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Preferences for Processes: the Process/Product Distinction and the Regulation of Consumer Choice

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<p>HARVARD LAW REVIEW</p>

ARTICLES

PREFERENCES FOR PROCESSES:
THE PROCESS/PRODUCT DISTINCTION
AND THE REGULATION OF CONSUMER CHOICE

Douglas A. Kysar

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PREFERENCES FOR PROCESSES: THE PROCESS/PRODUCT DISTINCTION AND THE REGULATION OF CONSUMER CHOICE

Douglas A. Kysar*

This Article examines a conceptual distinction between product-related information (such as whether a consumer good threatens to harm its user) and process-related information (such as whether a good's production harmed workers, animals, or the environment) that has appeared in various guises within international trade law; domestic environmental, health, and safety regulation; and constitutional commercial speech jurisprudence. This process/product distinction tends to dismiss information concerning processes as unworthy of attention from consumers or regulators, at least so long as the processes at issue do not manifest themselves in the physical or compositional characteristics of resulting end products. Proponents have offered the process/product distinction as a useful device for determining when consumer product regulations are likely to have drifted beyond the satisfaction of significant consumer interest into areas of unjustified alarm, disguised protectionism, or excessive encroachment onto competing interests, such as the speech concerns of product manufacturers or the domestic sovereignty of foreign nations. As this Article shows, however, the process/product distinction proves far too thin and formalistic of a conceptual device, once one examines the full panoply of reasons why consumers might express preferences for processes. Thus, rather than dismissing process preferences as especially likely to be ill-informed or otherwise objectionable, this Article argues in favor of acknowledging and accommodating such preferences within theoretical frameworks for policy analysis. Indeed, in view of several growing phenomena — including the cultural and political significance attached to the consumption function, the effort by regulatory cost-benefit analysts to ground public policies on the values revealed by individuals acting in their roles as market actors, and the integration of global product markets without similarly expansive integration of the global regulatory system — this Article concludes that, in the future, process preferences may serve as indispensable outlets for public-regarding behavior.

INTRODUCTION

Shortly after the terrorist attacks of September 11, 2001, U.S. Commerce Secretary Don Evans was quoted as saying, "People ask all

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the time, ‘What can I do, what sacrifices can I make for my country?’” His answer: “Go back to the stores.”¹ Although long present in political and popular discourse,² this conflation of patriotism with consumption, of civic life with market life, became unmistakably apparent in the wake of the World Trade Center and Pentagon disasters. Across the airwaves and in the newspapers, private consumer spending appeared as the primary, and at times the exclusive, avenue for citizen participation in the nation’s effort to recover from 9/11.³

A similar collapsing of citizen values and market values appears in the work of proponents of regulatory cost-benefit analysis. These thinkers argue that public safeguarding of endangered species, air quality, worker safety, and a host of other noncommodified goods should be derived not from the willingness of citizens to support protective legislation through political activity, but from the willingness of individuals to reveal a “vote” in favor of such goods through their decisions as consumers, laborers, or other private market actors.⁴ These choices, the argument goes, are untarnished by voter irrationality, agency capture, paternalistic overreaching, bureaucratic inefficiency, or any of the numerous other ills often associated with government action.⁵ In a particularly dramatic illustration of this stance, John Graham, head of the Office of Information and Regulatory Affairs for President George W. Bush’s Office of Management and Budget, suggested that revealed-preference methodologies could capture even the monetized value of liberty.⁶

For better or worse, then, the market and the consumer are central to public policy at the beginning of the twenty-first century. Indeed, Mark Sagoff’s careful effort to distinguish between the values that individuals express in their capacities as citizens and those that they ex-

¹ Brandon Loomis, *Commerce Secretary Urges Shopping*, AP ONLINE, Nov. 19, 2001, 2001 WL 30246793 (internal quotation marks omitted).

² See generally LIZABETH COHEN, *A CONSUMER’S REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* (2003).

³ Cf. Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 786 n.8 (2003) (“Another example of the neoliberal transformation of citizenship is the idea that Americans should express their patriotism in response to the attacks of September 11, 2001 by going shopping.”).

⁴ Such “votes” can occur either through the “revealed preferences” of actual individual market behavior or through the observed responses of subjects to experimental techniques, such as contingent valuation surveys, that attempt to provoke market evaluations of public goods. See Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L.J. 377, 383 (1998).

⁵ See, e.g., *id.* at 378 (noting that analysts “attempt to vindicate *consumer* behavior and often portray *citizen* preferences as misinformed, capricious, or insincere” (emphasis added)).

⁶ See Edmund L. Andrews, *New Scale for Toting Up Lost Freedom vs. Security Would Measure in Dollars*, N.Y. TIMES, Mar. 11, 2003, at A13 (describing a request by the Office of Management and Budget for economic data regarding the value of privacy and liberty lost due to tighter security measures).

press as consumers⁷ has been challenged in fundamental ways by the growing dominance of market-centered liberalism within academic, policymaking, and public circles. Not only have Sagoff's powerful arguments failed to slow the movement toward greater reliance on private market decisions as the standard for government provision of public goods,⁸ but also, and perhaps more significantly, the very citizen voices that Sagoff aims to preserve as the basis for societal decision-making seem endangered, as citizens come to view the government and the political process in primarily market terms.⁹ In that sense, even if Sagoff's view does prevail at the level of policy development, such that environmental, health, and safety standards continue to be determined by the willingness of citizens to vote rather than the willingness of consumers to pay, the distinction will have little practical significance if voting itself becomes simply another self-conscious manifestation of market preferences.

This Article does not rehearse the well-worn, but important and continuing, normative debates regarding the use of cost-benefit analysis in environmental, health, and safety regulation.¹⁰ Nor does it analyze the role of commercial relations and commercial activities in public life, except to observe their increasing prominence.¹¹ Instead, this Article examines recent developments in international trade law; envi-

⁷ See MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* 7–10 (1988); see also ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 144–47, 158–59, 203–10 (1993) (characterizing the market as “impersonal,” “egoistic,” and incapable of adequately capturing the value of shared goods such as environmental quality); CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 21–23, 44–45 (1997) (providing a variety of reasons why citizen preferences are more likely than consumer preferences to reflect concern for the public good).

⁸ See CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION*, at ix (2002) (“Gradually, and in fits and starts, American government is becoming a cost-benefit state.”).

⁹ Cf. COHEN, *supra* note 2, at 397 (noting that in the 1990s “the market relationship became the template for the citizen’s connection to government,” and describing consequences of this development).

¹⁰ Compare FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2004) (arguing that economic cost-benefit analysis is an unreliable decision technique that can never capture the full value of human life and health), with CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* (2002) (arguing that cost-benefit analysis should guide government regulation and that such analysis need not undervalue life and health). For a summary of many of the important arguments, see Douglas A. Kysar, *Climate Change, Cultural Transformation, and Comprehensive Rationality*, 31 B.C. ENVTL. AFF. L. REV. 555, 562–89 (2004).

¹¹ See ULRICH BECK, *WHAT IS GLOBALIZATION?* 9 (Patrick Camiller trans., Polity Press 2000) (1997) (defining “globalism” as “the view that the world market eliminates or supplants political action”); THOMAS FRANK, *ONE MARKET UNDER GOD: EXTREME CAPITALISM, MARKET POPULISM, AND THE END OF ECONOMIC DEMOCRACY*, at xv (2000) (calling “[m]arket populism” the “centerpiece of the new American consensus”); LESLIE SKLAIR, *GLOBALIZATION: CAPITALISM & ITS ALTERNATIVES* 108–15 (2002) (describing the “culture-ideology of consumerism” as one of the central pillars of neoliberal globalization).

ronmental, health, and safety regulation; and constitutional law, all of which challenge in subtle ways the notion of a stark divide between citizen preferences and consumer preferences. Specifically, these developments suggest, at least with regard to some areas of choice, that consumer preferences may be heavily influenced by information regarding the manner in which goods are produced. Such information — which this Article refers to as “process information”¹² — can include the labor conditions of workers who produce a consumer good, the environmental effects of a good’s production, the use of controversial engineering techniques such as genetic modification to create a good, or any number of other social, economic, or environmental circumstances that are related causally to a consumer product, but that do not necessarily manifest themselves in the product itself. As will be seen, although such factors generally do not bear on the functioning, performance, or safety of the product, they nevertheless can, and often do, influence the willingness of consumers to purchase the product. Consumers, in other words, often have “preferences for processes.”¹³

Such preferences long have been a feature of the mass consumer marketplace — consider, for example, once-significant levels of con-

¹² A common term from international trade discussions, “processes and production methods” (PPMs), highlights the “way in which products are manufactured or processed and natural resources extracted or harvested.” ORG. FOR ECON. CO-OPERATION & DEV., PROCESSES AND PRODUCTION METHODS (PPMs): CONCEPTUAL FRAMEWORK AND CONSIDERATIONS ON USE OF PPM-BASED TRADE MEASURES 7 (1997), available at [http://www.oecd.org/olis/1997doc.nsf/87fae4004d4fa67ac125685d005300b3/e84ef77f9aae7954c12564f000379377/\\$FILE/o8E73097.ENG](http://www.oecd.org/olis/1997doc.nsf/87fae4004d4fa67ac125685d005300b3/e84ef77f9aae7954c12564f000379377/$FILE/o8E73097.ENG). This Article conceives of process information slightly more broadly to encompass not only production methods, but also a variety of social, economic, and ecological effects of production.

¹³ See ALFRED C. AMAN, JR., THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM (forthcoming 2004) (manuscript at ch. 4, at 4–5, on file with the Harvard Law School Library) (recounting recent instances in which consumer awareness of labor conditions has led to boycotts and other market actions); ORG. FOR ECON. CO-OPERATION & DEV., ENVIRONMENTAL LABELLING IN OECD COUNTRIES 9 (1991) (observing “recent growth in numbers of environmentally concerned consumers throughout the OECD area”); ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 12, at 7 (“Consumers in many countries are increasingly seeking information on how the PPMs of the products they buy affect the environment.”); ENVTL. PROT. AGENCY, ENVIRONMENTAL LABELING ISSUES, POLICIES, AND PRACTICES WORLDWIDE 60 (1998) (identifying forty-nine “third-party” environmental labeling schemes worldwide in 1997, only seventeen of which existed in 1989), available at <http://www.epa.gov/oppt/epp/pubs/envlab/wwlabel3.pdf>; Julie A. Caswell et al., *Unifying Two Frameworks for Analyzing Quality and Quality Assurance for Food Products*, in GLOBAL FOOD TRADE AND CONSUMER DEMAND FOR QUALITY 43, 55–58 (Barry Krissoff et al. eds., 2002) (identifying animal welfare, biotechnology, environmental impact, worker safety, and other “process attributes” as important components of consumer product evaluations); Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 176 (2004) (noting that “as environmental data and analysis become more accessible, additional buyers will be positioned to factor environmental considerations into their choices”); Heiner Imkamp, *The Interest of Consumers in Ecological Product Information is Growing — Evidence from Two German Surveys*, 23 J. CONSUMER POL’Y 193, 195–99 (2000) (observing an increase between 1989 and 1998 in consumer interest in information on the ecological impact of products).

sumer demand for “Union Label” goods¹⁴ — yet the theoretical challenges that they pose have been insufficiently explored. Given the partial dependency of consumer demand on perceptions of manufacturing processes, lawmakers cannot determine product information disclosure policies strictly with reference to revealed preferences in the manner desired by advocates of cost-benefit analysis, at least not without engaging in a form of analytical bootstrapping.¹⁵ Instead, some prior decision must be made about how to manage consumer access to process information, a decision that in turn influences the pattern of preferences that will emerge following the regulatory decision. For example: To what extent should consumers be made aware that animals may have suffered pain in order for a particular product to reach the market? Should governments require labeling of food items that have been developed using genetically modified (GM) ingredients? Should national governments be able to require foreign producers to disclose information regarding production processes if the processes do not physically impact consumers or environmental conditions in the importing nation? Should private efforts by citizen groups to raise awareness about these types of process-related issues be subjected to regulation, liability, or other means of governmental control?

As Part I of this Article details, questions of this nature increasingly are being resolved in a manner that burdens or denies consumer access to process information. Broadly speaking, policymakers and litigants in a number of critical subject areas have argued in favor of a conceptual demarcation between production processes and the goods that result from them. According to this “process/product distinction,” information about the details of production processes, as opposed to information about products, is thought to constitute a presumptively illegitimate basis for regulatory or consumer differentiation. Like process preferences themselves, this process/product distinction enjoys a pedigree almost as lengthy as that of the mass consumer market-

¹⁴ See LAWRENCE B. GLICKMAN, *A LIVING WAGE: AMERICAN WORKERS AND THE MAKING OF CONSUMER SOCIETY* 108–28 (1997).

¹⁵ As discussed below, recent experimental psychological research suggests that process preferences are likely to be context-dependent and therefore difficult to estimate in the absence of some prior specification of the consumer’s information environment, see *infra* pp. 627–32; see also SUNSTEIN, *supra* note 7, at 17 (“[W]hen preferences are a function of legal rules, the government cannot take preferences as given Moreover, the rules cannot be justified by reference to the preferences”); Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, *AM. ECON. REV. PAPERS & PROC.*, May 2003, at 175, 178 (noting that, because “[w]hat people choose often depends on the starting point, and hence the starting point cannot be selected by asking what people choose,” this “problem of circularity” will sometimes make it impossible to make regulatory decisions based on what consumers prefer); cf. Samuel Bowles, *Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions*, 36 *J. ECON. LITERATURE* 75, 75–78 (1998) (describing conceptual problems created for economic theory when markets “influence the evolution of values, tastes, and personalities”).

place.¹⁶ However, the more recent developments gathered in this Article reflect a trend that is both new and consequential — namely, a palpable shift toward a consumer marketplace in which consumers will be presumed or permitted by government regulators to regard only the functional characteristics of products, leaving the ethical and environmental implications of process characteristics to be dealt with exclusively in other forums or by other decisionmakers.

As will be seen, the underlying concerns that drive policymakers to embrace the process/product distinction are not without justification. Just as a representative democracy is said to temper the excesses of popular political will,¹⁷ proponents of the process/product distinction believe that withholding process-based considerations from consumers helps to moderate market demand in cases where unfettered consumer choice could lead to socially undesirable outcomes. Such outcomes may occur either because individuals suffer from certain informational and cognitive deficiencies that impair their ability to comprehend process information accurately, or because interest groups have strong incentives to exploit public perceptions of manufacturing processes for private purposes.¹⁸

Despite the real significance of these underlying concerns, this Article demonstrates that each appearance of the process/product distinction suffers from an insufficient appreciation of consumers' full interest in process characteristics, an omission that in turn masks important conceptual shortcomings of the distinction as a tool for legal analysis. Part II therefore offers three accounts of consumer process preferences that collectively sharpen the focus of the various substantive debates that the process/product distinction presently attempts to resolve.

The first account posits that consumers demand process information because they wish to encourage or discourage the production practice in question through their market activity. In that sense, private consumption takes on a self-consciously political dimension: consumer behavior is directed not merely at satisfying personal needs or desires, but at shaping the way in which goods are produced. From this perspective, the accuracy of consumer perceptions and beliefs becomes a crucial factor for policymakers to consider when deciding whether to

¹⁶ See *Hammer v. Dagenhart*, 247 U.S. 251, 271–72 (1918) (striking down a federal prohibition on the interstate shipment of goods produced by child labor as beyond congressional authority under the Commerce Clause because the “goods shipped are of themselves harmless”). The case was overruled explicitly by *United States v. Darby*, 312 U.S. 100, 116 (1941), which recognized that the process/product distinction adopted in *Hammer* “ha[d] long since been abandoned.” *Id.* at 116.

¹⁷ See generally THE FEDERALIST NO. 10, at 49–52 (James Madison) (Clinton Rossiter ed., 1999) (arguing that the structures of representative democracy protect individuals and the public welfare from the self-interested demands of factions).

¹⁸ See *infra* pp. 586–89.

require product labeling or some other means of enabling consumers to act on their process preferences. For instance, are consumers justified in worrying about the effects of GM agriculture, or should governments discourage consumer suspicion by making it harder to identify goods that have been developed using GM technologies? As Part II discusses, although there is reason to agree with leading commentators that often “experts are right and ordinary people are wrong,”¹⁹ there is reason also to believe that public reactions to health and safety hazards are richer and more value-laden than typical expert assessments. In that respect, policymakers seem to have underestimated the coherence, and even occasional wisdom, of consumer process preferences.²⁰

Moreover, on the remaining two accounts of process preferences, consumer demand for process information is not viewed as entirely instrumental, such that its wisdom depends wholly on empirical questions about the social, economic, or environmental consequences of consumer actions. Rather, consumers are seen to avoid or acquire goods produced through certain processes merely because their knowledge, or lack of knowledge, regarding such processes affects the degree of benefit that they derive from their purchases. Just as money is not purely fungible to social beings,²¹ consumer products — even when physically indistinguishable — are not perfect substitutes to the extent that they are produced using different processes about which consumers have strong feelings.²² Consumers may hold such preferences because they derive procedural utility from participating in a marketplace that palpably links their purchasing decisions with important process-related policy issues. Alternatively, consumers may view consumption choices, at least in part, as moral acts that have personal significance irrespective of their instrumental effects. In either case — whether understood as an expressive or as an ethical act — process-based decisionmaking appears to be largely inseparable from other aspects of consumer demand that traditionally have been deemed beyond

¹⁹ Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1146 (2002) (book review).

²⁰ See generally FRANK FISCHER, *CITIZENS, EXPERTS, AND THE ENVIRONMENT: THE POLITICS OF LOCAL KNOWLEDGE* (2000) (describing ways in which local lay knowledge can provide invaluable assistance to expert understanding and public policy formation).

²¹ See generally VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* (1994) (describing how socioeconomic factors influence the way that money is perceived and handled, despite its ostensible fungibility).

²² See Daniel M. Hausman & Michael S. McPherson, *Taking Ethics Seriously: Economics and Contemporary Moral Philosophy*, 31 J. ECON. LITERATURE 671, 686 n.24 (1993) (noting that “a delicious piece of apple pie that was known to be stolen would not be the same object as a physically similar piece of pie that came as a gift”); Deirdre S. Shaw & Ian Clarke, *Culture, Consumption and Choice: Towards a Conceptual Relationship*, 22 J. CONSUMER STUD. & HOME ECON. 163, 166 (1998) (arguing that “for many consumers ethical attributes are one among a ‘bundle’ of other product attributes that must be evaluated when making purchase decisions”).

scrutiny within the framework of market liberalism.²³ In that sense, the process/product distinction seems to be an ill-conceived basis for regulating consumer choice.

Part II concludes by considering the future significance of process preferences to civil society in light of both the seemingly inexorable social and economic trends of globalization and the growing theoretical importance of private market behavior to understandings of civic participation and government regulation. As will be explained, the already heroic conceptual role of the consumer within market liberalism seems poised to become even more heroic. Long expected to help raise collective welfare through constant material accumulation,²⁴ consumers also now are being charged with determining the outcome of important policy disputes by revealing — again through private market behavior — their true level of support for human safety, the environment, and a host of other public goods. Although proponents of this valuation methodology expect market choices to reveal purely private preferences, individuals acting on process preferences instead seem to regard consumption at least partially as an act of public significance. Indeed, in coming years, rising levels of affluence,²⁵ combined with the continued overshadowing of civic life by market life, may lead individuals to view purposeful consumption as their surest, if not their only, means for public expression and engagement. The result may be a novel political economy.

To summarize, three prominent interconnected trends — the equation of civic responsibility with consumer spending, the displacement of politically determined regulatory policies by market-derived environmental, health, and safety standards, and the global integration of consumer product markets — have been joined by a less-noted fourth trend: the struggle for control over consumer access to information regarding the processes by which products come into being. This Article aims to identify and expand on this underappreciated trend in the following manner. First, it demonstrates that the process/product distinction is a prominent element of the effort to resolve policy disputes that involve the entanglement of consumer regulation with broader social or environmental questions. Second, it shows that the distinction is too thin and formalistic of a conceptual device to address those policy disputes in a stable or satisfying manner. Finally, it argues more

²³ See Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 702 (1985) (describing traditional liberal theory's embrace of the principle of "equal respect for the differing preferences and visions of the good life with which individual consumers and producers approach the market").

²⁴ See *infra* pp. 632–44.

²⁵ As described below, consumer preferences for processes are likely to become more significant as rising incomes permit greater expenditures on consumer goods that are made using environmentally or socially preferable processes, see *infra* pp. 638–39.

broadly in favor of acknowledging and accommodating process preferences within policy analysis, given the potential significance that such preferences may serve in the future as outlets for public-minded behavior.

It is important to note that this Article makes no claim about the desirability or effectiveness of consumer behavior as a regulatory tool when viewed in isolation from the various cultural, economic, and political trends that are described alongside the growth of process preferences.²⁶ If one does accept the existence and strength of these trends, however, then it follows that process preferences can be expected to capture the displaced moral and political sentiments of individuals who have been encouraged to regard the market as a more sure route to self-expression and efficacious activity than traditional public channels. To that extent, product labels may become significant venues for the expression and evaluation of policy issues that, for better or worse, seem no longer to resonate in alternative forums.²⁷ Similarly, consumption communities organized around process-related issues appear destined to become some of the most active and visible citizens' groups of global civil society,²⁸ emerging, somewhat ironically, from the one

²⁶ As described below, consumer behavior provides only an imperfect substitute for conventional regulation from the standpoint of achieving specified policy goals, *see infra* pp. 537–39. Even assuming that it is necessary to view process preferences as an important policy component of the evolving regulatory state, as this Article does, a series of difficult policy design and implementation questions remain. *Cf.* Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 673 (1979) (analyzing the use of customer preference and market competitiveness models to examine difficult regulatory questions concerning when and how to intervene in an effort to improve imperfect consumer information). Relevant topics include the extent to which a market unconstrained by the process/product distinction would respond to consumer process preferences; the likelihood that manipulative process representations would undermine consumer confidence in the market for process-distinguished goods; the difficulty of estimating benefits from mandatory labeling policies given the apparent context dependence of process preferences; and a host of other theoretical and technical issues. Questions of that nature are undoubtedly important, and they are addressed briefly below. *See infra* pp. 625–28, 630–32. For the most part, however, such questions are beyond the scope of this Article, which aims instead to identify and understand an aspect of consumer behavior that has been largely absent from theoretical frameworks for policy analysis, even before questions of implementation can be raised.

²⁷ *See* BECK, *supra* note 11, at 146 (hypothesizing that product “biographies” might allow “the much-vaunted responsible citizen . . . to decide how much he or she valued making the everyday act of purchase a political ballot over global forms of work and life”).

²⁸ Many commentators believe that commercial relations stand outside the realm of civil society by definition. *See, e.g.*, Larry Diamond, *Toward Democratic Consolidation*, in *THE GLOBAL RESURGENCE OF DEMOCRACY* 227, 228 (Larry Diamond & Marc F. Plattner eds., 2d ed. 1996) (noting that the notion of “civil society” excludes “the profit-making enterprise of individual business firms”). The process-based consumer campaigns described in this Article, however, undeniably involve “citizens acting collectively in a public sphere to express their interests, passions, and ideas, exchange information, achieve mutual goals, make demands on the state, and hold state officials accountable.” *Id.* (emphasis omitted). Moreover, the communities that form around process-based campaigns often provide casebook studies of how global networks of diverse groups

force that has been most successful at cohering disparate individuals and entities across the globe — the faceless and impersonal producer-consumer relationship.²⁹

Rather than lament or praise these trends, this Article largely accepts their existence and instead asks how they might impact future conceptions and practices of governance. As Fred Aman has written, “the essence of democracy in the 21st century depends on the ability of citizens to affect the policies that globalization would now seem to dictate.”³⁰ Because process preferences provide an outlet for the expression of public values through a market medium that is being endorsed simultaneously as a primary locus of choice, opportunity, and responsibility, individuals may well come to view such preferences as their most appropriate mechanism for influencing the policies and conditions of a globalized world. Accordingly, the central normative conclusion of this Article is that, if private market behavior is to serve the expansive evaluative function that proponents of the liberal market vision have proposed for it, then consumers should receive an informational context that is appropriately robust for the role they are being asked to serve. Similarly, if individuals come to perceive their civic role as primarily one of consumer purchase, then the state should not simultaneously deprive them of the information that is needed to express political values through their consumption choices. In short, policymakers and commentators should discard the view that consumer preferences for processes are somehow less appropriate or worthy of governmental support than preferences for products.

I. THE PROCESS/PRODUCT DISTINCTION

Contemporary consumer product markets are characterized by ever-increasing technological and geopolitical complexity. Consumers now have access to goods whose very existence was scientifically uni-

can operate effectively in domains where law has not or cannot achieve satisfactory results. Thus, even companies that fall outside of “civil society” are inextricably bound up with social and environmental welfare issues that civil society addresses. *See, e.g.*, Errol E. Meidinger, *The New Environmental Law: Forest Certification*, 10 BUFF. ENVTL. L.J. 211, 237–41 (2002–2003) (providing an extended analysis of the forest certification network — a community comprising forest industry companies, environmental nongovernmental organizations, indigenous groups, community organizations, and labeling bodies — that monitors and assesses international forestry certification systems). For an important theoretical discussion of such transnational networks, see ANNELOISE RILES, *THE NETWORK INSIDE OUT* (2000).

²⁹ *See* SKLAIR, *supra* note 11, at 277 (detailing the growing consumer movement and calling it “one of the central issues around which the embryonic anti-globalization movement is coming together”).

³⁰ AMAN, *supra* note 13 (manuscript at preface, at 1); *see also* BECK, *supra* note 11, at 13 (noting that, because globalization entails “world society without a world state and without world government,” new forms and modes of governance must be contemplated (emphasis omitted)).

imaginable just a few decades ago. They also encounter goods with a production history that bears the imprint of countless economic actors from across the globe, actors whose lives and working conditions are enmeshed in an intricate web of economic and political interdependence. Naturally, both the mounting technological sophistication of consumer products and the “cross-border interpenetration of economic life”³¹ tend to raise the stakes of consumption, expanding the uncertainty and the potential magnitude of social and environmental consequences that result from private consumer spending.³²

For the most part, however, individuals do not confront these consequences in their capacity as consumers. As Wendell Berry has written, “[t]he global economy institutionalizes a global ignorance, in which producers and consumers cannot know or care about one another, and in which the histories of all products will be lost.”³³ In the United States, such institutionalized ignorance is compounded by the fact that, with very few exceptions,³⁴ product manufacturers must only ever disclose material health and safety risks or other attributes that inhere in an end product itself and that therefore threaten to harm or mislead the purchaser directly.³⁵ “Disclosure of the conditions or methods of manufacture,” by contrast, “has long been deemed unnecessary under the law.”³⁶ Thus, although the development seems to have occurred by

³¹ Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93, 95 (1999).

³² See Meidinger, *supra* note 28, at 233 (“The emergence of worldwide production and consumption chains has increased the scope of both transnational interdependence and the externalities associated with market activities.”); cf. Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 721–24 (2002) (surveying a multitude of social and environmental responsibility issues that multinational corporations face within the context of their global operations). See generally ULRICH BECK, *RISK SOCIETY* (Mark Ritter trans., Sage Publ’ns 1992) (1986) (documenting social, economic, and technological forces that in combination have led to a worldwide “risk society”).

³³ WENDELL BERRY, *The Whole Horse, in THE ART OF THE COMMON-PLACE: THE AGRARIAN ESSAYS OF WENDELL BERRY* 236, 244 (Norman Wirzba ed., 2002).

