> Ediberto Román argues that international legal discourse has paid insufficient attention to issues of race. See Ediberto Román, *A Race Approach to International Law (RAIL): Is There a Need For Yet Another Critique of International Law?*, 33 U.C. DAVIS L. REV. 1519 (2000).

<sup>151</sup> AMY CHUA, *WORLD ON FIRE* 6 (2003).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 1455; see also Gott, *supra* note 36, at 1508. These laws include the North America Free Trade Agreement (and side agreements), as well as tax benefits which subsidize

“Consequently, their impoverishment may be disproportionately likely to remain entrenched, even as the globalization-driven economy booms.”<sup>154</sup>

The failures of government to act in situations begging for redistributive solutions arguably raise equality issues as well. When multinational corporations move to jurisdictions with fewer or no labor protections, for example, the failure of the government in the new locale to enact laws that protect its workers—or the failure of the government in the old locale to coordinate transitions with new locales—obviously has a disproportionate impact on the most disadvantaged citizens. The people with the least bargaining power are usually the people with the most need, and therefore not able to organize around labor issues for fear of losing much needed employment.<sup>155</sup> Government inaction in this context is especially troubling, as it is not simply something someone forgot to do. Rather, the decision not to act is usually that—a decision. In that way, government inaction in this context is actually action.<sup>156</sup>

Another area heavily implicated by economic integration and replete with potential equality claims is immigration law. In considering a North American Charter, participants and drafters would have to consider whether citizenship or nationality would be a protected class. Obviously, if North American governments are not permitted to discriminate on the basis of nationality or citizenship, then immigration laws would have to be rewritten so that free movement among the three member states is possible.<sup>157</sup> As things presently

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home ownership, federal loan and housing regulations that favor suburbs and suburban populations, and federal transportation policies that support highway subsidization while incurring universally recognized costs for cities, together which predictably drew the middle classes out of cities and left behind racial minorities, creating and reinforcing racial segregation. Thomas, *supra* note 37, at 1476–86.

<sup>154</sup> Thomas, *supra* note 37, at 1451–52; see also Lusane, *supra* note 50, at 439–47.

<sup>155</sup> The International Labor Rights Fund has a web site on which it has published several articles about the effects of economic globalization, and what are essentially lawless manufacturing zones, on the ability of workers to organize. See generally <http://www.laborrights.org/> (last visited Feb. 23, 2005).

<sup>156</sup> For a judicial analysis of how government inaction can be action in the Canadian context, see the majority judgment of the Supreme Court of Canada in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, which held that the failure of the Alberta government to include “sexual orientation” in the list of protected classes in provincial human rights legislation was “action,” and therefore reviewable by the Court under the Canadian Charter.

<sup>157</sup> Under NAFTA, foreign investors have the right not to be discriminated against on the basis of nationality. José E. Alvarez, *Forward: The Ripples of NAFTA*, in *NAFTA INVESTMENT ARBITRATION: THE FIRST TEN YEARS* (Todd Weiler ed., 2004). In fact, as Professor Alvarez has argued elsewhere, the NAFTA investment chapter is really a “human rights treaty for a special-interest group”—foreign investors. José Alvarez, *Critical Theory and the North American Free*

stand, immigration policies violate equality principles in at least two ways:<sup>158</sup> first, they draw distinctions between citizens of different countries and give benefits to some and not to others;<sup>159</sup> second, they articulate criteria for immigration which have a disproportionate impact on certain populations. For example, certain Canadian and Mexican professionals, such as doctors, lawyers, and law professors, are able to work in the United States pursuant to the North America Free Trade Agreement.<sup>160</sup> Those provisions do not permit plumbers, elementary school teachers, secretaries, or janitors to work in the United States under NAFTA.

As another example, each of the member states has special immigration rules for investors. Canada, for example, permits those who invest a certain amount of money in Canada to apply for landed immigrant status.<sup>161</sup> Under NAFTA, Canada cannot discriminate against American and Mexican investors on the basis of nationality.<sup>162</sup> Together, these would seem to suggest that having satisfied certain immigration conditions, wealthy Americans and Mexicans can in fact move freely within North America. This does not extend, of course, to anyone

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*Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 308303 (1997) [hereinafter Alvarez, *Critical Theory*]. Critically, Alvarez observes that few Mexican investors are in the position to penetrate the American market; therefore, these provisions primarily benefit American investors, who have gained "direct access to binding denationalized adjudication of any governmental measure that interferes with their rights" under NAFTA. *Id.* at 304-05, 307-08.

<sup>158</sup> A slightly different but related subject matter is nationality law, and its effect on women and racial minorities in the United States, and to a lesser degree, Canada. See Karen Knop & Christine Chinkin, *Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law*, 22 MICH. J. INT'L L. 523 (2001).

<sup>159</sup> Related to this are state and federal laws that draw distinctions between lawful immigrants and undocumented workers. For a discussion about the policy issues driving arguments for and against distinctions in this context, see Linda Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555 (1996).

<sup>160</sup> C.F.R. § 214.6 (2002); 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL 41.59 N1 Background, available at <http://foia.state.gov/masterdocs/09FAM/0941059N.pdf> (last visited Mar. 4, 2005).

<sup>161</sup> There are three classes of permissible business immigrants in Canada: entrepreneurs, investors and self-employed business people. Immigration and Refugee Protection Regulations of Canada, SOR/2002-227, pt. 6, div. 2, available at <http://laws.justice.gc.ca/en/i-2.5/sor-2002-227/133025.html> (last visited Mar. 4, 2005); Immigration and Refugee Protection Act of Canada, ch. 27 § 12, 2001, S.C. 49-50 (Can.); Immigration and Refugee Protection Regulations, § 88. Investors must have a minimum net worth of \$800,000. See <http://laws.justice.gc.ca/en/i-2.5/text.html> (last visited May 5, 2005).

<sup>162</sup> NAFTA, *supra* note 22, 32 I.L.M. at 639-48; see also BARRY APPLETON, NAVIGATING NAFTA 79-89 (1994).

who does not have the capital to invest on the scale required by the Canadian Immigration Act. Clearly, the privileging of a few, already privileged people has a disproportionate impact on less-advantaged populations. This is complicated by the fact that currency values and relative wealth mean that Americans are arguably more likely than Mexicans to satisfy the investor criteria.<sup>163</sup> A substantive equality commitment may suggest that those criteria treat Mexicans and Americans *differently* in order to achieve equality.

With a supranational equality right, interesting issues would arise as between member states.<sup>164</sup> Whether the scope of such a right could extend to claims by one country against another is something that would need careful consideration. One wonders, however, how existing interstate inequalities, which are complicated by their correlation to sex, race, and culture, could be alleviated without a commitment to interstate equality. As an example, the movement of low-skilled jobs to Mexico from the United States disproportionately hurts African American and Latina/o workers in the U.S.,<sup>165</sup> but also creates and maintains class and race hierarchies as between the two countries by concentrating high-skilled labor in one and low-skilled labor in the other. A recent United Nations Human Development Report documents that the economic and social division between industrialized and developing nations is “sharpening—what that report terms ‘persisting disparities.’”<sup>166</sup> The effects of these disparities are disproportionately born by women. The World Development Report estimates that women constitute 70–90 percent of workers in “export processing zones”<sup>167</sup>

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<sup>163</sup> Alvarez, *Critical Theory*, *supra* note 157, at 304–05, 307–08.

<sup>164</sup> Equitable distribution policies come to mind. Substantive equality considerations would seem to drive the practice of “equitable distribution” in international organizations. See William J. Aceves, *Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution*, 39 COLUM. J. TRANSNAT’L L. 299, 305 (2001).

Briefly stated, equitable distribution policies are adopted to promote effective participation and fair representation of states in the governance and regulatory mechanisms of international organizations, particularly with respect to non-plenary treaty organs. By classifying states according to such factors as geographic location, legal system, or form of civilization, and by using such classification schemes to determine membership composition in non-plenary treaty organs, equitable distribution policies seek to ensure that international organizations adequately manifest the diversity of the international system. . . . Some might call equitable distribution an affirmative action program for the international system.

*Id.* at 305–06.

<sup>165</sup> Gott, *supra* note 36, at 1508–09.

<sup>166</sup> Lusane, *supra* note 50, at 432.

<sup>167</sup> Export processing zones (“EPZs”) are areas in developing countries where labor laws and other human rights regulations are non-existent, abrogated or not enforced. EPZs are

around the world,<sup>168</sup> and the International Labour Organization reports that women average 50–80 percent of wages earned by their male counterparts in developing countries.<sup>169</sup>

These disparities are further complicated by the intra- and transnational racialized and gendered divisions of labor in North America. Global economic restructuring is occurring on a gendered and racialized terrain; therefore, “a renewed project of critical race [and feminist] globalism must grapple with a set of antinomies resulting from the reconstituted interplay of race, nation, [gender,] and class.”<sup>170</sup> It will not be enough to simply correct immigration policies to allow for international movement if Mexican people (or women) disproportionately occupy low-skilled jobs regardless of their location (i.e., whether in Mexico or the United States). There was much talk in 2004 about a plan to grant temporary worker status to illegal immigrants in the U.S.,<sup>171</sup> who are portrayed as enthusiastically participating in the American economy by doing the work that Americans do not want to do. Even if granted something more permanent than temporary status, however, the racialized division of labor will likely persist unchecked. Equality principles require progressive and proactive

generally operated by EPZ Authorities, outside the jurisdiction of Ministries of Labor, and physical access to EPZs is often restricted. They are described in more detail in Blackett, *supra* note 44, at 405–06.

<sup>168</sup> The report is cited by Bama Athreya, in *Trade is a Women's Issue*, 7(15) FOREIGN POLICY IN FOCUS 1 (Dec. 2002), available at [http://www.fpif.org/briefs/vol7/v7n15femtrade\\_body.html](http://www.fpif.org/briefs/vol7/v7n15femtrade_body.html) (last visited Feb. 2, 2005) (on file with author); see also Blackett, *supra* note 44, at 405; see generally ANNETTE FUENTES & BARBARA EHRENREICH, *WOMEN IN THE GLOBAL FACTORY* (1992); UNITED NATIONS, COMMISSION ON HUMAN RIGHTS, *THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE RELATIONSHIP BETWEEN THE ENJOYMENT OF HUMAN RIGHTS, IN PARTICULAR, INTERNATIONAL LABOUR AND TRADE UNION RIGHTS, AND THE WORKING METHODS AND ACTIVITIES OF TRANSNATIONAL CORPORATIONS*, U.N. Doc. E/CN.4/Sub.2/1995/11 (1995), cited in Blackett, *supra* note 44, at 404–05.

<sup>169</sup> In addition, women in developing countries do not enjoy the same “benefits” as men, since they are more often relegated to contract work, they are the first to be laid off in poor economic times, and they are given fewer promotions and fewer opportunities to train. Athreya, *supra* note 168, at 2. I put benefits in quotation marks, as poor men in developing nations share some of the same disadvantages as poor women vis-à-vis capital; the point is, women disproportionately bear the burdens and costs of economic globalization.

<sup>170</sup> Gott, *supra* note 36, at 1507.

<sup>171</sup> See, e.g., Steven Greenhouse, *Business Cheers Bush's Plan to Hire Immigrants More Easily, but Labor is Wary*, N.Y. TIMES, Jan. 12, 2004, at A1; Editorial, *Temporary Immigration*, N.Y. TIMES, Jan. 12, 2004, at A18; David Stout, *Bush Would Give Illegal Workers Broad New Rights*, N.Y. TIMES, Jan. 7, 2004, at A18.



remedies on both local and global levels at the same time by placing the “struggle for racial justice in the United States, Mexico and Canada in the broader context of international anticolonial and anti-imperial struggle”<sup>172</sup> and prioritizing a commitment to ensure that U.S. policies do not serve to entrench or exacerbate racial and ethnic divides within other countries.<sup>173</sup>

Before leaving the equality discussion, I want to return to Enron in the narrowest sense—the collapse of that particular corporation. Enron was able to happen, at least in part, because of a structural commitment and claim to so-called neutral “meritocracy” (a merit-based system), which in turn obscured the inequalities upon which it relied. Enron was made possible by a long list of laws and regulations set up to effectuate that meritocracy. Most American lawyers do not think of the regulations promulgated by the Securities and Exchange Commission or the Internal Revenue Service, for example, as equality issues. But any law which claims to be neutral or objective or otherwise set up to effectuate meritocracy in a society with underlying structural inequalities is likely to perpetuate those inequalities. Worse, it is likely to exacerbate those inequalities by having a disproportionate impact on disadvantaged communities. In that sense, those laws present equality issues. So, if one were able to show, for example, that a specific corporate law,<sup>174</sup> tax law, or securities law had a disproportionately harmful effect on women, people of color, or lesbians and gay men, one could theoretically advance an equality claim.<sup>175</sup> All issues are potentially equality

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<sup>172</sup> Gott, *supra* note 36, at 1511.

<sup>173</sup> Alvarez observes that, “[r]ace critics may find it illuminating that what the U.S. government does, by way of treaty, serves to entrench or even exacerbate racial and ethnic divides within other nations—as well as our own.” Alvarez, *Critical Theory*, *supra* note 157, at 303.

<sup>174</sup> For a discussion about the gender implications of corporate governance rules, see Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. SOC. JUST. 457 (2003).

<sup>175</sup> In *Symes v. Canada*, [1993] 4 S.C.R. 695, for example, the plaintiff—a female lawyer—argued that Canadian federal income tax rules prohibiting the deduction of child-care costs as a business expense infringed her equality right under the Canadian Charter, as the prohibition disproportionately effected women. *Id.* The majority of the Supreme Court of Canada did not agree with her, but (perhaps unsurprisingly) the two female members of the Court would have upheld her claim. *Id.* at 696. Madame Justice L’Heureux-Dubé (Madame Justice McLachlin concurring) found that child care expenses should not be disallowed as a business expense because they are “personal in nature” (as the majority found). *Id.* at 799–804. L’Heureux-Dubé found that while for most men the responsibility of children does not impact on the number of hours they work or affect their ability to work, a woman’s ability even to participate in the work force may be completely contingent on her ability to acquire child care. *Id.* at 800. Indeed, women lawyers are much more likely to rely on paid child caregivers than are male lawyers—by a ratio of three to one. *Id.* at 801. “The real costs incurred by

issues.<sup>176</sup> If we understand Enron as an equality issue, we are able to fashion solutions best suited to address the panoply of underlying conditions that made it possible.

## V. ENVISIONING THE FUTURE: TOWARDS A NORTH AMERICAN CHARTER OF FUNDAMENTAL RIGHTS

As we enter the treacherous territory of possible solutions to the unique set of problems created by transnational capitalism, multinational corporations, and increasing economic globalization, doing nothing is not an option. The present market structure is not self-regulating, and the concept of a “free” market is absurd, as if the costs were not being borne by someone.<sup>177</sup> It is not a question of whether to regulate, but how to regulate. There are hugely diverse possibilities.<sup>178</sup>

businesswomen with children are no less real, no less worthy of consideration and no less incurred in order to gain or produce income from business [than say, for example, the entertainment and meal deductions].” *Id.* at 803. Accordingly, she found that Ms. Symes had incurred an actual and calculable price for child care, in order that she could produce income from business, and that this cost is disproportionately incurred by women. *Id.* at 821. While this case provides a useful example of ways in which equality guarantees touch upon all aspects of our lives, I include it as an example of the right to state a claim, in the absence of any allegation of intent to discriminate.

