THE DIVERSITY AND EVOLUTION OF COMPETITION: AN IDEAL PROPOSED FOR REGULATORY DESIGN

by

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This dissertation presents a concept of diversity as an ideal of international economic regulation. The theme of diversity refers to the differentiation of individual competitive strategies. The first advantage of such differentiation is argued to be as a means of stable and adaptive progress; increasing the number of possible techniques with which to meet as yet unforeseen challenges. As the first principle of diversity entails a method for systemic responsiveness, the second principle gives content to this method and states that social goals should serve as the incentives encouraging competitors toward differentiation. The advantage offered by the second principle is that social non-economic goals may be advanced in the present, as individuals attempt new routes to personal reward via the satisfaction of collective objectives that previously may have had little or no economic value.

As an ideal of diversity contemplates a method of systemic incentives, rather than mandated outcomes, the location of innovation remains individual competitors. Accordingly, the ideal of diversity is justified and articulated from a basis in individual rights. Diversity is argued to be the optimal set of principles which individuals would select if given the ability to design a new competitive system. In joining a method of differentiation with the added social content of non-economic priority, diversity offers a unique blend of economic efficiency and equity; or of self-interest and concern for the welfare of others. Diversity allows an individual to think of their own pursuit of gain, but also and simultaneously further collective goals by selecting the priorities that should influence competitors toward differentiation. Other’s welfare becomes a route to individual success.

The project progresses through three broad conceptual stages. First, international problems of market failure are considered in light of strategies and the economic impulses toward self and system defeating cycles of competition. Second, a redefinition of legal and economic progress is offered to meet conditions of unpredictability, and to arrive at an evolutionary method that encourages constantly competitive variation with which to meet society’s future challenges. Third, an evolutionary approach to international regulation is translated into a priority system of legal rights.
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INTRODUCTION

I.

The proposed ideal of diversity offers a potential improvement to social problems that are international in scope and yet exacerbated by a lack of international cooperation. My object in this introduction is to sketch a theory of ideal international economic regulation, in which incentive is given for competition to: 1) produce a more varied set of techniques and strategies in order to meet future, as yet unrealized problems, and; 2) simultaneously incorporate social, non-economic goals in a manner that ameliorates problems of the present. As this project contemplates an ideal for influencing the regulation of international competition, the promotion of a theory of diversity is not intended to denote descriptive explanation in a scientific sense, but rather indicate an aspirational, normative idea.

The first and primary principle of a system of diversity is that long-term social benefit may be furthered through an indeterminate, or even modest, view of progress. Indeterminacy entails the recognition that future problems of a physical or scientific nature may not easily, if ever, be predicted in a consensual manner. Unknown external impacts in the future will react unpredictably with the techniques and strategies of individual competitors, favouring some unequally and in ways dissimilar to present conditions. The acknowledgement of indeterminacy places the responsibility for solutions upon individuals, with innovations arrived at through competition. A socially optimal approach to the regulation of competition would seek to increase the number of individual risks taken on new techniques and strategies, so that there is the greatest possible variation of potential solutions available to meet changing future impact. The function of individuality toward difference is given greater importance within the method of diversity than the separate, or procedurally neutral, standing of each individual competitor.
While differentiation is the primary principle of diversity, it remains that the theory can and should accommodate added social content rather than encourage difference without direction. The second principle of diversity offers that non-economic social value be introduced as reward targets in competition. Social concerns are accordingly introduced into competition so as to give incentive toward differentiation while simultaneously including wider achievements into the outcome of competition.

A theory of diversity may be justified from an ideal start-point to international competition, in which a membership comes together to orchestrate the incentives for regulation, and do so from a position of abstraction. Abstraction serves to separate individuals from knowledge of their circumstances and attributes, as well as permitting for a more long-term view of social benefit. The most rational choice perspective from abstraction is argued to arise from imagining the ideal qualities of the winner, who one will in all probability lose out to. In the simplest terms, individuals would optimally design their system of regulatory incentive so as to reward the competitor who innovated in a manner that benefited others en route to their attempts at personal gain.

The appeal of such a choice perspective is that it accords well with a blended, or nuanced manifestation of individual self-interest: containing at once an individualistic hope of greater rewards, of topping a pyramid of economic outcomes; while a more conservative and realistic assessment on the likelihood of joining the less successful majority leads individuals to favour incentives which promote an increase to the welfare of the wider society at large.

I hope to demonstrate ultimately that a theory of diversity represents an appealing vision of open-ended progress, and, when combined with a view to the qualities of an ideal winner,
yields a more optimal and equitable system of private regulation. This introduction is a preliminary step in this regard.

II.

A. Reconsidering Competitive Individuality

A theory of international regulation which proposes a move from the status-quo toward a more ideal configuration must confront the concept of individuality; of separate actors who pursue with some intent their own self-interest. Most obviously, individuality characterizes the current international system comprised of legally autonomous and sovereign states. Sovereignty entails that individual states must be enticed into agreement, with a view to their own self-interest, and that subsequent negotiation toward an agreement’s conclusion would be informed by this same self-interest. Also and unsurprisingly, individuality is also the basis of the economic and political themes, in market competition and liberal democracy respectively, which are ascendant internationally.

The mere fact of current status quo affairs, however, should not limit or prefigure the possibility of individuality in international competition. Under a system of diversity, individuality is to be a means of meeting social problems, but international regulation is to be designed so as to encourage wider considerations than presently. Given greater latitude of choice under diversity’s rule design, individuals would be permitted to manifest both wider possibilities in their own calculations of success, in the potential ways to rewarded outcome, and in their assessment of value, by deciding on rules that may favour issues and other individuals who are beyond their immediate selves.
Individuality receives reconsideration within a theory of diversity in three major and related areas: beginning and progressing from problem identification; through to proposed method for solutions, and; concluding with a system of rights that extends out of and supports the method of solution. In the first instance, individuality becomes the means of problem recognition, of viewing the physical consequences of economic competition, through consideration of the strategy and outcomes of individual competitors to determine the extent of needed institutional and regulatory change. In the second stage, individuality assumes its essential role within diversity, of providing a base response to unknown future difficulties in the differentiation of competition and the utmost of individual attempts at innovation. The third element of diversity involves giving the above solution perspective the added and needed assurance of a basis in individual rights; of justification for a future minded system in individual choice. In sum, the following sketch of diversity uses the concept of individuality to move through a different valuation of systemic failure, then to arrive at a future oriented system of viewing legal and economic progress, and finally to conclude in a political philosophy of rights for international regulation.

III.

B. Reconsidering Outcomes

A theory of diversity begins conceptually, and by way of first inspiration, in the face of a certain interconnectedness of impact. Though much commentary has been made on international interconnected under the well-worn rubric of globalization – with a closer world portrayed in the growth of information technology and economic liberalization – the focus here is first upon the complexity of economic competition as demonstrated through its impact upon the physical
world. This phenomenon forms a simple chain, in which individual economic output impacts upon the external environment and which in turn have a harmful impact upon individuals in both physical and economic terms. The double detriment of physical and economic loss finds a prominent example in the issue of global warming and climate change; or in any circumstance which similarly corresponds with the tragedy of the commons. In the tragedy of the commons metaphor, the economic strategy of each individual to pollute produces a physical deterioration in the commonly shared resource, as well as an economic loss for each individual when all similar strategies to pollute are aggregated.

The metaphor of the tragedy of commons may be seen as supporting the principle of private property, turning metaphor to parable, for it is the unregulated nature of the commons that leads self-interested individuals to shift as much as possible of their costs unto the resource that is shared; in effect having each neighbour share in the output or pollution costs of a production that only the polluter enjoys the gains from. Were each to have defined property stake, or were there an institution that could tax outputs from the use of property, the incentive to despoil physical space for economic gain would be lessened or eliminated outright. Given the diffuse movement of pollution across the national boundaries of sovereign states, and through it the difficulty of placing a restraint or cost on output, the tragedy of the commons has obvious relation to global environmental issues. This tendency renders each state a collection of individual outputs with no economic accountability or incentive for restraint, as the common resource impacted upon is atmospheric and transnational. As with the tragedy of the commons metaphor, the international system enables individuals to shift the expenses of dealing with pollution unto the wider neighbourhood of competitors.
Though the tragedy of commons metaphor points to institutional governance which may both grant property rights and constrain their usage, on the international stage this points initially to the revolutionary step of one world government. While such a goal should not be rejected theoretically simply because of its seeming practical and present impossibility, it is important to observe that such an extreme and revolutionary step may not be the only relevant approach to addressing the tragedy of the commons type situations on the international level. First, many specialists in the subject of common resources have noted that informal social norms have succeeded in certain cases of enforcing restraint and individual accountability even in the absence of institutional order. Unfortunately, these cases of informal regulatory success are very limited in number, and further limited to tiny and personally connected communities which may have little prescriptive relevance for the entire international system.

Second, the international system, while anarchic and without overarching authority, has witnessed countless examples of international cooperation and agreement, which increasingly take a legalistic form. It is easily demonstrated that states have pursued their interests, and perhaps have had their basic interests altered, through cooperation with other and competing states. Therefore, if influential international legal regimes and organizations, such as the World Trade Organization and the European Union, may flourish, it becomes conceivable to question the development of solutions to common resource problems without absolute authority. In essence, it should be possible to juxtapose the above examples of coordination; of informal solutions in the absence absolute authority as well as the demonstrated possibility of international agreement.

The focus of observation is then to be placed upon the ability of international coordination to meet the ideal of informal solutions for restraint as witnessed in small scale
examples. Are international actors, and their agreements, learning in the face of demonstrated harm so as to adapt toward more effective and responsive regulation? Uniquely, evaluating cooperation’s effective move to informal solutions introduces a method of observation that measures a current system’s adaptability against physical impact. While the scale of a dramatic problem may point necessarily to a dramatic, or even revolutionary, change such as a single world government, it nevertheless remains that questions of response and impact may be evaluated in rational, even scientific terms. Scientific knowledge of human economic impact upon the physical world, and then through it upon individual concerns, may provide for an essential marking of needed response, and the window of evaluation for how well international competitors are cooperating toward a solution.

The potential of systemic evaluation begins with, and is made possible by, a modern convergence of complexity, in which the increasing complexity of human economic output – of scale, participation rates, and techniques – is met by a greater awareness of this complexity as it interacts with the natural world and the individuals who receive its effects. Such observations may take the form of improved scientific observation, or even a layperson’s observation of change in their everyday experience. And while the first and main example used in this dissertation involves global warming and climate change, a focus upon physical and economic outcomes would include any economic practices which are found to produce illness in a given population that has no recourse upon the party of causation. Indeed, the perspective extends by definition to any social problem that is caused in large part by a lack of governance, which allows for exported costs, widely defined, to be visited upon another without recourse or proper accounting of harm.
Were the focus of observation to be solely scientific this would, however, introduce a potentially insurmountable obstacle of certainty. Even supposing a preponderance of scientific writing in support of situations of grave physical deterioration and its resultant harm, there would always seem to be room for a glimmer of doubt as to causation and eventual consequence. Accordingly, physical effect must be joined with a view to economic causation and the rational pursuit of self-interest that leads to the physical impact. It must be remembered that the physical world is the intermediate stage, the conduit of harm connecting individual economic activity with economic and physical detriment. Were the environment infinitely absorptive, there would be no tragedy of the commons. The focus of evaluation should, therefore, be upon the rational strategies engendered by the competitive situation and how these strategies are altered potentially by international accord.

Scientific observation may mark issues of concern, and give account to the scale of the physical problem, but the systemic analysis should transition to allow for a more consistent and emphatic view of economic detriment. For instance, the tragedy of commons is essentially an instance of extreme market failure, in which the most rational and self-interested strategy for each individual member – to offload their costs unto a common resource whose detriment is shared by all – combines with the same rational choice for all others. Unfortunately, when these rational and individual strategies that lead one to cheat upon the whole are aggregated, when each rational competitor chooses likewise, the result is that each competitor ends up worse off.

A purely scientific view of economic effect might concentrate upon the denigrated environment, in the lessened fish population in a pond and its multi-layered ecological effect for example, while a view to economic causation would reveal that that strategy to pollute the pond in the process of fishing saves expense. Market failure is seen to ensue when all the strategies to
reduce expense are aggregated, with the result that less fish are available for every competitor or individual who shares the common pond resource. Thus the strategy that is perfectly and economically rational in isolation becomes irrational, inefficient, or suboptimal when each competitor assumes the same strategy.

Scientific observation should mark a moment of first concern, of when potentially disastrous impact is first witnessed and discussed, to then pass to a strategic view of causation and instigation. Essentially, a strategic view to systemic adaptability concentrates upon the dangerous competitive tendency of causation, which is here given the label of competitive insecurity. The problem of physical impact and loss is caused by and exacerbated by the central tendency of competitive insecurity – when individuals must take short-term strategies, which they may know to be of long-term detriment to both themselves and everyone else – for fear that their competitors will gain advantage from doing so first. This obviously becomes a self-fulfilling prophecy, making it rational for each to predict and then take the most short-sighted yet immediately beneficial strategy. This introduces a notable quality to competitive insecurity, in which the individual freedom of choice is constricted by concerns of individual competitive survival.

Significant themes that underlie this dissertation develop from and upon this central concept of competitive insecurity. Competitive insecurity is at first the problematic tendency to be measured, with growing instances of its harm and suboptimal outcomes used to indicate systemic response. In doing so, and in addition, competitive insecurity endorses a view to individual strategies, and shifts the problem focus from pure physical problems to one of suboptimal competition. Consequently, the problem to be addressed also shifts from physical degradation to that of alleviating competitive insecurity.
IV.

C. Reconsidering Solutions

As the core problem to be addressed is competitive insecurity, the solution is argued to lie in leading individuals out of situations of forced and uniform choice. The proposed method of solution lies in embracing individuality in a very real sense of difference: of allowing, and indeed encouraging, individuals to express themselves through competition in different ways from one another. On the all important systemic level, the proposed theory embraces the notion that the best results occur when individual competitive activity as is very as possible, so as to produce the greatest possible number of techniques and strategies to serve as solutions to future and unforeseen problems.

Examples from the previous heading on reconsidering outcomes may help justify a future looking perspective; a perspective that is reconciled to the interconnectedness of impact, and the unpredictable future situations that may arise from the intertwining of economic strategies with the physical environment that in turn revisits impact upon individuals. Assuming that previous generations and groups of individual competitors do not plan to have the consequences of their behaviour balloon in effect to the detriment of future generations, then one must account for the unforeseeable nature of economic impact, and the need for an adaptable, response system of competitive regulation.

The fact of unpredictability should lead one to the embrace of indeterminacy and modesty: an approach that favours no one strategy or technique as providing all the answers, or of having achieved perfection above others in finality. Exception is taken to the widespread philosophical and theoretical school of pragmatism, which may be seen to influence, or at least coincide with, so much of legal and economic theory. Pragmatism holds generally that there is
no one absolute truth possible, and that accepted knowledge and social value is but an evolving social construction of what works best as accepted by the majority in present circumstances. While the above recognition of evolution is appealing partially, pragmatism’s neutral view to outcomes is problematic and ultimately an obstacle of further evolution, competitive, social, or otherwise. Legal and economic evolution under pragmatism assumes that the next and new idea, if any, will win out. This at once underappreciates the extent to which political and economic organization must inevitably favour the status quo, or the last winner, adding additional weight against the freedom of new solutions emerging. More importantly, pragmatism suffers from a key logical shortcoming: if individuals are (rightly) to be the location of individual of innovation, then taking a neutral position as to the competition of techniques, within a ‘marketplace of ideas,’ does nothing to support the ideal which is supposedly at the heart of the philosophy, the evolution of useful ideas.

A neutral view to progress and the competition of ideas is in effect an endorsement of the status quo, for it demands that new ideas not only win over the public, but all the governance instruments that are founded upon status quo assumptions that skew public perception toward it. When an economic, and especially legal, theory claims fidelity to pragmatism and its supposedly flexible basis in the marketplace of ideas, it is of questionable meaning when there is no mandated institutional means for encouraging the very individuality that is the only means of producing competing and contrary ideas.

The theory of path dependence, a variant strand in evolutionary biology and economic theory, proposes that once effective techniques may win out because of particular and time limited conditions, thereby to gain a virtual monopoly on procedure despite evolving need or efficiency. For once the previous limitations or conditions are altered, it may no longer be found
that the successful practice is as useful in meeting present or future demands. An idea or technique that was discarded long ago, or more probably never considered, may be more adept at handling a present situation, or a wider array of circumstances; yet the built up infrastructure around the previous technique makes this space of improvement impossible. For example, the colonial trail cut by fur traders that swerved around a wolves den, to later become a worn path, a frequented road, and eventually a paved highway, is an inefficient route between cities A and B when the threat of wolves has long since passed, but the costs of undoing past developments outweigh the gains of reconstructing as if the problem of moving between and A and B were considered anew and for the first time.

Legal and economic theory, to the extent that they represent and influence policymakers and decision-makers, must be seen as part of the infrastructure impeding more optimal solutions for the present and future. To continue with the path metaphor of above, pragmatism is neutral as to which ideas win out, and therefore sits in wait for an individual idea to emerge of such magnitude that it overcomes not only all personal predilections for the same, but also the entirety of institutional build-up around the status quo. Incremental change may be easily accepted by pragmatism, admittedly. But the belated wait for the acceptance of a monumental idea of revolutionary effect means that pragmatist followers may be a source of conservatism over dynamism, which they can only be convinced out of once the majority of society has already passed them by. If individuality is the source of innovation within the ‘marketplace of ideas,’ which pragmatists support theoretically, then institutions of governance should be directed with all effort to ensuring that individuals have the utmost ability to offer their own and potentially monumental ideas. Toward this end, a neutral stance as to content and outcomes is admirable, while a neutral stance as to the ability of attempt is both harmful and hypocritical.
The means of alleviating competitive insecurity (and the means of effecting monumental change to convince pragmatists of usefulness) is found in individual creativity. Individual innovation and their authorship of new ideas is the primary means of achieving a new ideal of usefulness; the paradigm adopted next because it best meets new and novel demands. Recalling the sense of unpredictably from the above section, in which competitive strategies and the physical world interconnect with increasing complexity and difficulty, encouraging individuality becomes an essential way out the causation impulse of competitive insecurity. Individuality, in a competitive sense, is thus the means of achieving the best solution or technique with which to answer unforeseen problems visited upon the present, as dictated by events, and the means of ensuring that unforeseen problems of the future are similarly provided for in the variation of individual innovation.

Calling for an increased diversity of strategies, especially in response to situations of suboptimality and competitive insecurity, may give rise to confusion on the recognition of difference, or contra uniformity. For the sake of clarity, it should be stated that the observation of variation within a modern consumer marketplace options does not necessarily equal a finding of diversity. For instance, consumers of a certain product may face a wide array of choices both by way of company origins, of labelling, packaging, marketing, etc. This variation of options does not reflect diversity if there is not a corresponding reflection of strategy options for the competitors who produce and then offer various products. When the basic strategy of all individual actors, whether of state, firm, or person, within a competitive field is uniform, such as to pollute a common resource to save costs, then diversity is needed to identify difference in this single and underlying assessment of competitive action. In sum, strategic diversity refers to an
alteration to the behind the consumer marketplace facade of what is advertised, to inquire as how competitors assess their best approach in providing their services into this marketplace.

The concentration upon individual innovation speaks of a refined view to legal and economic progress, in which a stance toward unknown problems take precedence over problems solved previously and in the past, however recent. An evolutionary inspiration to the theory on offer may be explained in no farther a source than the colloquial saying of ‘nature loves diversity.’ To continue the brief and simple analogy of biological evolution further, it is the environment which selects out from a field of unpredictable genetic variation that which will be of greater success in survival and of reproduction. Imagine the first giraffe born with an oddly higher neck than its counterparts, and the advantage this robust giraffe would hand down genetically in the ability of reaching high placed foliage on African plains. Two unpredictable screens collapse upon one another, so that further progress is based upon the terms set by the environment, but are to be answered or not by the genetic variations offered up by individuals and species.

The ideal of nature loves diversity may be translated into regulatory ideal quite simply: individual competition is to serve as genetic variation, offering up innovation unpredictably and in various forms; while regulation is to serve as the environment that encourages variation through reward. At this point the biological analogy must end, however, for the object of a theory of diversity is not to select out success, nor define economic outcomes. The market and the function individual choice is to assume the role of environmental selection, as a theory of diversity remains merely the method for ensuring that this market selection is made from the widest possible range of options.
The limitation placed upon diversity is one of consistency – for if individuals are to serve future and unknown objectives, the system itself cannot favour certain ends above others, as this would lead to the same type of status quo bias that detracts from pragmatism and neutral liberalism. Neutrality in this instance is to be taken in another direction, for governance shall take an active role in promoting private behaviour along the minimal lines of requiring that individuals should be encouraged to compete differently from one another. Though this active role of governance is the antithesis of traditional liberal and economic individualism, it is restrained, and value neutral – that is, it is not the state directed outcomes or valuations of activity associated with socialism. The goal of a system of diversity is allowing for wider consideration, contemplation of viable attempts at success. Though they might fail, the greater the number of attempts being made at novelty are thought to be to society’s advantage.

With the aim of encouraging competitive variation, a system of diversity would promote the widest and constantly renewed potentials of strategic attempt. As neutrality limits the role of a theory of diversity in terms of selection, with neutrality paramount and excluding institutional selection of outcomes, so too does it limit the scope of reward offered to promote this variation. Quite simply, were a reward too appealing, or a straightforward gain, every competitor would immediately adopt their strategies accordingly. This may favour a mandated policy, and be favoured by those who espouse discrete issues, but the object of a theory of diversity is to make competition work toward unforeseen issues – that which is unknown and therefore probably not of political concern at the moment. To this end, it would be hardly innovative to grant a systemic incentive such that all arrange around a new and uniform strategy.

An incentive change under diversity must hold out a degree and measure of risk, otherwise all would immediately adopt their strategies to a new accumulation point and thereby
defeat the purpose of differentiation. If differentiation is to have the added systemic benefit of potential responsiveness, then different paths must be taken from the status quo. Incentives are to be structured so that the previously impossible becomes possible; but just barely so. To make gains from the added latitude of diversity style rules and incentives requires individual ingenuity and innovation. Diversity creates new space for attempts, but a gamble on individual attributes and reception must still underlie the proposed system, ensuring that new boundaries are pushed with the pressure of both success and failure.

V.

D. A Regulatory Philosophy of Rights

A theory of diversity is centred upon a method of differentiation, but it may and should be more. Diversity should receive and incorporate social content to prevent it from being a mechanism of differentiation without direction; of economic purpose without moral and social value. The introduction of social content to serve as the means for defining the incentives toward differentiation requires a democratic element for diversity. As diversity is a principled system, in which a method of differentiation takes precedence over current assumptions, its extension into political and legal theory should be similarly principled and justifiable from a start position that is to carry forward independent of social redefinition and political mood.

With a concentration upon the promotion of individuality, to ease competitive insecurity and promote future response, the basis of diversity in political organization should obviously be made upon individual rights. A distinction will need to be drawn, however, between the individualism of traditional liberal democracy, of Lockean liberalism and its classical economic counterparts, and individual rights under diversity. Neutrality as to individual beliefs and
concerns is of course maintained, but under diversity governance would not be neutral as to the ends of individual behaviour: meaning some activities will favoured over others. However, the favoured ends of individuals are unspecified, and as the object of diversity is difference, the extent of governance involvement is to encourage that liberty is not a private case of individuals being free to behave and compete in the exact same manner as everyone else.

Perhaps in this way a theory of diversity transitions in philosophical proximity from liberal individualism toward a form of teleology, or communitarianism, which sees democratic group concern take priority over individuals rights. In truth, diversity uses individual rights as but a function of ensuring future welfare of society, and of wider group concern. Yet, as individuality is the key function and expression needed for a system of diversity, whose method will not allow for an infringement upon its essential element of individual innovation, it may be said that a blended liberal approach is attempted.

Offering a philosophy of rights premised upon diversity serves at once to complete the method of variation with important elements of social content, and to justify the theory itself from a position of individual choice. The method of diversity proposes a solution to the competitive insecurity problems of choice. Inspired by the work of John Rawls, the legal theory of diversity proposes that the method of diversity would be chosen as the ideal system of competitive organization by individuals free to choose without the burden of circumstance.

VI.

The use of individual rights to derive priorities of economic organization received its most well-known modern consideration in the work of John Rawls. While Rawls’s most famous work, *A Theory of Justice*, explicitly avoided thoughts on individual strategies within
competition, and instead offered a theory of post-competition distribution of society’s resources, two major procedural insights to competition may be gleaned nevertheless. A theory of diversity is developed with two main procedural concepts borrowed from Rawls: 1) abstraction, and; 2) self-interested selection in uncertainty.

Rawls’s theory is argued for through something of a thought experiment, in which individuals face a hypothetical creation of their new political society from a vantage of ignorance as to their past abilities and their future economic potential. Within this negotiation period over their new society, the original position, individuals who are blind to their personal circumstances, behind a ‘veil of ignorance,’ have to agree upon political principles. In regard to key distributional questions, Rawls argues that self-interested individuals would vote to maxmin – have the bottommost position maximized or raised as first priority, for fear that they would find themselves occupying society’s bottom rung once the veil of ignorance has been lifted.

Inspired by Kantian individualism, inviolable and universal beyond social definition, Rawls argued that individuals had no moral claim to their talents and individual advantages. Group agreement in abstraction serves to sever self-interested individuals from their circumstances so as to make their agreement abstract, or removed from the prejudice of possessing features or resources prior to regulatory design. Turning once again to thoughts on international coordination, abstraction would serve a similarly essential role in removing the myriad advantages and differences of circumstance that prefigure negotiating objectives. As with Rawls’ principles of justice, an international system of competition should be premised upon principles that could be justified as reasonable and fair from a point of abstraction and the freedom from situation.
A further benefit available under abstraction is the scope of how individual choice manifests itself. While the above usage of abstraction is concerned with the content informing self-interested choice, namely individual circumstance, it remains that abstraction may also point to priorities of selection that are not self-interested in nature. Behavioural evidence, gathered from abstract experiments such as the Ultimatum game, indicates that descriptive failures in the economic assumption that individuals are rational maximizers of their self-interest are not simply cognitive quirks, but may instead be said to result from the greater concern for systemic fairness in certain contexts. More to the point, is the privileged theoretical role ascribed to abstraction by scholars such as Amartya Sen, who note the central quality of abstraction in permitting for a relief from relentless self-interest. Abstraction, then, is seen to provide for the opportunity to display individual choice priorities apart from self-interest, whether it be fairness, or for a more altruistic concern for others, including an environment suitable, viable for future generations.

The second feature of abstraction argued for here involves a wider choice in value potential, and may be seen to add to the feature of self-interest in uncertainty. Rawls’s thought experiment presents an alternative manifestation of self-interest to that commonly found in present economic society. Self-interested individuals are rendered cautious by the uncertainty of their future and actual positions in the society they are designing, and are thus made indirectly considerate of others who may equally fill the same positions contemplated. Importantly, however, Rawls merely altered the process of self-interest, he did not allow for alternative priorities in individual choice. It is Rawls’s ingenious decision structure that points toward redistribution, not the individuals themselves. A theory of diversity uses a fuller view from abstraction to achieve a truly alternative and coexistent conception of individual choice from and between self-interest and other social value.
Beginning with a hypothetical start to economic organization in abstraction, the question remains of how abstracted individuals would choose the principles for their new competitive system of regulation. Unlike Rawls’s conservative choosers whose self-interest leads to an assurance for the safest bottom-most position, self-interest is argued here to likely and reasonably lead to an alternative view of success, with individuality in ascendance but not the exclusive value. Individuals would likely manifest a more optimistic, or even gambling, assessment of their chances for success, and the rewards due to it. Even absent information as to their actual capacities, individuals are bound to favour a greater appreciation for success, and the rewards that should accompany it, regardless of their individual achievement. A respect for success is independent, even if at times grudging, and is more persuasive than the resentment features of making success serve only those worst off. This means both a skew toward a reward system for individuals who succeed to the narrow pyramid top of competition, unlike Rawls dominating bottom, and a principled encouragement of the space and potential needed for individual attempts at success.

Individual success alone would hardly require a principled regulatory basis beyond the minimalism of libertarianism and laissez faire capitalism, but the matter becomes more interesting and nuanced when the alternative expression of individual choice is introduced into the equation. Although conservative thoughts on feared for individual failure should not come to dominate a system of organization, it is reasonable and rational that realistic alternatives to outright success are contemplated. Therefore, as the first impulse of our hypothetical choosers would be to imagine themselves as the winners of future economic competition, the second impulse no doubt would be contemplate the situation should they not win. Now it must be
stressed that ‘not win’ is different from lose. Whereas lose denotes the bottommost position of competitive result or capacities, the notion of not win is more general, meaning that the individual is simply included in the great bulk of others who do not reach some pinnacle of success. Not win, then, entails a consideration of what it is to be a member of society’s middle mass or majority, neither top nor bottom, but simply the vast majority who is other than the winner.

The thought of not win has important implications for the principles of organization, for it extends from the same individual in an almost simultaneous manner, as the chooser contemplates both potential winner and group. There is to be no one position priority or dominance as under Rawls, but rather a fuller consideration on the qualities of an ideal winner in economic competition. The ideal and rational selection question asked by an abstract chooser may be seen as a variation of the following: “I would like to win, but assuming I do not, what of the person who I lose out to?” Such a question maintains a self-interested vision of individual success, but may also factor in the vantage of the middle position group occupant. The point of such a question is essentially, “assuming that I do not win myself, what are the qualities of a winner that I would most willingly lose out to?” Note that the question does not equal “how do I benefit most from the winner?”, which would equate Rawls’s maxmin position. Such a resentful position is both contrary to treating individuals as ends in themselves, and is of course precluded by individuals’ initial impulse to favour success as quality itself independent of actual attributes. The ideal answer to the question on the qualities of competition’s future winner(s) would be that it is preferable to have success rewarded in such a way that social goals are achieved en route to the winner’s personal gain.
Asking on the qualities of an eventual winner does make the winner serve indirectly the widest group benefit, but it does so in a sense wider than a mere consideration of the choosers feared future position. Therefore, asking on the qualities of the individual winner contains a measure of self-interest, by furthering the middle group benefit of which the chooser will by probability join, but it is not tied completely to the individual’s feared position. By rendering the wider group the beneficiary, the chooser blends probable self-interest with other regarding concern, and a measure of altruism that is available under abstraction. Indeed, abstraction allows for a unique opportunity to simultaneously imagine success and define the attributes of the faceless winner who will most likely win out over the chooser.

If the first instance of a chooser’s thought is occupied with winning, more reasoned consideration will place the chooser in the other and wider group. Faced with the imagined prospect of another’s success, a self-interested chooser who simultaneously contains impulses toward fairness or even altruism would conclude reasonably that a competition’s winner should at least achieve something worthwhile to others. Put in the language of strategy, the imagined winner should preferably be one who has raced to the top rather than bottom; one who has achieved gains and advances that benefit others rather than simply one who has most efficiently offloaded costs unto third parties.

VIII.

The ideal choice found in abstraction, which speaks to individuality and qualities of an unknown winner, remains to be translated into systemic principle. A theory of diversity is offered as the ideal response to ideal choice. A system of diversity would contain three broad principles, or components of: 1) an evolutionary and outcome neutral system; 2) in which social
goals are to be the means of differentiation, and; 3) construed so as to further and favour an assumption that individuals require a certain autonomy within which to be able to offer up new attempts and techniques.

The first element or principle of diversity connects with evolutionary biology in the recognition that systemic selection, by the market in this case, remains ultimately unpredictable. It is unknown how genetic variations occur in the natural world so that the environment will favour one genetic variation over another. After the fact it may be obvious that longer neck giraffe offspring will have an advantage in feeding off the high foliage of the Savanna, but it remains uncertain as to what drives such genetic variations in the first place. The genetic aspect of competition may be equated with individual ideas, while the market may be thought of as the environment selecting out for success. The market may be influenced as to the selection of individual strategies, but the individual level of variation should remain independent of social design. Individuality is thus paramount in such an evolutionary system, for it assumes that uniqueness and variation will occur best from the expression of individuality.

The evolutionary regulation system of diversity is value neutral as to the emergence of techniques or solutions, and instead focuses upon the environmental, market forces that encourage individual attention. A system of diversity may give democratic weight and advantage to alleviating certain social problems as a means to individual success, but the system remains inherently neutral as to how these incentives are incorporated into future successful strategies and outcomes. New and novel ideas must emerge from individuality, with a system of diversity altering reward structures so that tree tops are considered a viable means of sustenance, for instance. How longer necks evolve to take advantage of this previously untouched resource, if at all, remains a matter for individual creativity in competition.
The second principle of diversity moves on from the realization of the market as a social environment. While state or regulatory solutions should not be imposed upon a group of competitors, it is nonetheless open to influence the environment that selects out for success. If individuality and the creativity of competitive attempts are to be the motor of economic and social gain, what is needed is a mechanism for encouraging strategies away from the minimal baseline of sameness often witnessed in status-quo competition. Social goals provide the means for individual differentiation by establishing alternative paths to conceiving, achieving success. In terms of strategic thinking, instances of competitive insecurity display a lack of options, a minimal singularity of strategy, which should be alleviated with alternate routes of competitive devise. Social goals, therefore, provide an additional option within individual strategy, an alternative route to success which is meant to trigger further and unforeseen creative attempts.

The third principle is meant to qualify the second principle of social incentive within the paramount priority of individuality. Accordingly, all usage of social goods as the means to differentiation should be interpreted in light of a view to individuality and the potential for each to make a contribution to society’s unknown and unpredictable future success. Simply, the furtherance of individual autonomy should rank higher than, and influence, other social goals of incentive.

The principles of diversity may be furthered illustrated and clarified with an example of hypothetical application. Imagine that an ideal system designer is summoned to institute the principles of diversity in accordance with the ideal choice witnessed in abstraction. Beginning with the address of choice in abstraction, the designer might define the general scheme of priority numerically and as follows:
The labels A, B, C, refer to three competitors, while the corresponding number below represents their individual gain in round one, before the prearranged principles of social goal and concern have been incorporated. The labels of A(2)... refer to the practices of the competitors which have impacted upon a prearranged subject area of concern, such as the environment. In the most straightforward manner, the administrative object would then be to incorporate the secondary benefits into each actor’s individual result. In this simple example it would enough to conclude that B and C should have their individual results (through taxation relief perhaps) include the added benefit of two units. The result prior to social priority, the non-bracketed values, would find A the most successful. With principle incorporated, the bracketed values, it would be B who is most successful. The practices of B are therefore to be the most rewarded strategy, conceivably altering the conceptions of other competitors who will respond with renewed assumptions on what is successful.

And while the above numerical example corresponds with the ‘qualities of the winner’ approach indicated by ideal choice, it would be the duty of the designer to envision a wider competitive system that builds from these impulses into the greater principles of diversity. First, an evolutionary assumption of unpredictable success is established through an economic measure such as taxation, or trade tariff, which will act as the reward for various strategies. For present purposes let us assume a universal tax, or tariff (the value T), upon the goods exported from each member country, or ‘individual.’

Second, social goals (SG) are to make up the rewards that encourage differentiation, taken here as a group of labour standards, environmental degradation, and education (L, D, and E
respectively). Notably, present here is a mix of concerns, both for purposes of social advantage and, more importantly, for the opportunity of individual attempts at success. The designer would accordingly devise an indexed system of economic reward, in which the satisfaction of prearranged social priorities, with the three areas above as example, would lead to preference in economic treatment. In keeping with the third principle of diversity, principles which encourage individual autonomy are to be furthered especially, and in this case could be seen to favour the lessening of environmental degradation (D). The consequence of social goods upon a competitor’s standing may be symbolized by the value of C. The designer’s simple development from the ideal choice matrix displayed above may take the following form:

\[ C = T \times \text{SG ratio} \]

where SG ratio = \% gain in L + D(x 2) + E

The point of moving between the simple examples above is to note the introduction of multiple concerns for multiple rewards. An indexed system of prearranged reward offers the opportunity for a widely improved differentiation of viable strategies. Moreover, an adequately designed system promises equal opportunity for each to at least envision success. Note the above scheme example and imagine an economically developed and less developed state facing competition: while the developed state may be assumed to have immediate advantages in the form of an educated society (E) along with stricter labour standards and enforcement (L), it is the less developed country that has an equal advantage in having much less of an impact upon others (D).

The future effect upon state and individual strategy is imagined easily enough, for either developed or less developed state may seek to gain economic advantages for its individuals and industries (T) by improvements in areas of weakness rather than exacerbating past and current
problem areas. The less developed may wish to maintain some environmental advantage, which now translates into economic gain, just as the developed state would have renewed incentive to lessen their environmental competitive disadvantage. So while the important first and second principles of diversity, of evolutionary system and social reward, set the structure of competition, it is the essential ingredient of autonomy and individual potential which allows for the ideal that each individual actor will have to begin from current positions to seek reward. The ideal system of diversity, therefore, allows for creativity to compete in a regulatory first instance, in which present circumstances are accounted for but not favoured in the way forward.

IX.

The theory of diversity sketched above is intended to blend conceptions of the right and the good for a more ideal arrangement in the area of international economic organization. Diversity thus bridges between and combines conceptions of individual rights, namely the inviolability of individuality, with conceptions of the social good, as contained in both economic social welfare and non-economic visions of social purpose. While no side of the individual and social good divide is provided for stridently, it is argued that an improvement is made to each in a blended form of two previous oppositions. Operating within the confines of a system of competitive regulation, a theory of diversity results in a unique endpoint of defining a social good dependent entirely upon individual rights. While diversity may be thought of as social good, as it places the ends of social purpose above the articulation of individual rights, the concept of individuality is the fundamental basis of the good itself. Individual rights, therefore, become the essential function or means of achieving the end of individual differentiation. Unlike usual conceptions of the social good, whether it be community democracy, truth, or beauty, the
good of diversity is necessarily value neutral. Diversity, at its heart, is about the imposition of a process of regulation which demands change through the constant encouragement of individual difference.

The underlying point of these machinations between right and good is to achieve a viable improvement to current economic problems and status quo international economic organization. On one level, diversity proposes an organizational solution meant to improve group benefit via individuality and its increase. In direct response to problems of market failure, rules of competition are to provide avenues for both the increase of individual and group gain. Through a priority of lessened impact and the respect for the autonomy needed for individual attempts at competitive creativity, diversity offers an other-regarding and principled system of competitive balance and reasonableness.

Furthermore, even should diversity’s claims to simultaneous economics improvements for both individual and group be ignored, there remains an important evolutionary and theoretical message of importance. Too often theories of law, and especially economics, view ideas as existing within a historical and competitive struggle; a struggle in which present forms and assumptions have deservedly won, thus justifying their present ascendancy. While it may be true that past solutions effectively met problems of the past, this does not mean that status quo concepts are apt for future and as yet unforeseen problems. It may be that our present theoretical assumptions are ideas grown indolent through want of serious testing. Diversity is an institutional, regulatory commitment to favour diversification and reject any possibility of the status quo as the final, perfect point in the evolution of thought and regulation. Diversity involves a procedural, principled commitment to further individual creativity at the expense of a stasis in public belief. Diversity is ultimately about planning for future problems and their
solution from a position of modesty, assuming that we do not know the answer, much less the question, to future problems, while all the time hoping that individual creativity within competition may yield unforeseen yet valuable insight.

A Note on Scheme of Progression:

The above introduction will have hopefully indicated the three major elements within this dissertation’s progression. First, international problems of market failure are considered in light of strategies and the economic impulses toward self and system defeating cycles of competition. Second, a redefinition of legal and economic progress is offered to meet conditions of unpredictability, and to arrive at an evolutionary method that encourages constantly competitive variation with which to meet society’s future challenges. Third, an evolutionary approach to international regulation is translated into a theory of legal rights.

While the above three elements characterize the major steps in articulating a theory of diversity, it must be noted that the third and final step involving a theory of rights is the most complex and, therefore, demanding of further and subdivided consideration. Accordingly, chapter three examines major themes in liberal political philosophy as the most likely influences on constructing an agreement of individual actors toward meeting social goals. These main themes of liberal social organization, identified with the right and the good, are held to a standard of responsive to dramatic system change and failure in line with the type treated in chapter one. Chapters four and five address the wider potential of individual interest available under choice situations of abstraction, with individuals severed from the prejudices of their current situations so as to permit for their value preferences to include the welfare of others, including future generations, and non-human organisms and life-forms. Chapters six and seven articulate a theory
of diversity, as first the ideal system choice for individuals in abstraction, and then as a useful reform to the study of international law with diversity acting as a normative, optimal example to hold against current affairs.
Inherent to an analysis of international law are difficulties not known with domestic legal matters that enjoy the certainty of state sovereignty and the potential for strict legal enforcement. An added layer of difficulty may be found, however, in international legal attempts at regulating the environment, for the absence of order results in, and is combined with, a further element of market failure. Without a defined and legally mandated cost to pollution, the market fails to attach an accurate price to production, and an externality is created. In the following chapter, the dynamics of market failure are examined in relation to the issue of global warming, and the Kyoto Protocol on climate change in particular. The issue is not only topical, but the subject matter example of atmospheric pollution is particularly apt for revealing the tremendous obstacles to collective international action, and the creative coordination solutions likely needed.
Failure on the atmospheric level need not be explained away by the absence of a pure legal order, for there are certainly instances of coordinated international regulatory success, but the degree and trend of failure will tell us something about how ambitious, or even revolutionary, coordinated change may need be in this given subject area.

Returning to thoughts on the theoretical arch of this overall project, it may be useful to first reiterate the focus on a view to strategies and the incentives informed by rules. Secondly, and arguably more importantly, the strategic lens should be placed within its theoretical role within this greater project. As this project involves the contemplation of achieving more efficient and equitable rules, which should be arrived at democratically, the strategic vision brought out in this first chapter may be thought of as an essential first level of inquiry. Before a hypothetical set of individuals and decision-makers choose their ideal future competitive system, it would be logical to have an evaluative method for examining what currently is - the nature of the strategic failure of current rule structures. As later parts and chapters argue for how rational individuals would best choose diversity as their guiding principle, this first chapter provides the method for these hypothetical rule designers to evaluate the systemic environment they hope to improve.

Before the weighty question of which way forward is addressed by our hypothetical and international society, given the luxury to retreat into abstraction and begin anew, a rigorous view of past and present failings is needed. In general, then, the following first chapter provides a method for evaluating the dynamics of what exists within the international system, against which to gauge the needed degree of coordinated response, while the second chapter provides insight into the individual potentials and concerns that system designers must use as their primary tool.
I.I INTRODUCING STRATEGIC ANALYSIS FOR INTERNATIONAL LAW

The Kyoto Protocol (Kyoto) on climate change is one of the most ambitious attempts to address a global environmental issue to date. Kyoto is chosen here as a framework example for how hypothetical system designers should respond to instances of collective market failure, both because of the Protocol’s ambition and its topicality. As to ambition, the Kyoto focus on climate change is atmospheric, and thus necessarily global in its attention, and demonstration of the irrational economic tendencies of states and the individual actors they contain. As to topicality, viewing Kyoto at a time surrounding its formation and ratification brings into relief the intense and often rationally contradictory impulses that influence agreement or not. Reduced to the basics of explanation, Kyoto is chosen as a framework case because it is the largest and latest environmental demonstration of the difficulties of collective coordination on the international level. Furthermore, Kyoto’s failings serve as a representative justification for the more abstract and ambitious decision-making model that is to follow in this dissertation. So while the scope and importance of Kyoto’s focus area of climate change ensures its centrality amongst modern international legal attempts, the revealed tendencies of failed coordination are of a more general and pressing concern.

As with many initiatives aimed at environmental protection, Kyoto has been met with both criticism and inaction. In an anarchic international system, where there is no

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2 See, generally, Scott Barrett, ENVIRONMENTAL TREATY MAKING 360 (2003): (noting that Kyoto is criticized because the
authority above that of the sovereign state, the issue of adherence to agreements is especially problematic. Without binding authority, enforcement must arise indirectly from the collective itself, making compliance, rather than content, the reflection of international norms. Unlike domestic laws that depend upon the authority of the issuing state for legitimacy, the legitimacy of international law is not created, but found in patterns of behavior. International law gains legitimacy when member states join in a united consensus, where before there was only autonomy and separation.

When considering the relative success of some international regimes in comparison with others, it becomes apparent that a lack of authority in the international system is not necessarily fatal to altering behavior. That one regime succeeds while another fails indicates that it is the subject and not the system that is determinative. If the success of international law is subject based, then the social perception of value underlies every regime. For instance, the phenomenal success of economic regimes, such as the World Trade Organization (WTO), rests in large part upon the importance of their subject matter to the concerns of decisionmakers. In this sense, it is not the rules themselves that require examination, but the social perception of the game that is played.

International environmental law presents a unique opportunity to objectively scrutinize a system against the principles that it purports to hold. In the past, criticism of economic structure has largely been centered on normative disagreement with the human consequences resulting from competition. This chapter assumes self-interested
competition is a given and questions the rationality of the system upon its own terms. Instead of challenging the system in place, this chapter questions whether the market provides the rational results so often claimed.

The correlation between environmental degradation and individual well-being allows the environment to serve as a measurable connection between economic practice and social goals. The environment provides a scientifically observable screen upon which individual economic strategies contrast with collective benefit. My immediate purpose in this chapter is to construct a model for discerning paradigmatic breakdown and its systemic consequences. The question is, in what situations do dilemmas of rationality lead to contradictions in the basic aims of a system? The significance for international law lies in the possibility of constructing a logical system with which to view the effect of new knowledge upon preexisting assumptions and patterns of behavior.

The first portion of this chapter discusses how new knowledge can redefine an apparently stable system. The problems posed by climate change are reflective of a modern realization that while the environment is a connected whole, the world’s organization is not. When we learn more about a subject that concerns us, we often find that a problem cannot be resolved using the mechanisms that we have traditionally relied upon. Atmospheric issues such as climate change reveal that causation is not directly attributable to the actions of any identifiable structure of authority or responsibility. Scientific data illustrates that our international atmospheric commons is a shared resource that an individual state may abuse at the expense of others.

The second portion of this chapter introduces the concept of an international commons. Also introduced is the theory for predicting rational strategies in a commons.
Insofar as decisions involve two exclusive values—for example the benefit of being able to pollute and the benefit of clean air—it becomes easy to mathematically represent the intersection between individual strategies and optimal benefits. Predictably, individual perceptions of interest rarely result in decisions that are most beneficial to the whole, as each individual strategy alters what is available to all. The tragedy of the commons\(^5\) and the Prisoner’s Dilemma\(^6\) are examples of situations in which an individual’s best strategies (Nash Equilibrium\(^7\)) are inevitably suboptimal for the whole. A dilemma of rationality occurs whenever a game promotes rational strategies that cause irrational results. As with the tragedy of the commons, it is rational for a player to offload costs unto the whole by polluting, but as every player realizes the same rational strategy, the available resources are reduced and everyone is worse off.

The third portion of this chapter develops a simple game theory model for viewing the dynamics of information assimilation. By comparing individual strategies with knowledge signals, in the context of international protocols such as Kyoto, we can determine whether players are learning from the consequences of detrimental group behavior. If the distance between individual choice and the benefit to the whole is widening, then actors are not recognizing a new paradigm of thought. In this sense, we may differentiate between situations that call for regulatory change and those that require a paradigmatic shift. Where regulation attempts to alter behavior through traditional adjuncts to game play, a paradigm shift involves environmental protection as a goal that


\(^7\) John F. Nash, Jr., *Equilibrium Points in N-Person Games and the Bargaining Problem*, in *CLASSICS IN GAME THEORY* (Harold W. Kuhn ed., 1997).
underlies the entire economic game. Instead of modeling the environment as an external appendage to economic market mechanisms, a paradigm shift would ensure that environmental concerns precede the functioning of the market itself. We must create a model for determining when knowledge is incompatible with systemic imperatives. While some systems have the potential to eliminate problems through regulation, this chapter addresses a different question: whether there are problems that simply cannot be surpassed because they are derived from the rules of the game itself.

Beyond the evidence of a continuing dilemma of rationality, the fourth part of this chapter illustrates when a system faces incompatible knowledge. If a system is externally shown to be illogical from the irrational results that it produces, there is a possibility that irrational results will also have implications for the internal logic of the system. A pattern of behavior appears different under the light of new knowledge, revealing that the behavior motivated by one principle is contrary to that defended by another. What occurs is not a sudden vanishing of legal structures such as the state, but rather that these structures regressively lose their meaning in the game. If one of the central justifications for the state is to provide a solution to the tragedy of the commons, then what happens to that justification when the state is shown to be worsening that tragedy? The state prevents what it once was: a solution to the commons. It may be impossible to say whether there is a truer or inherently better form for law to take, but one can prove when a legal structure is false based upon its own assumptions. New knowledge can reveal how the irrational tendencies of a system can eventually render its founding principles meaningless.
I.II INTERNATIONAL FRAMEWORK

First Postulate:

When international agreements are derived from scientific advancement they reflect a community’s acceptance of new knowledge. Agreements may only be said to reflect changing international norms to the extent that there is an alteration of behavior.

A. Common Resources and Social Divisions

Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. . . . As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, ‘What is the utility to me of adding one more animal to my herd?’ . . . Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him is to add another animal to his herd. And another . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in society that believes in the freedom of the commons. Freedom in the commons brings ruin to all.8

The “tragedy of the commons” is a famous concept, effective for its simple imagery and appealing universality. Before discussing how the tragedy of the commons is a fluid concept open to scientific discovery, it is pertinent to place the concept in a historical context. Dates and specific events are not essential to this discussion, but the notion of social change and development is. Every arrangement and relationship between the individual and the group must involve some sort of social division. Even if there is no overt decision-making process, every social structure is dependent upon social definition and a tacit understanding of what is an acceptable form of organization and what is not.

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Social divisions are simpler commonalities that define what certain things—family, prison, property, etc.—look like from afar.

Hardin’s passage, introduces a dimensional sense of social divisions. The ownership of cattle represents a one-dimensional division. In this sense, society acknowledges that people may individually own things and animals. In the above hypothetical the problem of the commons arises from mixed ownership: one economic form, cattle, is dependent upon another, land, which has no direct economic cost to the cattle owner. It is important to note that the exploited land has an economic value, and an indirect cost, but that these values are obscured when they are borne by society as a whole. Most societies respond to this problem by giving the land a direct economic value by dividing it into private property.

Property, and other territorial divisions such as the state, represent a two-dimensional social division. Unlike one-dimensional divisions that may rely on custom alone, institutions like the state necessarily involve a level of formal organization. The two-dimensional organization is fundamentally engaged in control; a protective function is exercised by an authority over the commons to insure at least a minimal level of future benefit and access. Moving from a one-dimensional division of ownership to a second level of organization sees the free market blended with a social need for control.

Dealing with a commons is reducible to two key elements: (1) the recognition of a system that engenders limitless maximization in a limited context and (2) the imposition of rules to preserve the exploited resource. With each recognition of wider interconnected economic effects the commons necessarily grows, and with it the area of potential organization. Where a degraded pasture points to the economic activity of one’s
immediate neighbors, the quality of water that passes in rivers and streams indicates a dependence upon distant communities.

Despite the complexity of modern governments and their international arrangements, the organization of the world remains tied to an antiquated two-dimensional model of territory. Recalling Hardin’s famous “tragedy of the commons” and the imagery of a “pasture shared by all,” human experience demonstrates that obligations and restrictions placed on individuals no longer meet the needs of society. As individuals passed from nomadic existence into a settled stationary society, the effects of their behavior became recognizable in their immediate surroundings—the pasture. From the physical observation of the “pasture shared by all,” science has now permitted an awareness of the global ecosystem shared by all.

B. Atmospheric Awareness

Perhaps the most striking aspect of modern environmental degradation is the speed with which concerns have outstripped levels of political organization. The central actor in the international system remains the state, meaning that more and more issues which impact individuals are beyond the control of their representation. Since climate change was scientifically measured, it has demanded a global view.

In 1896 Svante Arrhenius, a Swedish chemist, calculated that a doubling in the atmospheric concentration of carbon dioxide (CO₂), brought about by the burning of fossil fuels, would increase the global mean temperature by about 5 degrees Celsius. In retrospect this was a remarkable prediction, but not until the 1980s did a near consensus begin to emerge about the direction of climate change and the
need to reduce growth in atmospheric concentrations of greenhouse gases.⁹

The importance of Arrhenius’ calculation should not be underestimated, for a five percent increase in global temperature is more dramatic than the lowly number would indicate. Indeed the effects are likely unquantifiable when considering the unpredictable effects of warmer temperatures and increased water flows upon innumerable sensitive species. Regardless of quantification, the effects are likely to be profound, as the international community began to realize in the late 1980s and early 1990s.

The Intergovernmental Panel on Climate Change (IPCC) released its first findings in 1990, estimating that emissions of such long-lived gases as CO₂ would have to be reduced by more than sixty percent just to stabilize current levels. Member countries to the Organization for Economic Cooperation and Development (OECD) announced their intention of reducing CO₂ emissions, “[b]ut in contrast to the case of ozone depletion, most countries have not lived up to their unilateral commitments to reduce greenhouse gas emissions.”¹⁰ This dichotomy between intention and individual action leads to a question of compliance: if the directives of the Kyoto Protocol only suggest that industrialized members reduce their emissions to 1990 levels,¹¹ why is it so difficult to translate these comparatively modest intentions into actual behavior?

C. Conceptual Examples

The increased public concern over environmental degradation in recent decades has led to a broad international movement to coordinate responses to the problem of the

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¹⁰ Id.
¹¹ Id.
atmospheric commons. Two agreements in particular, Montreal and Kyoto, illustrate the contrasting effectiveness that exists between many modern environmental regimes. The Montreal Protocol, which aims to reduce the use of CFCs, has been quite successful.\(^{12}\) The Kyoto Protocol, on the other hand, has had no such success in reducing emissions of CO\(_2\) as it has only recently been ratified by enough countries to bring it into force.\(^{13}\)

For Kyoto to come into force fifty five percent of countries that produce fifty five percent the world’s CO\(_2\) emissions (the Annex I countries) were required to ratify it.\(^{14}\) The Protocol entered into force on February 15, 2005.\(^{15}\) However, it remains unclear whether the membership will be willing to accept the costs involved and impose penalties upon those who do not. The success of a regime in this regard may be simply defined as the acknowledgement of a problem and the coordination of rules of behavior that are enforced by the membership to further a solution.

The contrast between Montreal and Kyoto is more than an issue of time, which admittedly is an unfair test since Montreal is a slightly older proposal. More substantively, many argue that once ratified Kyoto would be largely ineffective at reducing world-wide emissions of CO\(_2\).\(^{16}\) As Barrett notes in his book *Environment and Statecraft*, Kyoto was explicitly designed along the lines of Montreal, but lacks the

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\(^{13}\) Kyoto Protocol, supra note 9, at 192. For a chart comparing the Montreal and Kyoto Protocols, see Barret, supra note 2, at 361.

\(^{14}\) Kyoto Protocol, supra note 1, at art. 25; Grubb et al., supra note 12, at 9.