³⁴ Labeling requirements pertaining to a good’s country of origin are the most prominent exception. See 19 U.S.C. § 1304(a) (2000) (“[E]very article of foreign origin . . . imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article . . . in such manner as to indicate to an ultimate purchaser in the United States . . . the country of origin of the article.”). In recent years, Congress has struggled over the question whether to extend country-of-origin labeling requirements to meat and other perishable agricultural commodities. See Jacquelyn Trussell, Note, *The Birth Place of Food Products: Do You Know Where Your Food Comes From?*, 16 LOY. CONSUMER L. REV. 285, 285–88 (2004) (detailing recent legislation requiring such labeling and subsequent congressional postponements of the legislation’s effective date).

³⁵ For a comprehensive overview of product labeling requirements that federal, state, and common law have imposed, see Lars Noah, *The Imperative To Warn: Disentangling the “Right To Know” from the “Need To Know” About Consumer Product Hazards*, 11 YALE J. ON REG. 293 (1994).

³⁶ *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166, 179 n.10 (D.D.C. 2000); see also *United States v. Ninety-Five Barrels, More or Less, Alleged Apple Cider Vinegar*, 265 U.S. 438,

historical happenstance rather than by deliberate design, one nevertheless might say that the process/product distinction is a concept already central to the regulation of consumer product markets.

Moreover, as this Part describes, an increasing formalization of the process/product distinction has appeared recently in diverse subject areas. Consequently, product manufacturers not only remain generally free of mandates to disclose process information, but also are beginning to enjoy legal protections both from government efforts to introduce such mandates and from consumer efforts to obtain and act on process information through other means. Such attempts to cordon off process information for special treatment are motivated by several overlapping concerns. Most notably, proponents of the process/product distinction argue that consumer decisionmaking premised on process information frequently will lead to harmful, self-defeating, or otherwise unwise choices.³⁷ For instance, labeling of GM food products has been criticized by scholars who doubt the ability of consumers to appreciate the environmental, health, and safety benefits that the new technology promises.³⁸ Similarly, commentators have

444–45 (1924) (interpreting the Food and Drugs Act of 1906 not to require disclosure of process information because, “[w]hen considered independently of the product, the method of manufacture is not material”); J. Howard Beales III, *Modification and Consumer Information: Modern Biotechnology and the Regulation of Information*, 55 FOOD & DRUG L.J. 105, 112 (2000) (“In the absence of specific health concerns, or material effects on the characteristics of the resulting product, regulatory policies have not required disclosure of processes that are used to produce a particular food.”); Karen A. Goldman, *Labeling of Genetically Modified Foods: Legal and Scientific Issues*, 12 GEO. INT’L ENVTL. L. REV. 717, 723–28 (2000) (describing the “dichotomy between labeling based on method of production and labeling based on safety concerns raised by the product itself,” and noting that labeling requirements only tend to be imposed in the latter case).

Although manufacturers rarely have been forced to disclose process information, they have faced regulatory oversight of the accuracy of certain process-related disclosures that are made voluntarily. See Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385(b)(3), (d) (2000) (containing a congressional finding that “consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins,” and establishing guidelines for “dolphin safe” labels on tuna); 18 U.S.C. § 1159(a) (2000) (declaring it unlawful to market goods falsely as being produced by Native Americans); Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.7 (2004) (providing detailed guidelines for environmental marketing claims); “Made in USA” and Other U.S. Origin Claims, 62 Fed. Reg. 63,756, 63,756 & n.1 (Dec. 2, 1997) (noting that the FTC has regulated claims that a product is of U.S. origin under section 5 of the Federal Trade Commission Act since the 1940s). As noted below, the constitutional status of such regulations has been drawn into some question by recent litigation, see *infra* section I.C.2, pp. 574–79.

³⁷ Cf. Robert A. Hillman, *The Rhetoric of Legal Backfire*, 43 B.C. L. REV. 819, 819–20 (2002) (“Consumer protection laws are said to increase prices and confuse consumers instead of arming them with legal rights.”).

³⁸ See, e.g., Goldman, *supra* note 36, at 722, 760 (noting with approval industry concern that “consumers may not have enough information on biotechnology to fairly evaluate [GM foods]”). Proponents of the process/product distinction also might cite evidence of scientific illiteracy in support of this contention. For instance, in one survey only forty-four percent of American respondents disagreed with the statement “Ordinary tomatoes do not contain genes, while genetically modified tomatoes do.” Gary E. Marchant & Andrew Askland, *GM Foods: Potential Public*

concluded that environmental product labeling schemes “inhibit product development and result in the consumption of more scarce natural resources and more harmful emissions to the environment than would be the case if they were absent.”³⁹ On the international level, environmentally motivated trade measures — such as import bans or labeling requirements triggered by the use of certain production processes — likewise have been critiqued as tending to exacerbate, rather than ameliorate, environmentally destructive activities.⁴⁰ Even efforts by developed nations to avoid the fruits of child labor have been challenged as likely to harm the very children whom nations seek to avoid exploiting.⁴¹

Consultation and Participation Mechanisms, 44 JURIMETRICS 99, 108 (2003) (citing NAT'L SCI. BD., NAT'L SCI. FOUND., SCIENCE & ENGINEERING INDICATORS 2002, at 7-21 to 7-22). Consumers themselves report that they do not feel well-informed regarding the scientific issues surrounding GM foods. See MARIO F. TEISL & JULIE A. CASWELL, INFORMATION POLICY AND GENETICALLY MODIFIED FOOD: WEIGHING THE BENEFITS AND COSTS 19 (Univ. of Mass. Amherst Dep't of Res. Econ., Working Paper No. 2003-1, 2003). Nevertheless, researchers have found that differences in scientific education and knowledge are only weakly correlated with differences of opinion regarding the desirability and appropriateness of genetic engineering, a result that suggests many variables other than purely scientific criteria may be at stake in GM food disputes. See Susanna Hornig Priest et al., *The “Trust Gap” Hypothesis: Predicting Support for Biotechnology Across National Cultures As a Function of Trust in Actors*, 23 RISK ANALYSIS 751, 757 (2003) (reporting that less than seven percent of the country-by-country variance in biotechnology opinion poll results can be explained by differences in the degree of citizen knowledge).

³⁹ JULIAN MORRIS, GREEN GOODS? CONSUMERS, PRODUCT LABELS AND THE ENVIRONMENT 98 (Inst. of Econ. Affairs, Studies on the Environment No. 8, 1997); see also Aaditya Mattoo & Harsha V. Singh, *Eco-Labeling, the Environment and International Trade*, in ECO-LABELLING AND INTERNATIONAL TRADE 37, 39 (Simonetta Zarrilli et al. eds., 1997) [hereinafter ECO-LABELLING] (demonstrating that under certain plausible market structure assumptions, environmental labeling campaigns may increase sales of both environmentally friendly and unfriendly products); Peter S. Menell, *Structuring a Market-Oriented Federal Eco-Information Policy*, 54 MD. L. REV. 1435, 1445 (1995) (raising doubts about the efficacy of unregulated environmental labeling in light of “consumers’ generally naïve understanding of the environment, the lack of clear standards regarding the relationship between human activities and the environment, and the difficulty of verifying many environmental claims” (footnote omitted)).

⁴⁰ See HÅKAN NÖRDSTROM & SCOTT VAUGHAN, TRADE AND ENVIRONMENT 3 (WTO, Special Studies No. 4, 1999) (arguing that “tackling [environmental] problems by targeting some indirect linkage, such as imports or exports, may divert attention from the underlying problems” and that “[i]n some cases, putative trade remedies may even aggravate the problems”); Brian R. Copeland & M. Scott Taylor, *Trade, Growth, and the Environment*, 42 J. ECON. LITERATURE 7, 67 (2004) (arguing that restrictions on imports from developing countries may have negative environmental effects by lowering incomes in developing nations, by reducing the value of natural resources, or by prompting the adoption of “an even dirtier slate of production”).

⁴¹ See, e.g., Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 AM. J. INT'L L. 126, 132 (2002) (arguing that the mere threat of a ban on products using child labor “led to the discharge of female children [in the textile industry], who were often forced instead into prostitution by destitute parents”). Similar arguments have been made regarding the use of “sweatshop-free” labeling to enable consumers to avoid products made under working conditions that are deemed objectionable by certifying bodies. See DRUSILLA K. BROWN ET AL., THE EFFECTS OF MULTINATIONAL PRODUCTION ON WAGES AND WORKING CONDITIONS IN DEVELOPING COUNTRIES 21 (Nat'l Bureau of Econ. Research, Working Paper No. 9669, 2003) (“There is a real

This belief that process preferences lead to unintended or self-defeating consequences is driven by two underlying concerns. First, scholars and lawmakers worry that individuals are ill-positioned to recognize and resolve the tradeoffs entailed by modern production processes in a globally integrated, technology-rich economy. Given their inexpertise and the paucity of information available to them, as well as the psychological tendencies that hinder their ability to assess information that is made available to them,⁴² individual consumers are believed to make especially unreliable evaluations of process-related issues such as the propriety of GM agriculture. Second, and perhaps more importantly, proponents of the process/product distinction worry that individuals are vulnerable to exploitation by factions that manipulate process-related concerns in service of their private interests. For instance, consumers may readily fall victim to cascade-like social reactions, in which the vocal concerns of a few interested activists give rise to unfounded, self-escalating public fears over stigmatized production processes.⁴³ Industrial interests similarly may capitalize on public fears in order to achieve protectionist goals through facially nondiscriminatory environmental, health, and safety regulations.⁴⁴

danger therefore that well-intentioned efforts to raise the wages and working conditions of workers in developing countries may work to the detriment of these workers and their families.”)

⁴² For an important work surveying cognitive and social psychological research relating to risk perception and examining the legal implications of individuals’ tendency to neglect probabilistic information in favor of more emotionally charged reactions to risk, see Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61 (2002); see also Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1059 (2000) (arguing that a technocratic approach to risk regulation such as cost-benefit analysis “is most plausibly justified . . . as a way of counteracting predictable problems in individual and social cognition”); Sunstein, *supra* note 19, at 1123 (using psychological evidence of how individuals perceive and process risk information to conclude that “sensible policymakers should generally follow science and evidence, not the public”).

⁴³ See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685 (1999) (arguing that exploitation by interest groups of cognitive heuristics might lead to “mass delusions” and demands for “wasteful or even detrimental laws and policies”). In a recent opinion, Justice Breyer similarly worried that “a purely ideological plaintiff” might wage a “political battle” through litigation if a California consumer protection statute were applied to process representations by product manufacturers without stringent constitutional safeguards. See *Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2567 (2003) (Breyer, J., dissenting from the dismissal of certiorari); see also *infra* pp. 613–14. In an especially nuanced variation of this concern, Howard Chang notes that while a comprehensive welfare analysis must account for the disutility caused by individuals’ fears — even if scientifically unfounded — it also should consider the risk that governmental acknowledgment of such fears might exacerbate the incentive of interest groups to whip up further unfounded public concerns. See Howard F. Chang, *Risk Regulation, Endogenous Public Concerns, and the Hormones Dispute: Nothing To Fear But Fear Itself?*, 77 S. CAL. L. REV. 743, 761–62 (2004).

⁴⁴ See Gustavo Grunbaum, *Dispute Settlement and U.S. Environmental Laws*, in THE GREENING OF TRADE LAW: INTERNATIONAL TRADE ORGANIZATIONS AND ENVIRONMENTAL ISSUES 51, 51 (Richard H. Steinberg ed., 2002) (describing the “success, increasing importance, and mechanics of Baptist-bootlegger coalitions of environmental nongovernmental organiza-

In light of these concerns, the process/product distinction has emerged in several distinct legal areas as a mechanism for protecting consumers from costly error and for reducing the harmful effects of interest-group manipulation. Specifically, the distinction has been employed in (1) international trade negotiations, as member nations of the General Agreement on Tariffs and Trade (GATT) and its successor institution, the World Trade Organization (WTO), have struggled to determine the extent to which foreign product imports may be conditioned on compliance with domestic regulatory standards for processes and production methods; (2) U.S. regulation of GM organisms, which has maintained that “biotechnology should not be regulated as a process, but rather that the products of biotechnology should be regulated in the same way as products of other technologies”;⁴⁵ and (3) the development of a constitutional free speech position that regards consumer process preferences as insufficient either to support mandatory state disclosure rules concerning process information or to subject voluntary manufacturer speech regarding processes to conventional advertising regulation. Together, these developments suggest a narrowing sphere of authority for individuals within the framework of market liberalism: consumers remain sovereign with regard to products, but in an era of profound market complexity and interest-group politics, governments must regulate processes according to science and other technical considerations, excluding the demands of consumers.

A. *International Trade and “Products As Such”*

Among legal academics, the most widely discussed modern articulation of the process/product distinction comes from the 1991 GATT *Tuna/Dolphin* dispute panel report, which examined the permissibility of U.S. import restrictions on tuna producers that failed to comply

tions . . . and industry in promoting U.S. environmental laws that also act as import restrictions”); John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 521–25 (2000) (providing an overview of protectionist political influences in domestic policymaking); Richard W. Parker, *The Case for Environmental Trade Sanctions*, 7 WIDENER L. SYMP. J. 21, 28 (2001) (noting that “the danger of abuse” of environmental trade sanctions for protectionist purposes “appears to be generic”); Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT’L L. 401, 415 (2000) (finding “a certain truth” to the application of the Baptist-bootleggers metaphor to environmental trade measures); David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years*, 32 N.Y.U. J. INT’L L. & POL. 865, 922 (2000) (describing a “coalition of consumer and protectionist interests” supporting the European import ban on hormone-treated beef). *But see* Copeland & Taylor, *supra* note 40, at 59–60 (noting that “environmental policy is less effective and more costly” than alternative instruments for distorting trade to benefit domestic industries).

⁴⁵ Thomas O. McGarity, *Seeds of Distrust: Federal Regulation of Genetically Modified Foods*, 35 U. MICH. J. L. REFORM 403, 431 (2002) (quoting COMM. ON GENETICALLY MODIFIED PEST-PROTECTED PLANTS, NAT’L RESEARCH COUNCIL, GENETICALLY MODIFIED PEST-PROTECTED PLANTS: SCIENCE AND REGULATION 22, 26 (2000)) (internal quotation marks omitted).

with the U.S. Marine Mammal Protection Act (MMPA).⁴⁶ Although the panel's ruling was never adopted by the relevant countries and therefore enjoys only limited jurisprudential force, the process/product distinction that it announced has become a subject of intense debate among member nations of the WTO. On the one hand, as John Jackson notes, "[t]rade policy experts are concerned that if a nation is allowed to use [a] process characteristic as the basis for trade-restrictive measures, then the result would be to open a Pandora's box of problems that could open large loopholes in the GATT."⁴⁷ On the other hand, most commentators recognize that process-based trade measures also are capable of expressing well-grounded and sincerely held concerns of consumers, such that restricting their use would prevent not only disguised protectionism, but also a host of legitimate democratic aims. Caught between these seemingly irreconcilable concerns, the international legal status of domestic efforts to support the satisfaction of process preferences remains in doubt.

1. *Process-Based Trade Measures Under GATT/WTO Jurisprudence.* — Although the history of international trade reveals many examples of trade restrictions based on the manner in which foreign goods are produced,⁴⁸ in recent years the legitimacy of such measures has come under intense scrutiny. Controversy has been sparked chiefly by the *Tuna/Dolphin* panel's response to Mexico's challenge to a U.S. ban on imports of Mexican yellowfin tuna under the MMPA.⁴⁹ In this dispute, Mexico had failed to obtain U.S. certification that the harvesting methods of its tuna industry resulted in an incidental dol-

⁴⁶ Panel Report, *United States — Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter *Tuna/Dolphin I*]; see also *General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, 33 I.L.M. 839 (1994). Although the GATT/WTO regime has provided the most prominent articulation, the process/product distinction also has appeared in other trade agreements. See Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 ENVTL. L. 851, 863 n.47 (2003) (noting that, under the North American Free Trade Agreement, "an importing country may not impose restrictions based on the way a good was manufactured in another country").

⁴⁷ John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1243 (1992); see also Gen. Agreement on Tariffs and Trade, *Trade and the Environment*, at <http://www.ciesin.org/docs/008-082/008-082.html> (1992) ("Changing the world trading rules so as to permit the suspension of trading rights of others by individual contracting parties, based simply on the unilateral and extra-territorial assertion of their environmental priorities, . . . [would risk] a big step down a slippery slope.").

⁴⁸ See Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459, 493-98 (1994) (providing a thorough history of environmentally motivated unilateral trade measures, many of which restrict goods based on their methods of manufacture); Alan Isaac Zreczny, *The Process/Product Distinction and the Tuna/Dolphin Controversy: Greening the GATT Through International Agreement*, 1 BUFF. J. INT'L L. 79, 120 (1994) (describing a 1906 convention, a 1911 treaty, and a 1921 regional agreement, all regarding the regulation of production processes).

⁴⁹ See *Tuna/Dolphin I*, *supra* note 46, at 156-60.

phin kill rate comparable to that of the U.S. tuna industry.⁵⁰ Such certification was required under the MMPA, which established a moratorium on the taking and importation of marine mammals and marine mammal products, with only limited exceptions.⁵¹

The MMPA trade provisions discriminated in practice against foreign producers, most notably by defining the permissible level of incidental dolphin mortality in a manner that prevented advance planning by foreign fishing interests.⁵² Nevertheless, the GATT dispute panel chose to rest its ruling on a much broader ground: it found that because the MMPA import restriction did not regulate “products as such,” it did not constitute an internal product regulation that could be analyzed and accepted under Article III of the GATT,⁵³ which prohibits domestic product regulations that discriminate between “like products” of domestic and foreign origin.⁵⁴ The United States had argued

⁵⁰ See *id.* at 156–58.

⁵¹ *Id.* at 156; see also 16 U.S.C. § 1371(a)(2) (2000) (listing statutory exceptions).

⁵² See Richard W. Parker, *The Use and Abuse of Trade Leverage To Protect the Global Commons: What We Can Learn from the Tuna/Dolphin Conflict*, 12 GEO. INT’L ENVTL. L. REV. 1, 112–20 (1999). Perhaps for this reason, the executive branch of the United States had been reluctant to enforce the import ban provisions of the MMPA. Nevertheless, the Ninth Circuit forced its hand with a decision upholding a court-imposed injunction against U.S. importation of tuna from Mexico. See *Earth Island Inst. v. Mosbacher*, 929 F.2d 1449, 1453 (9th Cir. 1991), *aff’g* 746 F. Supp. 964 (N.D. Cal. 1990) (finding that the U.S. Secretary of Commerce had not certified that Mexico complied with MMPA incidental takings standards, and imposing an injunction against importation of yellowfin tuna from Mexico).

⁵³ *Tuna/Dolphin I*, *supra* note 46, at 195.

⁵⁴ Article III provides in part:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

.....

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.

General Agreement on Tariffs and Trade, Oct. 30, 1947, art. III, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. Product “likeness” under this Article conventionally involves four criteria: the properties, nature, and quality of the products; the products’ end uses in a given market; consumers’ tastes and habits; and international tariff classifications. See Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products* para. 85, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter Appellate Body Asbestos Report]. The *Appellate Body Asbestos Report*, however, indicated that other relevant criteria, such as direct health or safety risks posed by a product, also may be considered. *Id.* paras. 149–54. Additionally, some panels in the past have treated the “likeness” determination as primarily a question of whether the products at issue are “directly competitive or substitutable.” Panel Report, *Japan — Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, L/6216 (Nov. 10, 1987), GATT B.I.S.D. (34th Supp.) at 83, 93 (1988). For an insightful discussion of the “likeness”

for a more inclusive definition of “like products” under Article III, which would have permitted governments to make nonprotectionist distinctions among products based on production and processing methods. Because the dispute panel believed that such process characteristics “could not possibly affect tuna as a product,” the panel instead regarded the MMPA trade prohibition as an unadorned ban on tuna imports simply because they came from Mexico.⁵⁵

Nor did the *Tuna/Dolphin* panel believe that the MMPA import provisions could be justified under the general exceptions clause of Article XX of the GATT, which authorizes otherwise impermissible trade restrictions when they are “necessary to protect human, animal or plant life or health” or “relat[e] to the conservation of exhaustible natural resources.”⁵⁶ In the panel’s view, the general exceptions clause did not apply to trade measures apparently designed to influence “extra-jurisdictional” practices.⁵⁷ Because process-based trade measures appear, almost inherently, to seek transformation of conditions outside the importing nation’s territory, the panel’s reasoning seemed to render such measures irretrievably suspect under the GATT. Indeed, following the *Tuna/Dolphin* ruling, trade specialists widely accepted the view that the GATT disallows product importation regulations not directly related to physical or other tangible characteristics of a product.⁵⁸

determination and the many complexities that it raises, see Robert E. Hudec, “*Like Product*”: *The Differences in Meaning in GATT Articles I and III*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 101 (Thomas Cottier & Petros C. Mavroidis eds., 2000).

⁵⁵ See *Tuna/Dolphin I*, *supra* note 46, at 195. Accordingly, the panel believed that the U.S. regulation constituted a simple quantitative restriction on importation that was impermissible under Article XI. See *id.* Article XI seeks to eliminate quantitative trade restrictions in general:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, *supra* note 54, art. XI, para. 1. This distinction is critical because, under an interpretive note to Article III, GATT member nations have agreed that product measures applying to domestic and imported “like products” are to be analyzed *only* under Article III and its national treatment requirements. See John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 6 (2004). By excluding process-based distinctions from a consideration of the “likeness” of various products, the *Tuna/Dolphin* panel effectively condemned process-based trade measures as per se violations of Article XI that must be justified, if at all, under the exacting provisions of Article XX.

⁵⁶ GATT, *supra* note 54, art. XX(b), (g).

⁵⁷ See *Tuna/Dolphin I*, *supra* note 46, at 198–200.

⁵⁸ See ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 12, at 27 (asserting that “[p]resent trading rules do not allow one country to use trade measures for the purpose of unilaterally enforcing its own environmental preferences or requirements on other countries in cases where the production externality has no spill-over effects”); Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 50, 60–61 (Roger B. Porter et al. eds., 2001) (noting “long-standing jurispru-

Notwithstanding this apparent consensus, numerous academic commentators criticized the process/product distinction as conceptually flawed,⁵⁹ and nongovernmental organizations excoriated it as an em-

dence on process and production methods” that regarded such methods as unlawful); James Cameron & Karen Campbell, *A Reluctant Global Policymaker*, in *THE GREENING OF TRADE LAW: INTERNATIONAL TRADE ORGANIZATIONS AND ENVIRONMENTAL ISSUES*, *supra* note 44, at 23, 41 (“[C]urrent WTO doctrine does not permit considering the means by which a product is made to distinguish between products and to determine whether they are ‘like products.’”); Alicia Morris Groos, *International Trade and Development: Exploring the Impact of Fair Trade Organizations in the Global Economy and the Law*, 34 *TEX. INT’L L.J.* 379, 408 (1999) (stating that “WTO rules mandate that goods cannot be subject to statutory labeling requirements or differentiated on the basis of how they are produced”); Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an “Aim and Effects” Test*, 32 *INT’L LAW.* 619, 624 (1998) [hereinafter Hudec, *GATT/WTO Constraints on National Regulation*] (noting that “product distinctions based on characteristics of the production process, or of the producer, that are not determinants of product characteristics are simply viewed as *a priori* illegitimate”); Robert E. Hudec, *The Product-Process Doctrine in GATT/WTO Jurisprudence*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON* 187, 187 (Marco Bronckers & Reinhard Quick eds., 2000) (noting that “the effect of [the process/product] doctrine was to make it *prima facie* GATT-illegal for governments to impose tax or regulatory disadvantages on imported products because of the way they were produced — except where the manner of production had some impact on the characteristics of the product itself”); Tanyarat Mungkalarungsi, *The Trade and Environment Debate*, 10 *TUL. J. INT’L & COMP. L.* 361, 370 (2002) (claiming that “[p]roduct distinctions based on characteristics of the production process or of the producer that are not determinants of product characteristics are viewed as illegitimate”); Peter W.B. Phillips & William A. Kerr, *Alternative Paradigms: The WTO Versus the Biosafety Protocol for Trade in Genetically Modified Organisms*, *J. WORLD TRADE*, Aug. 2002, at 63, 70 (“The WTO does not allow trade barriers to be put in place on the basis of production and processing methods. Only product characteristics can be used.”); *see also* Steve Charnovitz, *Environmental Harmonization and Trade Policy*, in *TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY* 267, 280 (Durwood Zaelke et al. eds., 1993) [hereinafter *TRADE AND THE ENVIRONMENT*] (observing that “[i]t is dogma in trade policy circles that unilateral import standards should relate to products only — not processes”); Steve Charnovitz, *The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality*, 27 *YALE J. INT’L L.* 59, 76–77 (2002) (gathering quotations from commentators indicating widespread belief in the view that “WTO rules do not permit importing governments to make distinctions based on the production process”); Robert Howse & Donald Regan, *The Product/Process Distinction — An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy*, 11 *EUR. J. INT’L L.* 249, 251 (2000) (noting that “it is widely thought that all process-based measures not directly related to physical characteristics of the product itself are *prima facie* violations of GATT”).

⁵⁹ *See, e.g.*, DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 134 (1994) (urging departure from the process/product distinction); Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 *TUL. ENVTL. L.J.* 299, 320 (1994) (arguing that the *Tuna/Dolphin* ruling was “seriously flawed”); Steve Charnovitz, *Solving the Production and Processing Methods (PPMs) Puzzle*, in *THE EARTHSCAN READER ON INTERNATIONAL TRADE AND SUSTAINABLE DEVELOPMENT* 229, 250 (Kevin P. Gallagher & Jacob Werksman eds., 2002) (arguing that the process/product distinction in international trade law “has prevented a reasoned discourse about how to distinguish appropriate from inappropriate [regulations aimed at processes and production methods]”); Ilona Cheyne, *Environmental Unilateralism and the WTO/GATT System*, 24 *GA. J. INT’L & COMP. L.* 433, 450 (1995) (arguing that the concept of “‘products as such’ . . . imposes an inappropriately narrow limitation and unnecessarily excludes unilateral measures”); David Pearce, *The Greening of the GATT: Some Economic Considerations*, in 1 *TRADE AND THE ENVIRONMENT: THE SEARCH FOR*

blem of the international trading regime's alleged disregard for public concerns such as environmental protection, labor standards, or human rights.⁶⁰ Believing that the doctrine would not hold in the wake of this mounting criticism,⁶¹ a number of commentators offered theoretical and textual exit strategies for future dispute settlement panels. Several scholars, for instance, formulated more or less elaborate typologies of process-based trade measures, hoping to isolate those measures that are most susceptible to abuse as protectionist devices, and therefore most in need of the exacting scrutiny applied in *Tuna/Dolphin*.⁶² Others argued, as the United States had in the original *Tuna/Dolphin* dispute, that the GATT should not subject process-based regulations to stricter scrutiny than it does to other product regulations, and therefore

BALANCE 20, 28–29 (James Cameron et al. eds., 1994) (criticizing *Tuna/Dolphin I* on the ground that both products and production methods can cause negative externalities in the form of environmental damage in the exporting country and welfare loss in the importing country); see also Douglas J. Caldwell & David A. Wirth, *Trade and the Environment: Equilibrium or Imbalance?*, 17 MICH. J. INT'L L. 563, 573 (1996) (observing widespread agreement that the process/product distinction is problematic and arguing that “[t]he level of consensus among these authors on this important question appears to be sufficiently widespread that policymakers might well take note”).