<sup>176</sup> One of the most common reasons for failing to apply a law in a particular situation is fear of the “slippery slope.” I know that the suggestion that all issues are potentially equality issues will strike fear and disdain in the hearts of some. But I am suspicious of this fear, particularly in the context anti-discrimination, because an honest commitment to anti-discrimination is exactly that—a commitment to anti-discrimination—and not merely a quasi-commitment in respect of only select areas of law and life. For a wonderful essay about slippery slope arguments, see Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985). As Professor Schauer notes, a slippery slope argument often “emerges as an appeal that forces decisionmakers to focus on the future implications of what they do today.” *Id.* at 382. There’s nothing wrong with that, provided they are not “wildly exaggerated.” *Id.*

<sup>177</sup> See generally, Fineman, *supra* note 1; MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCE* (2004).

<sup>178</sup> See Beverly Moran, *Economic Development: Taxes, Sovereignty, and the Global Economy*, in *TAXING AMERICA* 197 (Karen B. Brown & Mary Louise Fellows eds., 1996) (exploring the possibility of municipal government tax cartels); Westfield, *supra* note 89, at 1080 (exploring ideas for a cooperative approach of governance by multinational enterprises and their headquarters’ government); Annalise Riles, *Global Designs: The Aesthetics of International Legal Practice*, 93 AM. SOC’Y INT’L L. PROC. 28 (1999) (suggesting networks offer a flexible alternative to the age-old categories of state and non-state actors); David Katona, *Challenging the Global Structure Through Self-Determination: An African Perspective*, 14 AM. U. INT’L L. REV. 1439 (1999); Terry Collingsworth, *Separating Fact From Fiction in the*

Clearly, market collapses, the unregulated flow of capital, and the resulting impoverishment of whole communities will not be solved by tinkering with American domestic laws at ad hoc meetings in Crawford, Texas,<sup>179</sup> especially when that tinkering is limited to a disingenuous idea of “corporate responsibility.”<sup>180</sup> Beyond that, “multinational enterprises are not easily subjected

*Debate Over Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S.F. L. REV. 563 (2003) (suggesting domestic civil courts in the U.S. may be used for remedying human rights violations by U.S. companies abroad); Elliott Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT’L L. 153 (2003) (arguing the United States should, among other things, support the development of multilateral efforts to create accountability). Sam Roybal, a student in my University of New Mexico Commercial Transactions class in 2002, had the idea that if Delaware seceded from the Union, we would at least have another economic super power to balance things out.

<sup>179</sup> This is a reference to President Bush’s “Economic Forum,” held on Aug. 13, 2002 in Texas, not far from Bush’s farm. See Paul Krugman, *Clueless in Crawford*, N.Y. TIMES, Aug. 13, 2002, at A19. Among those invited to speak were John T. Chambers, C.E.O. of Cisco Systems. *Id.* The irony of that choice was not lost on at least one commentator:

Two years ago, Cisco was the world’s most valuable company, with a market capitalization of more than \$500 billion. Mr. Chambers was among the world’s best-paid executives, receiving \$157 million in 2000. Cisco was perceived as a company that combined new-economy glitz with old-fashioned solidity, that was on the cutting edge but made real products and earned real profits.

In short, people thought about Cisco the same way they thought about Enron.

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When Enron’s financial house of cards collapsed, \$80 billion of market value vanished. Cisco hasn’t collapsed, but its market capitalization has fallen by more than \$400 billion. Nobody from Cisco management—ranked No. 13 in Fortune’s “greedy bunch”—has been arrested. But then neither has anyone from Enron.

*Id.* With respect to the “substance” of the forum, “[t]he President offered no new programs or ideas to repair the economy,” but seven [of the eight] participants—three blacks, two Hispanic speakers and two white women—mirrored the political concerns of the White House.” Elisabeth Bumiller & Edmund L. Andrews, *Economic Outlook Is Positive, Bush Tells Texas Forum*, N.Y. TIMES, Aug. 14, 2002, at A1. Clearly, Bush’s “Economic Forum” was less about the economy and more about a photo opportunity in advance of the 2004 presidential election—an attempt to convince us that Mr. Bush cares not only about the economy but about minority groups and women. Bumiller and Andrews reported that Senator Tom Daschle (D) called it a “made for TV forum.” *Id.*

<sup>180</sup> In thinking about “corporate responsibility,” we could turn to Corporate Codes of Conduct. In these Codes, multinational corporations or enterprises voluntarily set standards for conducting themselves in developing or non-industrialized countries. These Codes are developed because of public pressure rather than law, and may include labor standards, wages

to national policy.”<sup>181</sup> Domestic governments have historically been able to develop broad policy goals and overarching principles that in turn inform the development of intranational regulation, but the global economy is undermining the capacity of nation-states to regulate their own domestic economic and social

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and working conditions. They arose out of multinational enterprises’ concerns about their reputations, and how those reputations affect their marketing potential at home in the United States and Canada. They are voluntary. Research has already been done about their effectiveness and potential. See generally SETHI, *supra* note 147. Whether or not there would be a way to convince corporations that the Codes should be enforceable, by whom and for what purposes, is an open question.

<sup>181</sup> Harvard University Economics Professor Vernon made this prediction in 1970, in *Future of the Multinational Enterprise*, in THE INTERNATIONAL CORPORATION 373, 396 (Charles P. Kindleberger ed., 1970), cited in Stone, *supra* note 82, at 988. NAFTA appears to have borne his prediction out. Ms. Taylor provides examples in *NAFTA, GATT, and the Current Free Trade System: A Dangerous Double Standard for Workers’ Rights*. See Taylor, *supra* note 22, at 413–15 (2000). She reports for example, that in 1997, Canada banned the importation and transport of MMT (methcyclopentadienyl manganese tricarbonyl), a gasoline additive and dangerous neurotoxin already banned by the U.S. Environmental Protection Agency. Ethyl Corporation based in the United States produces MMT and until the ban enjoyed steady sales to Canadian gasoline refiners. *Id.* Prior to the ban, Ethyl threatened Canada with a suit under NAFTA Chapter 11 if Canada went ahead with the ban. Less than a week after the ban was passed, Ethyl filed a claim for \$250 million in damages, claiming that the ban “constituted an illegal appropriation (a taking of private property for public use) by precluding sales to Canadian refiners and by tarnishing the corporation’s ‘good reputation.’” *Id.* Canada settled the case by repealing its ban on MMT, paying \$13 million in damages to Ethyl and issuing a public statement that MMT poses no health risk. *Id.*

In another case, a Canadian-based conglomerate, Loewen Group, was the defendant in a Mississippi lawsuit and found liable for fraud and gross business conduct for its aggressive attempts to ruin a small local funeral home and insurance operator. The jury awarded damages to the plaintiff in the amount of \$100 million (compensatory) and \$400 million (punitive). Rather than appeal, Loewen settled the case for \$150 million total, and

filed a claim for \$725 million from the U.S. government under NAFTA’s Chapter 11, claiming that the jury verdict, the punitive damages, and the appeal bond requirement “violated international legal norms of ‘fairness,’ discriminated against the Canadian-based corporation and attempted to ‘expropriate’ or seize Loewen’s assets . . .” in derogation of NAFTA guarantees.

*Id.* at 414. Although unsuccessful, the corporation clearly attempted to use NAFTA as a tool to evade liability in local courts (relying on the government to essentially indemnify them). Ms. Taylor observes that “[f]or workers, who lack judicious remedies in the international system, this threatens to take away their only mechanism for justice, namely, domestic courts.” *Id.* at 415.

policies.<sup>182</sup> And, as private entities, multinational enterprises are not subject to public international law. In all of the circumstances, one might instinctively look to international norms established by treaties. But these have either failed to work,<sup>183</sup> or have focused on the market to the exclusion and detriment of other important considerations. NAFTA is an example of the latter, the substance of which is astonishing for the uninitiated.<sup>184</sup> Consider, for example, that when a

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<sup>182</sup> See, e.g., Stone, *supra* note 82, at 988; Foster, *supra* note 55, at 598 (arguing that transactions in foreign exchange markets are fifty times the level of world trade in goods and services, are speculative in nature, and use complex financial instruments; “this development alone has outdistanced governmental responses with disastrous consequences for millions”); Kim Rubenstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalized World*, 7 IND. J. GLOBAL LEGAL. STUD. 519, 527 (2000) (“The more the economy becomes interdependent on a global scales, the less can regional and local governments, as they exist today, act upon the basic mechanisms that condition the daily existence of our lives” and “since global regimes and institutions can regulate matters beyond the control of any single government, national sovereignty is inevitably undermined as a consequence.”). But for a hopeful account of how the nation-state might transform or assert its role in the global economy, see Sassen, *supra* note 43, at 5.

In thinking about the experience and meaning(s) of nationality and citizenship, an interesting path of inquiry would be to explore how this discussion relates to the experiences, historical and present, of First Nations (or Native Americans, Canadians, and Mexicans) whose bands (or tribes) cross modern national borders. The first written constitution in North America was drafted by the Five Nations. Charlotte M. Emery, *Tribal Government in North America: The Evolution of Tradition*, 32 URB. LAW. 315, 323–24 (2000).

<sup>183</sup> U.N. Treaties and Conventions cannot realistically work when the United States will not participate or sign on. One obvious example is the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981). Another is the International Criminal Court (Rome Statute of the International Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, art. 8(d), U.N. Doc. A/CONF.183/9 (1998)).

<sup>184</sup> In the labor context, Stone has observed: “NAFTA, which imposes no substantive cross-border labor regulations, comes close to a no-regulation regime. Accordingly, this model solves none of the problems that globalization poses for labor.” Stone, *supra* note 82, at 1028. For a study in contradictions, compare how actual NAFTA provisions played out in the cases described by Ms. Taylor, *supra* note 181, with its Preamble, which states that the governments of Canada, Mexico, and the United States have resolved to (among other things), “Strengthen the special bonds of friendship and cooperation among their nations. . . . Reduce distortions to trade. . . . Undertake each of the preceding in a manner consistent with environmental protection and conservation. . . . Preserve their flexibility to safeguard the public welfare. . . . Promote sustainable development. . . . Strengthen the development and enforcement of environmental laws and regulations; and Protect, enhance and enforce basic workers’ rights.” NAFTA, *supra* note 22, pmb1.

member state's domestic laws are not cast in the least trade restrictive manner, taxpayers essentially indemnify corporations for lost profits.<sup>185</sup>

In all of the circumstances, I urge us to consider two possible solutions: harmonization and uniformity. When I say harmonization, I am referring to a stated and enforceable vision of minimum standards, or what I have called a North American Charter of Fundamental Rights. I am suggesting a commitment on the part of Canada, the United States, and Mexico to something that says: "this is what we provisionally envision for ourselves, and this is what matters for us as an interdependent community."

Though it may sound like the "cart-before-the-horse," it is critical that we consider establishing this—overarching principles and a commitment to the same—before considering uniformity of domestic laws (including uniform accounting or corporate governance principles).<sup>186</sup> Indeed, it is only with a North American Charter that we can determine where principles such as substantive equality will require uniformity and where they will argue against it. Put another way, in every instance that we consider uniformity, we will need to be vigilant about asking ourselves: "toward what end is this activity directed?"<sup>187</sup> We cannot answer that question without first stating the goals and principles that will inform the development of our (North American) community.

The experience of the European Union underscores the wisdom of doing things in this order.<sup>188</sup> In Europe, the Social Charter came decades after the first economic agreements.<sup>189</sup> Even then, the Social Charter shortchanged equality principles and was insufficiently authoritative. For example, member states were asked in 1991 to enact legislation to address sexual harassment. The states that did so, such as France, made their legislation toothless, incapable either of interpretation or enforcement. It was not until 1997, when the last of the member

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<sup>185</sup> Stone, *supra* note 82, at 1028; Taylor, *supra* note 22, at 413–15.

<sup>186</sup> For a discussion about corporate governance in global capital markets, see Janis Sarra, *Corporate Governance in Global Capital Markets, Canadian and International Developments*, 76 TUL. L.R. 1691 (2002); Sanford M. Jacoby, *Corporate Governance in Comparative Perspective: Prospects for Convergence*, 22 COMP. LAB. L. & POL'Y J. 5 (2000) (comparing two distinct patterns among industrialized countries: the "shareholder" and "stakeholder" systems).

<sup>187</sup> Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936–37).

<sup>188</sup> Comparisons with Europe are not perfect, as the EU is more fully integrated economically, politically, and socially. Understanding the limits of comparison, however, do not make comparison valueless.

<sup>189</sup> See R. Amy Elman, *Introduction: The EU From Feminist Perspectives*, in *SEXUAL POLITICS AND THE EUROPEAN UNION: THE NEW FEMINIST CHALLENGE 1*, 5 (R. Amy Elman ed., 1996).

states signed on, that the European Social Charter<sup>190</sup> became enforceable. It was only in 2002 that the European Parliament issued a binding directive requiring member states to have uniform sexual harassment laws and remedies on their books by 2005.<sup>191</sup> This directive is consistent with increasing European recognition that social guarantees and economic success are inextricably bound to each other.<sup>192</sup>

In the last few years, the United States has been pursuing an FTAA. In what would seem increasingly typical of this Administration, it appears that the United States has expended enormous energy on selling the *idea* of the FTAA and relatively little energy on development of plans and consideration of obvious intra-, inter-, and transnational consequences in all areas of life.<sup>193</sup> Trite, but true: ideas are the seeds from which plans and policies develop. But ideas alone are

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<sup>190</sup> This is a reference to the declaration of the rights and principles which operate throughout the Member States. See SINGLE EUROPEAN ACT, O.J. (L 169) 1 (1987); Treaty on the European Union, art. 3b, O.J.C. 224/1 (Feb.7, 1992) (commonly referred to as the Maastricht Treaty 1992). The Charter of Fundamental Rights of the European Union was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000. The issue of the legal status of the Charter of Fundamental Rights (i.e., whether to make it legally binding by incorporating it into the Treaty on the European Union) was raised by the Cologne European Council, which originally launched the Charter initiative. The Convention drew up the draft Charter with a view to its possible incorporation, and the European Parliament voted in favor of incorporation. The Nice European Council (see Annex I to the Presidency conclusions) decided to consider the question of the Charter's legal status during the general debate on the future of the European Union, which was initiated on Jan. 1, 2001. See [http://www.europarl.eu.int/charter/default\\_en.htm](http://www.europarl.eu.int/charter/default_en.htm) (last visited Jan. 20, 2005). The text of the Charter is available online at [http://www.europarl.eu.int/charter/pdf/text\\_en.pdf](http://www.europarl.eu.int/charter/pdf/text_en.pdf) (last visited Jan. 20, 2005).

<sup>191</sup> Council Directive of the European Parliament and of the Council, 2002/73/ED (amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions). Member States have until October 5, 2005 to bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive. See *id.* art. 2, s.1.