\(^{15}\) For more information on current status, see http://unfccc.int/kyoto_protocol/background/status_of_ratification/items/2613.php

\(^{16}\) See, e.g. Barrett, supra note 2, at 360.
essential enforcement and incentive mechanisms found in Montreal which make real progress likely.\textsuperscript{17}

Although Kyoto elaborates stringent mechanisms for monitoring whether Annex I members are in fact maintaining their emissions at 1990 levels, it contains no mechanisms for requiring them to do so.\textsuperscript{18} Negotiating sessions held in Bonn and Marrakesh in 2001 structured the Kyoto Protocol in a manner that may have created substantial obstacles to its success. An inducement mechanism has been devised in which countries that fail meet their initial 1990 targets on time are given higher reduction targets for the following measurement period.\textsuperscript{19} However, the difficulty remains that compliance under Kyoto is not binding.\textsuperscript{20} Monitoring organizations may only suggest penalties, and members would have to accept treaty amendments in order to make these penalties binding.\textsuperscript{21} If there is no penalty for missing targets, it is unclear what effect the addition of higher targets would achieve. As Barrett notes, the success of Montreal is due to providing both a “carrot” and a “stick.”\textsuperscript{22}

The weaknesses of Kyoto may be characterized as arising from both the construction of the agreement and the concessions used to induce key industrial

\textsuperscript{17} Id.
\textsuperscript{18} Grubb et al., supra note 12, at 142.
\textsuperscript{20} Kyoto Protocol, supra note 1, at art. 18. The last sentence of Article 18 of the Kyoto Protocol states that “binding consequences” of noncompliance may be adopted only by an amendment to the Protocol. See Glenn Wiser & Donal Goldberg, \textit{Implementing Kyoto}, 2 Intl’l & Comp. L. 1, 14-15 (2002) (advancing a new theory to promote compliance with the Kyoto Treaty).
\textsuperscript{21} As Jutta Brunnee has observed, members have generally been unwilling to express their views on which compliance structure ought to be set in place, and it is likely that “the question of penalties will be the most fought over issue in the development of the Kyoto Protocol Compliance Regime.” Jutta Brunnee, \textit{A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol}, 13 Tul. Envtl. L.J. 223, 247, 255 (2000).
\textsuperscript{22} Barrett, supra note 9, at 351.
signatories. In terms of explicit sanctions, Kyoto lacks a mechanism for blocking the trade of goods that are produced in manner inconsistent with the agreement.\textsuperscript{23} Trade sanctions have provided an excellent inducement mechanism under Montreal because countries could block the entry of goods that continued to use the prohibited CFCs.\textsuperscript{24} Countries continuing to use CFCs face a trade burden—in the form of lost access to markets—that significantly outweighs any competitive advantage gained by using the cheaper CFCs. Imposing trade sanctions upon those who do not comply with, or who are not party to, an agreement effectively places a cost upon those not participating.

Kyoto imposes no penalties for those members who do not comply with the agreement, nor any external means of placing costs upon those who are not members. The diverse nature of CO\textsubscript{2} production makes selective trade sanctions upon specific goods unlikely, and furthermore, the current structure of the Protocol would make such sanctions against noncompliant countries impossible. Many of the world’s countries — particularly developing nations — can be party to Kyoto without having any commitments to reduce CO\textsubscript{2} emissions.\textsuperscript{25} Additionally, the world’s largest polluter, the United States, has abstained from participating and Kyoto provides no means to impose a cost upon this nonparticipation.\textsuperscript{26} While Montreal has allowed members to impose an external cost upon nonmembers, under Kyoto costs are borne only by developed country-members.\textsuperscript{27} That is, the initial costs of Kyoto are only to be borne by the industrialized countries that voluntarily ratify the agreement.

\textsuperscript{23} See id. at 307 (focusing on the use of trade restrictions for deterring noncooperation).
\textsuperscript{24} Id. at 313.
\textsuperscript{25} Id. at 373.
\textsuperscript{26} See Barrett, supra note 9, at 215.
\textsuperscript{27} See id.
The prospect that Kyoto will deliver a comparative advantage to those who do not undertake to reduce CO₂ emissions has been a serious concern for many Annex I countries that have contemplated membership.28 The Bonn/Marrakesh process may demonstrate the reluctance of countries to accept the substantial costs of reducing CO₂ emissions within a process of uneven implementation.29 The incentives given to major industrial countries to ratify Kyoto not only lessens the cumulative amount of CO₂ reductions required, but introduces a large measure of uncertainty into the process for giving CO₂ emissions a detrimental cost.30

As with Montreal, Kyoto establishes a framework under which countries can trade pollution permits, making a market for pollution that rewards those who more efficiently and “cleanly” compete.31 The manner in which the agreement is being ratified seriously questions whether there will be sufficient demand to have a functioning market.32 Russia and other former Soviet republics, such as the Ukraine, have 1990 targets that are substantially higher than their present post-Communist outputs of CO₂.33 The former Soviet republics will thus have a great surplus to sell on the market. However, as Barrett details, some of the most significant Annex I signatories who have signaled ratification,

28 Barret, supra note 2, at 370 (noting that as of March 2001, only one Annex I country—those countries that have to limit their emissions—had ratified the Kyoto Protocol).
29 Id. at 371-74. For a discussion on the concessions sought and achieved by various Annex I countries see generally Wiser & Goldberg, supra note 20 and Matthew Coghlan, Prospects and Pitfalls of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, 3 Melb. J. Int’l L. 165, 180 (2002).
30 Barret, supra note 2, at 370-71.
31 On trading within the Montreal Protocol, see Wirth & Lashof, supra note 12, at 105. In terms of the Kyoto Protocol, see Coghlan, supra note 29, at 173. For a discussion on pollution trading in general, see Thomas Schelling, What Makes Greenhouse Sense—Time to Rethink the Kyoto Protocol, 81 Foreign Aff. 5, 2002.
32 Barret, supra note 2, at 382.
33 Grubb et al., supra note 12, at 214.
including Japan, Australia, and Canada, are each entering the agreement with substantial concessions that will lessen their targeted reductions.\textsuperscript{34}

Additionally, Canada unilaterally claimed a further thirty percent credit that was said to account for its exports of “clean” hydroelectric and natural gas energy to the United States, a nonmember.\textsuperscript{35} It is difficult to see how an emissions market will work if countries are able to unilaterally determine their own standards. There would be no need to purchase permits from another member when one could simply declare a new calculation that reveals targets to be suddenly met.\textsuperscript{36} Without the demand for emission permits, the price of CO\textsubscript{2} will provide no incentive for lessening its production.

The Kyoto Protocol may eventually exert considerable influence over the behavior of state actors. The international trade regime has developed gradually, moving from the General Assembly on Tariff Trade (GATT)\textsuperscript{37} to the present WTO, while slowly gaining greater influence and membership. Perhaps developing countries, generally the most rapidly growing producers of CO\textsubscript{2}, will eventually be included within the regime’s requirements. Perhaps the United States will one day ratify. Hopefully the countries that have ratified Kyoto because it was of no present cost to them will bear the burden of future reduction targets.

While such future progress may occur, as of 2007 the prospects do not look good. In 2007, the Canadian government acknowledged that it would not meet its Kyoto target

\textsuperscript{34} Id. at 371-74. Barrett notes that because the Kyoto Protocol does not constrain emissions, countries like Russia will have little incentive to sell their surplus entitlements, and may choose to “bank” them. Id. at 374.

\textsuperscript{35} Id. at 373.

\textsuperscript{36} See, e.g., Henry D. Jacoby et al., \textit{Kyoto’s Unfinished Business}, 77 Foreign Aff. 64: “Kyoto is likely to yield far less than the targeted emissions reduction. That failure will most likely be papered over with creative accounting, shifting definitions of carbon sinks, and so on.”

commitments. This is a further low point in Kyoto’s prospects, as a once strong supporter of the Kyopto principles has become the first Annex I member to publicly announce that their targets would be missed while remaining party to the treaty.\footnote{See: http://news.bbc.co.uk/2/hi/science/nature/6600585.stm} This could arguably dilute the perception of compliance from within the treaty, even as it gets underway.

A salient issue of Kyoto’s success is whether a limited Annex I membership will continue to accept the idea of competing with the numerous countries that have not agreed to, or are not required to, reduce their CO$_2$ levels. Kyoto provides neither the mechanisms to ensure that they do, nor the incentives for inducing others to join the treaty. In the end, for Kyoto to be considered a success, a majority of states will have to agree that it is worth the cost.

Atmospheric environmental issues provide an excellent example for this investigation, because it represents a clear connection between new information and the need for competition to adjust based on the new information. Montreal and Kyoto further illustrate that there are instances where a game adapts to new information, as with Montreal, and instances where competition is much more difficult to alter, as with Kyoto. Yet Montreal and Kyoto are only examples used to illustrate how differing models of success may exist within similar issue areas. Ultimately, this chapter is not about environmental agreements, Kyoto, or even international law; it is about proposing a different way to view law as an instrument for informing competition.

D. Compliance and Consensus

The provision of public goods is constantly at odds with the tendencies of individual actors to seek the benefits without paying their requisite share of the costs, a
phenomenon known as “free-riding.” Indeed one of the historical motivations for the formation of the state was a response to the dilemma of public goods, in that everyone would benefit from a certain service which no one individual would be willing to supply.

Without a world government the issue of free-riding remains salient in the international system. Free-riding requires that enforcement and compliance mechanisms arise directly from the collective membership and that these mechanisms are created and adhered to. While the former imputes the present and the latter the future, the distinction is artificial in that they both represent the same normative value. Normative values are represented by what the collective is willing to submit to in order to achieve the stated results. As such, weak enforcement mechanisms not only predict future failures; they also reflect the present state of value preferences. If a large membership is willing to bind itself to a system of defined accountability, then it follows that strong international support for the initiative exists.

The grandest pronouncements remain hollow if there are no consequences for failing to meet common objectives. This statement is especially true for environmental agreements which deal with the interplay of inconsistent political and economic values. Environmental agreements often represent a collection of good intentions that have good rhetorical value, but they also involve making domestic policy decisions that likely have a significant short-term economic cost. Therefore, short-term economic costs must be counterbalanced by the costs of noncompliance imposed by the membership. As stated by Professor Barrett, in his article Montreal Versus Kyoto: International Cooperation and the

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40 See Brunnee, supra note 21, at 269.
Global Environment: Perhaps the Kyoto agreement can, with time, be amended to resemble the Montreal agreement. Putting the right words down on paper is not the problem, however. Rather, it is making the required mechanism credible. A threat is credible only if everyone believes that, when push comes to shove, it will be carried out.\(^{41}\)

The inherent flaws of the Kyoto agreement may very well have a spiraling effect: nonexistent free-riding sanctions encourage noncompliance, so every party that fails to meet its commitments in turn reduces the value of compliance to the rest of the membership.

While Barrett perceptively analyzes the potential consequences arising from the differing mechanisms of the Montreal and Kyoto Protocols, this may be a somewhat hasty evaluation. Before credible threats can be agreed upon, there must be a stable consensus on the merits of participation. The skewed application of Kyoto, which only covers developed country members,\(^ {42}\) might well provide for continuing domestic criticism of Kyoto as a source of competitive disadvantage. Given the costs of increased environmental regulation, it is plausible to assume that industry may attempt to avoid these costs by relocating to countries not bound by the treaty.\(^ {43}\)

Concerns over competitive disadvantage may be characterized as examples of dependent reasoning. In this form of dependent reasoning it is not the central idea that is contested, in this case precautions to mitigate against climate change, but rather the

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\(^{41}\) Barrett, supra note 9, at 216.

\(^{42}\) The developed countries signatories are those listed in Annex I of the Kyoto Protocol, supra note 1, at art. 25.1.

imagined benefits to competitors. If one assumes that another country may benefit by avoiding the costs of Kyoto, by attracting industries that wish to avoid further environmental regulation for instance, than it follows that membership may be viewed as a competitive disadvantage. What is most troubling about this form of dependent reasoning is that it is completely rational only so long as no one else follows the same reasoning. For example, it would be cheaper for country A not to ratify Kyoto; therefore, it would be cheaper for every country not to ratify Kyoto. The result of dependent reasoning in this instance is that no country would ratify Kyoto, but the future costs borne by everyone would be greater.

I.III THEORETICAL FRAMEWORK

Second Postulate:

It is possible to mathematically represent the evolving relationship between individual decisions and common benefit.

A. Game Theory

A game is played by a group of individuals whenever the fate of an individual in the group depends not only on his own actions, but also on the actions of other individuals in the group.44 The most obvious examples of games are parlor games such as checkers, chess, and poker. In these games the play of A is dependent upon the plays, both past and anticipated, of players B, C and so on. The essential point is that individual strategies do not arise independently, but instead are contingent upon the behavior of others.

Von Neumann and Morgenstern first introduced the notion that it is possible to systematically extrapolate the model of parlor games to more interesting social

44 Binmore & Binmore, supra note 6, at 1.
phenomena. At first glance, it seems trite to correlate the socially significant with trivial games intended for amusement, but the perceptiveness of Von Neumann and Morgenstern lies in realizing that the same basic premises apply to both. Two general conditions exist: dependent strategies and individual rationality.

Rationality is the key to the mathematical model of game theory. Without the notion of individual rational actors, it is impossible to have any predictive or explanatory model whatsoever. Irrational decisions are inherently unpredictable. It is important to note, however, that rational does not denote a quality but rather a function; rational decisions in this sense are not necessarily perfect or even logical, only consistently self-interested.

B. Nash Equilibrium

While the work of Von Neumann and Morgenstern was revolutionary, its initial application was limited. The first theory of games was based upon “two person cooperative games” (cooperative meaning binding agreement and not working together) that have zero-sum results. As in chess, an advantage or gain by one player results in a corresponding detriment to the other. A zero-sum game could be simply illustrated as follows:

Beginning of Game: \( a = 1, \ b = 1 \)

Result of Game: if \( a = 2 \), then \( b \) must = 0

As most real life situations do not neatly correspond to defined zero-sum situations, the limits of cooperative games are obvious. A more applicable model may be found in

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47 Id. at 2-3; see also Alex Talbot Coram, STATE ANARCHY AND COLLECTIVE DECISIONS (2001).
noncooperative games that have \( n \) players (where \( n > 2 \)), as these games have no binding agreements and recognize multiple players. John Nash introduced the distinction between cooperative and noncooperative games, which is a central concept behind analyzing the strategic complexity of competition among multiple participants.\(^{48}\) Without binding agreements dictating the course of the game, players’ decisions are more flexible, less predictable, and more realistic.

Unlike two person games such as chess, which have alternating sequences, games such as poker require that multiple players simultaneously determine their play. The requirement of simultaneously determined strategies is arguably the most interesting facet of games, for it demands that players choose their strategies in anticipation of their opponents’ strategies. Put simply, a player’s best strategy is based upon the anticipation of others’ best strategies. Nash Equilibrium is the point when all of the best strategies converge, namely when no player’s best strategy can be bettered without a change in the strategies of others.

C. Nash Equilibrium Versus Pareto Optimum

The concept of Nash Equilibrium transformed economic theory and has been applied to fields as diverse as trade negotiations and evolutionary biology.\(^{49}\) While Nash Equilibrium is a concept that has had undeniable prescriptive success, it is also illustrative of the potential inefficiencies of individual strategies. This introduces a sort of paradox of rationality in which there is a dichotomy between optimal strategies and optimal effects. The theory of Pareto Optimum, which represents the point at which

\(^{48}\) Nash, supra note 7, 24; see also John F. Nash Jr., The Bargaining Problem, in CLASSICS IN GAME THEORY, supra note 7.

“there is no other feasible alternative allocation which makes everyone better off,”
contrasts with the Nash Equilibrium of strategies. There are situations, or games, that find
the best competitive strategy for each individual — Nash — which is a different point
than the strategy that would have realized the best result — Pareto. That is, the situation
is suboptimal as the best rational strategy does not translate into the best possible outcome.

The well-known Prisoner’s Dilemma is a classic example of when the rational
strategy of each individual leads to a suboptimal result. The game generally describes
two accomplices to a crime who face the temptation to inform on each other. An
interrogator addresses each detainee in isolation and offers them a similar deal. The deal
is that if one confesses and informs on their partner they receive a light sentence. If they
do not confess and their partner informs on them they receive the maximum sentence.
Fearing that the other will inform, and that they will suffer by receiving the maximum
sentence, each prisoner predictably informs on the other. The best result for both
individuals would occur if neither informed, and yet the best independent strategy for
both would be to inform.

Implicit in game situations is the idea that individuals must hedge against the
potential costs of the other’s strategy. Ideal or optimal outcomes are unlikely to occur for
fear that other players will free-ride and not restrain their strategies for the benefit of
everyone. Distrust or skepticism of others informs our decisions, which informs the
decisions of others, which further informs our decisions, and so on.

50 Dasgupta, supra note 8, at 25.
51 Binmore & Binmore, supra note 6, at 32-33; see Alex Talbot Coram, supra note 46 at 26-29, (describing
the Prisoner’s Dilemma).
D. Game Theory and the Environment

Game theory models of global environmental issues provide some of the clearest examples of rational contradictions within the market system of rational self-interest. The market produces results that are contrary to the longstanding doctrine of individual self-interest by producing results that are best for everyone.\(^\text{52}\) Resembling the Prisoner’s Dilemma is the tragedy of the commons articulated by Hardin, where “[e]ach man is locked into a system that compels him to increase his herd without limit—in a world that is limited.”\(^\text{53}\) In the context of game theory, Hardin’s use of “compel” may be seen as an example of Nash Equilibrium in that each herdsman’s best strategy would be to graze more and more cattle.

The figure that follows is a hypothetical illustration of the relationship between economic competition and environmental resources. Drawing upon a model constructed by the economist Partha Dasgupta in his work *The Control of Resources*,\(^\text{54}\) this article uses the example of an international fishery to discuss problems at common resources and market failures.\(^\text{55}\) It is not difficult to discern an analogy to Hardin’s pastoral commons, or for that matter, the case of the atmosphere and the climate change regime. Simply exchanging the hypothetical fishing waters for the atmosphere would achieve the desired result. The tendency illustrated in Dasgupta’s international fishery is analogous to the case of greenhouse gas emissions, as each country conducts an internal cost-benefit analysis in which the benefit from a minimal increase in pollution outweighs the damage

\(^{52}\) Adam Smith’s famous “invisible hand of the market” postulates that the best results for society as a whole occur when everyone pursues their own self-interest. Adam Smith, *THE WEALTH OF NATIONS* 572 (Edward Cannan ed., Modern Library 1994) (1776).

\(^{53}\) Hardin, supra note 5, at 1244.

\(^{54}\) Dasgupta, supra note 8, at 19-24.

\(^{55}\) Id. at 19-20.
incurred. Indeed this national cost-benefit analysis is explicitly mentioned in Barrett’s article on the Montreal and Kyoto Protocols.56

**Figure 1.1**  A Representation of Commons Competition

![Graph of Commons Competition](image)

*Legend:*

* X axis—*Amount of Pollution.*
* Y axis—*Amount of Fish.*
* A—*Marginal Damage;* the pollution that each offloads into the commons.
* B—*Mutual Benefit;* the mutual benefit from common resource.
* N—*Nash Equilibrium;* the most rational strategy for each individual.
* P—*Pareto Optimum;* the optimal strategy for mutual benefit.
* S—*Distance between N and P.*
* H—*Highest Point of Resource.*

The above illustration represents economic strategies and their results; it does not represent the environment itself. The figure illustrates a visual display of the underlying method of game theory. The game theory method predicts rational strategies and

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56 Barrett, supra note 9, at 202.
compares them to corresponding outcomes. The idea of correspondence is central to predicting and interpreting competitive games. For example, the Prisoner’s Dilemma has two strategies, “inform” and “not inform,” with a hypothetical correspondence of 0, 5, and 15 years. When strategies are combined they find their corresponding outcome. Therefore, if both players choose “inform” the result is that each receive 5 years. If player one chooses “inform” and player two “not inform,” player one receives five years and player two receives fifteen. If neither player informs, both are set free.

When considering an environmental commons the potential strategies are more numerous than the Prisoner’s Dilemma; Figure 1 attempts to represent these options along a continuum that is line $A$. As the Prisoner’s Dilemma had the options of “inform” and “not inform,” this international fishery model would have options that represent the pollution that each emits into the water, “1 unit,” “2 units,” “3 units,” and so on. The countries consider how much effluent to discharge into the commons in view of the potential detriment that results. $^57$ Each level of pollution along line $A$, or marginal damage committed by each country, corresponds with a point on line $B$ of mutual benefit.

The strategies of pollution are an economic consideration and not merely a byproduct of competition. $^58$ Pollution is a cost that countries may offload into the commons, thereby avoiding the expense of recycling or waste management. The reasoning of each country involves considering how much economic benefit is available through their marginal damage before the value of their share in the mutual benefit is diminished. Dasgupta’s calculations reveal a Nash Equilibrium of $N$, at which point each actor has concluded that polluting any more would be offset by their subsequent loss in

$^57$ Dasgupta, supra note 8, at 19-24.

$^58$ Id.
The difficulty, however, is that each strategy is contemplated independently while the results are dependent upon the strategies of all others considered together. When all strategies are combined the result is that the Nash Equilibrium point is suboptimal. Each player would have been better off choosing the point $P$, where the number of fish caught is maximized by restraining marginal damage.

With no regulation of the commons, the intuitive sense to restrain pollution is lost to the competitive fear that others will cheat first. The strategy to cheat, or “free-ride,” becomes more rational as a player becomes less competitive compared to those able to offload more of their pollution costs into the commons. Recalling the dynamic of dependent strategies (discussed infra Part III.A.) helps illustrate how a rational independent strategy considered in isolation may nevertheless lead to an irrational or suboptimal result when the strategies of everyone are combined. If a single country determines that it would be beneficial to increase its marginal output of pollution, every other player is certain to operate under the same assumptions. Comparing $N$ with that of the optimal point $P$ shows the predictable result that best strategies will not equal best outcome. The best solution for each country would have occurred if each country had opted for restraint.

As with the Prisoner’s Dilemma, the inefficiency of the economic commons is a result of competitive necessity rather than pure information. Both prisoners could easily envision that two strategies of “not inform” would result in zero penalties, and countries in the hypothetical fishery could equally infer that if all restrained their marginal damage their fish catch would be maximized. Restraint does not occur in either game for fear that

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59 Id. at 22.
others will benefit by surrendering restraint. This creates a suboptimal equilibrium: the strategy that none find ideal but that each fears another will choose.

I.IV PARADIGM CHANGE

Third Postulate:

If common benefit is associated with developing knowledge then it is possible to mathematically represent the social acceptance of a new paradigm of thought.

A. Environmental Economics

*Environmental Economics is generally regarded as a branch of the economics of externalities. [internal citations omitted] More particularly, environmental problems are commonly associated with the failure of market institutions. The starting point of this literature is the observation that in many cases the malfunctioning of market forces can be ascribed to the fact that for certain commodities and services, competitive prices simply do not exist.*

Essentially, the environment is one of the major domains that have yet to be successfully given significant value. Environmental economic theory advocates attempting to modify maladjusted market institutions by giving the environment an economic price. The most common suggestions for adjusting the market inevitably involve giving environmental degradation a monetary value. For example, tradable emission permits (in essence tradable licenses to pollute) are a popular proposal. Some of these programs have been successful; however, this Article considers situations in which emission permits may be ineffective.

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60 Partha Dasgupta et al., INTRODUCTION TO THE ECONOMIC OF TRANSNATION COMMONS (1997).
61 Id. at 1-2.
62 See Barret, supra note 2, at 374.
63 See Grubb et al., supra note 12, at 89-90; see also Schelling, supra note 31, at 5.
The traditional challenge of the environment as an externality needs to be addressed if answers to fundamental challenges are to be offered. There is a value ascribed to the environment, and it is located directly beneath the point of the suboptimal economic equilibrium. The problem is not that the environment lacks an economic value, but rather that individual strategies irrationally prioritize short-term economic gain at the expense of both environmental value and long-term individual welfare.

B. Theories of Change

Let us consider two different forms of societal change. The first is developmental or endogenous, and it involves incremental legal adjustments to the changing perceptions of society and its members. In the endogenous model, law is a reflection of the ideas that already permeate society. The second form of change, called revolutionary or exogenous, occurs when the law encourages the acceptance of new ideas. Revolutionary does not imply political upheaval or bloodshed, but rather an idea that offers a break with the previous paradigm. A new idea emerges, for instance Svante Arrhenius’ prediction regarding CO₂ emissions and climate change, but does not initially take hold.64 The dominant paradigm of economic exploitation continues on for decades despite this small blip of a discovery. However, more and more anomalies arise which the dominant paradigm cannot explain. The question then becomes what to do with this new information?

64 Barrett, supra note 9, at 196 (discussion on Svante Arrhenius calculation regarding climate change due to fossil fuel burning).
C. Solving the Commons Problem?

Recent scholarship in several fields has explored how cooperation can be explained as a product of self-interested competition. The premise of self-interested cooperation or “reciprocal altruism” generally holds that while individuals are inherently self-interested, the best strategy for each individual need not necessarily be aggressive or antagonistic. Instead of one basic strategy of competition like zero-sum rivalry, there are instances when the most self-interested strategy would lead to cooperation. If individuals are persuaded that others will cooperate with a measure aimed at furthering collective benefit, then their own self-interest will direct them to do likewise. This is an interesting perspective that contains a measure of both cynicism and optimism. If an altruistic quality of human nature is being discounted, so too are notions of a predetermined form of self-interest. Self-interest is assumed to be the primary impulse of humans, one that remains open to the possibility of individuals cooperating to solve collective problems.

Game theory methods are obviously signaled in the language above, and indeed game theory has informed much of the literature on self-interested cooperation. As always, the Prisoner’s Dilemma is a central example of this interdisciplinary approach, helping to illustrate how suboptimality is a feature of communication rather than a predetermined outcome of human nature. “If the rules for exacting confessions from apprehended suspects are structured differently, then isolated prisoners have very different optimal strategies and there is no dominance of individual (Pareto inferior)

66 Barret, supra note 2, at 55.
strategies.” The argument is that the tendency of individuals to “snitch” within the Prisoner’s Dilemma should not be viewed as an inevitable result of human selfishness but rather as the structure of the game itself. Therefore, changing the rules of the game may then lead individuals to prefer different strategies.

As with the Prisoner’s Dilemma, the tragedy of the commons has been rejected by many for not accurately reflecting the varying possibilities of self-interested human nature. Elinor Ostrom is at the forefront of a school of interdisciplinary scholars who have criticized Hardin’s famous tragedy of commons with the aid of empirical counterexamples. As opposed to Hardin’s description of common pastures before the enclosure movement and the shift to private ownership of those lands, Ostrom and others have pointed to communities that have solved the “tragedy” without having to resort to private property or other forms of centralized governance. This has been called the “middle-way approach” as it sits between two poles: that of unchecked self-interested competition, as in the tragedy of the commons, and the imposition of legal institutions. As Ostrom writes, these cases “illustrate situations in which individuals do talk with one another about the long-term condition of their shared resource and take account of one another’s actions when deciding on their own.”

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68 Id.
70 See, e.g., Ostrom, Id., at 5-8; Bromley, supra note 67, at 2-3.
72 Ostrom, supra note 69, at 297.
Essentially, the middle-way approach argues that there is evidence that individuals have been able communicate to establish norms of restraint and enforcement within the community itself. In terms of the Prisoner’s Dilemma, a community of accused individuals comes together to agree upon the suboptimality of “informing” and then organizes penalties for those who transgress this norm. The significance lies in change arising from within the community membership, as opposed to without, which may be identified with the imposition of legal institutions that either organize or divide up the resource.73 This distinction between intrinsic and extrinsic is equivalent to the concept of endogeneous and exogeneous change proposed earlier.

The examples of communities able to orchestrate a solution to the problem of commonly held resources are generally small and rural, ranging across time and geographic space. For example, Margaret McKean chronicles the case of various medieval Japanese villages between the thirteenth and sixteenth centuries.74 The village inhabitants, dependent upon the same common resources for a variety of their everyday needs and sustenance, came to develop highly effective social norms of restraint.75 Beyond the simple recognition of the need to protect the common resource, the villagers ostracized those found cheating, and further instituted schemes of alternating patrols drawn from the ranks of the community’s young men to ensure compliance.76

McKean details how the character of each village was itself a substantial mechanism of enforcement, since “all potential violators of rules knew that those near them had strong incentives to advocate compliance as a general rule—or, when

73 Dolsak and Ostram, supra note 69, at 5-8.
74 Margaret A. McKean, Management of Traditional Common Lands (Iriaichi) in Japan, in MAKING THE COMMONS WORK, supra note 67, at 65-90.
75 Id. at 63.
76 Id. at 81.
persuasion failed, to snitch on one’s colleagues rather than be implicated with them.”

Although living in such an observant community might seem oppressive, the point is that individual self-interest is directed toward furthering the benefits of the collective.

Although articulated differently, the principle used in the middle-way approach is the same as in the Prisoner’s Dilemma; its tendencies have neither been solved nor overcome, but have been steered toward a different goal. The Prisoner’s Dilemma is optimal for society at the expense of the individuals accused: the accused receive greater sentences than if they had acted with restraint and society increases the odds of gaining confessions and convictions. Similarly, the individual who “snitched” on their neighbor in the medieval Japanese village may have done better by keeping quiet, as they could have received more goods by colluding with or blackmailing the person they caught cheating. Thus a tragedy of the commons situation is avoided by invoking the Prisoner’s Dilemma to ensure that the competitive insecurity of each individual serves the collective. The middle-way approach acknowledges self-interest and argues that communities take advantage of it for the benefit of society as whole.

Despite the promise displayed by the middle-way approach, questions remain as to whether it can stand as a coherent theory. Two substantial problems exist: scale and indeterminacy. Dealing first with the issue of scale, it appears that a few isolated examples of rural responses to the problem of common resources may not translate to global environmental problems like the atmosphere. As Dolsak and Ostrom explain, “[g]roups with longer traditions of mutual trust and close knit communities that enable

77 Id. at 81.
78 This of course assumes that a greater conviction rate is a desirable social good. Those living under despotic government, for example, would certainly disagree. The middle-way approach necessarily contains an aspect of paternalism or communitarianism, for it is the social good that individual self-interest is made to serve.
resource users to reciprocate in behavior are more likely than other groups to succeed in devising and sustaining successful institutions.” And as Ostrom further acknowledges, “[f]or large and amorphous resources, such as ocean fisheries . . . it is extremely difficult, both technically and economically, to exclude potential beneficiaries from obtaining benefits from them.” When considering these statements it is difficult to see how the middle-way approach would yield answers to sophisticated atmospheric issues that exist on a level where people do not physically see those who are degrading the commons, and are not in connected relationships with those needed to help enforce a solution.

The middle-way approach finds its strongest connection with the international realm in the work of Robert Keohane. Keohane’s work in international regime theory, unsurprisingly, sits between two diametrical theoretical positions: realism and cognitivism. While the realist school believes that states are self-interested and only concerned with survival and their relative strength in relation to other states, the cognitivist school places a priority on learning, as state interests are thought to be formed through social interaction. Keohane’s “neo-liberal” theory assumes that each state is self-interested, and that this self-interest can sometimes lead to cooperation and coordination through agreements of mutual benefit. Analogous to the middle-way approach, Keohane claims that an international membership of states can develop means

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79 Dolsak & Ostrom, supra note 73, at 6.
80 Dolsak & Ostrom, supra note 69, at 295-96.
81 See, e.g., Robert O. Keohane, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 1 (1984) (arguing that in the international realm, discord, rather than cooperation, is scarce because the interdependence of international economies has created more points of friction).
82 Andreas Hasenclever et al., THEORIES OF INTERNATIONAL REGIMES 3 (1997).
83 Id. at 3-5.
84 Reciprocity, in the fashion of Robert Axelrod’s initial articulation, supra notes 6, 39, & 65, is central to Keohane’s theory of international cooperation. Keohane, supra note 81, at 75-78; see Keohane, supra note 39, at 12-13; see also Axelrod & Keohane, supra note 39, at 234-38.
of communication and enforcement when it is in their best interest to cooperate within a given subject area.\textsuperscript{85} Self-interest causes states to agree upon certain norms and the sanctions for violating these norms, thereby imposing a cost to “free-riding” in the absence of sovereign authority.\textsuperscript{86}

While Keohane’s regime theory may provide a transition to the international level that is arguably missing with the empirical work of Ostrom and others, the more substantial question of indeterminacy remains. The middle-way illustrates that there are different possibilities for effective social organization without providing a notion of how these possibilities come about. The middle-way ardently claims that the tragedy of the commons is not a monolithic constant, which is easy to concede, but the empirical evidence that it raises does not give us a new rule, only the rare exception to it. For every obscure example of an ancient fishing village that was able to enforce economic restraint through community observance, there remain myriad cases that do conform to the tragedy of the commons. As Ostrom writes, “[t]hree broad forms of ownership can govern a common-pool resource: government, private, or common-property ownership. . . there is no consistent evidence that any one of these regimes is best suited for all types of common-pool resources.”\textsuperscript{87}

As often happens with models designed upon explaining human behavior, each theory is destined to remain an incomplete picture. While Keohane’s neo-liberal regime theory explains certain endeavors of international cooperation, other aspects of his model manifest the characteristics of real-politick and the aggressive self-interest of the state.

\textsuperscript{85} Keohane, supra note 81, at 63.  
\textsuperscript{86} Id. at 150.  
\textsuperscript{87} Dolsak & Ostrom, supra note 73, at 8.
Although Keohane’s theory may explain why environmental agreements like Montreal have succeeded, but it remains silent on why Kyoto has not.

The insights and inconsistencies of various contrasting theories are assumed to be inevitable to covering diffuse situations of widely varying scale; rendering the object of this approach as determining whether failure or coordination best characterize interest perception and competition within a given case. I have proposed that through the measurement of rational strategies over time we may judge which model of common resources most accurately defines a specific system. In this way we may determine whether self-interest is developing new directions based upon membership communication, as if organically from within the game, or whether more ambitious legal reforms are needed to encourage new possibilities of communication and cooperation.

D. Variations on Game Theory

Having viewed the problem with the help of game theory, it is possible to gain the hint of a solution there as well. Figure 1.2 below is a hypothetical continuation of Figure 1.8 88 The two figures represent a repeating game, with Figure 2 showing a subsequent turn or later point in time. This notion of time is important for a game involving an environmental value in order to account for exhaustible and finite resources. The results of round one, $N, P,$ and $SI$, have been included with those of the imagined second round for comparison. The results of round two contemplate a worsening situation, and as such the curve of mutual benefit has diminished (compare with the previous peak of $H$). This

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88 It is important to note that this hypothetical continuation is not meant to imply scientific data or a reflection of reality. The selected points of the second figure show a worsening situation, but it may equally show an improvement. The point of this investigation is to explain the potential process for examining results, not produce the results.
reflects the fact that in the previous turns the players had a suboptimal equilibrium: they polluted too much and now there are fewer resources available.

**Figure 1.2  A Representation of Commons Competition – The Second Round**

**Legend:**

* X axis—Amount of Pollution.
* Y axis—Amount of Fish.
* A—Marginal Damage; the pollution that each offloads into the commons.
* B—Mutual Benefit; the mutual benefit from common resource.
* H—Highest Point of Resource; in this instance, found in round one.

**Current Round:**

* N2—Nash Equilibrium; the most rational strategy, current round.
* P2—Pareto Optimum; the optimal strategy, current round.
* S2—Distance between N and P; current round.

**Previous Round:**

* N—Nash Equilibrium; the most rational strategy, from round one.
* P—Pareto Optimum; the optimal strategy, round one.
* S1—Distance between N and P; round one.

Comparing the equilibrium and optimum points for multiple rounds in time provides an interesting perspective for viewing systemic developments. For instance,
contrasting $P$ and $P2$ shows how an exhaustible resource may be depleted to the point where a reduction in use is needed to simply maintain the already suboptimal condition. Recall the IPCC findings which estimated that emissions of CO$_2$ would have to be reduced by more than sixty percent just to stabilize current concentrations. The value $H$, representing the point of highest resource abundance from the previous figure, is also worth noting.

Perhaps the most intriguing idea contained within this theoretical example is the value of $S$. Quite simply, $S$ is the distance between the equilibrium and optimum points. In and of itself $S$ may be insignificant; but when considering the potential normative implications of a social game, the impact increases. With respect to the first turn of the game, the equilibrium is suboptimal to the value of $S1$, the distance from the optimum point. Suboptimal means only that the collective strategies resulted in an equilibrium that was not ideal, but it says nothing about how far from ideal the course of action was. Therefore, $S$ is a measurement of how near individual strategies were to the best for the whole.

Taken over time the value of $S$ becomes increasingly significant.

Suppose in turn one:
$N = 10$ and $P = 6$, therefore $S = 4$

In turn two:
$N1 = 13$ and $P1 = 5$, therefore $S1 = 8$

End of game:
$S2 - S1 = S$

If $S$ is a positive number the situation is deteriorating despite the previous turn. This implies that the players are not learning from their previous interaction. If the

89 Barrett, supra note 9, at 196.
distance is closing one could infer that the players are learning from previous suboptimal results.

E. Systemic Observation

By comparing equilibrium and optimum points we may gain insight into how a system of rules reconciles the competing rationalities of individual and collective interest. As demonstrated above, the dilemma of rationalities present in a commons is not a competition among equally viable options, but rather a competition between perceived and actual benefit. Both the individual and the entire collective are served by behavior commonly employed. The task of a legal system is to mitigate against the tendency of actors to profit from behavior that, if taken by others, would be detrimental to everyone. In essence, the object is to promote restraint and engender a way of thinking that makes individuals elevate their concerns above the immediate pay-off from cheating the whole.

The value of $S$ is thus a hypothetical measurement of social learning, or the cognitive development triggered by social forms and the awareness of interconnected consequences arising from behavior. If game theory models give us a theoretical vantage of rational strategies and collective benefit, then the value of $S$ is merely a simplistic attachment added to highlight the dynamics of systemic inputs. In essence, $S$ is a measurement of the distance between two figures over a series of landscape snapshots. If picture one shows a suboptimal relationship between two figures or points, then the following pictures show us whether or not surrounding forces are bringing the two figures together. By measuring the fluid relationship between knowledge and behavior we may objectively view when the conditions for radical paradigmatic change are in place, and ultimately necessary.
F. Montreal and Kyoto

The Kyoto and Montreal Protocols are similar in their atmospheric focus but differ significantly in their actual effect. Where the Montreal agreement has encouraged an alteration in behavior, and made a significant advance toward the elimination of CFCs, the Kyoto Protocol has not had a discernible impact upon climate change. To place Kyoto and Montreal into the theoretical framework developed above, Kyoto would have an increasing $S$ value while Montreal a decreasing figure. Essentially, CFC usage would be seen to be declining toward the collective or social optimum and away from the Nash Equilibrium point, and thus the declining amount for $S$ is a signal of social learning. Conversely, the likely increase in $S$ value under Kyoto illustrates that individual actors are not learning from past suboptimal results; despite the evidence of collective harm, individual maximization continues.

There has been much criticism of the science of climate change and the uncertainty that necessarily surrounds future estimates of environmental decline.\textsuperscript{90} Fundamental advancements in knowledge must be open to future qualification, as Newtonian governing dynamics was to Einstein’s theories of relativity. Uncertainty need not bar conservative human action for the sake of future security. Consider the words of Richard Benedick, the chief U.S. negotiator at the Montreal Protocol talks:

\begin{quote}
We seem to have forgotten that [the case for the Montreal Protocol] was completely theoretical. Measurements did not in fact record any thinning of the ozone layer, except over Antarctica, a seasonal occurrence which scientists at the time considered a special case, and for which there were
\end{quote}

\textsuperscript{90} Dennee A. Diluigi, Kyoto’s So-Called “Fatal Flaws”: A Potential Springboard for Domestic Greenhouse Gas Regulation, 32 Golden Gate U. L. Rev. 693, 697 (2002) (summarizing the combination of a broad consensus on observable effects with intense debate of the causes. “While scientists generally agree that global warming is occurring, some hotly debate the cause of global warming, as well as its potential impacts on the planet.”)
numerous theories. There was, moreover, no evidence that CFCs were responsible. Finally, there was no sign of increased ultraviolet radiation actually reaching the Earth.\textsuperscript{91}

Assuming a similar level of objective knowledge for both climate change and ozone depletion, we may infer that dissimilar implementation is not based on a scientific or logical method but rather the pragmatic realities of maintaining the status quo.

There are times when a legal system may quite admirably incorporate new information into social norms of behavior. What is less clear, however, is the capacity of a system to regulate away problems that go to the heart of how economic competition is defined. While Montreal involves a single replaceable component in the economic process (CFCs), Kyoto, by addressing the burning of fossil fuels, involves far greater implications for society’s functioning. For instance, consider the differing impact of replacing an ingredient in production (CFCs) with the lifestyle implications of reducing our dependence on fossil fuels.

Kyoto involves such great costs compared to the relatively unremarkable replacement costs of CFCs, that bearing these costs will inevitably undermine the social fictions under which we currently live. Solving climate change requires acknowledging a global issue and, most importantly, acting fully on the knowledge that the world’s divisions are social creations not fixed in nature. If Montreal and Kyoto pose problems of comparable form, it is the breadth and intensity of a required response that reveals the inability of systemic development.

\textsuperscript{91} Barrett, supra note 9, at 193.
G. A New Paradigm?

The measure of behavior that is implicit in the value of $S$ helps illustrate the state of a paradigm. By contrasting collective action with that of collective benefit it is possible to interpret the extent to which new ideas are either taking hold or simply ignored. The essential quality is that of an idea, an extension of knowledge which is not compatible with the existing paradigm. As the detriment to society increases by maintaining traditional assumptions, it becomes clear that those assumptions must be altered if the best interest of everyone is a desired result. The pattern of individual choice is an indication of how fundamental a solution needs to be.

If the distance between the equilibrium of strategies and the optimal outcome for all is closing over time, it follows that the new form of knowledge is being incorporated into the existing paradigm. This endogenous form of change exhibits the existence of a developing consensus and does not require a dramatic solution. In this instance law may be used to augment the impetus already present within society so as to minimize the gap between knowledge and behavior. Where ambitious endeavors are not demanded, environmental issues may be regulated as an economic accessory with such measures as tradable emissions permits.

In contrast, a dramatic break with tradition will be required in the face of impeded knowledge. Without consensus, endogenous legal change cannot occur, and the incorporation of environmental protection into the existing game remains fruitless if the players refuse to acknowledge any added dimensions. In cases such as these, the desired knowledge must precede the playing of the game itself. To illustrate the difference between endogenous change and a paradigm shift, consider the differing implications of
tradable emissions permits compared with requiring each country to satisfy high levels of environmental protection before gaining access to the benefits of international trade. Rather than a regulatory footnote to competition, a paradigm shift would require that environmental protection precede the market itself.

Recognizing the need for paradigmatic change is discussed in the following section, with international state competition as the system under consideration.

I.V DECLINE & LOST MEANING

*Fourth Postulate:*

*In circumstances where there is no authority for imposing change, logic may nonetheless indicate when a system’s underlying principles have been undermined.*

A. Assumptions and Perception

A system breaks down when its underlying assumptions are premised upon patterns that cannot adapt to new information. Game theory helps illustrate the incongruence between developing perception and the rules left over from a previous way of viewing the world. A system may contain assumptions in combination that remain logically sound so long as new patterns are not perceived. The sequence 1, 2, 3, 4, 5, 6, appears to be a minimal progression if as we do not know of prime numbers, which automatically differentiates 2, 3, 5, as belonging to a separate category. Once we possess the knowledge of prime numbers, a new pattern appears within the previous assumption and the sequence is not as simple as it first appears. As with prime numbers, climate change is a pattern found within a previously complete system. It is as if our sight has suddenly become three-dimensional while the world’s organization remains two-dimensional.
The awareness of damage to a global commons like the atmosphere goes beyond differing levels of perspective, it can undermine an entire edifice that is built on false assumptions. Developing knowledge of the surrounding world has the dual effect of initiating new information structures while simultaneously undermining the old. In keeping with the simplistic numerical sequence mentioned above, environmental awareness has not only revealed a pattern previously unseen, but as with the introduction of prime numbers, operations developed upon past patterns and assumptions are shown to be inconsistent.

B. The Minimizing Game

Territorial divisions are now unable to protect against despoiling the commons because they are now part of the problem. Just as the one-dimensional level of ownership of cattle created an open imperative for individuals to impose ceaselessly upon the commons, the state is now the means for one directional impositions upon the global environment. The state provides the impetus for individual conduct and then precludes accountability for that same behavior. While assimilating the various social progressions from previous commons, the state is now the greatest manifestation of that first level of ownership without responsibility; it encourages wasteful use of resources without answer.

Considering the second theoretical figure again reveals that continuing suboptimal outcomes not only represent a lack of cognitive learning, but also reveal a game’s uppermost imperatives. With new information, previously consistent objectives separate and one course of action must be chosen at the expense of another. As mentioned before, the environment is not without economic value, for we may infer that its deemed value is below that of the chosen alternative. When $S$ is an increasing value, players’ best
strategies are neither best for the group nor themselves; and competitive motives squeeze group concerns out of the game.

The concept of state sovereignty has evolved through time and it may need to evolve further to be able to maintain the demands of democratic representation. Even the most minimal definitions of liberal democratic government, such as Locke’s famous “night-watchman” state, are premised upon the protection of the individual. When the state itself is an impediment to realizing an end to harm, serious questions of future legitimacy may be triggered. The state has regressed to a one-dimensional organization like that of the herdsman on the open pasture. Without collective authority or individual restraint to protect the commons, each actor operates without accountability. When there is no balance between the freedom of autonomy and the freedom from the acts of others, the process of wealth creation is no longer promoting individual liberty.

I.VI CONCLUSION

The Kyoto Protocol does not conform to what many would think of as a law. But the fact that Kyoto is without express authority does not necessarily mean as much as we have been led to believe. Kyoto tells us what definitely cannot be, and it does so as unequivocally as many other traditional laws. Kyoto is like the law of contradiction, wherein both $a$ and $b$ cannot simultaneously be true. A state makes a statement just as loudly by ignoring Kyoto as by ratifying it.

In representing new information, Kyoto is fundamentally an issue of change. Because awareness of atmospheric degradation has an impact on the world, the question becomes how organizations will respond to this change. Organizations must either adopt

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92 For a modern expression of libertarian political philosophy, see Robert Nozick, ANARCHY, STATE, AND UTOPIA (1974).
to meet modern realities or these organizations simply cannot be what they claim. The state must grow or decline; it is not permitted the luxury of remaining the same.

The recognition of a new commons produces a situation in which the assumptions that underlie state sovereignty are not possibly consistent. In essence, the harmony of a social division is disrupted by the revelation of contradictory information. If institutions such as the state are to retain the social legitimacy that comes from controlling the market, the state structure will have to be reconnected with a means of accountability. Kyoto thus signals whether the direction of state movement is toward accountability or toward continued decline into mere economic agency.

Too often what has been is taken for granted as currently being. The attempt here has been to illustrate how information may allow us to logically deconstruct a system. While there is an unfortunate tendency to conceive of social fictions as social truths, using more objective tools from other fields can help demystify our legal structures. Regardless of our faith in longstanding legal fictions, scientific discoveries may reveal our way of looking at the world is flawed. And as with scientific theories, new knowledge may prove previously seamless legal principles to be suddenly inconsistent.
CHAPTER TWO

LEGAL AND ECONOMIC EVOLUTION MEETS THE ENCOURAGEMENT OF PROGRESS

The second chapter of this dissertation continues on with the concept of systemic unpredictability introduced above to engage the question how international regulation may most effectively meet the challenge of change. A hypothetical assumption underlying this project is that a majority of international actors have realized a serious situation of physical harm joined with economic suboptimality, with the aid of the procedure noted in part one, and have entered into negotiations to alter their rules of competition to meet these realized challenges.

The initial stage, conducted with a view to hypothetical negotiation, seeks to provide the ideal organization method of progress: of contemplating unexpectedness and having rule design promote the greatest number of viable solutions to future problems. Subsequent parts and sections of this project then seek to justify, and add social content to, this method of progress in a form of individual choice, interest, and rights.

The type of unpredictability introduced in part one involves an altered interconnectedness of impact, with the external effects and individual agency undergoing a change that undermines previous conceptions on what characterizes beneficial competition. This unpredictability of interaction and changed modes of success finds a ready and oft used metaphor in evolutionary biology, in which the environmental selects out from variations in individual agency to favour some over others. This evolutionary metaphor has influenced theories of law and especially economics, favouring the notion that the system will eventually promote the most efficient or persuasive idea for overall
success. While this recognition of changing interaction between system and agency is arguably necessary and useful, a neutral view that assumes system selection may obscure the extent to which social order may unduly favour the status and prevent true variation to occur. Evolutionary concepts in legal and economic theory, of legal pragmatism and classical economics respectively, remain descriptive as to the past and neutral as to the future, meaning that competitive struggle resulted in the status quo forms having defeated others to assume ascendancy, and that the next form will have to similarly have to defeat the present. Until such time as a complete change in social persuasion occurs, however, such theoretical views on evolution have the de facto effect of endorsing the status quo at the expense of potential variation.

The following chapter proceeds through an examination of evolutionary thought in legal and economic theory and with the aid of the theory of path dependence will concentrate upon the potential for past efficient solutions to no longer meet future demands, and may indeed stand in the way of adopting to a more beneficial scheme of organization. The concern of past assumptions standing in the way of improved techniques and variations gains much credence in light of the market failure discussed above, with rational strategies becoming irrational and self-defeating because of systemic circumstance. Furthermore, the tendency of competitive insecurity indicates that the systemic prevention of genuine individual choice must also prevent the variation potential required to test present assumptions and offer potential improvements. The central argument of the following chapter accordingly places the means of innovation in individuality, and advocates that systemic regulation must become a method for encouraging variation in competitive attempts as a primary principle.
In addition to elaborating the central method of diversity, the following chapter also addresses the question of convergence; of when it is efficient for many to follow the same successful strategy. In keeping with the When radical systemic change is called for in response to worsening suboptimality and conditions of competitive insecurity, then diversity may be thought of as guiding the redesign of an entire system of competition. However, the principles of diversity, and the premise of differentiation as the best response to future problems, remain sound even in face of homogenous strategies that are efficient currently. Therefore, though the scale of the problem may indicate the scale of the application, diversity may serve as a useful guide whether the concern be system redesign or improved oversight within stability or limited ambition. This difference in ambition is considered with reference to brief examples. The example of ambitious redesign, however, will later be elaborated upon as the main hypothetical application and use of diversity as this dissertation is premised upon the recognition and response to suboptimal system failure.

II.1 INTRODUCTION

The recognition of unforeseen consequences of economic competition may trigger descriptive questions on the past’s influence on the present. Specifically, what explains status-quo arrangements and distributions as the best approach? The mainstream, economic approach has been to assume an evolving competitive process, whereby present economic forms and actors have ‘won’ their way into continued existence. Opposed to this convergence view - in which the most efficient form is the point converged to - is the theory of path dependence, a variant within evolutionary and economic theories. The
theory of path dependence offers the lesson that past successes were often the result of specific and chance circumstances that have no rational connection with fitness or ability in meeting current challenges.

The competing visions of past success are an apt concern for the promotion of competitive diversity, for despite the general appeal of differentiation it remains that surely are instances in which uniformity, or convergence, should be encouraged. Rather than encourage individuals to follow divergent paths despite the undeniable success found by another, there must be a clipping point when all should follow and build upon a new practice. The object is distinguishing between convergence based on improvement and convergence based upon a minimal race to the bottom. This will indicate the ambition for encouraging variation in competition.

Competitive insecurity characterizes situations in which an actor must defect to a sub-optimal position for fear that their competitor will achieve an advantage in doing so first. Solving competitive insecurity, and relieving competitors of its minimizing impulses, should be the first objective of an equitable international theory. A regulatory system should not impose successful outcomes or strategies upon its members, but should promote the ability of each to offer up their own attempt at success. Accordingly, individuality and the potential for differentiation should offer a potential key to evaluating the qualities of convergence by allowing for individuals to compete differently if they choose.

The role of individuality in social development may be drawn out to advantage with legal pragmatism as an example of mainstream thinking on legal evolution. Legal pragmatism, a longstanding school that found inspiration in early American philosophy
and Darwinism, is premised on the rejection of absolute truths and universal ideals in exchange for what is useful currently and believed by most. Legal pragmatism tends to incorporate a progress narrative with similarities to both evolutionary biology and classical economics, in which social developments are thought to be determined by competition amongst techniques and ideas. The difficulty with such competitive views of social change is that they obscure the extent to which successful solutions of the past – now the status quo – may be less adept at meeting new and future problems. Drawing on the evolutionary and economic variant theory of path dependence, it is argued that an assumption that the best, most efficient technique always wins out unduly sanctifies the present and inhibits awareness of unmet challenges. Ultimately, the encouragement of social change and advancement would be more securely located in the legal promotion of individual attempts at originality, rather than an assumption that competition is constantly moving toward perfection.

II.II EVOLUTIONARY METAPHOR ACROSS DISCIPLINES

Arguably not since Newton’s Principa Mathematica has a scientific text captured the imagination of social scientists to the extent of Darwin’s The Origin of Species. Initially used to justify all manner of inequality and depravation with the hackneyed claim of ‘survival of the fittest,’ evolutionary metaphors also came to symbolize a liberating receptiveness to change. When taken up by the early pragmatists, evolution would inspire a uniquely American philosophy, and an optimistic view to the open-ended social possibilities of American life. Under pragmatism, the practical expediencies required in the here and now were to take priority over the ancient dilemmas and fixed
assumptions of the old world philosophies. The prospect of loosening the hold of the past over the present provided by pragmatism has been an appealing one for legal theorists.

In addressing a profession normally and willfully bound to the rule of the past, or the government of the living by dead in Holmes famous words, legal pragmatism has often contained an element of radicalism. Modern neo-pragmatists who call for the approach to be used to challenge oppressive legal institutions may be seen as continuing a radical strand that reaches back through CLS and legal realism to the early legal pragmatists. This chapter advises caution in these modern pragmatic hopes. Legal pragmatism, though it may often glorify social change, can never instigate it nor protect its possibility. In lacking a principled foundation apart from what most people currently believe, legal pragmatism tends to impose status quo beliefs in a Panglossian view that what exists must be the best of all possibilities.

The latest legal re-acquaintance with pragmatism is limited in the same fashion as Holmes early celebration of the ‘marketplace of ideas.’ As demonstrated by an impasse in the work of Richard Rorty, who has arguably done more than anyone to breath new life into pragmatism, the pragmatic vision of law as competing social beliefs endorses all change in the past while remaining silent on whether or how new change is to occur. No matter how enlightened or well-meaning a pragmatist may be, and as Rorty surely is, there is no independent key for triggering or encouraging development. Of course people may eventually believe differently, but until that time the present is unduly sanctified by having won out over all that came before. In drawing an analogy between legal pragmatism and economic theory, perhaps the field most given to evolutionary metaphor,

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I wish to accentuate the tendency of theories of competitive change to end up as an apologia for biases of the status quo. Past change is embraced as the precursor to what is now, for having providing the present through competitive struggle, evolving to perfection. Seen in this light, the threat is that a victorious practice of the past may easily become an unquestioned ought in the present.