⁶⁰ See Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 494 (2002) (“[A]fter *Tuna/Dolphin*, environmentalists — and others with concerns about how the trading system balances competing values — saw the GATT as a regime dedicated to the triumph of free trade over all other human concerns.”).

⁶¹ See John H. Jackson, *The Limits of International Trade: Workers' Protection, the Environment and Other Human Rights*, 94 AM. SOC'Y INT'L L. PROC. 222, 224 (2000) (“[T]he product-process distinction will probably not survive and perhaps *should* not survive.”).

⁶² See, e.g., ESTY, *supra* note 59, at 121–22 (describing, in descending order of urgency and legitimacy, a hierarchy of environmental measures aimed at curtailing activity that generates, from environmental effects within a country's own borders, to transboundary effects originating abroad but causing harm within a country's borders, to effects that cause harm to the atmosphere, oceans, or other aspects of the global commons, to effects that occur purely within a foreign country's borders); ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 12, at 15–16 (classifying non-product-related PPMs by the character of the harm against which they are directed, including transboundary pollution, effects on the management of transboundary living resources, global environmental concerns, and effects limited to the territory of the exporting country); Charnovitz, *The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality*, *supra* note 58, at 67–69 (distinguishing between “how-produced,” “government policy,” and “producer characteristics” process-based trade measures and arguing that “how-produced” measures are the least susceptible to abuse); Sanford E. Gaines, *Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?*, 27 COLUM. J. ENVTL. L. 383, 390 (2002) (distinguishing among “product regulations,” which target “the design, characteristics, and uses of particular products”; “resource access regulations,” which govern the manner and extent to which publicly owned resources such as timber and minerals may be extracted; and “PPM regulations,” which set standards for the environmental impact of production facilities and processes); Henry L. Thaggert, *A Closer Look at the Tuna-Dolphin Case: “Like Products” and “Extrajurisdictionality” in the Trade and Environment Context*, in 1 TRADE & THE ENVIRONMENT: THE SEARCH FOR BALANCE, *supra* note 59, at 69, 82 (arguing that nondiscriminatory environmental regulations should be valid if they target activity causing harm to the domestic environment, the global commons, or a migratory species that passes through the domestic jurisdiction).

that the Article III “like products” analysis should include process characteristics.⁶³

Although much uncertainty still clouds the debate over process-based trade measures, one nevertheless can state with confidence that the *Tuna/Dolphin* dispute would be analyzed differently today. Most notably, the Appellate Body of the WTO appears to have rejected the

⁶³ See, e.g., Christopher A. Cherry, Comment, *Environmental Regulation Within the GATT Regime: A New Definition of “Product”*, 40 UCLA L. REV. 1061, 1093, 1096–98 (1993) (arguing that the notion of “product” in Article III should encompass the entire history of a product’s manufacture, consumption, and disposal); Michael C. Strauss, *The Logic of Accommodating Process-Based Environmental Trade Measures Within the GATT: Welfare Principles from Law & Economics* 21 (Aug. 30, 2004) (unpublished manuscript, on file with the Harvard Law School Library) (arguing in favor of the notion of “the ‘essential’ product,” which acknowledges that “the production and consumption of [a] product tangibly [a]ffect [people’s] lives at the point of production, the point of consumption and between”), available at <http://www.stanford.edu/group/rats/wtoPaper.html>; see also Thaggert, *supra* note 62, at 72–73 (arguing that there is evidence in the drafting history of the GATT to suggest that “otherwise like products may be deemed ‘unlike’ based upon differences in production”).

In a particularly well-crafted version of the “like products” argument, Robert Howse and Donald Regan argue that “[i]f we assign ‘like’ its ordinary meaning in context, ‘not differing in any respect relevant to an actual non-protectionist regulatory policy’, then physically identical products that differ only in their processing histories may be ‘unlike’, because the processing differences may be relevant to such a policy.” Howse & Regan, *supra* note 58, at 261. Accordingly, if one views dolphin-safe and dolphin-unsafe tuna as “unlike” products based on their different processing histories, then the MMPA’s import provisions come to resemble a pairing of two distinct nondiscriminatory internal product regulations — one that applies to all dolphin-safe tuna, irrespective of origin, and one that applies to all dolphin-unsafe tuna, again irrespective of origin. Howse and Regan’s argument, however, has been criticized for downplaying the greater risk of disguised protectionism posed by process-based trade measures, as opposed to product-based measures. See Gaines, *supra* note 62, at 426 (“Trade policymakers are known for their hard-bitten skepticism that environmental protections are just an excuse for ‘green’ protectionism and discrimination. The realism deficit in environmental terms of the Howse/Regan [analysis] . . . means that their policy prescriptions fall short of the level of security and predictability that trade policy demands against subterfuge and deceit.”); John H. Jackson, *Comments on Shrimp/Turtle and the Product/Process Distinction*, 11 EUR. J. INT’L L. 303, 304 (2000) (“With respect to the product/process problem, the issue is not so much whether this distinction can be justified in all contexts . . . , but rather how to develop some constraints on the potential *misuse* of process-oriented trade barriers . . .”). Moreover, even if Howse and Regan are correct that the *Tuna/Dolphin* panel fashioned the process/product distinction without an adequate textual basis, it is difficult to put the genie back in the bottle. Some trade advocates appear to believe that, whether or not the process/product distinction exists as a matter of formal trade doctrine, it will continue to exist as a matter of practice. See Charnovitz, *The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality*, *supra* note 58, at 91–92 (“Whatever the validity of [Howse and Regan’s] legal analysis, any optimism that future WTO panels will tolerate origin-neutral PPMs in the context of Article III would be unfounded.”); Gaines, *supra* note 62, at 405 (noting the position of the Organisation for Economic Co-operation and Development (OECD) that “[p]resent trading rules do not allow one country to use trade measures for the purpose of unilaterally enforcing its own environmental preferences or requirements on other countries . . . where the production externality has no spill-over effects,” and arguing that the position is “an accurate statement of current WTO practice and sentiment” even if not “an accurate statement of WTO law” (second alteration in original) (quoting ORG. OF ECON. CO-OPERATION AND DEV., *supra* note 12, at 27) (internal quotation marks omitted)).

view that the process/product distinction gives rise to a per se ban on process-based trade measures. In two decisions regarding the permissibility of certain U.S. trade restrictions designed to protect endangered turtle species that may be harmed by shrimp harvesting,⁶⁴ the Appellate Body made clear that process-based trade measures are eligible for salvation under Article XX under appropriate circumstances. As long as the importing nation has a “sufficient nexus” with the environmental ill targeted by the measure, the measure is “not disproportionately wide in its scope and reach,” the “means and ends relationship” between the measure and its espoused policy goal is “close and real,” and certain other conditions are satisfied, the Appellate Body appears prepared to accept that the GATT permits process-based trade measures.⁶⁵

The *Shrimp/Turtle* rulings do not disturb previous GATT jurisprudence or commentary regarding the coverage of Article III. Thus, because process-based trade measures still must qualify for exceptional treatment under Article XX and are not analyzed as internal product regulations under Article III, the process/product distinction survives in modified form within international trade law. This continuing effect of the distinction is significant because, as Sanford Gaines has emphasized, Article XX tends to be read stringently in the context of environmental trade measures.⁶⁶ In particular, nations defending

⁶⁴ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle I*]; Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter *Shrimp/Turtle II*].

⁶⁵ *Shrimp/Turtle I*, *supra* note 64, at paras. 133, 141. The other conditions are described below, *see infra* pp. 549–51. As Robert Howse notes, the Appellate Body avoided deciding whether an actual territorial nexus was needed by noting that the endangered turtles targeted by U.S. import restrictions migrate at one time or another through U.S. territorial waters. *See* Howse, *supra* note 60, at 504. In Howse’s view, the nexus requirement likely will serve in future WTO rulings to prohibit process-based trade measures when the targeted process or condition does not exist in the importing nation and therefore does not require a comparable domestic restriction. *See id.* (arguing that “it should be sufficient, as required by the text of Article XX(g), that the U.S. measure was even-handed, imposing a conservation burden on its own producers and consumers, and not merely attempting to externalize the costs of environmental protection to the producers of other countries”). Austria provided a well-known example of such an asymmetric, process-based trade restriction in the early 1990s when it attempted to ban the importation of tropical timber products that had not been sustainably harvested. *See* Atsuko Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, 11 GEO. INT’L ENVTL. L. REV. 599, 611–12 (1999). Because Austria lacked a tropical forest of its own to conserve, developing nations argued that such actions were impermissibly discriminatory. *See id.* at 612.

⁶⁶ *See* Sanford Gaines, *The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT’L ECON. L. 739, 743–44 (2001); *see also* Donald M. McRae, *GATT Article XX and the WTO Appellate Body*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON*, *supra* note 58, at 219, 230 (noting interpretive decisions that “have led the Appellate Body to adopt a restrictive approach to . . . the *chapeau* — an approach that results in a very limited role for the Article XX

process-based regulations must show that the challenged regulation fits within one of Article XX's enumerated exceptions and that the regulation passes muster under Article XX's prefatory "chapeau."⁶⁷ Thus, the process/product distinction still poses a serious obstacle to process-based trade measures, even if they are not per se impermissible following the *Shrimp/Turtle* rulings.⁶⁸

2. *The Special Case of Product Labeling.* — Frequently lost amidst the furor over the *Tuna/Dolphin* ruling is the fact that the panel had no difficulty at all with the United States' labeling program for dolphin-safe tuna. Under the Dolphin Protection Consumer Information

exceptions"); Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 277 (1997) (noting that the stringent interpretation of "necessary" under Article XX(b) "constitutes too great an infringement on the sovereign powers of states to take decisions (one hopes) by democratic means so as to solve problems and satisfy their constituents"); David A. Wirth, *International Trade Agreements: Vehicles for Regulatory Reform?*, 1997 U. CHI. LEGAL F. 331, 336 (noting that Article XX paragraphs (b) and (g) have been "interpreted rather restrictively").

⁶⁷ See ARTHUR EDMOND APPLETON, ENVIRONMENTAL LABELLING PROGRAMMES: INTERNATIONAL TRADE LAW IMPLICATIONS 162 (1997). The Article XX chapeau requires that trade restrictions "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." GATT, *supra* note 54, art. XX.

⁶⁸ See Hudec, *The Product-Process Doctrine in GATT/WTO Jurisprudence*, *supra* note 58, at 188 (observing that "the product-process doctrine still remains a potentially lethal threat to process-based regulation"). Perhaps seeking to strike a final blow to the process/product distinction, Howse recently has pointed to language in the *Appellate Body Asbestos Report* that suggests both that the definition of "like products" should encompass a wide variety of characteristics, including nonphysical ones, and that the analysis under Article III should take account of subcategories of products, even when they are otherwise determined to be "like" products on a more general level. See Howse, *supra* note 60, at 515–16 (citing and discussing *Appellate Body Asbestos Report*, *supra* note 54). Based on these two interpretive points, Howse argues that future dispute settlement panels might choose to characterize an MMPA-type trade restriction as an internal product regulation affecting turtle-friendly and turtle-unfriendly shrimp in a manner that is "no less favorable" to foreign producers as a group. *Id.* (internal quotation marks omitted). The process-based trade restriction therefore would be treated no differently from a product-based one, and the process/product distinction would all but disappear from international trade law. *Id.*

Other commentators are skeptical of Howse's argument. They point chiefly to the fact that, because the health risks posed by asbestos include threats to product users themselves, France's trade measure banning the importation of asbestos-containing products clearly can be characterized as a product-focused regulation, rather than a process-focused one. See Gaines, *supra* note 62, at 418; Manoj Joshi, *Are Eco-Labels Consistent with World Trade Organization Agreements?*, 38 J. WORLD TRADE 69, 77 (2004). Whether the Appellate Body would be similarly generous in the context of a purely process-based trade measure, these critics point out, is a far less certain proposition. See Gaines, *supra* note 62, at 418 (noting that "[i]t is one thing to argue that two slightly different products with similar characteristics and uses might nevertheless be different, as the Appellate Body did in the *EC-Asbestos* case," but that "[i]t is altogether a different matter to propose . . . that physically indistinguishable products might nevertheless be treated as not 'like' based only on the circumstances of their manufacture"); Joshi, *supra*, at 77 (noting that, although the *Appellate Body Asbestos Report* may have "left the field open for interpretation in future cases[,] . . . as of now there has been no case of a Panel finding two products unlike merely based on [process characteristics that do not tangibly affect the end product]").

Act (DPCIA),⁶⁹ both foreign and domestic producers are prohibited from using the term “dolphin safe” or its equivalent on tuna packaging if their product is harvested using driftnets, purse seine nets, or other processes likely to injure or kill dolphins.⁷⁰ Additionally, DPCIA directs the Secretary of Commerce to establish “an official mark that may be used to label tuna products as dolphin safe” in accordance with federal guidelines.⁷¹ In rather sharp contrast to its ruling with regard to the MMPA, the *Tuna/Dolphin* panel found the U.S. “dolphin safe” labeling regulations to be consistent with the GATT.⁷² Notably, the panel rested its ruling on the fact that “[a]ny advantage which might possibly result from access to this label depends on the free choice by consumers to give preference to tuna carrying the ‘Dolphin Safe’ label.”⁷³

Notwithstanding the *Tuna/Dolphin* panel’s acceptance of the DPCIA program, many commentators in the years following the report have viewed both voluntary and mandatory government labeling programs as illegal, or at least vulnerable, under the GATT if they are premised on environmental or other process-related conditions.⁷⁴ To

⁶⁹ 16 U.S.C. § 1385 (2000).

⁷⁰ 16 U.S.C.A. § 1385(d)(1) (West Supp. 2004). In the case of purse seine nets and other harvesting methods “identified by the Secretary as having a regular and significant mortality or serious injury of dolphins,” producers still can use the “dolphin safe” label if they provide adequate assurance that “no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught.” *Id.* § 1385(d)(1)(D). In 2002, the Secretary of Commerce decided to permit “dolphin safe” labeling for tuna harvested by purse seine netting in the Eastern Tropical Pacific. Taking and Importing of Marine Mammals, 68 Fed. Reg. 2010, 2010-11 (Jan. 15, 2003). Critics attacked the regulation in court, charging that the Secretary’s action would contribute to significantly higher levels of dolphin mortality and was at odds with the terms of the DPCIA. *See Earth Island Inst. v. Evans*, 256 F. Supp. 2d 1064, 1068, 1075-76 (N.D. Cal. 2003). In 2004, a federal district court agreed with the critics:

[The administrative record] reflects an agency that (1) continued to drag its feet on conducting critical mandated research, (2) continued to ignore the fact that the best scientific evidence that *was* available, while not conclusive, pointed toward the fishery as the cause of the dolphins’ failure to recover as expected, and (3) compromised the integrity of its finding by allowing trade policy considerations to infect the decision-making process.

Earth Island Inst. v. Evans, No. C 03-0007 TEH, 2004 WL 1774221, at *6 (N.D. Cal. Aug. 9, 2004).

⁷¹ 16 U.S.C.A. § 1385(d)(3)(A).

⁷² *Tuna/Dolphin I*, *supra* note 46, at 204.

⁷³ *Id.* at 203.

⁷⁴ *See Groos*, *supra* note 58, at 408 (“WTO rules mandate that goods cannot be subject to statutory labeling requirements or differentiated on the basis of how they are produced . . .”); Okubo, *supra* note 65, at 600 (“One thing that all environmental labeling schemes have in common . . . is their uncertain status in relation to free trade.”); *see also* Caldwell & Wirth, *supra* note 59, at 588 (observing that “ecolabelling schemes” have become “a major flash point in the current debate” regarding trade and the environment); Erik P. Bartenhagen, Note, *The Intersection of Trade and the Environment: An Examination of the Impact of the TBT Agreement on Ecolabeling Programs*, 17 VA. ENVTL. L.J. 51, 68 (1997) (“[T]he current GATT regime creates much uncertainty about the future viability of voluntary, PPM-based ecolabeling schemes.”).

complicate matters further, product labeling schemes also now must be evaluated in light of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)⁷⁵ and the Agreement on Technical Barriers to Trade (TBT Agreement),⁷⁶ both of which were adopted as part of the Uruguay Round of trade negotiations. The SPS Agreement applies to all product regulations that are designed to protect human, animal, or plant life from “pests, diseases, disease-carrying organisms or disease-causing organisms,” or from “additives, contaminants, toxins or disease-causing organisms in food, beverages or feed-stuffs.”⁷⁷ The TBT Agreement covers all other mandatory or voluntary technical product standards. In simple terms, one can think of the TBT and SPS Agreements as more detailed and precise elaborations of the types of requirements that have been imposed within GATT jurisprudence through Article XX.⁷⁸ It is important to note, however, that the two Agreements apply to product standards, regulations, and procedures, whether or not such measures are alleged to discriminate against imported products. Thus, whereas previously countries did not violate GATT rules “as long as product standards [were]

The argument against mandatory labeling programs would be similar to the *Tuna/Dolphin* panel’s analysis of the MMPA import provisions: because process information does not affect a “product as such,” a national measure that blocked entry of unlabeled products would constitute a simple import ban that would have to be justified, if at all, under Article XX. See APPLETON, *supra* note 67, at 161–62. WTO panel members then might conclude that a voluntary labeling program provides a less trade-restrictive alternative to a mandatory system, rendering the latter program illegal under the Article XX chapeau. Voluntary programs, however, might still be challenged as disguised restrictions on trade, particularly in those instances where there is dispute about scientific evidence relating to the harmfulness or significance of the process at issue or where the regulating jurisdiction lacks a strong connection to the process or condition that the measure targets. See, e.g., Philip Bentley Q.C., *A Re-Assessment of Article XX, Paragraphs (b) and (g) of GATT 1994 in the Light of Growing Consumer and Environmental Concern About Biotechnology*, 24 *FORDHAM INT’L L.J.* 107, 128–29 (2000) (arguing that voluntary use of non-GM labeling could create a barrier to trade unless an accompanying disclaimer informed consumers that “no significant difference has yet been shown between foods with and without GMOs” (quoting C. Ford Runge & Lee Ann Jackson, *Labelling, Trade and Genetically Modified Organisms — A Proposed Solution*, 34 *J. WORLD TRADE* 111, 119 (2000)) (internal quotation marks omitted)); Gaines, *supra* note 62, at 400 (characterizing certain PPM measures as “an effort by one country simply to impose its environmental norms extraterritorially on uninterested or unwilling foreign sovereigns”).

⁷⁵ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND, vol. 27 (1994), http://www.wto.org/english/docs_e/legal_e/15-sps.pdf [hereinafter SPS AGREEMENT].

⁷⁶ Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND, vol. 27 (1994), http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf [hereinafter TBT AGREEMENT].

⁷⁷ SPS AGREEMENT, *supra* note 75, Annex A § 1(a), (b).

⁷⁸ See MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 142–43 (2d ed. 1999) (stating that the TBT Agreement “is really a more expansive formulation of Article XX”).

applied nondiscriminatorily,⁷⁹ now such standards must conform to the dictates of the TBT and SPS Agreements even when they are applied in a nondiscriminatory manner.

Member states may challenge product labeling regulations under either the TBT or the SPS Agreement. If the TBT Agreement governs, then such regulations must avoid imposing “unnecessary obstacles to international trade” and must not be “more trade-restrictive than necessary to fulfil a legitimate objective.”⁸⁰ In addition, product regulations must be based on available international standards unless the regulating nation can show that such standards are “ineffective or inappropriate.”⁸¹ If the SPS Agreement applies, then regulations must be “based on scientific principles,” supported by “sufficient scientific evidence,” and applied “only to the extent necessary to protect human, animal or plant life or health.”⁸² To fulfill this mandate, member nations must either rely on international standards when establishing sanitary and phytosanitary regulations or defend their selection of a higher level of protection by identifying a “scientific justification” in accordance with risk assessment procedures.⁸³ Finally, member nations must “ensure that such measures are not more trade-restrictive

⁷⁹ John J. Barceló III, *Product Standards To Protect the Local Environment — the GATT and the Uruguay Round Sanitary and Phytosanitary Agreement*, 27 CORNELL INT’L L.J. 755, 761 (1994).

⁸⁰ TBT AGREEMENT, *supra* note 76, art. 2.2. The TBT Agreement governs voluntary product labeling regulations with slightly less stringency than it oversees mandatory regulations. *See* Okubo, *supra* note 65, at 623. This more relaxed standard, however, has not prevented the development of doubt and controversy regarding the permissibility of voluntary process-related labeling programs under the Agreement. *See id.* at 621 (noting “debate over whether voluntary environmental labeling or eco-labeling acts as a *de facto* non-tariff trade barrier”). In addition, there has been some confusion regarding whether the TBT Agreement reaches voluntary labeling schemes that target process-related information, as opposed to product-related information. *See* Gaines, *supra* note 62, at 396–97 (noting that, due to a drafting ambiguity in the TBT Agreement, “there has been furious discussion but no consensus view within the WTO about how closely non-mandatory PPM measures such as eco-labels must be ‘related’ to the product to fall within the scope of the TBT Agreement”). Another interesting and potentially far-reaching aspect of the TBT Agreement is the requirement that nations supervise the design and implementation of even private, nongovernmental labeling programs. *See* Okubo, *supra* note 65, at 633–34.

⁸¹ TBT AGREEMENT, *supra* note 76, art. 2.4. Important sources of international standards include the Codex Alimentarius Commission for food safety, the International Office of Epizootics for animal health, and the International Plant Protection Convention for plant health. *See* Steve Charnovitz, *The Supervision of Health and Biosafety Regulation by World Trade Rules*, 13 TUL. ENVTL. L.J. 271, 286 (2000). In addition, although it is not strictly speaking an intergovernmental organization, the International Organization for Standardization provides another significant forum for devising consensus product standards. *See* Wirth, *supra* note 66, at 347.

⁸² SPS AGREEMENT, *supra* note 75, art. 2.2. The SPS Agreement creates an exception to this rule for cases in which scientific evidence is insufficient. *See id.* art. 5.7. In such cases, nations may adopt precautionary measures on a temporary basis, but these countries remain under an ongoing duty to revisit the state of scientific knowledge and the basis for precaution. *See id.*

⁸³ *Id.* arts. 3.3, 5.

than required to achieve their appropriate level of sanitary or phyto-sanitary protection.”⁸⁴

Defenders of the SPS Agreement believe that it will enhance the quality of democratic deliberation by forcing countries explicitly to identify scientific and empirical support for their domestic policy choices.⁸⁵ Others conclude, as Alan Sykes has, that the Agreement “unmistakably elevates the policing of trade restrictive measures above the ability of national governments to address risk in the face of scientific uncertainty.”⁸⁶ Whether the SPS Agreement and related aspects of GATT/WTO law truly promote democratic outcomes, rather than displace them, may well turn on the untested questions of whether and to what extent process-related labeling requirements are permissible under the SPS Agreement. That is, even granting that the rules of the international trading system can improve “democratic rationality” by discouraging regulatory actions premised on “popular prejudice and alarm,”⁸⁷ what is to be made of public concern that persists despite a lack of scientific evidence to support it? In such situations, may governments adopt labeling requirements as an intermediate position between, on the one hand, acceding to scientifically groundless policy demands and, on the other hand, ignoring altogether the sincerely expressed concerns of citizens?⁸⁸ As the next section describes, no dispute presents these questions in more stark or contentious form than the recently filed U.S. trade complaint over European regulation of GM foods.⁸⁹

⁸⁴ *Id.* arts. 5.5, 5.6.

⁸⁵ See Robert Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 MICH. L. REV. 2329, 2330 (2000) (“If rational deliberation is an important element in making democratic outcomes legitimate, then providing some role for scientific principles and evidence in the regulatory process may enhance, rather than undermine, democratic control of risk.”); cf. McGinnis & Movsesian, *supra* note 44, at 577 (“An objective evidence requirement . . . would weaken the power of protectionist interest groups, thereby reinforcing domestic democracy.”).

⁸⁶ Alan O. Sykes, *Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View*, 3 CHI. J. INT’L L. 353, 368 (2002); see also Vern R. Walker, *Keeping the WTO from Becoming the “World Trans-science Organization”: Scientific Uncertainty, Science Policy, and Factfinding in the Growth Hormones Dispute*, 31 CORNELL INT’L L.J. 251, 319 (1998) (concluding that “[c]ases under the SPS Agreement implicate the momentous clash between the interest in efficient international trade and the sovereign duty to protect health”).

⁸⁷ Howse, *supra* note 85, at 2330, 2336.

⁸⁸ See Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, *supra* note 42, at 101–02 (describing the difficulty of evaluating appropriate governmental responses to “a quasi-rational public panic, based on an intense emotional reaction to a low-probability risk”).

⁸⁹ During the long-festering trade dispute over Europe’s refusal to permit importation of U.S. meat due to the use of hormone treatment, Europe rejected an offer by the United States to settle the dispute by labeling U.S. meat exports. See Sean D. Murphy, *Does the World Need a New International Environmental Court?*, 32 GEO. WASH. J. INT’L L. & ECON. 333, 339 (2000) (noting that settlement discussions broke down over the precise wording of the proposed label); Michele D. Carter, Note, *Selling Science Under the SPS Agreement: Accommodating Consumer Preference*

B. Genetic Engineering and “Substantial Equivalence”

For close to ten thousand years, humankind has relied on hybridization and other methods of biotechnology to improve plants and animals for use in food production.⁹⁰ More recently, however, geneticists have developed a cluster of bioengineering techniques that allow the introduction of desired traits into host species with a speed and flexibility previously unknown to science.⁹¹ Many American consumers report that they oppose the use of these techniques in agricultural production,⁹² and that they strongly support mandatory labeling of retail products derived from GM organisms.⁹³ Nevertheless, industry estimates suggest that as many as sixty percent of all processed food items on U.S. supermarket shelves contain undisclosed GM ingredients.⁹⁴ The manner in which this curious juxtaposition came about provides one of the most telling illustrations of the process/product distinction and its growing importance within government regulation of environmental, health, and safety risks.⁹⁵

in the Growth Hormones Controversy, 6 MINN. J. GLOBAL TRADE 625, 654 (1997). Although such a compromise would have resolved “one of the longest running trade disputes in the modern trading system,” Sykes, *supra* note 86, at 358, it would not have shed light on the vexing questions whether and to what extent process-related labeling requirements are consistent with international trade law in the absence of a voluntary settlement.

⁹⁰ See CALESTOUS JUMA, *THE GENE HUNTERS: BIOTECHNOLOGY AND THE SCRAMBLE FOR SEEDS* 108–09 (1989) (noting that agricultural biotechnology dates back at least to the use of fermentation in 7000 BC). According to the U.S. Department of Agriculture, agricultural biotechnology consists of “a collection of scientific techniques . . . that are used to create, improve, or modify plants, animals, and microorganisms.” U.S. Dep’t Agric., *Biotechnology and U.S. Agricultural Trade: Questions and Answers*, at <http://www.fas.usda.gov/itp/biotech/Q&As.html> (last modified Nov. 7, 2003). Commentators in GM agriculture debates frequently use the term “biotechnology” to refer more specifically to modern genetic engineering techniques such as recombinant DNA isolation, cloning, and sequencing. See Michael John Gulliford, Comment, *Much Ado About Gene Patents: The Role of Foreseeability*, 34 SETON HALL L. REV. 711, 715 (2004).

⁹¹ Specifically, by allowing genetic material to be “spliced” into a host organism directly at the level of DNA, such techniques permit “the formation of new combinations of heritable material . . . [that are] incorporat[ed] into a host organism in which they do not naturally occur but in which they are capable of continued propagation.” JOHN E. SMITH, *BIOTECHNOLOGY* 38 (Cambridge Univ. Press, 3d ed. 1996).