<sup>192</sup> See, e.g., Elman, *supra* note 189; Caruso, *supra* note 40; Rachel A. Cichowski, *Women's Rights, The European court, and Supranational Constitutionalism*, 38 LAW & SOC. REV. 489 (2004) (examining the interaction between the European Court of Justice and member state governments in legal integration). Arguments for a European Constitution or Constitutional Treaty are being increasingly and forcefully made. See, e.g., Jürgen Habermas, *Why Europe Needs a Constitution*, 11 NEW LEFT REV. 5 (2001); TEN REFLECTIONS ON THE CONSTITUTIONAL TREATY FOR EUROPE (Bruno deWitte ed., 2003).

<sup>193</sup> I argue elsewhere that economic integration necessarily implicates culture and law. See Spitz, *supra* note 4.

insufficient bases for foreign policy decisions. It is not good public policy—and particularly not good foreign policy—to force the implementation of an idea *per se* without some vestiges of a broader plan and consideration of predictable consequences, or worse, to force implementation *knowing* but ignoring the consequences.

In the business context, of course, most educators and leaders agree that acting on an idea in the absence of a meaningful plan that takes into account predictable consequences promises almost certain failure of the idea and probable failure of the business altogether. In fact, the United States Small Business Administration (SBA), an agency of the federal government, advises:

To increase your chance for success, take the time up front to explore and evaluate your business and personal goals. Then use this information to build a comprehensive and well-thought-out business plan that will help you reach these goals. . . . The process of developing a business plan will help you think through some important issues that you may not have considered yet.<sup>194</sup>

Indeed, “[p]lanning is one of the most important aspects of starting a business. Proper planning is needed for success in business and, for that matter, *anything you do in life*.”<sup>195</sup> Expanding on the use of a business plan, the SBA states:

As a planning tool, the business plan guides you through the various phases of your business. A thoughtful plan will help identify roadblocks and obstacles so that you can avoid them and establish alternatives. Many business owners share their business plans with their employees to foster a broader understanding of where the business is going.<sup>196</sup>

Taking this last quote from the SBA, and replacing “business” with “North America” or “North American growth,” “owners” and “employees” with “citizens,” and “plan” with “Social Charter,” we are left with something like:

As a planning tool, the North American Social Charter guides [us] through the various phases of [our] North American growth. A thoughtful Social Charter will help identify roadblocks and obstacles so that [we] can avoid them and establish alternatives. North American citizens [should] share their ideas for a North American Social Charter with one another to foster a broader understanding of where North America is going.

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<sup>194</sup> [http://www.sba.gov/starting\\_business/](http://www.sba.gov/starting_business/) (last visited Feb. 24, 2005).

<sup>195</sup> *Id.* (emphasis added).

<sup>196</sup> *Id.*



To my mind, this makes perfect sense. As was the case for NAFTA—and is the case for the FTAA—the plan has to be something more than simply lifting tariffs<sup>197</sup> or forcing other nations to lower marginal tax rates.<sup>198</sup> It is a seemingly obvious principle that apparently discreet ideas should not be implemented without consideration—let alone understanding—of broader implications. A narrow focus on Enron or NAFTA or the FTAA, without regard to their broader contexts, cannot give us a complete picture and cannot foster human flourishing. The picture is not only bigger, but actually textured, layered, and understandable. Another analogy may be useful, if trite: we could not possibly understand or appreciate the ceiling of the Sistine Chapel if we only had three inches of the painting.

In a wonderful quote, William Greider described economic globalism with these words:

Imagine a wondrous new machine, strong and supple, a machine that reaps as it destroys. . . . Think of this awesome machine running over open terrain and ignoring familiar boundaries. It plows across fields and fencerows with fierce momentum that is exhilarating to behold but also frightening. As it goes, the machine throws off enormous mows of wealth and bounty while it leaves behind great furrows of wreckage.

Now imagine that there are skillful hands on board, but no one is at the wheel. In fact, this machine has no wheel or any internal governor to control the speed and direction. It is sustained by its own forward motion, guided mainly by its own appetites. And it is accelerating.

....

. . . To describe the power structure of the global system does not imply that anyone is in charge of the revolution.<sup>199</sup>

It is this aspect of North American economic integration—many skillful hands on board, but no one at the wheel—which should give us the greatest cause for concern. In one sense, this is what happened with Enron. When it collapsed, one could almost feel the huge collective shoulder shrug at the question: how could

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<sup>197</sup> This is particularly true where, in the case of the FTAA, it is proposed that some countries lift tariffs in situations where others do not (for example, in the context of agriculture).

<sup>198</sup> This is apparently an aim connected with national security. See NATIONAL SECURITY STRATEGY, *supra* note 33, at 17; see also Scales & Spitz, *supra* note 10, at 546.

<sup>199</sup> WILLIAM GREIDER, ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM 11, 26 (1997), cited in Thomas, *supra* note 37, at 1479–80 n. 143.

this have happened?<sup>200</sup> On the level of increasing interstate economic integration, there can be no excuse for a failure to consider connections, consequences, and implications. Who is driving this machine, towards what end, and in whose interests, would seem to be important questions to answer—before we have Enron on an even larger and more disastrous scale.

In summary, how the process of remedying the injustices brought about by advanced capitalism in general, and the collapses of Enron, Global Crossing, and others in particular, “will be managed and in whose interests it will speak,” are critical questions<sup>201</sup> that call for a capital-P Plan. In the end, we may decide that—informed by our Charter principles and guided by our stated collective vision—uniform corporate/securities/banking changes (like uniform accounting principles or New Deal-type banking regulations) are what are required by substantive equality. But it cannot happen the other way around; corporate/securities/banking changes will not give us a vision of the world we can live in.

## VI. UNIFORMITY AS A CONSEQUENCE OF, AND METHOD FOR, SUBSTANTIVE EQUALITY

Since the Canadian Charter of Rights and Freedoms took effect in Canada, Canadian courts and governments have been reviewing provincial and federal laws to ensure their compliance with the Charter. The result has been to make laws more uniform across Canada in those instances where to do so advances a Charter right or where the failure to do so would violate a Charter guarantee. I imagine that some North America-wide version of this will follow our ratification of a North American Charter.

My experience in Canada tells me that as among Canada, the United States, and Mexico, this review will suggest some need for uniformity in precisely the areas of law one might traditionally or instinctively think should be disparate, or at the very least, should be determined at the nation-state level, such as immigration, tax, human rights, and family law.<sup>202</sup> I am certainly not persuaded

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<sup>200</sup> Certainly the Senate asked itself this question. *The Fall of Enron: How Could This Have Happened: Hearing Before the Comm. on Governmental Affairs*, 107<sup>th</sup> Cong. (Jan. 24, 2002).

<sup>201</sup> Clarence Lusane comes to this conclusion in his article, *Persisting Disparities: Globalization and the Economic Status of African Americans*. See Lusane, *supra* note 50, at 450.

<sup>202</sup> Katharina Pistor has argued that the quest for developing “an optimal set of legal rules ignores a central feature of successful economic development, namely the constant change, innovation, and adaptation of institutions and organizations in a competitive environment.” Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM.

that we necessarily need uniformity of accounting principles or corporate governance laws.<sup>203</sup> In fact, substantive equality may argue against uniformity in these areas,<sup>204</sup> provided of course that whatever the rules, they be transparent and accessible.<sup>205</sup> Fundamentally, I do not propose harmonization in order to reduce transaction costs or to permit corporations to benefit from economies of scale. Rather, I am persuaded that unless there are some supranational powers of redistribution (so that capital can be put back in the communities impoverished by the present system), people are permitted to move where capital now moves freely (across the borders between Mexico, the United States, and Canada), definitions of family are consistent and consistently inclusive (so that tax and immigration laws can work to advance the substantive equality of self-defined family groupings), and there is nowhere in North America corporations can go to avoid labor laws and human rights, there will always be room for Enrons. I discuss each of these assertions below.<sup>206</sup>

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J. COMP. L. 97, 98 (2002). My answer is that an optimal set of legal rules for now is not an optimal set of legal rules for always. Legal rules should be dynamic and evolving. In any case, substantive equality and human rights should be measured in their own terms, and not in terms of whether they benefit capitalism *qua* capitalism (as if capitalism were a neat compartment and economic system that could be separated from other aspects of human existence).

<sup>203</sup> Indeed, at least one commentator has observed:

A more fundamental issue . . . is whether the areas of the law currently targeted by IMF standardization claims are in fact the most relevant area for legal reforms for developing countries. While there is some empirical evidence that equity markets are important determinants of economic growth, comparative data also suggest that countries need to cross a certain threshold in their income levels before viable securities markets will take off. More importantly from the point of view of legal development, most of the proposed reforms depend on the existence of a fairly developed and well functioning legal infrastructure. Absent this infrastructure, reforms in the areas of accounting standards, securities legislation, insurance regulation, and even corporate governance will remain at the surface.

*Id.* at 99–100.

<sup>204</sup> Corporate governance is exactly the kind of area where I can imagine culture and diversity may require difference from community to community.

<sup>205</sup> In accordance with the feminist suspicion of acceptable (“neutral”) reform noted above, such commercial changes sanctioned by the International Monetary Fund should raise red flags. *C.f.* Pistor, *supra* note 202, at 101.

<sup>206</sup> I mean these examples—tax, immigration, family, labor and human rights—to be illustrative of my thesis rather than an exhaustive list of potential areas of law where some uniformity might advance substantive equality interests.

## A. Tax

Historically, capitalism accepted that nations-states were “natural” economic units. One of the results of global capitalism and the expansion of liberalized trade zones has been that it may no longer make sense to talk about nation-states as natural economic units.<sup>207</sup> It may make very little sense to persist, then, in the position that the nation-state is the natural or unassailable or exclusive tax unit.<sup>208</sup>

If it is true that that the nation-state might no longer be the “natural” or exclusive economic unit—at least vis-à-vis other nations—what should we do? In these circumstances, we could do nothing and things will be like they are now, but worse. The race to the bottom will likely quicken, as interjurisdictional tax competition increases.<sup>209</sup> Or, each country could invoke its sovereign right to reassert the nation as the unassailable economic and taxing unit. Of course, this would mean abrogating NAFTA and (re)erecting the necessary barriers to promote economic isolationism. (This isn’t going to happen.<sup>210</sup>) Another choice is to accept (provisionally) the conclusion that the economic unit is bigger than or different than the nation-state, and to re-imagine our tax regime(s) to take account of the dramatic changes brought by global economic integration and its

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<sup>207</sup> See generally Steven Utz, *Tax Harmonization and Coordination in Europe and America*, 9 CONN. J. INT’L L. 767 (1994); Bosniak, *supra* note 66, at 454; Kim Rubenstein, *International Citizenship: The Future of Nationality in a Globalized World*, 7 IND. J. GLOBAL LEGAL STUD. 519 (2000). Tim O’Neill, chief economist for the Bank of Montreal and president of the National Association of Business Economists in Washington, said, “What you’re talking about is treating North America as a single economic entity.” Bernard Simon, *International Business: For Canadians, A Porous Border?*, N.Y. TIMES, Dec. 16, 2002, at C14; see also Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401, 427–36 (2002).

<sup>208</sup> It makes no more sense to talk about tax policy as separable from economic policy than it does to talk about tax policy as severable from social policy. Of course, the nation-state is not the exclusive tax unit intranation, as states, counties, and cities can levy taxes. In challenging the idea that nations are exclusive tax units, I am referring here to the possibility that it might make sense to talk about the ability or desirability of taxing from outside or beyond the nation.

<sup>209</sup> See, e.g., Priscilla Demenge-Beauchesne, *France Aims to Win the Tax Rates Race*, INT’L TAX REV. (Nov. 2000), at <http://www.legalmediagroup.com/internationaltaxreview/default.asp?Page=1&cIndex=3&SID=823&M=11&Y=2000> (last visited Jan. 20, 2005) (on file with author) (arguing that France’s draft finance bill for 2001 follows the example of Germany in reducing effective corporate tax rates).

<sup>210</sup> When I say economic isolationism is not going to happen, I mean to distinguish it from the politics of isolationism more generally. With respect to immigration, foreign policy, and human rights, for example, the United States is pursuing its most isolationist agenda in decades.

consequences. At the same time, we need to reject (and move quickly to correct) the assumption that the multinational enterprise or corporation is the natural economic unit from which our ideas about tax should flow. We need to vigorously interrogate the priority of corporations and nations.<sup>211</sup>

If the nation-state is no longer the “natural” or protected economic unit, then all the arguments that have been made for progressive and redistributive taxation intranationally<sup>212</sup> might be made internationally. We already know, for example,

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<sup>211</sup> Claire Moore Dickerson has observed that Wal-Mart’s economic power is greater than that of many nations. In 2001, “Wal-Mart’s economic power would rank it 30th among the worlds’ [sic] 191 countries, ahead of Poland and Greece, and there are eleven other corporations in the world even larger than Wal-Mart.” Dickerson, *supra* note 133, at 620 (footnotes omitted). Of the world’s 100 largest economic entities, 51 are corporations and 49 are countries. SARAH ANDERSON & JOHN CAVANAH, INSTITUTE FOR POLICY STUDIES, TOP 200: THE RISE OF CORPORATE GLOBAL POWER, at i (2000), available at [http://www.ips-dc.org/downloads/Top\\_200.pdf](http://www.ips-dc.org/downloads/Top_200.pdf) (last visited Mar. 5. 2005); see also FRIEDMAN, *supra* note 95, at 166.

I was reading the *Financial Times* one day in the fall of 1995, when a front-page picture jumped out at me. It showed Bill Gates, the chairman of Microsoft, holding talks with Jiang Zemin, the President of China. The caption was written as though this were a standard summit meeting between two world leaders. It said the two men held “very cordial” talks, in contrast with their frosty meeting eighteen months earlier. I thought to myself, Bill Gates has met with Jiang Zemin twice in eighteen months. Hmmm, that’s once more that Bill Clinton has met the Chinese leader. That was no accident. The Chinese seemed to believe at the time that they needed Bill G. more than they need Bill C. . . .

Reading that story, and studying the caption, started me wondering whether the attributes of countries and companies weren’t somehow starting to converge. . . . [W]hen you link your country up with the global economy, it’s like taking your country public—like turning your country into a public company with shareholders all over the world.

*Id.*

<sup>212</sup> See, e.g., Michael A. Livingston, *Blum and Kalven at 50: Progressive Taxation, “Globalization,” and the New Millennium*, 4 FLA. TAX REV. 731, 732 (2000).

If supporters of progressivity can confront the changes described above [a more conservative political environment, the feminization and minoritization of poverty and the globalization of economic life] and if they can adjust their arguments to the realities of the Twenty-First Century, then the case for progressivity may yet prove stronger than in Blum and Kalven’s era. However, to accomplish this progressivity supporters must change both their rhetoric and research agenda.

*Id.*; see also Vada Waters Lindsey, *The Widening Gap Under the Internal Revenue Code: The Need for Renewed Progressivity*, 5 FLA. TAX REV. 1, 3 (2001).

[A] progressive tax system does not reward or punish one class of taxpayers over another, but it is necessary to ensure that taxpayers do not pay more tax dollars to finance the government than they can afford. A progressive tax scheme is also necessary to enable every taxpayer to retain sufficient income to live above the poverty threshold. To the

that if we take all the resources out of a community (unfettered flow of capital) and leave it impoverished, that community will die. We will—quite literally—have used it up. When that has happened intranationally, in Canada for example, governments have sometimes used tax policies to assist in redistributing wealth and providing social services.<sup>213</sup> The arguments for transnational redistribution are compelling because impoverishment has not been happening “naturally,” but as a result of multinational corporations using domestic (i.e., jurisdictional) differences in tax, immigration, corporate, and human rights laws to their advantage.<sup>214</sup> Substantive equality requires us to consider a progressive supranational tax regime with the power to redistribute internationally.<sup>215</sup>

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extent that a taxpayer lives below the poverty threshold, that taxpayer should not be required to pay income taxes.