The danger in a pragmatic endorsement of evolution to perfection is that solutions to old problems configure our thoughts so that new problems, and their potential solutions, are not even contemplated. These dangers of evolution to perfection are well illustrated by the theory of path dependence, a radical variant in evolutionary and economic thought. The theory of path dependence offers the lesson that past successes were often the result of specific and chance circumstances that have no rational connection with fitness or ability in meeting current challenges. Evolution to perfection celebrates this past variation at the expense of questioning whether a new, or even previously defeated, technique may not serve better.

There are times when it may be impossible to undo the advantages given to past techniques, but we need not revel in the inevitable perfection of all the paths that led to where we presently are. Between the caution deserved by evolution to perfection and the simultaneous need to have others adopt around a better solution, lies a difficulty of how to balance the growth of new ideas while remaining neutral as to the ends of the system. Though path dependence warns against assumptions of the present as perfection, it remains that there are times when a certain path should be followed over others by most competitors. Rather than encourage the majority to follow divergent paths despite the undeniable success found by another, there must be a momentum point when many
should follow and build upon a new practice while space for a creative few to diverge is encouraged. The object is distinguishing between convergence based on improvement and convergence based upon a minimal race to the bottom so as to provide for the scale of diversity’s ambition of use.

A regulatory system should not impose success or strategies upon its members, but it should promote the ability of each to offer up their own attempt at success. On the more radical evolutionary level, in response to competitive insecurity and suboptimality, it is the entire competitive system that must be reconsidered. When convergence is still efficient for the group, then regulation should adopt a less ambition approach, and encourage individual innovation for the sake of diversity and future difference, but it remains that only few individuals will be able to translate a specific and time limited incentive toward a far out competitive goal post into competitive advantage in the long-term.

A potential bridge across the gulf between pragmatic convergence and path dependence, and thereby indicate the scale of diversity solution, may be found, perhaps ironically, in a pragmatic source. Throughout his work, Rorty joins his pragmatic philosophy with a fascination with the strong poet.\(^2\) Such prophetic figures as the strong poet are the individual agents of social change, who rise up and offer up their unique personality and ideas to society as models of what ought to be. These individuals are the motivators, the providers of new content, in a marketplace of ideas. Rorty’s pragmatism is purposively neutral: a method for viewing what works best by way of popular belief. But why limit it so? If change arises from individuals, prophetic or otherwise, why not

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\(^2\) “In my view,” Rorty explains, “an ideally liberal polity would be one whose culture hero is [Harold] Bloom’s ‘strong poet’ rather than the warrior, the priest, the sage, or the truth-seeking, ‘logical,’ ‘objective’ scientist.” Richard Rorty, CONTINGENCY, IRONY, AND SOLIDARITY 53 (1989).
encourage the supply of ideas rather than assume that the market will determine the best automatically? For if the pragmatic description of legal change is correct, then followed to its logical conclusion, the promotion of the greatest number of contributions should be the legal pragmatist’s constant goal.

Assuming an efficient market for ideas is a descriptive story of limited value when compared with a method for actively encouraging the supply of what this market is supposedly to choose between. With a progressive evolutionary system, the focus would rest on alleviating the impediments to individuals contributing their own vision of success. In constraining visions of new possibilities, evolution to perfection becomes an impediment to progress, not its pinnacle. Future solutions may well come from those who are currently excluded, ignored in the congratulatory noise surrounding what exists presently.

II.III LEGAL PRAGMATISM

The great American jurist and legal philosopher Oliver Wendell Holmes Jr. is usually credited with giving pragmatism its earliest and most articulate introduction to the law. Holmes’ work challenged traditional assumptions on the law as an independent system connected through time and guided by reason. It was an ambitious deconstruction. In tearing down and clarifying the structures of the past it was hoped that the law could become a straightforward practice of the present. Prophetically, in an article from 1895 entitled Learning and Science, Holmes states that “the law, so far as it depends on
learning, is indeed, as it has been called, the government of the living by the dead. But the present has a right to govern itself so far as it can.”

In a bold statement at the outset of The Common Law, Holmes claims that “The life of the law has not been logic: it has been experience.” Although modern eyes may find nothing revolutionary in this statement, that which has been made commonplace through the extent of its influence should not lose its proper place in legal history. The belief that the law was primarily an exercise in logical reasoning had gone unquestioned for centuries, allowing Sir William Blackstone to state authoritatively in 1765:

What the law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable… The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law fact… which judgment or conclusion depends therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice.

The longstanding ideals of judicial objectivity and neutrality may be seen to follow directly from a conception of law as logical system. If legal principles act as logical axioms, judicial interpretation is constrained in a manner consistent with the conclusion that judges discover rather create the law. Logic contains the past flow of legal decision, and new fact situations are placed via analogy within this developing stream of precedent. Thus the law is discovered; as the natural development of its inherent logic is uncovered and extended in each new circumstance.

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3 Oliver Wendell Holmes, Jr., Collected Legal Papers 138-139 (1921).
4 Oliver Wendell Holmes, Jr., THE COMMON LAW 1 (1948).
Though expressed in practical terms, Holmes’ priority of experience over logic undermined dramatically the theoretical connection of law and higher principle. In the monumental article *The Path of the Law*, Holmes states a simple enough definition of the law: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”

Interesting aspects of Holmes’ definition of the law are to be found in the limitations on where judges are supposed to find guidance. Most especially, Holmes is intent on undoing the belief “that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct.”

Holmes then deigned to relieve students of the law of their well-intended, but ultimately misguided delusions: “And the logical method and form flatter that longing for certainty and repose which is in every human mind. But certainty generally is illusion and repose is not the destiny of man.”

Holmes’ assault upon the law as a logical system corresponds well with the pragmatic rejection of objective and absolute truth. But there is, and must be, more to pragmatism than a void of foundation, and the tearing down of a previous era’s philosophical monuments. If legal pragmatism rejects theory, as an anti-theory as it were, but does not replace old methods with the new, it still must offer a location of value.

Truth may not be objective in the pragmatic view, but it has a place in social usage nonetheless. The founding American pragmatists, such as Pierce, James, and Dewey, were quite focused upon the physical sciences, and in an evolutionary sense were

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8 Ibid., 465.
9 Ibid., 466.
observant of the changing nature of knowledge. This evolutionary process of knowledge, wherein new ideas and assumptions are seen to replace old certainties, came to influence an instrumental view of truth in pragmatic thought. A priority of social usage may be discerned in William James’ oft quoted sentiment: “The true is the name of whatever proves itself to be good in the way of belief, and good, too, for definite, assignable reasons.”

A philosophy of truth defined by what is good by way of belief is uniquely open-ended, allowing for what works presently to be true regardless of the past assumptions and certainties. While Holmes’ call for the future to determine itself may be seen to echo the pragmatist’s rejection of past truths, his work would also contain hints on how this present social usage was to be located or found. The first element of Holmes’ prescriptive pragmatism (as I term it) was the claim that the law was to be found not in logical discovery, but simply in the person of judges. Hence the later and now well-known claim of legal pragmatists that the law is merely what ‘judges say it is.’ This liberation from logical legal aspirations was not perceived to be without danger, however. The renowned analytical legal philosopher H.L.A. Hart, for instance, chastised the legal realists for ignoring the extent to which the ‘rule’ – always paramount for Hart – of the law usually proceeded upon a following of clear precedents, and without the need for judicial creation or legislating.

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11 William James, WHAT PRAGMATISM MEANS, 63 (1906).
13 See, E. Hunter Jr. Taylor, H.L.A. Hart’s Concept of Law in the Perspective of American Legal Realism, 35 Mod. L. Rev. 606; (comparing the relationship between Hart and the American legal realists, and arguing that Hart overstates their differences in order to further extenuate his own theory - a ‘staw-man’
In a different vein, a danger welcomed by many amongst the early legal realists and the subsequent CLS school, was the demystification of law invoked by reducing law from principle to actual individuals. A more politicized view of law would emerge, which concentrated on the perceived biases that longstanding legal doctrines had come to enshrine as principle. Articulated mainly from a liberal basis, the early legal realists would challenge the sense of legal creations like the corporation, and in doing so connect the notion of a legal fiction with the political and economic preferences which underlie the status quo. Apart from the legal political activism engendered by pragmatism, much of which would probably have been distasteful to Holmes had he known the course of his influence, it remains that this judge based focus lies at the heart of pragmatism to this day. As Posner, for one, has detailed, legal progress occurs as individual judges pick and choose from surrounding ideas to find what society currently requires. Judges, in this interpretation, may be seen to be the individual representatives of social usage; the arbiters of what works best by way of belief.

If judges are to be the ones selecting amongst social ideas, the provision of these ideas are addressed in the second, and arguably more significant, element of Holmes prescriptive pragmatism. Though judges are the repository of so much selective power, in version of legal realism as it were. Though beginning from a similar basis, specifically a dissatisfaction with the moral claims of natural law and ‘syllogistic’ assumptions of law as derived from logic, it is the third element of legal realism/pragmatism that Hart cannot accept. Namely, the pragmatic view that lawyers are engaged in the art of predicting what judges – as individuals – are likely to do. This third element is antithetical to Hart’s priority of rules, and the surrounding political, institutional structure that gives the law an authority beyond the individual bureaucrat or legal decision-maker.

14 Aichele, supra note 5 at 14. As Aichele observes of Holmes: “Aloof, removed from the social upheavals of the day, Holmes showed little concern for the improvement of American society. Any support of specific programs for reform was more coincidental than intentional.”

15 Posner recounts Cardozo’s theory of adjudication, which is said to elaborate upon Holmes basic philosophy, as the obligation of legal decision-makers to find solutions that further the “welfare of society.” Richard A. Posner, What Has Pragmatism to Offer Law?, 63 S. Cal. L. Rev. 1656. In Cardozo’s words, “the thing that counts is not what I believe to be right. It is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right.” Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS 88-89 (1921).
a largely undemocratic fashion, Holmes was ultimately concerned with the restraint of judicial interference in the social forces beyond the law. In Holmes’ vision, the legal arbitration over social usage should allow ideas to compete for ascendancy in the ‘marketplace of ideas’ - perhaps the most well-known concept within legal pragmatism. As Cass Sunstein has observed in an often cited article on the seminal Lochner case, Holmes famous dissent seemed to exude personal forbearance, and the suppression of his personal predilections, for the sake of allowing social forces to contest each other in the safe confines of the law.16 What might seem more personally compelling to Holmes was secondary to the systemic need to provide the space for ideas and factions to battle it out in the private realm for supremacy.17 The undemocratic nature of judicial selection is thus balanced against a pluralistic need to let competing interests and ideas clash.

Holmes’ legal pragmatism joined three elements consistent with the American pragmatists: 1) rejecting past absolutes, in favour of 2) social usage, and 3) competitive valuations of truth. While the work of Holmes occurred over the years surrounding the exchange of the 19th for the 20th Century, according to Richard Posner, legal pragmatism has not advanced significantly since.18 In its essence, pragmatism remains an anti-theory, a method against methodological certainty, or certainty of any kind. As Posner observes perceptively, pragmatism “clears the underbrush; it does not clear the forest.”19 While most pragmatists agree that the approach does not offer solutions, a hallmark of pragmatism remains its attempted receptivity to change. As Stanley Fish states: “Pragmatism is the philosophy not of grand ambitions but of little steps; and although it

17 Ibid.
18 Posner, supra note 15 at 1653.
19 Posner, supra note 15 at 1670.
cannot help us to take those steps or tell us what they are, it can offer the reassurance that they are possible…”20 For those who find reassurance on the availability of change preferable to its active promotion, a legal pragmatism consistent since Holmes is no doubt comforting.

II.IV RORTY AND PRAGMATISM

Modern pragmatism as defined by the likes of Posner and Fish may be representative of the current parameters or mainstream of the approach, but it is not conclusive of the attempts to make it otherwise. Pragmatism by its very definition remains without content, without a theory as to what is correct or preferable. Unsurprisingly, there have been legal scholars of late who have tried to make pragmatism more socially active – a tool to be used against oppressive assumptions that exist within the current legal regime. The potential for new legal truths is understandably appealing to those who are reform minded. That the assumptions of the past, in this case viewed as oppressive, have no claim to objective truth or social priority is a potential recipe for radical change, and newfound equalities. And though this appeal for new beginnings may be undeniable, to understand pragmatism as a philosophy is to realize that such radical or equitable claims have no special place within it. That the attempt at such radical solutions has even made is no doubt a testament to the modern influence of Richard Rorty and his revival of the Romantic tradition within pragmatism. Yet, whatever Rorty’s influence, it remains that the basis of pragmatism is a method less view to social change, located in what people currently believe. The inability of radical approaches to be reconciled within

20 Stanley Fish, Truth and Toilets: Pragmatism and the Practices of Life in Dickstein, supra note 9 at 433.
pragmatism in a meaningful way is an inevitable lesson that the Romantic strand of pragmatic influence must lose out to the core belief of evolutionary competition.

The evolutionary influence upon American pragmatism is well-known. Darwin provided not only a scientific theory to replace old assumptions; he did so in a way particularly well suited for absorption into social theories. Darwin’s theory of natural selection indicated that one’s environment was determinate, selecting out variations as better fit for success, leaving these genetic advantages to be handed down to subsequent generations. The environment is thus the field against which competition is measured, providing the fuel of reward, while internal variation provides the diverse and divergent attempts at attaining this goal. It is not a far leap conceptually from Darwin’s environmental selection to that of pragmatism, whereby what works best in the present is good enough by way of belief and usage, and the marketplace of ideas selects the most fit idea for survival.

The Romantic strand of pragmatism, on the other hand, concentrates more on the possibility to construct the social world anew, and forge ahead despite the preferences of the past. Though rejected by such prominent pragmatists as Fish for an undue amount of glorification, aspirational content, this Romantic strand is precisely that which has inspired many modern legal neo-pragmatists. Authors associated with the radical Left, in the words of William Weaver, tend to “believe the influence of philosophy has provided intellectual cover for unjust power arrangements perpetuated by law.”21 A large number of reform minded authors have taken up an activist use of pragmatism.22

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inspiration given by Rorty is not difficult to understand when considering the reformists goals these neo-pragmatists have in view. As Weaver observes, “The radical Left sees in pragmatism what it needs to cut law free from philosophy, thereby facilitating the attack on traditional legal justification. Many on the radical Left see the pragmatist’s assault on foundationalist philosophy as preparing the ground for a new politics.” When considering this second, aspirational goal of neo-pragmatists it is perhaps unsurprising that many find Rorty somewhat uninspiring.

While many modern pragmatists of an activist bent have been influenced by Rorty, there is also within these modern pieces a pronounced criticism of a perceived conservatism in Rorty’s acceptance of liberal democracy and its economic institutions. For example, Rorty has in turn been called a “complacent pragmatist,” and charged with “reinforce(ing) existing power relations that illegitimately oppress and exclude large segments of the population.” Although Rorty’s work is replete with fair-sounding pronouncements and expressed hopes that would be appealing to an egalitarian ear, this optimism is attached to no method or philosophical claim radical enough to support actual change, nor appease his more radical followers. The degree to which these neo-pragmatists remain both indebted to and dissatisfied with Rorty’s position is a testament to the often appealing, enticing failings of legal pragmatism. As Lynn Baker notes perceptively, the dissatisfaction with Rorty on the part of those on the Radical Left is due

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23 Ibid.


25 See Radin, supra note 22 at 1710. This criticism is also mirrored by Minow & Spelman, supra note 19 at 1612.

26 Singer, supra note 24 at 1759.
to an essential distinction in Rorty’s work between pragmatism as his central method and his personal, aspirational hopes for that same method. Rorty, in his work, is a pragmatist first, and a liberal second. What appealing principles extend from Rorty as liberal should not be confused with the philosophy, theory, he espouses. And those who generally espouse change as a social good should not be confused the possibility of change with its active, principled promotion.

A relatively easy entry point into Rorty’s distinction between method and belief may be found in addressing his well-known strong poet ideal. Like the early American pragmatist philosophers, and such later legal pragmatists as Richard Posner, Rorty embraces a negative view of philosophy. Accordingly, truth is not absolute, knowledge is not objective, and legal decision-making is not bound to or explained by abstract principle. In the space provided by these negations, practical and new solutions are thought to thrive. Rorty goes further than this pragmatic foundation, however, to envision the actual motivators in this social movement of change. In keeping with his literary perspective, Rorty equates the motivation of social change with the individual, or the individual archetype, of the strong poet. The ‘prophetic’ individual represented by the strong poet draws on the “anxiety of influence” characterized by Harold Bloom, the renowned literary critic, who observed that the Romantic poetics were motivated by an obsession to escape the thought that were but a “copy or replica.” The desire of Romantic poets to fashion themselves as unique and autonomous individuals through

28 Ibid. 706.
29 See, e.g., Rorty, supra note 2 at 26, 20, 53.
30 Ibid., 26.
artistic expression, an outward claim of uniqueness, Rorty extends to social change in general.

Thomas Grey, another noted legal pragmatist, has written to emphasize and remind that early pragmatism was inspired by not only empiricism, but also the Romantics of art and literature. 31 While this Romantic feature of pragmatism has been rejected by some, most notably Stanley Fish, 32 as being outside of pragmatism’s neutral foundation of simply equating truth as social usage, I believe Rorty’s balance across this fissure within pragmatism is emblematic of his theoretical limits. So long as Romantic aspiration remains tied to a notion of truth as social usage, the supposed originality of constant change and redefinition does not escape the social, majoritarian measure of value. An initial claim of uniqueness, and the outward manifestation of one singular poetic personality, is inevitably met and judged by an audience. Social progress, and the idealized march of revolutionary ideals, is thus a product of individual expression meeting the wider society. While each radical new idiom of thought may issue from a solitary individual, the acceptance and implementation of this new idiom must be endorsed by a wider group of individuals. For no matter how much we may glorify the lone prophet, poet, revolutionary, it is the following herd which sanctifies a revolutionary idea through the act of belief. Without this essential element of engaging the belief of others, of convincing them of the coming rightness of an idea, a revolutionary notion remains an unrealized hope, drifting in a historical void like so many before it.

So where does this notion of the strong poet leave us – the theoretical, academic observer? Exactly where it leaves Rorty. Either we as individuals become strong poets,

32 Stanley Fish, Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin, in Brint and Weaver, supra note 12 at 47.
prophetic persons trying to convince others of our enlightened designs, or we are bound to watch on the sidelines. Rorty himself is an overly modest intellectual, inhabitant of the sidelines, who acknowledges that society’s new ideas lie beyond him; a result of his own lack of prophetic imagination. Without explicitly offering a new ideal or method for reorganizing society, without a revolutionary or poetic ideal, Rorty is content to reside in his pragmatic belief that such ideals will be offered by others. Seen in this light, the radical left’s dissatisfaction with Rorty’s perceived conservatism is both inevitable and unfair. Rorty’s well-known and well-liked liberal stands are simply his personal hopes of how future developments might occur; he is not offering the answers himself.

In one of Rorty’s few articles explicitly about law, he states: “I think of Brown [v. Board of Education] as saying that, like it or not, black children are children too. I think of Roe [v. Wade] as saying that, like it or not, women get to make hard decisions too, and some hypothetical future reversal of Bowers v. Hardwick as saying that, like it or not gays are grown-ups too.” Again this is an admiral position to be sure, but it must be stated that Rorty is not offering a guide to this final goal. Instead, Rorty is simply offering commentary on how the practical language of pragmatism explains change, with an added ingredient of personal hope and valuation. The added valuation, expectation contained in the hypothetical reversal of Bowers should not be confused with what Rorty’s, or pragmatism’s, neutral method can yield alone. Open to change but never demanding of it may be an accurate assessment of Rorty’s position, placing him firmly within the pragmatist mainstream.

When shorn of the often pleasing and admirable personal hopes that flavour his work, Rorty’s criticized acceptance of the status quo may seen as the result of his philosophical, not his personal choices.\textsuperscript{35} Placed within the two extremes of prophet, the convincer, and the market of ideas, the people to be convinced, is Rorty’s neutrality toward what currently exists. Rorty must necessarily embrace present beliefs as what was most recently convinced into being: the most recent victor in the marketplace of ideas. Despite his liberal personal views, Rorty’s theoretical hands are tied by his pragmatic method: he can no more reject what currently is as endorse what was once before. Pragmatism is bound to a competitive and majoritarian vision of truth, and until such time as a new vision is offered and accepted, Rorty the pragmatist must equally acknowledge these current beliefs as what works best by way of belief and practice.

II.V ECONOMIC EVOLUTION

While the claims of Rorty’s conservatism are normally leveled against an acquiescence in the legal and economic institutions of the status quo, there is a deeper, arguably more substantial, concept of evolutionary knowledge at stake. In true pragmatic style, legal structures may be viewed as merely the most noticeable points of reference or outcroppings in a wider debate over fundamental social concepts and ideas. Therefore, when Rorty is criticized for favouring what exists by way of belief in legal institutions that are thought to promote unjust power relations, he might be criticized equally for accepting a certain economic, western world view. The extent to which our current systems, institutions, prejudices, and their supporting legal rules, are alterable is dependent upon our wider social view of knowledge. Assuming a pragmatic view to a

\textsuperscript{35} See, Baker, supra note 27 at 706.
competition amongst ideas on the grandest stage possible, it is an economic definition of thought that is currently ascendant within western, and increasingly world society. It is this economic vision of thought that not only flavors and informs current conceptions of individuality, it also plays a substantial role in defining how thought is translated into social acceptance.

Much has been made of the economic definition of individuality, and of how the economic model of rational maximization has come to dominate social science and legal studies of individual behavior.36 In these brief pages, I instead concentrate on the influence of economic thinking on the prevalent view to social knowledge as an evolving system. If Rorty’s Romantic pragmatism may be said to fall into the perennial pragmatic trap of endorsing what is best by way of current economic institutions and distributions, it is an economic worldview that underlies, and gives life to these current preferences. The economic view of evolution is by definition simple, perhaps deceptively and enticingly so. A brief and excellent statement on the qualities of classical economic evolution is given by Mark Roe:

The classical evolutionary paradigm has a strong grip on law and economics scholarship. What survives is presumptively efficient: if it were inefficient, the practice, the law, or the custom would be challenged by its more efficient competitors. The success of the more efficient practice or law allows it to prosper, while its less efficient competitors wither and die. Entrepreneurs without a clear understanding of what they are doing can stumble on an efficient practice. They make money and their firms grow at the expense of firms that failed through bad luck or poor skill to adopt the efficient practice…37

Notice the prominence of the word efficient in the selection above, now an almost hallowed legal concept thanks to the modern ascendance of law and economics. But what

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does efficiency mean beyond the realm of the entrepreneur? One may readily imagine a new baking or candle-making technique leading to a better, cheaper good produced. But is law-making an efficient system? Public Choice theory would tell us that this is not always the case. And the law and economics claim that the common law has always been evolving toward economic efficiency, even if judges did not know they were doing so, has been rejected as hopelessly improvable or even fanciful. Yet, even should legal evolution rest solely upon private market assumptions absorbed from microeconomics, this is still a formidable basis. And perhaps no more evolutionary symbolism is needed for classical economics than individuals competing for the recognition and reward given by their peers, with the invisible hand of the market rewarding each according to the worth of their activity as determined by others.

Apart from any historical lineage linking economic thought with Darwin or pragmatism, it remains that economics contains a certain connection with evolution. As with Darwinian natural selection, economics is based upon the environment selecting, determining success. The market, arguably the central concept in modern economics, is a powerful environmental equivalent or symbol, wherein others assign value to an individuals’ activity by their willingness to trade their own output for it. Further, an evolutionary quality of individual variation is displayed in the economic attempts that each individual contributes, providing the activity which the market environment then selects between. While this is no doubt a persuasive combination, with democratic

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39 The influence of economics, particularly the work of Thomas Malthus, upon Darwin is well-known. See, e.g., Hardy Hannappi, EVOLUTIONARY ECONOMICS 7 (1994).
allusions of choice throughout, there remain significant difficulties this evolutionary view of knowledge.

While there is a voluminous number of criticisms of classical economic assumptions on the equation with markets and democratic choice, the focus here, shall be on the shortcomings of classical economics as evolutionary theory of knowledge. When viewed through an evolutionary lens, it appears that a classical joining of the market and individual capitalist will not necessarily further a comprehensive theory of change. This is not to say that a theory must be appropriately evolutionary, nor consistent with Darwinian biology, to be valid. Rather, the limitations revealed here through an evolutionary lens indicate detriments that also lie at the heart of such modern societal requirements as progress and individuality. To understand how such apparent tenets and provisions of classical economics may be limiting requires a two stage analysis, divided thematically by environment and individual. Environmental and individual issues within economic evolution will be discussed in the following sections, en route to the proposal of a pragmatic solution based upon individual rights.

II.VI PATH DEPENDENCE

Classical economics tends to entail an imperial view to the past. That which now exists, must exist because it has succeeded to this point. The present practice, technique or strategy, has won out over others to assume its rightful place as the dominant solution. Echoing the above words of Mark Roe, were the present practice not the most efficient solution it would already have been supplanted by something else. Evolution to perfection thus equates with classical economics, endorsing a competitive view to history
within which that what is now has won its way to ascendancy. I should clarify that I refer to evolution to perfection as a Panglossian tendency, not a literal imputation of belief unto scholars associated with either legal pragmatism or classical economics. I do not mean to imply that the present is deemed to be perfect, but am instead concerned with how the process of advancement is viewed: it is the to perfection that is my focus here. Specifically, the receptiveness of a particular theory – or anti-theory – to change may be found to extend in part from how the past itself is considered. A competitive view of the past, in which techniques or ideas battle it out for supremacy, tends to sanctify what currently exists for having won this past battle. However, as the theory of path dependence cautions, the techniques that have won out in the race to solve past problems may be less adept at meeting new or future ones. Not only does path dependence raise the prospect that previously vanquished techniques may actually be better at solving a newer problem than the dominant technique of the present, what is seemingly of far greater import, is that faith in this dominance may impede our very recognition of new problems and challenges.

Path dependence is a radical strand within mainstream economics, growing in prominence of late. As with all evolutionary thought, path dependence begins with the banal assumption that the past determines the present. Why path dependence is a radical variant in economics, and why it is different from the evolutionary model of classical economics, is a matter of historical interpretation. Path dependence, simply, argues that past circumstances – such as pure chance or initial advantages – are often determinative of what is the currently dominant practice. Whereas classical economics assumes evolution to perfection, path dependence elevates the vicissitudes of life and competition
that may result in random and initial advantages. Once locked in, these initial and random advantages can become so ingrained, and invested in, that they continue in prominence long after new and more efficient practices are identified.

A common example of path dependence is that of the QWERTY keyboard – named after the uppermost left row of letters, illogically placed to slow early typists who were too fast for the early, crude mechanisms that would jam repeatedly when pressed.\textsuperscript{40} Word processing having obviously surpassed this mechanical impediment, the debilitating delay designed into the keyboard is no longer necessary or efficient. Yet the old form remains, a sign of an initial economic advantage long since having worn out its rationale. The cost of retraining, and of retooling, replacing hardware and software is so exorbitant, prohibitive, as to make any short-term efficiency gains of modernization beyond realization.

As another example consider a physical allegory of path dependence.\textsuperscript{41} A road winds through a hilly landscape, a dark strip appearing and disappearing through green fields until the far off horizon. Your car out of fuel, and forced for once to exchange walking for driving, you notice the distances of this inefficient, bending road. You need to reach point B, and wonder why the area between there and your starting point of A contains so many bends unexplained by the landscape or any observable features. What you do not see is the trapper, who, two and a half centuries ago, had to make his way through the same terrain while having to avoid wolves’ dens spotted throughout.

\textsuperscript{40} The Qwerty example was first used by Paul David to demonstrate the tendencies of path dependence. Paul A. David, \textit{Clio and the Economics of QWERTY}, 75 Amer. Econ. Rev. 332, 335. The accuracy of the Qwerty example has, however, been questioned, see: S.J. Liebowitz & Stephen E. Margolis, \textit{The Fable of the Keys}, 33 J.L. & Econ. 1,3 (1990). Yet, as Oona Hathaway notes, “Despite the debate over its accuracy, the example continues to be considered one of the early illustrations of path dependence theory’s central insights.” Oona A. Hathaway, \textit{Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System}, 86 Iowa L. Rev. 111, at note 39, (2001).

\textsuperscript{41} The metaphor I describe is modeled on the one found in Roe, supra note 37 at 643-644.
A trader followed the trapper, now able to hunt perhaps, but unwilling to break a new path even though he need not fear the wolves. It was easier to follow a winding path in the woods than to break a new one. Travelers and then merchants found this same path, following the same reasoning as the trader before them. The trader’s path came to be the established route, with settlements and towns spotted along it long after the wolves had been eliminated from the surroundings. In the subsequent century, industry and cities solidified themselves in concrete along the way. Skipping forward to modern times, local authorities would have been faced with many budgetary questions and strategies regarding the road. At each stage they could have resurfaced the worn road or built it more efficiently – kept the winding path, now inefficient, or pave in a straight line between A and B, leaving ghost-towns and empty factories along the way. The choice of each succeeding municipal administration would have been clear, and hence the winding path you now find yourself meandering along.

The immediate lesson of path dependence, as indicated by the simple example above, is that past chance is often a greater factor in present forms than evolution as perfection implies. It is a lesson that goes to the heart of modern economic theory, for without the certainty that the competitive environment selects out the most efficient practice, the mysteries of the invisible hand of the market may no longer be assumed to yield the best results. The flow of market competition, usually idealized to hold that each pursing their own self-interest is produces the best result, may instead follow arbitrary routes, and favour arbitrary advantages that solidify the success of practices which are not necessarily the most efficient for present needs. In a general, path

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42 And modern microeconomic theory would seemingly have its claims to scientific predictability weakened.
dependence questions the environmental determination of success that is the private market. Beyond issues of explanatory or historical analysis, path dependence questions our assumptions on the ability of our present solutions to meet new and future demands. The more significant issue raised by path dependence, however, is the potential for solutions to become locked in, constricting our ability for envision the widest array of answers to meet future problems.

The winding path example above is more than simply a metaphor for the historical vicissitudes that have led to the present, and often remain beyond their usefulness, it should inspire caution for how current and past practices limit our adaptability and imagination. For what may matter more than the investment given to a practice, whether infrastructure of the physical or political, is the ingrained quality these practices assume within the contemplation of what remains to be done, attempted to progress. As Mark Roe notes in relation to the winding road metaphor: “Once society reached that summit, the next – a straight road through the forest that is easy to travel – can be reached only by going down the evolutionary hill, by going backwards and re-making the road.” 43 The hill analogy of Roe’s is well-chosen, for it captures the limiting nature of past success. The practice that is the most efficient and fit for its time may quickly achieve its purpose and then plateau by way of usefulness. What worked well enough before to succeed may not be able to evolve further than the tip of its particular hill. And while Roe’s hill analogy is apt in describing locked in advantages, and the costliness of undoing the

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43 Roe, supra note 37 at 644.
infrastructure of past techniques, I believe the greatest detriment lies in the hills that
remain still unseen.44

The clouded mountain top of evolution to perfection may be in reality but a small
hill, with greater challenges and possibilities hidden by our unquestioned embrace of the
current pinnacle. In my telling of the winding road example above I implied that
municipal administrations made a conscious decision to remain with the existing road
rather than opt for the cost of the most efficient solution in making a new road in a
straight line. But what local administration is likely to even consider such a grand
redesign when faced with more pressing and less abstract demands for expenditure?
Much more likely, is that the road’s path is taken for granted, an assumption firmly held
in the subconscious of local inhabitants, as part of the natural course of things as the
landscape itself. It may well be that given an overt cost benefit analysis that the result
would be the same, and that dramatic reinvestment for present efficiency would not be
undertaken. The difficulty, however, is when such an analysis and such possibilities are
not even considered. This is why a pragmatic view of truth defined as what is currently
believed is limiting to our vision of new hills to be climbed. The environment in question,
whether it is defined socially as the market or the marketplace of ideas, becomes static
under such a pragmatic, myopic vision. The competitive environment is more fickle and
fluid, requiring that we keep offering new techniques to meet the demand of what works
best. Assuming mastery at any point is not conducive to an ongoing process for renewing
possible solutions.

44 As Roe notes, “If society cannot think effectively about the alternative path because it lacks the
vocabulary, concepts, or even belief that the other path could exist, they that society cannot consciously
either to return to the branch point of the two paths (and then go down the other path) or jump to the other
path.” Roe, supra note 37 at 651.
II. VII  BIOLOGY AS METAPHOR

As the environment selects for success, the second essential ingredient in evolution is the individual variation to be selected between. Under Darwinian evolution, as under modern refinements and alternative theories such as punctuated equilibrium, genetic variation is the essential mechanism of increasing group fitness.\(^{45}\) Whereas Darwin posited that evolution occurred in a long slow process, the theory of punctuated equilibrium claims that it occurs in sporadic bursts of activity fueled by the isolation of fragments from a species.\(^{46}\) Regardless of these nuances in modern biology, evolutionary theory remains tied securely to the chance permutations that arise within individuals to give selected advantages. Economic theory, however, in keeping with a pragmatic view to evolution as perfection, adopts an inherited view of advantage. A brief example of this theoretical difference between biological and economic conceptions follows, which will hopefully indicate the troubling implications for individual potential that is entailed by the economic perspective.

Obviously business firms and individuals maintain their built-up advantages long after an individual life span. Corporations are legal persons that never die, which possess assets, trademarks, techniques, and managers that are not contained in any one living person. Similarly, individuals may pass down their inherited wealth through inheritances. To account for the built up advantages that firms maintain over time has led economic


\(^{46}\) Ibid. See also, Stephen Jay Gould, THE PANDA’S THUMB 182 (1982). The theory of punctuated equilibrium remains hotly contested, however, with such notable biologists as Richard Dawkins asserting that, contrary to punctuated equilibrium, evolution remains a gradual process.
theory to adopt a Lamarkian view of evolution. An early evolutionary theorist, Lamark theorized that advantages amongst individuals were both inherited and the result of activity. Darwin, more famously, proposed that while individual advantages were inherited, these advantages were the result initially of random variations, permutations on a preexisting genetic pattern. Imagine the giraffe for instance, existing upon leaves and foliage found high in trees. Lamarkian evolution claimed that the long-necked giraffe was the ancestor of previous giraffes who strove harder, higher, for sustenance. The fruits of these efforts, in the form of longer necks, were inherited by individuals who were thus more advantaged in the competition over scarce foliage - who were better able to reach food over the ancestors of lazier or less inspired giraffes. Darwinian evolution, alternatively, proceeds by way of the idea that an initial genetic permutation, being born with a longer neck, translates into a greater ability to achieve sustenance. This greater advantage thus gives the longer neck giraffe a higher likelihood of survival, and a greater chance that it will procreate and have this genetic advantage handed down to later generations, while less adept, short-necked, individuals struggle and are eventually superseded.

Though crude, this summary of differing evolutionary theories may be illustrative of the divergent potential of legal norms on change. When thinking of normative views of

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47 Though evolutionary metaphors have long been evident in economics, and vice versa, the systemic use of evolutionary concepts in economic analysis was most recently revitalized with the publication of Richard R. Nelson and Sidney G. Winter, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 7 (1982); (Nelson and Winter adopt a Lamarkian view of evolution, making the metaphor of evolution serve economic needs, not the other way around).


49 See, e.g., Richard Langlois & Michael Everett, What is Evolutionary Economics, 31 in EVOLUTIONARY AND NEO-SCHUMPETERIAN Evolutionary and Neo-Schumpeterian Approaches to Economics (Lars Magnusson, ed., 1993), (detailing how Darwinian evolution is premised upon variation and diversity within groups of individuals. Therefore, the focus is on individual organisms as the location of variation, and change within species.); Hodgson, supra note 48 at 164-165 (describing the centrality of variation and genes in Darwinian evolution).
progress, of how it is identified and promoted, the location of change in individual variation has two key aspects. First, the inherited or Lamarkian view of efficient advantages endorses what is as the best for a reason validated by history. What is currently best by way of belief, or of efficiency, is best because it has succeeded to this point – meaning that its ancestor path was successful and has yet to be supplanted by another. Even should this theory be often accurate as to historical circumstances of economics – with the important caveats and exceptions provided by path dependence – it remains that this says nothing of future needs. Second, the great metaphorical device provided by Darwinian evolution is that individuals each equally possess the potential for providing the unpredictable solutions to future demands. The essential element of Darwinian metaphor is that the universal potential of new developments lies in each individual, in ways that we cannot predict or foresee. Our social environment does not produce linear goals consistent through time, and neither do individuals produce the answers for all time. A system based upon the constant promotion and renewal of individual potential would not only be consistent with liberal ideals of individuality, it could also produce social benefits not as yet contemplated, and reveal unknown hills to be climbed.

II.VIII THE INDIVIDUAL AS AGENT OF CHANGE

Although the strand of legal neo-pragmatism influenced by the Romantics may celebrate the possibilities and qualities of change, it is passively silent on its actual motivation. Neo-pragmatists in the radical fashion argue for a change of circumstances, but it is decidedly results, or ends oriented. A goal, again admirable, is firmly in mind,

50 See, Langlois & Everett, supra note 49 at 31-31.
but the pragmatic means of getting there are elusive, perhaps hopelessly so. Pragmatism is treated as a mechanism for change, a call to a certain goal, while it more aptly resembles a method for viewing how change does, and has, occurred. As Rorty’s theoretical ideal of the strong poet illustrates, innovations most often arise in opposition to what the majority believes to be true. Indeed, history may well bare Rorty out in this regard, imprecise or unverifiable as this must be. For example, Einstein was once said to remark that he would not have had the audacity to challenge Newton’s gravitational system had he not been influenced by Hume’s philosophical skepticism of accepted truths.\(^\text{51}\) Unfortunately, the waited for result of neo-pragmatism cannot be more than an expressed wish that someone will theorize a new and better system, convincing others out of their oppressive current beliefs. By concentrating on the individual motivators of change, rather than descriptive analysis of how change might or does occur a legal theory would be more open to adaptation, and fluid alteration.

The purpose in returning now to Romantic pragmatism, after an evolutionary discussion, is to connect these two together in an approach to evolutionary pragmatism based on individual rights. Allow me to align the disparate threads running up to this point in a sequence. First, pragmatism argues that truth is socially defined and evolving, based upon what most currently need or believe as best by way of belief. Second, the view to evolution as perfection endorsed by pragmatism and classical economics is flawed in its assumption of a predictable and linear environmental selection of success.

Third, a metaphor of Darwinian evolution indicates that an essential feature of systemic evolution arises from individual agents themselves, as they contain the inherently unpredictable variations against the environment will select from. Without this final step of individual unpredictably, social progress would be as static as evolution to perfection assumes, leaving us on our small hill-top of ignorance forever.

The fourth point is that individual rights are the best means of ensuring the future of pragmatic progress. Drawing upon Rorty’s strong poet ideal initially, it then remains to make this ideal a more widespread, universal call for individual participation in the act/art of convincing others. In this way, with this embrace of individual rights, it is possible to encourage both Rorty’s pragmatic method of change and his personal hopes of radical change. The before-mentioned liberal content of Rorty’s aspirations may be open to debate, but for the purposes here it is only necessary to concentrate on the method and possibility, not the content of change. Let us first assume that knowledge is evolving, that truth is only what is best by way of practice and belief, and that law is simply what judges say it is. Surrounded in these pragmatic tenants, let us then imagine encouraging an active motivator within these belief structures. Rather than waiting for a strong poet to come along and convince others of the next great ideal -and admittedly unable to produce the idea ourselves - why would we not, as hypothetical system designers, encourage the greatest availability of strong poets?

In a sense, the argument for evolutionary individual rights proceeds by way of an argument that pragmatism is unfulfilled logically. Whether through the strong, Romantic version of pragmatism, with individuals as the motivators of revolutionary change, or the minimal market version, with the marketplace of ideas determining the social winner, it
remains that ideas of change originate with individuals. Followed to its logical conclusion, pragmatism should embrace the greatest number of possible contributions to the competition over social direction. Therefore, were pragmatism to be more than a apologia for what currently exists, it would actively need to promote the elements of change that it has consistently indicated.

The exact qualities of a marketplace of ideas may still be endorsed under such an individual rights approach to evolutionary progress. Ideas may compete in the same fashion for ascendancy in Holmes competitive vision of society, but the object of rules and governance is to ensure that individuals are not unduly restricted from participating. The shift within a rights based view to pragmatic competition and evolution thus occurs in the measure of market supply. Whereas so much of pragmatic and economic thought has concentrated on the notion that the competition produces the best possibilities, an evolutionary system premised on individual rights would shift the focus to access to this exalted marketplace. As individuals are originators of new contributions and ideas, there are far too many waiting to have their say on what works best.

In general, an advance needs to be made beyond the recognition on the changing nature of truth yielded by pragmatism, to engage with the production and increased likelihood of the ideas that constitute new truths. Rorty, for one, has commented approvingly on legal pragmatism’s rejection of Euclidean, axiomatic legal principle. Unfortunately, after this initial, now century’s old realization on changeable knowledge, nothing more has developed.\textsuperscript{52} As Rorty has further noted, the insights of legal pragmatism have become essentially banal, so widespread in acceptance has the approach become. However, it may foolish to assume a century’s long plateau with no advance in

\textsuperscript{52} Posner, supra note 15 at 1670.
methodology. Posner is undoubtedly correct that pragmatism clears the underbrush without planting new trees, but what of the qualities of the soil, its fertility, and receptiveness to new growth?

The notion that Einstein’s revolution in relativity (an appealing metaphor for pragmatism no doubt) has undermined the possibility of absolute certainty does nothing to promote another instance of an Einstein like insight or revolution. Pragmatism’s fixation on the systemic possibility of change has detracted from its actual promotion. Extending a scientific metaphor, a university administrator must be concerned with the environment of intellectual pursuit in a way that the individual researcher need not on an everyday basis. Most scientists may proceed in their research oblivious to pragmatism, as most do, working to extend and test the established truths of their field as if they were absolute and fixed. These researchers and scientists may either confirm or reject these established truths, but pragmatism will tell nothing on how to go about either. A good administrator, on the other hand, arguably should be concerned with pragmatic notions, and the systemic tendencies that may either support or detract from an individual researcher’s ability to advance new ideas. In short, academic freedom as engine to new knowledge is premised upon the possibility of each individual to pursue ideas independently. Similarly, returning to wider thoughts on social knowledge, so too may progress be identified with the independent potential of individuals.

While it should necessarily not be the place of law or government to actively promote the content of knowledge, the general pursuit of knowledge itself can be a firm

53 Ibid.
54 Wolfe, supra note 10 at 199. Wolfe observes that despite its warm reception in literature departments, “modern science continue to function as if pragmatism never happened. Biologists and chemists are blithely unaware of the differences between pragmatism, postmodernism, ethnomethodology, and science studies; for them, all efforts to render natural reality tentative are equally absurd.”
basis of individual liberty and potential. In this regard, an individual’s need to actualization of themselves through competition is joined by social concern, as others benefit from a diversity of ideas on offer to be selected from. Therefore, every individual who is prohibited from participating is potentially a new idea, solution, left out of the current pragmatic mix. The penultimate and concluding sections which follow address this promotion of individual potential. First, individual potential is addressed through a basic liberal concept of autonomy, which is extended to consider the competitive dynamics that may impinge upon a basic entitlement to express oneself. The second and final point is more speculative, touching on the distributive issues that inhibit individual potential and participation in the marketplace of ideas. Though as significant as the first section on autonomous choice, and probably more so, these distributive issues are far beyond international norms, and entail a measure of socio-economic rights and entitlements that have yet to be given serious consideration for implementation.

II.IX IDENTIFYING POINTS FOR NON-CONVERGENCE

Until this point I have concentrated on the connection between individual differentiation and the furtherance of possibilities for progress. I wish now to pause and stress that individuals often must, and should follow others. Though I will affirm readily that evolution to perfection, and the modern realities of economic liberalism unduly impose a singular world-view, or way of competing, upon everyone, it is oftentimes desirable that others should adopt the successes of others. A progressive system could hardly be advanced should it require that individuals pursue different paths to their own detriment in the face of other’s success. But individuals also deserve the chance to offer
up their own solutions to society, free from the closed possibilities of what most people currently believe. For this reason, it is arguably appealing to identify strong and weak versions of the encouragement of differentiation, with suboptimality indicating a more ambitious, radical reworking of an entire competitive system.

A difficult, perhaps inescapable, tension may thus be seen to exist between the need to have innovators both convince the wider society and act in opposition to its dominant belief. This conflict may be placed within wider intellectual trends that encourage us to either accept the economic world as essentially linear and predictably, or variable and indeterminate. In terms of economic theory, the dilemma may be placed between a belief in convergence, the economic liberalism of evolution to perfection, and path dependence. As evolution to perfection embraces market beliefs as having selected out the fittest practice, path dependence challenges these assumptions on certainty. Though the classical economic theory is currently ascendant, neither it nor path dependence alone provide a persuasive holistic picture of how competition advances.

If there are clearly times when the majority of individuals should follow the success of others, it is less clear when the possibility of difference for solitary individuals should be encouraged to a greater degree and on a systemic scale. Path dependence, though persuasive as to past imperfections economic evolution, cannot indicate when current beliefs will lead to future inefficiencies and locked in perspectives. At most, then, path dependence illustrates that the social environment is an evolving landscape, with achieved goals not always remaining the answer to changing problems. As noted above, a static environment is combined with an inherited view of individuality in classical economics. To approach a balanced position between convergence and path dependence,
therefore, requires addressing the second aspect of evolutionary thought, that of individual variation.

An evolutionary, progressive system should not impose solutions in a supply side fashion without limitations. Competition must still select out winners and losers. Regulation should simply select out tendencies for alleviation. The primary tendency to be avoided, with great institutional force and design, is that of competitive insecurity and suboptimality. Convergence should be encouraged against as a matter of diversity policy, but with much more limited ambition and institutional alteration of market rewards. The tendencies of competition to be alleviated are those which infringe individual potential, and a legitimate opportunity for individual choice. While the market environment should not be imposed upon to the extent that the state is selecting winners, individuals must also be given the chance to escape harmful cycles of competition in which they have no real choice. The fine balance between copying an admirable competitor and racing to the bottom toward a base instinct is a gray area that may be enlightened by the availability of choice.

The case for government intervention in competition is often a difficult case to make, but the space to behave, compete freely in the first instance should be an entry point into this closed off realm. For example, if one has no choice but to follow a competitor or risk competitive suicide, this should not alone be a good claim to intervention. Too many variables might explain the disparities of success. The claimant might, after all, be horribly inept, or unable to recognize a competitor’s superior technique or productivity. However, should the competitive race lead to both being be worse off, in a cycle of competitive insecurity, then there is surely cause to address rule
change and an alteration of incentives. Similarly, the strategy of one competitor may make all other players worse off, as they then must in turn adopt the harmful strategy that the forerunner to the bottom benefits from first. Autonomy, if it is to have a political meaning connected to a higher ideal, such as individual liberty, must at least guarantee a basic chance to promote an individuality of expression. The world need not be forced into difference, but what may be done to relieve the imposition of competitive, individual homogeneity should be attempted.

Competitive insecurity is a quality of systemic methods, representing a break-down in economic precepts, which should be overcome to allow greater potential. Alleviating competitive insecurity is but a first, essential, step in moving toward ever increasing competitive voices. Competitive insecurity, as with the theory of path dependence, signals that the present certainties of pragmatism and economics are susceptible to stagnation. In the space of these pragmatic omissions, a new theory might hopefully develop, which embraces optimistic and open-ended social possibilities of modern life. Believing in the pragmatic view to a competitive history should also trigger an attempt to ensure that our generation is not unreceptive to that same ideal of change - ensconced in a smug belief that our ideas mark the end of history, leaving it to later generations to finally overcome our intransigence.

A. Encouraging the Few Out of Convergence

While instances of competitive insecurity and systemic suboptimality indicate when convergence is to be avoided absolutely, it remains that systemic encouragement may always favour a view to competitive differentiation. It must be kept in mind that
suboptimality describes competitive problems of the present only, with the unpredictability of system and agent interaction having vested already in current shortcomings and failures. In keeping with the evolutionary metaphor introduced above, however, the best answer to future system needs is as yet unknown, and therefore best met in the provision of diversity and the widest possible number of answers to future problems. Even absent a finding of suboptimality, it may be the most prudent policy approach to reward difference as a matter of principle independent of current affairs. Suboptimality thus may be seen as the more serious consequences of a past inability to predict coming change.

Diversity provides for both relief to present competitive insecurity, and a method for avoiding similar constraints in the future even when convergence is presently efficient. To illustrate the less radical level of diversity regulatory design consider the example of an agricultural community who have gradually come to adopt a single agricultural crop, say wheat. This may be efficient in that the community has a comparative advantage, whether by way of soil content or local techniques, over other competing communities in this crop selection. But it is a situation that should arguably be avoided in that it may provide neither innovation as to the community’s attempts at other crops or techniques, nor, more importantly, variation to account for future system change. Should a certain virus strand affect the wheat produced homogenously, the community would have no production alternatives to rely upon. Present efficiency is achieved at the expense of systemic responsiveness and adaptability.

Now assuming that institution or government involved is conceived in a non-intrusive manner, as opposed to mandated economic value, then systemic intervention
may safely extend evolutionary norms to operate for more than the most straightened circumstances of competitive insecurity and suboptimality. As diversity seeks to encourage competitive difference, by definition this type of regulatory scheme must necessarily retain an element of individual chance, of gambling on a new technique that may achieve success under a new avenue of reward opened by regulatory reward. Were systemic incentive to promote a straightforward incentive for an alteration in competition behaviour then all competitors would adopt immediately around this new baseline of strategy, and thereby defeating the very purpose of competitive differentiation.

Unlike critical situations of competitive insecurity, wherein any reward incentive away from the suboptimal baseline is beneficial, the futureminded instances of responsiveness must be constrained to offering new goals for reward at the fringes of the currently efficient homogeneity. In such situations of current efficient convergence, reward must placed be placed at the edges of current possibility so that variation exists as a matter of future prudence and the unexpected insight of new and even present improvement. Only in this way will incentive correspond with the gambling instincts needed for dramatic change in competitive techniques and strategies, with an innovative individual able to capitalize upon the slim possibility of fitting their new approach within the window of regulatory reward.

Returning to the example of agricultural monoculture, community governance may hold out reward for a small group of competitors to attempt new crop developments in areas of poor to no wheat crops, even as the current preponderance of farmers remains engaged in efficient wheat production. This may serve to give incentive for the random individual improvement in an unexpected area, and thereby provide the community with
a further answer to unexpected changes in the future. The hypothetical incentive may take the form of a time limited tax break for investment in new cultivation techniques or crop design in poor soil areas that is to be combined with a potential windfall of an advantageous future tax treatment for any crop that is made supportable in the harsh region. Strategies of investment are altered as the attempt is cheaper in the short-term, and the long-term benefit of success is also defined. Though the best case scenario is that one individual arrives at a new technique that is viable, increasing society’s agriculture base reliance to two crops, at worst a few individuals waste the tax break without future gain; or that the reward sits unanswered. But this would be a wasted gambit without wasted public expenditure.

The above reference to community decision-making was a conscious one, and is intended to denote varying conceptions of individual competitors. A system of diversity premised upon individuality and its differentiation may seem, at first instance, to leave no legitimate space for organization that is communal in nature. But, the community’s ability to set policies in line with a system of diversity would enable the community to take advantage of social improvements regardless of how those improvements are achieved; so long as the community is able to operate at a decision-making level within an international system and that the community contains means to be exported.

B. Encouraging the Many out of Competitive Insecurity

An example of the more ambitious level of evolutionary incentive is made here initially (with a more detailed elaboration of this main example of diversity to come in chapter seven) in terms of re-conceiving the international trade regime. A danger with the
brand of economic liberalism that currently holds sway over the international system is the extent to which it has attained the status of dogma. Organizations such as the WTO and the IMF stridently impose one model of growth, facilitating a binary debate that is cast as pro-growth and anti-globalization. International institutions, and other instruments within the present game, should allow for different conceptions of progress and different patterns of competition. The ‘race to bottom’ is adequately named, for the result is a homogeneity along the base line of limited social policy. Instead of governments being encouraged to eliminate all barriers to trade simply for the sake of trade, could not barriers to trade be eliminated to encourage social goals? Facing a starting point of universally high tariffs, states would gain preferential access to markets by meeting general conditions agreed upon and indexed by the membership. In this manner competition will continue to function as a rational instrument while at the same time opening strategic possibilities to include various social goals.

Imagining a new beginning to international trade regulation premised upon dramatically higher presumptive trade barriers, albeit with the aim of reduction as reward for advancing social goals, might appear antithetical to the liberalizing project of trade advocates. But this conflict is more apparent than real when considering the principles of taxing international exchange. As trade proponents seek correctly to eliminate the distorting effects of state interference and subsidization, a system of diversity may be deemed to be consistent fundamentally with the trade premise of equal treatment of foreign producers.

Under diversity, states are not given the discretion to arbitrarily disfavour foreign producers save for prearranged and internationally set priorities. Efficiency and growth,
the general objectives of trade liberalization, are furthered similarly by diversity, only that the scope of efficient competition is widened. Indeed, diversity places constraints on state imposed barriers to trade so as to mitigate against arbitrariness, as the WTO is intended, but may be seen to go further by including state regulation as a potential instrument of economic growth, and holding it to a standard of economic efficiency. Not only is efficiency to be encouraged by delimiting state interference, but on a more ambitious level, states are also evaluated on their ability to encourage social goals so as to give their national actors competitive advantage.

The environment is an excellent and straightforward example of how social incentives may benefit the international system. The developed world has the advantage of having already attained economic gains and political liberalism. The developing world seemingly requires economic viability above all else. The current trade regime only rewards those who most efficiently eliminate regulation so as to attract fluid capital. The race to the bottom thus ensues, with the environment, labour standards, health, and other features of social policy an insignificant afterthought. By inverting the trade reward system it may be possible to move beyond competitive insecurity toward a more social operation of reason.

The developed world has advantages that should be encouraged and rewarded, namely the political freedoms that many parts of the world are not fortunate enough to share. However, with the political liberalism of the developed nations comes a history of economic progress that has exacted a heavy cost upon the rest of the world. The state of the environment is such that it is simply impossible for developing countries to follow the historical course of resource driven industrialization. It seems hardly fair though for the
developed world to expect starving populations to forgo industrialization for the sake of a
restraint that that the west has never itself displayed.

The political freedoms enjoyed in the developed world must be balanced against
the economic consequences that detract from the autonomy of everyone else. Inversely, a
developing country should not be given access to freer trade without having satisfied
certain political developments and guaranteeing basic freedoms. And neither should it be
ignored that the developing country has probably not damaged the environment or the
autonomy of others to nearly the same extent as western nations. By inverting the
economic and political through the lens of autonomy the developing world would be
rewarded for what it has not done to the environment. Both the physical and political are
aspects of autonomy, and the market should reward creative approaches that provide
freedom to individuals regardless of national borders.