⁹² See, e.g., Pew Initiative on Food and Biotechnology, *Americans Are Far More Comfortable with Genetic Modifications of Plants Than Animals*, Public Sentiment About Genetically Modified Food: September 2003 Update, at <http://pewagbiotech.org/research/2003update/4.php> (last visited Nov. 14, 2004) (reporting that forty-one percent of survey respondents believed it was “somewhat bad” or “very bad” to use genetic modification of plants to make produce last longer). Even more Americans reportedly opposed the genetic modification of animals. See *id.*

⁹³ See TEISL & CASWELL, *supra* note 38, at 2 (citing results from multiple polls).

⁹⁴ See Henrique Freire de Oliveira Souza, *Genetically Modified Plants: A Need for International Regulation*, 6 ANN. SURV. INT’L & COMP. L. 129, 131 (2000); Julie Teel, Student Article, *Regulating Genetically Modified Products and Processes: An Overview of Approaches*, 8 N.Y.U. ENVTL. L.J. 649, 649 (2000).

⁹⁵ For more comprehensive analyses of U.S. regulation of genetically engineered agricultural products, see Rebecca Bratspies, *The Illusion of Care: Regulation, Uncertainty, and Genetically*

1. *Modern Genetic Engineering Processes.* — Neither the potential benefits nor the potential risks of modern genetic engineering are insignificant. On the positive side, supporters of GM technologies emphasize that GM crops can reduce the need for external pesticide applications by incorporating insect and disease resistance traits directly into a plant's genetic makeup.⁹⁶ Similarly, plants can be engineered to tolerate herbicide applications in a manner that potentially enables the use of fewer chemicals to achieve a desired level of weed control.⁹⁷ Other potential enhancements for agricultural crops include improved plant tolerance to unfavorable growing conditions,⁹⁸ and various means of improving the handling, distribution, and processing of food products.⁹⁹ Finally, although such products have yet to make a significant appearance in the consumer marketplace, proponents of GM foods also envision a future in which agricultural products express desirable output characteristics, such as improved nutritional content or a more aesthetically pleasing texture and appearance.¹⁰⁰

On the negative side, opponents worry that GM food products may pose human health risks that, given the novelty of GM technologies, scientists will have difficulty identifying. Opponents voice concerns about the potential toxicity and allergenicity of GM food products,¹⁰¹

Modified Food Crops, 10 N.Y.U. ENVTL. L.J. 297 (2002); Gregory N. Mandel, *Gaps, Inexperience, Inconsistencies, and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals*, 45 WM. & MARY L. REV. 2167 (2004); Emily Marden, *Risk and Regulation: U.S. Regulatory Policy on Genetically Modified Food and Agriculture*, 44 B.C. L. REV. 733 (2003); McGarity, *supra* note 45.

⁹⁶ See Indur M. Goklany, *The Future of Food*, F. FOR APPLIED RES. & PUB. POL'Y, Summer 2001, at 59, 60. Indeed, according to USDA researchers, pesticide use has fallen measurably following widespread U.S. adoption of GM corn, cotton, and soybean crops. See JORGE FERNANDEZ-CORNEJO & WILLIAM D. MCBRIDE, ADOPTION OF BIOENGINEERED CROPS 27 (U.S. Dep't Agric., Agricultural Economic Report No. 810, 2002) (estimating a reduction, related to the adoption of genetically engineered crops, of 6.2% of total pesticide treatments), available at <http://www.ers.usda.gov/publications/aer810/aer810.pdf>.

⁹⁷ See Mandel, *supra* note 95, at 2181. To date, the overwhelming majority of both field-tested and marketed GM organisms have been engineered to express either or both of these two traits. See McGarity, *supra* note 45, at 410 ("Of the thousands of field trials that biotechnology companies have completed to date, 83 percent have involved plants genetically engineered for pest resistance or herbicide tolerance and only 22 percent tested plants with improved quality traits.")

⁹⁸ See Mandel, *supra* note 95, at 2181.

⁹⁹ The first GM food organism submitted to the FDA for approval was a tomato that had been engineered to stay firm and fresh for longer periods of time after being picked than conventional tomatoes. McGarity, *supra* note 45, at 413–14. Although this product was commercially unsuccessful, biotechnology advocates continue to view increased fruit and vegetable shelf life as an important input trait for research and development. See *id.* at 414.

¹⁰⁰ See Mandel, *supra* note 95, at 2183.

¹⁰¹ Although GM crops frequently are engineered to contain pesticidal substances, the toxicity of resulting food products is difficult to predict or detect because the products do not lend themselves to traditional methods of risk assessment. See I.R. Rowland, *Genetically Modified Foods, Science, Consumers and the Media*, 61 PROC. NUTRITION SOC'Y 25, 27 (2002) (noting that toxicity assessment typically involves exposing laboratory animals to high levels of isolated chemicals,

the impact of genetic engineering techniques on antibiotic effectiveness,¹⁰² the possibility that modified genetic material might transfer “horizontally” to humans through ingestion or other bio-mechanisms,¹⁰³ and the potential for GM processes to have adverse effects on important nutrient levels in food products.¹⁰⁴ With regard to ecological consequences, evidence suggests that GM crops may threaten desirable nontarget species such as monarch butterflies or beneficial predatory insects,¹⁰⁵ may cause unpredictable ecological disturbances as engineered traits spread to neighboring species,¹⁰⁶ and

and that “complex mixtures of complex chemicals,” such as novel GM foods, cannot be administered to animal subjects in this conventional manner). Similarly, because bioengineers sometimes incorporate proteins from nonfood sources whose allergenic potential is presently unknown, resulting GM food products pose at least a possibility of serious allergic reactions for some consumers. See *id.* at 28 (noting that “[a]ssessing the allergenic potential of novel foods presents major problems, since there are no reliable tests for predicting allergenicity”).

¹⁰² Scientists sometimes link manipulated genes with a “marker gene” that is resistant to antibiotics, thereby raising the possibility that antibiotics will treat humans less effectively as this resistance spreads. See *id.* This concern should dissipate, however, as scientists respond to pressure to phase out the use of antibiotic-resistant marker genes. See Anthony J. Conner et al., *The Release of Genetically Modified Crops into the Environment — Part II. Overview of Ecological Risk Assessment*, 33 PLANT J. 19, 28 (2003).

¹⁰³ See Conner et al., *supra* note 102, at 27.

¹⁰⁴ See McGarity, *supra* note 45, at 422–23.

¹⁰⁵ In 1999, a preliminary study in *Nature* demonstrated lethal effects of pollen from *Bacillus thuringiensis* (Bt) corn on monarch butterfly larvae. See John E. Losey et al., *Transgenic Pollen Harms Monarch Larvae*, 399 NATURE 214, 214 (1999). Follow-up research in the wake of the media attention generated by this study determined that most GM corn did not express the Bt toxin at sufficiently high levels to threaten monarchs in actual field environments, as opposed to the conditions evaluated in the initial laboratory study. See Genetically Engineered Organisms — Public Issues Education Project, *Impact of Bt-Corn on Monarch Butterflies*, at <http://www.geopie.cornell.edu/issues/monarchs.html> (last updated Aug. 16, 2004). Notably, however, researchers did find that one variety of Bt corn approved for commercial use was capable of increasing larvae mortality in field environments. See *id.* This variety had not been widely adopted — and has since been discontinued — and thus the monarch butterfly species was never seriously threatened. See *id.* Nevertheless, the risk of adverse effects of GM crops demonstrated by this example remains a serious concern. See David E. Ervin et al., *Towards an Ecological Systems Approach in Public Research for Environmental Regulation of Transgenic Crops*, 99 AGRIC., ECOSYSTEMS & ENV'T 1, 6 (2003) (noting that “there are still questions being raised about the effects of long-term and low-level exposure to Bt in corn pollen on monarch larvae survival and fitness”); see also A.N.E. Birch et al., *Interactions Between Plant Resistance Genes, Pest Aphid Populations and Beneficial Aphid Predators*, in SCOTTISH CROP RESEARCH INST., ANNUAL REPORT 1996/97, at 68, 71–72 (1997) (reporting the development of reproductive difficulties in ladybugs that had been fed aphids reared on GM potatoes), available at <http://www.scri.sari.ac.uk/SCRI/web/FILES/AnRp967.pdf>; Angelika Hilbeck et al., *Effects of Transgenic Bacillus thuringiensis Corn-Fed Prey on Mortality and Development Time of Immature Chrysoperla carnea (Neuroptera: Chrysopidae)*, 27 ENVTL. ENTOMOLOGY 480, 482–84 (1998) (demonstrating negative health effects among lacewings reared on prey that had been fed Bt maize).

¹⁰⁶ See Ervin et al., *supra* note 105, at 5 (noting that “[t]here is little doubt in the scientific community that genes will move from crops into the wild” and that “[g]ene transfer could become a problem if the transferred genes do not have deleterious effects on the crop-wild hybrids, but instead confer an ecological advantage”).

may hasten the development of resistance among target pest species.¹⁰⁷ Finally, in addition to these concerns about human health and the environment, some individuals object to GM technologies on cultural, religious, ethical, or other nontechnical grounds. For instance, some believe that GM agriculture exacerbates the trend toward concentrated, monocultural production, thereby threatening national food security and traditional agrarian culture.¹⁰⁸

Because many of the foregoing positive and negative effects are highly speculative,¹⁰⁹ policymakers have been required to resort to default assumptions when developing regulatory frameworks for GM crops and products. Many jurisdictions, for instance, have employed the precautionary principle, a decisionmaking heuristic that “counsels serious contemplation of regulatory action in the face of evidence of health and environmental risk, even before the magnitude of risk is necessarily known or any harm manifested.”¹¹⁰ Consistent with this precautionary approach, Europe requires manufacturers both to dem-

¹⁰⁷ See Bratspies, *supra* note 95, at 300 n.14 (“[T]here is some degree of scientific certainty that it is a question of when — not if — insects will develop resistance to [GM] plants engineered to produce pesticides, herbicides or other ‘plant-incorporated protectants.’”). The EPA has acknowledged this risk by requiring non-GM biological “refuge” areas to be planted around GM crops, although it is doubtful that these requirements have much practical effect due to the EPA’s lack of a strong enforcement regime. See Rebecca M. Bratspies, *Bridging the Genetic Divide: Confidence-Building Measures for Genetically Modified Crops*, 44 JURIMETRICS J. 63, 72–73 (2003) (concluding that the EPA’s system for regulating GM crops containing pesticides is “full of holes”). The risk of resistance is of special concern to organic producers, who long have relied on the Bt bacteria as a last resort to combat pests, but who now see the Bt gene being expressed directly in GM maize crops on millions of acres across the United States. Indeed, a study by the National Research Council concluded that “[i]nsect resistance to Bt crops is considered inevitable.” COMM. ON ENVTL. IMPACTS ASSOCIATED WITH COMMERCIALIZATION OF TRANSGENIC PLANTS, NAT’L RESEARCH COUNCIL, ENVIRONMENTAL EFFECTS OF TRANSGENIC PLANTS: THE SCOPE AND ADEQUACY OF REGULATION 76 (2002).

¹⁰⁸ See Melissa L. Finucane, *Mad Cows, Mad Corn and Mad Communities: The Role of Socio-Cultural Factors in the Perceived Risk of Genetically-Modified Food*, 61 PROC. NUTRITION SOC’Y 31, 31, 33 (2002); Marden, *supra* note 95, at 761 (noting that demands for mandatory labeling of GM foods reflect “the desire to safeguard the purity of the food, prevent potential allergic reactions, avoid a process that interferes with religion or moral views, and promote traditional farming”).

¹⁰⁹ See, e.g., ROYAL SOC’Y OF CANADA, ELEMENTS OF PRECAUTION: RECOMMENDATIONS FOR THE REGULATION OF FOOD BIOTECHNOLOGY IN CANADA 132 (2001) (concluding that “the quantity and the quality of research on the potential environmental impacts of [GM organisms] is not sufficient to address many of [the field’s most] pressing questions”), available at <http://www.rsc.ca/foodbiotechnology/GMreportEN.pdf>.

¹¹⁰ David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 NW. U. L. REV. 1315, 1315 (2003). For an overview of the precautionary principle in international and domestic environmental law, as well as an exploration of the principle’s implications for international trade, see Joint Working Party on Trade & Env’t, Org. for Econ. Co-operation & Dev., *Uncertainty and Precaution: Implications for Trade and Environment*, COM/ENV/TD(2000)114/FINAL (Sept. 5, 2002).

onstrate the safety of GM crops and food products before they are marketed, and to label such products even after they are approved.¹¹¹

The United States, in contrast, has embraced the doctrine of “substantial equivalence,” under which regulators subject GM food products to no greater regulatory oversight than the unmodified products that they are shown to strongly resemble.¹¹² Of course, given that a GM product almost certainly has been altered to an extent that is sufficiently “novel” to earn intellectual property protection for its developer,¹¹³ one naturally might wonder how such a product could ever be deemed substantially equivalent to an unmodified product. The answer lies in the highly stylized definition of “substantial equivalence.” Most notably, the substantial equivalence determination accords no significance to the fact that a product has been developed using modern genetic engineering processes.¹¹⁴ Rather, substantial equivalence is determined solely with reference to the compositional and other tangible characteristics of the modified organism and its conventional counterparts.¹¹⁵

The substantial equivalence doctrine is built upon a variation of the process/product distinction: absent some identifiable alteration in the physical features and characteristics of the end product, the doctrine assumes that modification of a plant’s or animal’s genetic makeup is an inconsequential process about which neither regulators nor consumers should concern themselves. Similarly, a recent draft risk assessment from the USDA addressing the hazards of cloned livestock advocates a “compositional analysis method” of risk assessment, under which regulators assume that “food products from healthy animal clones and their progeny that are not materially different from corresponding products from conventional animals are as safe to con-

¹¹¹ Europe’s regulation of GM food products is briefly described below, *see infra* pp. 562–63.

¹¹² *See* ORG. FOR ECON. CO-OPERATION & DEV., SAFETY EVALUATION OF FOODS DERIVED BY MODERN BIOTECHNOLOGY: CONCEPTS AND PRINCIPLES 14–16 (1993) (introducing the “substantial equivalence” concept). For an overview of U.S. use of the substantial equivalence doctrine in GM regulation, *see infra* section I.B.2, pp. 558–62.

¹¹³ For a discussion of intellectual property issues in the context of agricultural biotechnology, including the controversial “terminator” gene technology that was developed to enforce patent rights by rendering GM seeds sterile, *see* Cullen N. Pendleton, *The Peculiar Case of “Terminator” Technology: Agricultural Biotechnology and Intellectual Property Protection at the Crossroads of the Third Green Revolution*, 23 BIOTECHNOLOGY L. REP. 1 (2004).

¹¹⁴ *See* McGarity, *supra* note 45, at 429 (“[T]he baseline assumption of the substantial equivalence doctrine is that there is nothing inherently novel about plant breeding through modern genetic engineering.”).

¹¹⁵ *See* ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 112, at 11. An obvious theoretical problem then becomes how to determine the class of compositional and other tangible characteristics that provide the benchmark for the substantial equivalence determination. *See* Rowland, *supra* note 101, at 27.

sume as their conventional counterparts.”¹¹⁶ The process of cloning itself, in other words, lacks conceptual significance, just as the process of genetic manipulation carries no significance under the substantial equivalence doctrine. As shown by the discussion of U.S. GM food regulation in the following subsection, these various uses of the process/product distinction can have significant implications for the manner in which regulators address novel technologies.

2. *U.S. Regulation of Genetically Modified Food Products.* — In the early years of recombinant DNA research in the United States, the National Institute of Health categorically banned all releases of the products of recombinant DNA technology into the environment.¹¹⁷ This ban was lifted in 1982 and, following years of delays caused by litigation and community challenges, the first U.S. field testing of a GM organism began in April, 1987, near Brentwood, California.¹¹⁸ At the time, the United States had adopted a regulatory stance toward agricultural biotechnology that declined to single out GM organisms for enhanced scrutiny based solely on their method of production. Specifically, in June of 1986, a working group convened by President Reagan’s Domestic Policy Council published a policy document, “Coordinated Framework for Regulation of Biotechnology,” establishing the fundamental premise that modern genetic engineering did not ipso facto warrant any more regulation than “traditional genetic manipulation techniques” such as hybridization.¹¹⁹

Because the Coordinated Framework and subsequent executive branch position statements embraced the substantial equivalence doctrine in this manner,¹²⁰ policymakers determined that no new laws

¹¹⁶ U.S. DEP’T AGRIC., ANIMAL CLONING: A RISK ASSESSMENT: DRAFT EXECUTIVE SUMMARY 6 (Oct. 21, 2003), available at <http://www.fda.gov/cvm/index/cloning/CLRAES.pdf>.

¹¹⁷ SHELDON KRIMSKY & ROGER P. WRUBEL, AGRICULTURAL BIOLOGY AND THE ENVIRONMENT: SCIENCE, POLICY, AND SOCIAL ISSUES 159 (1996).

¹¹⁸ See PAUL B. THOMPSON, THE SPIRIT OF THE SOIL: AGRICULTURE AND ENVIRONMENTAL ETHICS 35 (1995).

¹¹⁹ Coordinated Framework for Regulation of Biotechnology, 51 Fed. Reg. 23,302, 23,303 (June 26, 1986); see also Proposal for a Coordinated Framework for Regulation of Biotechnology, 49 Fed. Reg. 50,856, 50,857, 50,859–77 (Dec. 31, 1984) (summarizing laws that may regulate GM products).

¹²⁰ In 1990, the first Bush administration elaborated on the 1986 Coordinated Framework through its articulation of “Four Principles of Regulatory Review for Biotechnology.” See Exercise of Federal Oversight Within Scope of Statutory Authority: Planned Introductions of Biotechnology Products into the Environment, 57 Fed. Reg. 6753 app. at 6760 (Feb. 27, 1992). The first of the four principles stated that “[f]ederal government regulatory oversight should focus on the characteristics and risks of the biotechnology product — not the process by which it is created.” *Id.* Similarly, in February of 1992, the Office of Science and Technology Policy published a “Final Statement on Scope,” which announced that executive oversight of biotechnology products “should not turn on the fact that an organism has been modified by a particular process or technique.” *Id.* at 6753.

were required to regulate GM organisms.¹²¹ Instead, federal agencies would share regulatory oversight duties by exercising their authority under a pastiche of existing statutes.¹²² Accordingly, today the EPA regulates environmental risks posed by GM organisms through its authority under the Federal Insecticide, Fungicide, and Rodenticide Act¹²³ and the Toxic Substances Control Act;¹²⁴ the FDA evaluates the safety and marketing of GM organisms intended for human consumption under the Federal Food, Drug, and Cosmetic Act (FFDCA);¹²⁵ and the USDA, acting through its Animal and Plant Health Inspection Service under the Plant Protection Act,¹²⁶ monitors the use of GM organisms in agricultural production.

Critics charge that the responsible agencies have diluted these statutory powers in practice.¹²⁷ For instance, the FDA arguably has discretion to require thorough premarket review of GM food products under the FFDCA's grant of authority to regulate "adulterated foods" and "food additives."¹²⁸ In practice, however, the FDA has conferred a "generally recognized as safe" (GRAS) exemption from premarket review on any GM food crop deemed substantially equivalent to its traditionally bred parental strain.¹²⁹ Moreover, the FDA has allowed product manufacturers themselves to determine whether a substance should be considered GRAS.¹³⁰

¹²¹ See PEW INITIATIVE ON FOOD AND BIOTECHNOLOGY, GUIDE TO U.S. REGULATION OF GENETICALLY MODIFIED FOOD AND AGRICULTURAL BIOTECHNOLOGY PRODUCTS, at i, 6 (Sept. 2001) [hereinafter PEW GUIDE], available at <http://pewagbiotech.org/resources/issuebriefs/1-reg-guide.pdf>.

¹²² See Nathan W. Eckley, Comment, *Reaping the Benefits of Agricultural Biotechnology Through Uniform Regulation*, 35 J. MARSHALL L. REV. 433, 436-39 (2002).

¹²³ 7 U.S.C.A. §§ 136-136y (West 2000 & Supp. 2003).

¹²⁴ 15 U.S.C.A. §§ 2601-2692 (West 2000 & Supp. 2003).

¹²⁵ 21 U.S.C.A. §§ 301-399 (West 2000 & Supp. 2003).

¹²⁶ 7 U.S.C.A. §§ 7701-7772 (West 2000 & Supp. 2003).

¹²⁷ See, e.g., Bratspies, *supra* note 95; Mandel, *supra* note 95; McGarity, *supra* note 45.

¹²⁸ See Stanley H. Abramson & J. Thomas Carrato, *Crop Biotechnology: The Case for Product Stewardship*, 20 VA. ENVTL. L.J. 241, 250-51 (2001); Ved P. Nanda, *Genetically Modified Food and International Law — The Biosafety Protocol and Regulations in Europe*, 28 DENV. J. INT'L L. & POL'Y 235, 246-47 (2000); Terence P. Stewart & David S. Johanson, *Policy in Flux: The European Union's Laws on Agricultural Biotechnology and Their Effects on International Trade*, 4 DRAKE J. AGRIC. L. 243, 248-49 (1999); George E.C. York, Note, *Global Foods, Local Tastes and Biotechnology: The New Legal Architecture of International Agriculture Trade*, 7 COLUM. J. EUR. L. 423, 437 (2001).

¹²⁹ See Sheldon Krinsky & Nora K. Murphy, *Biotechnology at the Dinner Table: FDA's Oversight of Transgenic Food*, ANNALS AM. ACAD. POL. & SOC. SCI., Nov. 2002, at 80, 82. GM substances altered in a manner such that they cannot be deemed GRAS are subject to regulation as food additives. As of 2001, however, only one GM food product had triggered the food additive review process. See PEW GUIDE, *supra* note 121, at 21 n.15.

¹³⁰ See PEW GUIDE, *supra* note 121, at 20 ("FFDCA does not require FDA to make a premarketing determination that a potential food additive is GRAS; that determination is made by the food manufacturer without FDA review."); McGarity, *supra* note 45, at 438 ("Ultimately, the agency leaves it up to the manufacturer to determine whether an added substance is GRAS.").

The doctrine of substantial equivalence also finds expression in the FDA's labeling policy for GM foods. In its 1992 Policy Statement concerning GM food products, the Agency made clear that it did not regard the fact that an agricultural substance was produced through genetic modification techniques to be "material" information subject to mandatory disclosure under the FFDCA.¹³¹ The Agency did indicate that labeling would be required "if a food derived from a new plant variety differs from its traditional counterpart such that the common or usual name no longer applies to the new food, or if a safety or usage issue exists to which consumers must be alerted."¹³² The FDA might require labeling, therefore, when developers incorporate known allergenic material into a food product or when the "concentration and bioavailability of important nutrients" in the modified food product are no longer within the range ordinarily seen in traditional counterpart foods.¹³³ Short of such extreme cases, however, the FDA concluded that it lacks statutory authority to force disclosure of information related solely to the process by which a food product was developed.¹³⁴

Manufacturers may, but need not, petition the FDA for an affirmation that the Agency agrees with the manufacturer's GRAS determination. *See, e.g.*, Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22,984 (May 29, 1992); Food & Drug Admin. Ctr. for Food Safety and Applied Nutrition, *Guidance on Consultation Procedures: Foods Derived from New Plant Varieties*, <http://www.cfsan.fda.gov/~lrd/consulpr.html> (Oct. 1997). During its waning days, the Clinton Administration issued a proposed regulation requiring premarket notification to the FDA, but the Agency appears not to have pursued the issue further. *See* Premarket Notice Concerning Bioengineered Foods, 66 Fed. Reg. 4706 (Jan. 18, 2001).

¹³¹ *See* Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. at 22,984; *id.* at 22,991 ("The agency is not aware of any information showing that foods derived by these new methods differ from other foods in any meaningful or uniform way, or that, as a class, foods developed by the new techniques present any different or greater safety concern than foods developed by traditional plant breeding.").

¹³² *Id.* at 22,991.

¹³³ *Id.* at 22,992.

¹³⁴ Referencing both the language of the FFDCA and the Agency's own past practices, commentators have criticized the FDA's conclusion that it lacked this authority. *See, e.g.*, Lara Beth Winn, *Special Labeling Requirements for Genetically Engineered Food: How Sound Are the Analytical Frameworks Used by FDA and Food Producers?*, 54 FOOD & DRUG L.J. 667 (1999). Farmed salmon provides an instructive comparison. In this context, the FDA has taken the position that canthaxanthin — the primary artificial coloring agent used by the salmon industry — is a product additive whose use under the FFDCA must be disclosed to consumers in order to prevent the "economic fraud" that would occur if consumers assumed that farmed salmon is naturally colored. *See* 63 Fed. Reg. 14,814 (Mar. 27, 1998); FDA Listing of Color Additives Exempt from Certification, 21 C.F.R. §§ 73.35(d)(3), 73.75(d)(4) (2004); FDA Food Labeling Requirements, 21 C.F.R. §§ 101.22(a), (b), (k)(2), 101.100(a)(2). The FDA could easily have applied this reasoning to the GM context: just as consumers in the absence of disclosure might assume that salmon products are not artificially colored, they also seem likely to assume that food products are not the result of genetic engineering unless informed otherwise.

Despite the failure of a legal challenge to these conclusions,¹³⁵ opponents of GM foods have found some success in the court of public opinion. For instance, the USDA's 1997 proposed federal organic certification standards, which would have permitted the use of GM ingredients and other practices that were inconsistent with prevailing understandings of organic agriculture, prompted more public comments — almost all of them negative — than any other proposed regulation in the Agency's history.¹³⁶ Also around that time, more than 500,000 individuals signed a petition demanding that the FDA require labeling of GM foods.¹³⁷ Awareness of and opposition to GM food products continued to mount as activists adopted a variety of publicity strategies. Finally, in late 1999, the FDA announced that it would hold a series of three public meetings to explain its position on GM foods and to solicit views on whether the position should be altered.¹³⁸

As the FDA would later acknowledge, “[m]ost of the comments [it received] that addressed labeling requested mandatory disclosure of the fact that the food or its ingredients was bioengineered or was produced from bioengineered food.”¹³⁹ Nevertheless, the FDA held to its position that genetic modification alone is not a material fact that must be disclosed under the FFDCa.¹⁴⁰ Instead, the Agency issued draft labeling guidelines for voluntary disclosure by manufacturers, recognizing that “many consumers are interested in the information, and some manufacturers may want to respond to this consumer desire.”¹⁴¹ Because it did not believe that food manufacturers could ensure that their products were completely free of GM ingredients, the Agency noted that “GM-free” labeling is likely to be misleading, and therefore

¹³⁵ In *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166 (D.D.C. 2000), a federal district court refused to find that the FDA's presumption that GM foods meet the GRAS standard in the absence of contrary evidence was arbitrary and capricious. *Id.* at 181. The court also rejected a challenge to the FDA's labeling policy, accepting the Agency's interpretation that the FFDCa required a “material” difference in products before consumer demand could even be considered. *Id.* at 179 & n.10.

¹³⁶ See Curt Anderson, *USDA Urged To Scrap Organic Rules*, AP ONLINE, May 1, 1998, 1998 WL 6659243 (noting that comments were “overwhelmingly negative”); Patrice Wendling, *Permissive U.S. Rules Threaten the Meaning of “Organic”: New Serpent in the Garden*, CAPITAL TIMES, Apr. 25, 1998, 1998 WL 5869134 (noting that 115,000 public comments “obliterat[ed] the previous record of 6,800 comments”).