*Id.*

<sup>213</sup> For example, the Canadian “federal government’s most important program for reducing fiscal disparities among provinces” is its Equalization Program, whereby it redistributes tax revenue among the provinces. CANADA DEPARTMENT OF FINANCE, EQUALIZATION PROGRAM (FEDERAL TRANSFERS TO PROVINCES AND TERRITORIES), <http://www.fin.gc.ca/fedprov/eqpe.html> (last updated Mar. 8, 2005). The federal government uses Equalization payments to assist provincial governments in the provision of programs and services. The underlying justification for the program is to “enable less prosperous provincial governments to provide their residents with [minimum] public services,” and to ensure that all Canadians receive “reasonably comparable” levels of public services, wherever they live. *Id.* For 2003–04, Equalization payments ensured that all provinces had access to revenues of at least \$5,995 per resident to fund public services. *Id.* Currently eight provinces qualify for Equalization (NL, PEI, NS, NB, QC, MB, SK and BC). *Id.* Other provinces are required to contribute to the program (ON and AB). *Id.*

The Equalization Program is part of the government’s Federal Transfer Program. Transfer Payments also include the Canada Health and Social Transfer, provided to provincial governments by the federal government on an annual basis, again to ensure that all Canadians “receive reasonably comparable levels of public services [such as] health care, post-secondary education, social assistance, and social services, as well as early childhood development.” CANADA DEPARTMENT OF FINANCE, FEDERAL TRANSFERS TO PROVINCES AND TERRITORIES, <http://www.fin.gc.ca/fedprov/ftpte.html> (last updated Mar. 8, 2005). *But see* SHELAGH DAY & GWEN BRODSKY, WOMEN AND THE EQUALITY DEFECIT: THE IMPACT OF RESTRUCTURING ON CANADA’S SOCIAL PROGRAMS 17 (1998) (Replacing the Canada Assistance Plan with the Canada Health and Social Transfer means that “Canadians no longer have an entitlements in every jurisdiction to social assistance.”).

<sup>214</sup> In fact, it is their legal obligation to do this. Present corporate laws in North America require corporations to maximize profits by any (legal) means available to them. *See generally* BAKAN, *supra* note 44, at 60–84.

<sup>215</sup> Progressive taxation is, by definition, a commitment to some redistribution and collectivity. And it is fair to acknowledge taxation is, at least in part, about subsidization. But as

Of course, national tax regimes already take some account of global economic integration. There already exist tax treaties among Canada, the United States, and Mexico. The purpose of the existing coordination, however, is basically to ensure the workability of our intranational tax systems and make the spread of global capitalism easier.<sup>216</sup> Existing tax coordination in North America tells me: (1) it is not enough to take the fact of global economic integration into account; we must also be guided by our stated commitment(s) to equality<sup>217</sup> and by the consequences of global economic integration to date; and (2) there should be no real objection to tax harmonization or uniformity on the ground that taxation regimes are too complicated to coordinate internationally.<sup>218</sup> We have already done it, both internationally (by tax treaties) and intranationally (all three North American countries are federalist states with multiple levels of taxing authorities).

In addition to resistance based upon complexity, I suspect that some proponents of trade liberalization will rely on the conventional assertion that taxation is an appropriate instrument for competition, and to argue that any restriction on the freedom to tax—or not tax—is an improper restriction on free trade. First, this characterization of tax and trade relies on the assumption that the free market is a law of nature. The fallacy of this assumption has been exposed.

Second, even most free market economists admit that the market requires some regulation. And regulation is—at least in part—restriction. Taxation is

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Professor Fineman has pointed out, pretty much every legal arrangement is a subsidy of someone or something. Fineman, *supra* note 1, at 1409; FINEMAN, *supra* note 177. Every governmental subsidy is a choice, and it is the right choice to be subsidizing (i.e., putting resources back in) the communities left empty by (disproportionately affected by) the global flow of capital.

<sup>216</sup> I oversimplify, but one primary purpose is to ensure that (primarily wealthy) Canadians, Mexicans, and Americans can own income-producing property in the other North American countries without having to pay more tax than we would otherwise be required to pay if we owned those properties in our countries of residence.

<sup>217</sup> By “stated” I mean to refer to the Constitutional documents of Canada, the U.S., and Mexico.

<sup>218</sup> The EU provides an excellent example of trying to ‘work it out’ among different nations. The goal of the European Economic Community was to create a single integrated market in Europe. That required harmonization of indirect taxes because those differential rates were a primary reason for border controls in the first place. Moreover, they concluded that any variation in direct tax (corporate and individual tax) would inhibit the free movement of people and capital. The European model is not perfect, nor perfectly worked out, but it is an example of effort. See generally Stephen G. Utz, *supra* note 207, at 790–94; Tracy A. Kaye, *European Tax Harmonization and the Implications for U.S. Tax Policy*, 19 B.C. INT’L & COMP. L. REV. 109, 119–29 (1996).

merely one form of regulation (and is already used to regulate the market). Given that market regulation can concern itself—at least in part—with fairness and distribution, it seems obvious that taxation—also potentially concerned with fairness and distribution—is among the most obvious areas in which to regulate the market.

Finally, at a fundamental level, taxation is not the appropriate locus for competition.<sup>219</sup> The goals of equality and economic efficiency both support limitations on international tax competition.<sup>220</sup> Using an analysis developed in feminist jurisprudence,<sup>221</sup> progressive taxation is really a form of (collective) “care.” Government may take care of its citizens by taxing (in order to pay for things) and redistributing wealth (in order to balance and mitigate the effects of the market).<sup>222</sup> Obvious examples include public services, roads, health care, and education. Understood this way, it seems outrageous for governments to compete for business by lowering taxes for corporations and allowing individual taxpayers to subsidize them.<sup>223</sup> But even if there is an economic argument for tax competition, it should plainly be seen as contrary to public policy.<sup>224</sup>

In the end, if we deploy tax as a vehicle for international redistribution, I can imagine at least two immediate benefits. First, we could move away from the concept of “foreign aid,” whereby the United States provides aid with “strings”<sup>225</sup>

<sup>219</sup> Moran, *supra* note 178 (arguing that we ought not to be competing with respect to tax); see also John Douglas Wilson, *Theories of Tax Competition*, 52 NAT'L TAX J. 269, 269 (1999); Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1632–48 (2000); see generally ORG. FOR ECON. CO-OPERATION & DEV., HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE (1998).

<sup>220</sup> See generally Avi-Yonah, *supra* note 219, at 1625–26.

<sup>221</sup> See Fineman, *supra* note 1, at 1409; see also Kathryn Abrams, *The Second Coming of Care*, 76 CHI.-KENT L. REV. 1605 (2001).

<sup>222</sup> “Taxes are what we pay for civilized society.” *Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes J., dissenting).

<sup>223</sup> This is particularly true in the international context because the connections between lowering taxes, capital mobility, labor immobility, and further entrenching poverty and inter-country wealth disparities (particularly through forces to keep labor cheap) are clear. Dr. Sethi provides a clear explanation and analysis of how and why this happens. See SETHI, *supra* note 147, at 3–13.

<sup>224</sup> Under the European Code of Conduct, tax measures which provide for a significantly lower level of taxation than the levels generally applicable in a Member State are considered “potentially harmful,” whether the level of taxation is the result of rate, base, or any other factor. Jacques Malherbe & Robert Boon, *Introduction, Harmful Tax Competition and the European Code of Conduct*, 28 INT'L BUS. LAW. 339, 339 (2000).

<sup>225</sup> Although there is such a thing as purely humanitarian aid, foreign aid is more often than not given on certain conditions. These conditions ensure the homogenization of cultures,



to the qualifying or “deserving” poor. The present system works against substantive equality by further entrenching class, race, and gender systems; steamrolls over important cultural differences by imposing conforming conditions on government or business (or both); and promotes inefficiency by requiring communities to be in dire circumstances before providing support. Second, the impoverishing effects of the present global capitalist market—the unfettered flow of capital from the many to the few—could be redressed directly by putting capital back into the communities most adversely affected.

### B. Immigration

In thinking about immigration policies generally—and their relationship to business policies more specifically—it is important to remember that business practices and law are heavily influenced by proximity to international borders. Borders—like all lines—become blurrier the closer you get to them. And my experience tells me that borders, like all lines, need to be reexamined as to purpose from time to time.<sup>226</sup>

The problems created by the unrestricted flow of capital across national borders are hugely exacerbated by the corresponding immobility of people.<sup>227</sup> The present structure of advanced capitalism impoverishes communities of people who have nowhere else to go (contra the multinational corporations, which always have somewhere else to go).<sup>228</sup> It favors that which is mobile over that which is immobile, effectively advantaging capital (i.e., the few) over labor (i.e.,

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economies, and political systems to a far greater degree than would a harmonized tax system, which could be responsive to and respectful of difference.

<sup>226</sup> Kevin Johnson recently published a thought-provoking article, asking us to reimagine the meaning and significance of international borders. Specifically, he “attempts to articulate arguments for eliminating the border as a legal construct that impedes the movement of people into the United States.” Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 193 (2003).

<sup>227</sup> In fact, immigration barriers between the United States and Mexico increased under and after NAFTA. Kevin R. Johnson, Introduction, *Regional Integration in North America and Europe: Lessons about Civil Rights and Equal Citizenship*, 9 U. MIAMI INT’L & COMP. L. REV. 33, 40 (2000–01). Moreover, the nonimmigrant worker provisions that permit certain Canadian and Mexican professionals to work in the United States are procedurally more onerous for Mexicans than Canadians. See U.S. Department of State, <http://www.state.gov/> (last visited Feb. 23, 2005); U.S. Citizenship and Immigrations Services, <http://uscis.gov/graphics/index.htm> (last visited Jan. 28, 2004).

<sup>228</sup> “Analyzing the relationships and slippages between legitimate and illegitimate forms of movement, personhood, and statehood is key to understanding the processes that have been characterized as globalization.” Susan Bibler Coutin et al., *In the Mirror: The Legitimation Work of Globalization*, 27 LAW & SOC. INQUIRY 801, 803 (2002).

the many).<sup>229</sup> In the United States, for example, the effects of immigration laws that have been largely about racist and xenophobic exclusion<sup>230</sup> have been devastating both for the people excluded and affected outside the United States and for people in the United States.

The devastating effects presented by mobile capital and immobile labor are facilitative of, and exacerbated by, the absence of infrastructure to mediate the harmful effects of trade liberalization on developing nations. Infrastructure such as social welfare benefits, schools, hospitals, clean water, safe highways, etc., require money that governments in developing nations have little hope of raising in the current market:

The mobility of capital means that an important segment of the local governments' tax base can simply get up and leave, giving governments the unappetizing option of imposing disproportionately high taxes on income from labor, agricultural products from even poorer rural areas, and household consumption, and higher taxes on local property. Short of resources, host country governments have been unwilling or unable to exercise regulatory oversight to enforce the already rudimentary infrastructure of labor and environmental protection laws.

Globalization and the dominant role of [multinational corporations] do not provide any mechanisms to enhance a country's economic infrastructure and instead push lower its already meager fiscal resources through tax abatement, tax holidays, and other esoteric techniques.<sup>231</sup>

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<sup>229</sup> See Lucy A. Williams, *Cross-Border Reflections on Poverty: Lessons from the United States and Mexico*, 5 HYBRID 33, 46 (2000). Globalization of capitalism has depended on the disparate treatment of capital and labor. Williams urges us to consider the connection between immigration (mobility of people) and globalization (mobility of capital). *Id.*, cited in Davis & Neacsu, *supra* note 38, at 762 n. 147; see also SETHI, *supra* note 147, at 5.

<sup>230</sup> See, e.g., Kevin R. Johnson, *The End of "Civil Rights" As We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1490-91 (2002); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 22-28 (1995); Linda S. Bosniak, *Membership, Equality, and the Difference Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994). At the moment, Congress is making life for immigrants considerably worse, see Margaret Graham Tebo, *The Closing Door: U.S. Policies Leave Immigrants Separate and Unequal*, ABA JOURNAL 43 (Sept. 2002), and the "new federalism" promises to have increasingly dramatic effects on immigrants, Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

<sup>231</sup> SETHI, *supra* note 147, at 9. Dr. Sethi goes on to remind us that: "Lest we forget, the growth of industrialized nations was not achieved by private enterprise alone. Even in the United States, it was government that created the vast state-supported educational infrastructure

In order to maintain a policy that restricts the mobility of people while systematically dismantling restrictions on the mobility of capital, one has to accept that it makes sense to talk about the “people” and the “economy” as a logical duality, as separate and distinct spheres of life. Common sense tells us otherwise. When economies were largely intranational, then it may have made some sense—at least historically—to justify restrictive immigration laws for all manner of reasons. But our now larger economic community requires that we consider permitting movement within that community (e.g., North America) for any lawful activity.

Elimination or reform of North American immigration barriers not only advances substantive equality, but may make good economic sense as well. The experience of the European Community shows that restricting human mobility disrupts market operation. The Treaty of Rome<sup>232</sup> provided that the creation of a common market implied the elimination of all barriers to free trade and the *free circulation of people, services and capital* among member states.<sup>233</sup> Under European law, workers may move freely inside the European community.<sup>234</sup> As one European scholar has observed, “[i]t is now quite evident that the free circulation of persons, enterprises and services greatly enhanced the flow of all available resources within Europe, *particularly human resources*, creating a positive impact on enterprises.”<sup>235</sup> That is, when people are given the resources and choice to self-select, they can move to where they are best (most efficiently) deployed. The effect is something of a reversal of Adam Smith. Whereas Smith believed that the “invisible hand of the market” would have “unintended beneficial social consequences”<sup>236</sup> (such as increased social equality), my point is

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and the highly subsidized railroads that helped educated the populace and improved transportation systems.” *Id.*

<sup>232</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 140.

<sup>233</sup> NAFTA attempts to eliminate barriers to free trade and the free movement of capital, without any concomitant elimination of barriers to the free movement of people (with certain professional exceptions). See generally NAFTA, *supra* note 22, chs. 11, 15 19.

<sup>234</sup> See GIANNI ARRIGO, INTERNATIONAL LAW DIRITTO DEL LAVORO NELL “UNIONE EUROPEA” 227 (1998), cited in Del Conte, *supra* note 64, at 215. *Except note* that citizens of the 10 new member states added on May 1, 2004 face some restrictions on movement for a limited period of time. See Europa, *Free Movement of Workers*, <http://www.europa.eu.int/scadplus/leg/en/s02305.htm> (last visited January 24, 2005).

<sup>235</sup> Maurizio Del Conte, *supra* note 64, at 215 (emphasis added).