A system of social reason would engender a competitive system of striving toward
the elimination of trade barriers. For instance, instead of China simply being admitted
into the WTO membership, and thereby achieving the exact same status as other
members, it may have been more beneficial had China been admitted into a process that
rewarded each degree of increasing openness and tolerance. In a system of degrees each
member would be vying to achieve a higher ranking so as to lessen the taxation that is
imposed upon its goods. The underlying purpose of social reason is altering interest
perception to account for non-economic social goals while internalizing those costs that
are explicitly economic. Regulation should be not automatically dismissed as inefficient
but considered a potential competition advantage.
Considering two hypothetical states under an indexed trade system may help to illustrate the potential for social reason. Suppose a developed state currently enjoys the same trade status of a developing country that has little industrial production and relies upon agricultural exports. If environmental damage is afforded forty percent of the index, representing the autonomy of others, the developing country would then have decidedly different possibilities for growth. Two competitive impulses immediately appear for the developing country. One, it is important that agricultural production be optimized so that a maximum output is based upon sustainability. If overproduction leads to environmental degradation, in the form of soil erosion or water pollution for instance, the added output becomes contradictory.

Second, it becomes apparent that further economic diversification for the developing country would be subject to individual rights, or internal autonomy. Drawing in foreign capital would, as ever, be contingent upon advantageous economic regulations. Unlike the past, however, regulations that are advantageous for promoting exports and production would be dependent upon the holistic considerations represented in the index. It would be illogical to eliminate labour standards to attract foreign capital if it subsequently leads to a lesser index ranking and higher export taxation.

A unique situation may develop that sees multinationals enticed to poor countries that have robust legal regimes, encouraging various liberties such as property rights or freedom of assembly, rather than those states that do not. The best climate for business investment would thus reflect the factors an individual might consider in choosing the best society to live in. The initial inflow of capital that goes with deregulation, or a complete lack of it, would be an admitted short-term loss, but one that would lead to
stronger social institutions for future growth. In this way, if growth occurs citizens are at least given some guarantee that they may participate in it.

Our hypothetical developed country would face challenges of a different sort. Under social reason the developed country would have an advantage over much of the world because of the political liberty its citizens enjoy. Yet apart from the substantial portion of the index that is internal, sixty percent as chosen here, developed countries could for the first time be hampered by trade rules that benefit the developing world. Although domestic autonomy is given priority in this hypothetical, it is important to note that it would most likely be easier to attain. It is arguably easier to provide political freedoms than to alter the economic structure of society. Developing countries would easily outpace developed countries in lessening their taxation rates by encouraging or maintaining civil liberties and individual autonomy.

Most pertinent to the hypothetical developed country is how the index would significantly alter the competition between developed states. The environment would now be a cost that is internalized within the country that outputs harm. Specifically, the manner in which goods are produced is a matter in determining the valuation of all goods that a society exports. A country that has been more forceful in promoting clean economic practices would now realize trade advantages across the spectrum of its economy. A steel industry that has been sustained through cheap but ‘dirty’ energy sources such as coal, and a general lack of pollution control, would now be a cost upon a national economy and not the global commons alone. Policy makers in developed countries would need to think of ways to compete with rivals that are racing to eliminate the external outputs of their economic practices.
The labels of developed and developing countries are obviously imprecise. It is important to note, therefore, that the procedural nature of a system of diversity provides for, and covers, a responding diversity of social and national circumstances. Simply put, there is certainly a wide divergence in both situation and concerns between the societies of, for instance, India and Bolivia. The advantage of a system of diversity is that such divergent societies have a standard evaluation based on improvement from their specific and previous status quo. And as between developed and developing countries in general, it is conceivable that India might begin the new competitive system with an advantage based upon education or political representation levels (though this is not necessarily the case), while Bolivia might have an advantage as to a lesser pollution output per person.

Despite minor variations in beginning position advantage, in which some degree must be assumed, the main systemic advantages under diversity are to occur with the next turn of indexed reward – so that Bolivian firms may gain new found advantage because the Bolivian government has made improvements on the level of education, for example. Therefore, procedure allows for national difference as it is the reward for a percentage gain within a democratically selected field of importance that counts, independent of the relative economic positions of India and Bolivia on entering the new system of diversity.

The benefits of the free market would be given to those who are competing within the enlightened dictates of autonomy. The most competitive players become those who respect the space of others and creatively foster choice. In sum, diversity offers significant gains through and in individual competitive expression with a minimum of institutional direction.
II.X  A METHOD IN SEARCH OF DIRECTION

When diversity is conceived in its less ambitious guise, policy direction may gain the benefit of a method that is forward-looking and open to future challenges that may upend the efficiency assumptions of the status quo, but the full prospect of the theory’s potential is left apart, and speaks nothing of the response to systemic failure to which this dissertation is occupied with. As such, the ambitious type example of trade system redesign, indeed recreation, serves as the main hypothetical illustration within this project, and will be elaborated upon later in the fashion of steps to ideal system design. And yet when such ambitious system reform is contemplated, it becomes more apparent that the method of diversity must find its second aspect in a theory rights.

Following sections and parts accordingly address diversity as an ideal product of agreement, both as a means to justify diversity as the optimal system choice for a forming membership and to provide the social content which may input into the greater method. Significantly, these elements of social content not only direct diversity, but they allow that diversity will function to promote important social goals as a means to, and en route to, personal success in market competition. And so while the primary focus of diversity is upon future response, the needed addition of social content to serve as direction to differentiation has the added benefit of addressing social goals of the present that are otherwise not alleviated by status quo market competition.
CHAPTER THREE

EXAMINING THE RIGHT AND GOOD IN MODERN CONTEXT

A theory of diversity has thus far been offered as the ideal method for encouraging progress through regulation, and it now remains to consider the hypothetical point of international response, in which international actors come together to coordinate a response to demonstrated systemic failings. So while an ideal method has been proposed independently, it remains to consider how individual actors might design their system in response to joined physical harm and market failure.

Before a theory of diversity is further built upon to achieve an international legal theory, it may be more appropriate to consider the most obvious regulatory themes available under traditional liberal thought, the ideas that are most appropriate to organized rules combining social goals with individuals who are minded to independence. To this end, the following chapter provides an examination of competing visions of social priority, of whether the individual right or the social good of political philosophy ought to take precedence and compares each vision against its potential receptiveness to changing knowledge.

The distinction between the right and the good is not only a fundamental division within liberal thought, it also represents a broader division between individual and group that this project will engage with, between self-interest and fairness, or efficiency and social equity, with the aim that a theory of diversity will transcend the divide and in doing incorporate advantages from either side.
III.I LIBERAL THEMES & SYSTEM RESPONSIVENESS

When a radical approach to systemic variation is indicated by worsening sub-optimality, with greater losses to individual and group, such a variation may arise in reconsideration of the legal relationship between individual and group, and how it affects the democratic construction of legal and social priority. The divorce between individual action and group concern is a modern dilemma, especially apparent on the international level of common resources, as the means of economic activity are dislocated by private rights and legal divisions from more ambitious and accountable regulation. At the heart of this modern dilemma is the public private dichotomy inherent to liberal democracy, supporting autonomous individual rights and free market preferences. The market is and has been historically an undeniably effective mechanism of social welfare and efficiency; but this realization or faith alone should not limit the formation of more ambitious and socially accountable regulation.

Attempting a potential solution to a public private dichotomy may necessarily involve engaging with perennial debate between the right and the good that exists in political philosophy and legal theory. In the absence of a unitary legal order, a view to a developing political agreement need involve the question of social priority: the ideal or centre out from which other subsequent and subsidiary social rules will spring out of and be justified by. The agreement may be hypothetical and applicable to any regulatory attempt to develop out of disorder, though particular thematic focus will here be paid to the international system as the most obvious case of anarchy.

In summary fashion, the right, or a contractarian theory, defines rules and social obligations as extending out of the individual. As individuals are held to contract into
their respective society, individual rights are an inviolable aspect of that society’s future operation. What individuals bring to society, themselves, must be a measure that is always paramount: as if society cannot impinge upon what lead to its very creation by contract. The good focuses, on the other hand, on the collective vision of society as an organic whole. No preceding myth of pre-society is needed, for the imperative, and subsequent priorities, of society are of societal definition. Lending itself to democratic forms of agreement and governance, the good is an ideal to which a society chooses to direct itself. All further rights and obligations of individuals are then later features of pursuing this social ideal.

In examining the respective sides of the right versus good, the object is to observe how each alone is an insufficient basis for meeting modern challenges of international scope. Indeed, it is the binary and oppositional debate between the right and good that is in and of itself counterproductive. For instance, the good is an excellent tool in revealing the short-comings of the right, and the presently dominant model of liberal rights, but the good is a flawed model for responding to modern dilemmas of sub-optimality and changing knowledge.

If the good is utilitarian in nature, and concerned with a maximization of a good such as happiness or wealth, the difficulty is twofold. First, a utilitarian good is inescapably difficult to measure. The good remains forever elusive for want of a means to determine how exactly the preferences of individuals are counted fairly toward determining the objective which furthers the stated goal. How may one count happiness? Or if economic gain is the end, how are individual preferences to count when there is no direct equation between ability to purchase and the equal desires of each? The limits of
the good in this regard may be seen as the absence of a means for stepping beyond the ideal itself. A circular world may exist within a defined good, in which the stated goal is always sought without a means for determining the journey’s progress or continued relevance. Far worse than an inescapable lack of verification for the good, is the danger of not recognizing new knowledge, and the new social ideals that may need to come into ascendance. The unverifiable good will continue apace because the good itself contains no mechanism with which to alter course beyond itself if need be.

Alternatively, if the communitarian model is to define the good in terms of political involvement in a republican, town hall style, the difficulty becomes modern circumstance. A communitarian good may speak eloquently of a democratic ideal no longer realized, and which is exacerbated by modern liberal rights, but it does not speak with solutions for the modern world. Forces of globalization have placed individual concerns beyond their local polis, and it is doubtful that a democratic ideal alone can return them. Instead what is necessary is a means with which to connect the social priorities expressed historically and locally with significant economic forces that are now of a global nature. Democratically chosen and changing social valuations are obviously desirable attributes to include in social direction, competitive or otherwise. And as indicated by the examination conducted in chapter two, these changing and variable social valuations may be present simultaneously within each individual. Translating these social values unto the international stage, however, requires an adaptive and universal mechanism not available with the good alone.

The right does provide such a universal mechanism. By applying to each individual, as derived from each, the right provides a degree of universal protection and dignity not
automatically provided by the good. Moreover, by locating the source of social priority in an unchanging and neutral basis of individuality, the right is a base that is open to changing social realities and new forms of knowledge: it need not be a closed world of the social ideal that only recognizes itself, for it is a mechanism open to a changing external world. The difficulty, however, is that the mechanism within the changing world is itself fixed and unchanging. The great promise of rights, with its protective basis in individual equality, also has its corollary limitation. For in centering upon individuality, rights theories tend to atomize individuals and ensure an autonomy that cannot be transcended by social purpose.

Unfortunately, the right is necessarily neutral on social value. The difficulty of the right is not merely of forming social policy in which the wishes of the majority must not unduly harm the minority, but rather an inability to reconceive of the base element of social priority. If the place of individuals within society is dependent upon inexorable limits centered upon individuals themselves, then the flexible adaptation of society is not optimal. While the right may certainly be an appealing basis for human rights, when viewed in light of competitive design the inflexible nature of rights becomes most troubling. The inability to reconceive and redirect visions of individuality is endemic to rights theory in general, though is most clearly pronounced in relation to Lockean style property rights. The right, too often in competitive circumstances, is the bar to realizing outcomes that would be of greater benefit to individuals independently and as a whole. Essentially, for more fortunate economic goals to be realized requires an orchestration of legal priority that overcomes the obstacle of individual autonomy and separation. Modern economic problems will increasingly require individuality to be viewed within a wider
ideal than that of the isolated individual who acts as justification for the entire liberal democratic edifice.

III.II DIVISIONS IN LEGAL THEORY AND POLITICAL PHILOSOPHY:

Debates in legal theory often involve a tension over whether the individual or group ought to be afforded the priority of place in law. The fundamental norms for determining social rules emerge from this simple distinction between individual and group. At the heart of the matter is a question of whether rights and obligations arise from community or precede it. Contractarian theories concentrate on individuality, and the natural rights each person possesses before they contractually create a community. Conversely, teleological theories conceive of rights as extending out of the social good. Like conceptions of truth or beauty, the 'good' contained in law is an ideal that has value independently of each individual.¹

Unfortunately, the potential benefits arising from theories of the social good and individual rights are lost through their current articulation. As both group concern and individuality are defined in terms of the wider economic system, normally contrasting concepts meet in a common space of contradiction. In sub-optimal situations, like that of the tragedy of the commons, both the individual and group are worse off from the exercise of individual self-interest. Even the most minimal social goal of economic maximization may go unrealized when organized around a conception of individuals as autonomous economic actors. The normative centre of each theory is therefore undermined by incompleteness. While economic market signals are universal in their

¹ Contract theories, as well as other rights based theories, are also termed deontological. The distinction between teleological and rights based approaches uses the terminology of political philosophy: see, Patrick Hayden, JOHN RAWLS: TOWARD A JUST WORLD ORDER 8-12 (2002).
simple dictates of self-interest, the principles underlying social organization remain ineffectually tied to a division between individual and group. The environment is amongst the most obvious signs of the decaying philosophical justifications for the law.

At a point of philosophical regression an opportunity for a new beginning emerges. Historically, an awareness of inconsistencies within the dominant philosophical framework has led to a reformulation of social norms. Thinkers dissatisfied with the moral implications of an established worldview have located social justifications in new theories of knowledge. If philosophical progress may be said to be occurring, it is the evolution of a primary discussion and not a constant expansion. In the past, as now, when an impasse is reached it becomes necessary to return to fundamentals and begin anew. Rather than an assumption of linear progress accumulating in greater and greater sums, legal philosophy may thus be seen as a constant reworking of the same essential formula.

One of the most ambitious philosophical formulations ever attempted is found in the work of Immanuel Kant. Confronted with the deterministic universe of Newtonian science, Kant wished to recapture a central role for the individual and free will. Indeed, the present day conception of universal rights owes much to the influence of Kant's Critique of Pure Reason. As the Critique defined a scientific world as structured by the mind, Kant's subsequent moral theory could claim that individuals possess inalienable rights by nature of their rationality. The universal quality of individuality is justified by a theory of knowledge that explains perception as existing prior to society itself.²

Kant redefined the two major philosophical perspectives of his time, empiricism and rationality, so as to find the appropriate balance between the individual and scientific

² Roger Scruton, KANT (1982).
discovery.\textsuperscript{3} This striking method may be applicable to the more modest discussion conducted here. A similar bridge between two opposing theoretical positions will be contemplated in order to redefine individuality within the greater background of developing knowledge. Whereas Kant tried to salvage the individual by making science dependent upon the internal structure of the mind, the following project shows how individuality is dependent upon responsiveness to external information. Scientific knowledge is not presumed to be a product of our mental structure but rather a test upon which our shared values are judged, and formed.

Looking to the international system, instances of international market failure provide direction for a new beginning out of nothingness. The global nature of modern issues facing people requires that the individual protection of rights be combined with the flexibility of the social good. An ongoing process emerges, in which the sustenance of individual protection and group participation must be joined for either to have meaning.

III.III TELEOLOGY

A. Aristotle and the Good

Aristotle was the first, and arguably most significant, philosopher to respond to Plato. Where Plato had used the literary technique of dialogue to hold forth on metaphysics, such as the search for knowledge or the nature of existence, Aristotle turned his focus to the nature of living in society. In the \textit{Ethics}, Aristotle was to equate the ethical desire for good with politics and involvement in community. The ultimate good is said to be happiness, and society is the means of attaining this good. The famous remark that ‘man’ is a ‘political animal’ is a sign of Aristotle’s belief in the inherent virtue of

\textsuperscript{3} Ibid.
participating in the governance of society. Society is not about mere organization and convenience, but participation in an aspiration.

For even if the good of the community coincides with that of the individual, it is clearly “a greater and more perfect thing to achieve and preserve that of a community; for while it is desirable to secure what is good in the case of an individual, to do so in the case of a people or a State is something finer and more sublime.”4 If individual virtue is found in the common pursuit of the good, it remains that the social good not only takes precedence over, but also precedes the individual.5

Teleology is a theory that builds upon the method of Aristotle by similarly defining an ultimate good for society. As with Aristotle, and regardless of the chosen ideal, the good is not dependent upon any single individual. “For a teleological theory, the right act to perform is that which maximizes the amount of intrinsic good in the consequences.”6 As society is the basis of pursuing an ideal, the normative basis of social organization is furthering the ends of the whole rather than its constitutive parts. Legal rights neither precede, nor take precedence over the collective, but instead are defined so as to further the collective pursuit of the good. It is not what individuals possess in autonomous abstraction that matters, but that which may be aspired to when all are considered together.

International environmental degradation, the present instance of new knowledge, is a condition of harm that could show a teleological approach to be especially appealing. Recalling the tragedy of the commons, and the simple game theory models elaborated earlier, helps illustrate the need for a collective, common focus. It is the cumulative

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6 Hayden, supra note 1 at page 9.
effects of individual behaviour that reveal the irrational results of self-interested strategies calculated in isolation. The distinct benefit of teleology is the holistic view to consequences, which most clearly corresponds to the level of environmental outcomes. However, the benefit of teleology may also contain its greatest shortcoming. The same flexibility that comes with a collective view to the good also results in a vagueness that prohibits the definition of new directions. This shortcoming is especially significant when considering the measure of changing knowledge, and the theory of diversity which will be offered in solution and in comparison.

The issue, to reiterate, is designing a legal system of adaptive rights that reacts to a changing external world. To declare a new social good to be the priority based upon our immediate needs, such as environmental protection or fair trade, would be besides the point. A social good may be at once everything and nothing. Rights extend out of the good, but the good may remain indefinable; an assumption that remains hanging ineffectually in the air without the possibility of locating the ideal in events. Even if we assume that a social good is desirable in abstraction, the problem remains that the good may never be reformulated to account for change.

The potential for recognizing change will be the lens of analysis for the following examination of two teleological views, communitarianism and utilitarianism. Assuming that it is possible to locate one truth or good as an ultimate value, the point will be to consider whether the articulation of that goal is adaptable. Can a theory of the good give rise to new rights and obligations in response to external change? If the good does not spark new organization, can it be universal, or the ultimate good? Even if dramatic systemic reform is disagreed upon, surely the capacity to contemplate change is an
essential requirement of an intellectual system. Without flexibility and the possibility of envisioning alternate forms, a defense of the status quo has the danger of becoming an intellectually empty response of just because.

B. Maximizing the Good

Utilitarianism combines a conception of the good with a fascination for calculation and the possibility of social measurement. From an original focus upon happiness, through various manifestations of the good that include economic efficiency, utilitarianism has appealed to those who would measure social phenomenon as with an instrument. A scientific attempt is then quite naturally joined by a skepticism for rational systems that define morality as existing prior to experience. Utilitarianism follows in the skeptical tradition of David Hume, who argues that moral values are set by the ‘passions’ and may only be discovered through an examination of what human beings, as a matter of fact, prefer. Unlike natural rights or universal human rights based theories that argue from an abstraction into practice, utilitarianism begins with empirical observation prior to systemic conclusions. Therefore, legal norms are not to be derived from ideas, but from observation. Instead of arguing what law should be, as justified by individual or spiritual morality, utilitarianism is unique in its neutral assumption that people are to be governed by what their behaviour indicates.

The view of the good as scientifically measurable is found most clearly in the work of Jeremy Bentham, the founder of utilitarianism. The opening and declarative sentences of Bentham’s seminal work, An Introduction to the Principles of Morals and Legislation help define the utilitarian project: “Nature has placed mankind under the governance of

7 Jeffrey G. Murphy, KANT: THE PHILOSOPHY OF RIGHT 23 (1994).
two sovereign masters, pain and pleasure. It is for them alone to point out what we ought
to do, as well as to determine what we shall do."8 Individuals are seen to possess a
fundamental preference for pleasure over pain, and it is the object of law to further this
preference. And so if the good is first located in individual preference, it is individual
preference that is then extended to society as a whole. As each individual calculates
happiness, weighing pleasure over pain, societal governance would involve calculating
each individual preference in reaching an aggregate of happiness. Or as Bentham
succinctly terms it, the ‘greatest happiness of the greatest number’9.

At first glance utilitarianism appears to embody democratic ideals, as it necessarily
accumulates the wishes of the majority. Yet, upon further consideration it would seem
that the application of the majority’s pleasure might possibly lead to the most distasteful
consequences for those not aligned with that majority. As Michael Sandel illustrates: “If
enough cheering Romans pack the Coliseum to watch the lion devour the Christian, the
collective pleasure of the Romans will surely outweigh the pain of the Christian, intense
though it be."10 In view of such extreme circumstances, many would no doubt agree with
Kant’s condemnation of utilitarianism for reaching unjust conclusions by not treating
individuals as ‘ends in themselves’.11 The difficulty of course is that criticizing
utilitarianism for not honouring the individual is hardly an argument at all. One might just
as easily criticize rights based perspectives for not recognizing group concern, and the
reality that each person is a dependent member of community and not a floating atom that

9 It has been suggested that Bentham took this term from Beccaria; Ginglell supra note at page 227.
10 Michael Sandel, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC
11 Murphy, supra note 7 at page 25.
possesses universal attributes in space. So instead of engaging in circular debates of political theory, the point here is to question the ability of utilitarianism to adapt to its changing environment - any environment, whether it be social, economic, or physical.

C. The Good and Market Failure

International market failure may reveal a potentially ruinous discrepancy between the independent strategies of individual perception and group consequence. Looking to group consequence would then address the problem by mandating responsibility for previously isolated and irresponsible individuals. Utilitarianism operates on the level of group concern, but it is doubtful whether it could ever respond to changing systemic information. The most obvious problem with utilitarianism is that is unclear how happiness could ever be quantified or measured. For how could a government or decision making body possibly measure the intricacies of individual perception, even if limited to the binary of distinction between pleasure and pain?

The indeterminacy of the good leads to a still more significant defect for utilitarianism. Indeterminacy creates a dependence upon continuing definitions, and a cycle of utility that does not recognize new features. That is, if A currently defines the measure and variations of happiness, how will B ever be recognizable? The environment provides a clear example of this inability for new definition. If the deleterious effects of individual action become apparent when all individuals are considered, then it would follow that the utility of the majority would dictate that rules are changed so as to bring behaviour into accordance with majority benefit. The difficulty is that ‘benefit’ is not an absolute value, and that the imprecision of measurement equally leads to relativism.
Since it is a majority of individuals that is causing the harm, would it not equally follow that the majority has already chosen its preference? Individuals may well prefer the ability to consume and pollute over the benefit of being free from its harm. If they do not, utilitarianism will never tell us.

Once a form of utility is assumed there is no way to radically challenge its articulation. A social good cannot possibly assess itself out of existence. If happiness is the measure for legal analysis how can one look through the lens of happiness and conclude that happiness is no longer a desirable social good? If it is efficiency, what would tell us to discard efficiency when it is efficiency that defines how we look at a situation? This circularity is the very essence of the difficulty, for there is no internal trigger in utilitarianism that changes the legal perspective.

If a set of laws are supposedly set toward happiness how could one possibly prove otherwise? What begins a simple view to majority preference becomes an indecipherable imposition of what is probably happiness, and what is probably best. Whether suboptimal situations result from a competitive cycle of insecurity or a genuine demonstration of what people prefer will forever remain unclear as utilitarianism only propagates that which is currently assumed. In this sense, utilitarianism is a form of governing upon already accepted dictums.

Utilitarianism claims to proffer an empirical system for calculating a social good, yet its greatest defect is that it is not in truth tied to any empirical concept whatsoever. A supposed empirical observation begins the utility project, assuming that individuals calculate pleasure over pain or that efficiency makes society better, but then all empirical considerations are lost. There is no rule or principle within utilitarianism that clearly
demarcates when the founding conditions are not being met. A genuinely empirical system would define parameters to be observed; utilitarianism defines no measure of concern and instead sets in motion a cycle that is destined to remain nebulous. Despite its pretense of rigor and calculation, utilitarianism lacks any form of testability or scrutiny. Without a means of quantification that is external to a school of thought, its prescriptions are reduced to dogmatic pronouncements of an arbitrary social truth. Recalling Karl Popper’s critique of Marxist theorists, utilitarianism should be rejected for lacking any prospect of ‘falsification’. Absent a means of verification or challenge to its operating tenets, the good, and especially the utilitarian good, is ill equipped to answer changing knowledge – a failed solution to be compared with the theory of diversity offered in the following chapter.

D. Involvement as the Good

Communitarianism generally advocates the good of civic and political life once found in local communities. This ideal of civic republicanism draws its inspiration from direct democracy, where citizens are personally involved in making the decisions that affect their community. Looking to the Greek polis and the New England town hall meeting for its inspiration, democracy is seen as an activity rather than an abstraction of rights. Hannah Arendt drew an important distinction between Vita Contemplativa and Vita Activa that is illustrative of the communitarian focus. Where modern political thought has predominantly favoured Contemplativa and the qualities of individual

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12 Popper was less scornful of Marx himself, for unlike his future disciples he had offered verifiable and testable predictions.
thought, Arendt argues that ideas require the engagement of Activa; that they be vocalized and put into action.\textsuperscript{13}

The realities of present day society have increasingly made communitarianism appear as solely a critique of modernity. As Arendt writes, "What makes mass society so difficult to bear is not the number of people involved, or at least not primarily, but the fact that the world between them has lost its power to gather them together, to relate and to separate them."\textsuperscript{14} Communitarians claim that the law in liberal democracies has facilitated a dislocation of individuals from their community and the means of their active identification as citizens. It then follows that the “demise of democracy is a direct result of the triumph of liberal legalism and its underlying need to support the emerging dynamic of modern political economy.”\textsuperscript{15} The rise of bureaucratic and procedural state, it is argued, is directly enabled by a legal individualism that defines each person as an autonomous rights holder. As Sandel writes:

\begin{quote}
The philosophical difficulty lies in the liberal conception of citizens as freely choosing independent selves, unencumbered by moral or civic ties antecedent to choice. This vision cannot account for a wide range of moral and political obligations that we commonly recognize, such as obligations of loyalty or solidarity. By insisting that we are bound only by the ends and roles we choose for themselves (sic), it denies that we can ever be claimed by ends that we have not chosen - ends given by nature or God, for example, or by our identities as members of families, peoples, cultures, or traditions.\textsuperscript{16}
\end{quote}

Communitarianism thus presents a critique of distance; individuals are separated from their community, and left isolated by a far off formalism that treats each as a private rights holder.

\textsuperscript{13} Leah Bradshaw, ACTING AND THINKING (1989).
\textsuperscript{14} Hannah Arendt, THE HUMAN CONDITION 52-53 (1958).
\textsuperscript{15} Ian Ward, AN INTRODUCTION TO CRITICAL LEGAL THEORY 70 (1998).
\textsuperscript{16} Sandel, supra note 10 at page 322.
The work of many communitarian theorists is situated in the American experience, with its inspirational tone set by the early civic ‘spirit of 1776’ and its current dissatisfaction found in what Sandel terms the ‘procedural republic’. Many communitarians find an ideal image in the work of Alexis de Tocqueville, who visited the New England townships in the newly independent nation:

Town meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it. A nation may establish a free government, but without municipal institutions it cannot have the spirit of liberty.

Tocqueville’s portrayal has attained an idyllic, almost mythical dimension, which has probably become more important than the actual political landscape of the time.

While the town hall meeting conjures images of grassroots politics in an ideal form, the opportunity for the force of personality to dominate others remains troubling for democratic intent. Arendt at least is consistent in her view of civic virtue, even at the expense of democracy, claiming that some will naturally rise above the rest based upon their love and aptitude for politics. Leaving aside considerations on the proper democratic form, the issue of concern here is how the civic virtue witnessed by Tocqueville in the early American state may translate into a modern equivalent. If communitarianism raises distinct problems, does it equally offer distinct solutions?

If a fascination with the ‘spirit of 1776’ leans toward the sentimental, it nevertheless contains a regard for the opportunity presented by a society ‘newly’ begun. For instance, in On Revolution, Arendt contends that revolutions are “the only political

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17 Ibid., 4.
19 Bradshaw, supra note 13.
events which confront us directly and inevitably with the problem of beginning.” So why is communitarianism not able to suggest a new beginning? The difficulty no doubt lies in the nature of modernity, and the expanding society that is continually thinning and lessening those matters that are purely local, or even national. The political force and Activa called for by Arendt simply has nothing to focus its force upon. The law has coincided with, and followed, the economic forces of concentration, but it did not create them. As Sandel acknowledges:

The nationalizing of American political life occurred largely in response to industrial capitalism. The consolidation of economic power called forth the consolidation of political power. Present-day conservatives who rail against big government often ignore this fact. They wrongly assume that rolling back the power of the national government would liberate individuals to pursue their own ends instead of leaving them at the mercy of economic factors beyond their control.

The legal ethic of liberal individualism is representative of a changing society, but the law cannot change society back to its idyllic form of yesteryear.

Communitarianism results in an unfortunate standstill, in which a poignant argument of what has been lost is followed only by silence. Communitarians have not been so reactionary as to call for a ludite move away from technology, but neither have they articulated a response for society. There has been as yet no equivalent of Thomas Paine or Jean-Jacques Rousseau offering an embrace of world democracy through information technology, and there has been no clear articulation of how global issues are to be made response to individuals through local involvement. For example, at the end of his lengthy work on public philosophy, Democracy’s Discontent, Michael Sandel’s simple prognosis is that civic relationships of a local and regional nature should be

20 Hannah Arendt, ON REVOLUTION 21 (1965).
21 Sandel, supra note 10 at page 346.
encouraged with a simultaneous “strengthening and democratizing (of) transnational structures, such as the European Union.” 22 Unfortunately, Sandel offers no precise notion of how this is to occur, or of how local involvement is to be strengthened while we simultaneously acknowledge that many of the forces that most concern us are no longer located in the local roles we inhabit.

As Sandel admits, the law did not change the economic composition of society, and so it seems questionable to assume that the law may reinvigorate local affiliations to make these matters central to individuals once again. If community involvement is the ideal location of democracy, then we should let community involvement reinvigorate democracy instead of using the law to impose this individual focus. Looking to the law as a source of diminishing civic involvement is primarily a misdirected argument, logically similar to blaming Canada’s Charter of Rights and Freedoms for diminishing numbers of church attendance or union membership. The law should not be used to impose a reflection of individual association that is not supported by the concerns of individuals.

Communitarianism remains tied to physical notions of community, of individual concerns defined by their nearness to our local identification, and in this way remain tied to the past. In the absence of answers communitarianism is left as simply a sign of the unsettling disconnection between modern international forces and local community. If people are reflective parts of a community, both defined by and helping to define a community, group interaction obviously remains salient. However, without articulating answers of how local involvement is to meet the challenge of global issues, communitarianism remains at best a commentary on the dangers of the social disconnection that we face.

22 Sandel, supra note at page 345.
Perhaps if individual rights could be redefined to account for an external good there could be less systemic accusation. If individual rights could be defined to propel the social good through the results of their choice, it would hopefully end accusations that the law is distorting community by not corresponding to the ‘spirit 1776’. At the very least, by concentrating on individuality it would be possible to consider reordering legal conceptions and orchestrating a break with a longing for the past.

Having discussed the failings of the good in general terms – of a theoretical lack of internal challenge and of a modern international response – it remains to contrast such failings, along with admitted strengths, with those offered by the contra perspective of the right.

III.IV THE SOCIAL CONTRACT

Social upheaval without a principled end or justification is only violence. It is the attempt to develop a new normative foundation for society that distinguishes revolutionary movements from palace coups that merely rearrange a cast of characters. A revolutionary project assails not only who is in power, but also the theoretical basis of that power. The intellectual conflict of systemic change necessarily involves first undermining, and then replacing the raison d’etre of a regime. The entire edifice of government stands upon a central legal fiction that subsequently supports each other social right and obligation; and a new beginning must exchange one fiction for another. An idea must be developed so that it may be held up against the status quo, providing a new test of justification that the old order inevitably fails. The idea which justified the emergence of modern democracy was the social contract.
The legal legacy of the Enlightenment is the replacement of religion as the foundation of social order. Although liberal thinkers of the 17th and 18th Centuries were hardly fanatics calling for regicide or the overthrow of monarchial rule, the very notion of a social contract was revolutionary. Instead of an ecclesiastical basis of society, with the divine right of kings at its apogee, the social contract was based upon a historical agreement amongst individuals. Primarily a hypothetical device rather than a view to actual historical events, the social contract envisions the circumstances of society’s initial formation.

As it is generally understood, the social contract is an agreement amongst individuals seeking to relieve the uncertainties and hazards of anarchy. Individuals surrender the freedom found in the ‘state of nature’ to escape being at the mercy of arbitrary force and to gain the benefits of organization by agreeing to form a society. The profound implication of the social contract is that individuals are free and autonomous before society. The social contract in this way became a powerful tool in undermining oppressive rule that claimed to represent a predestined society. A new manner of thinking had emerged, one that saw Jean-Jacques Rousseau make the previously unimaginable exclamation: “man is born free; and everywhere he is in chains.”

If the social contract leads to a secular definition of society, the composition and character of that society remains indeterminate. This indeterminacy may be seen to extend from the form of the exercise of itself. Even if it is commonly proposed that a contract is made, the terms of the contract are dependent upon a conception of the preconditions and what demands these might impose. The simple question of imagining an agreement amongst a group of people becomes infinitely complex when considering

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the substantial inferences involved. The social contract requires offering not only a view of human nature, of what people are like in the state of nature, but also demands a definition of the fundamental priority that society will revolve around.

As liberal democracy has flourished in the western world, the nature of the discussion over rights has shifted from the justification for a new society to a debate over precedence within an increasingly procedural society. The environment is amongst a growing number of international issues that requires a return to the abstractions of the social contract. Looking beyond the domestic debates of how to rearrange the status quo, an anarchic international system challenges theories with the task of defining new rights and obligations out of a state of nature. The social contract may have lost its allegorical charm in the collective consciousness, but the theoretical consideration of rights that arise from agreement remains nonetheless relevant.

Where past works of political theory have relied upon imagination, and often incredible insight, modern issues of international market failure represent the sober check of science against purely philosophical ideas. As the environment brings individuals into the physical proximity of the economic effects of others, social theories become accountable to a notion of actual impact. While social contract theory yields the benefit of addressing individual agreement, so too must it be cognizant of the circular involvement of individuals. As game theory models reveal, the deleterious impact upon group and individual is a direct result of individual interest perception. The individual becomes both the trigger and the ultimate location of harm. With the insights of chapter one in mind, the environment may hold contract theories to a unique standard of universality, questioning whether past premises of rights are consistent through time and differing
levels of organization. The test is then of slight demand, requiring only that the fundamental justification for a contract be able to exist beyond a specific historical context. Needless to say, if a fundamental justification is not transferable through time then it is neither universal, nor very fundamental.

A. Individual Protection

Thomas Hobbes was a confessed coward. Though unlike most cowards, Hobbes would develop his aversion to danger into an entire philosophical justification for government. Writing in the time of great political turmoil surrounding the English civil war, the desire for security would come to characterize Hobbes’ political philosophy. The dangers of unrestrained human nature are cast by Hobbes in such a light as to make any form of order preferable to the conditions of life in anarchy. The following passage from Hobbes’ Leviathan famously presents his dismal view on the state of nature, in which:

…there is no place for Industry; because the fruit thereof is uncertain … no Arts, no Letters, no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.25

A fervent concern for security would lead Hobbes to advocate absolute monarchy, but it is the manner of his approach that signals Hobbes as one the first modern political theorists. Where other monarchial apologists argued for the divine right of kings, Hobbes’ was a purely practical justification. As Bertrand Russell notes pithily: “Unlike most defenders of despotic government, Hobbes holds that all men are naturally equal.”26

While people could conceivably have any form of government, and were theoretically equal in a state of nature, the entire meaning of Hobbesian order was security, and other notions were decidedly besides the point. Securing the person in the safety of organized society takes precedence over any idealized notion of rights that exist in abstraction. And so government is not a spiritual or philosophical talisman, but merely the primary organization of external events. A government is a matter of effective power, and law is an instrument of this power – good if effective, bad if it is ineffective.\(^{27}\)

Through a scientifically inspired approach, Hobbes went on to reject moral versions of political explanation. Although Hobbes might be best known for first using the social contract, it is through his empiricism that his legacy is most assured. This empiricism, weighing external factors of experience rather than purely intellectual concepts, would evolve into utilitarianism, and eventually, legal positivism.

Hobbes, as might be expected, is an out-and-out nominalist. There is, he says, nothing universal but names, and without words we could not conceive any general ideas. Without language, there would be no truth or falsehood, for ‘true’ and ‘false’ are attributes of speech.\(^{28}\)

The exclusion of metaphysics would lead Hobbes to a curious reduction of human experience, calling life nothing but a motion of the limbs.\(^{29}\) The implication is that human nature is essentially neutral and behaviour is a consequence of surrounding conditions. Many have shared with Aristotle a belief in individuals as generally being predisposed to good, but Hobbes was not one of these. For Hobbes, any neutrality or openness contained in human nature would be quickly marred in the harsh reality of the state of nature. As

\(^{27}\) Ward, supra note 15 at page 82.
\(^{28}\) Russell, supra note 26 at page 534.
\(^{29}\) Ibid., 533.
Ian Ward comments wryly, “Left on his own, Hobbesian ‘man’, in his natural state, was more likely to beat up his neighbour than sit in the sun and contemplate metaphysics.”  

Hobbes describes two dominant inclinations of individuals, ‘appetites’ and ‘aversions’. Both inclinations derive from the same source, the need for self-preservation. Individuals have an appetite for power and an aversion to fear and pain. The drive toward accumulating power begins out of insecurity, for the best way to protect oneself is to become more powerful than those who would harm you. A cycle of harm ensues in the state of nature as each calculates how to preemptively preserve their own safety. Community is a response to this cycle of harm, an agreement to accept order and escape perpetual conflict. Therefore, government is not a manifestation of human nature but a response to it.

While later theorists would develop upon his work, Hobbes in many ways presents the culmination of a certain skepticism directed at human nature. The concept of defining government and law as necessary to combat human tendencies is somewhat of an outer position in political thought. Whether thinkers were to focus upon the social contract and individual rights, or the social calculations that would come to be utilitarianism, the basis of society was justified on qualities attributed to individuals. For instance, the utilitarianism of Bentham or J. S. Mill involved a extrapolating an individual calculation for that of society as whole. On the societal level, the greatest happiness to the greatest number was to be determinative, which in turn is based upon a view of individuals as maximizers of their own happiness. The social good simply becomes an extension of how

30 Ward, supra note 15 at page 82.
31 Hobbes, supra note 25.
each individual supposedly thinks. Hobbes is thus distinguished by defining the good in opposition to the consequences of individual self-interest.

The complete surrender to authority advocated by Hobbes would obviously be unpalatable to most today. Yet if the form of government advocated by Hobbes is rightly dismissed, his justification for government remains worthy of consideration. Avoiding a cycle of harm is increasingly relevant, and present international issues such as climate change may be said to reinvigorate this Hobbesian concern. A short conceptual distance separates Hobbes’ ‘appetites’ and ‘aversions’ in the state of nature from the tragedy of the commons. Hobbes’ harsh portrayal of the state of nature, as “a perpetual and restless desire for power after power, that ceaseth only in death”\(^{32}\) is not unlike the bleak commercial competition on the commons envisioned by Hardin:

> Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in society that believes in the freedom of the commons. Freedom in the commons brings ruin to all.\(^{33}\)

The impulse for self-preservation that leads one to seek power over others in the state of nature is intrinsically the same as the competitive insecurity of the market that leads producers to harm others through defection. Dilemmas of rationality occur when the benefit of restraint is overcome by the possibility that one may gain by abuse or defecting. Rational self-interest dictates that if cheating the whole benefits one actor, then each should independently reach the same conclusion. As it is logical for each rational prisoner in the prisoner’s dilemma to inform, the result of their inevitable calculations becomes sub-optimal, and illogical. The great insight made by Hobbes was to separate

\(^{32}\) Hobbes, supra note 25 at page 41.
the good from the individual, recognizing that merely because a response may be natural, such as insecurity, does not mean that its consequences are desirable. This brilliant insight of Hobbes’ has arguably been underappreciated; with this dissertation’s advocacy of a theory of diversity attempting to build upon it.

Given the materialism underlying *Leviathan*, and its nominalist rejection of legal principle, the practical justification for government would appear to the same for that of world government. If the state is not said to be designed around nationality or moral differences in culture, then the practical reasoning that creates government should be achieved in one contract and not many in opposition. As Bertrand Russell comments on Hobbes, “Every argument that he adduces in favour of government, in so far as it is valid at all, is valid in favour of international government.” Following Hobbes’ line of reasoning, states should enter into an international agreement of governance, since the practical basis for entering society does not logically permit varying levels of security.

If security is the ultimate, and only good for society, then a system of international anarchy inhabited by self-interested countries is simply a larger state of nature. Danile Archibugi expresses a general Hobbesian critique, by questioning the security justification of the modern state:

The weak point in the Hobbesian line of argument lies in the fact that individuals cannot be considered free from a condition of fear as long as they are still exposed to the threat of war: in other words, security internal to the state is not a sufficient condition unless a parallel security is guaranteed in relations amongst states. Until the state can eliminate the threat of war, its promise to liberate its subjects from the dangers of war cannot be considered fully realized, and consequently the subject has not the obligation of obedience.35

34 Russell, supra note 26 at page 541.
As the means of inflicting military harm have become more diffuse and global, in the form of nuclear weapons or terrorism for example, the justifications for the state are often claimed to have passed beyond traditional territorial boundaries. The same argument made be used for a number of modern phenomena, such as economics or the environment, but there is a difficulty in focusing upon a single justificatory object.

Modern Hobbesian arguments for world government, which claim that people’s concerns are not being met by the sovereign state, are subject to the same justificatory incompleteness found in *Leviathan*. The predicament is locating a genuine basis for moving toward a radically new form of legal organization. If insecurity and uncertainty raise the prospect of further organization, it remains for the proffered organization to provide security in a recognizable and agreed upon manner. Simply put, if the state of nature provides a push toward society, society must equally contain a pull away from anarchy. Hobbes was so intent upon reaching a specific conclusion that he does not consider that individuals may actually be more wary of prospective society than the harsh reality found in the state of nature. Why would the insecure souls found in the Hobbesian state of nature leave one form of uncertainty for a potentially greater hazard? If people are terrified by their violent and brutish neighbours, does it logically follow that they would voluntarily enter a contract that gives all means of force into the hands of one brute alone? That the state has the ability to make terror more systemic, and more effective, could reasonably give pause to security conscious persons.

Looking to the international system of states reveals serious questions over the Hobbesian formation of new obligations. The international system presents the nearest approximation of the first hypothetical state of nature, and international anarchy persists
in the face of a constant threat of war and conflict. There has been untold human loss as a consequence of armed conflict and people have not rushed to surrender themselves to the security of global order or supranational state. People have instead been willing to risk their lives to combat the very establishment of a larger order. As people have been willing to die to defend a country or nation, it does not exactly follow that they would surrender this affiliation only to avoid conflict. If individuals were as cowardly as Hobbes assumed, and preferred any rule to that of uncertainty, wars of conquest would have been little more than peaceful absorptions of one government by another.

The only example to be found which approaches remotely near to supranational government is that of the European Union. An agreement borne out of conflict that slowly developed into a community of political norms, the EU presents the Hobbesian half solution in its most pronounced form. The economic integration of Europe was initiated by a Hobbesian concern for security, but the present structure of political integration was dependent upon a long process of constructing norms of interest perception. The consideration of new European possibilities began with the avoidance of harm and conflict, but the growth of political union has been dependent upon shared principles that each individual in the community may equally identify with. Necessity and self-interest may cause individuals to consider new possibilities, but overcoming the uncertainty for the new and sentimental attachments to the old requires a clear picture of what the contract will be about.

36European integration began as an economic arrangement primarily aimed at furthering issues of security, between Germany and its neighbours and between the capitalist west and the communist bloc. The security priority has since given way to a much more comprehensive movement toward political integration. For a general introduction, see Marin J. Dedman, THE ORIGINS AND DEVELOPMENT OF THE EUROPEAN UNION (1996); Peter M.R. Stirk, A HISTORY OF EUROPEAN INTEGRATION SINCE 1914 (1996).
The unique qualities of voluntarily agreement are unfortunately diminished by a fixation on fear that leaves Hobbes unable to contemplate that individuals might be concerned with the order they are contracting into. If Hobbes spoke of insecurity as the stick leading people out of anarchy, he overlooked that a carrot might also be necessary. Hobbes unique insight of defining the social contract as a response to the individual loses force by not recognizing that it is individuals who are being protected. The consequences arising from the behaviour of others may trigger a need for new organization, but for the process to be complete the individual must have a defined place in that new order.

B. Individual Possession

John Locke has been amongst the most influential thinkers of the modern era. Not only did Locke initiate the philosophical tradition of empiricism, which holds knowledge to be the product of sense data and experience, he would also lay the theoretical foundation for political individualism. Through his influence upon the American founding founders and the French philosophes led by Voltaire, Locke’s ideas would help shape the basic premises upon which western democracy has subsequently developed. Sir Frederick Pollock has said that Locke’s second Treatise of Government is “probably the most important contribution ever made to English constitutional law by an author who was not a lawyer by profession.” The lawyers who rank above Locke must surely be amongst the most well disguised geniuses of all time.

The lasting influence of Locke’s political philosophy may be explained in some way as stemming from an unoriginality that is not found in the work of many other great

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thinkers. Locke was not attempting to redefine the human condition or advocating radically new ideas for social organization, but rather sought to justify a transitional force already at work. England had replaced the absolutist monarchy of the Stuarts for a constitutional one under William of Orange, and Locke was attempting to both defend this change of power and ensure its future limits. Though even if begun as a pragmatic response to political events, Locke’s placement of the justification in individual terms has remained persuasive for many since.

The great insight of Locke was to envision both sides of the social contract. Significantly, where Hobbes had discussed the forces that led to agreement and then allowed that organization could take any form, Locke identifies natural rights that exist before and after the contract. Taking a less drastic view of the state of nature than Hobbes, Locke felt that individuals were generally disposed to good. The state was then not a life saving device but a means for the provision of social order and mutual convenience. There are “inconveniences of the state of nature” which, says Locke, “I easily grant that civil government is the proper remedy.”

Locke identified individuality through possession. Individuals possessed themselves, and the products of their faculties, completely. Therefore, property as an economic form is seen to transcend market activity and connect with the natural rights of the individual involved. The following passage from Locke’s second Treatise of Civil Government illustrates how property attains the status of an inalienable natural right, and deserves quoting at length:

Though the earth and all inferior creatures be common to all men, yet every man has a “property” in his own “person.” This nobody has any right to but himself. The “labour” of his body and the “work” of his hands, we may say,

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are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that his own, and thereby makes it his property. It being by him removed from the state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this “labour” being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.

There are so many controversial concepts in this passage that it would take a far larger work than this to adequately address them. Of note here is not the moral questions of private property, which are no doubt valid criticisms, but the historical nature of these natural rights.

Locke constantly addresses labour but his real intent appears to be the historical exclusion of others rather than an ongoing process or activity. “He that is nourished by the acorns he picked up under an oak,… has certainly appropriated them to himself.” This is an overly idyllic portrayal of individuals wandering through a safe and bountiful countryside to find property rights through fortuitous happenstance. The first person to find the acorns may well have acquired them through their labour, or more likely force, but each subsequent passerby would no doubt find themselves trespassing in an orchard already claimed. Locke is hardly offering a principle of social development with the argument that the status quo of ownership is justified by a notion of labour contributed at a point lost in the fogs of time.

Locke’s famous reservation of ‘enough, and as good’ left for others is so vague that it appears as nothing more than a footnote warning against extreme concentrations of ownership. There is no real articulation of when ‘enough’ might occur, and does not seriously question the sanctity of land ownership that was so essential to the Whig gentry of which Locke was a hanger-on. If Locke, and modern day libertarians such as Robert
Nozick, were so concerned with the primacy of individual labour why insist upon an historical beginning of rights that is indeterminate in the vagaries of time?\textsuperscript{40} If individual labour were an extension of individual property why does it extend back through generations to some indecipherable moment – why is property inheritable if it is only justified by the labour put into it?

Property rights have been difficult to assail in liberal democracies for reasons of both vested interests and the theoretical rationale that connects possession with individuality. For example, Nozick argues that any redistribution of property or resources impinges upon individual liberty by making one person labour for another.\textsuperscript{41} If society’s greatest earners are taxed half their income to support those less fortunate, or less able, then some individuals are being forced to contribute half of their labour and industry, and are in essence being made to work for others. In a neutral system of individual rights, redistribution unfairly favours some by giving them the benefits that others have earned.

What seems beyond the contemplation of Locke and Nozick is that even the most minimal state is more than merely an arbiter between autonomous individuals, and may in reality provide its merits unequally. It follows that those who possess a disproportionate share of resources, that were admittedly ‘common to all’ in the state of nature, most require the existence of the state for protection. If the state did not enforce the fiction of property could not those less fortunate simply choose to not accept that a few should have so much? The danger of locating individual rights in an external manifestation such as property is that it is questionable whether individuality is a genuine value that exists independent of that external feature. Since it is property that gives value,

\textsuperscript{40} For example, Nozick argues the existence of historical rights and yet fails to explain how these come about: see, Andrew Heywood, POLITICAL CONCEPTS AND IDEAS 241 (1994).
\textsuperscript{41} Nozick, supra note 39.
and some individuals may be without property, one could reasonable question the universality of these natural rights, and what the ultimate priority actually is.

The environment shows that the inconsistencies of individual rights externally located have become acute. International market failures associated with the environment challenges the compatibility of individual protection and property. Locke had argued a coherent theory, regardless of moral considerations, that nicely provided for identification and protection. Property was the device that allowed for individual rights to exist after the social contract by defining the limits of community and government. Individuals did not enter a contract only to surrender themselves to the whole, as with Hobbes, but maintained a structure of exclusion, and arguably protection. The state could no longer arbitrarily dispose of people’s land and livelihood if the basis of the social contract was ‘possessive individualism’, as C.B. Macpherson terms it. 42 Individual possession in this way may be seen to fit into a division detailed by John Stuart Mill in On Liberty, between ‘self-regarding’ and ‘other-regarding’.43 Property could have been viewed as self-regarding in its provision of relative autonomy, of excluding others and delivering space. In its most basic sense, property was a means to be ‘let alone’.

The awareness of atmospheric environmental consequences reveals property to be turning into a distinctly ‘other-regarding’ action. Mill’s harm principle states that society should only infringe upon the freedom of an individual to prevent physical harm to another.44 As economic activity increasingly results in health detriments, even the tremendous latitude granted by the harm principle will have been compromised. Yet

42 Heywood, supra note 40 at page 241.
43 John Stuart Mill, ON LIBERTY (1985). It should be noted that On Liberty marked Mill’s dissatisfaction with, and turn away from strict Utilitarianism.
44Ibid.
society will be unable to respond in the traditional manner envisioned by Mill because the harm originates in the traditional manner of a solitary individual transgression. As harm is diffuse, both in its origin and impact, it is more commonly a result of a long standing economic process rather than one instance or source.

Modern environmental problems present a paradox in which property becomes the means of harming individuals while supposedly guaranteeing them liberty and freedom. Property as liberty is dependent upon a notion of possible isolation, in which individuals may go about their own activity free from interference or oppression. For example, Hayek argues that private property is the most essential civic liberty for a free society, as government regulation eventually leads to totalitarianism. 45 However, without the essential possibility of isolated possession, the prospect is that individuals become dominated by the means of their own legal separateness and autonomy.

It is perhaps a testament to the brutalities witnessed during the twentieth century that so many theorists have been concerned with freedom of the individual vis a vis the state, but the modern democratic state seems more open to critiques of ineffectualness than to encroaching oppression. The solution should not be totalitarian government, at least that is not argued for here, but neither does it seem reasonable to look for a solution in locating individual rights in the old external role of possessors.

Market failure on a global scale of environmental resource may increasingly indicate that individuals either possess property autonomously or are protected from others through rights. The game theory analysis of state sovereignty conducted in chapter one illustrates how new information makes the combination of independent territory with individual protection logically impossible. Harm has become transnational, and the issue

is whether legal organization will ameliorate or further this harm. Evoking the criticism Bertrand Russell levels at Hobbes, the justifications used by the state in curtailing property rights would equally justify curtailing the state in favour of international government.

C. Individual Rationality

*Two things fill the mind with admiration and awe, the oftener and more steadily they are reflected on: the starry heavens above and the moral law within me.*

- Immanuel Kant
Critique of Practical Reason

Immanuel Kant is widely considered to be the greatest modern philosopher.\(^4^6\) In the *Critique of Practical Reason* Kant claimed to have affected a ‘Copernican revolution’ in ethics. Kant’s revolutionary idea was removing the concept of the good from the center of the moral universe and replacing it with the law.\(^4^7\) The law that Kant placed at the center of his ethical system, or moral universe, was the categorical imperative. The categorical imperative states that individuals are to “act such that the maxim of your will can always at the same time hold good as a principle of universal legislation.”\(^4^8\) The philosophical significance of this move toward the categorical imperative is that moral decisions are to be the outcome of pure reason rather than considerations of virtue, or of good and evil.

The categorical imperative directs individual action toward universality, toward considering others as we ourselves wish to be treated. Essentially, Kant regarded the

\(^4^8\) Immanuel Kant, CRITIQUE OF PRACTICAL REASON (T.K. Abbot trans.), at 54/46 (1996).
categorical imperative as the philosophical basis of the golden rule, “that we should do as we would be done by.”

Within Kantian reason individuals are to contemplate their actions in abstraction, in a manner removed from their own personal desires and beyond specifics of time and place. Moral decisions are to be made upon the basis of reason alone by invoking an internal judgment as to the universal applicability of their action, as if the outcome of their action might equally be applied to them in the future.

Human reason is the center of Kant’s entire project. Allen Wood observes that if Kant is the philosopher most concerned with the limits of human reason, so too does he most ardently call for the “absolute title of reason to govern human thought and action”. Reason may be seen as both the process that underlies Kant’s ethical system, and the means through which each individual is protected within that system. Kant claimed that freedom was the ability to be governed by reason, and that this freedom must be equally enjoyed. The autonomy that permits one individual to freely act must not infringe upon the autonomy of another to choose their own personal ends.

Kant’s famous dictum that individuals ought to be treated as an ends in themselves, and not used as means, is an extension of the categorical imperative. As a universal maxim, individual autonomy could not logically be used to lessen that of another as it would contradict its own meaning. As Roger Scruton states, “The constraint on our freedom is that we must respect the freedom of all: how else could our freedom issue in universal laws?”