¹³⁷ See Lisa A. Tracy, *Does a Genetically Modified Rose Still Smell As Sweet? — Labeling of Genetically Modified Organisms Under the Biosafety Protocol*, 6 BUFF. ENVTL. L.J. 129, 156 (1999).

¹³⁸ *Biotechnology in the Year 2000 and Beyond; Public Meetings*, 64 Fed. Reg. 57,470 (Oct. 25, 1999).

¹³⁹ Food & Drug Admin. Ctr. for Food Safety and Applied Nutrition, *Draft Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering*, <http://www.cfsan.fda.gov/~dms/biolabgu.html> (Jan. 2001).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

unlawful. Moreover, the Agency noted that “[a] statement that a food was not bioengineered or does not contain bioengineered ingredients may be misleading if it implies that the labeled food is superior to foods that are not so labeled.”¹⁴² Finally, in addition to these restrictions on the content of voluntary labeling, the FDA also noted that manufacturers should be able to substantiate non-GM marketing claims through such measures as “validated test methods,” “special handling,” “appropriate recordkeeping,” “segregation procedures,” or “certifications or affidavits from farmers, processors, and others in the food production and distribution chain.”¹⁴³

Given the Supreme Court’s skepticism of government bans on truthful commercial information,¹⁴⁴ the FDA could go only so far in its effort to regulate non-GM claims by product marketers. Nevertheless, taken together, the substantive and procedural requirements contained in the FDA’s draft labeling policy seem to suggest that the Agency would like to see food manufacturers refrain entirely from providing consumers with information regarding genetic engineering processes.¹⁴⁵ Having determined that GM food products are indistinguishable from alternative products for purposes of risk assessment, the FDA also seemed to assume that the products are indistinguishable for all other purposes relevant to consumer markets.

3. *The Looming Trade War with Europe.* — Unlike the United States, the European Union has established a regulatory program that distinguishes GM products for special treatment based solely on the fact of modification. Specifically, under recently finalized EU rules,

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ The Court repeatedly has emphasized the paternalistic dangers of suppressing accurate commercial information. *See, e.g.*, 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 503 (1996) (noting that government restrictions on truthful, “nonmisleading” speech “usually rest solely on the offensive assumption that the public will respond ‘irrationally’ to the truth”) (quoting *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 96 (1977)); *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 111 (1990) (“The Commission’s concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment.”); *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 351 (1986) (Brennan, J., dissenting) (arguing that a Puerto Rico ban on casino advertising constituted an effort to “manipulate private behavior by depriving citizens of truthful information concerning lawful activities”); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 574–75 (1980) (Blackmun, J., concurring) (describing a commercial speech restriction as “a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (deeming a restriction on the advertisement of pharmaceuticals “highly paternalistic”); *see also Wash. Legal Found. v. Friedman*, 13 F. Supp. 2d 51, 69–70 (D.D.C. 1998) (“If there is one fixed principle in the commercial speech arena, it is that ‘a State’s paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it.’”) (quoting 44 *Liquormart*, 517 U.S. at 497).

¹⁴⁵ *See McGarity, supra* note 45, at 463–64.

before a GM product can be marketed, the European Food Safety Authority must assess its safety through an extensive risk assessment and evaluation process that is open to public input and that does not include any shortcut approval mechanism akin to the United States's GRAS procedure.¹⁴⁶ In addition, all genetically altered products, including animal feed, vegetable oils, seeds, and byproducts containing more than 0.9% GM ingredients, must bear a label that notes: "This product contains genetically modified organisms."¹⁴⁷ Finally, such products must be "traceable" through the establishment and maintenance of an extensive informational network that tracks GM products within the production and distribution chain.¹⁴⁸

Member nations of the European Union considered these stringent regulations necessary to mollify concerns associated with overturning what had been a de facto ban on the importation, release, and marketing of any new GM products. Although in the early 1990s Europe had authorized the release of eighteen GM organisms into the environment and the marketing of food products derived from sixteen GM organisms, high-profile food scares later in the decade resulted in public demand for heightened government screening of food and food technologies.¹⁴⁹ Thus, beginning in October of 1998, the European Union suspended authorization of any new GM organisms for environmental release or for marketing to consumers.¹⁵⁰

Despite the fact that Europe was poised to supplant this de facto moratorium with its new regulatory framework, the United States filed a formal WTO trade complaint on May 13, 2003.¹⁵¹ The complaint

¹⁴⁶ See Regulation 1829/2003 of 22 September 2003 on Genetically Modified Food and Feed, 2003 O.J. (L 268) 1; Regulation 178/2002 of 28 January 2002 Laying Down the General Principles and Requirements of Food Law, Establishing the European Food Safety Authority and Laying Down Procedures in Matters of Food Safety, 2002 O.J. (L 31) 1. For a brief overview of the new regulations, see Brian P. Rafferty, Note, *The Door Opens Slightly: Recent European Union Regulations on Genetically Modified Products and the Ongoing United States-European Union GM Product Dispute*, 16 GEO. INT'L ENVTL. L. REV. 281 (2004).

¹⁴⁷ See Regulation 1830/2003 of 22 September 2003 Concerning the Traceability and Labeling of Genetically Modified Organisms and the Traceability of Food and Feed Products Produced from Genetically Modified Organisms and Amending Directive 2001/18/EC, arts. 4, 7, 2003 O.J. (L 268) 24, 26, 27.

¹⁴⁸ See *id.* arts. 4, 5.

¹⁴⁹ See Kim Brooks, *History, Change and Policy: Factors Leading to Current Opposition to Food Biotechnology*, 5 GEO. PUB. POL'Y REV. 153, 154-59 (2000) (describing the manner in which highly publicized food scares led to the emergence of a "transformed" consumer in the United Kingdom); Carter, *supra* note 89, at 626-28, 640-45 (1997) (noting the impact of the DES, E.Coli, and mad cow disease controversies on European demands for food safety).

¹⁵⁰ See Request for Consultations by the United States, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/1 (May 20, 2003), available at http://trade-info.cec.eu.int/doclib/docs/2003/november/tradoc_114610.pdf.

¹⁵¹ See *id.*; see also Elizabeth Becker, *U.S. Contests Europe's Ban on Some Food*, N.Y. TIMES, May 14, 2003, at C1.

alleges that European regulation of biotechnology products is inconsistent with the GATT, the TBT Agreement, and the SPS Agreement, and it therefore requests consultations with the European Communities to resolve the issues.¹⁵² In the words of U.S. Trade Representative Robert B. Zoellick, the United States believes that European caution with respect to GM agriculture is “Luddite” and “immoral,” reflecting not only a failure to respect the findings of science but also a failure to appreciate the powerful potential of genetic engineering to boost world food production.¹⁵³ Europe naturally contests this characterization and has vowed to fight the complaint vigorously.¹⁵⁴ At stake in the dispute are a number of important unresolved questions of international law and, in a more abstract sense, the normative foundation of the trading system itself.

To begin, the GM food products dispute brings to the fore longstanding uncertainties regarding the relationship between international trade agreements and other multilateral instruments, particularly those designed to protect the environment.¹⁵⁵ As Jeffery Atik and David Wirth note, although several multilateral environmental agreements (MEAs) appear on their face to conflict with international trading rules, the conflicts have yet to be tested due to “the absence of any concrete disputes in which trade measures authorized by an MEA in fact have been challenged.”¹⁵⁶ The GM food controversy may present just such a concrete dispute, given the apparent conflict between the position of the United States and the Cartagena Protocol on Biosafety,¹⁵⁷ an international agreement adopted pursuant to the Convention on

¹⁵² See Request for Consultations by the United States, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, *supra* note 150. The complaint also alleges that the E.U. regulatory regime violates the Agriculture Agreement. *Id.*

¹⁵³ Lizette Alvarez, *Consumers in Europe Resist Gene-Altered Foods*, N.Y. TIMES, Feb. 11, 2003, at A3.

¹⁵⁴ Cf. Thomas P. Redick, *Stewardship for Biotech Crops: Strategies for Improving Global Consumer Confidence*, 44 JURIMETRICS J. 5, 18 (2003) (quoting former U.S. Secretary of Agriculture Dan Glickman as saying that the conflict over GM foods promises to be a “Battle Royale of the 21st Century” (quoting Reuters, *U.S. Opposed to Segregation of Genetically Modified Crops*, July 9, 1997, <http://users.westnet.gr/~cgian/glick.htm>) (internal quotation marks omitted)).

¹⁵⁵ For a general discussion of the relationship between GATT/WTO jurisprudence and other aspects of international law, see JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003).

¹⁵⁶ Jeffery Atik & David A. Wirth, *Science and International Trade — Third Generation Scholarship*, 26 B.C. INT’L & COMP. L. REV. 171, 178 (2003). See generally Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841 (1996) (discussing the conflicts between MEAs and the GATT). In 2001, WTO member nations committed as part of the most recent round of trade negotiations to consider the question of how MEAs and trading rules interact. See Mungkalarungsi, *supra* note 58, at 362. Like many other aspects of these negotiations, however, the discussions have not been fruitful.

¹⁵⁷ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M. 1027 (2000).

Biological Diversity and ratified by over fifty nations, including those of the European Union.¹⁵⁸ The Cartagena Protocol requires exporting nations to obtain informed consent from importing nations before shipping GM organisms and to label GM products that are intended for animal or human consumption.¹⁵⁹ Because the United States is expected to argue that the EU labeling requirements constitute an impermissible trade restriction,¹⁶⁰ and because the European Union might well defend such requirements by pointing to its obligations under the Cartagena Protocol, one might say that the legality of the Cartagena Protocol itself will be at issue.¹⁶¹

The GM food products dispute also may force clarification of how certain GATT/WTO agreements relate to each other. Although both

¹⁵⁸ Secretariat of the Convention on Biological Diversity, *Cartagena Protocol on Biosafety (Montreal, 29 January 2000): Status of Ratification and Entry into Force*, at <http://www.biodiv.org/biosafety/signinglist.aspx?sts=rtf&ord=ctr> (last visited Nov. 14, 2004).

¹⁵⁹ See Cartagena Protocol on Biosafety to the Convention on Biological Diversity, *supra* note 157, at arts. 7–12, 18. It is unclear whether the labeling requirement must be satisfied by notifying the ultimate consumer, as opposed to retailers, customs officials, or other agents earlier in the distribution chain. See Michael P. Healy, *Information Based Regulation and International Trade in Genetically Modified Agricultural Products: An Evaluation of the Cartagena Protocol on Biosafety*, 9 WASH. U. J.L. & POL'Y 205, 231 (2002). Regardless of the interpretation, it seems likely that the negotiators of the Cartagena Protocol, a group consisting largely of environmental officials from participating nations, were aware of the importance of the GM labeling issue. Cf. Phillips & Kerr, *supra* note 58, at 69 (contending that the labeling provision of the Cartagena Protocol represents “an attempt by those opposed to biotechnology to obtain the ability to inhibit international trade in GMOs through the back door when they have been unsuccessful in obtaining it at the WTO”). Indeed, their actions may represent an example of what Kal Raustiala and David Victor have called “strategic inconsistency” in international lawmaking. See Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277, 301–02 (2004) (coining the term “strategic inconsistency” to refer to states’ efforts to force change by crafting rules in one regime that are incompatible with those in another).

¹⁶⁰ The United States’s first submission in the dispute challenged only the EU’s de facto moratorium on new product approvals rather than the new regulatory regime itself. See First Submission of the United States, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, para. 4, WT/DS291, 292, and 293 (Apr. 21, 2004), available at http://www.genewatch.org/WTO/submissions/US_WTO_Submission.pdf. Nonetheless, commentators expect future submissions and challenges from the United States to focus more specifically on the adopted regulatory regime, including especially the requirements of labeling and traceability. Cf. Joshi, *supra* note 68, at 83 (noting American opposition to mandatory GM labeling).

¹⁶¹ As if to highlight the confusion regarding this important question of treaty priority, the preamble to the Cartagena Protocol states both that “this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements” and that “the [foregoing] recital is not intended to subordinate this Protocol to other international agreements.” Cartagena Protocol on Biosafety to the Convention on Biological Diversity, *supra* note 157, at 1027. Thus, although the European Union may describe its new regulatory regime for GM products as consistent with the obligations of the Protocol, it is not at all clear that this defense will suffice for purposes of international trade law. See Brett Grosko, *Genetic Engineering and International Law: Conflict or Harmony? An Analysis of the Biosafety Protocol, GATT, and the WTO Sanitary and Phytosanitary Agreement*, 20 VA. ENVTL. L.J. 295, 297–98 (2001); John H. Barton, Note, *Biotechnology, the Environment, and International Agricultural Trade*, 9 GEO. INT'L ENVTL. L. REV. 95, 113–16 (1996).

the TBT and SPS Agreements position the WTO as a sort of “global meta-regulator,”¹⁶² the SPS Agreement, with its scientific basis requirements, is clearly the more stringent of the two.¹⁶³ Despite the obvious importance of the question, however, there is a surprising degree of uncertainty about how to determine which Agreement applies to a given product standard.¹⁶⁴ Some commentators appear to read the SPS Agreement broadly, arguing that the Agreement applies so long as the protection of human or animal health and safety at least partially justifies the measure, irrespective of whether other nonscientific interests also might support it.¹⁶⁵ Others seem to give nations more latitude to characterize the motivations behind a product measure and therefore to determine whether it falls within the scope of the SPS Agreement.¹⁶⁶ For instance, on this reading, if the European Union described its GM labeling regulation as a matter of consumer awareness rather than as one of health and safety protection, then the regu-

¹⁶² Walker, *supra* note 86, at 255.

¹⁶³ Indeed, the rigorous requirements of the SPS Agreement have been characterized by David Wirth as even “more aggressive than what has generally been accepted in the [U.S.] domestic regulatory reform debate.” Wirth, *supra* note 66, at 337.

¹⁶⁴ SPS AGREEMENT, *supra* note 75, Annex A.1. Commentators have disagreed, for instance, about whether Europe’s labeling regulations should be analyzed under the TBT or SPS Agreement. Compare Fiona Macmillan & Michael Blakeney, *Genetically Modified Organisms and the World Trade Organization*, 3 TUL. J. TECH. & INTELL. PROP. 93, 114 (2001) (suggesting that a GM label dispute “falls most properly within the sphere of the TBT Agreement”), with John S. Applegate, *The Prometheus Principle: Using the Precautionary Principle To Harmonize the Regulation of Genetically Modified Organisms*, 9 IND. J. GLOBAL LEGAL STUD. 207, 237–39 (2001) (stating that the SPS Agreement will likely be applied to evaluate GM label requirements); see also Michele M. Compton, *Applying World Trade Organization Rules to the Labeling of Genetically Modified Foods*, 15 PACE INT’L L. REV. 359, 409 (2003) (noting that while it is unclear which agreement governs, “[t]he labeling schemes would likely not fall under the SPS Agreement”); Joanne Scott, *European Regulation of GMOs and the WTO*, 9 COLUM. J. EUR. L. 213, 228–31 (2003) (noting that both the TBT and SPS Agreements are relevant to the GM label dispute).

¹⁶⁵ See Healy, *supra* note 159, at 233 (opining that a nation would “undoubtedly violate the SPS Agreement” if it imposed a labeling requirement while simultaneously determining that a GM food product posed no articulable risk); cf. Alessandro Nucara, *Precautionary Principle and GMOs: Protection or Protectionism?*, INT. TRADE L. & REG., Mar. 2003, 47, 50 (“Consumer concerns about the use of hormones or genetically modified products can no longer constitute a valid reason for restrictions on the import of such products when these concerns are not backed by consistent scientific evidence.”).

¹⁶⁶ See Mariëlle Mathee & Dominique Vermersch, *The International Integration of European Precautionary Measures on Biosafety*, 10 EUR. ENVTL. L. REV. 183, 188 (2001) (noting that “[w]hether the European labelling regulation is to be considered as a sanitary or phytosanitary measure depends on its purpose” and that labeling might fall under the TBT Agreement if premised on the consumer’s right to know); Sara Pardo Quintillán, *Free Trade, Public Health Protection and Consumer Information in the European and WTO Context — Hormone-Treated Beef and Genetically Modified Organisms*, 33 J. WORLD TRADE 147, 189 (1999) (arguing that precautionary measures resting on consumer concern and the wider notion of risk embraced by the public should be lawful, even when supported by little or no scientific evidence).

lation might be analyzed under the TBT Agreement, not the SPS Agreement.¹⁶⁷

Much turns on this interpretive question. If a nation's citizens demand the prohibition of both the importation and the domestic production of a certain good, but insufficient scientific evidence of health or safety threats exists to support their opposition to the good, does the ban nevertheless constitute a measure designed to "protect human or animal life or health" subject to the dictates of the SPS Agreement, or does it instead represent a nondiscriminatory consumer protection measure governed by the TBT Agreement? Put concretely, could a ban on GM food be considered similar to a ban on child pornography, justified not by empirical evidence regarding harmful consequences of its distribution but simply by the sovereign will of a nation's citizens?¹⁶⁸ What role, in other words, do consumer concern and moral

¹⁶⁷ On its website, the WTO states that the SPS Agreement does not cover "[m]easures for environmental protection . . . , to protect consumer interests, or for the welfare of animals." World Trade Organization, *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, at http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm (May 1998). When multiple considerations support a single regulatory measure, however, it may be difficult to classify the measure in the neat manner hypothesized by the WTO. For instance, when the WTO Appellate Body reviewed the European Union's ban on imports of hormone-treated beef, Europe defended itself by pointing to scientific evidence that growth hormones are linked to cancer and other adverse health consequences. The Appellate Body rejected this contention on the ground that Europe was required to provide a risk assessment of the health threats specifically arising from hormone-treated beef rather than from growth hormones as a general matter. See Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, para. 200, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC Hormones Report*]. Given the high levels of anxiety over food safety among European consumers, however, Europe theoretically could have defended its import ban simply by invoking the need to respond to intense consumer concern. See Carter, *supra* note 89, at 653 (describing proposals within Europe to treat "consumer preferences" as a "fourth hurdle" that technologies must overcome in order to obtain regulatory approval). Had Europe only invoked strong consumer opposition to hormone-treated beef in this manner, the Appellate Body would have been forced to explicate the scope of the SPS Agreement in relation to scientifically unsupported regulations that nevertheless respond to sincere consumer demands for information. Cf. Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 412 (2003) (noting that if the policy behind the E.U. ban on the importation of hormone-treated beef "could be restated as one of ensuring that consumers are protected against unwitting ingestion of hormone residues that they might prefer to avoid," then labeling would provide a less trade-restrictive means of accomplishing this goal). Presently, the European Union continues to ban hormone-treated beef imports on the ground that scientific risk assessments conducted subsequent to the Appellate Body decision establish a specific health risk from the ingestion of hormone-treated beef. See European Union, *Hormones in Meat — Introduction*, at http://europa.eu.int/comm/food/food/chemicalsafety/contaminants/hormones/index_en.htm (last visited Nov. 14, 2004).

¹⁶⁸ To turn the question around, must a ban on child pornography also be based on a purely instrumentalist assessment of its harmful consequences? Although the SPS Agreement would not apply to such a ban, the requirements of the TBT Agreement and GATT/WTO jurisprudence more generally would. Thus, the question is not entirely academic. Cf. Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 143-44 (1999) (noting that a rigid process/product distinction might raise questions regarding the permissibility under the GATT of a ban on pornography "made with children or involving (but not necessarily depicting) involuntary acts of sex and other illegal violence").

objection play in international trade law when viewed separately from empirical evidence that might or might not support the ban from a purely instrumental perspective?¹⁶⁹

As these questions indicate, the GM dispute challenges more than simply the manner in which international treaties are interpreted. Rather, as Richard Stewart has noted, the dispute poses fundamental questions regarding the normative foundation and the institutional design of contemporary international trade.¹⁷⁰ Many Europeans believe that GM foods implicate not only scientific questions about the environment and human health and safety, but also important moral and cultural questions regarding the production of food.¹⁷¹ Thus, through the GM foods controversy, the WTO will find itself in the uncomfortable position of either, on the one hand, dismissing long-cherished aspects of European culture as insufficient bases for domestic regulation or, on the other hand, accepting the legitimacy of Europe's interests while opening the door to a stream of moral or cultural justifications for trade regulations that will be difficult for complaining nations to

¹⁶⁹ Under the TBT Agreement, product regulations must be no more trade-restrictive than necessary to fulfill a "legitimate objective." TBT AGREEMENT, *supra* note 76, art. 2.2. The Agreement, however, provides only a suggestive list of what counts as a "legitimate objective," *see id.* ("[L]egitimate objectives are, *inter alia*: national security requirements; prevention of deceptive practices; the protection of human health or safety, animal or plant life or health, or the environment."), leaving one to wonder whether the satisfaction of consumer interest alone would constitute a sufficient purpose to support labeling regulations. Similarly, under the GATT, Article XX(a) contains an exception for trade measures "necessary to protect public morals." GATT, *supra* note 54, art. XX(a). However, as Steve Charnovitz notes in his exhaustive review of the history of morally based trade measures, the scope and significance of the exception is "uncharted in trade jurisprudence." Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 690 (1998). At least one commentator regards the public morals exception as an outdated provision that should remain unused: "In the polyvalent society of the Global Market Place there is, of course, small room for individual ethics. Ethics are not a permitted ground for restricting trade pursuant to Article XX of GATT 1994." Bentley, *supra* note 74, at 130.

¹⁷⁰ Richard B. Stewart, *The Challenge of GMOs to International Governance of Trade and Environmental Regulation* (unpublished manuscript, on file with the Harvard Law School library).

¹⁷¹ *See Compton, supra* note 164, at 383 (noting that the European Union requires labels "to provide information to consumers, for health reasons, for ethical reasons and to prevent them from being misled") (footnotes omitted); Marsha A. Echols, *Food Safety Regulation in the European Union and the United States: Different Cultures, Different Laws*, 4 COLUM. J. EUR. L. 525, 526 (1998) ("The culture and attitudes of European citizens have tended to favor traditional foods and minimal processing, while being skeptical of new technologies."); Drew L. Kershen, *Innovations in Biotechnology — Public Perceptions and Cultural Attitudes: An American Viewpoint*, 3 GLOBAL JURIST TOPICS 1, 13 (2003) ("Europeans, to a greater percentage than Americans, consider scientific evidence irrelevant. What is relevant is protecting the religious and ethical purity of food."); *cf.* Christopher D. Stone, *Is There a Precautionary Principle?*, 31 ENVTL. L. REP. 10,790, 10,798 (2001) (noting that opposition to GM foods "arises not merely from diverging interpretations of the limited empirical data," but also from "[c]onflicting national and cultural values . . . including control over what we eat, and attitudes toward science, sovereignty, and capitalism").

falsify. In either case, the integrity of the modern trading regime will be seriously strained.

C. *Commercial Speech and “Mere Consumer Concern”*

A final example of the process/product distinction appears in rudimentary form under the First Amendment. Recent commercial speech litigation has generated a new free speech principle, according to which the satisfaction of “consumer curiosity” is an insufficient state interest to support laws that require manufacturers to provide consumers with process information through labeling or other means of disclosure. Just as the international law of trade tends to view consumer interest alone as an insufficient basis for sustaining process-based trade measures, a well-known Second Circuit opinion in *International Dairy Foods Ass’n v. Amestoy*¹⁷² regarded “mere consumer concern” about “production methods” as an inadequate justification for mandatory state disclosure rules.¹⁷³ Additionally, litigants in the recent *Nike, Inc. v. Kasky*¹⁷⁴ appeal attempted to push the process/product concept further, offering the distinction as a new test for separating corporate publicity into commercial and core speech. Under this test, information concerning products would constitute commercial speech subject to traditional false advertising regulation, while information concerning processes would constitute core speech entitled to the full protection of the First Amendment.¹⁷⁵ In combination, these developments suggest a consumer marketplace in which process information may become comparatively privileged against disclosure and verification.

1. *International Dairy Foods Ass’n v. Amestoy: Mandatory Disclosure of Process Information.* — In 1993, Monsanto Corporation’s synthetic bovine growth hormone, Posilac, became the first widely marketed agricultural product to be developed using modern biotechnology.¹⁷⁶ Formally known as recombinant bovine somatotropin (rbST), Monsanto’s product boosts the milk production of cows by mimicking the effects of naturally occurring bovine hormones.¹⁷⁷ Monsanto contends, and the FDA agreed in its review of Posilac, that no discernable differences exist between milk obtained from rbST-treated cows and nontreated cows.¹⁷⁸ Accordingly, the FDA approved

¹⁷² 92 F.3d 67 (2d Cir. 1996).

¹⁷³ *Id.* at 73 n.1, 73–74.

¹⁷⁴ 123 S. Ct. 2554 (2003) (order dismissing certiorari as improvidently granted).

¹⁷⁵ See *infra* pp. 576–77.

¹⁷⁶ See David Abouafia, *Pushing RBST: How the Law and the Political Process Were Used To Sell Recombinant Bovine Somatotropin to America*, 15 PACE ENVTL. L. REV. 603, 605–06 (1998).

¹⁷⁷ See *id.* at 604–05.

¹⁷⁸ *Id.* at 615–16.

the drug for commercial use despite a rash of controversy including congressional investigations,¹⁷⁹ intense public criticism,¹⁸⁰ and internal dissent within the Agency.¹⁸¹ In addition, consistent with its general stance regarding the products of genetic engineering technologies, the FDA issued labeling guidelines that not only failed to require milk from rbST-treated cows to be labeled as such, but also cast doubt on the ability of other retailers to identify their product as the milk of nontreated cows.¹⁸²

Given the uncertainty and controversy surrounding rbST, it was only natural that disputes involving the product would spill over into forums other than the FDA, including the courts. In the first lawsuit involving rbST, a group of “American consumers of commercially sold dairy products” challenged both the FDA’s decision to approve rbST for general use and the Agency’s failure to require labeling of rbST-derived dairy products.¹⁸³ Despite finding that rbST causes a number of adverse health effects in cows and potentially poses health risks to humans,¹⁸⁴ the district court nevertheless concluded that the FDA did not act arbitrarily or capriciously given the administrative record before the Agency at the time of rbST’s approval.¹⁸⁵ Moreover, the court found that although rbST may increase levels of a protein hormone that has unknown long-term health consequences, this product difference, even if demonstrated, would not be “organoleptic” to the consumer — that is, it would not be “capable of being detected by a hu-

¹⁷⁹ See *id.* at 614–15, 621–24 (describing investigatory actions by the General Accounting Office and congressional leaders during and after the FDA rbST approval process).

¹⁸⁰ Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 865 (1995) (“No other recent legal event in American agriculture . . . has provoked as much agrarian anger as the [FDA’s] decision to permit the use of rbST in milk production.”).

¹⁸¹ See Aboulaflia, *supra* note 176, at 623 (noting that “an anonymous letter, circulated by FDA employees, . . . raised the issue of bias in the FDA approval process”).

¹⁸² To eliminate FDA concerns that an rbST-free label would mislead consumers, the Agency told any producer choosing to label its milk as rbST-free to include on all product packages a contextual disclaimer such as: “No significant difference has been shown between milk derived from rbST-treated cows and non-rbST-treated cows.” Interim Guidance on the Voluntary Labeling of Milk and Milk Products from Cows That Have Not Been Treated with Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279, 6280 (Feb. 10, 1994). The guidelines also suggested that states should impose a substantial record-keeping burden on any firm making an “rbST-free” claim, stating that the firm might face administrative action “in the face of circumstantial evidence that it is using rbST or selling milk from treated cows [despite claims to the contrary].” *Id.* Critics were quick to point out that these guidelines were “strikingly similar” to language contained in a Monsanto legal memorandum that the company had used to warn companies not to label their products as “BGH free.” Aboulaflia, *supra* note 176, at 617. Michael Taylor, a former Monsanto attorney who had advised the company on food labeling issues, approved and signed the labeling guidelines while serving as an FDA official. See Anne Miller, *Time for Government To Get Moooving: Facing up to RbST Labeling Problem*, 18 HAMLIN L. REV. 503, 519 n.181 (1995).