<sup>236</sup> ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776). Liberal economic theorists, and Adam Smith in particular, argue that free markets, “unfettered by state regulation, will result in the greatest prosperity for all.” Davis &

that the opposite may be true. With respect to immigration, I am more concerned about substantive equality. Nevertheless, it turns out that if we start with the norm of social equality, it may be that we may get the happy unintended consequence of increased economic efficiency.<sup>237</sup>

At this point, I can just hear my neighbors on the north shore of the Rio Grande saying that everyone (by which they mean, everyone on the south shore, from Mexico to Argentina) will move to the United States in order to receive social service benefits and otherwise avail themselves of streets paved with gold.<sup>238</sup> The answers to this are many.<sup>239</sup> People may move, but movement should level off. Our newly conceived international progressive tax system should balance immigration, and there should be less economic necessity to move. With some meaningful economic independence, the reasons people do not want to move (such as family, cultural ties, community ties, friendships, preferences) should become more determinative of their actual actions. Most importantly, a hopeful result of our North American Charter would be that people no longer need to move to acquire additional or different social rights and freedoms.<sup>240</sup>

Neacsu, *supra* note 38, at 758. Adam Smith's "Invisible Hand" proposes that individuals working to advance their economic interests in an open market will ultimately specialize, focus on their comparative advantage, and trade goods and services among themselves. As a result, individuals and society will be better off. Smith concluded that competing interests in an open market achieve superior economic and social results. Liberal economics has thus been concerned more with the production of new wealth than with the distribution of existing wealth. *Id.*

<sup>237</sup> See, e.g., Dickerson, *supra* note 133, at 614 (suggesting a similar stratagem).

In order to teach multinationals to listen, I propose to frame appropriate behavior in terms familiar to multinationals; they should extend to workers the legal norm of good faith ubiquitous in the commercial realm. Further, in order to make the extension more palatable, the multinationals should be encouraged to see that they can actually benefit from the extension of this familiar norm.

*Id.* Dickerson adds: "Critical to success is to first frame the extension as a benefit for the multinationals and then to apply consistent and persistent pressure on them." *Id.* at 616.

<sup>238</sup> See Johnson, *supra* note 227, at 38–39 ("Racial, cultural and class differences between Mexican people and U.S. citizens, combined with fears of mass migration, prevented an agreement allowing for labor migration among the NAFTA nations.").

<sup>239</sup> For an interesting article problematizing immigration and sovereignty, legitimacy and jurisdiction, see Susan Bibler Coutin et al., *supra* note 228.

<sup>240</sup> Ironically, the foreign direct investment ("FDI") provisions of NAFTA are said to "reduce the pressures of Mexicans to emigrate." Alvarez, *Critical Theory*, *supra* note 157, at 310. Alvarez reports that those who have examined the history of FDI flows and their impact on U.S. immigration would suggest otherwise:

### C. Family Law

In so far as benefits and responsibilities flow from the legal designation “family,” it is as much a legal construct<sup>241</sup> as “corporation.” In Canadian, American, and Mexican culture and law, “family” is a deeply privileged grouping. Accordingly, narrow definitions of family based on discriminatory views (such as racism,<sup>242</sup> sexism, and heterosexism) are inconsistent with equality goals.

The privileging of certain family groupings over others (and in particular white, heterosexual, two-parent families<sup>243</sup>) has translated into economic support

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[Saskia] Sassen argues that U.S. investments abroad actually encourage greater emigration to the United States through:

(a) the incorporation of new segments of the population into wage labor and the associated disruption of traditional work structures both of which create a supply of migrant workers;

(b) the feminization of the new industrial workforce and its impact on the work opportunities of men, both in the new industrial zones and in the traditional work structures; and

(c) the consolidation of objective and ideological links with the highly industrialized countries where most foreign capital originates, links that involve both a generalized westernization effect and more specific work situations wherein workers find themselves producing goods for people and firms in the highly industrialized countries.

*Id.* at 311 (footnote omitted).

<sup>241</sup> Indeed, there is often no correlation between our self-described or self-identified “families” and those prescribed by law. Gay and lesbian families are only one example.

<sup>242</sup> For example, definitions that emphasize the centrality of parent/child relationships as opposed to “kinship” or extended family groupings have been shown to disproportionately affect First Nations (Native Americans), and contribute to racist assumptions about what families should look like. Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN’S L.J. 115, 133 n.72 and accompanying text (1989).

<sup>243</sup> See BELL HOOKS, *FEMINISM IS FOR EVERYBODY* 77 (2000).

No anti-feminist backlash has been as detrimental to the well-being of children as societal disparagement of single mothers. In a culture which holds the two-parent patriarchal family in higher esteem than any other arrangement, all children feel emotionally insecure when their family does not measure up to the standard. A utopian vision of the patriarchal family remains intact despite all the evidence which proves that the well-being of children is no more secure in the dysfunctional male-headed household than in the dysfunctional female-headed household.

*Id.*

and subsidization of the these citizens at the expense of everyone else (particularly with respect to taxation,<sup>244</sup> immigration,<sup>245</sup> and the delivery of social services<sup>246</sup>). Narrow definitions and regional differences in definitions<sup>247</sup> have meant that governments and corporations can deny benefits in a discriminatory fashion, with devastating economic and social consequences. For example, even if we reform immigration laws in Canada, the United States, and Mexico to eliminate discrimination based on nationality, restricted definitions of family (i.e., who workers can bring with them when they immigrate) would have the effect of making the immigration reform meaningless to large numbers of people. Either they will not move because they cannot leave their family or they will have to

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<sup>244</sup> See generally Beverly Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996); Patricia A. Cain, *Dependency, Taxes, and Alternative Families*, 5 J. GENDER RACE & JUST. 267 (2002); Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465 (2000); Patricia A. Cain, *Taxing Lesbians*, 6 S. CAL. REV. L. & WOMEN'S STUD. 471 (1997); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997); Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996); Nancy C. Staudt, *Taxation and Gendered Citizenship*, 6 S. CAL. REV. L. & WOMEN'S STUD. 533 (1997); Nancy C. Staudt, *The Theory and Practice of Taxing Difference*, 65 U. CHI. L. REV. 653 (1998); Edward J. McCaffery, *The Missing Links in Tax Reform*, 2 CHAP. L. REV. 233 (1999); Sharon C. Nantell, *A Cultural Perspective on American Tax Policy*, 2 CHAP. L. REV. 33 (1999); Marjorie E. Kornhauser, *A Taxing Woman: The Relationship of Feminist Scholarship to Tax*, 6 S. CAL. REV. L. & WOMEN'S STUD. 301 (1997); Marjorie E. Kornhauser, *A Legislator Named Sue: Re-Imagining the Income Tax*, 5 J. GENDER RACE & JUST. 289 (2002); Nancy E. Dowd, *Women's, Men's and Children's Equalities: Some Reflections and Uncertainties*, 6 S. CAL. REV. L. & WOMEN'S STUD. 587 (1997); Lisa M. Colone, *Taxing Housework . . . With A Deeper Purpose*, 21 VA. TAX. REV. 417 (2002); Michael A. Livingston, *Women, Poverty, and the Tax Code: A Tale of Theory and Practice*, 5 J. GENDER RACE & JUST. 327 (2002); see also EDWARD J. MCCAFFERY, *TAXING WOMEN* (1997); Brown & Fellows, *supra* note 178; Symposium, *Taxing Women: Thoughts on a Gendered Economy*, 6 S. CAL. REV. L. & WOMEN'S STUD. 287 (1997).

<sup>245</sup> Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacy of Coverture*, in *CRITICAL RACE FEMINISM: A READER* 380 (Adrien Katherine Wing ed., 1997).

<sup>246</sup> This is discussed fully by the majority of the Supreme Judicial Court of Massachusetts in its recent decision, *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 964–66 (Mass. 2003). But see Susan Jones, *Mass. Court Will Hear Arguments on Its Homosexual Marriage Decision*, CNSNews.com, Feb. 11, 2005, <http://www.cnsnews.com/ViewPrint.asp?Page=\Culture\archive\200502\CUL20050211a.html> (last visited Mar. 14, 2005) (reporting that the Massachusetts Supreme Judicial Court has agreed to hear oral arguments on a request to stay its earlier ruling until Massachusetts has a chance to amend its constitution to ban same-sex marriage).

<sup>247</sup> For differences between Chicano and Anglo/American family kinship structures, see Oscar Ramirez & Carols H. Arce, *The Contemporary Chicano Family: An Empirically Based Review*, in *EXPLORATIONS IN CHICANO PSYCHOLOGY* 3 (Augustin Baron, Jr. ed., 1981).

move without their family. In order to truly advance substantive equality rights, family groupings must be self-determined without regard to legal economic barriers and definitional pressures to assimilate.<sup>248</sup> At a minimum, definitions of family should not present competition opportunities (e.g., if the factory is located in a jurisdiction with a restrictive, narrow definition of family, less benefits will have to be paid to employees) nor should they be contrary to the spirit and purpose of immigration or tax laws aimed at advancing substantive equality.<sup>249</sup>

The Supreme Court of Canada has observed—correctly in my view—that in addition to the practical or tangible implications of inequality, there are deep psychological and emotional harms that flow from discrimination:

[A]t the heart of s.15 [one among several Canadian equality guarantees] is the promotion of a society in which all are secure in the in the knowledge that they are recognized at law as equal human beings, equally capable, and equally deserving. A person or persons has been discriminated against within the meaning of s.15 of the *Charter* when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.<sup>250</sup>

This sentiment is echoed by Massachusetts Chief Justice Marshall in *Goodridge v. Dept. of Public Health*. “The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.”<sup>251</sup> Drawing distinctions based on sexual affiliation or kinship so as to create family hierarchies are precisely the sorts of distinctions which make people feel less worthy or less valuable as human beings, and can therefore be discriminatory regardless of tangible harms.

Let me acknowledge at this point that any definition of family for the purposes of providing social services or other benefits is problematic.<sup>252</sup> In

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<sup>248</sup> This does not mean, however that lines cannot be drawn where the equality rights (and other freedoms) of some individuals confront broader family definitions. For example, it is likely that North Americans will decide that inclusion will not extend to marriage of very young children. An interesting challenge will be family groupings that include more than two adults engaged in some combination of intimate sexual relations.

<sup>249</sup> I have argued elsewhere that the pressure to harmonize family laws between Canada and the United States may overtake any conscious attempt to co-ordinate them. See Spitz, *supra* note 4.

<sup>250</sup> *Egan v. Canada*, [1995] 2 S.C.R. 513, 545 (per L’Heureux-Dubé, J.), *cited with approval in Law v. Canada*, [1999] 1 S.C.R. 497, at para. 49.

<sup>251</sup> *Goodridge*, 798 N.E.2d at 948.

<sup>252</sup> See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER* (1995).

discussions about family definitions, I am hopeful that there will be occasion for considering feminist and critical race interrogation of all attributes of “family-ness.”<sup>253</sup> We will need to confront head on the public/private or market/family split, and what happens (particularly to women) in the private/family sphere where (predominantly male) power is least constrained. In addition, we will need to explore why we privilege family, and why heterosexual groupings get that privilege and other relationships of actual intimate dependency have not. It may be that—guided by our North American Charter—discussions about family lead us to abandon the construct for some, though not necessarily all, purposes.

#### D. *Human Rights and Labor Laws*

I expect that our discussions about, and implementation of, a North American Charter will logically lead to the conclusion that there must be minimum human rights and labor standards among Canada, the United States, and Mexico. The suggestion that human rights and labor laws should be in some respect universal and uniform is neither radical nor new. There is already a great deal of excellent work written about human rights and labor issues in the global context.<sup>254</sup> I would just add my voice to those who persist in the claim that human rights are an immoral forum for economic competition. At a minimum, if private actors are to get any benefit from intergovernmental facilitation of commerce, they should be required to respect uniformly recognized human rights, uniformly. Human rights and labor laws are two of the most important vehicles by which we make private actors conform with the principles set down in our North American Charter.

### VII. OBJECTIONS

My suggestions so far have been aimed at eliminating or minimizing some of the most obvious legal opportunities for global capitalism to discriminate against and impoverish people. There will be other specific legal areas beyond those I have mentioned, since all areas of law are interconnected (i.e., form part of the System). Once a North American Charter is in place, those areas will become more obvious. At this point, however, I would like to canvass some of the

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<sup>253</sup> *Id.*

<sup>254</sup> See generally, Collingsworth, *supra* note 7; Collingsworth, *supra* note 178; Stone, *supra* note 82; THE CASE AGAINST THE GLOBAL ECONOMY (Jerry Mander & Edward Goldsmith eds., 1996). For a summary of the current international labor rights framework (as of 2001), see Steven Diamond, *Bridging the Divide: An Alternative Approach to International Labor Rights After the Battle of Seattle*, 29 PEPP. L. REV. 115, 120–32 (2001).



concerns and objections that my proposals undoubtedly raise: sovereignty, diversity, and impossibility.<sup>255</sup>

### A. Government Sovereignty

In law, we regularly deal with three kinds of sovereignty: government, corporate, and individual. The biggest outcry at the suggestion of a supranational governance model,<sup>256</sup> I suspect, will be about governmental or national sovereignty.<sup>257</sup> There is no agreement about what comprise the definitive attributes of national or governmental sovereignty;<sup>258</sup> however, insofar as national or governmental sovereignty are meaningful concepts, surely they include the power to give up some of their power. Countries do it as part of ratifying every treaty. In my view, enacting a North American Charter represents an act—rather than erosion—of sovereignty.<sup>259</sup> Canada, the United States, and Mexico can

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<sup>255</sup> It is beyond the scope of this Article to answer these concerns in anything other than the most general way. The purpose of this Article is to raise issues and talk about ideas in order that we might think about different ways to have discussions about global capitalism. I leave the deeper, and necessarily much longer, discussion for another day.

<sup>256</sup> Larry Catá Backer argues that a more sophisticated understanding of the possibilities of federalism for international or supranational governance requires consideration of the lessons of early American federalism, prior to the civil war. See Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173, at 173–74 (2001).

<sup>257</sup> For an example in the tax context, see George M. Melo, *Taxation in the Global Arena: Preventing the Erosion of National Tax Bases or Impinging on Territorial Sovereignty?*, 12 PACE INT'L L. REV. 183 (2000). For a discussion of the use of dignity as a justification for, or as an explanation of, state power within the United States, see Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003). But see Denise G. Reaume, *Discrimination and Dignity*, 63 LA. L. REV. 645 (2003) (arguing that some substantive interest must underpin equality jurisprudence if it is to have any bite at all, and the Supreme Court of Canada is on the right track in latching onto dignity as the substantive concept informing equality rights). For a discussion of how the use of the plenary power doctrine by American courts is, in effect, the use of sovereignty as a mechanism for overriding fundamental human rights, see Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U. L. REV. 1115 (2002).

<sup>258</sup> In fact, sovereignty is a contested term, challenged by the current processes of economic globalization and integration. Rubenstein & Adler, *supra* note 182, at 519.

<sup>259</sup> But see José E. Alvarez, *The New Treaty Makers*, 25 B.C. INT'L & COMP. L. REV. 213, 213 (2002). Alvarez suggests that “if state sovereignty has been ‘eroded’ or transformed in the wake of World War II, the new forms of treaty making and the new treaty makers are part of that story. . . . Increased treaty making amidst proliferating conventional and less conventional intergovernmental organizations suggest nascent structures of international governance.” *Id.* at

legitimately assert their right to delegate regulatory authority to a supranational body, particularly if it is the best way to protect their respective citizens.<sup>260</sup> In that way, national governments remain the primary source of political legitimacy.<sup>261</sup> Besides which, a supranational Charter asserts government control—or sovereignty—in an arena presently dominated not by governments, but by corporations. Lastly, a supranational government or governance system can be shaped to serve democratic ideals, perhaps better than national governments are presently able to do.