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49 Scruton, supra note at page 70.
51 Scruton, supra note at page 64.
52 Scruton, supra note at page 70.
The universality and inherent equality contained within Kantian principle seemingly make for the most natural articulation of international rights. The primacy of autonomy within the Kantian ethics is especially relevant to the modern concerns of the environment as it affirms the need for the individual to have a defense against the acts of others, and the space for choosing their own ends. The categorical imperative of universality would come to inform Kant’s later ‘cosmopolitanism’ and theory of international relations, which laid the foundation of universal rights by stressing that individual rights be equally applied across the globe.\(^5\)

Unfortunately, as universal and fair sounding as Kantian rights appear there remains a significant impediment to their realization and their ultimate value. The problem emerges with the Kantian justification and location of individual rights in the process of reason. By making reason, in a manner purely internal to the individual, the foundation of ethical principles Kant ensures that these principles are an impossibility. Kantian reason is a flawed process that cannot be adapted to the demands of actual behaviour in world of changing information. Therefore, Kantian principles, and the universal rights project in general, are premised upon an untenable presumption that rules are to be a foundation that is unchanging for all time. Unfortunately, the static nature of such rights, or even of such social truths, is inherently difficult to reconcile with changing knowledge of the external world, much less the openness of individual attempts needed in response.

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\(^5\) Kant’s cosmopolitanism was not the chosen focus of this investigation as it is built upon a foundation of Kant’s earlier and more influential philosophy of reason that is found in the first two *Critiques*. Put differently, when briefly discussing a philosopher’s location and justification for individual rights it is perhaps more direct to address the center of their coherent system rather than its secondary applications.
D. Non-Euclidean Knowledge

Kant’s moral system is the product of his larger philosophical project of arguing that experience and knowledge conform to an innate structure of thought that is shared by each individual. Arguably, more than any philosopher of the Age of Enlightenment Kant had been inspired by, and attempted to incorporate, new methods of scientific discovery.\(^{54}\) Newtonian science had made the world seem deterministic, with apparently iron clad scientific rules defining the external world, and Kant had wished to make these scientific truths dependent upon an essence that is a priori to human experience. If Newtonian science revealed how mathematical principles defined the operation of the natural world, Kant tried to prove that it was the mind that predetermined the course of these scientific discoveries by defining the possibilities of how people could perceive of reality:

The physical science of Kant’s day seemed to assume a priori the existence of universal causation, and of reciprocal interaction. It assumed that it must explain, not the existence of matter, but the changes undergone by it. It assumed the need for a law of conservation, according to which, in all changes, some fundamental quantity remains unaltered. It is just such assumptions, Kant thought, that had guided Newton in the formulation of his laws of motion. Kant therefore attempts, in deriving his principles, to establish the ‘validity of universal laws of nature as laws of the understanding’\(^{55}\)

The laws of ‘understanding’ articulated by Kant were an attempt to connect a priori and synthetic knowledge, arguing that it is possible to know the world through pure reflection without recourse to experience.\(^{56}\) Essentially, Kant held that synthetic knowledge, or conclusions that require outside validation to determine their validity,

\(^{54}\) Kant’s famous claim was to have orchestrated a Copernican revolution in philosophy. See, preface to Immanuel Kant, CRITIQUE OF PRACTICAL REASON (T. K. Abbott trans.), (1996).

\(^{55}\) Scruton, supra note at page 37.

\(^{56}\) Ibid., 21.
conforms to the internal process of the mind. Kant used the poignant example of mathematics, which we know through reasoning and not the analysis of mathematical terms. That is, mathematics is understood through engaging in a process of thought, and not only through the experience of seeing mathematical forms or numbers on the page.

Geometry may reveal new knowledge and concepts through observation, or empirical ‘experience’, but Kant holds that it is the mind that structures how geometry itself is used and developed. Therefore, scientific discoveries that extend knowledge of the external world do so upon the predetermined pattern that is our a priori structures of the mind. That which is possibly knowable is defined within the individual through internal reason.

Kant’s moral system is strikingly similar to the argument for the possibility of synthetic a priori knowledge found in the *Critique of Pure Reason*. For instance, the conclusions of both moral action and mathematics are synthetic while the process that defines them are a priori. The results of mathematics are given in values that may apply and respond to the real world. Similarly, individuals must act and decide in situations that arise in the social world. As mathematical solutions are arrived at by the process of thinking through problems in abstraction, moral decisions are made by abstracting oneself from individual concern so as to consider the matter through reason alone. As such, Kantian reason is the source for both mathematical and moral truths, as conclusions are not reached by observing through personal experience but by thinking through the laws that structure the subject. As geometry conforms to the rules of our thought processes, so too should individual action conform to the universal laws of reason that the categorical imperative is said to provide.

57 Immanuel Kant, CRITIQUE OF PURE REASON (Norman Kemp Smith trans.), (1965).
The universal rights project was begun with Kant’s desire to make both the external and moral worlds dependent upon a structure of innate ideas. While it may be comforting to think that each individual equally structures the physical world in their mind, and that each is equally privy to an inherent method of thought that provides moral conclusions, it may be dangerous to permit this conceit. Advocating for an a priori structure of the mind, whether for mathematical principles or shared moral outcomes, necessarily means declaring that all future possibilities are defined in terms of what is currently assumed.

Kant assumed that Newton had found a universal method and tried to devise a similarly universal method of metaphysics and morality. However, Newtonian science has received significant qualification, and the developments or ‘discoveries’ which revealed these limitations are definitely not Kantian. Non-Euclidean geometry and the physics of relativity resulted from testing the limits of knowledge and a dissatisfaction with the truths that the mind supposedly contained a priori.58 Revolutionary thinkers like Einstein, and the mathematicians who discovered non-Euclidean geometry, were able to successfully develop our understanding of the external world by explicitly rejecting the method of knowledge that Kant claimed as an immutable extension of our mind. If the mind does not inherently contain the structure for how individuals perceive of the external world, it seems odd to assume that it does the social.

Kant had wanted to save a place for religion in a Newtonian universe by carving out an impenetrable space that exists before science, and before the mind that structures it.59

58On Einstein and the audacity of challenging Newtonian science see Magee, supra note 46 at page 167. Lobachevski, Bolyai, and Gauss are each believed to have independently formulated a non-Euclidean, or Hyperbolic geometry. Interestingly, Gauss, the most renowned mathematician of his age, never published his results for fear that people would never be reconciled to the idea unintuitive thought of non-Euclidean geometry. Jan Gullberg, MATHEMATICS: FROM THE BIRTH OF NUMBERS 381-382 (1997).
59Magee, supra note at page 46.
Kant had assumed that science had discovered a universal method, and he then proceeded to argue backwards from external knowledge into the individual mind, concluding that nothing is knowable before our innate structure of thought. If the source of our a priori reason is unknowable, then it might be God that resides in this impenetrable space. Yet considering the rate of scientific change and development that occurred in the last century alone, it may be wiser to acknowledge that what is impenetrable is our understanding of future knowledge and the ways in which it might undermine our current assumptions. Perhaps the admiration and awe felt for the ‘starry heavens above’ and the ‘moral law within’ are a result of a continuing incomprehension of either.

Kant’s unerring faith in human reason would lead him to the conclusion that if individuals could only act in a purely detached and rational manner the best and most ethical results would necessarily follow. As Dieter Henrich comments, “the law as such, remains totally indifferent to both the objectives and the outcomes of the actions of a will that adopts maxims meeting the requirement of universalizability.” For ethics as with geometry, Kant believed that logical necessity defined the form of perception regardless of external content. David Martyn gives an interesting analogy for Kant’s belief in the formal process of reason: “It is comparable to an algebraic expression that has x’s and y’s but no actual numbers, variables but no values. Kant’s claim is that whatever value I ‘plug in’ to this expression, the result is going to be ethical.”

The apparent openness of a formal ethical system that is without explicit content may be seen to give way to a much greater conservative impulse that characterizes Kant’s

60 Ibid.
62 Martyn, supra note 47 at page 15.
political conclusions. While Kant is not providing the content for individual thought, he is defining how individuals are to think. The categorical imperative is a moral system that disconnects individuals from their own concerns and desires so as to impose unconditional dictates for behaviour. Kant’s rational rules may be neutral, but the thought process that he hopes will govern humanity is directed toward a deferential and pious society that was consistent with the secularization of Protestantism that seemed to drive Kant’s entire project. The Kantian ideal of individual negation to reason at times begins to resemble religious asceticism more than a philosophy concerned with individual freedom. As Roger Scruton comments, “Kant seems to have more praise for the misanthropy which does good against every inclination, than for the expressions of cheerful benevolence. It is in his ability to resist inclination that the worth of the moral agent resides.”

The categorical imperative results in ethical principles of a commonsensical nature achieving the status of unconditional laws. While many people would no doubt agree with Kant’s dictum that one should not lie, or even that one should not engage in civil disobedience, the troubling aspect arises with Kant demand that these rules be unconditional, and that exceptions are not permissible. The demand of universality does not allow individuals to address specific instances that require aberrations from rules that are to be considered binding for every single situation. Individuals may find it ethical to commit a lie so as to conceal an innocent from a dangerous pursuer, or to disobey a

63 Ibid., 19.
64 The notion that Kant embodied the secularization of Protestantism was first popularized by the German sociologist Max Weber.
65 Scruton, supra note 2 at page 74. (italics in original).
66 Martyn, supra note 47 at page 15-19.
government that has slid into tyranny, but Kant’s rational rules do not permit these ethical outcomes.

The great failing of Kant’s system is that internal reason does not necessarily provide for, or represent, anything that is universal. Kantian abstractions of individual reason can neither contemplate the entirety of the external world, nor contain the future forms of knowledge that may alter how we think. Instead of justifying rights as extending out of individuals who internally predetermine the world, it would be more beneficial to articulate principles that remain open to unknown possibilities. Universal rights may be the ultimate conceit: a presumption that individual reason already contains the answers to future questions.

E. Autonomy and Subjectivity

Kantian rights may cater to an intuitive sense of individuality that is shared by many, but it remains unclear whether reason serves any purpose beyond making the theory appear more intellectual than it actually is. Internal reason yields no social value or prescription that could not be equally served by the simple recognition of the physical separation of people. Essentially, the argument could be that we are physically separate from one another and that this separateness deserves respect. And while it may be that Kantian thought should not be taken out of its Enlightenment context, after all it was the age of reason, it should be acknowledged that autonomy could be invoked through any number of distinctions.

By focusing upon the autonomy deserved by internal reason the liberal process inevitably leads to subjectivity, allowing each the freedom of thought but providing no
way of articulating social goods beyond the individual. Where communitarianism may articulate a goal in the accumulation of individual opinion, Kantian liberalism goes in the opposite direction toward individual neutrality, protecting subjective thought but necessarily unable to articulate a definitive good. The difference is of great significance, determining what is the focal point of public space, the good or the individual. With liberalism, a worthy purpose of individual protection is joined with the empty promise of social goals.

With individual subjectivity as a base, public space under liberalism becomes a value free ground. Liberalism defines the state as a theoretically neutral device that lies above various competing interests. This neutrality between competing interests is also known as pluralism, wherein the method of public discourse is placed above its ends. The difficulty, as observed by Alisdair McYntre in *After Virtue*, is the potential for certain social debates to be forever unresolved.\(^67\) Is the purpose of the state to aggregate individual desires into a movement toward something that is eventually defined, or is there no purpose at all, only a function? And while we may need to acknowledge that some divisions are irresolvable, the difficulty with liberal individualism is that we are never given a talisman with which to determine when, and in what cases, we may move forward.

Once a movement of political upheaval, liberalism has assumed a conservative quality through its advocacy of subjectivity and neutrality. Allowing freedom but demanding that society is individual and separate, liberalism becomes a force of the status quo by avoiding the strife that comes with choosing ends and answers. As Roberto

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Alejandro has claimed, liberalism has rejected the ‘heroic’ search for truth in the name of avoiding conflicts.\textsuperscript{68}

For all of contemporary liberalism’s suspicion of traditions and claims that its principles stand for a radically new vision of individuality, current expressions of the liberal-communitarian debate may prove that contemporary liberal theory is an attempt to defend the status quo. Or to put it differently, liberalism is now a conservative philosophy that, in these times when the end of history has been decreed and the universal validity of liberal principles has been proclaimed, seeks to buttress failing institutions in the name of justice and neutrality.\textsuperscript{69}

The conservative nature of liberalism is especially troubling to an account, such as this, which is designed around a test for the recognition of new possibilities. Liberal subjectivity was an undeniable achievement years ago, freeing individuals from oppressive hierarchies of thought and action, but the question becomes of what is to be done with the public space that liberalism has subsequently freed. Issues like those arising with global environmental degradation indicate that there is more to be hoped for, and indeed demanded, than separation. Held against the measure of responsiveness to change, liberal rights of equal autonomy do not hold much promise, and indeed are in many ways a major obstacle.

III.V CONCLUSION

To properly reflect society a legal system must develop along with the greater methods of knowledge that come to revolutionize thought. The advance of knowledge presents both an opportunity and a charge for the law. When new knowledge radically redefines our central assumptions of thought and behaviour, the law must be able to adapt. As this investigation has tried to reveal, neither selecting one single value nor one

\textsuperscript{69}Ibid.
single right for prominence enables the law to become an adaptive system. The hope of answering future challenges rests with the essential need for accommodating new theories of knowledge within a legal system that is free from outmoded definitions of individual interaction. Above all, what must be overcome is a dogmatic view of rights that presupposes that what was once defined must exist for eternity.

If rationality is to continue to act as a justification for individuality it must accommodate the information of an increasingly interconnected and complex world. If individual rights do not acknowledge a dependence upon others the danger is that individual reason will come only to justify self-interested economic competition. And while competition may certainly promise short-term growth, without a legitimate social role individual reason will provide a basis for nothing more than consumption. To regain the freedoms the market has been heralded to provide requires that market mechanisms become embedded in the social relationships that influence individual choice.

For all of the scientific and technological advancements that have expanded our knowledge and capacities, it is perhaps the awareness of past failures that should most benefit our future prospects. The Mayan pyramids of Mexico and the Incan ruins of Peru are testament to the dangers of continuing on with past patterns of organization in the face of unforeseen challenges. In the end, by promoting social variation and diversity we may arrive at unforeseen solutions, and potentially avert a historical cycle of self-defeat.
CHAPTER FOUR

DIVERSE INDIVIDUAL CONCERN IN RATIONAL DECISION-MAKING

The following chapter continues on from the assumption of a hypothetical agreement on the need for international system redesign to address the question of how individuals are likely to choose; their assessment of purpose and priority in creating new principles for the international system. Whereas the previous part canvassed the most prominent themes in liberal political philosophy that would likely act as comparators, the following chapter narrows the focus to consider the priorities that will influence actual individual choice.

The conceit of a new beginning to the international competitive system oversteps many practical and real-politick challenges of state interest and the reluctance for agreement that might follow. It may also be said that the conceit of radical reform also ignores powerful private interests and their lobbying influence. However, and in response, it should be noted that the very recognition of a grave global problem justifies the ideal of coordinated solution; and similarly works against the cynical politics of influence peddling associated with domestic policy setting. When faced with a dramatic global problem, transparency may serve as a bar to the advantages of cynical politics, for it relies upon intense interests outweighing the diffuse and more minor concerns of the wider group. When confronted with a serious global failure, the particular could not seemingly take advantage of widespread unconcern – it would arguably be an instance of intense public attention that does not permit for specific interest influence to be dominant.

The following chapter continues on analysis of the tension between self-interest and other regarding valuations, as with the right and good examination above and the
efficiency and equity to follow in the next chapter. In regards to the prediction of individual behaviour and choice, the following will take exception to the assumption of rational self-interest that underlies economic theory and offer that individuals may exhibit values beyond the self when rules and situations allow.

As the first part of this project questioned the prescriptive quality of self-interest in light of significant instances of market failure, the following chapter takes exception to the descriptive position of economics that views individuals as relentless maximizers of their own self-interest.

Drawing upon literature of behavioural economics and behavioural law and economics, it is to be shown that not only do individuals manifest and contain simultaneous value priorities, fluctuating between self-interest and fairness, but that such manifestations are dependent heavily upon rules and context. This descriptive realization has normative consequence for the contemplation of international system design. New international principles for competition should be envisioned so as to allow the widest consideration and manifestation of value, both in terms of the negotiation style and form, and the later workings within the system itself. This chapter accordingly provides for this potential within individuality, while subsequent chapters will build upon this potential.
IV.I  INTRODUCING THE POSSIBILITY OF VARIABLE RATIONALITY

As chapter one has introduced a strategic view to systemic observation, chapter four shall do so on the individual level. As the focus of this project’s ambition is to those imagined to be charged with new system design, it is reasonable that those given such a responsibility would require an appreciation of current state information, including an appraisal of dynamics on both the systemic and individual level. A view to individual choice and rationality may complement, or even contrast with, the systemic analysis of chapter one; for this second chapter may be seen as the examination of another and different level of economic market failure.

Whereas in chapter one situations of market failure and inefficiency were found to be dominated by the impulses of competitive insecurity, chapter two addresses situations in which mainstream economic thought does not adequately predict, nor understand, individual decision-making as it points toward other, greater valuations. Competitive insecurity is equally observable within the following analysis of individual rationality, but it comes to represent a more fully negative, indeed often cruel, feature, as the physical, personal necessity of want is introduced. The following chapter contrasts a bare minimum rational result of competitive insecurity with the luxury of abstract choice that allows individuals to demand an entitlement to fair treatment. In this regard, chapter four introduces an aspirational quality to contrast with the negative market tendencies witnessed within the first chapter; for as abstract choice is contrasted with sub-optimal market dictates, principled choice is contrasted with short-sighted and unfortunate necessity.
This dissertation will often take up a challenge to the tenets of neo-liberal economic theory, and more specifically its means of influence and infiltration into legal theory achieved via the Chicago school of law and economics. Such a challenge begins here in the second chapter, with individual rationality separated from the necessity of personal maximization and of immediate satisfaction. Beyond an agreement with the Chicago School that rules may serve as incentive, or prices, on individual behaviour, the position advanced in this chapter concentrates on the possibility that the freedom from strict economic rules may allow for value preferences that are unrecognizable to self-interested economics. Rules may, and often do, impose results consistent with individual maximization and self-interest, but more innovatively, and importantly, they might also yield the potential for individuals to express and further goals beyond themselves. With the conceptual space for choice, individuals may prioritize purely on a value basis of what is fair or principled in a general result.

IV.II LEGAL THEORY AND THE IMPOSITION OF ECONOMIC THEORY

Law and economics scholars tend to rely upon a notion of individuality incorporated from economic theory, which assumes that individuals are rational maximizers of their own self-interest. A straightforward definition of self-interested maximization is given by Richard Posner as simply “choosing the best means to the chooser’s ends.” While the rationality assumption has been controversial since its

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1 Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 Stanford Law Review 1551 (1997-1998). Generally, individuals are thought to be rational maximizers of their own self-interest to the extent that they pursue preferences, economic or otherwise, which are consistent or relatively constant. Simply, the definition of rationality need only demand that individuals are not internally sporadic in what they desire, and that they seek the most effective means to achieve these desires.
introduction to legal analysis, it has also lent law and economics much of its theoretical coherency and force.

Individual rationality supports both the abstract calculations from which modern law and economics currently expands, and the broader normative justifications for a system said to reflect free choice in the market. In an ideal sense, if rationality characterizes choice, then individual actions within a marketplace become an aggregation of free will; a democratic collection of personal valuations and choice. The question posed here is whether it is valid to make this move from individual rationality to market conclusions. If individuals do not always favour self-interest, as evidence suggests, it does not necessarily follow that market solutions reflect voluntary choice and valuations. Indeed, assuming an overly narrow view of rationality may have the unintended result of imposing arbitrary ends upon individuals.

While the most virulent, and often the most poignant, critiques of law and economics have involved normative challenges to its assignment of social priorities, the essential joining of free markets, and especially private property, with the promotion of individual liberty is often associated with the University of Chicago, and the neo-liberal philosophy espoused by the likes of Milton Friedman and Friedrich Hayek. See, e.g., Friedrich A. von Hayek, THE ROAD TO SERFDOM (1972). Hayek offers a defense of Lockean rights and neutral individual liberty, equating government regulation with the threat of totalitarianism. For an interesting discussion of the academic connection between rational choice and the politics of the Cold War, see, S. M. Amadae, RATIONALIZING CAPITALIST DEMOCRACY: THE COLD WAR ORIGINS OF RATIONAL CHOICE LIBERALISM (2003).

The most notable is perhaps the liberal critique, which generally argues that furthering the systemic goal of economic efficiency, by equating ability to pay with an equality of desire, does not treat individuals as ‘ends in themselves.’ See, Ronald Dworkin, Is Wealth a Value?, 9 Journal of Legal Studies (1980). For more on the incompatibility of ability to pay with the assumption of voluntary preferences, see, e.g., Guido Calabresi, The Pointlessness of Pareto: Carrying Coase Further, 100 Yale Law Journal (1990-1991); Jules Coleman, Efficiency, Utility, and Wealth Maximization, in Markets, Morals, and the Law 95-132 (1988);
more recent developments in the literature question its descriptive accuracy. Drawing upon experimental evidence and well-known examples of anomalies within economic theory, a new ‘behavioural approach’ attempts to augment law and economics so as to account for instances of individual irrationality. Irrationality, and with it rationality, have been subsumed within the greater economic view of law, aligning irrational behaviour with motivations that do not accord with self-interest. The terms and definition of rational behaviour have been set by the economic approach to law, and behavioural law and economics scholars enter the field to revise within the parameters already determined. Therefore, if traditional law and economics posits that individuals maximize, the behavioural response may be characterized as conforming to the ‘yes, but’ variety – seeking to identify the situations when rational maximization does not hold and then orchestrating regulation to help individuals ‘get it right.’

Unfortunately, the conservative ambitions of the behavioural scholars have not done justice to their source material. In using experimental evidence to argue for bureaucratic tinkering to achieve the same ends as law and economics efficiency, the behavioural approach obscures the extent that these experimental results point to different individual ends. There is more to human endeavour, and the regulation of it, than varying degrees of correspondence to market rationality. Evidence reveals values to be independent of both the market and government, with the potential for fairness existing alongside self-interest in the thought patterns inherent to individuals.

(which argues that that there can be no cardinal, or one to one, correspondence between ability to pay and individual measures of desire, happiness, etc. Therefore, though law and economics espouses maximization in the utilitarian sense, it does not meet the standard of utilitarianism and the promotion of a sum good of happiness, or whatever value).
In the following chapter I argue that anomalies of self-interest may signify much more theoretical import than behavioural scholars have thus far demonstrated. My object is to show that the structure of competitive rules influences the availability and likelihood of certain inherent values, such as fairness, manifesting themselves in individual behaviour. The implication is that, regardless of the normative priorities of a legal system, the status quo may not be said to reflect a natural state of individual preferences, nor human nature as a given constant. Even if though the law may often favour a priority of individual self-interest, this need not mean that it must do so exclusively, or that it should do so.

In using a prominent example from the behavioural catalogue, the ultimatum game, I wish to demonstrate that rationality and irrationality do not exist in a binary relationship, either present or not present, but may instead be fluid within the same context. There are instances, as the ultimatum game reveals, when a similar context may yield differing value choices of individuals based on the structure of competition. In the ultimatum game, self-interest is both dependent upon, and also secondary to, the availability of fairness considerations. To grasp this reality requires a theoretical framework more expansive than the maximization universe of law and economics, behavioural or otherwise.

That individuals act contrary to economic theory, and act in accordance with general principles of fairness, need not be taken as merely a correctable anomaly. The inefficient instances of individual choice, or sub-optimal games, may be seen as constraints on individuals’ freedom to choose otherwise; to articulate inherent principles not recognized by the market. The continuing relevancy of non-economic concerns
should at the very least point toward the desirability of designing legal rules that recognize both self-interest and social fairness. Both descriptive and normative elements of the law could well be improved if individuals are free to manifest their preferences in different ways, across theoretical categories.

IV.III METHODS OF SKEPTICISM

As with the economic theory that inspires it, law and economics is often clothed in the congratulatory rubric of science. The economic field’s foremost methodological expression remains Milton Friedman’s famous essay “The Methodology of Positive Economics”, which articulates a Popperian standard of falsification. In keeping with Popper’s ideal of scientific inquiry as providing falsifiable claims, Friedman argues that the measure of economic theory should not be the accuracy of its basic assumptions but the accuracy of its predictions – its testability. Specifically, in Friedman’s words: “Viewed as a body of substantive hypotheses, theory is to be judged by its predictive power for the class of phenomena which it is intended to "explain."”

Whether individual maximization is in fact the prime motivator of human behaviour is secondary to the ability of this conception to further the practical objectives of society. Economic prediction is thus seen as analogous to that of science, providing insight into

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6 I refer here to the most prominent approach to law and economics, that of the Chicago law school. The Chicago school (also commonly referred to as the conventional, traditional, or classical approach), closely mirrors the free market program made famous by the Chicago school of economics, and its influential members such as Milton Friedman. A good introduction to law and economics, including Chicago and other subsequent schools, may be found in Nicholas Mercuro and Steven G. Medema, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM (1997).

7 “Factual evidence can never ‘prove’ a hypothesis, it can only disprove it.” Milton Friedman, The Methodology of Positive Economics, in Essays in Positive Economics 9 (1953). For a discussion of Friedman’s methodology and its place within the economics field, as well as Friedman’s ‘instrumentalism’ and following of Popper, see, Lawrence A. Boland & William Frazer, An Essay on the Foundations of Friedman's Methodology, 73 The American Economic Review 129 (Mar. 1983).

8 Id., 4.

9 Id., 8.
how observable results come about, and how forces react and join into future outcomes. If market exchange is conceived of as the current paradigm, or predominant worldview within western society, individual maximization is then held out to be the best explanation for why collective market outcomes occur.\textsuperscript{10}

The foundational assumption upon which economic formulations and abstractions are built is individual rationality, or the model of rational choice. Though rational choice theory is a widely used and often imprecise label, its application to legal analysis generally conforms to the market view of individual behaviour espoused by Gary Becker, an approach summarized in his aptly titled Noble acceptance article “The Economic Way of Looking at Life.”\textsuperscript{11} Becker’s influential attempts at so-called economic imperialism, or the extension of the economic method to traditionally non-economic fields, is justified with the claim that the existence of three simple criteria within areas of social behaviour merit an economic perspective. These criteria may be described as: individual maximization, stable preferences, and general equilibrium. The first two criteria may be seen to describe a model of rational choice, joining the self-interested pursuit of atomistic goals with the rationality of doing so in a consistent manner. The third criterion, that of general equilibrium, describes the systemic outcomes of rational choice, in which competition is the sum of disparate strategies that combine into predictable trends, such as the inverse relationship between supply and price.

Evident in Becker’s characterization, as with economic theory in general, is an explanatory interdependence between individual and system. A unique relationship exists

\textsuperscript{10} Id., 5 (claiming that differences of economic policy ‘derive predominantly from different predictions about the consequences of taking – differences that in principle can be eliminated by the progress of positive economics – rather than from fundamental differences’).

between the individual agent and the prediction of system operations; as the conception of individual maximization permits for abstract predictions of the whole, the system also determines the parameters of individual interest perception. Therefore, the assumption of individual maximization is a dependent theory of the self, for its descriptive content relies on market results to validate a conception of individual behaviour (or human nature). Individual behaviour, even that of the rational maximizing kind, is not measurable objectively, or separate from human influence, in the same way that physical phenomena are. Where physics students may predict the behaviour of a moving body based upon the surrounding environmental forces that impact upon it, such as friction or gravity, those engaged in human study are observing the effects of factors which are dependent to a large extent upon social determination.

From the assumption that most human behaviour conforms to market rationales, since individuals maximize their consistent preferences, has developed the central law and economics tenet that rules act as prices on behaviour. Again, the object is to predict how external signals that enter individual contemplation, whether rules or other forms of prices, effect individual strategies and coalesce in collective outcomes. While the study of rules as prices uses a unique economic nomenclature, it is not a particularly radical approach. Indeed, studying the impact of law upon behaviour has long been a staple of law and society.\footnote{Mark Kelman, \textit{Legal Economists and Normative Social Theory}, in \textit{A GUIDE TO CRITICAL LEGAL STUDIES} 115 (1987).} The radical departure of law and economics occurs through its reliance upon, and often explicit embrace of, the ideology of neo-liberal economics.

While a powerful explanatory tool is undoubtedly provided for by economic theory, it is contingent upon society’s continued allegiance to neo-liberal economic norms.
Friedman’s methodological statement implicitly acknowledges as much. The claimed correspondence between economic theory and the Popperian ideal of scientific falsification is the primary justification, but Friedman’s view contains an additional, and perhaps inconsistent, reliance on a Kuhnian concept of paradigms. For though Friedman’s claims that no single theory can explain the complexities of the entire economy, or arrive at the truth (as with Popper), he also acknowledges that the determinate of economic predictions is social. On the one hand, objectivity is held out to be possible on the basis of the testability of economic predictions, while on the other, the social composition of the economy is a matter of public policy and debate.

Friedman’s scientific aspirations for economic theory may be seen to proceed along the following lines: First, if an accurate picture of human behaviour is not provided for by the narrowing of individual experience that occurs with the assumption of rational maximization, at least economic theory provides testable predictions on how individual behaviour will manifest itself in the market. Second, even if the predictive ideal should falter, economic theory has yet to be replaced as the dominant explanatory model for a market based society. Justification thus moves from an independent ideal of scientific inquiry, testability or falsification, to rest upon a general correspondence to what most people currently accept as true.

13 Kuhn’s arguments on the social determinates of research popularized the notion of ‘paradigms,’ and the idea that science is composed of revolutionary breaks rather than linear or constant progress. “For Kuhn science is always dominated by one paradigm that its members pursue religiously until it runs up to limits of its puzzle-solving capabilities.” Steven Fuller, Kuhn vs. Popper 55 (2003). Central to Kuhn’s notion of a paradigm shift was academic hierarchy, and the elite within a discipline that would lead the acceptance of new research programs. See generally, Thomas S. Kuhn, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3rd ed.) 10 (1996). A paradigm was revolutionary, not solely because of its empirical accuracy, but in part because it was “sufficiently open-ended to leave all sorts of problems for the redefined group of practitioners to resolve.”

14 Boland, supra note 7 at page 130.
Friedman’s expression of methodology has perhaps been so persuasive within the economics community because of its categorical approach, which has in turn been very influential upon the law and economics school’s most categorical proponent, Richard Posner. Posner’s voluminous output contains not only an expression of sympathy to Friedman’s views, but also signals a more profound shadowing of its intellectual progression. First, Posner shares with Becker a view of individuals as maximizers of their preferences, broadly conceived of as self-interested advancements of desire not limited to pure market transactions.\(^{15}\) Predicting behaviour, in the Popperian fashion, is thus possible because of the consistency of individual maximization. Second, Posner claims that since we live within a market economy, increases in market size,\(^ {16}\) or wealth maximization, ought to be law’s object.\(^ {17}\) Therefore, Posner, as with Friedman before him, offers a formalized version of economic quasi science, only to ultimately rely upon the social acceptance of the current paradigm of economic competition to justify his position. And so it is that Posner may claim allegiance to both Popperian science,\(^ {18}\) and the pragmatic justification of representing the dominant paradigm of the day.\(^ {19}\)

The scientific aspirations of economic theory makes for an interesting sociological study of academic influence and fashion, but it also provides a ready division for how critiques to law and economics are addressed. The distinction between Popperian and Kuhnian views, even in the gross over-simplification given here, involves more than a

\(^{15}\) Posner, supra note 1.

\(^{16}\) Also termed potential Pareto improvements, or Kaldor-Hicks efficiency. See, e.g., Mercuro and Medema, supra note 5 at page 13-21; Calabresi and Coleman, supra note 4.


\(^{18}\) Posner, supra note 1 at page 1560.

debate over the nature of scientific history, or how science has progressed; it invokes an implicit consideration as to how a dominant worldview might be challenged. It could be said that a specific questioning of a theory’s predictions is Popperian in nature, while a systemic challenge to a dominant thought system endorsed by a social group, or paradigm, represents a Kuhnian style challenge.

IV.IV  FROM NORMATIVE TO DESCRIPTIVE CHALLENGES

Initially, legal scholars opposed to the law and economics approach, or least its normative and philosophical pretensions that extended beyond law and society type analysis, were apt to reject a market conceptualization of law. The most forceful critiques of the past tended to attack law and economics for its assumptions that individual ends are represented by market transactions, as if reflecting a sum equation of happiness in a weak version of utilitarianism. Despite the force of these critiques, however, the arguments have been susceptible to the impasse faced by most normative challenges: namely, since it is not fact based, and does not point to distinct factual contradictions, it may be ignored as safely external to society’s dominant structural assumptions. So if law and economics may be challenged for deriving an ought from an is, it may equally be said that challenging an ought with another ought is unlikely to prove persuasive to those intent on maintaining the status quo. Put differently, the claim that another paradigm ought to hold sway, and that another constellation of values ought to inform public life, is easily ignored for not corresponding to what currently is. The idea

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21 See, e.g., Coleman, *supra* note 4.
that ‘what is, ought to be’ may not be overly imaginative, but it is nonetheless difficult to supplant.

Exceptions to the descriptive validity of law and economics, which avoid the moral indeterminacy of prior normative challenges, have grown in frequency within recent years. Part of this growing descriptive debate may be explained by the direction of law and economics itself. As Russell Korobkin and Thomas Ulen have observed, law and economics has steadily been devolving into a sub-discipline of applied economics, with the desire for mathematical elegance taking priority over usefulness to legal study.22 The pressure for law and economics scholars to arrive at new, mathematically driven applications has resulted in a form of nominal legal analysis which is inscrutable to those whose training and professional focus remains tied to the more pedestrian notion of law as it is recognized by most people. While the application of topology or invariance theory23 to widget regulation would no doubt awe the editors of law and economics journals, the relevance to legal study would likely remain obscure to mathematical novices.

The increased abstraction and formalization of law and economics scholarship has only served to make its lack of descriptive engagement with legal reality more overt. As legal scholars have become more conversant with the anomalies within the economic model of rationality, long known to economists, they have seemingly become more secure in challenging law and economics scholars’ monopoly on economic rationality. Drawing upon experimental evidence gathered from behavioural sciences, psychology, and the fringes of economic theory, a new behavioural approach has attempted to reform

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23 These forms of mathematical study were chosen randomly and hypothetically.
law and economics so as to account for instances of individual irrationality. Having entered the fray, the question becomes of what use behavioural law and economics scholars have made of their new found knowledge of human behaviour? Has it lead to new tools, or a fixing of the old?

The lessons from the descriptive inadequacies of economic theory may be interpreted in different fashions. In addressing the scientific pretensions of economic theory, the adopted view of scientific inquiry may indicate the likelihood that initial skepticism of the economic program may lead to its outright rejection as a valid theory. On the one hand, a Popperian concern with scientific falsification, and the testability of empirical observations appears to represent the scientific ideal, yet, it also permits a more incremental, or even conservative, approach. The concern about specific factual inaccuracies, as when a descriptive hypothesis is offered and then compared with observable results, may be advanced in a piecemeal fashion, with only the most overtly inconsistent parts of the theory rejected.

As behavioural law and economics illustrates, when one begins with the assumption that a theoretical framework should be retained, the object becomes incorporating new information, or techniques, to compensate for obviously incorrect conclusions – in effect, resuscitating the most flagging points of the theory. But this specific form of theoretical accommodation may be more socially determined than is commonly assumed. A more cynical social critique would find that specific accommodations are often nothing more than an attempt of scholars to retain their professional investment in a theory, even in the face of its apparent inconsistencies and ripeness for replacement. In this way, the move toward greater abstraction on the part of law and economics scholars may be read as
ignoring empirical inconsistencies for the sake of theoretical sustenance alone. With careers tied to the continued prevalence of a research program, the ideal of scientific objectivity may not always apply to the physical sciences, much less to economics.

The social determination of science usually invokes a pragmatic, or competitive theory of scientific progress. Scientific knowledge, then, is seen as the reflection of what most people within a given community, in this case a scientific discipline such as physics, believe to be true at a given time. The essential ingredient becomes acceptance and use by the majority, not objective truth. Therefore, from Kuhn’s discussion of scientific communities extends the hackneyed notion that it ‘takes a theory to beat a theory.’ Although the requirement that a successful argument must advance an alternative theory to the status quo is not particularly nuanced, the idea does bear some relevance to the present treatment of behavioural law and economics. The lack of theoretical framework on the part of behavioural approaches given to date is not a secondary consideration.

Advocating for the inclusion of the anomalies of rationality within the traditional school of law and economics is a significant choice, meaning that the reading of these findings is not to threaten the wider principles upon which the classical paradigm rests. Since the behavioural approach begins explicitly from the assumption that the law and

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25 The social definition of truth plays not only a part in the work of those such as Kuhn and Lakatos, it is also reflected in the philosophy of pragmatism, and subsequently, legal pragmatism. See generally, Brint & Weaver, *supra* note 18.


27 Id.
The economics program should be supported and augmented, the question becomes whether a meaningful contribution can be made from this start position. The following section summarizes the basic form of the behavioural evidence, and then discusses the implications of its given treatment in the hands of the behavioural scholars to date.

IV.V BEHAVIOURAL EVIDENCE

Arguments for a behavioural approach to law and economics have generally proceeded in the following manner: evidence of rational inconsistencies within the classical paradigm are trotted out, and it is then argued that this evidence demands inclusion within the law and economics program. Evidence from the behavioural sciences often shows individuals in a light distinct from the self-interested choosers who are able to make neutral assessments of the world around them. Essentially, individuals often display preferences that are not in keeping with rational assessments of either value or risk.

First, in terms of valuation, individual behaviour may often correspond with the endowment effect, in which individuals tend to prefer their current holdings above what their exchange value might be. A common example of the endowment effect is a ticket to a sought after event or performance, in which individuals are seen to be unwilling sell their ticket for an amount that they themselves would be unwilling to pay to replace the ticket. For example, a ticket-holder who purchased their ticket for $50 might be unwilling

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29 As the approach is yet young there can be no categorical pronouncements. I refer here, then, to the beginnings of an approach. The works of JST and Korobkin and Ulen may be said to be fairly representative, and the most comprehensive expressions of this new school of law and economics.

30 A good discussion of endowment effect may be found in Issacharoff, supra note 2, as well as JST.
to sell it for $500, even though they would not pay $500 for the same ticket. In this instance of unwilling scalping, individuals will neither realize the profits of their tickets’ appreciation, nor themselves value the ticket at that appreciated amount were they without it. This is contrary to rational predictions of maximization, and the law and economics tenet that initial distributions have no impact upon final allotments, as it leaves an unaccounted for valuation that is biased toward current possession. Law and economics, following the Coase theorem, predicts that goods will always move to their most efficient usage, and to the party who is willing to pay the most to use or possess the resource. What the endowment effect illustrates, however, is that individuals do not always surrender themselves to market incentives, and in doing so prohibit markets from ‘clearing,’ or allocating goods in the most profitable manner possible.

Individual value assessments may also be irrational in the treatment of costs already incurred, or ‘sunk costs.’ In a similar vein to the endowment effect, the well-known fallacy of sunk costs reveals that individuals favour possessive impulses above purely neutral calculations. Economic theory predicts that individuals ought to ignore sunk costs for the logical reason that they are costs already incurred, and therefore, should not inform present decisions. Returning to the theme of tickets, an example would be the season ticket-holder to the theatre. The annual subscriber who feels reluctant to venture out for an evening of entertainment should consider this impulse in isolation, without regard to the costs incurred in the past since that money is already spent and gone. However, evidence suggests the contrary, as individuals tend to think that they will lose their investment, or that their money will have been wasted, if they do not attend the

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performance.\textsuperscript{32} This example, perhaps more than most, displays the limitations of rational choice theory.

Whereas maximization only looks to the money involved - money spent on a season’s subscription is money gone, so individuals should move on and think not of it again – individuals are often found to equate money with its underlying purpose of exchange. The subscriber paid their money to see performances, maximizing some artistic interest perhaps, and will continue to view their sunk costs in terms of this equation between their initial outlay and their initial object. Even though the artistic performance will not register in a monetary sense, as the costs are sunken or lost, individuals will still think of honouring their prior intent. In this regard, their obligation shifts from market forces, of getting ahead in the usual manner, to revolve around the question of whether or not to maintain the goal they marked out for themselves earlier.\textsuperscript{33}

The second major form of irrational valuation concerns individuals’ assessments of risk, and their own relation to it. Generally, individuals are likely to favour themselves in calculations of risk, often to their own detriment. For example, a high percentage of individuals might think of themselves as above average drivers.\textsuperscript{34} Obviously, statistical reality disproves most people’s complementary assessments of themselves, driving or otherwise, and denotes that most people are, well, average. Individuals, then, might not make rational decisions, by improperly weighing certain risks involved in their behaviour for example, when they overestimate their own abilities or predilections. The case of retirement savings is a common example. Individuals may think of themselves as rational

\textsuperscript{32} For further discussion of this example, as well as potential rational choice response of rational choice, see Korokbin and Ulen, supra note 21 at page 1107.

\textsuperscript{33} Id.

\textsuperscript{34} Claire A. Hill, Beyond Mistakes: The Next Wave of Behavioural Law and Economics, 29 Queen's L. J. 567 (Spring 2004).
in the long-term, and assume that they will make regular contributions to their retirement savings, while in the short-term they may continually forsake those same installments for other expenditures that more readily promote their present enjoyment. Mandatory retirement plans are thus seen as way to mitigate individual impulses and overcome their lack of rational discipline. A difficulty of course would be distinguishing when the adoption of mandatory investment should be voluntary, and undertaken privately, and when government should mandate such a scheme for everyone, spendthrifts and misers alike.

Apart from individual’s preference for favouring their abilities above rational calculations, there also is the phenomenon of individuals favouring that which is nearest to their own experience. Events tend to become distorted from their actual statistical probability when considered by most individuals. Specifically, that an event is known to have occurred may lead to an incorrect assessment of the likelihood that a similar event will occur again, or even to an incorrect assessment of that event’s likelihood of occurring in the first place. These skewed assessments of immediate experience are characterized as the ‘hindsight bias.’ On the one hand, this tendency is particularly relevant for regulatory scrutiny, as public demands for protection often are a response to the last catastrophe given widespread media attention, all the while more dangerous, and more everyday, concerns are overlooked. 35 On the other hand, this tendency is relevant for common law determinations of tortuous liability in that individuals, in the form of juries and judges, tend to equate a chance occurrence with its inevitability. That an

35 JST, 1518-21.
accident did occur tends to prejudice a later view of the probabilities as they appeared to the individual considering what course of action to take.\textsuperscript{36}

Where there might have been a twenty percent chance that an omission would lead to an accident, when an accident occurs, and people are later scrutinizing that same choice, there is a tendency to increase instinctively the likelihood of the accident happening. In this regard, the hindsight bias serves to impute what we do know into what should have been known. Taken together, the evidence suggests that it is difficult for individuals to transcend their situation rationally; to either ignore what has occurred most sensationally and recently, or to consider the statistical probabilities present before an event came about.

IV.VI REGULATING INRRATIONALITY

The most significant issue arising from the potential application of the behavioural sciences to law is not whether these situations of irrationality are accurate, or involve important fields of regulation, but how a systemic approach to the law may be developed from these findings. Even the most unyielding proponent of classical law and economics would acknowledge that the model of rationality is derivative and open to exceptions. Indeed, the classical approach is derivative by design, in the stated cause of providing testable predictions of human behaviour. But if a model of individual behaviour is to arise from evidence of irrationality,\textsuperscript{37} a difficult move from specific instances of irrationality on the individual level to theoretical coherence on the systemic level must be made. As yet, a principled argument for making such a move has not been articulated. This

\textsuperscript{36} Id., 1525-6.
\textsuperscript{37} For example, model building is the stated object of JST, 1475.
conceptual flaw exists, it is suggested, because a theoretical framework for regulation may not extend from the incoherent view of individuality which underlies the behavioural approach.

While many behavioural scholars have thus far limited themselves to vague calls for the incorporation of knowledge from the behavioural sciences into law and economics, a few have been bold enough to extend their treatment into calls for actual impact. In their excellent article, “A Behavioral Approach to Law and Economics” Christine Jolls, Cass Sunstein, and Richard Thaler (“JST”), combine a comprehensive treatment of rational anomalies with an ambitious call for the development of behavioural model that would contain both descriptive and prescriptive elements. Although limited within this new approach to the work of a few, with JST amongst the most prominent, the prescriptive element of their work may be taken to be representative of the approach’s potential as they take the approach to its logical conclusion. Here the scientific themes mentioned above are particularly relevant, for it is not rejection but reform that is indicated, and reform in this instance can only mean government intervention. For present purposes let us assume that government intervention in the market is capable of doing good, ignoring ideological statements to the contrary for the time being. Assuming this presumptive good of intervention allows for a clearer analysis of what exactly is so troubling about the implications of following the behavioural approach to its logical and systematic conclusion. Namely, it is impossible to derive consistent principles of regulation from a haphazard definition of individuality.

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38 Id.
The most common criticism of the proposed behavioural approach has been, unsurprisingly, that it does not offer a theory of individual behaviour. Even though evidence which contradicts individual rationality is often accepted by both critics and proponents of economic theory alike, anomalies of rational self-interest continue to be seen as largely exceptions to the rule. The inability of behavioural scholars to offer a coherent theory has been claimed to leave them offering nothing more than a ‘laundry list’ of quibbling exceptions to a useful and powerful rule. Yet, apart from the predilection of academics for straightforward, or even axiomatic, theories, the lack of behavioural theory is emblematic of the unprincipled direction of its approach. While I do not presume that it ‘takes a theory to beat a theory,’ the behavioural case may indicate that an augmented half theory is worse than no theory at all. The behavioural approach is an unfortunate half-solution: it is neither consistent with free-market liberalism, nor is it premised upon principles of individuality that are non-economic in nature.

Behavioural scholars wish to maintain the market ends of law and economics, but in qualifying its assumptions of individuality the justificatory basis for market coordination are lost, and they are not replaced by any other principle. The prescriptive behavioural model seeks to advance the utility of everyone, but misses the essential presumption of economic liberalism which sees the best results occur by each pursuing their own free and self-interested choice in the market. By assuming the government can approximate this utility of welfare, the behavioural approach is open to the charge that it offers regulation without guidance, or coherence. Without a distinct conception of individuality,

39 See, e.g., Posner, supra note 1, and Issacharoff, supra note 2.
40 The term ‘laundry list’ is taken from: Colin Camerer, et al., Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,” 151 U. Pa. L. Rev. 1211 (2003); (which refers to the common complaints leveled against the early behavioral economics).
or of any social good that would take priority over it, the behavioural view of pragmatic regulation may be everything and nothing at once. Individuals are rational sometimes, irrational at other times, and a paternalistic government should decide when individuals need help in getting their own self-interest right. The rational choice model is consistent in ways that behavioural approach cannot hope to be, for how can one reject the notion that individuals are rational maximizers of their preferences, and then argue for government to regulate as if individuals are, or worse, should be, maximizers of their under-appreciated interests?

While behavioural scholars are justified in criticizing classical law and economics for deriving an ought from an incorrect is, they paint themselves into a conceptual corner by maintaining the theoretical ends of maximization. The wider system of economic liberalism is thought to properly inform social objectives, the ultimate good as it were, but government intervention is required in instances of individual irrationality in order to help people choose in accordance with what ought to be in their best interest. If government regulation is better in certain instances, how is it to proceed, or be articulated, from a vacant conception of individuality? What is to inform, and what are to be the priorities, of this government intervention? And most significantly, what justification is there for irrational individuals being led to different ends than those of their own choosing by equally irrational bureaucrats? As Posner observes insightfully, the behavioural approach, when offering a regulatory guide, is premised upon a logical inconsistency. For if individuals are conceived of as irrational in nature, what is the sense

\[\textit{41} \text{ Posner, supra note 1.} \]
\[\textit{42} \text{ Id. (While Posner is responding to JST specifically, the argument would seemingly hold for any attempt to reform law and economics in the same prescriptive manner).} \]
in relying upon equally irrational individuals in bureaucratic roles to correct these instances of irrationality?

The central assumptions of economic theory, which sees atomistic individuals competing separately as the best possible means of attaining proper social distributions, are discarded by the behavioural approach in an incongruous attempt to retain the outcomes of free market competition. A logical inconsistency thus occurs as behavioural scholars advocate systemic ends that are not supported by any sensible justification premised upon a notion of individuality. Whatever its faults, at least classical law and economics has a consistent connection between assumptions on individual behaviour and the desired form of competition. Behavioural law and economics, on the other hand, simply assumes the systemic ends of the classical paradigm without any thought to the need to have principles of individuality consistent with the regulation of individuals.

Whereas classical law and economics offers a dependent theory of the self, explaining behaviour as a dependent part of a system of market exchange, the behavioural approach introduces an unsupported faith in bureaucratic tinkering. The behavioural approach leads to an admittedly paternalistic model of governance, with JST suggesting an ideal of regulatory bodies that are insulated from populist expressions of public opinion.43 This paternalism is decidedly Keynesian in character, reflecting a previous eras’ faith in the ability of enlightened civil servants to regulate the great and uneducated mass. But free market ends without free market assumptions are simply paternalism in the most negative sense of the term. In this one respect, it is not difficult to be sympathetic to Posner’s preference for a system which assumes individual rationality, despite its undeniable failures, over a system premised on the notion that individuals do

43 JST, 1544.
not know what is best for themselves and require others to correct their misapprehensions. Unless and until paternalistic drives are bound to principled values inherent to each individual, assumptions on the benign wisdom of bureaucrats are at best naïve, and at worst authoritarian. For without a principled standard that is said to emanate from individual’s innate uniqueness, and thereby forming the limits of government interpretation, the relativistic claims of what is best for each are irretrievably arbitrary.

It is not difficult to imagine a world guided by behavioural law and economics, for it would most likely mirror the current state of affairs. One need only imagine a world where markets determine most relationships and valuations, in which sporadic government action attempts to correct the market in the most socially egregious, or politically profitable, areas. With no other ends than a vague goal of making the current status quo work better, the result is predictably haphazard, or worse, may be a distorting practice of influence peddling. When considering a system of enlightened bureaucracy, as with Keynes and the behavioural scholars, those of a cynical frame of mind might be forgiven for thinking immediately of public choice economics and its skeptical view of government regulation. Under the theory of public choice, political actors are thought to act as economic actors do, maximizing their political self-interest. This political maximization manifests itself in the furtherance of that which increases the possibility of continued electoral success; and in these times of expensive campaigning, this corresponds increasingly with catering to sectoral interests.

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45 See, e.g., James M. Buchanan, LIBERTY, MARKET AND STATE (1986).
The great insight of public choice is the contrast between diffuse and specific economic interests. Issues that may be of minor concern to most may be of intense interest to a few. This inevitably leads to a distorting influence of lobbying. The relatively minor impact of dairy subsidies on the population at large in the form of a few cents per person, contrasted against the tremendous profitability that accrues to the business that benefits from this aided competition serves as a good illustration. The sectoral interest thus benefits from the relative unconcern of the many, even as it is contrary to their self-interest, and the relative ease of civil servants in catering to the monied lobbying of the intense and specific. Within this cynical view of government procurement, there exists a potentially fatal exception to the hyper-rational bureaucrat who is supposedly able to further the best interests of citizens in a selfless and altruistic manner.

The merits of government intervention in the economy should be by no means rejected outright, as the most extreme libertarians would have it, but it is inconsistent to premise that intervention on nothing more than helping individuals act consistently with what their self-interest should be. Quite simply, if individuals do not act in accordance with notions of economic theory, why impose this behaviour? The behavioural approach, in seeking to only qualify a system rational maximization, has joined the best of intentions with an insupportable conclusion of regulatory corrections. Were it to be more, the behavioural approach would need to step out from under the assumptions of classical theory and consider how the evidence of irrationality signals something separate from the systemic status quo. Until and unless a new direction of individuality is signaled, behavioural law and economics risks being safely ignored as the manifestation of an academic fad of limited time and use.
IV.VII THE ULTIMATUM GAME & SIMULTANEOUS VALUES

The ultimatum game is well on its way to catching the famous prisoner’s dilemma as the exemplar of behaviour inconsistent with rational maximization. Despite its prominence, however, the ultimatum game remains grouped in the same class as other instances of irrationality, such as those mentioned above. Yet it is not its popularity, but the uniqueness of the ultimatum game that deserves special attention; and the following section attempts to remedy this deficiency.

In looking to the ultimatum game, the missed potential of the behavioural approach becomes most evident. Unlike many instances of individual irrationality, the ultimatum game reveals a continuum of value preferences within individual choice and behaviour – it is not just a case of individuals giving undue preference to stubborn and uninformed assessments of themselves within the market. Rather, the ultimatum displays self-interest as a significant, but conditional thought. Values other than self-interest, namely concerns for fairness, may influence individual behaviour given the opportunity. Therefore, it is opportunity that is the most important feature in the determination of individual behaviour and the articulation of group values. In the following discussion of the ultimatum game, the well known results of past and oft repeated experiments will be considered with a new view to opportunity, and the dependent constellation of value preferences.

Although the implications of the ultimatum game are complex, the game itself is very straightforward.47 Two individuals play a game of offer and acceptance. Person \( A \), the proposer, is given a sum to be shared with player \( B \), the responder. \( A \) may divide the sum in any way she chooses, but with the important caveat that \( B \) must approve of the distribution. Should \( B \) accept \( A \)’s offer they each keep their agreed upon share. Most significantly, if \( B \) rejects the offer neither play gets anything – the sum returns to the ‘house,’ or whatever entity is controlling the game, usually a university professor. Suppose \( A \) is given ten dollars, and subsequently decides to offer \( B \) two. If \( B \) accepts, then \( A = 8 \) and \( B = 2 \). If \( B \) declines \( A \)’s offer, the result is 0,0. Therefore, the rational object for \( A \) is to predict, and then offer, the minimum amount that is likely to be acceptable to \( B \). \( B \)’s rational strategy is much simpler in a one round game,48 only requiring a decision as to whether they would be better off accepting the offer.