¹⁸³ *Stauber v. Shalala*, 895 F. Supp. 1178, 1182 (W.D. Wis. 1995).

¹⁸⁴ *Id.* at 1183–85.

¹⁸⁵ *Id.* at 1190–93.

man sense organ.”¹⁸⁶ Absent such a detectable difference in the end product itself, and irrespective of the degree of consumer demand for information about the use of rbST, the court concluded that the FDA was correct in its determination that it lacked authority to require labeling based merely on differences in production processes.¹⁸⁷

Opponents of rbST have had more success on the state level. Following the FDA’s issuance of interim labeling guidelines, a number of states moved to formalize voluntary programs for labeling dairy goods that were produced from non-rbST-treated cows.¹⁸⁸ One state, Vermont, adopted a mandatory labeling scheme under which retailers were required to place a blue dot on products that contained or might have contained milk from rbST-treated cows.¹⁸⁹ In accordance with the FDA interim guidelines, the Vermont labeling regulations required a disclaimer that “the [FDA] has determined that there is no significant difference between milk from treated and untreated cows.”¹⁹⁰ In addition, however, the regulations also required notice that “[i]t is the law of Vermont that products made from the milk of rbST-treated cows be labeled to help consumers make informed shopping decisions.”¹⁹¹

A consortium of dairy manufacturers and food retailers challenged the Vermont statute and regulatory scheme in *International Dairy Foods Ass’n v. Amestoy*.¹⁹² The dairy producers argued that preliminarily enjoining operation of the labeling scheme was appropriate in light of its likely impermissibility under the First Amendment. The Second Circuit agreed, reasoning that because “neither consumers nor scientists can distinguish rBST-derived milk from milk produced by an untreated cow,”¹⁹³ the only plausible state interest in support of the Vermont labeling rule was “mere consumer concern”¹⁹⁴ about “production methods.”¹⁹⁵ In the court’s view, “consumer curiosity alone” could

¹⁸⁶ *Id.* at 1193. For a discussion of evidence linking this hormone to the development of various cancers, see George Davey Smith et al., *Cancer and Insulin-Like Growth Factor-I: A Potential Mechanism Linking the Environment with Cancer Risk*, 321 BRIT. MED. J. 847 (2000).

¹⁸⁷ *Stauber*, 895 F. Supp. at 1193.

¹⁸⁸ See Terence J. Centner & Kyle W. Lathrop, *Labeling rbST-Derived Milk Products: State Responses to Federal Law*, 45 U. KAN. L. REV. 511, 535–50 (1997); Jennifer R. Thornley, Note, *Got “Hormone-Free” Milk?: Your State May Have Enough Interest To Let You Know*, 76 IND. L.J. 785, 799–801 (2001).

¹⁸⁹ *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 69–70 (2d Cir. 1996).

¹⁹⁰ *Id.* at 70 (emphasis omitted) (quoting Adopted Rules: rBST Notification and Labeling Regulations Relating to Milk and Milk Products, Vt. Gov’t Reg. § 3.1b (1995)).

¹⁹¹ *Id.*

¹⁹² *Id.* at 67.

¹⁹³ *Id.* at 73.

¹⁹⁴ *Id.* at 73 n.1.

¹⁹⁵ *Id.* at 74.

not support a law that required manufacturers and retailers to disclose “even an accurate, factual statement” against their will.¹⁹⁶

In a stinging dissent, Judge Leval first chastised the majority for failing to appreciate the full range of considerations behind the Vermont statute, which, on his reading of the record, included “concerns about human health, cow health, biotechnology, and the survival of small dairy farms.”¹⁹⁷ According to Judge Leval, the majority’s attempt to distill these multifarious concerns into a single catchphrase — “consumer curiosity” — seriously distorted the policy purposes behind the Vermont legislation.¹⁹⁸ Additionally, the dissent sharply criticized the majority’s implicit presumption that an FDA failure to find any “significant difference” between milk from treated and nontreated cows eliminated entirely the possibility that health and safety concerns might justify the statute.¹⁹⁹ In the face of scientific uncertainty — which inarguably characterized the rbST situation, at least regarding long-term consequences for human and animal health — Judge Leval reasoned that states might adopt a range of regulatory stances, some more cautious and consumer-focused than the FDA’s.²⁰⁰

As the majority noted, however, Judge Leval’s dissent failed to distinguish between the interests that consumers might espouse in favor of a state disclosure law and the interests that the state actually invokes. Significantly, when defending its regulatory scheme, Vermont refused to take a position on whether rbST is safe for human consumption.²⁰¹ Instead, Vermont simply argued that “its citizens are entitled to have information which assists them in making purchases consistent with their beliefs on the appropriateness of rBST use.”²⁰² Thus, the process/product distinction was presented in sharp relief to

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 76 (Leval, J., dissenting); see also *id.* at 75 (listing “concerns about FDA determinations about the product as regards health and safety or about recombinant gene technology, concerns about the effect of the product on bovine health; and concerns about the effect of the product on the existing surplus of milk and in the dairy farm industry’s economic status and well-being” (internal quotation marks omitted)).

¹⁹⁸ *Id.* at 76.

¹⁹⁹ See *id.* at 77 (“To suggest that a government agency’s failure to find a health risk in a short-term study of a new genetic technology should bar a state from requiring simple disclosure of the use of that technology where its citizens are concerned about such health risks would be unreasonable and dangerous.”).

²⁰⁰ *Id.* at 76–77.

²⁰¹ *Int’l Dairy Foods Ass’n*, 92 F.3d at 73 n.1 (“Vermont takes no position on whether rBST is beneficial or detrimental.” (quoting *International Dairy Food Ass’n v. Amestoy*, 898 F. Supp. 241, 252 (D. Vt. 1995)) (internal quotation marks omitted)). Of course, the two required messages under the Vermont labeling regime — one espousing the FDA’s conclusion about health effects from rbST and the other indicating Vermont’s desire that consumers have a basis for making “informed shopping decisions” — seemed to carry the implicit message that, regardless of the FDA’s position, Vermont believed its consumers *should* be concerned about the use of rbST.

²⁰² *Int’l Dairy Foods Ass’n*, 898 F. Supp. at 252.

the Second Circuit panel: Vermont consumers desired information regarding a process that, all parties agreed for purposes of litigation, did not result in products that were tangibly different from those of competing process methods. In that regard, Judge Leval's attempt to examine directly the grounds of "consumer curiosity" and to question the empirical basis of the FDA's "no significant difference" finding was an attempt to resolve a different case than the one before the court.²⁰³

Although the *International Dairy* holding has yet to receive wide reinforcement in constitutional caselaw, the process/product distinction that it articulates has become a prominent argument raised by opponents of product labeling requirements.²⁰⁴ Additionally, Monsanto has aggressively challenged voluntary labeling by producers of milk from nontreated cows, claiming that such process information is misleading to consumers unless accompanied by a statement that "[s]cientific stud-

²⁰³ Judge Leval recognized the distinction and therefore urged Vermont to revise its stance on remand to include more than "mere[] consumer curiosity" among its justifications for the mandatory labeling program. *Int'l Dairy Foods Ass'n*, 92 F.3d at 81 (Leval, J., dissenting). Perhaps in recognition of the force of Judge Leval's argument — binding facts to the contrary notwithstanding — the *International Dairy* majority expressed reluctance regarding its holding at several points in its discussion. See *Int'l Dairy Foods Ass'n*, 92 F.3d at 73 ("We do not doubt that Vermont's asserted interest, the demand of its citizenry for such information, is genuine; reluctantly, however, we conclude that it is inadequate."); *id.* at 74 ("[T]he Court is sympathetic to the Vermont consumers who wish to know which products may derive from rBST-treated herds . . ."). Nevertheless, the court ultimately concluded that it would be unwise to allow "consumer interest alone" to justify mandatory disclosure of information "about a production method that has no discernible impact on a final product," reasoning that such disclosure obligations could multiply uncontrollably. *Id.* at 73–74. More recently, a Second Circuit panel upheld a Vermont statutory scheme that required manufacturers to label certain products containing mercury in order to facilitate proper disposal of the products by consumers. See *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001). The court distinguished *International Dairy* on the ground that Vermont's interest went beyond merely satisfying "consumer curiosity" to affirmatively "protecting human health and the environment from mercury poisoning." *Id.* at 115 n.6. Although the court recognized that the state's environmental goals were "inextricably intertwined with the goal of increasing consumer awareness of the presence of mercury in a variety of products," the statute passed constitutional muster in part because Vermont did not defend it based solely on consumer awareness for its own sake. *Id.* at 115.

²⁰⁴ For instance, a recent decision by the FDA to require that trans fatty acids be declared on food and supplement nutrition labels was opposed on the ground that "the government cannot compel speech when disclosures are not necessary to materially alleviate real consumer harm." Food Labeling: *Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims, and Health Claims*, 68 Fed. Reg. 41,434, 41,439 (July 11, 2003) (to be codified at 21 C.F.R. pt. 101) (noting citations of *International Dairy* by commentators to support the quoted statement). Similarly, the USDA Food Safety and Inspection Service's mandatory labeling regulations for irradiated food were challenged on the ground that "consumer desire to know how food was processed is not alone sufficient to justify mandatory disclosure of the processing." *Irradiation of Meat Food Products*, 64 Fed. Reg. 72,150, 72,158 (Dec. 23, 1999) (to be codified at 9 C.F.R. pts. 381, 424). The Agency rejected this argument, not because it necessarily disagreed with the legal proposition, but because it found that the irradiation process can result in actual material alterations to the treated products that are "not obvious to consumers in the absence of labeling." *Id.* For further discussion and criticism of this reasoning, see *infra* pp. 591–92.

ies conclude that the use of rBST to improve milk production does not change the nutrition, taste, quality, or any other health or safety characteristics of milk.”²⁰⁵ Shortly after publication of the FDA labeling guidelines, for instance, the company sued two dairies that used “rBST-free” labels and wrote to over two thousand other producers, threatening legal action if they should do the same.²⁰⁶

More recently, Monsanto argued that the Maine Quality Trademark for Milk and Milk Products, a voluntary program used to certify in-state dairy producers who do not use rBST, constitutes misleading advertising and imposes an unlawful restriction on market access.²⁰⁷ When the Maine Attorney General rejected these arguments,²⁰⁸ Monsanto responded by suing a leading Maine dairy under the Lanham Act in federal district court, charging that its product label (“Our Farmers’ Pledge: No Artificial Growth Hormones”) constitutes a misleading representation of fact and indirectly disparages rBST.²⁰⁹ In its suit, Monsanto contended that “[b]ecause there is no known way to tell the difference between milk from cows supplemented with Posilac and milk from other cows,” the marketing and sale of milk from cows that have not been treated with rBST cannot constitute “any kind of *legitimate* marketing advantage.”²¹⁰ This argument would seem to imply that, in Monsanto’s view, consumers also cannot express any kind of legitimate preference for the use of manufacturing processes that do not result in identifiable physical differences in end products.

2. *Nike, Inc. v. Kasky: Voluntary Disclosure of Process Information.* — While *International Dairy* suggests that process information should be privileged against mandatory disclosure in the absence of some demonstrated environmental, health, or safety effect, arguments recently offered in *Kasky*²¹¹ suggest that process information also should be insulated from false advertising regulation when manufacturers provide it voluntarily. To defend itself against charges of ex-

²⁰⁵ Press Release, Monsanto Co., Monsanto Statement Regarding Oakhurst Dairy Inc. Filing, available at <http://www.monsantodairy.com/updates/OakhurstDairyInc.Filing.html> (last visited Nov. 14, 2004).

²⁰⁶ See Thornley, *supra* note 188, at 799.

²⁰⁷ See Letter from G. Steven Rowe, Attorney General, State of Maine, to Joan Z. Bernstein, Esquire (Feb. 6, 2003), available at <http://www.KeepMaineFree.org/AttorneyGeneral2.pdf>.

²⁰⁸ See *id.*

²⁰⁹ See Complaint for an Injunction, Monsanto Co. v. Oakhurst Dairy Inc., No. 03-11273RCL (D. Mass. filed July 3, 2003).

²¹⁰ Memorandum of Law in Support of Plaintiff Monsanto Company’s Motion for Preliminary Injunction at 13, Monsanto Co. v. Oakhurst Dairy Inc., No. 03-11273RCL (D. Mass. filed July 3, 2003). The parties ultimately settled the litigation when the Oakhurst Dairy agreed to add the following disclaimer to its label: “FDA States: No significant difference in milk from cows treated with artificial growth hormones.” Edward D. Murphy, *Oakhurst To Alter Its Label*, PORTLAND PRESS HERALD, Dec. 25, 2003, at 1A, available at 2003 WL 58374343.

²¹¹ See 123 S. Ct. 2554 (2003); 45 P.3d 243 (Cal. 2002).

exploitative labor practices, Nike conducted an extensive publicity campaign in the late 1990s that depicted the company as a socially responsible employer.²¹² Pursuant to an unusual state consumer protection regime that at the time allowed “any person acting for the interests of . . . the general public” to bring an action for equitable relief,²¹³ California resident Marc Kasky challenged several of the factual claims made by Nike as false and misleading. An important preliminary question for the California courts in assessing Kasky’s claims was whether to characterize Nike’s statements as commercial or noncommercial speech.²¹⁴ By portraying its publicity campaign as noncommercial speech, Nike sought the benefit of the heightened constitutional protection afforded to speech on matters of public concern, a status that would render portions of the California consumer protection law constitutionally suspect.²¹⁵

The California court rejected Nike’s argument, holding instead that “when a corporation, to maintain and increase its sales and profits, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements are commercial speech that may be regulated to prevent consumer deception.”²¹⁶ To be sure, the court noted, Nike’s speech is protected to the full extent of the First Amendment when it constitutes general discussion of issues such as the value of globalization or the status of developing world labor conditions.²¹⁷ When, on the other hand, the

²¹² Nike’s efforts included press statements, letters to newspaper editors, and letters to heads of collegiate athletic programs. See *Kasky*, 123 S. Ct. at 2554 (2003).

²¹³ CAL. BUS. & PROF. CODE § 17204 (West 1997). For the structure of the regime generally, see Unfair Competition Law, CAL. BUS. & PROF. CODE §§ 17200–17210 (West 1997); and False Advertising Law, CAL. BUS. & PROF. CODE §§ 17500–17509 (West 1997). For a discussion of the California statute and the constitutional issues that it raises, see Trevor Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. (forthcoming 2005).

²¹⁴ The Court has described the proposal of a commercial transaction as “the test for identifying commercial speech.” *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989); see also *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (noting that commercial speech is “usually defined as speech that does no more than propose a commercial transaction”); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) (following the formula articulated in *Fox*). In an earlier decision, the Court referred more vaguely to factors such as whether the manufacturer conceded that its speech constituted advertising, whether it referred to a specific product, and whether the manufacturer had an economic motivation for speaking. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983).

²¹⁵ See *Bolger*, 463 U.S. at 64–65 (“[T]he Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.”). Specifically, by casting its communications as noncommercial speech, Nike hoped to benefit from the heightened scienter standard that must be met prior to the imposition of tort liability for statements relating to matters of public concern. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265–66, 279–80 (1964); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Time, Inc. v. Hill*, 385 U.S. 374, 388–89 (1967).

²¹⁶ *Kasky*, 45 P.3d at 262.

²¹⁷ *Id.* at 261.

speech consists of “factual statements about how Nike makes its products”²¹⁸ designed to appeal to a consumer audience, it is subject to the less stringent level of scrutiny for commercial speech outlined by the Supreme Court in its *Central Hudson* test.²¹⁹ Notably, as part of its conclusion that Nike’s speech was motivated by the prospect of economic gains, the California court observed that process information of the type offered by Nike frequently constitutes an important criterion for consumer decisionmaking.²²⁰ Indeed, by reading the Supreme Court’s definition of commercial speech expansively to include, among other things, “statements about the manner in which . . . products are manufactured,” the court seemed specifically to reject any distinction between processes and products for purposes of its analysis.²²¹

Nike’s appeal from the California Supreme Court attracted thirty-one amicus briefs and widespread public attention.²²² Much of the discussion in the court filings centered on the distinction between corporate speech that concerns processes as opposed to products, with Nike and its supporters advancing the argument that speech concerning process information is necessarily noncommercial speech, and therefore entitled to full First Amendment protection. Nike’s brief, for instance, argued that commercial speech should consist only of statements that relate to “the qualities of a *product as such* (like its price, availability, or suitability).”²²³ Similarly, in its amicus filing, the U.S. Chamber of Commerce proposed a test for commercial speech that explicitly incorporated a process/product distinction: “only speech that in some way advertises the attributes of products or services for sale should be considered ‘commercial speech,’ and speech that merely re-

²¹⁸ *Id.*

²¹⁹ Under the test set forth in *Central Hudson Gas & Electricity Corp. v. Public Service Commission*, 447 U.S. 557 (1980), a restriction on commercial speech may be upheld even when the commercial speech “concern[s] lawful activity” and is not “misleading,” so long as “the asserted governmental interest is substantial,” “the regulation directly advances the governmental interest asserted,” and the regulation is “not more extensive than is necessary to serve that interest.” *Id.* at 566.

²²⁰ See *Kasky*, 45 P.3d at 262 (“For a significant segment of the buying public, labor practices do matter in making consumer choices.”).

²²¹ See *id.* at 257; see also *Ass’n of Nat’l Advertisers, Inc. v. Lungren*, 44 F.3d 726, 727–29 (9th Cir. 1994) (concluding that merchants’ environmental representations constitute commercial speech).

²²² See *Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2560 (2003) (Breyer, J., dissenting from the dismissal of certiorari).

²²³ Brief for the Petitioners, *Kasky* (No. 02-575), available in 2003 WL 898993, at *21 (emphasis added). Nike’s phrasing in this sentence bears a striking resemblance to the language used by the *Tuna/Dolphin* panel when it first announced the process/product distinction as part of GATT/WTO jurisprudence. See *supra* p. 542.

lates to business operations or other matters of public concern should be accorded full First Amendment protection.”²²⁴

Nike also challenged the California Supreme Court’s acceptance of the notion that consumers express preferences for processes as part of their market behavior, arguing instead that “[t]here is only the most attenuated link between public statements on important social, political, and moral issues — which generate heated responses and debate — and consumer purchasing decisions.”²²⁵ To the extent that some consumers do appear to care about factors such as whether a good was produced using sweatshop labor, unsustainable harvesting techniques, animal cruelty, or other objectionable practices, Nike argued that such consumers act “for non-economic reasons.”²²⁶ A brief filed by three advertising trade groups seconded this view, asserting that “[t]he consumer’s concern is [only] about the price of the product and whether the product works as it should.”²²⁷ Beyond those spare attributes, the advertisers argued, consumers have no interest in corporate or process-related information, at least not in their capacity as consumers.²²⁸

In contrast, supporters of the California court’s decision repeatedly cited the importance of process information to consumer decisionmaking as evidence that Nike’s speech was primarily commercial in nature.²²⁹ As Erwin Chemerinsky wrote on behalf of several members of

²²⁴ Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Petitioners, *Kasky* (No. 02-575), available in 2003 WL 835350, at *12; see also Reply Brief for the Petitioners, *Kasky* (No. 02-575), available in 2003 WL 1922453, at *6 (arguing that the category of commercial speech “encompasses product advertising, product labels, and other statements touting the attributes of a product . . . such as its price, how it performs, or where it may be purchased”); Brief Amici Curiae of Forty Leading Newspapers, Magazines, Broadcasters, Wire-Services, and Media-Related Professional and Trade Associations in Support of Petitioners, *Kasky* (No. 02-575), available in 2003 WL 835613, at *28 (“Accordingly, this Court should hold here unequivocally that only speech that does no more than propose a commercial transaction — that is, speech that does no more than promote tangible qualities of a product or service in a traditional advertising format — may be treated as commercial speech and subjected to strict liability rules such as the California laws at issue here.”); Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Northern California in Support of Petitioner, *Kasky* (No. 02-575), available in 2003 WL 721563, at *13–14 (“The challenged statements do not concern the price or safety of any Nike product, nor are they even alleged to provide any misleading information about the product’s essential purpose or function. Absent these considerations, there is no justification for treating Nike’s statements as transaction driven speech.”).

²²⁵ Brief for the Petitioners, *Kasky* (No. 02-575), available in 2003 WL 898993, at *36.

²²⁶ *Id.* at *22.

²²⁷ Brief of Amici Curiae the Association of National Advertising, Inc., the American Advertising Federation, and the American Association of Advertising Agencies in Support of Petitioners, *Kasky* (No. 02-575), available in 2003 WL 835112, at *22.

²²⁸ See *id.* (“To the extent that a consumer brings his or her own political views about the company into purchasing decisions, the consumer is taking the purchase out of the realm of commercial speech and into the realm of political, noncommercial speech.”).

²²⁹ Brief for Global Exchange as Amicus Curiae in Support of Respondent, *Kasky* (No. 02-575), available in 2003 WL 1844651, at *14–15 (“Consumers have indicated that they value the character of the labor input into a product just as they would any other product attribute.”); Brief of

Congress, “[t]he position taken by Nike and its amici fails to recognize that consumers may care more about the conditions under which goods are produced . . . than the price, ingredients, or caloric content.”²³⁰ Refusing to acknowledge these aspects of consumer preference, the respondent and its amici argued, leads to an unduly narrow view of commercial speech and its role in contemporary market society.

The Court dismissed certiorari in *Kasky* as improvidently granted,²³¹ and soon thereafter Nike settled the litigation by agreeing to contribute \$1.5 million to a workers’ rights organization.²³² Nevertheless, the constitutional questions presented by the case will be raised again. More than any speech case the Court has heard before, *Kasky* illustrates the instability of the First Amendment divide between core and commercial speech.²³³ Because the Court previously

Domini Social Investments LLC, KLD Research & Analytics, Inc., and Harrington Investments, Inc., as Amici Curiae in Support of Respondent, *Kasky* (No. 02-575), available in 2003 WL 1844598, at *2 (“Consumers and investors are increasingly taking social and environmental facts into account in their purchasing and investment decisions, and thus these facts are properly understood as commercial speech.”); Amicus Curiae Brief in Support of Respondent by Members of the United States Congress, Representatives Dennis J. Kucinich, Bernard Sanders, Corrine Brown, and Bob Filner, *Kasky* (No. 02-575) [hereinafter Brief of U.S. Congressional Representatives], available in 2003 WL 1844684, at *9 (“Consumers have a variety of concerns when they buy products, and concerns about the conditions under which products are made are entitled to no less protection than concerns about price.”); Brief of Amici Curiae the States of California, Alaska, Arizona, Connecticut, Florida, Illinois, Louisiana, Maine, Maryland, Minnesota, New Mexico, New York, North Dakota, Ohio, Oklahoma, South Dakota, Vermont, and West Virginia and the Commonwealth of Puerto Rico in Support of Respondent, *Kasky* (No. 02-575), available in 2003 WL 1844750, at *8 (“A spokesperson from Reebok openly stated that ‘consumers today hold companies accountable for the way products are made, not just the quality of the product itself.’” (quoting Su-Ping Lu, Note, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT’L L. 603, 624 (2000))); Brief of Amicus Curiae Public Citizen, *Kasky* (No. 02-575), available in 2003 WL 21012624, at *6 (“Labor practices, as with other intangible aspects of products, are an established basis of consumer choice.”). Significantly, the United States also adopted this position, though it sided with Nike in the dispute, arguing that the private attorney general aspect of California’s statutory scheme rendered it constitutionally infirm. See Brief for the United States as Amicus Curiae Supporting Petitioners, *Kasky* (No. 02-575), available in 2003 WL 899100, at *28 (“In today’s environment, the means used to produce goods, no less than the quality of the goods themselves, have profound significance for some consumers, who are willing to pay more to achieve desirable environmental or social ends.”). The United States’s private attorney general argument is thoroughly critiqued in Morrison, *supra* note 213 (manuscript at 54–61, 68–79, on file with the Harvard Law School Library).

²³⁰ Brief of U.S. Congressional Representatives, *Kasky* (No. 02-575), available in 2003 WL 1844684 at *3.

²³¹ 123 S. Ct. at 2554 (2003) (order dismissing certiorari as improvidently granted).

²³² William McCall, *Nike Free-Speech Case Settled for \$1.5 Million*, SEATTLE TIMES, Sept. 13, 2003, at C1.

²³³ Even before *Kasky*, the Court had recognized this instability. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (observing “the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category”); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring in the judgment) (noting that “the borders of the

has described commercial speech as “expression solely related to the economic interests of the speaker and its audience,”²³⁴ a critical focus of the briefing in *Kasky* was how to characterize the interests that consumers have in receiving representations concerning a producer’s labor practices: do such representations “shape[] moral conclusions in the first instance and affect[] purchasing choices only secondarily, if at all,”²³⁵ as Nike put it, or do they “provide consumers with information about the circumstances under which goods are produced so that they can rely on the information in their purchasing decisions,”²³⁶ as *Kasky* put it? The answer, discussed in Part II, is naturally more complicated than either of these depictions suggest.

II. THE REGULATION OF CONSUMER CHOICE

Despite the aspiration of market liberalism to avoid judging or interfering with the choices of individual actors, “[i]n many situations, some organization or agent *must* make a choice that will affect the choices of some other people.”²³⁷ Government regulation of the informational environment of consumers represents a strong example of this kind of unavoidable paternalism. By influencing the amount of information that must or may be disclosed to consumers regarding product manufacturing practices, governments also influence the patterns of consumer preference that emerge following the regulatory decision.²³⁸ As the previous Part demonstrates, a particular vision of consumer decisionmaking is being offered to policymakers who are faced with these inevitably paternalistic decisions, a vision in which consumers scrutinize price, performance, and safety characteristics of products, but do not question or concern themselves in their role as consumers with the broader economic, social, and environmental context within which products are manufactured.

The process/product distinction and related legal developments appear in response to a variety of overlapping concerns. For instance, rather than allow nations to accommodate citizens’ process-related demands through unchecked and potentially protectionist actions, the law of international trade strives to ensure that domestic regulations

commercial speech category are not nearly as clear as the Court has assumed”). Moreover, Steven Shiffrin argued well before these observations that the commercial/noncommercial dichotomy displays insufficient sensitivity to the fact that “the commercial speech problem is in fact many problems.” Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1216 (1983).

²³⁴ Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 561 (1980).

²³⁵ Brief for the Petitioners, *Kasky* (No. 02-575), available in 2003 WL 898993, at *36.

²³⁶ Brief for Respondent, *Kasky* (No. 02-575), available in 2003 WL 1844849, at *33.

²³⁷ Thaler & Sunstein, *supra* note 15, at 175.

²³⁸ See *infra* pp. 628–32.

rely on adequate scientific justification and do not appear to reach too far beyond consumers' immediate environments. Rather than subject complex technologies such as genetic engineering to the potentially erratic market test of consumer choice, the substantial equivalence doctrine holds that most products of recombinant DNA techniques do not differ significantly from their conventional counterparts and therefore do not require special regulatory treatment or product labeling. Rather than permit discovery and scrutiny of all aspects of a product's history by actors who may misconstrue, exploit, or chill the provision of such information, commercial speech doctrine stands ready to narrow the circumstances under which states may mandate or regulate corporate disclosure of process information. In short, the process/product distinction and its related developments function as ready devices for determining when regulations are likely to have drifted beyond the satisfaction of legitimate consumer interest into areas of disguised protectionism, unjustified alarm, or excessive encroachment onto competing interests.