In any case, I am suspicious of sovereignty claims because NAFTA and the World Trade Organization (among others) already represent a greater encroachment on governmental sovereignty than many other treaties,<sup>262</sup> in no

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213, 232. Of course, as his comments apply to NAFTA, the WTO, and some portions of the EU, I agree with him.

<sup>260</sup> “Delegation is not the same thing as abandonment.” Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 19 (1999).

<sup>261</sup> See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 YALE L. J. 619, 623 (2001) (“[T]he assignment of regulatory authority would become a self-conscious act of power, exercised with an awareness that a sequence of interpretive judgments, made in real time and revisable in the future, undergirds any current designation of *where* power to regulate *what* activities rests.”).

<sup>262</sup> A core provision of the WTO states: “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.” Agreement Establishing the Multilateral Trade Organization, Dec. 15, 1993, art. XVI(4), 33 I.L.M. 13, 23 (1994). “NAFTA forbids governments from establishing or maintaining some investment preferences to promote development in impoverished or minority areas, as well as investment conditioned on non-commercial performance standards, such as environmental performance.” Lori Wallach, *supra* note 81, at 828. Both NAFTA and WTO “non-tariff” provisions are based on certain underlying premises, among them: domestic health, safety, and environmental policies must be designed in the ‘least trade restrictive’ manner.” *Id.* at 829. Thus, Lori Wallach concludes, “the provisions in NAFTA and the WTO promoting harmonization are likely to serve only as a one-way downward ratchet on domestic standards.” *Id.* at 831; see also INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA’S CONTROVERSIAL CHAPTER ON INVESTMENT RIGHTS vii, 1–4, 15–48 (2001). The Preface of this publication begins with a quote from the New York Times, dated March 11, 2001:

Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questions and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors under the North America Free Trade Agreement.

small measure because their effect is to give up governmental sovereignty in favor of corporations as opposed to another government body.<sup>263</sup> Whatever else might be said about sovereignty, it is something that—in the context of fashioning broad policy goals for the development of a cohesive, responsible, and equitable North American community—should be exercised only by governments, not by for-profit corporations.<sup>264</sup> It is astounding that “[a] focus on market well-being has supplanted more inclusive and nuanced public assessments about national direction. . . . It is as though the function and role of the state has merged with those of the market.”<sup>265</sup> Multinational enterprises cannot be left to promote and

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*Id.* at vii.

Contrast the relative sanguinity about the erosion of governmental sovereignty in the business context with claims made in the criminal context. At the time of writing, Mexico was awaiting a ruling by The Hague, to whom Mexico has applied for an order voiding 52 convictions and death sentences of Mexican citizens living in the United States, on the ground that they were denied the right to meet promptly upon arrest with Mexican diplomats. Unsurprisingly, “lawyers from State and Justice Departments, called Mexico’s demands ‘an unjustified, unwise and ultimately unacceptable intrusion in the United States criminal justice system.’” Adam Liptak, *Mexico Awaits Hague Ruling on Citizens on U.S. Death Row*, N.Y. TIMES, Jan. 16, 2004, at A1 (emphasis added). Like in the case of NAFTA, however, Mexico relies on a treaty right, alleging that the United States violated a treaty guaranteeing that foreigners arrested in the U.S. have access to representatives of their government. Clearly, for the United States, governmental sovereignty is a moving—and often insincere—target, trotted out in some contexts and abdicated in others.

<sup>263</sup> See Taylor, *supra* note 22 (setting out examples); see also Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT’L L. 365, 398 (2003). Claire Moore Dickerson’s observation that Wal-Mart’s economic power would rank it 30th among the world’s nations, and there are eleven other corporations in the world even larger than Wal-Mart should probably frighten people. Dickerson, *supra* note 133, at 620.

<sup>264</sup> Fineman makes this argument in the context of her assertion that dependency relationships warrant a public, supportive, and collective response to the needs of caretakers:

The historical social contract may be broken or its conditions may be impossible to perform or enforce in view of changed circumstances. If reconsideration is warranted given change, the state is the only institution that has any arguable mandate and capability to negotiate a reconsideration of the basic terms of our historic societal undertaking.

Fineman, *supra* note 1, at 1421. Jeffrey Kaplan puts the question this way: “By what authority can a conglomeration of capital and property, whose existence is granted by the public, deny the right of a sovereign people to govern itself democratically?” Jeffrey Kaplan, *Consent of the Governed*, 22(6) ORION MAG. 54, 58 (Nov.–Dec. 2003).

<sup>265</sup> Fineman, *supra* note 1, at 1436; see also DAVID A. WESTBROOK, CITY OF GOLD: AN APOLOGY FOR GLOBAL CAPITALISM IN A TIME OF DISCONTENT 42 (2004) (“[M]oney is in essence a form of communication. . . . We view the rise and fall of various indices (in the

ensure the health, welfare, and equality rights of citizens because “the very structure of the modern business form enhances and encourages, at best, indifference to the impact on workers, and, at worst, ruthlessness.”<sup>266</sup> An assertion of sovereignty as I am suggesting will allow for the function and role of the state to re-emerge in its own right, separate from the market.

To that end, it is important to remember that sovereignty is a flexible concept. Intranationally, Judith Resnik has eloquently explained the need for Americans to get away from a categorical bi-polar vision of state and federal governments.<sup>267</sup> The separate spheres of government concept is inaccurate, undermines efforts to hold actors accountable, and actually impedes the functioning of federations. Moreover,

[c]ategories of jurisdiction have particular saliency to women because the legal concept of jurisdiction has served as a vehicle by which to preserve male control, first by a claim that the family was itself a jurisdiction free from state superintendence and then by arguing that the family was a specially situated arena sheltered from government intrusion.<sup>268</sup>

Professor Resnik urges us to see federalism as “a web of connections formed by transborder responses” and shared efforts.<sup>269</sup> Similarly, governmental sovereignty in the international context can be seen as a “web of connections formed by transborder responses” and shared efforts.<sup>270</sup> It makes little sense to cast national sovereignty and supranational governance as distinct and binary. Laws cross all sorts of borders in all sorts of ways.

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United States, usually equity indices, for reasons not entirely clear but probably largely historical) as oracular pronouncements of national health, and even the wisdom of specific policies.”).

<sup>266</sup> Dickerson, *supra* note 133, at 617; *see also* BAKAN, *supra* note 44, at 60–75.

<sup>267</sup> Resnik, *supra* note 261, at 624. Professor Resnik points out that it is not helpful to see the acts of the federal government as separable and predatory. *Id.*; *see also* Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Laws in the United States*, 150 U. PA. L. REV. 245, 249 n.17 (2001); FRIEDMAN, *supra* note 95, at 24 (“[T]he boundaries between domestic, international, political and technological affairs are all collapsing.”).

<sup>268</sup> Resnik, *supra* note 261, at 625.

<sup>269</sup> *Id.* at 624.

<sup>270</sup> *Id.*

### B. *Individual Sovereignty (or Individualism)*

Like objections based on governmental sovereignty, we should be suspicious of objections founded on some notion of individual sovereignty. If the act of a democratically elected federal government in establishing a supranational Social Charter is an act of sovereignty and the supranational Charter is enacted to protect individual citizens' rights and freedoms, then the individual sovereignty claim is less than compelling. Being a citizen means—at least in some part—having given up some sovereignty to the nation.<sup>271</sup> In addition, depending on the structure of a North American Charter, rights—including voting rights—could be given to North American citizens *qua* North American citizens.<sup>272</sup> The potential exists, then, for improving individual sovereignty and democracy.<sup>273</sup>

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<sup>271</sup> Fineman, *supra* note 1, at 1420.

The very idea of a social contract is that it preexists and transcends any individual citizen. Individual bargaining and specific consent are not provided for nor required. The whole idea behind the social contract is that it legitimates compelling the individual to concede certain existing interactions, expectations, and relationships with societal institutions.

*Id.*

<sup>272</sup> Debate is currently under way as to the nature of “citizenship,” and whether or not it can be framed in anything other than national terms. *Compare* Bosniak, *supra* note 66, at 447–48 (arguing the denationalized citizenship claim is entirely coherent) *with* HANNAH ARENDT, *MEN IN DARK TIMES* 81–94 (1968) (arguing that citizenship is a national project). Saskia Sassen suggests—and I agree—that it might be useful to think about citizenship as “something akin to an ‘incompletely theorized’ form.” Sassen, *supra* note 43, at 6. Rubenstein and Adler make a convincing case for the potentiality of “citizenship,” arguing that it represents “cohesion in a world increasingly characterized by fragmentation” and “a collection of rights, duties, and opportunities for participation that define[s] the extent of sociopolitical membership.” Rubenstein & Adler, *supra* note 182, at 522. “The citizenship project is about the expansion of equality among citizens.” *Id.* at 523–24; *see also* Blackett, *supra* note 44, at 433–34, 439 (“The organizing notion of ‘citizenship’ in its varied manifestations, for persons and for corporations, and across levels of governance, also needs to be fundamentally rethought.” (footnotes omitted)); Peter J. Spiro, *The Citizenship Dilemma*, 51 *STAN. L. REV.* 597 (1999) (reviewing Rogers M. Smith, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997)).

<sup>273</sup> *See* Bosniak, *supra* note 66, at 489.

But why should it matter whether we decide to describe . . . recent transnationalizing developments in the language of citizenship? What is at stake in this debate? Parties on both sides are clearly concerned with getting the facts and the categories right, of course. But correspondence and coherence are not the only objectives; there is, ultimately, more at issue. For “citizenship” is not merely a word that describes the world. It is also a powerful term of appraisal, one which performs an enormous legitimizing function. To characterize a set of social practices in the language of citizenship is to honor them with recognition as

The objection based upon individuality stems from the seemingly relentless invocation of the public/private distinction. In this context, the assumption plays out something like this: we can consider reform—including harmonization—of corporate governance and banking laws because those laws fall in the public/market/economic/apolitical category; on the other hand, we cannot harmonize anything like family law, immigration, or human rights because those fall in the private/family/political/value-laden sphere.<sup>274</sup> The latter category properly falls within the exclusive jurisdiction of the individual sovereign. These are matters of individual choice.<sup>275</sup>

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politically and socially consequential—as centrally constitutive and defining of our collective lives.

*Id.*

At this point, of course, corporations have arguably already been given some degree of North American “citizenship.” They can, for example, sue national governments for breaches of NAFTA, including any failure to make national laws the least trade restrictive possible. NAFTA, *supra* note 22, chs. 11, 19. In fact, multinational corporations enjoy many benefits of personhood, including constitutional rights, oftentimes without the correlating liability or responsibility. BAKAN, *supra* note 44. It is difficult for real people, however, who have been relegated to the national arena in an increasingly transnational world, to imagine how they might participate in the global economy. Sassen raises the possibility that citizenship “might find institutional groundings inside the nation-state that would allow citizens to participate in global politics.” Sassen, *supra* note 43, at 6. She is particularly concerned with democratic global governance. *Id.*

<sup>274</sup> For example, see the comments of Korean Attorney Sai Ree Yun at the *Seoul Conference on International Trade Law: Integration, Harmonization, and Globalization*, 10 COLUM. J. ASIAN L. 305, 324 (1996) (“[T]he grounds for harmonization should be more technical and economic or specific rather than broad based philosophical or political claims.”), and Leebron, *supra* note 81, at 94–95 (“More dubious harmonization claims (e.g., fairness) will sometimes have more political appeal than sounder harmonization claims (e.g., economies of scale).”).

<sup>275</sup> See Fineman, *supra* note 1, at 1419.

Within the rhetoric of public and private, contract and consent, existing institutional arrangements allow us to avoid general responsibility for the inequity and to justify the maintenance of status quo by reference to an abstract notion of individual “choice” or “personal responsibility” for the life circumstances in which one finds oneself. In this way, we can often ignore the implications of the fact that individual choice occurs within the constraints of social conditions (including the ideological) that funnel decisions into prescribed channels and often operate in a practical and symbolic manner to limit, or practically eliminate, options.

*Id.* For a fuller interrogation of “choice” and “autonomy,” see generally FINEMAN, *supra* note 177.

This objection is premised upon two false assumptions. First, it accepts the public/private categories as accurate, knowable, and divisible—as if the market were separate from the family, as if the market could exist without the state, and so on and so forth.<sup>276</sup> Second, it embodies the very depressing liberal view of human nature that the *best* we can do is be rational self-maximizing economic actors. The invisible hand of the market is simply an enlarged and sacralized version of the view that we are incapable of progressing beyond that.<sup>277</sup> Individualism is a powerful but misguided argument for the way things are. Individual dignity can flourish only in a supportive social matrix.

### C. Cultural Relativism, Diversity and Difference

The objection to harmonization and uniformity most often raised by progressive voices is a concern for protecting diversity and cultural differences against the forces of homogenization. I am also motivated by these concerns. These voices are strategically joined by conservative proponents who see the debates as an opportunity to divide. Again, my responses to these concerns are most easily set out in a number of general observations.

First, harmonization should not only take account of difference, but should rely on it. Harmony cannot be univocal if it is to advance substantive equality. I am urging us to resist a definition of harmonization which requires sameness. And as with music, the difficult question is what should be different and what should be similar in order to make the very best whole. Understanding Enron as an equality issue holds promise for me because the harmonization of a substantive equality right (which will *necessarily* sometimes mean different things for different people) is perhaps the only way to protect and honor difference. It is the homogenizing forces of global capitalism, without a concomitant commitment to some vision of a more just community, that present the greatest threat to cultural diversity.<sup>278</sup>

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<sup>276</sup> See generally FINEMAN, *supra* note 252 (describing the tenuous distinction between the public and private realm in the raising of children).

<sup>277</sup> See generally Susan Rose-Ackerman, Comment, *Progressive Law and Economics—and the New Administrative Law*, 98 YALE L.J. 341, 341 (1988) (advocating a “reformist law and economics, closely linked to administrative law and based on public finance theory, public policy analysis, and social choice theory”); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991) (arguing that public choice theory’s insights must be balanced with notions of civic virtue).

<sup>278</sup> See Hope Lewis, *Global Intersections: Critical Race Feminist Human Rights and Inter/National Black Women*, 50 ME. L. REV. 309 (1998):

[T]he framework is transnational in perspective because the concerns of women of color increasingly are cross-border concerns. Women of color struggle to survive within their

Second, in many instances the effects of global capitalism are life and death matters, where cultural relativism has less relevance. Very diverse people have similar interests<sup>279</sup> in food, water, freedom from violence, freedom from domination, access to health care, safety, and meaningful reproductive choice.<sup>280</sup> In that context, diversity can become a code word for the cultural right to be poor (or dead). Professor de Sousa Santos offers an historical account of what we commonly call “cultural relativism” in the 21st century:

In the 1980s, the “cultural turn” contributed decisively to highlight the poles of difference, identity, autonomy, and recognition, but it often did it in a culturalist way, that is to say, by playing down the economic and political factors. Thus were the poles of equality, solidarity, cooperation, and redistribution neglected.<sup>281</sup>

His argument is that some balance between the cultural, the political and the economic must be retrieved in the interests of equality and redistribution.