The conclusion of these rational strategies, as predicted by economic theory, should be as straightforward as the game itself: \( A \) should offer as close to zero as possible, say one cent, and \( B \) should accept it, always. The reasoning is simple enough, for one cent is greater than zero - what \( B \) had before the game and would have should they reject \( A \)’s offer. However, experimental evidence reveals economic theory’s prediction to be a very bad one. In the study conducted by JST responders (party \( B \)) were typically found to reject offers that were less than twenty percent of the total sum, while on average they claimed that an amount between twenty and thirty percent is the minimum that they

47 Richard Thaler gives a good account of the Ultimatum Game, including the efforts of some game theorists to ‘rescue’ the rationality assumption by directing their subjects toward it. Richard Thaler, The Ultimatum Game 2 Journal of Economic Perspectives 195 (1998).
48 Two and multiple round versions have been devised as well. See, Thaler, id.
would accept.\textsuperscript{49} As it is highly unlikely that the test results may be explained by subject’s lacking the mathematical sophistication to grasp that .01 is greater than zero, one must assume that there are considerations more important to responders than pure maximization. Additionally, JST observe that the participants’ desire to arrive at results they perceive to be fair is quite resilient, even as conditions are altered to be more conducive to accepting less by either enticing with larger sums or ensuring anonymity.\textsuperscript{50}

One of the most interesting dynamics of the ultimatum experiments occurs through the introduction by JST of an increased possessive stake in the distribution. JST ran a second version of the game that saw the ten dollar amount contributed equally by players $A$ and $B$, instead of the game’s administrator. In this second game, the minimum demands of $B$ increased dramatically.\textsuperscript{51} As JST predicted, when individuals contributed their own money they acted as if they had a greater ‘entitlement’ to a fair distribution than when the game was more hypothetical.\textsuperscript{52} Accordingly, the minimum demands of $B$ in this second version were much higher; with a significant percentage demanding five, and the average moving from just below two to over four.\textsuperscript{53} While imputing a greater element of possession, or entitlement, into the ultimatum game was a brilliant move on the part of JST, it could be said that the implications are underutilized by the ideas’ authors. JST treat the increased average demands by responders as strengthening the case against rational maximization, and further supporting the evidence of fairness considerations in decision-making. But this can readily be agreed to and still leave much unsaid.

\textsuperscript{49} JST, 1490.
\textsuperscript{50} “People will often behave in accordance with fairness considerations even when it is against their financial self-interest and no one will know.” Id., 1492.
\textsuperscript{51} Id., 1491.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
JST seem to conceive of fairness and self-interest as separate, and mutually exclusive values. This may explain their object of illuminating the cases when maximization does not hold while acknowledging the greater systemic legitimacy of maximization. Rational self-interest in this way occupies a binary relationship, as in on-off, with irrational values such as fairness. In this behavioural world there are times that self-interest works, and times that it does not, period. But while the ultimatum game undermines the rationality precepts of economic theory, it does not do so completely. It is significant to note that while the responders B would not accept any amount, as predicted by economic theory, neither do they demand an equal share, say five dollars out of ten. At some point between five dollars and one cent, rational self-interest is supplanted by concerns for fairness. But fairness does not hold completely, for if it did individuals would accept nothing less than a equal sharing of five dollars; nor does rational self-interest, since responders on average will not accept anything below twenty percent, or two dollars. So if A offers three dollars and B accepts (as experiments indicate they would), A is able to keep seven dollars. Self-interest would explain B’s decision while pure fairness would seemingly not. Alternatively, if A offers two dollars, and B rejects it, fairness may then replace financial self-interest as the rationale. Similarly, while I have concentrated on the responder alone, should A offer five, this would correspond with fairness considerations rather than pure self-interest.

The simultaneous spheres of interest perception revealed by the Ultimatum game may be imagined along a simple continuum. In the case of the ten dollar game, minimum demands which are closer to zero than five, say one, display a self-interest priority, while those that approach an even distribution reflect fairness priorities. Perhaps the most
significant implication of the Ultimatum game is that the simultaneous spheres of interest perception are not fixed, but fluctuate along the continuum when the context of the game is changed. Altering the game so as to promote individual identification with the sums involved revealed a greater space for fairness along the continuum (roughly from 2.5 to 4 in the JTS study). If spheres of interception may fluctuate to the benefit of fairness, or whatever ‘irrational’ value inspires people to act contrary to maximization, it follows that the reverse may also be true. Although not covered in the study by JST, it might be worthwhile to question if the game’s structure could not be altered to all but eliminate fairness from the continuum of interest perception.

Suppose that once again the dollar amounts are not contributed by the participants, but that this time the subjects change from students at prestigious American universities (the subject pool for JST’s study54) and are instead individuals suffering from abject poverty. And though experimental work in this area would no doubt be beneficial, it is not difficult to imagine that extreme material want would constrain the ability of an individual to reject monetary offers for the sake of fairness. In this sense, the intensity of material want would render concerns for fairness an impossible luxury.

The most interesting aspect of the JST variation, in my opinion, is that it displays movement. More than simply indicating the strength of fairness concerns, as JST claim, the second variation reveals the importance of game rules on individual perception. JST allowed, or promoted, greater identification with the sums involved, and fairness impulses were indicated. But promoting greater identification with the sums, as with individuals in desperate need of any basic amount, could equally send results in the other

54 The group was comprised of University of Chicago MBA students, MIT MBA students, and University of Chicago law students. JST, 1491.
direction. Comparing these two different forms of external influence indicates that the surrounding context or starting position of the game dictates the likelihood that certain values may manifest themselves in behaviour. Affluent students were both encouraged, and able, to exercise a strategy contrary to maximization for the sake of fairness, or some principle known only to them. Destitute subjects would not have the same opportunity. Self-interest or fairness could equally appear in the same game depending upon the contextual opportunities of participants.

IV.VIII CONCLUSION – OPEN POSSIBILITIES

If individual behaviour is not binary and exclusive in nature, but is instead simultaneous and situational, then the premise of the behavioural approach is flawed.55 By taking an instrumental view of competition, and adopting the limited aim of helping individuals get it right within the existing theory of maximization, behavioural scholars have missed the potential of their own source material. The behavioral approach is directed toward varying forms of regulation, as when rationality does or does not hold, but in keeping the same ends as law and economics no real variation is possible. The potential displayed in the ultimatum game, that individuals contain simultaneously different value priorities, is therefore lost in conforming to neo-liberal assumptions. No distinct pattern of thought is furthered when the highest ideal of regulation is correcting irrational behaviour.

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55 By binary and exclusive I mean that it is a one to one relationship: with one present the other may not be. By simultaneous and situational I mean that depending on the setting of the game, its secondary rules in a sense, the strategies could fluctuate between different priorities. Simultaneous, therefore, refers to the potential that different values may appear in the same instance depending on the game’s setting.
By looking to instances when irrationality may signal something more than misconceived self-interest, as with the ultimatum game, larger questions of systemic priority are necessarily invoked. Evidence of variable values within the same game indicate that competing theories of the self, and the ends desirable to individuals, must be chosen between, not regulatory instruments of rationality versus irrationality. Rather than accepting the legitimacy of maximization, it would be better to consider which situations illustrate that maximization is being imposed at the expense of other principles that may equally represent individuality, and perhaps be of greater benefit to society.
CHAPTER FIVE

ABSTRACT CHOICE AS LENS OF SOLUTION
FOR COMPETITIVE INSECURITY

The recognition that fairness concerns may equally present themselves alongside of traditional self-interest points to thoughts on how ideal negotiations are to occur to allow for true individual preferences to be translated into international principle. The following chapter attempts to adopt the insights from the previous to arrive at ideal situation for choice, and negotiation on a new system from the vantage of abstraction.

The luxury of exhibiting fairness concerns demonstrated above should be endorsed for the premise that rules may allow for more independent consideration of issues, values, and other individuals. Abstraction serves to separate individuals from the prejudices and bias attendant to their personal circumstances, encouraging that their choice is more representative of a universal individual not bound by competitive pressures. And while abstraction allows for a wider consideration of value beyond self-interest, this may be seen to extend beyond immediate interpersonal distributions, to include concerns for future generations and non-human species – concerns that coincide at the point of significant environmental challenge. This chapter is thus meant to confirm abstraction as the ideal choice location for international agreement, before abstraction is next utilized to arrive at principles of international organization.

V.I ABSTRACTION & THE FREEDOM OF INTEREST

When an individual is asked to decide upon hypothetical policy issues that are separate from their personal circumstances, the chances that they will endorse a decision which favors others’ welfare likely increases, and no doubt dramatically so. Perhaps this
Part two of the chapter examines the contextual and beneficial features of commitment through well-known examples of strategic behavior and theoretical games. Specifically, as situations of market failure such as the tragedy of the commons demonstrate, common benefits may accrue from principled choice and commitment. While such principled choices may be characterized by altruism, greater personal benefits would actually have flowed to the individual if others had equally followed principle. However, another famous model, the ultimatum game, reveals that the potential for this principled choice is a dependent, contextual variable. The principled aim chosen in abstraction may easily be overwhelmed by the more immediate demands for self-interested preservation via maximization. Joining these two elements of context and benefit indicates that a framework for incorporating altruism into rational choice must take advantage of the restraint that only occurs in abstraction – when individuals have the luxury to choose principle before necessity imposes a more immediate and often self-defeating decision.

V.II RATIONAL CHOICE RECONSIDERED

Sen’s argument for commitment may be distinguished in comparison with the more accepted views of rationality; along a continuum and moving away from traditional rational choice. The first position would be that of the mainstream and narrow definition of rational choice, in which individuals pursue ends that increase their own personal gain. The second, intermediate position involves sympathy – another of Sen’s terms – that describes acts which personal acts taken into account the welfare of others. ¹ Though

¹ See, Amartya Sen, Why Exactly is Commitment Important for Rationality? 21 Economics and Philosophy, 6 (2005); Rational Fools: A critique of the behavioral foundations of economic theory, 6 Philosophy and
possibly charitable in effect, sympathy remains consistent with self-interest broadly defined as it is the individual chooser’s satisfaction that is the primary motivation. Charitable acts are furthered, then, because it makes the individual feel better about themselves.\(^2\) With sympathy, the centre of self-interest is arguably retained even though it does not correspond with traditional, pure maximization of the chooser’s material welfare. The third and opposite end of the rational choice continuum is occupied by Sen’s concept of commitment. With committed behavior, individuals are choosing in a way that is completely disconnected from their own welfare or self-interested preferences, no matter how widely it may be defined.\(^3\) Significantly, an individual may advance the welfare of others to their own detriment, arguably divorcing rationality from self-interest altogether. Whereas sympathy enlarges the definition of self-interest, commitment is said to transcend it.

According to Sen, the implication of commitment is that a new theory of rational choice is required to account for such other favoring behavior. Indeed, if rational choice forms a continuum of definition from narrow to broad, it may be that Sen’s concept of commitment is of a different order altogether, deserving a complete break from the already strained explanatory movement. While many would no doubt find favor with Sen’s first stage premise of dissatisfaction with the narrow rational choice model,\(^4\) the

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\(^2\) Sympathy has often been confused with altruism but an important difference is that sympathy involves a benefit to the chooser, whereas altruism does not. See e.g., Daniel M. Hausman, *Sympathy, Commitment, and Preference*, 21 Economics and Philosophy, 40 (2005); (commenting upon his own prior confusion on the relation between sympathy and altruism, and then drawing out a useful identification of commitment and altruism as being ‘counterpreferential,’ if preference is equated with individual gain.)

\(^3\) Sen, supra note 1 (2005), 8.

\(^4\) For example, in a recent journal publication dedicated to Sen’s concept of commitment, two of the three contributors agreed with Sen’s criticism of narrow rational choice but were unwilling to accept his second
second step call for a new theory has led commitment to be deemed Sen’s most controversial work to date. The controversy no doubt stems in large part by what is perceived to be the unlimited elasticity of self-interested preferences.

Preferences, within such extended views, become the central classification of rational choice over the more narrow, commonsensical equation of self-interest with the individual pursuit of gain. Rational choice may be widely defined as to have action treated as a cardinal, exact reflection of preferences, so that individuals always act to pursue to their own goals regardless of the material consequences to themselves. In this regard, it would then be inconceivable to have one displace one’s goals for the benefit of another as contemplated under commitment. As a goal becomes one’s own, even if it favors another and suffers the chooser, it is their preference. As acting necessarily means following one’s own mental decision or impulse, then rational choice may always explain behavior as advancing self-interested preferences.

The extended view of preferences is persuasive, but trivially so. It seems to provide a low level metaphysics to rational choice, promoting explanatory completeness at the expense of theoretical distinction. If rational choice is everything at once, then what does it say that is important about individual behavior? If preferences are simply the expression of goals, and these goals are the reflection of mental desire or the barest thought, then what does rational choice theorize beyond the realization that personal mechanics emanate from nerve impulses sent from the mind? The extended preference

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6 See e.g. Hausman, supra note 2 at 42; see also Peter & Schmid supra note 4 at 2.
7 Pettit, supra note 5 at 19.
model is based upon the ‘belief-desire schema’ in the words of Philip Petit. Though it is unclear why such elaborate theoretical language, if any, is needed to capture the realization that to “act intentionally, is to act with a view to realizing a goal.” Conceivably, the connection between thought and controlled action was apparent to even the shoddiest of medieval doctors.

A. Distilling From Commitment

Unfortunately, a concentration on the all-encompassing potential of preferences distorts the potential indicated in Sen’s concept of commitment. Though it may be that the same definition of decision-making that incorporates sympathy may also include commitment, and every conceivable human motivation, the real advance of Sen’s approach lies in the rational treatment of other regarding behavior. Narrow rational choice maximization has been criticized vehemently for decades, as witnessed upon its introduction into legal analysis through law and economics, but such critiques have remained vaguely expressed. Many have been certain that there remains more to human decision-making and experience than a single-minded pursuit of gain. Indeed, even the most strident advocates for the method acknowledge that its purpose is not the encapsulation of human experience (as the extended preference model seems to claim)

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8 Id., 22.
9 Id., 21.
result is intuitively available, as when the question of peace or environmental sustainability is put before an individual in isolation without any demands flowing from the choice. Two related questions emerge from the possibility of altruistic decision-making. First, does altruism offer a form of individual decision-making that is not reconcilable with the presently dominant theory of rational choice that treats individuals as maximizers of their own self-interest? Second, if altruism is not reconcilable with rational choice, how might a theory of competitive regulation reflect the unique dimension of altruistic choice alongside of self-interested choice? In this fifth chapter, I will address these questions in turn.

In part one of the following chapter, I discuss the question of altruism’s compatibility with rational choice with reference to Amartya Sen’s theory of commitment. Committed behavior takes place, according to Sen, when individuals give the concerns of others priority in their decision-making, rendering principled positions their goal regardless of the impact upon themselves. The connection between altruism and committed behavior is thus quite strong, if not interchangeable. The implication of commitment, Sen argues, is that a new theory of rational choice needs to be articulated which will take account of commitment’s potential. Though Sen’s theory of commitment has been controversial, particularly the stage of requiring a new version of rational choice, I argue that there are essential aspects that should be distilled from Sen’s approach, regardless of their theoretical characterization. Sen’s commitment importantly signals both the contextual nature of rational choice and the greater benefit that individuals may realize through their commitment to principle.
but rather the location of self-interest as the best means for predicting individual behavior.\textsuperscript{11}

Even the recent advance of behavioral law and economics, which has made valuable contributions in pointing toward regulation more aware of cognitive reality, has done so within the dominant school of rational choice maximization.\textsuperscript{12} Behavioral law and economics often recognizes and catalogue instances in which individual decision-making does not correspond with rational choice, but it does not offer a theory explaining what type of decision-making exists as an alternative to, or alongside maximization.\textsuperscript{13} For just as there are times when individuals incorrectly assess their strategies, perhaps due to an incapacity to decipher the information involved, so too are there instances when individuals consciously decide against maximization in order to advance a principle unconnected with their gain. With behavioral law and economics, the normative decisions contra maximization remain as vaguely expressed, theorized as ever.

The potential signaled by commitment is the development of a rational approach to non-maximizing behavior that occurs in a principled fashion. The traditional ‘other’ beyond pure self-interested maximization remains unidentified, and necessarily so given its various likely motivations, but the rudiments of a new theoretical articulation of rational choice are indicated in Sen’s indication toward new developments. First,

\textsuperscript{11} The foremost expression of the economic method as aimed at the ideal of scientific prediction remains that delivered by Milton Friedman: see The Methodology of Positive Economics, in ESSAYS IN POSITIVE ECONOMICS 9 (1953); See also, Richard A. Posner, Rational Choice, Behavioral Economics and the Law, 50 Stan. L. Rev. 1560 (1997-1998); (arguing for a similar Popperian method of testable predictions of individual behavior).


\textsuperscript{13} See, e.g., Posner, supra note 11 (in which Posner criticizes JST for not offering a theory of behavior, amongst other things, and instead relying on cognitive quirks to justify a negation of traditional law and economics in a piecemeal fashion).
commitment is rational in that it is a legitimate option of decision-making, freely chosen – not a quirk of incapacity\textsuperscript{14} – and directed toward principle. Indeed, Sen notes that commitment may provide a release from self-defeating behavior that often characterizes the strategic thinking of rational choice. Second, commitment is principled in that it occurs as individuals remove themselves from their self-concern to consider the welfare of others, placing themselves in ‘as if’ relationship with what others face.\textsuperscript{15} The following section elaborates these aspects of commitment with reference to competitive situations, and seeks to identify the ‘when’ possibility for rational, principled choice.

V.III IMMEDIACY AND DEPENDENT RATIONALITY

While commitment may embody an alternative type or manifestation of rational choice, it does not do so exclusively, nor as a wholly divorced system of thought. A difficulty, therefore, confronts commitment in the move from descriptive to normative, of how to translate the possibility of committed reason into systemic design and policy. As experimental models as well as actual examples illustrate, commitment is a possibility conditional upon the immediacy of the subject matter, often taking into the dynamics of a competitive context and the behavior of others who may gain advantage from one’s choice.

The contextual and shifting nature of individual self-interest may often be discerned in experimental games that seek to record the value preferences of individuals in a forum of clinical distance. While the product of such games, and the conclusions

\textsuperscript{14} As with bounded rationality, the notion that individuals do not possess limitless cognitive capacity with which to make perfectly informed decisions. Bounded rationality was first explored by the renowned economist Simon. See, Herbert A. Simon, \textit{A Behavioral Model of Rational Choice}, 69 Q.J. Econ. 99 (1955). See also JST, supra note 12 at 1477.

\textsuperscript{15} For a good discussion see, Pettit, supra note 5 at 19.
drawn in the behavioral law and economics literature—such as Jolls, Sunstein and Thaler’s (JST) comprehensive catalogue of rational failings—have been criticized for limited objectives, there is an implicit advance to be found within nonetheless. As I have argued above, the ultimatum game indicates the potential that different valuation priorities, and the degree of self-serving interest, are simultaneous and inherent within each individual. The ultimatum game shows individual valuations to be inherently simultaneous and shifting, while necessarily dependent upon real-world need and immediacy.

Recall that an individual’s sense of entitlement to fairness may depend upon their personal stake, and that an entitlement to fairness may be a condition encouraged by game structure. Characterizing fairness as a luxury is not meant merely to indicate a privileged availability, but to point to how dual, and indeed numerous, possibilities of value preference exist with the same individual simultaneously. With diverse potential existing within each individual, a broad approach to competitive regulation, or game design, is indicated.

V.IV PRINCIPLE AND A COMPETITIVE CONTEXT

The character and limiting scope of commitment may be further drawn out with reference to a practical example, specifically the environment. Here the connection with chapter one becomes most apparent. Although Sen stresses that commitment is a general concept, applicable to wide-ranging areas of practical impact, a main example given is

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16 Sen, supra note 12.
that of environmental sustainability.\textsuperscript{17} The example of the environment is well–chosen. Few subject areas display so markedly a contrast between principle and self-interest as that of environmental protection. A contrast given between principle and self-interest that, significantly, is dependent upon immediacy and competitive context.

Sen observes insightfully that individuals may opt to further environmental sustainability, and a sense of responsibility toward other species, for reasons beyond any consideration of their own well-being.\textsuperscript{18} Sen proposes that the individual facing the issue of environmental sustainability, and that of protection of the spotted owl in particular, may put the matter thus: “Our living standards would be largely – or completely – unaffected by the presence of spotted owls, but I do strongly believe that we should not let those owls become extinct, for reasons that have nothing to with human living standards (not to mention my own living standards.)”\textsuperscript{19} The expression of such principled thought process need not be taken as universal to be compelling – it need only be acknowledged that such sentiments are conclusions derived legitimately from rational choice.

Whether an individual favoring environmental sustainability is furthering their own identification as an environmentally sensitive person or the spotted owl’s existence as an end in itself is secondary to the observation that no material advantage is flowing to the chooser. The precise why of the choice for environmental protection – the potential blending of the above considerations – is less important than the possibility of the rational choice itself. Yes, it may be that individuals choose to protect the spotted owl because it

\textsuperscript{17} Sen, supra note 1 (2005), 10-12; see also Sen, \textit{Whey we should preserve the spotted owl}, The London Review of Books, February (2004).

\textsuperscript{18} Sen, supra note 1 (2005), 11.

\textsuperscript{19} Id., 11.
makes them feel better about themselves. Also, it might be that the spotted owl is chosen for protection because the individual has a vague, but intellectually nuanced sense that the continued diversity of species will benefit their ancestors. In the end, however, it may be most persuasive to follow the reasoning indicated by Sen, and accept that individuals may support the existence of the spotted owl independent of reasons unconnected to themselves – that the owl is being protected as end in itself, in recognition of its valid and fragile otherness. A sure way to ensure this other considering aspect of rational choice would be to imagine Sen’s hypothetical statement conducted in anonymity, thereby ensuring that the owl is considered as an end in itself, free from social valuations given to the protective chooser. As is often the case, anonymity points toward fairness.20

Sen’s spotted owl example may be seen to introduce into rationality an element of principle. The spotted owl, or environmental protection in general, may be said to reflect a principle, or an idea, that is favored by the individual chooser regardless of the chooser’s relation to the outcome of choice. In the given example, the principle of spotted owl existence is more important than any notion of the owl’s place in maximizing the individual’s well-being. Sen’s hypothetical choice in regards to the spotted owl nonetheless contains a substantial difficulty. The spotted owl favoring choice is both compelling and plausible when conducted in isolation, but no cost has been introduced. Were a distinct disadvantage tolerated for the sake of protecting an endangered species, then the environmental drive could be said to have been preeminent in the chooser’s calculation. Left as an isolated choice, the environmental priority expressed remains a valid priority of rational choice which tells us nothing of its intransigence.

20 See, JST, supra note 12 at 1492 (wherein individual’s demonstrated fairness decisions held even when “it is against their financial self-interest and no one will know”).
While one may agree with Sen that the responsibility to other species be incorporated into rational choice necessity, the precise choice result of favoring the spotted owl contains none of the real-world difficulties that have seemingly rendered the spotted owl a species deserving of protection. Though there are no doubt specific environmental issues that are bound up with vulnerable and adorable animals, such as the spotted owl or baby seal, the most widespread environmental damage rests arguably with the most widespread of culprits, global consumers. Unless we assume an unreal amount of consumer naiveté, which is difficult since the prominence of the environmental movement since the 1970s at least, then the actual, environmentally harming behavior of individuals must be accounted for. The hypothetical individual concerned with the spotted owl in Sen’s example is not demonstrated on a diffuse level: atmospheric and oceanic concerned individuals would seem to loose out to the exploitation favoring by a wide margin.

If, as Sen argues, commitment is an important part of rational choice, then we must also realize that it is but a part of that equation, and often a minor one. As the example of the ultimatum game indicated above, when necessity is introduced into the equation of individual choice, the luxury for principled decisions may narrow to near zero. The notion of abstraction thus becomes essential. The same individual that opts to endorse the protection of the spotted owl, in isolation and when asked nothing else, may then proceed in their everyday life to act in a manner which endangers untold number of species (which are no doubt less observable and sympathetic than the spotted owl). When faced with relative disadvantage, the environmental ideal expressed in isolation likely becomes less appealing to individual choosers.
The principle enunciated in support of the spotted owl in private and isolation likely becomes something quite different with the introduction of other, competitive individuals. When faced with the practical concern of one’s relation to other competitors, the rational chooser will attempt to predict an opponent’s best strategy and respond accordingly. However, there are instances, such as the famous prisoner’s dilemma game, when the separately operating pursuit of self-interest leads to sub-optimal results for both the individual competitor and the entire group of competitors taken together. Sub-optimality, therefore, characterizes the choice structure of certain situations, such as the prisoner’s dilemma, when the best strategy for each individual is to defect, yet the combined strategies of all who defect rationally leads to less for each. A lack of restraint induced rationally and economically, produces unfortunate losses for the society of competitors. Above I argued that the tendency of sub-optimality often results from competitive insecurity. Competitive insecurity characterizes a competitive situation wherein one, thinking rationally, is forced to act in what they know to be a defeating manner for fear that they will be the only competitor not benefiting from an admittedly short-sighted strategy. The collective loss resulting from the lack of restraint is foreseen, but it is accepted in preference to the greater loss of being the only not to defect, or cheat, to the base point. When this preemptive cheating is extended to each rational competitor the cheating strategy becomes baseline, and each cheater is left worse off.

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21 That an individual’s best strategy is chosen rationally in anticipation of their competitor’s best strategy. Innovative work in this regard of mathematical competitive prediction first extended from John Nash. See, John F. Nash, Jr., *Equilibrium Points in N-Person Games and the Bargaining Problem*, in CLASSICS IN GAME THEORY (Harold W. Kuhn ed., 1997).

22 See Alex Talbot Coram, STATE ANARCHY AND COLLECTIVE DECISIONS, 26-29 (2001); (describing the Prisoner’s Dilemma).
Returning to the example of the tragedy of the commons is a short conceptual journey.\textsuperscript{23} Without order, a commonly shared resource has little limit upon its use or abuse. For instance, recall the fisher who relies upon a common lake for their haul may face the issue of what to do with the effluent pollution produced from their daily fishing. The fisher may dispose of this effluent in the common waters, for there is no order to curb this, but they also realize that it may deplete the amount of fish available in the future. On an individual level, the discharge of effluent may only result in the lessened fish stock to the value of 3. And since the waters are held commonly, the loss of three fish increments will be borne by all fishers in common, while the effluent discharge savings will be had by the polluter alone. An effluent savings to the value of 2 with a cost of 3 borne by the community is an obvious advantage, with perhaps the individual cost measured in reduced catch only a fraction of the 2 savings. Unfortunately, yet predictably, when each fisher in turn conducts the same analysis, the effluent emitted into the common waters reduces the amount of available catch dramatically. The cumulative cost of to each by cheating is then well beyond what each saves in discharging their effluent. Whereas it might have been optimal for each fisher to exercise restraint and only discharge to a value of .5, the combined strategies, rational and optimal for each, results in far less for each.\textsuperscript{24}

\textsuperscript{23} Garret Hardin, \textit{The Tragedy of the Commons}, 162 Science 1243 (1968).
The fair sounding principles indicated in Sen’s spotted owl hypothetical should not be dismissed because they are fragile or easily trumped within the spectrum of individual self-interest. It is significant that such principles may even be expressed at all. Abstraction indicates that other regarding concern are legitimate aspects of rational choice; or alternatively, that rational choice may include some of the more legitimate and essential aspects of thought. Additionally, and beyond the recognition of commitment, is the further sense that other regarding behavior may actually be more efficient, or optimal, than purely self-serving rationality. Many endangered species would no doubt gain a vote of protection from individuals in abstraction. Many, if not most of those same individuals, would vote differently if their own livelihood was at stake in the choice. Eventually, however, most individuals would gain, or at least their off-spring would, by encouraging the greatest range of ecological diversity.

That individuals might opt to protect a species from motives that are not intellectually attached to this sense of ecological diversity nonetheless produces a more beneficial ecology for the inhabitant chooser. So while the relationship between abstraction and fairness decisions may be obvious, or perhaps intuitive, the simultaneous possibility of abstraction, fairness, and collective benefit should lend a further, more persuasive element to case for abstraction in rule design. The potential of abstract decision-making is that it may bind individuals into decisions: 1) that they would have preferred without knowledge of their own circumstances, and which at the same time; 2) benefits the widest number.
The promise of a theory of diversity lies in blending the right and the good of political philosophy debate so as to provide a theory that serves as an open-ended method. Premised upon an essential function of individual rights, the social good of diversity ensures that variation is encouraged constantly, and in turn reaffirms the necessity of individual rights. A perennial danger of the good, that individuality is trampled beneath a majority’s vision, is therefore avoided in defining the good in such a way that the focus of change, the individual, need always be protected and promoted. The contra perennial danger of the right, of a neutral society of individuals without social priority or greater value, is similarly averted.

Though the good of diversity, and its mandate of a method for perpetual change and reexamination, is admittedly less grand when compared with such goods as truth or beauty, diversity does have the advantage of being a more concrete ideal with potential standards of application. Because diversity is a process, rather than an elusive goal or end position, its potential is contained in a constant motivation toward change and improvement. Grander ideals may exist, but they may always be said to be in place, or not, with equal force and equal inexactitude. Truth may be the most beautiful ideal, as beauty may be the ideal truth, but only diversity provides an actual and renewaable indication of social direction.

As the chapter three delineated important distinctions between historical schools of political philosophy, especially in light of changing external knowledge, it remains to
further bring out the essential elements of a theory of diversity. And as neither the right nor the good was found to be particularly adept at providing an open-ended and responsive system, the right and good will have to be blended for better effect. This attempt at political philosophy novelty may be further accentuated with a turn back toward legal theory and analysis. An appropriate mirror for the right and good debate within political philosophy is that which exists between efficiency and equity within legal theory. Within this more focused attention, the good may be equated with efficiency while the right stands in support of equity.

Not only are the above concepts relatable, if not interchangeable, they also are equally representative of dichotomy; of a division that needs to be transcended. Moreover, in affixing the right good debate to contested elements surrounding the legal theory of law and economics, more specific elements of actual and hypothetical application arise in questions over which individual legal right ought to be favoured and why. In responding to the opportunity of the actual and the specific, it is hoped that the universal will emerge in the offered theory of diversity.

VI.I INTRODUCTION

Decades long growth of the law and economics movement has placed the concept of economic efficiency securely within the lexicon of legal theory and jurisprudence. One consequence of the advance of efficiency has been a concomitant diminishing of equity, and the general concern for fairness that has historically influenced the law. Given a world of limited resources, it is inevitable that legal rules will often transfer wealth from one individual to another. While the legal principles guiding these shifts in resources are
various, it is assumed that the law may further either economic efficiency or equity, but not both.¹ Law and economics scholars, for their part, have tended to challenge equity as an overly vague and unworkable legal principle,² and for resulting in wasteful economic outcomes.³ Accordingly, if resources are allocated with a view to fairness, it is claimed that they are not being used to their most optimal effect. This chapter argues that furthering a diversity of individual potential, premised upon an economic social contract, may help resolve the current impasse between efficiency and equity.

The discussion which follows is ordered around the relationship between individuality, especially self-interest, and the legal priorities that are derived from wider social values. A theoretical start position of self-interest not only coincides well with the traditional focus on individuality within liberal thought, it also links to the modern methods of economic theory that have become pervasive within the academy. Indeed, the most prominent expressions of justice as efficiency and justice as equity in the last half-century, in the work of Ronald Coase and John Rawls respectively,⁴ have extended from theories of self-interested bargaining. Though not commonly examined together,⁵ I argue

³ Louis Kaplow and Stephen Shavell, *Fairness Versus Efficiency*, 114 Harv. L. Rev. 966 (2000-2001); the authors claim that when legal rules are chosen with a view to fairness, individuals tend to be made worse-off, indeed sometimes all individuals.
⁵ Michael I. Swygert and Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness Into Efficiency* 73 Wash. L. Rev. 249 (1998); this article, and the subsequent response by Russell B. Korobkin and Thomas S. Ulen, *Efficiency and Equity: What Can Be Gained By Combining Coase and Rawls?* 73 Wash. L. Rev. 329 (1998); mark the most prominent, if not the only, legal discussion of these combined concepts and authors.

The above mentioned article by Swygert and Yanes attempts to infuse Rawlsian concerns for equity into the consideration of efficiency in a traditional legal sense: that is, articulating how Rawlsian equity may influence the economic view of contract law, for instance. The difficulties and exceptions to this approach are noted in the responding article by Korobkin and Ulen; who may be said to represent a pragmatic law and economics response. The method proposed in this article is less concerned with the
that both Coase and Rawls have used self-interest to claim social ends that no longer connect with individuals after the point of needed justification. Either individuals are surrendered to the market, regardless of future non-economic values of liberty, or they are surrendered to fulfill the distributional needs of others. By requiring a present term determination of social utility, Coasian and Rawlsian rights impose a majoritarian valuation upon individuals, so that they are not being treated as ‘ends in themselves.’

The model of rights proposed here, which I equate with diversity and a metaphor of evolutionary biology, places process above ends. Rather than imposing present round solutions, a model of diversity entails a dispersal of individual strategies, and the identification of social objectives that are to act as the incentives rewarding creative attempts. A model of diversity seeks to combine an unpredictability of success with a realization of the competitive environment as a social creation. Individuals should be encouraged to pursue as many different paths as possible, but the social preferences that select successful strategies should in some measure be determined independently of present assumptions and economic distributions. Who succeeds and how they do so should be a matter of competition; why they succeed – what values they have furthered for reward – should be influenced by principles agreed upon prior to competition.

If the governing principles of competition were to be decided upon in a form of hypothetical social contract, self-interest could reasonably lead individuals through a two step process of personal and group concern. The first principle of diversity identified

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specific practices of law, such as tort or contact, and instead focuses upon the broader philosophical ideas supposed to inform the law in a democratic sense; concerned with the originating ideas of the law, should they exist. So whereas Swygert and Yanes seek to use Rawlsian equity to enliven present legal doctrines, which is a noble practice to be sure, this paper addresses the foundational precepts that Rawls himself might have addressed, and tries, modestly, to improve upon them.

6 Immanuel Kant, GROUND OF THE METAPHYSIC OF MORALS (H. J. Paton trans.) 32, 96 (1964). See, also: Roger Scruton, KANT 70 (1982); “The constraint on our freedom is that we must respect the freedom of all: how else could our freedom issue in universal laws?”
would be the potential for individual differentiation, as individual envision themselves benefiting from the creation of innovative practices or strategies. The second principle would contemplate the incentives that encourage and allow for this individual differentiation to occur. Unlike the neutrality inherent to traditional liberal theory, which in combination with a market economy often means that individuals are free to compete in exactly the same manner as everyone else, diversity takes an active role in rewarding certain objectives over others. The favoured objectives of competition are likely to be those – perhaps widely defined to include educational or environmental goals, for instance – that are convincing to individuals even should they find themselves the losers in the game they are designing.

If the first principle of diversity may be said to reflect self-interest in the traditional liberal economic sense, the second principle turns self-interest to the articulation of social goals that are beyond the individual themselves. In contemplating competitive principles, rationally self-interested individuals would hope to possess the most rewarded abilities, but also plan on mediocrity or worse. Competitive reward structures would, therefore, likely be an amalgam of that which allows each to express their potential while simultaneously having the winners achieve objectives which benefit others. Put in well-known terms from international competition, it is more likely that individuals would prefer to lose to someone racing to the top rather than the bottom. When individuals imagine a hypothetical winner other than themselves, it is reasonable to assume that they will favour someone who competed in a way that was unobtrusive to others, and ideally advanced group benefit as part of their successful strategy.
Beginning with the modest assumption that we do not possess all the answers to current and future problems, diversity combines a constant promotion of difference with the space for social objectives to be advanced along the way. For if the future and unknown potential of individuals is considered, legal outcomes may come to be seen as incentives in an ongoing competitive process rather than merely terminal solutions in the present. Equity and efficiency may thus be seen as simultaneous values, equally drawing out individual potential and strategies of difference. As differentiation encourages that the next great idea is given possibility, social rewards encourage that winning ideas are based upon more than status quo distributions and inequalities. A model of diversity may not be purely oriented around efficiency or equity, but it does offer the potential advantage of having equity serve as an incentive in the competitive drive for efficiency.

VI.II SELF-INTEREST & EFFICIENCY

The law and economics movement, though it has grown to include many variations, is still identified largely with the University of Chicago, the place of its origin. In drawing on the free market philosophy associated with such University of Chicago luminaries as Milton Friedman and Friedrich von Hayek, law and economics scholars would gain both an ideological perspective and a method. Within the heightened sensibilities of the Cold War, western social scholars increasingly came to assume an economic view of individuality, formalizing and strengthening the connection between freedom and markets. The law would bear this economic influence in turn, as the Chicago school

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adopted the assumptions of microeconomics and defined legal rules as the prices placed on individual behaviour.\textsuperscript{8}

An economic method would provide legal scholars with an appealing platform for issuing policy advice, especially as neo-liberal economic norms became ascendant and private market solutions were favoured over public coordination. But it was a limited framework, as later and more ambitious law and economics attempts at normative theorizing would reveal. Missing in the normative claims of law and economics, however, has been a principle that connects individuals with the wider legal system that they live and compete within. Efficiency has obviously served humanity, as specialization allows for more production and the pursuit of greater tasks, but it is difficult to imagine that individuals would be content with legal principles that serve efficiency alone. Under the Chicago view of law as efficiency, the market is no longer viewed as a means to ensuring individual choice and freedom, but becomes an end in itself. The consequence is negative for not only the qualities of choice, but also the economic system that thrives on its provision.

In briefly analyzing the shift from descriptive to normative law and economics, I wish to demonstrate how the movement occupies an extreme end along the market liberalism spectrum, in which neither individual choice nor economic potential are advanced. Just as market liberalism may be criticized for equating liberty with choice in an unequal marketplace, Chicago law and economics deserves additional criticism for not sufficiently providing for choice, unequal or otherwise.

\textsuperscript{8} Nicholas Mercuro and Steven G. Medema, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM 58 (1997).
A. Markets and Liberty

A market economy has long been assumed to be a necessary component of democracy and individual liberty. This joining of market and freedom has perhaps received its most famous modern expression in the work of Friedrich von Hayek, who argued that government regulation was an encroaching infringement upon individual liberty – the ‘road to serfdom’ as it were.9 In Hayek’s view, it is only within a market of free exchange that individuals could be assured of determining their own valuations and ends.10 The same function of individual choice that was thought to be the best determination of social value since the time of Adam Smith was identified with ensuring freedom from oppression. Smith’s ‘invisible hand of the market’ was no longer simply an explanation for how individual self-interest served collective benefit; it became an essential ingredient in political freedom as well.

While Hayek’s vision may be inexorably linked to the conflict between totalitarianism and liberal democracy that was its defining cold-war context, it also continues a strand of liberal thought reaching back to Locke. Property was the basis of Lockean rights,11 acting as a legal protection from government coercion, just as Hayek’s marketplace would after it. As with Hayek’s later echo, Locke’s system was premised upon the minimal protections provided by neutral rights.12 Rather than a positive conception of what individuals are entitled to, negative Lockean rights are the guarantees

10 Id., 68-69: “This is really the crux of the matter. Economic control is not merely control of a sector of human life which can be separated from the rest; it is the control of the means for all our ends.”
11 See, John Locke, TWO TREATISES OF CIVIL GOVERNMENT section thirteen (1700).
12 The distinction between positive and negative rights was first articulated by Isaiah Berlin in: FOUR ESSAYS ON LIBERTY 118-172 (1969). In general, negative freedoms revolve around the freedom ‘from’ something potentially oppressive, such as government or the majority of the community. Positive freedoms, on the other hand, envision a higher level of active entitlement, usually economic, for each individual to be a fulfilled and equal part of society.
that government may not infringe upon. Whether it be private property, or the market that
depends upon its recognition, these pillars of neutral liberal rights are the start position,
the enablers, of individual freedom. Market instruments were conceived of as the means
to a greater end of individuality.

However, as economic and mathematical influences grew within academic and
policy realms during the last half-century, represented by rational choice and game
theory, definitions of individuality would also undergo change. Individual freedom as
existing alongside the invisible hand of the market, in the notion of Hayek, came to be
replaced by its complete absorption within the economic ideal. In Rationalizing Capitalist
Democracy, S. M. Amadae notes perceptively: “That the West today is permeated with
the precepts of rational choice is clear:…rational choice is deployed as an analytical tool
by the World Bank and the judicial bench; it tacitly underpinned the emergence of the
‘Washington Consensus’ in development economics in the 1990s.”

This economic treatment of individuality and freedom, or market sovereignty as it is
often been called, has been criticized chiefly for the unequal potential for choice inherent
to the marketplace. As Eric Hobsbawm commented:

Market sovereignty is no a complement to liberal democracy: it is an
alternative to it. Indeed, it is an alternative to any kind of politics, as it
denies the need for political decisions, which are precisely decisions about
common or group interests as distinct from the sum of choices, rational or
otherwise, of individuals pursuing private preferences. Participating in the
market replaces participation in politics. … The consumer takes place of the
citizen.

Similarly, the Canadian political scientist C.B. Macpherson argued: “We may still
call it consumer sovereignty if we wish. But the sovereignty of an aggregate of such

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13 Amadae, supra note 7 at page 6.
unequal consumers is not evidently democratic.\textsuperscript{15} When choice is equated with purchasing power, the unequal distribution of resources obviously results in an unequal measure of choice. Votes in the market cannot carry an equal weight, an apparent democratic principle, when some possess so much more than others. This charge of democratic inequality becomes even more damaging when the legal branch of Chicago philosophy is considered. Law and economics adopts economic reasoning and goals of efficiency, but does so in a manner not truly supportive of individual choice, economic or otherwise. The difficulties on the unequal treatment of individuals would continue and increase as law and economics moved from descriptive to normative proposals.

B. Descriptive Law and Economics

The original focus of Chicago School was viewing government regulation in light of economic theory. As Edmund Kitch, a former Chicago scholar, recalled, the early Chicago approach began with the straightforward recognition that since the law was going to be intervening in the economy more, legal scholars should “try to help the government do it right.”\textsuperscript{16} A significant portion of law and economics scholarship remains tied to this descriptive analysis of the effects of regulation. As Posner describes it, descriptive law and economics “tries to explain and predict the behavior of participants in and persons regulated by the law. It also tries to improve law by pointing out respects in which existing or proposed laws have unintended or undesirable consequences,

whether on economic efficiency, or the distribution of income and wealth, or other values."

The classic example of this positive analysis of law may be found in the area of Anti-trust, one of the movement’s first successes. Before law and economics, government regulation of Anti-trust had been focused on the likely conditions that produce monopoly pricing and cartel behaviour, in the belief that bigger meant less competition and higher prices for consumers.18 Law and economics studies, pioneered by Posner and others, instead argued that economic measures, such as a good’s price elasticity or how easily consumers could substitute product alternatives, would better reveal the consequences of firm action.19 Rather than impede imprecisely the qualities assumed to lead to cartels and monopoly pricing, economic analysis was to be a tool turned upon the actual consumer consequences in the market. Bigger, aggressive firms did not always mean higher prices for consumers.

The descriptive form of law and economics is perhaps the least controversial aspect of the entire school of thought. This relative lack of controversy, for a perspective often surrounded by it, may be explained by the nature of the exercise itself. For unlike subsequent developments within law and economics, the descriptive element finds its justification in government action. In the case of Anti-trust, law and economics scholars were able to inform the government objective of consumer price protection. Significantly, the objective of consumer protection was articulated by the government, not law and economics scholars. In turning economic tools to the studying the effects of regulation,

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19 Id.
law and economic scholars are engaging in a form of legal study that is quite traditional, unexceptional. Indeed, as Mark Kelman, the Critical Legal Studies scholar, has observed, law and economics would have not be distinguished as a significant movement had it remained no more than “a collection of policy analyses of the probable impact of particular decisions.”

This type of empirical analysis, Kelman further notes, is largely indistinguishable from traditional Law and Society impact studies and the hypothetical analyses of rules that policy-oriented Legal Realist law teachers have long been doing.

C. Normative Law and Economics

The greatest difficulty facing the movement occurs as law and economics passes from descriptive to normative pronouncements; advocating ends independent of government policy and formed on the basis of economic efficiency. Drawn toward the economic ideal of Pareto optimality, in which no distributional move may be made without making someone worse off, Chicago scholars have claimed that the law should promote efficiency as its central objective. While there have been subsequent shifts in the normative nomenclature, from Posner’s grand philosophical claims for ‘wealth maximization’ to the subsequent label of ‘welfare’ used by others, the same drive to efficiency has been the basis. At its essence, normative law economics argues that competing rights ought to be decided between in a manner that furthers the net economic position of society. When confronting new fact situations under the common law, or new

20 Mark Kelman, Legal Economists and Normative Social Theory, in A GUIDE TO CRITICAL LEGAL STUDIES 115 (1987).
21 Id.
regulations, the law should be interpreted so as to ‘mimic’ the market, and assign rights as market bargaining would. In the more direct words of Posner, “The only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money – in other words, that is registered in a market…”

A useful illustration of the Pareto ideal – and the subsequent law and economics goal of efficiency – is provided by the 19th Century debate over the British Corn Laws, which would lead to the notion of Kaldor-Hicks efficiency. The Corn Laws had prohibited the importation of cheap foreign wheat, to the effect that the price of domestic British wheat was artificially raised. Farmers were thus given an economic benefit, in the artificially high prices and the profits that flowed from them, at the expense of consumers who had to pay for costlier wheat. Apart from the potentially harmful consequences imposed on foreign producers, a domestic tension exists between two group interests: farmers and consumers. Nicholas Kaldor proposed that if the repeal of the Corn Laws would have favoured consumers to the extent that they could compensate the farmers for their lost income and still be in a better position than under the Corn laws, then the repeal represents a net gain to social welfare, even if the compensation is not paid. This compensation principle is termed Kaldor-Hicks efficiency or, in Posner’s popularization of the concept, wealth maximization.

Kaldor-Hicks efficiency is a modification of the well-known criterion of Pareto-optimum, in which an equilibrium point exists where an alteration in resource allocation to the advantage of one individual cannot be made without making another worse off. Kaldor-Hicks may be seen to have two variant features dependent upon compensation

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26 Mercuro and Medema, supra note 8 at page 18.
that have implications for its relation to Pareto-optimality. First, if compensation is actually paid to the losers under a change of economic rules, then the compensation principle nearly mirrors Pareto-optimum since the losers are put in almost the same position as before the change, while the winners are better off. Second, if compensation is not actually paid, then the principle is quite separate from Pareto-optimum, since the winners are better off, and the size of the social ‘pie’ has increased, but the losers are unmistakably worse off.

The compensation principle was consciously developed with a positivist aim of informing government regulation, indicating when a net gain economic should be justification alone for policy change. Whether or not the potential compensation was actually paid out to losers was thought to be a matter of normative political decision-making. The difficulty, however, is that if compensation is not paid, Kaldor-Hicks efficiency becomes only a selection criterion for competing economic interests within the terms of the status quo. As Mercuro and Medema have noted, it has been “recognized that if the potential compensation was not in fact paid, labeling the change an improvement requires an implicit acceptance of the prevailing distribution of income.” Therefore, even though a positivist stance of neutrality is taken, Kaldor-Hicks involves an implicit normative protection of the status quo by presuming that a net increase in social welfare which is obtained only by the winners, without losers paid, is a benefit to society as a whole.

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27 Id., 20.
28 Id., 20.
D. The Coase Theorem and Normative Law and Economics

As economic theory by way of Koldor-Hicks would provide the goal of efficiency for law and economics, the work of Ronald Coase would be taken to demonstrate how the private market could yield this result independent of the law. In his seminal article, “The Problem of Social Cost”, Ronald Coase first made the insight that would come to be called the Coase theorem. Coase’s novel contribution lay in using straightforward examples from nuisance law to question the dominant economic theory on externalities, and economic harm in general. An externality is a harm visited upon a third party from a practice directed at another: “The standard example is that of a factory, the smoke from which has harmful effects on those occupying neighbouring properties”.29 Most economists had traditionally relied on Pigou’s theory of externalities – viewing them as an instance of market failure, as the full cost of production is neither borne by the producer or the consumer, leaving the pollution costs exported unto indirect parties. The solution was normally seen to be a form of government intervention, either through imposing legal liability or a tax upon the polluter.30

Coase’s radical departure from traditional economic analysis was to define harm as reciprocal in nature.31 When harm is reciprocal, rights are equally open to loss, and protecting the rights of A by prohibiting the activity of B simply shifts the externality from A to B. In terms of noise pollution, for instance, the reciprocal nature of harm may be observed as the legal protection of one’s right to be free from a neighbour’s behaviour would necessarily impede the right of that neighbour to make use of their property as they

30 Id., 1
31 Id., 2
saw fit. The neutral treatment of rights within a notion of reciprocal harm allowed Coase to lay the groundwork for a normative theory of efficiency.

When harm is viewed as reciprocal, there is an inevitable loss to each legal dispute. There is no externality to be solved – by reincorporating the cost of pollution back into the production source in the manner of Pigou, for example – only externalities to be chosen between. As Coase notes in a passage that would no doubt make modern day environmentalists cringe: “If we assume that the harmful effect of pollution is that it kills the fish, the question to be decided is, Is the value of the fish lost greater or less than the value of the product which the contamination of the stream makes possible?”32 Obviously Coase was not a firm believer in the possibility that legal prohibitions might give added incentive to innovation, so that the contamination of the stream would no longer be needed to make the product possible.

With a Coasian presumption of neutral and reciprocal rights, the determination of which right ought to be given legal protection is a matter of choosing the least costly alternative. Social welfare is then maximized to amount that one alternative is cheaper than the other. For the determination of this maximization, Coase prescribes an ‘as if’ bargaining hypothetical, which would become the basis of what was called the Coase theorem. Generally, the Coase theorem holds that if transaction costs are zero, or very low, parties to a dispute will achieve a bargained solution that is efficient economically regardless of the initial assignment of legal rights.33

A common hypothetical may help illustrate the Coase theorem. Suppose, in keeping with the fish example from above, there is a factory situated upstream from a fishing

32 Id., 2
33 Mercuro and Medema, supra note 8 at page 67.
community. Effluent discharged from a factory is found to kill fish to detriment of the community in the amount of $1000. The effluent could be handled in two possible ways: first, the factory could install a filter at a cost of $600; second, the fishing community could clean the water at a cost of $300. Whether the court grants rights to community or upholds the right of the factory to pollute, Coase perceptively observes that the matter is not likely to end there. If the right is assigned to the downstream community the factory would then pay the for cost of cleanup to any amount up to the $600 cost of the filter. Conversely, if the right is assigned to the factory, the community would pay for the $300 cleanup since it is less than the $1000 loss. In either scenario, or either assignment of rights, community cleanup rather than factory filter is the result. The law, therefore, may determine who pays what amount, but not what form the end solution takes. Furthermore, if in keeping with Coase’s normative pronouncement that the law ought to promote the least costly solution, the factory owners would be given the right to pollute.

E. Coase and the Status Quo Bias

Although the Coase theorem is often deemed a tautology, its premises are limited in a more serious sense than the condition of ‘zero transactions costs’ would imply. The Coase theorem is more than simply a truism that exists within a given set of hypothetical conditions; it entails the promulgation of the underlying preferences that preface bargaining, and the resources that determine the bargain struck. The natural resource under dispute may be treated neutrally under Coasian bargaining, as reciprocal rights imply, but the economic basis of the bargaining over the resource, or legal rights, is not

similarly neutral or equal. The result is that status quo distributions of wealth influence, indeed determine, who wins what in the competition over rights.

The Coase theorem provides an especially clear example of the Chicago school’s tendency to favour unduly the present term allocation of resources. It is obvious that qualitative and non-economic factors, such as environmental preservation, have no bearing on law as efficiency beyond ability to pay. Less obvious, however, is the economic consequences of Coase’s system of neutral and competing rights. The Coase theorem provokes a trade-off between economic losses that only considers the present, to the effect that no incentive for less intrusive behaviour is provided. The Coase theorem is problematic economically because the signals it sends to parties is that an advantage is gained by being on the right side of externalities, not by eliminating them innovatively.

The Coase theorem’s snapshot view of harm discounts the opportunity for adaptive change, in which rules act as an incentive to eliminate the cause of harm altogether. If rights were still connected to a notion of personal freedom, the costs of hampering others would place a continuing and additional incentive on filter development, for example. So while the Kaldor-Hicks point might favour downstream cleanup to a savings of five hundred dollars in round one, favouring autonomy might provide an incentive to invest in filter technology that by round ten has eliminated harmful emissions outright. This future savings is not certain absolutely, nor should it be. The point is that the potential is lost when the protection of space is given no consideration. That something might develop is surely part of how market success occurs, in the reward of potential used, attempted, gambled.
The imposition of status quo cost effectiveness inspired by the Coase theorem has implications beyond the ignorance of future potential. The neutral treatment of harm indicates to competitors that an economic advantage may be had in front loading harm in the short-term. The counterintuitive result of the Coase theorem is that the more exploitive the environmental practice is, the more likely it is that indirect parties will bear the cost. For instance, the cost of filtering an open pit coal mine might be so high that the cleanup cost to neighbours would always be lower given market prices in a neighbourhood bordering a strip mine. What might have been, what the community – admittedly in an ideal fashion – might have attempted is forestalled by the market realities imposed by this one neighbour. Under wealth maximization, the factory that produces significant and costly amounts of pollution may be given a comparative advantage over the factory that has negligible emissions which are cheaper to filter than cleanup. It is not simply the status quo that is being furthered by wealth maximization, but also a minimal definition of what constitutes a strategy for economic advantage.

For the insights of reciprocal rights to be truly great, or greater, would require that Coasian bargaining acknowledge both the social start and end positions that enter into calculations of efficiency. Only then would law and economics conclusions represent efficiency as anything approaching free choice, and indicate approach the most beneficial assignment of rights for society. To argue for a normative system of law as efficiency based upon competing rights within the present status quo is but the dressing up and justification of inequalities in the flimsy clothing of economic rigour. As the economist Warren Samuels has argued, “To argue that wealth maximization… can determine rights serves only to mask a choice of which interests to protect as rights. Legal decisions or
changes can be said to be efficient only from the point of view of the party whose interests are given effect through the identification and assignment of rights.\textsuperscript{35}

By interpreting the market in a very conservative manner, the Chicago approach arbitrarily anoints its chosen legal solutions as efficient. As Samuels, Schmid, and Shaffer observed: “The neoclassical approach tends to legitimize, selectively, either some specification of the status quo or some alternative to it. For example, it condemns some legal change as rent-seeking and applauds other legal change as wealth-creating…. Yet such conclusions are highly presumptive and give effect to an assumption that ‘what is, ought to be.’”\textsuperscript{36} Gone with a system of law as efficiency is a previous era’s conception of the market as a means to freedom, and the notion that economic competition is but an avenue of individual expression. Without individual autonomy in the present, the market can hardly be said to be to a forward looking indicator of social value, much less offer a staple of liberty. Law and economics honours the idea of individual choice in the market, just not the actual individuals who choose, nor their concerns that may exist outside of their ability to express them through money.

VI.III SELF-INTEREST & EQUITY

A. The Liberal Critique of Law as Efficiency

While normative law and economics appears an economic detriment to the joining of liberty and markets, as I hope to have indicated above, much more critical ink has been


spilled on the unequal treatment of individuals inherent to the law as efficiency view. Mirroring the claims against market liberalism mentioned above, legal critics have focused upon the unequal rights inherent to a system of monetary justice. Jules Coleman, in offering one of the more nuanced critiques of law and economics, observed that there is no cardinal correspondence between ability to pay and people’s desires or preferences. Given unequal distributions of the measuring device, money, it cannot be said to reflect underlying preferences. When competing rights go to the most efficient usage, or the highest bidder, it is an expression of ability to pay, not a neutral vote on preferences or an individual’s pursuit of happiness. As such, Coleman claimed that wealth maximization does not even satisfy the basic promise of utilitarianism, that the sum total of societal happiness to be promoted is calculated with the equal consideration of each person’s vote on the ends and definition of happiness.