This Part assesses the strength of the case for the process/product distinction, both by reexamining the assumed content of process preferences and by evaluating those preferences within their domestic and international regulatory contexts. Although proponents of the process/product distinction tend to view manufacturing processes as especially unreliable bases for consumer distinction, process preferences on close examination appear to reflect coherent, well-grounded consumer viewpoints, essentially indistinguishable from other aspects of preference that have been regarded as unassailable within the liberal market framework. Moreover, although undoubtedly a partial and unsatisfactory substitute for more traditional forms of political activity, process-based consumer activities nevertheless resonate well with a variety of forces that have combined to place the consumer and the market at the center of twenty-first century culture and governance. Accordingly, in the search for vehicles of public expression and social organization that might help to close the "democracy deficits" created by the forces of globalization,²³⁹ process preferences present an unlikely but promising candidate.

A. Comprehending Preferences for Processes

To begin an assessment of the normative case in favor of the process/product distinction, this section asks an important preliminary question that sometimes attracts only passing attention from proponents of the doctrine: why exactly is it that consumers seem to prefer certain manufacturing processes in the absence of any tangible impact

²³⁹ See *infra* pp. 634–35.

from those processes on the product itself? Why, in other words, do GM food products that are “substantially equivalent” to traditional foods nevertheless spark boycotts, street protests, international trade disputes, and enormous expenditures on organic alternatives? Why are inexpensive textile imports greeted by some consumers with hesitation and discomfort, rather than with admiration (or indifference) at the fact that modern trading has harnessed developing-world labor for the convenience of Northern consumers?²⁴⁰

As will be seen, the answers to these questions significantly complicate the effort to resolve important policy debates through an imagined distinction between products and processes. This section examines three separate perspectives on process preferences. The first treats consumer process preferences as most critics have: by examining the essentially empirical question whether acting on such preferences will achieve the apparent policy aim of the consumer or whether, instead, consumers are especially likely to misjudge the effect of purchasing goods for process-related reasons. It will be argued that critics of process preferences often fail to account fully for the social, economic, and environmental consequences of production processes, such that the grounds of consumer attitudes with respect to those processes remain insufficiently appreciated. Properly understood, these grounds diminish much of the force of the instrumental critique of consumer preferences for processes.

Moreover, there are important alternative ways of understanding process preferences that do not depend so critically on debatable scientific and economic questions regarding the consequences of consumption. In particular, the two remaining accounts of consumer process preferences provided in this section describe their expressive and ethical dimensions, seeking to understand such preferences from the viewpoint of the consumer herself, rather than from an accounting of their impact on the external world. From these perspectives, it will be argued that process preferences exhibit many of the features that traditionally have defined an individual’s sphere of autonomy within the liberal political framework. That is, in addition to whatever role they may play as mechanisms for instrumental change, process-based purchases also represent a significant vehicle through which individuals both project their public views and practice their core moral convictions. In those respects, there is little theoretical justification for denigrating process preferences in the manner that the process/product distinction implies.

²⁴⁰ Cf. Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885, 892 (2003) (“[I]f one is wholly unconcerned about the welfare of foreigners, foreign labor practices that reduce the cost of production — no matter how abhorrent — are not a cause for concern.”).

1. *The Instrumental Account.* — One notable exception to the process/product distinction occurs in a federal labeling requirement for products developed using chlorofluorocarbons and other ozone-depleting substances.²⁴¹ Adopted as part of the 1990 Clean Air Act Amendments, the requirement mandates inclusion by product manufacturers of “a clearly legible and conspicuous label stating: ‘Warning: Manufactured with [insert name of substance], a substance which harms public health and environment by destroying ozone in the upper atmosphere.’”²⁴² Thus, despite the fact that products manufactured with ozone-depleting substances appear indistinguishable from substitute wares manufactured without such substances, and despite the fact that end users may be harmed in only an indirect sense by ozone-depleting substances used to manufacture a particular product, Congress nevertheless felt that consumer awareness of this process information would aid the effort to resolve the international ozone crisis.²⁴³

In a world characterized by consumption practices with complex and far-reaching consequences, actions of the sort taken by Congress in the case of ozone-depleting substances may grow in significance. Already, voluntary efforts to bridge the gap between products and processes are proliferating. For instance, member organizations of the International Social and Environmental Accreditation and Labelling Alliance certify products from a diverse range of production processes, including sustainable forestry (Forest Stewardship Council), sustainable fishing (Marine Stewardship Council), organic and sustainable agriculture (International Federation of Organic Agriculture Movements, International Organic Accreditation Service), and socially accountable labor (Fairtrade Labelling Organizations International, Social Accountability International).²⁴⁴ In addition, websites such as behindthelabel.org, corpwatch.org, sweatshops.org, and responsibleshopper.org

²⁴¹ See 42 U.S.C. § 7671j(d)(1) (2000).

²⁴² *Id.*

²⁴³ Indeed, the EPA’s implementing regulations for the statute indicated strong awareness of the possibility that labeling might spur the development and satisfaction of consumer process preferences, which in turn might inspire changes in the environmental impact of production processes. See Protection of Stratospheric Ozone, 57 Fed. Reg. 19,166, 19,169 (proposed May 4, 1992) (to be codified at 40 C.F.R. pt. 82) (“The increased ability of consumers to express a preference for products not using controlled substances would create a market-based incentive for manufacturers to find and utilize substitutes for ozone-depleting substances that reduce the overall risk to human health and the environment.”). In practice, however, the labeling requirement turned out to be less significant than anticipated, given the rapidity with which Class I ozone-depleting substances were phased out. See ENVTL. PROT. AGENCY, ENVIRONMENTAL LABELING ISSUES, POLICIES, AND PRACTICES WORLDWIDE B-162 (1998), available at <http://www.epa.gov/oppt/epp/pubs/envlab/wwlabel3.pdf>.

²⁴⁴ Int’l Soc. & Env’tl. Accreditation & Labelling Alliance, *ISEAL Members*, at <http://www.isealalliance.org/membership/founding.htm> (last visited Nov. 14, 2004).

provide more detailed information regarding manufacturing practices than the spare medium of a packaging label can provide.²⁴⁵

Such programs appear to be meeting with success. For instance, spurred by increasing consumer awareness and the development of a uniform federal labeling program, the organic food movement has expanded from a little-understood fringe element to the fastest growing segment of American agriculture, with U.S. sales totaling \$7.8 billion in the year 2000.²⁴⁶ Demand for “fairly traded” coffee, chocolate, bananas, and other goods has grown to the point that Fairtrade Labelling Organizations International, a leading certification body, now endorses more than 800,000 producers in forty countries.²⁴⁷ Indeed, according to the International Federation for Alternative Trade, sales of Fairtrade-labeled goods have increased anywhere from fifteen to forty-two percent in each of the last five years, reaching an international total of \$260 million in 2002.²⁴⁸ Buoyed by such successes, delegates to the World Summit of Sustainable Development in Johannesburg recently called for action at all levels of government to “[d]evelop and adopt . . . consumer information tools to provide information relating to sustainable consumption and production.”²⁴⁹

As noted in the previous Part, however, the process/product distinction casts considerable doubt on the legality and desirability of these

²⁴⁵ A graduate student in the Massachusetts Institute of Technology’s Media Lab took this premise one step further by designing a bar code scanner that is linked to a database of information regarding product manufacturers’ labor practices and environmental records. See Will Wade, *A Good Corporate Citizen? This Scanner Can Tell*, N.Y. TIMES, Aug. 28, 2003, at G5. In that manner, detailed process information can be made available to the consumer at the point of purchase.

²⁴⁶ See CAROLYN DIMITRI & CATHERINE GREENE, U.S. DEP’T OF AGRIC., AGRIC. INFO. BULLETIN NO. 777, RECENT GROWTH PATTERNS IN THE U.S. ORGANIC FOODS MARKET 2 (Sept. 2002), available at <http://www.ers.usda.gov/publications/aib777/aib777.pdf>. With respect to organic food, it is difficult to separate consumers’ beliefs or desires about the processes lying behind the product from their perceptions about physical attributes of the product itself. Nevertheless, to many observers, demand for organic food encompasses not only a desire for reduced pesticide residues and other product-related characteristics, but also, and more fundamentally, a desire to promote a particular vision of the human role within economic and biotic communities. On this account, “[o]rganic food is not just about a product; it is a philosophy in which the process of production is as important as the final result.” Peter Hoffman, Editorial, *Going Organic, Clumsily*, N.Y. TIMES, Mar. 24, 1998, at A23; see also INT’L FED’N OF ORGANIC AGRIC. MOVEMENTS, IFOAM BASIC STANDARDS FOR ORGANIC PRODUCTION AND PROCESSING 9 (2002) (noting that an aim of organic agriculture is “to support the establishment of an entire production, processing and distribution chain which is both socially just and ecologically responsible”), available at <http://www.ifoam.org/standard/norms/ibs.pdf>.

²⁴⁷ Fairtrade Labelling Orgs. Int’l, *FLO: Fairtrade Labelling Organizations International*, at <http://www.fairtrade.net> (last visited Nov. 14, 2004).

²⁴⁸ Luuk Zonneveld, *2002–2003: The Year in Review: Labelled Fairtrade*, at <http://www.fairtrade.net/sites/news/onetonine/two.html> (last visited Nov. 14, 2004).

²⁴⁹ Report of the World Summit on Sustainable Development 14, U.N. Doc. A/CONF.199/20 (2002).

efforts to downstream process information to consumers. This section challenges the case for the process/product distinction, arguing that consumers frequently are not irrational or misguided in their preferences for processes, but rather are expressing different levels of risk aversion and a wider set of relevant considerations than are regulators.²⁵⁰ This conclusion has significant implications for the variety of legal disputes that the process/product distinction has been employed to resolve, including the controversial and uncertain status of process-based trade measures within the international economic system.

(a) *Sovereignty of Consumers.* — The very structure of market economies ensures that consumer choices exert an extraordinary level of influence over the activities of producers. It is not immediately obvious, therefore, why the sphere of influence entrusted to consumers should be artificially confined to the physical dimensions of the product, excluding all aspects of the product's processing history that do not directly bear on price, safety, or functionality. When economist William Hutt coined the term "consumer sovereignty," he referred broadly to "the controlling power exercised by free individuals, in choosing between ends, over the custodians of the community's resources,"²⁵¹ a conception that easily accommodates consumer desires regarding the conditions of production. Indeed, Hutt regarded this self-consciously political aspect of consumption as a vital element of the normative case in favor of capitalism. He wrote: "The consumer is sovereign when, in his role of citizen, he has not delegated to political institutions for authoritarian use the power which he can exercise socially through his power to demand (or to refrain from demanding)."²⁵²

Hutt's vision long has been reflected in actual market behavior. Indeed, almost from its outset, the age of mass production and marketing of consumer goods has generated episodes of consumer activism designed to catalyze changes in labor standards, factory conditions, and other processes by which products are made. According to historian Kathryn Kish Sklar, for instance, "[d]uring the first two decades of the twentieth century the National Consumers' League . . . constituted the single most powerful lobbying group for the enactment of labor

²⁵⁰ Cf. Franz Xavier Perrez, *The Efficiency of Cooperation: A Functional Analysis of Sovereignty*, 15 ARIZ. J. INT'L & COMP. L. 515, 527–38 (1998) (describing a variety of externalities that might foster states' interest in process information, even when the production processes do not affect the physical characteristics of products themselves).

²⁵¹ W.H. Hutt, *The Concept of Consumers' Sovereignty*, 50 ECON. J. 66, 66 (1940); cf. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976) ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions.").

²⁵² W.H. HUTT, *ECONOMISTS AND THE PUBLIC: A STUDY OF COMPETITION AND OPINION* 257 (1936).

legislation to protect nonunionized, unskilled workers.”²⁵³ An essential component of this group’s advocacy came in the form of a “Consumers’ White Label Campaign,” which ran from 1898 to 1918 and which served to “moralize the relationship between consumers and producers” by identifying whether particular goods were manufactured under sweatshop conditions.²⁵⁴ At its peak, the Consumers’ White Label Campaign certified goods from sixty producers, including the emerging retailing giant Wanamaker,²⁵⁵ and helped encourage consumers not only to support improved labor standards through their purchasing decisions, but also to begin to think of themselves and their activities in a public-regarding fashion.²⁵⁶

In a similar manner, sit-ins, boycotts, affirmative purchasing campaigns, and other episodes of commercial activism proved essential to the success of the civil rights movement throughout the twentieth cen-

²⁵³ Kathryn Kish Sklar, *The Consumers’ White Label Campaign of the National Consumers’ League, 1898–1918*, in *GETTING AND SPENDING: EUROPEAN AND AMERICAN CONSUMER SOCIETIES IN THE TWENTIETH CENTURY* 17, 17 (Susan Strasser et al. eds., 1998).

²⁵⁴ *Id.* at 17–18. Specifically, the Consumers’ White Label Campaign assured that garments bearing its mark were “made under clean and healthful conditions” in accordance with all applicable state manufacturing laws and without the use of overtime or child labor. *Id.* at 18 (all capitalization omitted). An important predecessor to the labeling campaign consisted of “White Lists” and “We Don’t Patronize” lists issued by labor unions and women’s consumer groups that enabled members to purchase products only from union-friendly manufacturers and merchants. *See id.* at 21–22; MONROE FRIEDMAN, *CONSUMER BOYCOTTS: EFFECTING CHANGE THROUGH THE MARKETPLACE AND THE MEDIA* 39 (1999).

²⁵⁵ Sklar, *supra* note 253, at 24. Wanamaker not only proudly advertised its National Consumers’ League certification, but also set up traveling exhibits with pictures of sweatshop labor juxtaposed against pictures of Wanamaker workers. *See id.* at 31.

²⁵⁶ *See id.* at 24–25 (noting that “consumers supporting the White Label campaign became the vehicle whereby the National Consumers’ League emerged as the single most politically effective organization of middle-class women in the decades before World War I”). The leader of the National Consumers’ League, Florence Kelley, vowed to continue the campaign until it created nothing less than an entire nation of citizen-consumers practicing ethical consumption. *See id.* at 27. Although Kelley’s grandiose vision never materialized, the White Label Campaign did generate a foundation of support for the National Consumers’ League that ultimately enabled the organization to play a key role in many Progressive Era labor reforms. The League spearheaded litigation that led to the Supreme Court’s acceptance of the constitutional validity of maximum workday legislation for female workers in *Muller v. Oregon*, 208 U.S. 412 (1908). *Id.* at 423. Indeed, according to Sklar, Josephine Goldmark, Justice Brandeis’s sister-in-law and a member of the League, authored the famous Brandeis Brief that heavily influenced the Court’s decision in *Muller* and that forever changed the role of social science evidence in constitutional advocacy. *See* Sklar, *supra* note 253, at 32; *see also* LANDON R.Y. STORRS, *CIVILIZING CAPITALISM: THE NATIONAL CONSUMERS’ LEAGUE, WOMEN’S ACTIVISM, AND LABOR STANDARDS IN THE NEW DEAL ERA* 44–46 (2000). Additionally, the League campaigned for minimum wage legislation that eventually became the basis for the minimum wage provisions of the federal Fair Labor Standards Act of 1938. As Sklar argues, these political achievements were made possible in no small part by the League’s earlier success at mobilizing thousands of consumers through the White Label Campaign. *See* Sklar, *supra* note 253, at 32–34.

tury.²⁵⁷ Unquestionably, participants viewed these campaigns as a means of reforming the economic and moral character of market processes. Black leaders in Lynchburg, Virginia, for instance, sparked an early boycott of segregated trolley cars by urging consumers: “touch to the quick of the white man’s pocket” by withholding patronage, for “[t]is there his conscience often lies.”²⁵⁸ Throughout Northern cities in the late 1920s and 1930s, consumer protests sought to widen options for African-American laborers by appealing, “Don’t Buy Where You Can’t Work,” or “Spend Your Money Where You Can Work.”²⁵⁹ Activist Ella Baker later worked to solidify this concept of “organizing at the point of consumption” as a key element of the overall civil rights movement, a strategy that proved essential to the movement throughout the remainder of the century²⁶⁰ and that ultimately received constitutional recognition from the Supreme Court.²⁶¹

As these examples demonstrate,²⁶² process-oriented consumer activism enjoys a long pedigree in the United States. The contemporary critique of process preferences, however, tends to ignore this history by attributing such preferences to ill-informed personal fears or the

²⁵⁷ As historian Lizabeth Cohen notes, it is not coincidental that, in addition to the female-led National Consumers’ League, African Americans were the other major socioeconomic group to use consumer activism prominently and successfully in pursuit of political goals during the twentieth century. Denied access to traditional avenues of political expression and authority, both groups “seized upon the citizen consumer role as a new way of upholding the public interest.” COHEN, *supra* note 2, at 13.

²⁵⁸ August Meier & Elliott Rudwick, *The Boycott Movement Against Jim Crow Streetcars in the South, 1900–1906*, 55 J. AM. HIST. 756, 761 (1969) (quoting LYNCHBURG NEWS, June 9, 1906).

²⁵⁹ COHEN, *supra* note 2, at 44. Similarly, ministers began to speak of the “Double Duty Dollar,” whereby consumers not only could satisfy their personal needs and desires through purchases, but also could help to improve the economic prospects of African Americans by patronizing black-owned or black-employing businesses. *Id.* at 48.

²⁶⁰ *Id.* at 50. Indeed, Cohen contends that, in no small measure, “[m]ass consumption begot a mass civil rights movement.” *Id.* at 190.

²⁶¹ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (“In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, though not identical, are inseparable. Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change.” (citation omitted) (internal quotation marks omitted)). See generally Michael C. Harper, *The Consumer’s Emerging Right To Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law*, 93 YALE L.J. 409 (1984) (providing a thorough analysis of the *Claiborne Hardware* decision and the possibility of a more general constitutional right to boycott).

²⁶² Other notable examples of consumer behavior aimed at altering production processes include the grape boycotts of the late 1960s led by Cesar Chavez and the United Farm Workers Organizing Committee, see FRIEDMAN, *supra* note 254, at 47–49; the long-running campaign of international activists against Nestlé Corporation in protest of its infant formula marketing practices in developing nations, see *id.* at 176–78; the consumer boycott of the 1980s that, in conjunction with other aspects of the anti-Apartheid movement, ultimately led more than 160 U.S. corporations to cease operations in South Africa, see *id.* at 172–73; and the early 1990s boycott of the Cracker Barrel restaurant chain in protest of the company’s anti-gay and -lesbian employment policy, see *id.* at 149–50.

machinations of interest groups. In the past, regulators could not have convincingly dismissed the Consumers' White Label Campaign or the civil rights boycotts as irrational or misled, given that those campaigns targeted the unequivocally normative goals of economic and political equality. The process/product distinction, on the other hand, portrays process preferences as almost inherently illegitimate, in that it confines the acceptable scope of consumer interest merely to verifiable claims about physical consequences that are manifest in the end product itself and that impact the consumer directly.²⁶³ Absent such tangible effects, the consumer's demand for information regarding processes appears by definition to be unfounded, and therefore subject to paternalistic discounting rather than governmental acknowledgment and support.

Consider in this regard the preference of some consumers and states for small or family-owned producers. To proponents of the process/product distinction, such preferences are understood as barely disguised efforts to subsidize or otherwise protect inefficient industries,²⁶⁴ generally with harmful consequences to both domestic consumers and foreign producers.²⁶⁵ Consistent with this view, a GATT dispute panel ruled in 1992 that certain excise tax credits provided by the state of Minnesota to small breweries would have been inconsistent with Article III of the GATT, even if the state had offered such credits to foreign and domestic breweries on a nondiscriminatory basis.²⁶⁶ The panel rested its ruling on a formalistic determination that brewery size does not affect beer as a product — foreshadowing the process/product distinction that would be adopted in *Tuna/Dolphin I*

²⁶³ See, e.g., Kurt Buechle, *The Great, Global Promise of Genetically Modified Organisms: Overcoming Fear, Misconceptions, and the Cartagena Protocol on Biosafety*, 9 IND. J. GLOBAL LEGAL STUD. 283, 311 (2001) (contending that labels are more “helpful” to consumers when the labeled product expresses traits that affect the product’s end uses); Healy, *supra* note 159, at 239–40 (stating that “[o]nce the government has determined that a product poses no risks, it is incoherent to require a label that would allow individual decisionmaking based on concerns about the product that have no basis in fact”).

²⁶⁴ For example, state labeling requirements for rbST-treated milk have been critiqued in this fashion. See Chen, *supra* note 180, at 866 (describing state efforts to require or promote rbST labeling and concluding that “[t]he pungent odor of producer protectionism permeates the legislative air”); see also Jim Chen, *Globalization and Its Losers*, 9 MINN. J. GLOBAL TRADE 157, 201–04 (2000) (arguing that, “[i]f anything, smallness and family ownership bear a *negative* correlation to environmental protection”).

²⁶⁵ Too often, for instance, measures turn out in practice to direct resources to (nominally) unintended beneficiaries, thereby harming consumers and foreign competitors through artificially inflated prices while simultaneously failing to achieve the very wealth transfer that provided the publicly avowed purpose for the measure’s passage. Cf. Chen, *supra* note 264, at 201 (“Farm-sector lobbyists readily bamboozle agriculturally illiterate consumers and policymakers . . .”).

²⁶⁶ United States Measures Affecting Alcohol and Malt Beverages, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 275 (1993) [hereinafter *Beer II*].

shortly thereafter.²⁶⁷ The panel's underlying concern, however, seemed to center on the fact that, at the time of the dispute, Canada was home to few or no microbreweries that would qualify for the Minnesota tax credit. To the dispute panel, therefore, Minnesota's policy appeared to be an unfair attempt to support local producers through a cleverly designed tax scheme that, although facially neutral, excluded nearly all of an important trading partner's breweries.²⁶⁸

As this example reveals, dispute panelists and trade scholars have especially sensitive antennae when it comes to detecting disguised protectionism.²⁶⁹ Although their sensitivity is not without some justification, it should be tempered by a healthy measure of respect for the preferences of citizens and consumers, who may have legitimate motivations for adopting even those process-based policy measures that commentators believe are most subject to abuse. Minnesota, for instance, seems to have been sincere in its desire to support a nascent "microbrew revolution" at a time when industry concentration had depleted levels of both brewery employment and consumer choice.²⁷⁰ Furthermore, nothing prevented the development of a microbrewery industry in Canada that would have been eligible for Minnesota's preferential tax treatment.²⁷¹ Without any obvious impediments to such a development, the GATT panel was unjustified in leaping to its

²⁶⁷ The link between the panel's ruling and *Tuna/Dolphin I* should not be overstated. As Sanford Gaines points out, the *Beer II* panel interpreted "like products" under Article III:2 of the GATT, a provision that "offers limited guidance on the interpretation of Article III:4." Gaines, *supra* note 62, at 413.

²⁶⁸ A celebrated example of such disguised protectionism concerned an effort by Germany to grant a tariff reduction to Switzerland without affording similar benefits to its other trading partners. Accordingly, the measure was drafted to cover only "large dappled mountain cattle or brown cattle reared at a spot at least 300 meters above sea level and which have at least one month's grazing each year at a spot at least 800 meters above sea level." Charnovitz, *The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality*, *supra* note 58, at 68 (quoting *Memorandum on Discriminatory Tariff Classifications*, League of Nations Doc. C.E.C.P. 96, at 8 (1927)).

²⁶⁹ Perhaps this sensitivity is explained by the fact that many panelists and scholars spent their former lives in national trade offices, carefully manipulating tariff schedules around product descriptions to accomplish just this kind of protectionism. See Hudec, *supra* note 54, at 110-11 (describing such efforts and stating that "[m]ost observers have their own anecdotal evidence to support this generalization about tariff practice").

²⁷⁰ See, e.g., BILL YENNE, *THE AMERICAN BREWERY: FROM COLONIAL EVOLUTION TO MICROBREW REVOLUTION* 115-48 (2003).

²⁷¹ Indeed, in subsequent years, a microbrewery industry emerged in Canada, aided, somewhat ironically, by tax breaks from provincial governments. See, e.g., Kelly Louiseize, *Tax Breaks on Tap for Breweries*, N. ONTARIO BUS., May 1, 2003, at 10 (describing a tax concession scheme for small brewers in Ontario), available at 2003 WL 12121647; David Kuxhaus, *NDP Pours Tax Relief into Microbreweries: Reduction To Help Local Producers Compete*, WINNIPEG FREE PRESS, Apr. 19, 2001, at B7 (describing a similar program in Manitoba), available at 2001 WL 16235499. In the celebrated mountain cattle example, by contrast, Germany utilized more permanent geographical conditions to confer its disguised tariff concession on Switzerland without opening up eligibility to other nations. See *supra* note 268.

skeptical conclusion about the state's motivation for adopting a policy preference in favor of small producers.²⁷²

This tendency toward skepticism is further exemplified in the international trade context by the SPS Agreement, which requires that certain trade measures rest on scientific risk assessments in order to withstand WTO scrutiny. As Alan Sykes notes, the premise of the SPS Agreement's evidentiary requirements is simple:

If a regulation that is ostensibly aimed at protecting health, safety, or the environment nevertheless has the effect of restricting trade, and there is no scientific evidence of any danger to be avoided or of any reduction in risk as a result of the regulation, then the suspicion arises that the regulation is disguised protectionism.²⁷³

The shortcoming of this approach, however, is its implicit assumption that regulations that appear aimed at preventing environmental, health, or safety risks can be adequately understood and evaluated outside of the cultural context within which they originate. As sociologist Dorothy Nelkin observes, "controversies over science and technology [often] are struggles over meaning and morality, over the distribution of resources, and over the locus of power and control" in a society.²⁷⁴ By demanding that regulatory actions be "based on an assessment . . . of the risks to human, animal or plant life or health,"²⁷⁵ the SPS Agreement relegates such nontechnical meanings of risk to a second tier of legitimacy, able to be invoked by nations in defense of regulatory measures only after a "sufficiently specific" risk assessment has identified an "ascertainable" threat.²⁷⁶

²⁷² The panel was perhaps impaired in its analysis by the failure of the United States to defend Minnesota's scheme seriously. See Howse & Regan, *supra* note 58, at 263.

²⁷³ Alan O. Sykes, *Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View*, 3 CHI. J. INT'L L. 353, 354 (2002). Note, however, that it is not necessary to demonstrate that the restrictive measures have had discriminatory effects in order to invoke the SPS Agreement. See *supra* pp. 550-51.

²⁷⁴ Dorothy Nelkin, *Science Controversies: The Dynamics of Public Disputes in the United States*, in HANDBOOK OF SCIENCE AND TECHNOLOGY STUDIES 444, 445 (Sheila Jasanoff et al. eds., 1995); see also Alvin M. Weinberg, *Science and Trans-Science*, 10 MINERVA 209, 209 (1972) (coining the term "trans-science" to describe controversies that may be framed within the discourse of science, but cannot be resolved within it). A large body of psychological evidence, for instance, suggests that individuals infuse risks with a variety of social meanings, many of which escape the comparatively sterile methodologies of scientific risk assessment. See Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1763-66 (2003) (summarizing studies that suggest that "risk is a complex, textured assessment of numerous variables that surround a given environmental, health, or safety hazard . . . such as whether a risk is voluntarily confronted by the victim, whether its potential harm is equitably distributed among the population, whether it poses a particularly dreaded form of death or illness, whether it threatens future generations, and whether the perceived source of the risk is believed to be a trustworthy actor").