Third, we must be careful about the scope we give “relative” in cultural relativism. We should have no desire to go back to the radical individualism that is really the depressing and paralyzing liberal notion, to wit, that we are unable to

own rural villages, urban centers, and nation-states, but their hard-won participation at these levels *can be undermined by the global fluidity of capital and culture.*

*Id.* at 312 (emphasis added).

<sup>279</sup> For an interesting discussion about solidarity and shared experience, see RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 192 (1989):

The view I am offering says that there is such a thing as moral progress, and that this progress is indeed in the direction of greater human solidarity. But that solidarity is not thought of as recognition of a core self, the human essence, in all human beings. Rather, it is thought of as the ability to see more and more traditional differences (of tribe, religion, race, customs, and the like) as unimportant when compared with similarities with respect to pain and humiliation—the ability to think of people wildly different from ourselves as included in the range of “us.”

*Id.*

I would not say traditional differences are “unimportant,” even when compared with similar experiences and needs. Nevertheless, I appreciate that Rorty’s observations about shared human experiences take him to a place where increased solidarity is “progress.”

<sup>280</sup> In these cases, women need meaningful access to effective tools in order to assert their rights to equality. In Mexico, for example, employers can require women to take pregnancy tests when they apply for a position and fire them if they’re expecting a child. See Laurence Pantin, *Mexicans Seeking to Outlaw Workplace Gender Bias*, Aug. 12, 2002, <http://www.womensenews.org/article.cfm?aid=996> (last visited Jan. 30, 2005).

<sup>281</sup> de Sousa Santos, *supra* note 71, at 1058–59.



agree on lunch, much less on minimum human rights guarantees. As Claire Dickerson has noted, “[t]he more sophisticated relativists acknowledge that absolute and mindless tolerance would require hands off everything from cannibalism to genocide as long as the behavior is the norm in the relevant community.”<sup>282</sup>

Fourth, while diversity is something to be protected and celebrated, the mere assertion of a difference potentially obscures more than it reveals.<sup>283</sup> We must instead interrogate the nature of difference if our discussions and strategies are to advance substantive equality for everyone.<sup>284</sup>

Fifth, I am persuaded by Daniela Caruso that the role for a supranational court or body charged with enforcing fundamental rights—such as the European Court of Justice—is to hold the floor and enforce minimum basic rights. I am also persuaded that where the floor is insufficient to advance the interests of collective justice for diverse identities, however, those interests may be better served by national and local governments better positioned to design rules for redistribution (or affirmative action). The challenge is to ensure that a North American court does not limit national and local governments’ ability to engage in redistributive justice by collapsing the floor and the ceiling.<sup>285</sup>

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<sup>282</sup> Dickerson, *supra* note 133, at 626–27. This has particular resonance at this time in history, as we explore the position of women in communities governed by fundamental religions, and how cultural relativism and freedom of religion is invoked to protect not them, but their domination. See HUMAN RIGHTS WATCH, *Crime or Custom: Violence Against Women in Pakistan*, Aug. 1999, available at the Library of Congress, <http://www.hrw.org/reports/1999/pakistan/> (last visited Jan. 30, 2005). On October 12, 2002, a sixteen year-old Muslim girl was murdered by her father in London, because she planned to run away from home after starting a relationship with an 18-year old Lebanese teacher. It was described as an honour-killing. See *Father Jailed for ‘Honour Killing,’* BBC NEWS UK EDITION, Sept. 29, 2003 (on file with author); see also *Memorial for Honour Killing Victim*, BBC NEWS UK EDITION, Oct. 21, 2003, at <http://news.bbc.co.uk/1/hi/england/london/3209856.stm> (last visited Jan. 30, 2005) (reporting a memorial service for the victim of the October 12, 2002 “honour killing”).

<sup>283</sup> See Laura Spitz, *Perhaps Divided, But Never Conquered . . . Taking Back Our Differences*, N.A.W.L. (1994) (on file with author); see generally Shelley A. M. Gavigan, *Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian, and Gay Engagement to Law*, 31 OSGOODE HALL L.J. 589 (1993).

<sup>284</sup> Gavigan, *supra* note 283, at 591 (noting that “feminists who adopt a critical stance toward ‘the family’ have been urged to acknowledge and rethink the white, heterosexual privilege apparently implicit in such an analysis”); see also Leebron, *supra* note 81, at 94 (“Before harmonization is pursued, we need to understand the sources and value of the difference that is the predicate to harmonization.”).

<sup>285</sup> See generally Caruso, *supra* note 40.

Finally, we ought not let the fact of our differences prevent us from exploring commonalities and forming pragmatic alliances.<sup>286</sup> Disadvantaged populations are stronger as a group.<sup>287</sup> Thus far, theories of difference or separation have prevailed over theories of union or unity,<sup>288</sup> but localities are increasingly powerless to resist homogeny and advance their own cultural interests.<sup>289</sup> In the context of Europe, the point has been made that traditionally disadvantaged or relatively powerless groups are able to increase their bargaining strength and

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<sup>286</sup> See, e.g., Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN'S L.J. 1, 6 (1992) ("In my view, conventional political divisions, such as left versus right, are at best an artifact and more probably a smokescreen that keep progressive people from taking even modest steps in coalition toward liberation."); see also ZILLAH EISENSTEIN, HATREDS: RACIALIZED AND SEXUALIZED CONFLICTS IN THE 21ST CENTURY 1, 66 (1996).

Feminism(s) as transnational—imagined as the rejection of false race/gender borders and falsely constructed 'other'—is a major challenge to masculinist nationalism, the distortions of statist communism and 'free'-market globalism. It is a feminism that recognizes individual diversity, and freedom, and equality, defined through and beyond north/west and south/east dialogues.

*Id.* On the idea of shared experiences and commonalities, see de Sousa Santos, *supra* note 71, at 1054–55.

The excluded, whether people or countries, or even continents like Africa, are integrated in the global economy by the specific ways in which they are excluded from it. This explains why, among the millions of people that live on the streets, in urban ghettos, reservations, the killing fields of Urabá or Burundi, the Andean Mountains or the Amazonic frontier, in refugee camps, occupied territories, sweatshops that use millions of bonded child laborers, there is much more in common than we are ready to admit.

*Id.*

<sup>287</sup> Scales, for example, points to the shared "context of institutional white male consciousness. . . . For women and other outsiders, the thread is a common sort of experience of exclusion. Our individual and group experiences are the fibers that overlap and intertwine. We need to recognize the strength of the thread in order to get on with it." Ann Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139, 160 (1990).

<sup>288</sup> de Sousa Santos, *supra* note 71, at 1056–57.

<sup>289</sup> A transnational Charter of Fundamental Rights should back the claims of localities with the force of the state.

share resources by forming transnational alliances.<sup>290</sup> This has been true in North America as well.<sup>291</sup>

This takes me to some observations about divide and conquer strategies. We should be suspicious if advanced capitalism backs cultural diversity as a reason to do things a particular way.<sup>292</sup> The proponents of further dismantling the welfare state in the United States and Canada, and exporting this version of neo-Conservative capitalism elsewhere, are what I like to call “Grandmasters of Taxonomy,”<sup>293</sup> taking advantage of any opportunity—including identity politics<sup>294</sup>—to create divisions, define them, make categories, and then fill them. Difference is just another marketing opportunity,<sup>295</sup> and if people are divided into categories set by them, all the better. If the Grandmasters are really lucky, North Americans will internalize the Grandmasters’ versions of both what and how intractable our differences are, thereby obscuring the systemic nature of shared powerlessness.<sup>296</sup> The greatest threat to cultural diversity is not careful alliance-building across shared experiences with exclusion, but the homogenizing forces of global capitalism.<sup>297</sup>

The power enjoyed by the Grandmasters of Taxonomy is enhanced by the alleged public/private split in the international market, because in that version, this is a story about the economy (public sphere), an area outside our traditional

<sup>290</sup> Increasing economic globalization, especially trade liberalization, has had the simultaneous effects of fragmentation (of, for example, national identities) and cohesion (of transnational identities). See Bosniak, *supra* note 66, at 453 (“[T]here are important reasons of justice and democracy to support nonnational conceptions of identity and solidarity.”).

<sup>291</sup> See Spitz, *supra* note 4 (American and Canadian groups have formed transnational organizations and worked together in the contexts of same-sex marriage and pornography, to name just two examples.).

<sup>292</sup> See Leti Volpp, *Migrating Identities: On Labor, Culture, and Law*, 27 N.C. J. INT’L L. & COM. REG. 507, 507 (2002) (examining “the causes of the deployment of cultural narratives, and the dehumanizing and depoliticizing effects of their use”).

<sup>293</sup> In the context of law, Ugo Mattei has fabulously called “taxonomy” the “grammar” of discourse. Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems*, 45 AM. J. COMP. L. 5, 5 (1997).

<sup>294</sup> e. christi cunningham recently published an insightful article about identity and capitalism. See e. christi cunningham, *Identity Markets*, 45 HOW. L.J. 491 (2002).

<sup>295</sup> HARDT & NEGRI, *supra* note 36, at 152.

<sup>296</sup> In doing so, they encourage us to focus only on local solutions and abandon the possibility and relevance of bigger ones. Sometimes I wonder whether it is actually Coca-Cola™ which distributes that bumper sticker “Think Globally-Act Locally.” Surely it is in everyone’s best interests to think and act both globally and locally. “As a rule of thumb, critical race globalism would require that we respect locality when acting globally, and that we retain global justice commitments when acting locally.” Gott, *supra* note 36, at 1510.

<sup>297</sup> See, e.g., Lewis, *supra* note 278, at 312.

female or cultural domain (private sphere), based on reason (not our strong suit); and therefore, women and minorities are irrelevant to the market and the discussion. Even if we can show ourselves to be relevant to the market, our diversity makes us all differently relevant, foreclosing the possibility for coalition(s).

We must be prepared to recognize the internalization of global capitalism's divisions, categories, and labels; to resist those divisions; and to unlearn them—all the while inserting ourselves into the interpretive debates about diversity, equality, harmonization, and economic globalization. We must acknowledge that our debates will be a difficult and tense, but we need to have them.<sup>298</sup> In the end, the critical role of diversity will be in acquiring and exercising the power to define the issues and design the process of change. In order to truly advance substantive equality through harmonization, the delegates to our constitutional convention will necessarily be representative and diverse.

#### D. Implementation

Optimistic? Is it possible to enact and implement a North American Charter? True, as a Canadian, the timing of my first engagement with constitutional law<sup>299</sup> has made me rather optimistic about the possibilities for diverse groups of people to complete monumental projects together.<sup>300</sup> Very broad and comprehensive equality guarantees were entrenched in the Canadian constitution in my lifetime<sup>301</sup> as a result of the largest lobbying and participatory effort ever

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<sup>298</sup> Simply because the debate will be difficult, however, is not a reason to back down from engagement. There are all manner of reasons for doing nothing, but however slippery the slope, or difficult the questions, or fine the line, or potentially divisive the debate, doing nothing on a global scale is no longer an option and certainly will not make the issues go away.

<sup>299</sup> The main equality provision of Canada's Charter came into effect in my first year of university. I took Constitutional Law at a time when equality jurisprudence developed so rapidly that it was almost impossible to follow a syllabus.

<sup>300</sup> "The Special Joint Committee of the Senate and House of Commons on the Constitution of Canada sat from November 7, 1980 to February 8, 1982, to hear submissions on the Constitution. Over 1,200 groups and individuals appeared before the Committee. See Issue 57, *Minutes of Proceedings and Evidence* for the Committee's Report to Parliament submitted on February 13, 1981." Mahoney, *supra* note 6, at 229 n.2.

<sup>301</sup> The Canadian Constitution was patriated in 1982. Patriated is a uniquely Canadian term and refers to "bringing [the constitution] home" to Canada from the United Kingdom. PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 55 (Student ed. 2001). Prior to 1982, Canada was actually a Dominion, a term used to distinguish the more advanced colonies of the United Kingdom. The Confederation of British North America in 1867 did not actually give Canada her independence, but established the Dominion of Canada with a responsible government and a large measure of self-government in local affairs. *Id.* at 47. It was not until

mounted by "ordinary Canadian citizens."<sup>302</sup> Nevertheless, I am suggesting that engagement with the debate is possible, necessary, and valuable in any event. That is, it is worth talking about, even if, in the end, something different than a North American Charter is achieved.

Objections and concerns about implementation seem to fall into two broad categories: practical difficulties and political will.<sup>303</sup> I have organized my comments accordingly. Practical hurdles are probably obvious. Establishing a North American Social Charter and working towards bringing all domestic laws into compliance will be a complex,<sup>304</sup> costly, and time-consuming undertaking,<sup>305</sup> even assuming we can get all the participating governments to

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1931, and the Statute of Westminster, that no statute of the United Kingdom was permitted to extend to Canada without Canada's request and consent. Statute of Westminster, 1931, R.S.C., app. II, No. 27 (1992) (Can.). It was not until 1949, that Canada's Supreme Court replaced Britain's Privy Council as the final court of appeal. And it was not until 1982, that Canada's Constitution was "patriated" in the Canada Act of 1982. Although that act was an Imperial Statute of the Parliament of the United Kingdom, it was drafted by and for Canadians, and enacted at Canada's request and with Canada's consent. The Act formally terminates the authority of the U.K. Parliament over Canada and provides that future constitutional amendments shall be made by the Canadian Parliament. See Canada Act of 1982, ch. 11, 1980-83 S.C. part V, 18-22 (Can.).

<sup>302</sup> See generally Mahoney, *supra* note 6, at 229. She points out that in Canada, many diverse groups participated in the recent process of constitutional renewal. As stated above, between November 7, 1980 and February 9, 1981, over 1200 groups and individuals appeared before a Special Joint Committee of the Senate and House of Commons to hear proposed submissions for the Constitution of Canada. *Id.*; see also Issue 57 of the *Minutes of Proceedings and Evidence* for the Special Joint Committee's Report to Parliament submitted on February 13, 1981 (on file with author).

<sup>303</sup> Diamond observes that efforts to include a social charter—at least in respect of labor rights—in NAFTA was a "near-complete failure." Diamond, *supra* note 254, at 122. This makes empirical research into the effects of NAFTA more critical. Demonstrating its inadequacies with concrete examples would seem necessary to garnering the political support missing last time around.

<sup>304</sup> In the European context, Vivian Grosswald Curran has noted that this is in no small measure because they "have to cope with issues of distinctive national traditions and sovereignty within a developing body politic that strives to attain arguably incompatible goals of political and cultural freedoms and, simultaneously, supranational uniformity in legal standards and in political and civil rights." Vivian Grosswald Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657, 657 (1998).

<sup>305</sup> In the context of possibilities for harmonization of collective labor relations in Europe, Stone has observed that harmonization is unlikely to be a "simple expedient." Stone, *supra* note 82, at 1005. She cautions that we must be extremely careful not to let the complexities take us to the point where we set the floor very low, thus level downward. *Id.* at 1024. Katharina Pistor

commit to the idea in the first place.<sup>306</sup> However, I am not deterred by these difficulties. We undertake, by ourselves and in groups, all manner of complex, costly, and time-consuming tasks. The examples are endless and continue as I write.<sup>307</sup> Moreover, our diverse experiences mean we each bring different and valuable skills to the table,<sup>308</sup> and disagreement along the way does not have to be immobilizing or counter-productive.