In a similar vein, Ronald Dworkin approached the utilitarian failings of law and economics from a rights based, or liberal perspective. In “Is Wealth a Value?,” perhaps the most famous normative critique of law and economics, Dworkin draws a hypothetical couple, Derek and Amartya, to argue against the possibility of including societal wealth as an element, or equivalent, of justice. When the possession of a resource, in this case Amartya’s desire for Derek’s book, is determined according to wealth maximization, Dworkin argues that Amartya would receive the book outright without having to pay for it. The presumption that the market would have resulted in Amartya possessing the book is enough to conclude that he should do so, saving the transaction costs of their bargain

38 Id.
and the payment. The point is to move the resource to its most efficient usage, and place it in the hands of those who value it most, as demonstrated by their highest hypothetical bid. But as with Coleman’s point on the non-cardinal correspondence between money and desire, the criterion of value can never really connect within internal valuations, only its monied expression. The rich person may long for the book much less, but their greater resources enable them to satisfy their more minimal desires at the expense of those who cannot equally translate desire into purchasing power.

Dworkin’s rather blunt description of the ability to pay criterion for ‘mimicking the market’ result nonetheless indicates the difficulties of assigning individual rights based on the economic gains of society at large. As Dworkin argues, so soon as social benefit is viewed as a trade-off between individual and social gain, the result cannot be said to encapsulate justice, nor approximate the values desired by individuals for their society. In Dworkin’s words: “Once we personify the society so as to make the social choice an individual choice, there is no longer anything to be considered under the aspect of justice.”

Dworkin’s insistence on the need to preserve a conception of justice separate from present utilitarian social gains, may be seen to connect with a longstanding, even ancient, legal tradition recognizing the basic claims of fairness within justice. As Dworkin asks: “If the individual is to choose the morally best society, why should not its justice alone matter?” The common law has acknowledged for ages the claims of fairness, and the vague but essential principles of equity. As a form of ingrained protection, equity has held out to individuals the promise of recourse against unfair or oppressive results from

40 Id., 353.
41 Id., 352.
42 Swygert and Yanes, supra note 1 at page 288.
the application of legal rules aimed at long-term, wider social usage. This carved out protective space for fairness and equity may be seen as an exception above the law, and its everyday workings, not unlike a previous era’s faith in natural law and the rightness that informs from greater notions of justice as seen via Christian morality. Unlike natural law, however, liberal theorist’s higher principles of justice do not reach above to religious faith, but are usually said to extend from the hypothetical agreement amongst individuals that created society - the social contract. In general, liberal legal theorists43 would continue a view of equity as higher principle, and define it in the modern democratic terms of contractarianism.

B. Rawls and Equitable Self-Interest

While the contractarian tradition reaches back through Kant, Rousseau, and Locke to Hobbes at least, its modern expression is most readily identified with the work of John Rawls, and his Theory of Justice in particular. Unlike many liberal arguments that treat individual values as an a priori truth – existing prior to, and supported by the nature of, a social contract – Rawls uniquely tried to locate a justification for those values. Rawls offers a reasoned argument for liberal values rather than arguing on from their assumed existence. And it must be stressed that it is a far different thing to assume the intuitive position of a shared human dignity than to actually make an attempt at proving the form of its manifestation. What distinguishes Rawls’ early44 project is the articulation of a

43 Dworkin, however, is not amongst the contractual school. His focus instead appears to be on the evolving nature of social legal norms, grandly defined as a narrative, rather than rights based upon a hypothetical, past agreement. See, e.g., Ronald Dworkin, LAW’S EMPIRE (1986).
44 Rawls’ restated and modified his approach after A THEORY OF JUSTICE, though Rawlsian justice still refers to the ideas espoused in this, his most famous work. See, e.g., John Rawls, POLITICAL LIBERALISM (2005); THE LAW OF PEOPLES (1999).
theory that connects liberal principles of equality and fairness with a structure for how to conceptualize social policy decisions. The brilliance of A Theory of Justice, therefore, lies not only in the wealth of arguments it contains, but also the originality of the theory that supports them.

The difficulty facing Rawls was to ground Kantian, and a priori, reason in a framework that could envision coherent social decision making. The Kantian project, rooted in a metaphysical universe ordered by internal reason, could yield principle but no substantiation for those principles because of a central vagueness and incomprehensibility. As Mulhall and Swift note:

In the case of Kant, the metaphysical view of the self, which grounded his moral claim that human beings had an absolute right to be treated as ends rather than means, involved him in claims about a noumenal realm beyond space and time in which all human beings participated insofar as they were rational; human beings were dual-aspect beings, a part of nature and yet simultaneously possessed of faculties that transcended nature. Rawls wanted to avoid this highly controversial and seemingly unintelligible metaphysical framework.45

Rawls’ departure from traditional liberal discourse begins with his variation of choice theory that was originally derived from economics. The point was to construct an alternative model of individual choice that allows for the a priori values of reason to be given an outward manifestation.

Whereas law as efficiency arguments are centered upon the tenets of maximization, increasing the whole irrespective of each individual allotment, A Theory of Justice advocates maximin, or maximizing the value of the bottom. In offering an alternative to utilitarianism, Rawls’ perspective determines success in the ability of social institutions to increase the value of society’s least well-off. Put simply, society is to be ordered

around a principle of fairness that maximizes the value of the lowest share. This fairness principle is to guide the creation of social institutions and frame each subsequent answer to social problems.

In a brilliant move, Rawls articulates a hypothetical start position for society that is intended to universally correspond with Kantian notions of a priori human values. At the heart of A Theory of Justice is the ‘original position’,46 in which people decide principles of justice that are to guide society. These individuals are placed beneath a ‘veil of ignorance’47 wherein they know nothing of their capacities or standing in the world and are only permitted general knowledge of society. It is then that Rawls argues that people would choose society’s principles of justice according to maximin preferences. Unsure of what position they will occupy in the new social order, people would opt to make the worst position as palatable as possible in the event that they should soon find themselves occupying it. When faced with competing interests or difficult policy issues we need simply ask which measure will increase the bottom portion. Inequalities may exist in this system, but only should they be to the advantage of the least well-off. The person that has less than another should be content if they have more because of that inequality. Basically, there is a distinction between absolute and relative quantities. It is not the relative position of each compared with another but the absolute amount available that is of primary concern. Inequality is thus an incentive that is made to serve others. People may receive a disproportionate share of resources for their relative skill advantages only to the extent that it increases the lot of those who are not as well favoured by nature and luck.

46 Rawls, supra note 4 at page 15-19.
47 Id., 11, 17.
Rawls claims that the natural advantages of individuals have no moral basis, and that our principles of justice ought then to be crafted in ignorance of these arbitrary talents. The veil of ignorance separates individuals from the lottery of birth, and forces them into the consideration of the ‘other,’ with their unknown position making individuals consider their place equally with others, for they are equally indeterminate. Self-interest leads individuals to worry about the other, for the other’s imagined place may be equally their own. Individuals are thus disembodied from their own self-interest. Self-interest is a purely mental exercise, deriving principles in the absolute manner contemplated by Kant. Fairness is calculated to result from self-interest when it is divorced from the realities of personal advantage that prejudice our present system.

However, Rawl’s theory also separates individuals from genuine behaviour in full knowledge of others, potentially trapping them into a future system of serving others. The criticism normally directed against max-min is that people would not, and should not, decide to serve the interest of the collective above themselves. As Nozick has argued, individuals are unlikely to surrender the personal sense of participation merely for the sake of the safest result. But regardless of whether maximin is plausible reasoning the more interesting issue is that it does not point to any universal values at all.

The veil of ignorance is a subtle device of self-interest, in which individual insecurity is used to indicate principles of justice and fairness. The difficulty is that self-interest could be used to point in any number of directions. Reducing the information available to a bare minimum may produce conservative results that see individuals choose a relatively safe bottom position, but this is not evidence of any moral quality.

save that of self-interest. A Theory of Justice is Kantian in its faith in individual reason, but the heightened claim that reason unites individuals in shared human values does not follow from self-interest alone. If self-interest has to be constrained, or directed, through arbitrary theoretical constructs then it may hardly yield universal values. Fundamental principles of justice, if they are claimed to be a priori to society, must be evidenced in both the rules and the playing of a theoretical game, it cannot simply be its product. The results of a game may change while anything a priori would obviously remain constant in human experience.

Connecting liberal individualism with notions of maximizing the minimum is an obviously controversial, if not outright contradictory, proposition. For if the beginning of the process is Kantian individualism, characterized by rational choice, the result is that individuals interests are subsumed into the collective. Indeed, Richard Posner claims that despite the Kantian aspirations of A Theory of Justice, the results are remarkably similar to utilitarianism.\textsuperscript{51} But beyond claims of theoretical categorization, it is the manner in which Rawls bridges between a priori and community organization that is most problematic. As Clark Wolf has argued:

Rawls’s argument for the claim that parties to the original position should employ maximin reasoning in their choice among conceptions of justice is widely regarded as perhaps the single worst argument in Theory. Those who find Rawls’s project attractive have found it necessary to either find some alternative supporting argument for the difference principle or to articulate an alternate and less controversial principle of distributive justice.\textsuperscript{52}


\textsuperscript{52} Clark Wolf, \textit{Fundamental Rights, Reasonable Pluralism} in \textsc{The Idea of a Political Liberalism: Essays on Rawls} 105 (2000).
Even assuming that people would not choose maximin, as Rawls would have us believe, still leaves an interesting notion to be explored. If Rawls was ‘rigging’ his theoretical construct to arrive at preconceived and selected values, it nevertheless remains that he was using the consistent instrument of self-interest. The manner in which Rawls attempted to use individual choice is worthy of consideration even if we do not agree with what he assumed those choices should be.

Rawls admirable failure flows from reaching too far. He wishes to use the instrument of rational choice to ground Kantian principles in something other than the metaphysical, but in the end only the instrument of self-interest can withstand scrutiny. Rawls’ result of fairness, though intrinsically appealing, is not consistent with the individuality that underlies his thought experiment of rational choice. Rawls uses individual self-interest to justify results that are disconnected from its continued operation; the continuing viability of free choice. It is as if Rawls wants to have it both ways: individuals are “Kantian choosers and Hobbesian calculators, they are meant to go their own separate way”53 and yet are expected to support a collective conception of justice that gives priority to the demands of the whole over the individual. If autonomous individuality is the base a priori assumption, then it does not logically follow that a grand social system of redistributive justice is a natural component of individual choice. It appears overly contrived to define individuals in a liberal sense of autonomy and then distort their choice mechanisms to achieve social policies that favour group benefit over individual freedom.

VI.IV SELF-INTEREST & DIVERSITY

A. Limited Ends

While the theories of Coase and Rawls are both distributional in nature, they are rarely examined together. This is no doubt explained in part by a difference in fields, and that Coase’s theory is commonly applied to private distributions, whereas Rawls’ normally influences conceptions of the public realm. Considering a well-known counter example to the Rawlsian distributional system may help summarize how both these distributional views are limited in their treatment of individual potential. John Harsanyi, the game theoretician and Noble Laureate in economics, posed a simple thought experiment aimed at questioning the soundness of Rawls’s maximin system of justice. This thought experiment, though it surely does not capture the intricacies and breadth of Harsanyi’s work, may nonetheless provide a useful example lens through which to view both Rawlsian and Coasian systems. For with such a shared and basic premise it is possible to consider how individuals are viewed under each system, and why another may be preferable.

To begin, two students are to receive math instruction, a limited educational resource. While the first student displays great aptitude, the second shows almost none at all. The implication is that resources expended on the first student will result in their increased talent, thereby benefiting society in an increase in mathematic or scientific knowledge. Conversely, significant resources may be expended on the second student with little improvement in their personal ability or knowledge, and little return on society’s educational investment.

Harsanyi’s simple example appears to offer direct support for welfare utility, and necessarily a refutation of Rawls. In this math hypothetical, Rawl’s maximin criterion would effectively force society to promote the worse student regardless of the impact of the lessons. Each educational move would have to contemplated within the view of increasing the position of the worst off, the lesser student, no matter how inefficient or counterproductive the lessons become. Common sense would seem to be aligned with social utility in this case, indicating that the resources be distributed to where they will have the greatest benefit. In this way, the more apt student and wider society benefit, while the worse student suffers only the loss of lessons that were ineffective in any event.

While social utility may be compelling within Harsanyi’s thumbnail hypothetical, there are underlying and more substantial difficulties indicated for utility as well as Rawlsian justice. The first problem extends from the view of individuals as a means to social benefit, and may be identified with the general liberal tenet, which in keeping with Kant, claims that individuals are to be treated as ‘end in themselves.’ By determining distributions, and the social priorities of justice, based on the gains that accrue to the wider group, individuals become a means to an end beyond themselves. Both math students are viewed in relation to how their abilities serve social ends - in both Coasian and Rawlsian theories of rights. It is not the intrinsic worth of the education that is considered, as complicated as such a measurement may be, but how valuable the education turns out to be for others, society at large.

That Rawlsian justice does not treat individuals as ends in themselves is perhaps odd given the Kantian basis of Rawls’ project, but it nevertheless is a product of maximin principles. While Rawls’ system is obviously more considerate of those least well-off, a
noble intention to be sure, it is not equitable nor necessarily fair. Everyone in society is forced to work toward the benefit of one segment; and regardless of how egalitarian this may appear, it is not a consistent treatment of individuals. Those who are blessed with more natural ability are forced to work for the benefit of others, with their activity being considered in light of what it achieves for others.

Deeming this arrangement slavery, as Nozick famously did,\textsuperscript{55} may be overly polemical, but it does capture the essence: Individuals, motivated by self-interested insecurity in the original position, are thence onward bound by this forced perception and made to surrender their endeavours to an arrangement that evaluates their efforts in terms of what it achieves for others. The ends of the system, in this case the position of the worst off, therefore takes precedence over the process, the qualities of individual behaviour. How things are achieved becomes secondary to the greater purpose of producing the desired distributional ends; hence Posner characterization of Rawlsian justice as utilitarian in nature. The ends determine the arrangements of individual activity, and individuals become a means to an end beyond themselves, regardless of how fair sounding it may be.

In terms of social utility, the problem is more subtle, since both the group and the more apt student are seen to benefit from the location of resources in this student. However, the process remains driven by ends independent of the individual. The more apt student receives further instruction not because of any intrinsic value they derive from math instruction, but simply because it suits society that it should be so. The troubling aspect, potentially for both group and individual, is that pursuit for the individual’s sake alone, never mind the pursuit of knowledge itself, is meaningless without recognition by

\textsuperscript{55}Nozick, supra note 50 at page 191.
the majority. One need not engage in a treatise of how scientific progress has often occurred despite popular support to realize that minority views and individual potential may benefit others despite their contrary beliefs.

The social view of utility, requiring majority preferences to denote value, invokes the previously mentioned liberal exception to utilitarianism espoused by Dworkin among others. Without a cardinal correspondence between ability to pay and personal valuation there is no practical means of connecting social utility with an independent or equal measure of individual aspirations. A further, and related exception to utility welfare, may be found in another point made by Coleman, as he argued that wealth maximization requires conflict in order to determine value.\textsuperscript{56} If both parties to an exchange feel themselves better off, for instance with one favouring an orange to an apple and vice versa, then the competing rights of wealth maximization and Coasian rights cannot recognize it.\textsuperscript{57} Wealth maximization requires a competition for the same resource, which it will then decide upon a net wealth increase; without a conflict to be viewed from society’s gain, there is no measurement. Coleman thus concludes that wealth maximization depends upon an ironic promotion of conflict.

\section*{B. Individual Potential}

As social utility is limited in regards to the qualitative nature of individuality – or at least is philosophically challengeable from a perspective of liberal rights – it also suffers from the practical limitations given by a present term weighing of value. As mentioned above in regards to the Coase theorem, reciprocal rights account only for present term

\textsuperscript{56} Coleman, \textit{supra} note 38 at p. 523-24. \\
\textsuperscript{57} Id., 523-24.
ability to pay, not the potential of the resource nor the rights claimant. The same difficulty holds for the math example drawn by Harsanyi. Though there are few assumptions, or facts, underlying the hypothetical, there are at least two problematic features. The first is that there are only two students, when a multi student example would no doubt be more reflective of real world problems, and trigger more complex distributional issues. For instance, when a spectrum of individuals of varying abilities are considered, would it be preferable to favour the most talented, or promote the greatest competency for those clustered around the mean ability? Would society be furthered by an elite cluster of mathematical genius or a strong average population?

The second, and more significant, problem with the math hypothetical is that of individual potential. As with the Coase theorem, the math example invokes a competing situation in which present term reality is conclusive. The abilities of the students are given rather than unknown qualities. Regardless of how innate some abilities may be, such as mathematical or musical aptitude, there are surely myriad others that rely entirely upon training or social investment. Furthermore, even assuming the innate nature of mathematics, in keeping with the math example, sound principles of distribution and competition would be better placed upon the recognition of future potential and not the immediate means that an particular individual represents.

The math example is meant to trigger a view of two students in light of how their abilities equate with the efficacy, and through it the efficiency, of social investment. But the math example can yield no principles apart from a continuing social calculus, for the treatment of individuals is so specific, particular to the circumstances of each individual, that no universal principle of individuality may extend from it. A system that honours
individuality may not be said to extend from a doctrine which states that individuals will be defined based on the fluctuating, and unequal, valuation that society places on the present needs of a certain goal. The seemingly wasted resources poured into the lesser mathematics student, connects social ends with an instrumental view of individuals, but the same social ends would be more effectively brought about if an abstract and autonomous view of individuals were instead encouraged.

Even assuming for an innate ability for mathematics, a forward looking system would necessarily ask the distributional questions – of who is to receive how much of the educational resource? – from an assumption of unknown capacity. Not every issue of distribution, or indeed of justice, may occur in a prescient view of the present; also taken into account must be how principles will encourage the unknown persons not yet contemplated or confronted by the law; the others of unknown ability and behaviour. The math example easily poses problems for the Rawlsian notion of maximin. But if we acknowledge that raising the bottom irrespective of consequences is flawed, does not favouring the best as determined by society pose additional and equally damaging difficulties? An affirmative answer is indicated by looking to the source of valuation – majority beliefs.

When faced with two students competing for educational resources, the utility standard of appraisal must be based on majority views of success. Recall the liberal criticism that there is no cardinal correspondence between social measurement (such as ability to pay or mathematical aptitude) and actual desire, or talent in this case. An illustration of the importance of this lack of cardinal correspondence may be had by imagining a straightforward mathematical situation, in which a great measure of natural
talent goes unrecognized. A book of mathematical biographies will quickly identify cases of unappreciated genius, whose revolutionary work was only realized by succeeding generations.\textsuperscript{58} Consider a cardinal number - the hypothetical value representing the majorities view on an artist’s or scientists current worth - against the value that may potentially arise from this person, unknown to the current status quo. There is no solution or right answer, either in terms of the individual or group; and this is precisely the point. It is impossible to connect subjective valuations, whether artistic or scientific, with likely values of outcome.

The object here is to connect the idea of natural potential with the fluctuating measure of what most people think of as successful. Without romanticizing the situation, all that is needed is the thought of someone talented in ways that most people do not currently appreciate. It is easy to declare after the fact that a policy, or an individual, should have been supported. What is more difficult, however, is to declare that the same individual investment should be supported when it goes against what most people currently believe to be successful.

Instances of overlooked genius, and the slow gestation period sometimes demanded by revolutionary work, should inspire caution, and the modesty to acknowledge that we do not always possess all the answers in the here and now. With this modesty for the limits of collective knowledge, indeed any knowledge, comes a realization that majority benefit may be best encouraged by allowing individuals space from the imposition of the majority’s present view on efficient or correct outcomes. Embracing the indeterminacy of correctness may thus provide for a unique role for individual rights and the individuality they further. Individual rights become a function, the essential process, of ensuring future

\textsuperscript{58} E.g. E.T Bell, \textit{The Men of Mathematics}, (1937).
benefit to others. And unlike Rawlsian and Coasian definitions of rights, the process of individuality remains paramount within a system of diversity, carried along by an articulated but constantly indeterminate end point of diversity itself.

Recalling the math example, the point should not simply be determining who receives what in light of the market, or our current views on success, but instead evaluate what this distributional choice will mean for the future promotion of mathematical knowledge – or any other chosen social end. Choosing between the manipulated extremes of Harsanyi’s example of brilliance and developmentally challenged\textsuperscript{59} is too simple, too limited a foundation for deriving principles of mathematical education, must less a just distribution of resources under law. When thinking of who is to receive what, thought must be given to what needs to be encouraged; the incentives that inflate and inform social goals. A primacy of process would advance multiple attempts of individuals of unknown potential, and what is most important, it could occur in ways not contemplated by status quo knowledge. Ordaining the right selection based on what we assume to know would be replaced by a systemic process of encouraging each to make an attempt so that the widest scope of ideas is cast about.

In placing process above ends, the focus shifts to how the most individuals could be encouraged to contribute their ability. An undiscovered mathematical proof may lie in the obscure, otherwise rejected work of a divergent mind, or it may not; the point is to ensure that it is offered at all. That individuals be free to enter the study of mathematics, and pursue an initial freedom of method, becomes more important than their present usage in the calculation of social ends. Therefore, in guaranteeing a basic freedom to offer

\textsuperscript{59} Harsanyi, supra note 54 at page 596.
attempts in a manner different from others, society may gain the advantage of discovering ideas that may ultimately provide wider and greater benefit.

C. Evolution as Metaphor for a Model of Diversity

Diversity as a model of rights is premised upon two key features loosely related to biological theories of evolution. The first element is the unknown qualities of future developments. There is general agreement amongst biologists that evolution occurs because the environment selects certain variations for success and not others. Genetic variations occur which then give some individuals an advantage – they are more fit, and are better able to survive and ensure the promulgation of their genes. Advantages are thus handed down to successive generations, squeezing out the less advantaged genes. Hence Spencer’s hackneyed term of ‘survival of the fittest.’

While there are competing versions of how evolution has occurred, with punctuated equilibrium versus Darwinian evolution, they each share a foundation as a backward looking explanatory study; that is, the exact causes of variation and why they came about are not systemically explained so that future predictions may be offered. Human understanding has yet to grasp a wider pattern of evolution that connects past observations and hypotheses with future predictions on what will occur. Whatever the scientific standing of evolutionary biology, the point here is simply to note the feature of indeterminacy. Since diversity is intended as but a metaphor, grasping the overall theme

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61 As E. Donald Elliott has noted, Spencer’s phrase “has probably created more misunderstanding than any phrase in science.” E. Donald Elliott, *Law and Biology: A New Synthesis* 41 St. Louis U. L. J. 599 (1996-1997).

62 See, e.g., Eldredge, *supra* note 60.
of unknown future variations is all that is required. Therefore, the most intriguing aspect of evolution for the purposes here is that when the individual part of the equation, genetic variation, is combined with the environmental, which subsequently determines or selects which variations succeed, the result is an ongoing and fluctuating system.

The second element in the model of diversity, extending from the first of unpredictable success, thus becomes the promotion of diversity itself. Embracing the notion of unpredictability means that success is best ensured by promoting a multiplicity of strategies for competition. The biological saying that ‘nature loves diversity,’ or that nature rewards difference, nicely captures the general meaning of a model of diversity. While the social environment may be said to be at least in some measure a construction of individuals and their collective will, the combinatorial features which yield unknown potential remain. Even assuming for a perfectly functioning market, occupied by homo-economicus according to the tenets of economic theory, still leaves the individual variation side of the equation indeterminate. Remaining unknown are the ideas and techniques that will be offered in the future, much less how they will be received in the preference rankings of other individuals, no matter how rational they are. Promoting diversity is, therefore, simply a systemic requirement to allow and encourage individuals the freedom to compete and actualize themselves in unique and potentially creative ways.

D. Diversity and Liberal Rights

The promotion of diversity may potentially yield a distinct conception of liberal rights. The first principle to be furthered under a model of diversity would be that of individuality and its potential. This relatively straightforward principle is consistent with
the self-interested individuality that informs so much of modern economic and political thought, and the Coasian and Rawlsian theories addressed above. Furthermore, it is consistent with mainstream liberal theories in the tradition of Locke and Mill, which treat individual freedom as a good in itself. The second principle in the model of diversity, however, marks a significant departure from these traditional views. The second principle defines diversity as a primary social good, and individual rights as the essential function in its promotion. This definition of diversity results in the priority of process over ends, as individuals are the essential motivator of social benefit, not merely items in a social calculation.

Honouring processes over their ends means that the principles of competition take precedence over concerns for present outcomes alone. Not only does diversity offer a consistent view of individuality, unlike Coasian and Rawlsian systems which use self-interest to justify social ends beyond the individual, it also points to an improvement over the minimal definition of freedom inherent to traditional liberalism. Rather than the traditional freedom of neutral liberal rights, which allow individuals to behave as everyone else beneath market dictates, the point is to alleviate these pressures, to allow for active individual differentiation. And above all, diversity may point to a way to accommodate the equitable concerns of Rawls’ theory in a system that is more flexible and less stringently bound to the distributional ends of a given segment of society. Diversity would include concerns for equity and fairness as an organic part of competition, and how it is won, rather than a distributional set-piece imposed upon its conclusion.
Rawls theoretical construct, the beginning point of the original position and veil of ignorance, was a brilliant thought experiment precisely because it indicated that self-interest could lead to and support equitable principles. Rawls start point lead individuals to consider the other through the operation of their own self-interest; a disembodied calculation as it were. The problem, again, is that it forces a minimal spectrum of consideration based upon what are assumed to very conservative creatures. The Rawlsian system is based upon a distributional question, in effect, that asks: what would you like the bottom position to look like, should find yourself within it? This locks the Rawlsian system into a scheme for determining outcomes regardless of what developments occur. But this appears overly contrived; using self-interest, in the guise of insecurity, to devise an entire equitable system on fear of failure. If individuals are less risk averse than Rawls assumes, would it not do to have them consider their fears of failure alongside their hopes of success, empathy and greater concern alongside their individual aspirations?

The results of the original social bargain should continue to be reasonable to each person while the game is ongoing, after the veil of ignorance has been lifted. And more importantly, it should be premised upon the holistic consideration of competition. So instead of having forced empathy based upon fear of the worst, it may make for a more palatable, or appealing system were it to acknowledge that individual self-interest should include aspirations and insecurity in varying degrees. Instead of asking what would you like the bottom position to look like? - it may be more beneficial to ask what would you like the traits of the winner to be? Asking for the ideal qualities of the game’s winner, presuming that it is not the decision-maker themselves, triggers thoughts on the game itself, not just the outcome. Each individual, when faced with such an original position or
bargain, would no doubt contemplate a fuller spectrum than simply the worst position, which would also include the wide middle and uppermost. The gambling, egocentric qualities within certain individuals would be witnessed, but each would also need to consider other positions and the people who occupy them, both out of fear of failure, and of simple mediocrity.

The principles of diversity connect in such a way that makes such a holistic contemplation logically consistent. The beginning point of individual potential, the first principle of diversity, is easily identified with the drives of individual aspiration for it may be completely self-seeking. The provision of this potential is dependent upon others of course, and the contemplation of the game dynamics triggered by a questioning on the qualities of the winner invokes the qualities of competition itself. Others must behave in certain manner, honouring certain limits, for the potential to exist within which to contemplate ones own potential. Therefore, when one contemplates the qualities of an ideal, one is in essence considering the incentives that will govern all, and, most importantly, govern ones competitors. For one to envision success, and the ability to translate ones own, and as yet unknown, capacities into success, requires the space to do so. The freedom to actualize oneself through competition is a quality that must be equally given to exist.

E. Rethinking Insecurity

Insecurity in the Rawlsian sense appears as nothing more than a conservative underbelly of self-interest; but it may be a more ongoing concern, one which must be alleviated for individuals to enjoy their own potential. In order for individuals to express
themselves through competition, they must be freed from the neutral liberalism of the market which so often sees individuals race to meet the bottommost majority or face competitive disadvantage. The second principle of diversity, that of promoting it, may thus be seen as a natural extension of the first, as individual desires for potential lead to the furtherance of conditions that encourage the same for others. Thinking on the qualities of an ideal winner, then, is necessarily an issue of the structural incentives of competition; the winner would be conceived of one who was able to adapt around the needs of others, who creatively strove to win based on terms of the others. Put simply, it is most reasonable to assume that individuals would rather lose to someone who raced to the top rather than the bottom. The potential of each to express their own attempt is the essence of diversity, constantly promoting that each be encouraged to address and attempt new problems – the foundation upon which other specific and emerging social ends may be furthered from.

Diversity is a principled system that attempts to encapsulate both the indeterminacy of success and the individual potential needed to explore and enlarge our conception of that same success. With diversity as the primary social good, individual potential is the motivating factor in both drawing out individual expression and ensuring individuals the space to do so, while subsequent social ends may inform the incentives of the particular game, and how it is won. If the first principle of diversity to emerge in considering the qualities of an ideal winner are reasonably assumed to be pursuit in a reciprocal manner, in a way that does not impinge upon others equal attempts at success, the second principle of diversity would further require the active encouragement of individuals competing in different ways. Put differently, the first priority is ensuring that other
individuals maintain their ability to express their potential – that others not be rewarded for engaging in a one-dimensional race to the bottom. The second priority, on the other hand, would encourage that individuals actually do compete in different ways. Therefore, principles of diversity would first align incentives for non-infringement, and then concentrate on rewarding those that make different attempts and offer new ideas.

While diversity is expressed as a social good, one which takes individuality as its essence, additional social goods or ends could also influence competition. With diversity as the foundational model, subsequent social goods which are democratically chosen upon would inform how and why certain creative pursuits are to be rewarded over others. So long as the initial requirements of diversity have been ensured, it then remains open to consider the additional gains that the ideal winner will be furthering. As the first principle of diversity allows for each to imagine themselves the winner, and requires them to afford the space for others to do the same, the second principle of diversity asks them to contemplate losing, and through it the ends they would hope the winner would have advanced along the way. Accordingly, it is this second principle of diversity that allows for the inclusion of additional social ends, and the particular goals found in future deliberations on competition and social necessity.

Returning to the metaphor of evolution, if the promotion of individuality under the model of diversity may be said to represent the variation of genetic characteristics within biological evolution, future democratic policies may be seen to represent the environment which selects for success. The point here is not to articulate what the subsequent social ends may be, or guess at what the selective social environment may choose, but simply to argue that the choice will be more beneficial and just if it is premised upon the principles
of diversity. Oppressive ends are mitigated against by the constant requirement for freedom of potential. Diversity becomes a method for analyzing, organizing competition, with the opportunity for further and secondary ends to inform incentives around the central function of individuality. Whatever the social end, whether it be mathematical knowledge or economic gains, diversity may be a useful principle for advancing the system in ways beneficial to both individual and group.

Admittedly, surpassing neutral liberal individualism, in which each individual is free (or cynically, forced) to follow the competitive dictates of the market to act exactly as one’s competitor, might entail a disadvantage to those whose individual interest extends no further than conformity. A system of diversity would certainly hold out a preference or reward for those who are willing to contemplate difference, and thereby disadvantage those who have no inclination to depart from homogeneity. In response, it must be said, first: that this is why diversity is a social good dependent upon individuality, and not a theory of individual rights; and, second: that the harm for conformity desiring individuals is minimal as it is only the few who are rewarded for innovation toward difference, while the conforming individuals nonetheless receive the social advantage from the innovations.

VI.V DIVERSITY FROM ABSTRACTION

A. A Conceptual Example of Individual Choice

Beginning with a similar structure for abstract decision-making as Rawls, with individuals in an original position and behind a veil of ignorance, the question becomes of how individuals would choose? How would the potential of diversity display itself?
The conservatism of Rawls will not be endorsed here, but some sense of individualistic striving and caution must be balanced out. Diversity may be seen as an inherently balanced approach, containing self-interest and altruistic principle simultaneously within each individual. So, with a pillar of individuality, and the gambling desire of individuals to risk their own merits, also come thoughts on what is the principled, right action regardless of the individual’s relation to its outcome. Neither one aspect nor the other may predominate exclusively. Ruthless self-interest without context is unrepresentative of actual individual behavior and self-defeating if pursued. The altruistic principle expressed in abstraction should not be taken as exclusive either, for no personal cost has yet been incorporated into what is a fluid spectrum of individual decision-making.

A form of accountable self-interest would, therefore, be likely displayed by a majority in a competitive start position. Individuals would opt to maintain a priority on individualistic competition but have it tempered with principles associated with group and future benefits. The game devised would remain atomistic competitive, but factors which would influence how individuals compete, and therefore who ultimately wins, would reflect altruistic principle. A measure of the conservatism endorsed by Rawls may also be detected in this accountable approach, as individuals would no doubt hope in the first instance they possess the creative energies and luck needed for success, but in the second instance turn their concern to the wider group which they will also occupy. The articulation remains primarily principled, however, because the articulation is not a monetary insurance scheme to competition, but a broader social direction of where competition should be headed. Accountable self-interest envisions a method for pre-arranging social priority within competition, wherein all manner of principle and social
goods, such as sustainability, education, or other concerns for intergenerational equality, may come to factor as systemic rewards.

As a theory of competitive system design, accountable forms of self-interest would need to await market results. Abstraction assigns the value priorities, but market competition produces the practices that will come to be viewed through a pre-arranged, principled lens. Accountability awaits the selection of those who have competed in a manner most deserving of encouragement based upon individuals abstract designs. Consider a simple numerical illustration:

\[
\begin{array}{ccc}
A (A2) & B (B2) & C (C2) \\
7 (0) & 6 (2) & 5 (2) \\
\end{array}
\]

The labels A, B, C, refer to three competitors, while the corresponding number below represents their individual gain in round one, before the prearranged principles have been incorporated. The labels of A(2)… refer to the practices of the competitors which have impacted upon the prearranged subject areas. The administrative object would then be to incorporate the secondary benefits into each actor’s individual result. In this simple, example it would enough to conclude that B and C should have their (through taxation perhaps) individual results include the added benefit of two. The previous, and independent of principle result would find A the most successful. With principle incorporated, it would be B. The practices of B are therefore the most rewarded strategy, conceivably altering the conceptions of other competitors who will respond with renewed assumptions on what is successful.

The advance of a principled competitive reward system would implicitly be based upon a diminishing and indexed function of social goods. A social good would
accordingly serve as an indexed quality whose furtherance would have a corresponding economic advantage. Apart from pure economic considerations that occur before the incorporation of principle (represented by the unbracketed number above), the added feature of a social good is intended to alter reward and incentive dynamics. Therefore, the competitor that is able to achieve an improvement in a prearranged value area, such as worker safety, would then witness their taxation level decrease by a similarly prearranged amount. The economic race to efficiency may then be seen to include other social features as well. The promotion of worker safety, for example, may then be an economic advantage in the overall calculus of how efficiently something is produced and delivered to market. Ideally, a prearranged social good may be seen to improve living standards in a manner that competition might otherwise ignore, or even lessen. The object is not to lessen or distort economic ingenuity, but to have it opened to considering wider possibilities for advantage.

B. The Good of Diversity and the Avoidance of Intrusion

To complete a thematic arch of arguments, questions of Coase and externalities may be examined in light of diversity. The advance of social goods may easily be translated into concerns for environmental sustainability by having the bracketed number above reflect impact upon others, in which a lower figure would be more desirable. The strategies, or practices, of B and C would then be found to be the most intrusive upon others, or externalizing of their costs. A should accordingly receive an additional benefit as B and C lose out by the measure of their additional costs placed upon others.
Perhaps it is in this regard to sustainability that the rationality of abstract principle is most clearly made out. If individuals think on the qualities of those who should win, or at least be best rewarded within their new competitive system, then those who compete with the least detriment exported unto other competitors and other non-human life-forms should be singled out for reward and success. Not only does sustainability speak to environmental issues, including the viability of future generations, but it achieves a greater benefit in having others more free to pursue their own and independent attempts at success. The reasoning displays a logical progress that concludes in greater social benefit in both economic and non-economic terms. First, individuals may endorse that, yes, individual pursuit is a staple of the competitive system. Second, however, individual gain should both be curbed and directed around principles that promote the ecosystem as an end in itself. Third and further, the incentives aimed at reducing externalities may be seen to have an additional benefit of allowing other individuals more space to actualize their own practices free from wasteful conflicts triggered by the acts of others.

Economic and legal debates over property rights in environmental conflict have often fluctuated in past decades from the concept of externality to a reciprocal view of harm. Once it was generally assumed that market inabilities to address external costs of production borne by an unconcerned third party should be corrected by government regulation – attempting to incorporate the externalized cost back into a polluting production practice. Recall that an externality is a harm visited upon a third party from a practice directed at another: “The standard example is that of a factory, the smoke from which has harmful effects on those occupying neighboring properties”. Most economists had traditionally relied on Pigou’s theory of externalities – viewing them as

an instance of market failure, as the full cost of production is neither borne by the producer or the consumer, leaving the pollution costs exported unto indirect parties. The solution was normally seen to be a form of government intervention, either through imposing legal liability or a tax upon the polluter.\textsuperscript{64} Externalities were instead viewed by Coase as reciprocal and competing, as the cost imposed upon the third party by the producer was of the same form as the legal rule which impinged the producer’s ability to pollute.\textsuperscript{65}

A system of diversity would arguably avoid such contentions, and their basis in legal conflict altogether. With priorities set in abstraction, the matter becomes one of administering competitive advantages in line with these priorities. Legal issues which underlie property operate at a level removed and after this greater expression of principle. If sustainability is pre-selected, and with it the corollary priority of autonomy and the freedom from other’s intrusions, then the major competitive structuring of incentives occurs before competition and legal conflict over rights.

Systemic incentives rest upon the practices of a competitor, not their legal standing. Regardless of later legal treatment and a rights debate, it would remain that a certain practice is rewarded based on its correspondence to pre-arranged principles. The polluter and recipient of pollution may of course still be in legal conflict, but the wider competitive concerns of the polluter (and their immediate competitors) will have already been addressed, their practices already judged and afforded their added strategic costs. The competitor with a high impact on others would have received their most severe detriment within its peer group of competitors long before the localized issue of legal

\textsuperscript{64} Id., 1.
\textsuperscript{65} Id., 2.
conflict is heard. In essence, the competitor with less external impact would be rewarded for avoiding the transaction costs of legal conflict altogether, and for allowing others greater space within which to orchestrate their own attempts at success.

VI.VI CONCLUSION

Efficiency, though it is a jealously guarded tenet of modern economics and law and economics, is but a drive toward something. Self-interested desires and preferences are the ordering mechanism of the market, assigning value to the works of others, achieving an efficient balance in the valuation of others’ output – the sanctified ‘invisible hand of the market.’ And in remembering that efficiency is but a drive and calculation of individuals, it is easier to envision it being directed in different ways, depending on where self-interest sends it. As diversity is based on a function of individuality, and the related good of furthering its differentiation, so too may efficiency may be thought of as a function, to be sent in many different directions.

When principles of competition are decided upon prior to competition, in a hypothetical social contract, – a market before the market – they may inform the incentives of competition, not the outcomes. The drive to efficiency may lead individuals in diverse directions based upon the signals they receive: a collection of natural impediments, resources, abilities, and games rules. With efficiency as the drive, the key remains the individual motivators of the economic, any, system. And so as society continues toward the compartmentalization of interests and desires, it may prove useful to keep a theoretical view to the essential nature of individuality, and the unknown, always unlimited potential it may give to wider society.
While a model of diversity does not declare a victor in the scholarly impasse between efficiency and equity, it does offer an alternative to the impasse itself. It may be that the fixation on outcomes engendered by a view to social utility will forever lead to an irresolvable conflict between efficiency and equity. And though efficiency is currently ascendant, it is far-fetched to presume that individuals are ever so one-dimensional in their perception as to care nothing for social priorities that require a consideration for others’ well-being. As with many academic conflicts, it is often foolish to assume that exclusive, oppositional views may contain absolute truth in their expression. Far more likely is that the reality of personal preferences and action lie somewhere in between two opposing and extreme visions.

By concentrating on the process of competition rather its ends or outcomes, diversity provides a more nuanced treatment of efficiency and equity. Neither efficiency or equity is advanced in their purest, most dogmatic fashion, but an advantage appears as diversity promotes each value alongside of the other. Under diversity it is possible to embrace the competitive dictates of efficiency while promoting equity as an ingredient in the drive to things more quickly, cheaply, better… The appealing prospect is that equity may be retrieved from a status as an ancient, vague, and rarely used principle to become an active component in modern competition.

In embracing the economy as a socially constructed environment, it becomes possible to envision individuals choosing principles of competition that honour both their individual desires and their related hopes for social progress. Encouraging differentiation provides the avenues of individual potential, while social rewards may further the wider concerns individuals have for the society which exists beyond their immediate self-
interest. For when the requirement of individual potential meets democratically determined rewards and goals, a true combination of efficiency and equity is possible. While social values will inform the qualities of a enlightened competitor, who has advanced group goals as part of their own drive to win, the essential mechanism of individual differentiation promotes an ongoing openness and democratic possibilities. The constant impetus toward diversity ensures that each individual may equally contain and offer the next, needed solution.
CHAPTER SEVEN

STATES, STRATEGY, AND DIVERSITY:
LEGAL THEORY FOR THE INTERNATIONAL SYSTEM

If the goal of this dissertation as a whole is the articulation of a theory of diversity, the goal of this seventh chapter is to advocate for a theory of diversity as new and potentially beneficial influence within international legal theory. Although this dissertation aspires to a social theory which may stand alone against others – between and above the right versus the good divide and its equivalent in efficiency versus fairness – the specific focus driving the following investigation is competition and its conception in the study of international law. Appropriately, it is hoped, what began with an examination of market failure and a proposed strategic means for judging the efficacy of international law similarly ends with an examination of how the study of international law itself might benefit from the introduction of a theory of diversity and its strategic means of achieving optimal results. The following chapter argues for an extension of international legal theory toward a normative method of evaluation – a rational voice of economics and equity with which to compare current and proposed international regulation against. For international legal theory to contribute more to the discussion of, and perhaps future course of international affairs, a greater force for normative positions is likely required. Yet, beyond a simple normative good or bad analysis for regulations which exist, a theory of diversity is argued to provide international legal theory with a needed and useful addition of an ideal for comparison.
VII.I INTRODUCTION – INTERNATIONAL LEGAL THEORY IN VIEW OF DIVERSITY

International legal theory has of late grown increasingly receptive to influence from other disciplines. Though the reach toward interdisciplinarity is certainly a laudable development, this alone will not satisfy those who criticize international legal theory for its lack of method. This chapter argues that the continued and future significance of international legal theory may be furthered by the combination of interdisciplinarity with the articulation of a pronounced normative system. The promotion of systemic equality and autonomy, goals particularly well-suited to legal application, may both provide an evaluative model for what currently exists and an aspirational one for that which is yet unrealized. The principles of procedural equality and autonomy may be seen as incentive platforms for encouraging state cooperation, and the means of ensuring more equitable competition.

In the first instance, procedural equality promotes faith in the competitive institutions to which states surrender their sovereignty. Equal procedural application may strengthen underlying principles as parties submit to governance by a neutral body applying these same principles. The second instance involves the procedural promotion of competitive autonomy, which is equated with the metaphor of diversity. Within the surrounding dictates of neo-liberal economic norms now prevalent in the international system, the call to autonomy and diversity is a measure of ensuring the widest array of individualistic attempts at success. Three related benefits are argued to be advanced by this method of diversity. First, competitive rules may entice state enrollment in agreements by providing a means for competitors to each individually envision success. Second, the wider system and society benefit from the provision of multiple and diverse
attempts at achieving previously agreed upon rewards. Third, state policy, increasingly weakened within globalization, is given a renewed impact on the formation of domestic competitiveness.

Globalization has resulted in a simultaneous movement toward both uniformity and difference. A systemic homogeneity occasioned by the dominance of free market instruments and goals is thus contrasted against the proliferation of individual competitors, consumers, and content which inhabit an advancing global marketplace. Though the vanguard of these international developments has been market and consumer centric, there is much that has been left behind; whether it be specific communities or non-economic social values that are ill adapted to neo-liberal economic norms. An international legal theory premised upon diversity, it is argued, may assume an active role in connecting these two discordant features of uniformity and difference by providing a normative theory that encourages competitive individuality and accountability.

This chapter takes up an evolving strand of international legal theory moving toward greater interdisciplinarity and attempts to give it a more specific focus and effect. In addition to the increased influence of international relations theory in the study of international law already underway, it is argued that economic methods, and the neo-institutional law and economics of transaction costs in particular, may be beneficial in discerning the often prohibitive costs of state coordination. Beyond prohibitive costs, however, a view to state strategic behaviour may also indicate how competitive rules may alter the perception of interests and the avenues for pursuing them. Drawing inspiration from the cognitive stream of international legal theory, rules are taken as alterable
features in the incentive formation of competitive actors: a developing language for how interests are expressed.

Moving from the methodological potential of interdisciplinarity, this chapter will then argue for a normative theory of competitive and ongoing systems of relationships. This normative theory shall be one of diversity. This normative system first considers how the principle of procedural equality may form an enticement to international cooperation and regime creation. The second, and arguably more significant, element considers how market mechanisms may be directed toward the achievement of non-economic social value and group benefit. Though economic state strategies may make international coordination in such areas as common environmental resources difficult, it may be possible to direct competition toward partial and evolving solutions to these problems under the guise of diversity.

VII.II  A RAPPROCHMENT BETWEEN DISCIPLINES

It has been a common practice in recent years for articles on international legal theory to begin with a call for a return to greater interdisciplinarity within the field. Some authors have advocated that international law incorporate insights and methods from international relations theory in particular.\(^1\) Considering the complex variables that make up the international dynamics of state agreement and rule creation, it was perhaps inevitable that the relative academic isolation of international law should come to be seen as arbitrary and counterproductive.

The explanation for the past isolation of international law from international relations (IR) theory, and their subsequent re-acquaintance, extends in part from the path of IR theory itself. For much of the Twentieth Century, IR theory was consumed with realist assumptions on the world and state behaviour within it. The result was a narrow theoretical focus on power, with international law seen as merely a weak illusion covering states’ ‘real’ concerns for their relative power position vis a vis one another. Unsurprisingly, such a realist view that dismissed the role of international law did not sit well with international law scholars, as it undermined the legitimacy of their very discipline.\(^2\) Subsequent developments in IR theory would, however, take a more nuanced view of international law, finding in it a genuine importance in determining the outcome of international affairs. With the liberal institutionalism of Robert Keohane as a notable foundation, international law was increasingly deemed a central manifestation of international regimes – the collection of agreements in given subject areas that both coordinate state goals and give force to collective normative expressions.\(^3\)

With the modern prominence of international regime theory, now termed ‘institutionalism,’ IR theory became better positioned for an interaction with international legal scholarship. With such a re-acquaintance possible, the question necessarily turned to what benefits might follow an interaction between disciplines. Though the attention of this brief background lies with the benefits accruing to international legal scholarship from interdisciplinarity, it is important to note that the potential benefits to IR scholars


have been well made out elsewhere and previously.\textsuperscript{4} Foremost amongst the claimed benefits to international legal scholars available from IR theory are those involving methodology. A general criticism of international legal theory has been that it has suffered from a lack of method; a framework with which to offer either an explanatory or predictive basis for state behaviour.\textsuperscript{5} Put simply, international legal theory has lacked the how and why answers to state action which led to the agreements upon which international legal scholarship rest. IR theory, on the other hand, has been heavily influenced by the methods of economics that have been so prominent throughout the social sciences.

Through this economic method, IR theory has concentrated on the aspects leading to agreement and coordination that have been missing in international legal analysis. The initial economic and rational basis of international relations was quite straightforward, equating power with economic self-interest. However, the economic method has also informed Keohane’s more influential liberal institutionalism, in which self-interested states may find a conduit to their ends in international coordination and cooperation. Although international legal theory need not adopt the economic methods of IR wholly, or even in part, it remains that an operative theory for the behaviour of international actors is likely needed to make it a more persuasive theory.

Without a theory for either how international actors do or should act, international legal theory risks classification as a one dimensional textual reading of international agreements, missing both a realistic or idealistic voice on what exists. First, the improved

\textsuperscript{4} See, e.g., Slaughter, Tulumello, Wood, supra note 1, at 370.
\textsuperscript{5} Jeffrey L. Dunoff and Joel P. Trachtman, \textit{Economic Analysis of International Law}, 24 Yale J. Int’l L. 3 (1999); (wherein the authors note that international legal scholarship lacks a “progressive research program” that may support the move from descriptive to prescriptive analysis.)
theoretical voice of international legal scholars would seem to require an appraisal of international law from a vantage beyond the mere existence of codified agreements. International law obviously does not share the luxury of domestic systems in having the sovereignty of enforcement. International law remains a prospective, uneven endeavour. Accordingly, international legal scholarship would benefit by speaking to the dramatic inequality witnessed in international legal effect – why some laws, or groupings of laws, are effective and others are not. It would benefit international legal scholarship to explain the determinates of this unequal effect, and explain why some features, such as subject matter, serve to alter state behaviour from what it would have been in the absence of international agreement. Beginning with such a basic test, the actual alteration of state behaviour for instance, international legal scholarship may come to assume a more active and robust theory of world affairs.

A second potential gain, which perhaps touches upon a more familiar objective of international legal scholarship, involves the interpretation of existing agreements. IR theory provides a focus upon state motivation as it exists prior to the assumption of laws, and therefore temporally before the traditional international legal analysis. It is this pre-agreement stage, and the political realities that permit for agreement, which may subsequently inform regime interpretation post agreement. By looking to the surrounding impulses and motivations of actors that led to the formation of an agreement, the normative intent of the entire project and its intended application may be gleaned.

The reading of existing international law should not be a hermetically sealed prospect. As observed perceptively by Slaughter, Tumello, and Wood, to gauge the desired outcome of an agreement necessarily requires an inference on the norms that gave
rise to the very agreement. No matter how text specific, or politically independent an international legal analysis may purport to be, it is the international bargain amongst states that defines the normative principles that give life to the law or regime. International law may be found to arise from a consensus of states to be governed in a given issue area, and to understand how this law should be applied requires an understanding of what the parties were agreeing to, and what objective their agreement was meant to serve. The created form of an international agreement will normally contain more than enough detail and content to occupy a text specific analysis and exegesis. Yet, what is needed also is the international legal scholar with enough vision to contemplate and explain how the agreement came about, what it is meant to serve, and how well it may do so.

A. An Extension and Selection of Economic Methods

In a similar, though less pronounced fashion, international legal theory has also been chastised for its avoidance of an economic influence that could be had via the school of law and economics. International law has been identified as one of the last, if not the only, major legal discipline to resist the influence of law and economics; the dominant school of American jurisprudence in recent memory. Given the increased economic interdependence within the world system, which may be placed within the well-worn rubric of globalization, it should come as no surprise that some areas of international coordination merit, and have received, greater economic analysis. Consider, for example, the phenomenal success of the international trade regime, which has moved from the

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6 See, Slaughter, Tulumello, and Wood supra note 1 at 372.
7 Dunoff and Trachtman, supra note 5 at 2.
GATT to a WTO system complete with an adjudicative body and much of the world’s states as either members or aspirants to membership. The WTO is an example of how international coordination has developed out of shared (or more cynically, imposed) values of economic liberalism, which in turn are readily treated by the economic method that advocates for those very values.

However, it may be an unsatisfactory basis for economic analysis to rest solely upon international developments that most align with current economic assumptions and ease of application. While a comprehensive application of economic reasoning to international law in general may not be necessary or desirable, it would appear beneficial that international legal scholarship connect with a wider economic view of coordination, including the deficiencies of markets that may inhibit cooperation. Environmental protection seems an especially pertinent example of when international legal scholars could use economic reasoning to help explain why coordination in the subject area does not exist, and what, if anything should be done instead.

International instances of market failure, and the corresponding absence of coordination, indicate that an economic approach to international law should concentrate on competitive situations rather than selective subject areas predisposed to success. When certain topics demonstrate a competitive and ongoing dynamic as a necessary foundation, an economic analysis is uniquely poised to provide insight. Not all international topics, however, will demonstrate such a competitive dynamic. Often a normative position develops through state interaction so that it remains simply that: a normative position that delineates the current understanding amongst the community of states on acceptable parameters of behaviour and common definition.
National zones of artic waters protection are an illustrative case of such a normative parameter. In 1970 the Canadian Parliament passed the Arctic Waters Pollution Prevention Act, which in effect imposed unilaterally a zone of 100 miles of jurisdiction for the purposes of environmental protection. Not only was such a unilateral action contrary to established customary international law, it was also opposed vehemently by the United States. Interestingly, the move came to be endorsed by the international community despite U.S. opposition, and Canada’s unilateral policy became a new foundation of international customary law. As Stephen Toope observed in using the above example, Canada’s unilateral action gained normative force based on its rational and commonsensical appeal to the international community.

While Toope’s discussion arose in the context of refuting the all-importance of power (and American power in particular) in the formation and validity of international law, I believe two separate points relevant for this dissertation may be drawn out from the example. First, there are instances, as with much of customary international law, which involve specific and one time demarcations of standards that do not involve an ongoing competitive dynamic. Second, there are normative impulses within the international community, as a reflection of diverse domestic impulses, which do not correspond with one-dimensional treatments of state behaviour, whether it be power or economic self-interest.

Customary law and the definition of agreed upon parameters for recognition, such as airspace or artic zones of sovereignty, are clearly significant, but they arguably lack

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9 Toope, supra note 8 at 310.
the complexity of ongoing competitive relationships. Rules regulating international competition are not only tied to widespread, essential social and economic aspects of society, they also contain an ongoing quality of indeterminacy. Actors shape their actions around rules while the outcomes of the competition are unknown at the outset and constantly evolving. The international trade regime provides a useful representation of such regulatory indeterminacy; a large collection of the international community may agree on the general benefits produced by liberalized trade, but the specific features of how firms and individuals compete occurs beyond such minimal operations as the reduction of tariffs. Put simply, the content of competition - that which is traded - benefits from greater market access, but what is traded remains to be determined by market demand and reward, not governments.

B. Types of Coordination

The coordination represented by the international trade regime is a significant matter of international coordination, but it is by no means the only complex category. To help clarify the different rough standards of coordination I envision, an elemental hypothetical may be beneficial. First imagine a group of city states, imaginatively named A, B, C... The governments of these respective cities seek to coordinate certain efforts in order to facilitate the growth and welfare of their societies. The first matter, arising between A and B, is how to arrange travel and trade routes between them. The cities of A and B are joined by a solitary road. After some initial debate, both parties agree that forward progress is to occur on the right hand side of the road. This most straightforward form of coordination may be seen as an analogy to international air travel standards and
many instances of customary international law in general. As Kenneth Abbot has observed, while initial coordination is certainly needed, and oftentimes difficult to arrange, once standards are arrived at they are virtually self-enforcing.\textsuperscript{10} Or, in terms of the road between A and B, once an agreement on the mode of progress has been reached, its observance is virtually costless since both parties agree upon the requirement of a uniform route and what remains is only to coordinate which equal, or even arbitrary, choice is to be made.\textsuperscript{11}

Removed by a further level of complexity are indeterminate, competitive relationships. In keeping with the trade example from above, suppose the cities of A, B, and C address the goods exchanged between their societies. The basic foundation for agreement arises from a shared desire to increase trade between the societies, with each hoping to benefit from both its own comparative advantages and those of its neighbours. From this basic initial understanding, however, arise many complex difficulties. Numerous social forces, including the overtly political, may undoubtedly converge upon the issue of what goods may pass between the borders of A, B and C. For instance, the relatively inefficient agricultural producers of A may oppose liberalization for fear of losing out to their more efficient competitors from the land of B. Similarly, the manufacturers of B may fear their competitors in C. The genius of the international trade regime, if it may be called that, has been its character of diffuse ‘tit for tat.’ Any trade benefit or reduced tax upon incoming goods given to one state is automatically afforded to all member states.\textsuperscript{12} The result, returning to our small city state hypothetical, is that

\textsuperscript{10} Abbot, supra note 1 at 371; (discussing examples of the road and flight coordination mentioned above.)

\textsuperscript{11} While traffic rules would obviously need enforcement, the treaty or arrangement would seemingly not.

\textsuperscript{12} See, e.g., Michael J. Trebilcock and Robert Howse, THE REGULATION OF INTERNATIONAL TRADE (3rd ed.) 49 (2005): “The Most Favoured Nation (MFN) obligation calls for a country to grant to
any bargained reductions in the tariffs placed upon C’s agricultural goods by B automatically accrue to A as well. The larger result is a declining cycle of trade barriers, and a dramatically altered trade landscape facilitated by this diffuse system of tit for tat. Again, it is important to note that this phenomenal success in achieving systemic objectives remains tied to the minimal basis of early agreement on the desirability of trade.

The efficient producers of A, B and C will have benefited from their governments’ bargained tariff reductions, in that they may outdo inefficient producers in new markets, but their strategies will have remained relatively unchanged by this form of state interaction and agreement. Through trade liberalization government A, for example, will have benefited some of its producers and arguably all of its consumers, who may now receive cheaper goods from the more efficient producers of B and C. But in such a system, Government A has not actively taken part in the furtherance of trade joined with any other social objective. The coordination on this level remains indeterminate because it is the market that rewards certain practices over others, and therefore selects what outcomes are to win out. It is a great benefit coupled with the absence of potential. While the ends of economic liberalism have been furthered, no additional social purpose, such as environmental protection, has been furthered with this powerful mechanism of market competition.

every other country with which it has signed an MFN treaty the most favourable treatment that it grants to any other country with respect to imports, exports and related regulations. Although the expression ‘most favoured nation’ suggests that some sort of special treatment or privilege is accorded to the country entitled to MFN treatment, the underlying principle is the opposite, that is the main objective of the principle is to prevent discrimination, by generalizing concessions made to a specific trading partner. The MFN principle is often referred to as the cornerstone of the multilateral trading system.")
C. Public Goods and Common Resources

Removed by a level of difficulty, if not in complexity, from the above form of competitive coordination are circumstances involving the provision of public goods. Public goods often involve the provision of a service that is of a measured benefit for all, but would entail a huge cost unable to be borne by a single party. The related converse of these public goods are problems of common resources, in that it would be a benefit for all to have regulation of the shared resource, but no party is able to provide the regulation unilaterally and no regulatory institution arises from amongst the group. Summarizing the relationship of these levels of coordination in terms of the ABC hypothetical: simple coordination may be found in the road travel arrangement; complex and indeterminate coordination is found in their trade along preexisting roads, and; public goods problems may be discerned if we introduce the new cities D and E, and ask who is to build a road to these new cities, or who is to regulate the rich farming lands that lies in the unclaimed territory in between.

In the first instance, that of the potential road connecting ABC and DE, a basic coordination problem arises in that all parties would benefit from a network connecting all cities for travel and trade, but no single city state is willing to undertake the expense of constructing the road. The second instance, that of the unclaimed farming land lying between the unconnected city states, would likely invoke a tragedy of the commons situation. As such, in the absence of authority and property rights, it will be in the best interest of each city state, and its inhabitant farmers, to exploit the common resource to its fullest, and as quickly as possible, before their competitors beat them to it. The unfortunate logic of the tragedy of the commons is that it will be in the rational self-
interest of each to exploit the common resource without restraint until it finally collapses leaving each user worse off.\textsuperscript{13} Of course it would have been of greater benefit to each user of the resource if all had used restraint, but the rational strategy of each in the absence of authority is to preempt the exploitation of others by exploiting first, so that one does not suffer by one’s good faith in others’ restraint – thus the circular nature of the tragedy of the commons.

The provision of public goods, and the related problem of common resources, is of such a foundational nature within economic thought that it has received a wealth of academic attention and analysis. Indeed, the emergence of the state itself has been explained pragmatically as a response to the problem of the provision of social goods (albeit one bereft of any culturally or socially unique factors or histories).\textsuperscript{14} I propose here to merely incorporate thoughts on the second level of coordination, the competitive, into a discussion of how the provision of the third level of coordination, on public goods, may be incrementally improved. I argue that economic regulation may direct individual actors toward the satisfaction of non-economic social goals as a product of their self-interested competition even in the absence of any supranational authority.

VII.III RULES, STRATEGIES, AND THE ALTERATION OF INTEREST PERCEPTION

A. Transaction Costs

Before theorizing on the systemic designs that may encourage competitive solutions, it may be worthwhile to draw out a positive interdisciplinary basis.

\textsuperscript{13} Garrett Hardin, \textit{The Tragedy of the Commons}, Science 1243 (1968).
Specifically, the object of the following section is to combine related threads of thinking present within law and economics, and IR theory that already point toward the realization of rules as shaping behaviour and competitive thinking. From this socially determined start position, of rules as both outcomes of and factors in state behaviour, it is then a small, if contentious, step to the normative enticements contemplated in the following section. The underlying point of this section is to give a thumbnail theoretical sketch to the objective expressed above; namely, the use of competitive coordination to solve broader, deeper dilemmas of collective action and resources.

To begin, the issue of public goods and common resources draws immediate connection to the school of neo-institutional law and economics, and the economics of transaction costs in particular. Unlike classical law and economics, which unsurprisingly draws upon its ancestor school of Chicago economics and the price theory of economics, neo-institutional law and economics is more contextual, and concerned with the rational behaviour of actors within their surrounding circumstances. Combined with this greater emphasis upon context is a focus upon individual strategies, analogous here with game theory, and the cost benefit analysis that rational economic actors perform within this context. Transaction costs - the intermediate costs that emerge in delivering good X between parties A and B, such as transportation or legal expenses – are then claimed to be a significant determinate of competitive strategies, and the form of economic institutions. In sum, the form of economic institutions, whether it be the firm or the state, are explained in large part by the strategic calculations of self-interested actors faced by a decision of whether to coordinate or not.\footnote{Examinations of the economic strategies that underlie the formation of property rights regimes has perhaps most famously been brought out by such authors as Douglass North and Harold Demsetz. See, e.g.,}
From a view to transaction costs and individual strategies, the absence of international coordination on such large scale common resource issues as atmospheric environmental protection may be seen to be a matter of inadequate incentive: while benefits to coordination are evident, the potential gains of such organization are outweighed by the short-term gains to be had by continual and unchanged usage. An interesting circularity may be seen to emerge, in which it is only the state that has the capacity for absorbing these diffuse costs, but in the absence of enough incentive the state will not develop, therefore the problem becomes the reason for the impossibility of the solution. Although the transactional view to international coordination may appear overly self-defeating or circular - in that if it does not exist, it is not appealing enough economically to exist – the method contains potential nonetheless.

B. Dependent Strategies

If self-interested strategies define presently the parameters of international investment, currently limiting the possibility of coordination and institution creation, so too do they indicate the primacy of the competitive context or game. This is significant because the surrounding context in which rational strategies are formed is not given by nature, but is rather a social creation. By implication, should the surrounding context be altered, so too would the rational strategies of competitors – even as their motivation remains the same, the function of their competition, and its outcome, would change. Now

I do not mean to propose that state action be used to impel a drive toward ever increasing world governance, were that even possible, but merely that neo-institutional economics, as well as the neo-liberalism of Robert Keohane, tells us that states are economic agents pursuing coordination as a means to the end of self-interest and the efficient alleviation of transaction costs. This self-interest may in turn be directed, if not mandated, around certain objectives that alleviate the deleterious effects of public goods and common resources. Context is the game, its rules and incentives, while the players are one-dimensional pursuers of their self-interest. If the rules of the game are altered, the players remain rationally self-interested, and so the outcomes may still be deemed efficient if sanctified by self-interested pursuit.

The priority of context and strategies indicated by the economics of transaction costs leads seamlessly, in this instance, to a discussion of the formative effects of rules upon the interest perception of actors. For as the above discussion has indicated, strategies are dependent upon the context of a cost benefit analysis regarding the assumption of coordination, it may be beneficial to further consider fuller and alternate views on contextual impact. Two related schools of thought in this regard are the institutional school of law and economics and the cognitive school of international relations. Though not often joined, perhaps because of obviousness, the institutional and cognitive schools share a distinct emphasis on the ability of rules to interact with, and shape, the underlying perception of those individuals operating within a system.

Both institutional law and economics and cognitivist international relations are composed of a varied scholarship, but for the present purposes I wish only to draw upon

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the broad themes represented by each. As is perhaps indicated by the similarity of their nomenclature, institutional and neo-institutional law and economics share a similar focus upon context, instead of the price theoretic ideal of classical Chicago law and economics. Institutional law and economics, the older tradition of the two, draws upon such renowned economists as Veblen and Commons to bring out foundational insights from both; the evolutionary nature of economic institutions, and the social interaction between laws and markets respectively. The important characterization, for this investigation, is the institutional school’s focus upon the simultaneous relationship between the economy and law, with each informing the other in turn, with neither ever in prominence.

Perhaps the most interesting aspect of the institutional school is its rejection of the rational, formalistic method of classical economics, and by extension classical law and economics. Rather than an ideal rational actor found before formal decisions, used to identify the rational solution or price, the institutional approach, as advocated by such modern proponents as Samuels, characterizes the economic system as one of cross-reference. Economic impulses influence the development and creation of law, while the law in turn influences the form of economic institutions and outcomes. An overtly positive endeavour, institutional law and economics seeks to identify the motivators for social change, with the legal and economic in an alternating and ongoing exchange.

18 See, e.g., Thorstein B. Veblen, THEORY OF THE LEISURE CLASS, (1899); John R. Commons, LEGAL FOUNDATIONS OF CAPITALISM, (1974).
19 See, e.g. Mercuro and Medema, supra note 13 at 101-116.
C. Cognitivism

The ongoing interchange between the legal rule and economic outcome has implicit connections to the IR school of cognitivism. Cognitivism, or Constructivism, holds that “actors’ identities and interests are not exogenously given but are constituted through interaction on the basis of shared norms such as international law, sovereignty and anarchy.”20 With cognitivism IR theory is arguably seen to reach to its furthest extent toward the dependent nature of interest perception. Cognitivism is also the furthest step out from the path sketched so far: from the strategies in the context of a game; to the game dependent upon the interaction of legal rules and market; to the altered interest perception of actors based upon ongoing international relationships.

It is easy to understate the departure represented by cognitivism. It develops seamlessly enough, in a linear progression within IR theory - from realism and its focus on the absolute quality of power, to liberal institutionalism and the self-interested value of cooperation, and finally to cognitivism and the transformative effects of cooperation. It is this last step that must be brought out, and appreciated, for the way it fundamentally alters the view of international relations. The previously dominant schools – or more accurately realism and the currently dominant school of liberal institutionalism – proceed from the same basis of state self-interest. Whether states are pure maximizers of their own power, as with realism, or may cooperate when circumstances are calculated to serve, as with liberal institutionalism, state interest is based upon the individual model of rational maximization from economic theory. Cognitivism, on the other hand, contemplates a new dynamic of international relations in which interaction and ongoing relationships may actually lead to a redefinition of self-interest.

20 Slaughter, Tumelello, and Wood, supra note 1 at 373.
As an important caveat, I would hasten to add that the redefinition of self-interest should not be taken to mean an exchange for other selfless motives, whether altruistic or otherwise charitable. Were such grandiose claims of state or individual abnegation attributed to cognitivism, it would do the movement no favours, and would surely but unfairly mark the theory as unrealistic. However, cognitivism need not argue the complete alteration of state behaviour or motivation – and we might as well think of human nature here, since so much of IR theory appears a mere extrapolation of individual philosophy onto state behaviour, whether the inspiration be Hobbes, Kant, or Axelrod. Cognitivism proposes that sustained and deepening relations between states may alter the interest perception of states so that their identification of objectives changes to revolve around objectives quite different than if the relationship had not existed.\textsuperscript{21} From the basis of sustained agreement and coordination, states not only alter the means by which they communicate their goals, the goals themselves may alter on the basis of the relationship. Law, in the form of sustained and building agreements, is thus an indirect means of collective learning, in which parties redefine how they think of each other, and redefine what they seek from and with a new partner.

The differing schools of international relations theory, for the sake of clarification, could arguably be placed along rough stages of historical developments in international affairs. Whereas international realism was undoubtedly most accurate descriptively during eras of Realpolitick, of competition with a view to state power vis one’s neighbours, liberal institutionalism became more appropriate in the post-WWII scene when international agreement became more sophisticated, robust over time, and

ultimately significant in state interest pursuit. Cognitivism bookends this growth, and contemplates that international institutions may become so enmeshed in state and national interest identification that the very nature of those interests change; from competitive self-interest constrained to a different form of interest identification altogether. The most prominent example of cognitivist potential is no doubt the development of the European Union: in which institutional arrangements at first served to make future armed conflict economically impossible due to interdependence, but in time the perception of parties altered in a fundamental way, making certain types of interest pursuit illegitimate and unconsidered completely. As cognitivism points to a new potential within the development of international relations, this project is concerned with the type of regulatory design that would incorporate the widest potential of interest perception at the point of ideal system formation.

VII.IV A NORMATIVE THEORY OF INTERNATIONAL LAW

Having sketched out a background of interdisciplinary influence within international legal study, it remains to further bring out a theoretical approach to regulating competition along the lines of diversity. In terms of the specific approach contemplated here, the object is to identify a means for narrowing the distance between the burdens of transactions costs and the potential of contextual self-interest. To articulate a general method for devising competitive rules that encourage the path of competition toward the simultaneous provision of public goods and the fulfillment of non-economic social goals. Before discussing in detail the called for requirements of international competitive design, I will briefly discuss the role of normative value. The normative
represents the push toward cooperation, with the theory of system acting as the pull, encouraging action toward previously expressed goals through faith in the regulatory process.

A. International Law and Normative Value

As Slaughter, Tulumello, and Wood have observed, the interpretation of an international agreement necessarily depends upon its normative foundation – the reasons that cooperation occurred at all and what it was meant to serve.22 The implication is that a reading of an international agreement must contain a normative element, weak normativism as I term it here, in order to indirectly pronounce and consider upon the value basis of the agreement. If the content of an agreement, for example, is the regulation of shipping lanes between the ports of ABC, then the international legal scholars may assess this agreement by weighing desired outcomes, say the promotion of shipping and the seamless passage between ports, against the regulatory expression given to this wider objective, evaluating the efficacy of a national tug boat registration for instance. Often an economic view to efficiency, or even a commonsensical view to everyday application, may prove useful; while at other times a purely legal analysis of the agreement’s wording may be needed to bring out its likely consequences.

While the weak normative content of international legal reading may be seen to increase the scope of analysis, beyond the aridness of a pure textual explanation, so too does it provide a limitation. The simple realization of where an agreement gains its force and initial meaning, the political impulses of member states, indicates the territory upon which international law may not yet tread; namely the creation of norms themselves. In

22 See, Slaughter, Tulumello, and Wood supra note 1 at 372.
analogy to modern domestic legal systems, it is not the legal scholar, nor even an individual judge, that creates the wider norms of the legal system. Even the most ambitious and creative constitutional theory does not suppose that courts or lawyers unilaterally create new social valuations; but rather must place their novel insights and interpretations within the framework of previously accepted political norms, such as democracy, liberalism, individualism.  

Returning for an instant to the example of national zones of artic waters, and the previous mentioned normative impulse, it becomes evident that the essential drive of international cooperation and rule creation remains a political, not legal, matter. The motivation for what was to become customary law regarding artic waters is a unique case on the surface, in that a middle sized power such as Canada could declare unilaterally a new international standard in the face of opposition from the world’s lone superpower. However, two related and quite general aspects to international norm development may be seen in the artic case, as in many others. First, there is the required drive from within the international membership, which may be derived from an amalgam of forces, including variations of domestic political will; such as elite preferences, grass roots mobilization, or concerted lobbying from a powerful interest group. Such pluralistic forces may also occur, though to a lesser extent, at the international level, as evident in the growth of NGO size and effectiveness. A second related and obvious aspect in normative development is that of an idea. In the artic waters case, the move on the part of the Canadian government was endorsed by an international membership upon the basis of a growing awareness of the special environmental fragility of the ecosystem and region in

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23 The most famous proponent of an interpretative legal theory is arguably Ronald Dworkin. See, Ronald Dworkin, LAW’S EMPIRE, (1986).
question. This scientific, ecological awareness was the persuasive feature in securing international support, and in turn a new development in international law.\(^{24}\)

As the law does not generally provide for either political mobilization or the content of new and independent ideas, it is often limited to observing the written effects of the aforementioned. In the following section these limits of weak normativism are expanded upon, to determine if there is not a more active role for international law possible. The question posed is that if the vagaries of the political are to define when an impetus for cooperation may occur, may not international law be theorized in such a way as to become a more active element of international relations? Accordingly, if the push of international relations remains the political, perhaps the respective pull of international institutions, and their design, may serve a normative function as well. The following sections detail both the procedural elements necessary to entice state agreement and the competitive rules likely to have substantive, non-economic impact. While remaining purposefully neutral, these two features of international pull may be seen to approach the independently normative for international law.

**B. Procedural Incentives**

The procedural pull of international law may be thought of as a function of reassurance. It ideally gives a measure of faith to governments surrendering sovereignty in the process and institution to which their powers have been ceded. That decisions affecting national interests will be conducted in a principled and above board manner is no doubt central to the transition from autonomous to supranational interaction. An excellent example of this essential function of procedure may be discerned in the

\(^{24}\) See, Toope *supra* note 8 at 309-310.
development from the GATT to the WTO, and the initiation of a relatively unique instance of an international tribunal complete with appellate body.\textsuperscript{25} This drive toward legalism represents an evolving confidence in the values underlying the GATT process.\textsuperscript{26}

The procedural pull of international law is aided to a large extent by the broad process of globalization, for as governments find their powers shrunk by the pace of world events, such as the technological interconnection of markets and information, they may find the prospect of a distant, procedural rule better than none at all. Yet, an assumption that domestic sovereignty is being gradually seeded in a rational manner corresponding to international reality would be overly naïve. Neither rational behaviour nor economic efficiency may yet completely characterize international arrangements – and perhaps they never should.

Economic efficiency, for instance, does not explain why the U.S. and the European Union maintain separate approaches to competition and anti-trust law, when a uniform approach would clearly benefit the myriad firms that conduct business in both regions.\textsuperscript{27} Rather, economic efficiency for the constituent members of their economies, or at least the multinational ones, is subsumed beneath the political benefit of maintaining this discretionary control. It would be more efficient to agree upon one standard as to what constitutes monopolistic behaviour or collusion, but still governments prefer to retain this discretion. It is ironic the trade relations of European Union, perhaps the world’s best representation of cognitivism, with the United States should so often correspond with

\textsuperscript{25} For a background on, and introduction to the Dispute Settlement process within the GATT/WTO, see, Trebilcock and Howse, \textit{supra} note 11, 112-147.

\textsuperscript{26} For further discussion of the international movement toward legalism and ‘judicialization,’ see, e.g., Robert E. Hudec, \textit{The Judicialization of GATT Dispute Settlement, in IN WHOSE INTEREST? DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE} 9 (Michael M. Hart & Debra P Steger eds., 1992).

\textsuperscript{27} See, Dunoff and Trachtman, \textit{supra} note 5 at page 24.
Realpolitick. Nevertheless, the often and multiple obstacles to international agreement do not always fit into the rational requirements of economics, nor the easy rationale provided by globalization.

With prior political obstacles in mind, the procedural pull of international law may serve as an incentive away from the currently less practicable. A procedural pull, therefore, draws upon the universal basis of law in an ideal fashion, invoking the promise of equal application regardless of parties and influence. It is an ideal that should be included in the form of all competitive systems, for it will inspire increasing confidence, and through it greater cooperation.

C. Diversity

Beyond the reliance upon the universal legality signaled by a procedural pull lies an incentive arguably far greater, that of state self-interest. In the draw toward international agreement there is perhaps no greater motive than that of competitive desire. The theoretical system sketched here relies upon the self-interested nature of state behaviour to argue for new instances of cooperation that would fulfill benefits beyond the mere satisfaction of that same competitive impulse. Beginning with a foundation of state self-interest I draw out two related aspects explaining why the differentiation of competitive state behaviour is required, and how it may be articulated. Before detailing the content of these following and proposed components I will give a general theoretical setting to competitive interests and systemic diversity.

Recalling positive, or descriptive, elements highlighted earlier, the purpose here is to join thinking on economic impediments to agreement, transaction actions in particular, with the cooperative potential expressed in IR theory. As a form of entry position in the consideration of international coordination, transaction costs may indicate the strategic difficulties in arriving at coordinated solutions to such problems as the environmental commons. Put differently, economic reasoning may confirm the inability of international cooperation in a given subject area, and then provide a rational explanation of the gulf between rational strategies and the adoption of international commitments. For example, it may be conceivable to competitive parties that more efficient outcomes for each member of a community might be had through coordination, but the short-term and individual gains that may be had from self-serving behaviour far outweigh the huge costs required. It may be either that no single party possesses the resources to create order unilaterally or that the costs of collective organization are too high, but it remains that individual calculations consistently and continually win out over the potential benefits of coordination. In short, the economics of transaction costs provides us with a basic insight that there exists an individual strategic explanation for the inadequacies of cooperation, no matter how the irrational the group result may at first appear.

If transaction costs may help demarcate the tremendous obstacles facing further international cooperation, the theoretical degrees of cooperation within IR theory may help to minimize the distance between the present anarchy and the potential gains of cooperation and order. So, if an economic view indicates that optimal competition would occur with a greater measure of individual restraint, and also reveals the impediment costs that make strategies of cooperation near to impossible, IR theory may aid in the
incremental steps toward relieving this high hurdle. In deeming IR schools to be of a degree - from realist, to liberal institutional, and finally to cognitivist – I refer to a small spectrum moving from pure self-interest to the possibilities of interaction. As if mirroring political conceptions on human nature, the previously dominant school of realism is purely, even one-dimensionally, self-interested. Neo-liberal institutional theory occupies the middle position of the spectrum, joining the self-interest with the nuance of cooperation, finding in it a means to self-interested ends. Cognitivism then bookends the spectrum, speaking of the possibilities of altering individual conceptions of self-interest through interaction and institutions of cooperation.

While cognitivism yields the potential, in which states may learn from the language and form of their cooperation, it is important to note that it does not supplant self-interest in toto. Cognitivism does not posit an ideal state in isolation, a completely different view of human nature free from self-interest as it were, but rather requires that the institutions of communication be created first. The basis, then, of moving incrementally toward strategic calculations that may one day favour the solution of greater international problems remains securely within straightforward state self-interest.

To achieve the move from isolated state interest, finding strategies on the basis of short-term gain alone, to a point when cooperation becomes a more desirable option, requires systemic enticement. As a faith in procedure may reassure parties contemplating further cooperation and institutional growth, an even greater enticement lies in pure state interest. To make international agreement desirable for each individual state, and then cascading with momentum as greater numbers and greater powers sign-on, requires that there be a convincing benefit to be had. In competitive terms, to envision a benefit means
that a party is able to envision succeeding under an adopted institutional scheme. Now it is of course impossible to consistently guarantee success, despite whatever systemic logic may apply economically to the issue area and for the collective in whole, such as with a global environmental commons. However, an elemental aspect of a proposed, and even aspirational, scheme of international law is that it appeals to the competitive contemplation of parties, so that they may each envision an approximate avenue to their own success and its constituent members of firms and individuals.

D. Diversity and Differentiation of Success

An obvious difficulty, perhaps, with the above incentive of providing recognizable potential for success is that international coordination has not, or does not, operate in this fashion. A cynical, or even realistic, reading of modern international affairs will reveal a tradition nearer to the application of asymmetrical power than to the democratic assumption of institutions in which each member must be equally encouraged into agreement. After all, the current international economic order is often characterized more by imposition than by consensus, with international institutions such as the IMF and the WorldBank dictating the monetary and fiscal policy for many international members.

While the intricacies of these arrangements, with western institutions as stern lenders to developing countries, lies beyond the scope of this chapter, it is enough for now to acknowledge that international economic consensus may not be viewed as either amiable or ideal. The first defense offered to predictable criticisms of realism would be that this account offers a theoretical ideal, the expression of a goal and not the description of what currently is. But something more is needed, admittedly. A second, and more
fundamental, argument in response to realism is that the current system, with its imposed status quo, is faulty based upon its own liberal terms. I offer this argument, not based upon any enlightened notion of human rights or of a shared human dignity that has been slow to spread with market liberalism, but on the economic tenets said to value individual preference above all else.

The liberalization of markets is an arguably admirable goal, spreading prosperity with it in fits and spurts, but its international application has thus far concentrated on private actors and the transnational trade of firms of individuals. But just as governments are essential components in domestic order, providing goods the market would or could not, so too are states important contributors to the furtherance of public goals on an international level. In the homogeny of market solutions currently propounded under western neo-liberal economics, the differentiation of national economies through state policy has been deemed parochial and necessarily inefficient, despite obvious transgressions by main and powerful players.29 It is as if the doctrine of market liberalization has superseded both the viability of domestic state policy and historic precedent. First, it should be remembered that the most successful national economies of recent memory have emerged and developed through individual circumstances that do not correspond with the neo-liberal economic norms of government non-intervention, as represented in the Washington Consensus, whether the example is of the British, American, German economies, or those of the Asian tigers – the New Industrialized Economies. Second, as John Gerard Ruggie has observed insightfully, the post-WWII consensus that would give rise to the present day economic and trade regime was founded

29 Id.
initially on both international liberalism and domestic interventionism. The international liberalization of trade has succeeded to such an extent that it no longer seems possible to think of domestic intervention as an equal policy objective existing alongside. It as if success breeds unwieldy success, and with it developments not entirely welcome.

In the plainest terms, if an economic market thrives on the availability of choice, both providing and rewarding based on competing options placed before consumers, this choice would achieve greater potential were international diversity, rather than homogeny, encouraged. The international race toward efficiency, put bluntly as a drive to do things more quickly and cheaply, is more than adequately served by the current international system of neo-liberal uniformity. However, a fundamental economic aspect not covered by this blanket drive to efficiency is that of innovation. It goes without saying that economic, as well as social, advancement occurs as new forms, techniques and technologies are developed and put to competitive use. But the current system only promotes competitive efficiencies as they currently exist: it does not contain a mechanism for furthering the content of creative regulatory solutions internationally. Returning again for analogy to the ABC example dealt with above, the trade pact between the parties widens the market to include three zones where there was before only one. This pact increases competitiveness in that each local industry or producer must now compete with the best, most efficient producer from a neighbouring society. The benefits to such an arrangement for the consumers of ABC are quite clear, as mentioned above. Yet, the missing piece, arguably, is the potential gain gone unrealized.

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Each state, of ABC respectively, before the trade pact would have organized their policies and energies in different manners and with different priorities. When combined under the new competitive environment of the free trade pact, some of these policies will have resulted in competitive advantages, such as a highly developed postal system for instance, while others would not. The point is that a diversity of forms and techniques that originally gave rise to benefits for others will have been lost in the exchange for uniformity. The competitive dictates of efficiency and reward will remain a competitive incentive as ever, but a fundamental instrument for the provision of difference will have been lost, and with it unknown future choices available for innovative production.

Put in the terms of unrealized options, the theoretical call for diversity is articulated on a plane of group benefit. In this way, the call for diversity is not about the sovereignty of state policy alone. Indeed, it becomes a means to a greater end. The articulation of diversity serves egalitarian objectives in seeking an incentive for each individual participant that is joined with majoritarian objectives, so that differentiation and individuality serve the greater whole simultaneously.

E. Defining the Diversity of Success

Since success cannot and should not be guaranteed to each party contemplating an international agreement, the matter becomes one of differentiating between the openness of competitive outcomes and the means by which individual attempts will be rewarded. The needed pull of diversity as incentive, in which each may envision success, must be balanced against, and kept within the context of advancing international norms toward the solution to ever greater problems. The form of this solution need never be unitary or
completely defined, for this would enter the realm of one world government and the current impossibilities illustrated by transaction costs law and economics. Instead, in a form of neutral perfectionism, systemic goals may be broadly defined by the collective itself in a way that encourages a diversity of competitive attempts and unknown results. It is at this point, the final stage of theoretical development, that non-economic social values may come to the fore.

As the dual enticements of procedure and diversity are to be combined to provide for a general overview of what persuasive international agreements governing competition are to look like – that is, the procedural reassurance of universal application and the design intent that each should be able to envision success – it remains to elaborate how this second systemic pull is to articulated. Non-economic social value, accordingly, may act as the mechanism for differentiation. Assuming a baseline amount of support for cooperation in a given issue area and along a certain ideological framework, such as that of neo-liberalism, the question then becomes one of ascertaining how systemic rewards are to be designed into the system. Significantly, non-economic value may here play a dual role, of both offering the enticement into agreement and providing the evolving reward structure of the agreement.

On the entry level, non-economic social value may allow previously disadvantaged members to foresee a new advantage or potential means to success. On the second and next level involving sustained competition, non-economic value may then provide the incentives for competing parties to attempt different paths to success, indirectly allowing more options and market choices that ultimately benefit the whole community. As a hypothetical, consider once again the states of ABC. Suppose that party A is much more
They agree that economic liberalization between ABC is to be encouraged generally; and that their agreements should be governed by an adjudicative body that will independently hear and try disputes between the parties based upon their agreement and any jurisprudence that develops out of it. At this point, there exists a broad ideological agreement combined with the incentive of a universal procedure. Party A, being the stronger party, seeks to simply confirm a free trade agreement on these terms alone. Parties B and C, however, are wary. In a desperate move, the parties call upon an independent advisor, of hypothetical and neutral insight.

The advisor proceeds to advocate for a competitive system that will at once recognize their unequal start-positions and permit for relatively equal competition to begin immediately after their agreement. The first stage in this advisor’s brief is to propose that each party be given the ability to envision success in whatever system they agree upon. This would undoubtedly appear an unexceptional request, and we may from it readily believe that all three parties would agree to it. The advisor then indicates that systemic rewards, in the form of the benefit given by reduced trade tariffs that are placed upon a nation’s goods, shall be based upon the achievement of non-economic social goals. The underlying purpose, the advisor explains, is to arrange the competitive start-position so that each progression, in whatever direction and in whatever field, is rewarded by the system created by the parties.

The advisor is able to identify rough competitive advantages currently enjoyed by each party. State A has a highly developed economy and well-educated populace. States B and C have relatively less educated populaces and lower levels of economic
productivity. Two issue areas become apparent to the advisor: education and economic output. Although country A has distinct advantages, these advantages should not be exported automatically unto the others as if it were the solution ready made. Rather than simply adopt a superficial model of country A’s economy, which has had a distinctive history in comparison with B and C, the advisor attempts to give each party an incentive into, and viable strategy for success within, the new system. To begin, the advisor defines three values:

E = economic growth

L = education of populace

I = environmental impact of economy

While country A is clearly ascendant in the categories of E and L, it is just as clearly deficient in terms of I. The two key aspects of the game were identified previously as E and L, but the advisor goes on to make two revisions. First, the game itself is about E – it is the outcome that is desired by each party, and therefore, it is the end within which incentives are to be directed. It would hardly make sense to devise a competitive card game by declaring that the player with the most money coming to the table should receive almost all the cards.

The additional money player A has, from its advantage in regards to E, is undoubtedly a strength – just not one that should be incorporated into game play. Rather, the contra side of A’s past economic success has been a severe degradation of its own environment, and by extension, that of others as well. Should B and C attempt to follow the path to success first blazed by A, the collective of ABC would not be able to withstand it. Therefore, two related incentives may be discerned within A’s overall
ascendancy: One, that of increased the education levels of a society’s populace, and; two, reducing the environmental detriments caused by one’s society.

Suppose, then, that tariff rates were set along a current baseline of forty percent. A previously agreed upon decrease in the tariffs a country’s goods faced could be arranged for each incremental improvement in either specified issue area of education or environment. State A may well have less room for growth in terms of education, perhaps meaning that incremental improvements might require huge investment to move from eighty five to ninety percent literacy, but then environmental gains will be more open. The fewer options presented to state A in this regard would arguably be made up for the fact that it both starts off in a far better position and that it is still better equipped for any social policy change or redirection as the more developed. Again, it is not equality of outcome or even precise outcome of opportunity that is addressed here, but the combined enticement of state participation with the achievement of collection solutions. Of the three hypothetical states, it would be A that would be most able to take advantage of the game design. What this scheme attempts to offer is that A’s advantages are not absolute, and that B and C have a viable opportunity to gain rewards on the basis of their current strengths, all the while systemic objectives and goods are advanced.

States B and C, within this hypothetical proposal, do not magically achieve equal status and opportunity with A. They do, however, gain a very significant advantage that might not otherwise have been open to them. States B and C, beginning with a strength in the environmental area given their far lesser impact, might wish to spend an increased amount of their domestic expenditure on education in order to provide their growing industries with the trade benefit. Alternatively, they might wish to preserve their
environmental advantage by promoting less exploitive practices, and the use of their resources in a blended approach between environment and education. Which practice from the above two examples, out of myriad possibilities, would be successful is of course unknown, and should be. This is precisely the point of having the market continue to reward competitive attempts.

Beyond the enticement of parties of disparate power into agreement, the promise of this theory is that the unknown and unpredictable essentials of market competition may continue with greater pace while simultaneously advancing social goals outside of traditional economic definition. For instance, the developing state pushed presently to deforest a region may now conceivably be given an incentive to maintain it for the added benefit that attaches to any export it has. Not only may new forms of coordination and technique be addressed, but it may be done in a fashion that alters state strategies to further goals beyond short-term self-interest.

To summarize and concentrate the above ideal advice: Beginning with the address of choice in abstraction, the designer might define the general scheme of priority numerically and as follows:

<table>
<thead>
<tr>
<th></th>
<th>A (A2)</th>
<th>B (B2)</th>
<th>C (C2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>0</td>
<td>6</td>
<td>5</td>
</tr>
</tbody>
</table>

The labels A, B, C, refer to three competitors, while the corresponding number below represents their individual gain in round one, before the prearranged principles of social goal and concern have been incorporated. The labels of A(2)… refer to the practices of the competitors which have impacted upon a prearranged subject area of concern, such as the environment. In the most straightforward manner, the administrative object would
then be to incorporate the secondary benefits into each actor’s individual result. In this simple example it would enough to conclude that B and C should have their individual results (through taxation relief perhaps) include the added benefit of two units. The result prior to social priority, the non-bracketed values, would find A the most successful. With principle incorporated, the bracketed values, it would be B who is most successful. The practices of B are therefore to be the most rewarded strategy, conceivably altering the conceptions of other competitors who will respond with renewed assumptions on what is successful.

And while the above numerical example corresponds with the ‘qualities of the winner’ approach indicated by ideal choice, it would be the duty of the designer to envision a wider competitive system that builds from these impulses into the greater principles of diversity. First, an evolutionary assumption of unpredictable success is established through an economic measure such as taxation, or trade tariff, which will act as the reward for various strategies. For present purposes let us assume a universal tax, or tariff (the value T), upon the goods exported from each member country, or ‘individual.’

Second, social goals (SG) are to make up the rewards that encourage differentiation, taken here as a group of labour standards, environmental degradation, and education (L, D, and E respectively). Notably, present here is a mix of a concerns, both for purposes of social advantage and, more importantly, for the opportunity of individual attempts at success. The designer would accordingly devise an indexed system of economic reward, in which the satisfaction of prearranged social priorities, with the three areas above as example, would lead to preference in economic treatment. In keeping with the third principle of diversity, principles which encourage individual autonomy are to be
furthered especially, and in this case could be seen to favour the lessening of environmental degradation (D). The consequence of social goods upon a competitor’s standing may be symbolized by the value of C. The designer’s simple development from the ideal choice matrix displayed above may take the following form:

\[ C = T \times \text{SG ratio} \]

where \( \text{SG ratio} = \% \text{ gain in } L + D(x2) + E \)

The point of moving between the simple examples above is to note the introduction of multiple concerns for multiple rewards. An indexed system of prearranged reward offers the opportunity for a widely improved differentiation of viable strategies. Moreover, an adequately designed system promises equal opportunity for each to at least envision success. Note the above scheme example and imagine an economically developed and less developed state facing competition: while the developed state may be assumed to have immediate advantages in the form of an educated society (E) along with stricter labour standards and enforcement (L), it is the less developed country that has an equal advantage in having much less of an impact upon others (D).

The future effect upon state and individual strategy is imagined easily enough, for either developed or less developed state may seek to gain economic advantages for its individuals and industries (T) by improvements in areas of weakness rather than exacerbating past and current problem areas. The less developed may wish to maintain some environmental advantage, which now translates into economic gain, just as the developed state would have renewed incentive to lessen their environmental competitive disadvantage. So while the important first and second principles of diversity, of evolutionary system and social reward, set the structure of competition, it is the essential
ingredient of autonomy and individual potential which allows for the ideal that each individual actor will have to begin from current positions to seek reward. The ideal system of diversity, therefore, allows for creativity to compete in a regulatory first instance, in which present circumstances are accounted for but not favoured in the way forward.

VII.V CONCLUSION

The international system is rife with difficulties of coordination that approach the seemingly impossible. However, situations, and the surrounding reality of possibilities, change. European integration, for example, has helped transform the previously constant threat of war between the European powers into the inconceivable. With admittedly less ambitious aims than the elimination of armed conflict, this chapter has nonetheless attempted to articulate a competitive ideal which embraces the dynamic of social evolution. As interests and strategies are variable, and capable of finding various expression, the design of competitive rules may direct actors toward discovering strategies that may simultaneously advance social goods. The power of the market is ideally retained with such a model of diversity; but it is made to serve equitable social goals along the way to individual success and reward.
A. Concluding Thoughts on Legal Application

Before turning to concluding thoughts on the ideal of diversity, and its wider significance as a principle of international organization, it may be appropriate to reiterate the legal influence provided potentially by the concept of diversity. This potential legal influence may be viewed as of varying levels of prescriptive application and ambition; varying from an ideal characteristic of future global legal structure to a concept of insight for domestic rule setting.

On the first, most ambitious level of potential legal influence, diversity serves as an ideal for a new system of international regulation for economic competition. As the argument for this ideal regulatory model has formed the core substantive drive of the preceding project, the extent of potential legal influence is hoped to be readily identifiable. At this point, it may do to simply reiterate the main aspirational, normative quality of this project. Assuming that an international consensus among state actors emerges on the need to confront a serious global problem of competitive insecurity, such as on the issue of climate change for instance, then diversity is argued to be the ideal framework for regulating a system that is adaptable to meet future and unforeseen challenges. The prescriptive level of this argument is thus the most normative, and even abstract, of those considered here; as it joins an assumption of international response with an argued for should to be put in place on a global level. The weight of the above project, accordingly, was given to the justification in self-interest, and in individual notions of justice, for this normative position.
The normative element inherent to the concept of diversity continues through to a second, though admittedly less ambitious, potential legal application. From a move toward articulating a global system of enlightened trade regulation, the argument for diversity may also take the more modest move toward influencing the evaluation of international law from a purely theoretical or scholastic sense. As introduced in chapter seven, the concept of diversity may serve as instigation to a more normative evaluation of existing and developing international laws; even absent the more fundamental systemic change envisioned in the preceding and primary level. The difference between these levels of ambition and normative prescription may described as that occurring between the role of diversity within a major global system redesign and that within the study of the global system continuing under present assumptions.

The normative element of diversity within present assumptions concentrates on a more rigorous and demanding view of international legal agreement formation, especially in regard to the degree of a problem confronted and the obstacles to coordination. So, rather than a purely legalistic, or textual, reading of agreement or treaty language, a more economic view of purpose and effect may be called for. First, problems of straightforward coordination, with little advantage for non-compliance, must be separated out from the much more substantial problems that require restraint to avoid the tendencies to gain competitive advantage through non-compliance or withholding agreement altogether. As such, lessons from straightforward coordination should not speak to international tendencies that involve competitive insecurity. Further, and in a related sense, an economic view to transaction costs may be useful in indicating the degree of rational obstacles to coordination that result from the difficulty of high costs and diffuse
interests that do not rise to a sufficient level of efficient action on the part of any one single party.

These steps of problem identification indicate that not only is a textual reading of internal law overly limited at times and in certain contexts, but it helps introduce a wider normative aspect of study: that is, the agreements that are still outstanding and that are called for given international problems of costs due to the deficiency of coordination. While diversity is proposed as an ideal regulatory design in the absence of absolute international governance, this second level of normative legal influence envisions further steps in between evaluation and solution. Namely, the concept of diversity appeals to, and provides for, a view to regulatory incentive that is applicable beyond the concept of diversity itself.

The argument for diversity is conducted so as to highlight the need for procedural and substantive incentives to encourage state actors toward agreement. This is, arguably, an underappreciated aspect of international legal study; and the consideration of what is needed to render a proposed international agreement acceptable to a widespread group of diverse actors is inherently significant when thinking of legal agreements to come, and how they are formed. Therefore, the consideration of procedural pull of a rule based and neutral system combined with a neutral start position is an aspect of diversity that may be applicable well beyond the proposed system of diversity. This dual view to systemic enticement and fairness may provide a normative ideal for many international agreements, and a serve as basis for how global problems are evaluated in light of nascent international coordination proposals.
Finally, diversity may be seen as providing principles to guide or influence law in a domestic context. Although diversity has been offered explicitly as an ideal of regulating international competition, the enunciation of a theory of rights may find a domestic application. The prescriptive usage in this domestic context may potentially include areas from common law interpretation, to statutory reading, and to domestic law design.

On the level of common law interpretation, diversity could help reconcile between conflicting rights in which neither party to a dispute has a clear presumptive claim to priority. Recalling the nuisance examples utilized by Ronald Coase, in which the right to act is in legal conflict with the right to be free from the effects of the act, provides a key to diversity’s domestic potential. Whereas Coase attempted to offer economic efficiency as a means of deciding the conflict between apparently equal claims of individual right, by evaluating the economic utility of the individual resource usage, diversity would point to the remaining social potential left after a rights entitlement. Under diversity, the greater capacity of second and third parties to explore different opportunities might lead to a rebuttable presumption in favour of the right to silence as opposed to the right to make noise, for instance. As with Coase’s influential approach, diversity may provide for a reasoned and persuasive means to giving priority between interests of conceivably equal claims to liberal individual rights on a basic level of interaction, of individuals living together in complex and interconnected circumstances.

In a related fashion of deciphering ambiguity to resolve conflicting rights, the second instance of domestic application for diversity may extend to statutory interpretation. For instance, it may be that a piece economic of regulation results in two parties disputing who is to gain priority but that specific terms of the act do not clearly
indicate priority. In such a situation, the overall statute may be read to provide systemic objections and then the specific conflict may be read in terms of whether their competitive situation serves to further greater opportunities for others in similar circumstances. So, if a statute is directed thematically to low energy pricing for consumers, then two competing claims from energy firms might be viewed via the lens of diversity to indicate that the winning right should go to the firm whose position leads to new and potentially innovative energy delivery technique. Though this is consistent with statutory interpretation in general, the introduction of a view to diversity would simply entail the recognition of precedent as guiding future strategy formation. The simple decision-making influence of diversity, within statutory themes and when confronted with ambiguity as to priority, would provide guidance based upon which rights award would lead to the widest variation of attempts that may improve and advance the overarching statutory theme by future competitors or applicants similarly situated.

Predictably, the third instance of diversity’s potential domestic influence may be imagined on the level of legal design, of legislative writing and statutory creation. It is on this level of domestic legal design that the analogy to diversity as a proposal for the international system becomes most apparent, for it envisions the use of social goals as a fundamental guide to competition and those regulated. In keeping with the energy regulation example used above, law makers may define a social goal such as environmental impact to work alongside a standard economic goal of efficient energy provision. Diversity may then inform statutory creation as the designers contemplate what types of regulatory incentives may lead competitors to consider previously unconsidered options of environmentally sound energy provision. The regulatory task
then would be to allow for environmental improvements in energy provision to count as measure of efficiency advance, reordering the basic calculation of what equals the lowest price delivery. What must begin with a political decision to include a new social priority, such as environmental impact, should then proceed to design for an openness of outcomes within predetermined signposts of reward for deciding between two strategies, of past success and of future risk in innovation for a competitive windfall.

The preceding analysis of potential legal influence is not intended to reconfigure this project; but simply serve to illustrate a common basis of appeal presented by the concept of diversity. Accordingly, and for instance, the potential application of diversity to a domestic legal context is not meant to extend this project beyond its stated focus of international competitive regulation, but merely to reiterate diversity’s place within legal theory as a minor variation on thoughts of priority setting and what might be called a political philosophy of regulation. The main advantages claimed for the proposal of diversity remain those connected to the level of international competition and its organization.

B. Concluding Overview and Object

There are small and apparently simple problems involving individual thought and choice that become remarkable through their stubborn avoidance of a solution. The Prisoner’s Dilemma is such a problem. Despite the availability of colloquial examples and the limited figures to consider, the intransigence of the problem remains, and a rationally appealing solution remains unattainable. There are also small and simple problems that become remarkable through the gravity of the consequences that result
from their stubborn avoidance of a solution. The Tragedy of the Commons is such a problem. Despite an equivalence to colloquial examples of figures on limited and imaginary pastures, the intransigence of the problem has attained global significance, and a compelling rational solution is now required.

The dissertation presented above has attempted an entrance and voice within these above observations, combining a view to simple patterns of individual choice with grander questions of individual political responsibility, and accountability for wider and future social concerns. A theory of diversity is directed at answering the questions of organization that have not yet been asked, but should be.

What began in chapter one with a broad question of competitive coordination, which proceeded via a discussion of the example of the Kyoto Protocol, served to set both the problem and the focus of examination in strategy and individual choice. The specific problem surrounding Kyoto is obviously that of global warming, but the example was chosen for its wider relevance to all forms of market failure. The point, then, of chapter one was to introduce and engage with market failure itself; the endemic situations in which parties defect for imagined short-term gain at the expense of the actual gains that coordination would have yielded. So while environmental degradation is arguably the most pressing and visible example of market failure, the theoretical response of this dissertation was directed at the tendencies of such failures, not limited to any one particular subject area.

From tendencies comes a view to strategies. The tendencies in a competitive situation equate with individual strategies and provided methodological inspiration for this wider project. A strategic view of individual choice was used to illustrate suboptimal
situations over time so as to measure the efficacy of legal rules, or even the consequences of their absence. The concept of rationality over time, through repeated strategic choices, is essential to show both the decreasing benefits that accrue to each competitor under sub-optimality, and also the effect upon strategies taken in response to legal regulation. The notion of interacting movement between law and strategies sets a measure of analysis, and also pointed to theoretical requirements for dramatic systemic revision. A proposed response for facing such radical calls for change accordingly formed the heart of this preceding project.

The search of a method to help solve dramatic system failure led to considerations of evolution; biological, legal, and economic. The issue of competitive uniformity was addressed in the second chapter, which considered different conceptions of how ideas are seen to compete in both economic and legal fields. Accordingly, legal pragmatism was compared alongside of traditional economic theory to illustrate cases of evolution to perfection – that is, that society is constantly improving in its techniques and manners of competition. By way of contrast, the divergent theory of path dependence was introduced to illustrate the argument for how locked in advantages from the past may serve to exclude more beneficial solutions in the present and future. A dilemma of economic regulation emerges between these different conceptions of evolution, for as it is surely inopportune for competition to align along one way of competing to the exclusion of alternative ideas, so too must undeniable insights and advantages be adopted by others. And though it is difficult to envision one single explanatory system operating to indicate when individuals and society should make a radical shift in competitive paths, a
straightforward indicator for such change would occur when a uniformity of strategies is joined with continuing sub-optimality.

As a theory of diversity takes some bare inspiration from evolutionary biology, in which the environmental system selects out forms of variation for competitive success, the advocacy for differentiation should be unsurprising. While not a wholesale rejection of convergence to a successful strategy, a theory of diversity does argue for a constant opportunity for differentiation through offering multiple features of regulatory reward. An engagement with legal pragmatism, and the work of Richard Rorty, allowed for the political philosophy version of diversity to connect to find an alternative expression in the form of individual creativity. As Rorty argues that individuals of ‘heroic’ creativity have served to alter social truths, then to embrace this realization fully requires that all individuals be encouraged to each attempt such heroic variations. Diversity entails a modest worldview, in which society is never assumed to have answered perfection, with an openness to the next insight must be favoured by competitive regulation that allows for alternative rewards for the as yet unforeseen development.

Chapter three began this project’s turn to a consideration of international agreement, addressing the question of how an international membership of states would best choose their principles of economic organization in response to dramatic competitive insecurity. As potential member thoughts on a new combination of individual and group organization for competitive organization would likely turn to major themes within the tradition of liberalism, these themes were considered in light of unpredictable and changing external knowledge.
Taking the right and good as broad categories of how a liberal society’s organization might be inspired – of what priorities might be chosen to inform a new competitive system – these categories were then evaluated by their potential responsiveness to changing circumstances. The environment once again served as a convenient example, but as before the example is applicable to wider instances of change. When measured against the ability of adapting to significant change in how the physical world is understood, such as with global warming and its environmental and economic implications, neither the right nor the good appeared especially adaptable. This is admittedly unsurprising given the longstanding history of both perspectives.

The analysis conducted above, however, did point to benefits contained in each perspective. For instance, the good is inherently able to respond to a given problem area, such as environmental degradation, by having that value occupy the central place in social priority – by making it the good as it were, in which other rights and obligations will flow out of. The difficulty with the good is that once in place it contains no internal means for reevaluating the desirability of its own premise. A system of the good does not contain the means to trigger a reevaluation of the pre-chosen good for it defines all subsequent debate as operating within the assumption on the universal desirability of that same good. Conversely, theories of the right inherently contain such a mechanism for reevaluation, namely individuality and individual rights. Indeed, the right is about process above ends, honouring the individual actor to the exclusion of socially mandated visions of value. The difficulty of the right’s response to change obviously then occurs with its absence of, and an inability for, organizing principles that may often take precedence to individual autonomy.
Whereas chapter one was concerned with market failure, chapter four was concerned with failures of economic explanation, namely, the assumption of individual motivation and self-interested choice. This explanatory failure connects with the theme of this dissertation in chapter two argued that individual choice demonstrates a wider consideration of value than contemplated by traditional economic theory. Pointedly, what the ultimatum game example revealed was that not only were economic theory predictions on individual choice often times incorrect and under-inclusive, but that individuals display choice patterns which actually approach values contrary to self-interest as they favour fairness as a principle above their own gain.

The potential of varying principles displayed in individual choice is of elemental importance to question of system design, for it posits that rules or their absence in a competitive context may determine the availability of principled strategies. From out of the simple point of recognizing such a principled and hidden potential within individual choice grew the central ambition of the project: that international legal system design should account for the ability of group value to exist alongside of individual pursuits of gain.

Continuing the theme of abstract choice, chapter five attempted to justify a beginning point of abstraction for hypothetical system designers. In continuing the environmental example from chapter one, the view of abstraction was found to be especially well-suited to matters involving group benefit often at odds with individual gain. In sum, the potential demonstrated in part one in regards to the availability of individual value choice most likely requires that individual participants and system
designers first be placed in a decision making position of abstraction, and given the luxury of distance from their own immediate self-interest.

Out of abstraction, insights and advantages from both the right and the good were blended together in the sixth chapter. This chapter detailed a theory of diversity, and was the most theoretically ambitious and central of the dissertation. The right and good were blended by advocating for a theory in which the good is ascendant, but with the good defined as that of individuality. Individuality as the good ensures protection of individuals and minorities from the tyranny of the majority, as with traditional liberal rights, but a distinction appears in the value of autonomy. The good of individuality, and thereby of a theory of diversity, concentrates upon the active encouragement of individual differentiation, that individuals pursue as many viable alternatives as possible. The good is then focused upon the process of individual competition, and not is not content with individual separation by public right resulting in conformity in the private market.

The appeal of diversity was argued for in a manner of abstraction drawn from political philosophy, and John Rawls in particular, in which individuals would choose a system of diversity in response to a question asking on the characteristics of a game’s winner. Individuals would prefer to lose out to a winner who advanced common benefit en route to success and victory. Self-interest, in the guise of the cautious potential loser, thus supports principled results approaching altruism. A secondary order of good, such as environmental protection, then serves as encouragement within the array of strategies required by diversity. Individuals are encouraged out of uniformity by altered incentives, provided for by the secondary good, thus allowing for differentiation of competitive attempts as individuals contemplate new ways to success.
The main and most ambitious contribution was elaborated upon in chapter seven, combining a normative view to international legal study with an example of ideal system design. For international legal theory to contribute more to the discussion and perhaps future course of international affairs, the greater force of normative positions is likely required. Beyond a simple normative good or bad analysis of regulations which exist, a theory of diversity was argued to provide international legal theory with an admirable and workable addition to international legal theory discourse. Diversity is inherently amenable to multiple voices and directions within an international population of states, as it is a cross cultural approach that recognizes and encourages constantly evolving solutions of difference. What is more, diversity facilitates the democratic and international agreement on secondary goods such as – with agreement itself made more likely because of the recognition of drastically different ways of achieving regulatory reward.

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With brief space remaining to justify this project’s aim, and with hopefully little needed, a connection of ideas supporting this project’s proposed significance may be offered by way of final mention. Competitive insecurity is a ruinous tendency at once rational and irrational. With economic pressures often constraining and corrupting rational choice, the object is to identify circumstances in which individual competitors should orchestrate an abstract and new arrangement to their competition. Given this opportunity, how would and should these individual choose? This dissertation has argued that a ‘qualities advanced by the winner’ approach offered by diversity is at once the most rational and equitable to all.
Diversity entails that individual self-interest is recognized in both how individuals are enticed toward differentiation, and why individuals would endorse the qualities of the winner approach, while all the time honouring the diverse and other regarding principles individuals contain simultaneously with self-interest. For if individuals are seen to forgo self-interest for the sake of principle when their instincts toward fairness are offended, why should they not do so when it is to both their and other’s benefit? And why should not international regulation reflect this more measured impulse if it equally offers individual and collective gains? A historical tendency has been to extrapolate power hungry and self-interested states as mirrors of the individuals they represent; but if non-binary individuals seek and value more than pure self-interest, and our explanations witness more besides, perhaps these old tendencies can themselves be consigned to history.
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