It would seem that by far the greatest impediment to the establishment and implementation of a North American Charter of Fundamental Rights is, and will continue to be, political will.<sup>309</sup> In talking about the European Union's Solemn

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has argued that more complexity is added to the international standardization of a rule when that rule is not freestanding, but its meaning can be understood only in conjunction with other legal concepts. Pistor, *supra* note 202, at 107. It seems to me that an answer to Pistor's concerns is (a) we already engage in complex international legal relations; (b) Canada, the United States, and Mexico are all federalist states used to complexity in interjurisdictional regulation; and (c) NAFTA and the WTO are not any more or less "freestanding" than international agreement about social rights and freedoms.

<sup>306</sup> Obvious challenges to multinational commitment will be legal and political structural differences—including enforcement regimes—between the three countries. Collingsworth, *supra* note 7, at 200; *see generally* Pistor, *supra* note 202 (discussing the drawbacks and difficulties of legal standardization on developing nations). Language and cultural translation issues will also require attention. *See* Vivian Grosswald Curran, *The Interpretive Challenge to Uniformity*, 15 J.L. & COM. 175, 176 (1995) (reviewing CLAUDE WITZ, PARIS: LIBRAIRE GENERALE DE DROIT ET DE JURISPRUDENCE (1995)). Interestingly, Nicholas Kristof considers "faith" to be the one of the most, if not the most, fundamental divides between America and the rest of the industrialized world. For example, Americans are three times as likely to believe in the Virgin Birth of Jesus (83%) as in evolution (28%). American Christianity is becoming less intellectual over time and the majority of Americans believe it is necessary to believe in God to be moral. Other industrial nations overwhelmingly disagree. Nicholas D. Kristof, *Believe It, Or Not*, N.Y. TIMES, Aug. 15, 2003, at A29. I assume this would be a point of disagreement between Canada and the United States, particularly if ascribing to American Christianity were a condition to commitment.

<sup>307</sup> The European Union is one example of many diverse communities working out complex issues towards a monumental common goal. The Canadian Charter is another.

<sup>308</sup> Canada, for example, has very recent experience in working out social ideals on a constitutional level. *See* Mahoney, *supra* note 6, at 241–42. Mexico has a model constitution with respect to the prioritizing of government over capital and the separation of church and state. MEX. CONST. arts. 3–5, 24, 27, 28.

<sup>309</sup> For an examination of possible reasons the United States was unwilling to include human rights commitments in the text of NAFTA, *see* James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793 (1994).

In the context of international relationships and consensus building vis-à-vis the possibility of war against Iraq, at least one commentator has said that in addition to will, the present U.S. administration lacks skill:

Proclamation,<sup>310</sup> which combined in a single text the civil, political, economic, social, and societal rights of EU citizens, Professor Del Conte observed that “the main obstacle to an economic and social union of the American continent is not so much technical as political.”<sup>311</sup> He went on to note that the problem, initially, will be “getting into the spirit of compromise and relinquishing the unyielding ‘non-negotiable’ approach. It took Europe decades to learn the lesson and much still remains to be accomplished.”<sup>312</sup>

Then again, perhaps the greatest hurdle to a North America Charter is not so much political will, but the *combination* of political will and a failure of imagination.<sup>313</sup> In talking about the potential for a North American economic and

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Bluntly stated, George W. Bush and Colin Powell will lose the diplomatic game with France and Germany.

Both men lack the necessary intellectual capacity; they are, in a word, outmatched by their European counterparts. In the end they must resort to violence. They have no other recourse.

Both Jacques Chirac and Gerhard Schroeder are skilled consensus builders, masters in the art of diplomacy. They will easily outflank Messrs. Bush and Powell.

Marc Ash, *Bush and Powell Will Lose the Diplomatic Game*, TRUTHOUT OPINION, Jan. 30, 2003, at [http://www.truthout.org/docs\\_02/013103A.ma.game.htm](http://www.truthout.org/docs_02/013103A.ma.game.htm) (last visited Jan. 30, 2005).

<sup>310</sup> At the Summit of Nice, on December 9, 2000, the European Council, the European Parliament, and the Commission approved the Charter of Fundamental Rights of the European Union, which includes as fundamental rights: workers’ right to information and consultation within the undertaking; right of collective bargaining and action; protection in the event of unjustified dismissal; prohibition of child labor and protection of young people at work; social security and social assistance, including protection in cases such as maternity, illness, industrial accident, dependency, unemployment, or old age; and health care, including the right of access to preventative health care and standardized medical treatment. Charter of Fundamental Rights of the European Union 364/01, ch. IV, 2000 O.J. (2000/C).

<sup>311</sup> Del Conte, *supra* note 64, at 218.

<sup>312</sup> *Id.* at 218–19.

<sup>313</sup> I am supported in this contention by the observation of Bosniak: “We face an acute imaginative deficit in the current period.” Bosniak, *supra* note 66, at 507. And also by bell hooks:

To be truly visionary we have to root our imagination in our concrete reality while simultaneously imagining the possibilities beyond that reality. A primary strength of contemporary feminism has been the way it has changed shape and direction. Movements for social justice that hold on to outmoded ways of thinking and acting tend to fail.

HOOKS, *supra* note 243, at 110. Optimistically, David W. Kennedy traces the enthusiasm of “younger internationalists” today, portraying a “story of vigorous renewal and reform,” in his

social union, Professor Del Conte continued: “[I]t would require *a truly reckless stretch of imagination* to try to compare the European Community to the community of states of the American continent.”<sup>314</sup> I am drawn to this statement because, notwithstanding the complexity of the situation and what appear to be, at best, overwhelming and, at worst, insurmountable obstacles to the achievement of a North American Social Charter, I believe it is neither reckless nor a stretch to *imagine* that there may be helpful and hopeful points of comparison<sup>315</sup> between the EU and North America.<sup>316</sup>

Of course, it is not a promising strategy to tell people it will be easy or that they will not be anxious.<sup>317</sup> Rather, we must begin by explaining what we mean to do and what we do not mean to do.<sup>318</sup> It is in this way that we address

article, David W. Kennedy, *A New World Order: Yesterday, Today, and Tomorrow*, 4 *TRANSNAT'L L. & CONTEMP. PROBS.* 329, 332 (1994).

<sup>314</sup> Del Conte, *supra* note 64, at 218 (emphasis added).

<sup>315</sup> The limits of comparison between EU and U.S. legal and social norms are driven, at least in part, by an historical and continuing disagreement about the role of international law and international institutions. See, e.g., Robert Kagan, *A Tougher War for the U.S. Is One of Legitimacy*, *N.Y. TIMES*, Jan. 24, 2004, at B7.

<sup>316</sup> I hope I am not misrepresenting Professor Del Conte, because he does go on to observe that the European Community is like North America in that it is made of member states with great economic and social gaps among them. Moreover, he states, that if one is to look at the next group of countries to be admitted to the EU, including Turkey, Cyprus, and the Eastern countries, “the dissimilarities in economic and social situations in Europe appear of no greater amplitude than those existing in the American continent.” Del Conte, *supra* note 64, at 218. One of the benefits of a transnational equality right should be to permit and encourage transnational group formation and alliance building so that, for example, Indo-Canadian communities may form alliances with Indo-American communities, and so on. Such communities may find their bargaining power enhanced or increased by their alliance(s).

<sup>317</sup> In the context of American federalism, Resnik notes that we should acknowledge the anxiety that flows from “inevitable ambiguity of living with multiple legal regimes.” Resnik, *supra* note 261, at 626.

<sup>318</sup> In the European context, British Foreign Secretary Jack Straw stated in a speech in Scotland on Aug. 28, 2002:

We have to make the EU better understood. We must explain what Europe does and doesn't do, what should be done at the European level and what is best left to member states at the national, regional or local level. The current lack of clarity creates the impression that power is draining away from national governments to Brussels.

Jack Straw, *Strength in Europe Begins at Home*, Speech in Edinburgh, Scotland, Aug. 28, 2002, at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391629&a=KArticle&aid=1030405878065> (last visited Jan. 30, 2005).



predictable fears directly. At the end of the day, we would have to commit ourselves to building political will and capturing the imaginations of our now larger community, not to mention garnering the energy necessary to accomplish something so large.<sup>319</sup> It would mean no less than a cultural shift for most North Americans, requiring us to newly see and make connections, listen to voices previously silent or silenced,<sup>320</sup> understand the nature of subsidies,<sup>321</sup> and expand and enhance our understanding of responsibility (corporate and personal) in much different ways.<sup>322</sup> In the end, it may be that a North American Social Charter is not only impossible to achieve, but a bad idea.<sup>323</sup> Or political will may be determinatively against it. I hope to have convinced you, however, that engagement with the idea is worth pursuing regardless.

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<sup>319</sup> Nathaniel Berman uses a wonderful quote from MAURICE BARRÈS, *THE ENEMY OF LAWS* 4 (1893): "We do not lack systems, but energy." Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 *YALE J.L. & HUM.* 351 (1992).

<sup>320</sup> Basic human rights would empower the voices in our community that need to be heard, but have been previously left out—if our commitment to substantive equality is to mean anything—on all manner of issues, including how corporate governance models and accounting principles affect their lives.

<sup>321</sup> Fineman, *supra* note 1, at 1409–11; FINEMAN, *supra* note 177, at 25–26. In *Contract and Care*, Fineman states:

In this society no one is totally self-sufficient, either economically or socially. We all live subsidized lives, whether the benefits we receive are financial (such as in governmental transfer programs or favorable tax policy), or nonmonetary (such as those provided by the uncompensated labor of others in caring for us and our needs). The interesting question in our subsidy society therefore is why some subsidies are differentiated and stigmatized while others are hidden.

Fineman, *supra* note 1, at 1409 n.14.

<sup>322</sup> While some of the wrong-doers at Enron, Global Crossing, and WorldCom et al. undoubtedly understood the nature and consequences of their actions, I believe that many others benefited without truly understanding what they were doing and how. Indeed, they may have been surprised to learn what it really meant to "capitalize" on something or someone. It is simply not part of the American free market "culture" to engender and see connections in that way (more of that divide and conquer methodology). Joel Bakan suggests that this is, in no small part, because corporate culture (and law) requires directors and officers to maximize profits to the exclusion and detriment of any other policy or goal that might adversely affect profits. BAKAN, *supra* note 44, at 60–75.

<sup>323</sup> Gott warns of twin normative dangers: "bad globalism" and "regressive" or "parochial nationalisms." Gott, *supra* note 36, at 1509–10. Inclusive and vigorous debate may lead to the conclusion that a North American Social Charter is some version of "bad globalism." Failure of a North American Charter for reasons of "parochial nationalisms," however, would be disappointing.

## VIII. CONCLUSION

I began this Article with two quotes. They were meant to position and shape understanding of my thesis. While it may be true that the only constant is change, some changes are bigger than others. At this particular moment in history, dramatic changes have been brought by increased human mobility, enhanced communications, greatly increased trade and capital flows, and the increasingly transnational nature of capitalism and new technologies.<sup>324</sup> The conditions underlying our social arrangements have changed so dramatically that they no longer bear resemblance to their original shape. Therefore, it makes sense to reexamine our arrangements.<sup>325</sup> Reexamination and redefinition are what keep us alive and humane.<sup>326</sup>

Because it is so difficult to give sound, yet convincing, moral guidance in a System already so badly skewed, the long-term business ethics agenda must begin with the recognition that corporations are now operating in a relatively deregulated and highly competitive global environment where the primary operative values are material and economic ones. Since non-material values are critical to the flourishing of human beings, ethics must partner with law (and other disciplines such as sociology, psychology, and political economy) toward the goal of changing rules and systems that perpetuate the reckoning of social and economic well-being in material terms alone. In seeking to create or recreate communities where people discover enduring human values, we must recognize that much of the problem lies not in "big government" as such, but in the permanent partnering of corporate and governmental interests with ever-increasing material and monetary growth (for some) as the bedrock, bottom-line value.<sup>327</sup>

Clearly, in these circumstances law is not the only answer. But law is one answer, or at least forms part of a larger answer. Looking to law<sup>328</sup> as a way to

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<sup>324</sup> See Spitz, *supra* note 4, (discussing the relationship between transnationalization and new technologies); see generally Katherine Van Wezel Stone, *Dispute Resolution in the Boundaryless Workplace*, 16 OHIO ST. J. ON DISP. RESOL. 467 (2001) (discussing how these changes have transformed the workplace).

<sup>325</sup> Fineman, *supra* note 1, at 1431.

<sup>326</sup> Williams, *supra* note 2, at 231.

<sup>327</sup> Mayer, *supra* note 136, at 256-57.

<sup>328</sup> According to Fineman:

The existence of "background rules" (law) is necessary so that actors can bargain and contract. This approach is distinct from typical law and economics analysis in that law is posited as constitutive as well as reactive. From this perspective, law is viewed as having a significant and positive role in creating and sustaining the "market." As a social and legal institution, the market does not exist independent of law. Even more fundamentally, the

articulate and enforce changing norms and to accommodate changing structures in a changing System makes sense when corporations are using law (and the absence of law<sup>329</sup>) for capital gain at the expense of human well-being.<sup>330</sup> Where those corporations operate in an arena outside national regulation, we need to look to international, transnational, or supranational regulation for solutions. A North American Social Charter has the potential to reassert governmental sovereignty over corporate sovereignty, protect already achieved rights, introduce and enhance new rights, shape the debate, and give us a coherent vision—or capital-P Plan—for our evolving<sup>331</sup> North American community.<sup>332</sup> At a minimum, it is a promising area of inquiry. To respond adequately and effectively to the challenges brought about by increasing economic integration and technological developments in North America, we need new rules.

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market relies on law—law is necessary in order for markets to function. A system of background or default rules is required in order that competitive and voluntary transactions (contracting) can take place.

Fineman, *supra* note 1, at 1425.

<sup>329</sup> In discussing the U.S.'s dismantling of the social capitalist model, Mattei tells us this means "abandoning the proactive role of the government in the economy in favor of a reactive one." Mattei, *supra* note 100, at 434. And, as proactive institutions are dismantled, "there is the need for stronger reactive ones, or total lawlessness follows." *Id.* This explains Enron, at least in part.

<sup>330</sup> I do not mean to ascribe actual malice to the corporation itself. Just to be clear (and trite), corporations can only do what they do because they have been created, and the system within which they operate has been created, to accomplish these goals. In other words, the corporation is a state-constructed entity, created to affect certain policy and other goals; happily it can therefore be recreated and reregulated to accomplish different policy goals. See generally BAKAN, *supra* note 44, ch. 3 ("The Externalizing Machine.").

<sup>331</sup> I am heartened by the comment of former Canadian Prime Minister Jean Chrétian: "You have to look at history as an *evolution of society*." Clifford Krauss, *Canadian Leaders Agree to Propose Gay Marriage Law*, N.Y. TIMES, June 18, 2003, at A1 (emphasis added).

<sup>332</sup> John Foster identifies the potential for a global social contract as an element of hope. Foster, *supra* note 55, at 600.