²⁷⁵ SPS AGREEMENT, *supra* note 75, at art. 5(1).

²⁷⁶ See *EC Hormones Report*, *supra* note 167, paras. 186-87. Thus, while the *EC Hormones Report* indicated that consumer concerns could be considered in selecting the appropriate level of protection once a scientific risk assessment had established a basis for taking precautions, such

A similar excision of meaning occurs in the U.S. regulation of GM technologies. By parceling government authority in piecemeal fashion among USDA, FDA, and EPA regulators, the Reagan Administration ensured that no single government decisionmaker would take a comprehensive look at the variety of risks and benefits posed by GM agriculture.²⁷⁷ Consumers, however, are not similarly compartmentalized in their evaluation of GM food products. Thus, in addition to capturing concern over long-term consequences for human health and safety, consumer suspicion of GM foods also reflects disapproval of the impact that GM agriculture may have on nontarget animal and insect species, on ecosystem integrity, on the viability of organic farming, and on a host of more general ethical and cultural considerations.²⁷⁸ Failure to label GM foods therefore invites the alteration of fundamental agricultural, economic, and cultural aspects of the food supply without input from consumers. This exclusion is defended on the basis that consumers are incapable of comprehending the complex set of trade-offs posed by biotechnology. A fair review of the evidence, however, suggests that much of the opposition to GM food products is both reasoned and, at least partially, substantiated. Indeed, given that consumers are, in some sense, the only decisionmakers in a position to evaluate new technologies such as GM agriculture *in their totality*, one might think that consumer views merit special credence, rather than special efforts at suppression.²⁷⁹

concerns could not enter the first stage of the analysis. *Id.* para. 245. As Jeffery Atik describes, these science-based aspects of the SPS Agreement may “lead to a new kind of international discourse, where certain moves are excluded.” Jeffery Atik, *Science and International Regulatory Convergence*, 17 NW. J. INT’L L. & BUS. 736, 758 (1996–1997); see also Marc L. Miller, *NIS, WTO, SPS, WIR: Does the WTO Substantially Limit the Ability of Countries to Regulate Harmful Non-indigenous Species?*, 17 EMORY INT’L L. REV. 1059, 1089 (2003) (“‘Science’ is an important aspect of rational decisionmaking, but the limits of the scientific paradigm and its role in a larger sphere of choice should be recognized, not only for questions that seem largely scientific but also for those that reflect reasoned choices about what environment — ecological and cultural — we would like.”).

²⁷⁷ See Applegate, *supra* note 164, at 233 (noting that the Coordinated Framework for regulating GM products assumes that GM organisms “pose no social complications that are sufficiently serious to include in the regulatory evaluation”); Bratspies, *supra* note 95, at 310 (“Rather than having a single agency responsible for regulating biotechnology, . . . the United States doles out administrative responsibilities piecemeal to various federal agencies.”). As William Buzbee has noted, such “regulatory gaps” can be thought of as arising almost inevitably from “predictable incentives in complex, multi-layered political-legal contexts for social ills not to be overregulated, but to remain unaddressed,” an incentive deficit that Buzbee refers to as the “regulatory commons problem.” William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 5 (2003).

²⁷⁸ See *supra* pp. 554–56.

²⁷⁹ For instance, because regulators from various agencies address GM agriculture in piecemeal fashion, they might demonstrate a form of group-choice paradox in which each agency approves GM agriculture with respect to their issue or issues of concern, even though they might reject it on a holistic evaluation. See LEWIS A. KORNHAUSER & LAWRENCE G. SAGER, *THE MANY AS*

Other uses of the process/product distinction also overlook important grounds for consumer preference. In the case of rbST-derived milk, for instance, consumers have expressed concern not only over the types of risk that accompany genetically engineered products more generally, but also over the threat of painful and potentially dangerous effects of rbST treatment on dairy cows. Indeed, Canada refused to authorize the use of rbST on animal welfare grounds alone, citing potentially increased levels of lameness and infection among treated cows, as well as reduced livestock lifespans due to increased herd culling.²⁸⁰ Similarly, the “compositional analysis method” proposed by the USDA to analyze the risks of cloned livestock distinguishes between cloned and conventional food products only on physical dimensions. Consumers, however, might desire labeling due to a variety of ethical and religious concerns regarding the cloning process itself, including the fact that cloning may pose health risks to surrogate livestock and result in a high frequency of nonviable offspring.²⁸¹ In short, by assuming likeness between novel and conventional organisms based solely on physical makeup, both the substantial equivalence doctrine and the compositional analysis method invite policymakers to ignore the full complexity of the issues raised by new technological processes such as genetic engineering and livestock cloning.

Finally, the limits of the process/product distinction as a conceptual device are also apparent in the FDA’s labeling determination with regard to food products that have been treated with irradiation. In this context, in contrast to its decisions on GM food and rbST, the FDA chose to require disclosure of the process of irradiation because of its potential impact on certain physical properties of the treated product

ONE: INTEGRITY AND GROUP CHOICE IN PARADOXICAL CASES (N.Y.U. Sch. of Law, Research Paper No. 68, 2003; Univ. of Tex. Sch. of Law, Research Paper No. 55, 2003), available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID441466_code030915570.pdf?abstractid=441466&mirid=1; Bruce Chapman, *More Easily Done than Said: Rules, Reasons and Rational Social Choice*, 18 OXFORD J. LEGAL STUD. 293, 312–16 (1998). Consider in this respect the experience of Switzerland, which in 1992 established the contours of its regulatory framework for GM foods through an elaborate public discussion and national referendum process. See Franz Xaver Perrez, *Taking Consumers Seriously: The Swiss Regulatory Approach to Genetically Modified Food*, 8 N.Y.U. ENVTL. L.J. 585, 590–91 (2000). Reflecting the diversity of individual concerns regarding genetic engineering, the resulting constitutional amendment required Swiss regulators to “consider not only the safety of humans, animals, and the environment, but also the ‘dignity of creation’ when regulating genetic engineering and GMOs.” *Id.* at 591 (citation omitted).

²⁸⁰ See Thornley, *supra* note 188, at 790–91; Press Release, Health Canada, Health Canada Rejects Bovine Growth Hormone in Canada (Jan. 14, 1999), available at http://www.hc-sc.gc.ca/english/media/releases/1999/99_03e.htm. A post-approval monitoring program conducted by Monsanto scientists confirmed the increased risk of hoof disorders associated with rbST treatment, but found no evidence of elevated levels of mastitis infections. See R.J. Collier et al., *Effects of Sustained Release Bovine Somatotropin (Sometribove) on Animal Health in Commercial Dairy Herds*, 84 J. DAIRY SCI. 1098, 1098 (2001).

²⁸¹ See U.S. DEP’T AGRIC., *supra* note 116, at 11.

such as shelf life or nutritional content.²⁸² To the consumer, however, such undetectable physical alterations in the end product only scratch the surface of concerns over food irradiation. As in the GM food and rbST contexts, consumer demand for labeling of irradiated foods stems from a variety of social, economic, and environmental objections regarding the consequences of the process itself, rather than merely concern over the personal health and safety risks of treated goods.²⁸³ For example, given that irradiation enables meat and produce to be shipped across greater distances than current handling and processing technologies allow, some opponents fear that irradiation will further the erosion of local agricultural production and regional food security.²⁸⁴

In many respects contemporary process-related controversies continue the tradition of publicly oriented consumer activity exemplified by Progressive Era campaigns and the civil rights movement. In each of the cases examined in this subsection, consumers appear to be expressing preferences not merely for the goods that they wish to purchase, but also for the technological and socioeconomic characteristics that they wish to encourage in the economy's productive sphere. Most notably, consumer concerns seem premised on a recognition that, as Wendell Berry puts it, "how we eat determines, to a considerable extent, how the world is used."²⁸⁵ To that extent, dismissing consumer preferences wholesale simply because they pertain to process characteristics seems as unwarranted today as it would have been during earlier periods of consumer activism. Instead, consistent with the premises of a liberal market democracy, the default response of the government to purportedly unreliable process preferences should not be to suppress process information, but rather to expose it to scrutiny and counterargument.²⁸⁶

²⁸² See 21 C.F.R. § 179.26(c) (2004); 51 Fed. Reg. 13,376 (Apr. 18, 1986).

²⁸³ Cf. Fred H. Degnan, *Biotechnology and the Food Label: A Legal Perspective*, 55 FOOD & DRUG L.J. 301, 306 (2000) (arguing that the FDA "went to rather great lengths to craft a rationale for the required disclosure that fell within the literal confines of the agency's traditional application" of its labeling authority, and that other interests surely were at play in the Agency's irradiation decision).

²⁸⁴ See The Food Commission, *Position Statement of The Food Commission, Food Irradiation — The Problems and Concerns*, http://www.foodcomm.org.uk/irradiation_probs.htm (July, 2002) (observing that "[i]rradiation supports greater globalisation of food production and supply, threatening local farmers and food processors").

²⁸⁵ WENDELL BERRY, *The Pleasures of Eating*, in WHAT ARE PEOPLE FOR? 145, 149 (1990).

²⁸⁶ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (arguing that government actors should "assume that [commercial] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them"). Consistent with this approach, biotechnology advocates in recent years have pursued various public confidence-building measures for GM food products and other genetic engineering technologies — in contrast to the industry's earlier approach, which sought to suppress informa-

To restore this traditional liberal view, several changes are necessary. First, rather than rely on an overinclusive proxy for protectionism such as the process/product distinction, WTO dispute panels should investigate directly the policy purposes driving challenged product regulations, accepting those regulations whose nondiscriminatory purpose satisfies some variant of a means-ends rationality test and rejecting only those that do not.²⁸⁷ The once-prominent “aims and effects” test essentially followed this approach.²⁸⁸ Its recent explication and attempted revival by Donald Regan should therefore be welcomed as an effort to combat the problem of disguised protectionism without simultaneously eviscerating a nation’s ability to respond to the firmly held convictions of its consumer-citizens.²⁸⁹ Similarly, WTO member

tion out of concern that consumers would not comprehend the mix of costs and benefits offered by GM agriculture. See generally Anne R. Kapuscinski et al., *Making ‘Safety First’ a Reality for Biotechnology Products*, 21 NATURE BIOTECH. 599 (2003) (describing a public-private “consultative and transparent process to incorporate scientific, technical, social and governmental considerations in developing environmental and human health safety standards for genetically engineered products”); Gary E. Marchant, *Introduction*, 44 JURIMETRICS 1 (2003) (introducing symposium issue on the subject).

²⁸⁷ See William J. Snape III & Naomi B. Lefkowitz, *Searching for GATT’s Environmental Miranda: Are “Process Standards” Getting “Due Process?”*, 27 CORNELL INT’L L.J. 777, 796 (1994); see also Joel P. Trachtman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT’L L. 32, 32 (1998) (including a simple means-end rationality test within a typology of “trade-off devices” that dispute panels may employ when faced with a conflict between the reduction of trade barriers and the effectuations of other social or environmental interests).

²⁸⁸ See Howse & Regan, *supra* note 58, at 268; Hudec, *GATT/WTO Constraints on National Regulation*, *supra* note 58, at 626–29.

²⁸⁹ See Donald H. Regan, *Further Thoughts on the Role of Regulatory Purpose Under Article III of the General Agreement on Tariffs and Trade: A Tribute to Bob Hudec*, 37 J. WORLD TRADE 737 (2003). After an extensive textual and functional analysis, Regan concludes that products should be regarded as “like” for purposes of Article III under the GATT only if “(a) they are in a competitive relationship, and (b) they are not distinguished by any non-protectionist policy which actually underlies the challenged regulation.” *Id.* at 752; see also Amelia Porges & Joel P. Trachtman, *Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects*, 37 J. WORLD TRADE 783, 794–97 (2003) (arguing that the “aim and effects” test may have been revived by the *Appellate Body Asbestos Report* in the context of deciding whether a measure is applied “so as to afford protection” or to confer “less favourable treatment” within the meaning of Article III (quoting Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef* para. 100, WT/DS161/AB/R (Jan. 10, 2001)) (internal quotation mark omitted)). A less deferential approach, but one still superior to the process/product distinction, would require that the nondiscriminatory regulation adopt the least trade-restrictive means available to achieve its purpose. See Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 5 (1999) (excluding from the definition of regulatory protectionism any “nondiscriminatory” regulation for which “no less restrictive alternative is available”). The limitation of such an approach, however, is the fact that hypothetical alternative regulations often are constrained only by the panelists’ imaginations, rather than by the full complexity of political and economic reality. See Robert Howse, *Managing the Interface Between International Trade Law and the Regulatory State: What Lessons Should (and Should Not) Be Drawn from the Jurisprudence of the United States Dormant Commerce Clause*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW, *supra* note 54, at 139–40 (“A legal economist can always imagine a hypothetical welfare-maximizing regulatory instrument that

nations should clarify the SPS Agreement to ensure that its scientific basis requirements are not imposed on regulatory measures that seek to effectuate consumer interests other than (or in addition to) concerns about the type of health and safety risks that scientific risk assessments can verify.²⁹⁰ For instance, although U.S. opponents of mandatory labeling requirements for GM foods argue that such regulations are “not scientifically defensible,”²⁹¹ it should be understood that this argument targets only one factor in the evaluation of process-based regulations and that Europe remains free to posit other interests in defense of its labeling regime.

Second, the FDA should abandon the restrictive interpretation of its FFDCa labeling authority, which the Agency adopted only amidst the politically charged debate over GM regulation and which departed significantly from the FDA’s own longstanding practice of requiring labeling in a variety of appropriate contexts to aid consumer decision-making.²⁹² More generally, the FDA and other relevant authorities in the GM context should reaffirm that the “substantial equivalence” doctrine serves merely as a temporary heuristic device for assessing certain types of physical risks that might be presented by novel technology. Moreover, these agencies must acknowledge that employing the doctrine (or related concepts such as the compositional analysis method) beyond this sphere of application risks the incidental exclusion of numerous ethical, cultural, and environmental concerns simply as a matter of definition, rather than as a result of reasoned analysis.

Finally, the presumption that “mere consumer concern” about “production methods” is an insufficient basis for state action — a presumption expressed both in the beliefs of many international trade commen-

achieves a public purpose without resort to trade restrictions.”). For this reason, among others, John McGinnis and Mark Movsesian argue in favor of a test that focuses on procedural features of the domestic decisionmaking process that led to adoption of the measure. *See* McGinnis & Movsesian, *supra* note 44, at 572–83; *see also* Jan Bohanes, *Risk Regulation in WTO Law: A Procedure-Based Approach to the Precautionary Principle*, 40 COLUM. J. TRANSNAT’L L. 323, 363–75 (2002) (proposing an approach to evaluating environmental and human health and safety trade measures that focuses similarly on procedures). McGinnis and Movsesian argue that their “procedure-oriented jurisprudence . . . would allow the WTO to invalidate covertly protectionist measures without supplanting the substance of national regulatory policies.” McGinnis & Movsesian, *supra* note 44, at 580; *see also* Bohanes, *supra*, at 365 (noting that under a procedural approach, “a national trade-impeding health regulation unsupported by science could be ‘purified by a bona fide public risk perception’ and pass muster under WTO dispute settlement” (footnote omitted)).

²⁹⁰ A separate question concerns the extent to which the SPS Agreement acknowledges the precautionary principle as a legitimate basis for adopting protective regulation pending development of a stronger scientific understanding of health and safety risks. *See* Walker, *supra* note 86, at 255–63.

²⁹¹ *See Recent Developments in Regulation of Genetically Modified Crops*, 23 BIOTECHNOLOGY L. REP. 55 (2004).

²⁹² *See supra* p. 560.

tators regarding GATT/WTO law²⁹³ and in the *International Dairy* opinion²⁹⁴ — should be rejected. By deeming process preferences presumptively illegitimate, policymakers aim to root out protectionist or otherwise ill-founded legislation, yet they neglect to consider the many ways in which consumer preferences reflect normatively coherent demands for change with respect to the myriad consequences of production. Indeed, even when consumer process preferences *do* reflect scientifically unfounded fears, the rejection of “mere consumer concern” as a legitimate state interest overlooks both the potentially significant welfare effects of fear itself,²⁹⁵ and the more abstract notion that, as Martha Nussbaum observes, “there is a distinctive human good expressed in the freedom we give our fellow citizens to make choices that we ourselves may hold to be profoundly wrong.”²⁹⁶

In sum, the process/product distinction exacts too dear a price in exchange for its promised exclusion of socially harmful legislation. This price becomes all the more burdensome when it is recalled that proponents of regulatory cost-benefit analysis believe government policies should derive from the preferences that individuals “reveal” while acting in their role as private market actors — the same role that the process/product distinction constructs as essentially apolitical and unworthy of informational enrichment, except to the extent that consumer products might threaten direct personal harm. In essence, individuals who are motivated to participate in public debates become subjected to a double bind, denied on the one hand an informational basis for seeking to incentivize changes through their market behavior, yet expected on the other hand to reveal their “vote” in favor of public goods while acting in that very capacity. As this subsection has argued, attempts to justify these seemingly contradictory policy positions with reference to instrumentalist arguments understate the meanings of modern technology and its role in a consumer society. Consumers may make ill-informed or otherwise erroneous decisions, but they may also make decisions that exhibit a richer value structure than proponents of the process/product distinction generally suppose.

²⁹³ See, e.g., Grant E. Isaac & William A. Kerr, *Genetically Modified Organisms and Trade Rules: Identifying Important Challenges for the WTO*, 26 *WORLD ECON.* 29, 39 (2003) (“[A]ccording to the WTO, there are no legitimate uses of mandatory labelling standards based on the consumers’ right to know about non-safety-related and non-product-related [processes].”).

²⁹⁴ See *supra* pp. 571–72.

²⁹⁵ See MATTHEW D. ADLER, *FEAR ASSESSMENT: COST-BENEFIT ANALYSIS AND THE PRICING OF FEAR AND ANXIETY 1* (AEI-Brookings Joint Ctr. for Regulatory Studies, Working Paper No. 03-12, 2003) (observing the cognitive reality of fear and arguing in favor of attempts to incorporate “fear assessment” into regulatory cost-benefit analysis).

²⁹⁶ Martha C. Nussbaum, *The Good As Discipline, the Good As Freedom, in ETHICS OF CONSUMPTION: THE GOOD LIFE, JUSTICE, AND GLOBAL STEWARDSHIP* 312, 336 (David A. Crocker & Toby Linden eds., 1998).

(b) *Sovereignty of Nations*. — Both critics and defenders of process-based trade measures tend to assume that the primary, if not the exclusive, purpose of such measures is to inspire actual changes in production methods or conditions.²⁹⁷ In that sense, process-based trade measures appear not only to risk codifying scientific ignorance or disguised protectionism, but also to interfere with the sovereignty of foreign producer nations.²⁹⁸ After all, “[w]hy should one country be able to use its trade laws . . . to enforce its own view of how plant or animal life in the oceans beyond its jurisdictional limits of the territorial sea are treated, or how tropical hardwoods are harvested?”²⁹⁹ These concerns are reflected in the *Shrimp/Turtle* rulings, which require process-related trade measures to demonstrate a “sufficient nexus” between the regulating nation and the targeted practice.³⁰⁰ Such concerns also underwrite the views of dispute panelists³⁰¹ and academic commentators³⁰² who argue that a prerequisite to the use of process-based trade measures should be a demonstration by the regulating nation that it has pursued multilateral solutions to the problem targeted by its trade measure. By treating nondiscriminatory process-based trade measures differently from product-based measures in this fashion, the process/product distinction serves not only to deter disguised protectionism and other means of trade discrimination, but also

²⁹⁷ See, e.g., Bartenhagen, *supra* note 74, at 52–53 (“While ecolabeling programs vary widely, they all use market incentives to promote ‘green’ products with the ultimate goal of influencing behavior among both consumers and producers.”); Schoenbaum, *supra* note 66, at 294 (“The theory behind eco-labels is that if consumers are informed, the market and consumer choice can be relied on to stimulate the production and consumption of environmentally friendly products.”).

²⁹⁸ As John Jackson notes, “[t]he term *eco-imperialism* has been coined for this problem.” John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, in *TRADE AND THE ENVIRONMENT*, *supra* note 58, at 219, 226–27.

²⁹⁹ *Id.* at 226.

³⁰⁰ See *Shrimp/Turtle I*, *supra* note 64, para. 133 (avoiding “the question of whether there is an implied jurisdictional limitation in Article XX(g)” by noting that “in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States” because the “species here at stake . . . are all known to occur in waters over which the United States exercises jurisdiction”).

³⁰¹ See, e.g., *id.* para. 166 (noting that the United States failed to engage “in serious, across-the-board negotiations” with other countries before imposing its import ban); *Tuna/Dolphin I*, *supra* note 46, at 199–200 (same); see also Andrea Bianchi, *The Impact of International Trade Law on Environmental Law and Process*, in *ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE* 105, 114–16 (Francesco Francioni ed., 2001) (noting that “[r]estrictions imposed by international trade law on the use of unilateral environmental measures . . . may occasionally act as a catalyst for the development of multilateral regimes for the conservation of resources”).

³⁰² See, e.g., Cameron & Campbell, *supra* note 58, at 41–42 (arguing that “if there are global or transboundary effects to a PPM, the best response will be international cooperation, the development of multilateral agreements, or harmonization”).

to eliminate certain effects of trade policy and consumer preference that are perceived to be inappropriately coercive.³⁰³

Developing countries in particular have stressed the perceived threat to their sovereignty posed by process-based trade measures. Accordingly, they have argued strenuously against the legality and appropriateness of such measures, including even voluntary, nongovernmental product labeling programs.³⁰⁴ Unlike the instrumental argument described in the previous subsection, which depicts consumers as scientifically naïve,³⁰⁵ the argument of the developing nations depicts consumers as morally naïve. It would be nice, they argue, if sweatshop labor could be expunged from the global economy so that no one suffers the “moral taint”³⁰⁶ of purchasing an item produced under exploitative conditions. Until that utopia arrives, however, these nations maintain that it is unduly provincial to condition a foreign manufacturer’s access to product markets or to government-conferred competitive advantages on its compliance with domestic labor and environmental standards.³⁰⁷ Assuming that the failure to meet such standards tangibly impacts only the workers and environment of the exporting nation, greater tolerance of such harm in the developing nation should be treated no differently than any other aspect of comparative advantage. Indeed, some might argue that the global trading system exists precisely in order to take advantage of such disparities in pro-

³⁰³ See David M. Driesen, *What Is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT’L L. 279, 312–29 (2001) (distinguishing between nondiscrimination and noncoercion and arguing that the WTO is most competent as an institution to pursue the former).

³⁰⁴ The concerns of developing nations certainly are not without merit. The complexities involved in crafting, satisfying, and enforcing process-based trade measures often mean that such measures discriminate in practice against producers who lack the technical expertise and institutional resources necessary to achieve compliance with process standards. See Gaines, *supra* note 62, at 427 (describing the “vociferous opposition by developing countries to PPM-based measures and analogous ‘product’ requirements such as environmental packaging and eco-labeling”); Veenha Jha & Simonetta Zarrilli, *Eco-Labeling Initiatives As Potential Barriers to Trade: A Viewpoint from Developing Countries*, in ECO-LABELLING, *supra* note 39, at 277 (discussing the concerns of developing nations with respect to product labeling programs); Joshi, *supra* note 68, at 72 (detailing market-access complaints of developing nations); René Vossenaar, *Eco-Labeling and International Trade: The Main Issues*, in ECO-LABELLING, *supra* note 39, at 21, 23–24 (cataloging ways in which environmental labeling schemes might practically disadvantage producers in developing nations).

³⁰⁵ See *supra* pp. 589–95.

³⁰⁶ See Howse, *supra* note 168, at 160 (describing social labeling of products as a way to “enable individual consumers to avoid the moral ‘taint’ of themselves consuming [a morally objectionable] product”); see also *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 65 (1st Cir. 1999) (describing Massachusetts’s effort to avoid the “moral taint” of associating with entities that do business in Burma).

³⁰⁷ Cf. sources cited *supra* note 41.

duction costs and capabilities.³⁰⁸ From this perspective, the process preferences of affluent Western consumers do indeed seem egregiously puritan.

Naturally, however, there is an opposite extreme: On April 28, 1939, in an address to the Reichstag, Adolf Hitler criticized a boycott of German goods by U.S. consumers in language that is remarkably similar to contemporary criticisms of process-based trade measures.³⁰⁹ Specifically, the Nazi dictator argued that “[i]t is . . . an unbearable burden for world economic relations that it should be possible in some countries for some ideological reason or other to let loose a wild boycott of agitation against other countries and their goods and so practically to eliminate them from the market.”³¹⁰ This example is not, by any means, intended to equate current process-related concerns with the concerns that motivated U.S. consumer boycotts during the Holocaust. It is instead intended to demonstrate a spectrum of moral objections to extraterritorial conditions, none of which tangibly impact a domestic nation’s environment or threaten physical harm to its citizens, but many of which might viscerally impact the willingness of consumers in that nation to accept imported goods. Obviously, not all of these objections can or should be dismissed as “moral militancy.”³¹¹

The view that regards process preferences as extrajurisdictional in orientation³¹² follows naturally from geographically bound, Westphalian notions of sovereignty.³¹³ It does not, however, adequately reflect

³⁰⁸ See Howse & Regan, *supra* note 58, at 283–84 (arguing that, apart from the use of slave labor and child labor, most labor standards issues are primarily local and redistributive in nature and are therefore better understood as aspects of comparative advantage rather than issues that should properly concern domestic consumers).

³⁰⁹ See Adolf Hitler, Address to the Reichstag (Apr. 28, 1939), *quoted in* FRIEDMAN, *supra* note 254, at 137.

³¹⁰ *Id.* Hitler continued by urging President Roosevelt to squelch the boycotts as an essential precondition to productive international relations:

For it is my conviction that if the leaders of nations are not even capable . . . of removing boycotts pursued for ideological reasons which can damage trade relations between countries to so great an extent, there is much less prospect of achieving by means of international agreements any really fruitful step toward improvement of economic relations.

Id.

³¹¹ The phrase “moral militancy” was coined by Jagdish Bhagwati, a noted trade scholar and critic of process-based trade measures. See Jagdish Bhagwati, *Trade and the Environment: The False Conflict?*, in TRADE AND THE ENVIRONMENT, *supra* note 58, at 159, 170. Bhagwati does acknowledge the existence of some international norms in defense of which process-based trade measures might be justified. Jagdish Bhagwati, *The WTO: What Next*, Twenty-Fourth Wincott Memorial Lecture 26–27 (Oct. 25, 1994) (on file with the Harvard Law School Library) (“[T]here will be nearly universal agreement that if slavery produces competitive advantage, that advantage is illegitimate and ought to be rejected.”).

³¹² See, e.g., McGinnis & Movsesian, *supra* note 44, at 587.

³¹³ See Eric Engle, *Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?*, 40 WILLAMETTE L. REV. 103, 107 (2004) (noting that the

consumers' sense of concern and responsibility in a global economy.³¹⁴ To the contrary, consumers who express process preferences typically care about the *nature* of the harm being avoided, not the locus of that harm. Thus, the question whether a domestic trade measure seeks to alter domestic or extraterritorial conditions is misplaced: “[E]ven if the physical effects of the disfavoured processing method occur entirely outside the importing country, the importing country may be concerned to avoid the moral discredit . . . of . . . encouraging harm or wickedness — and the moral discredit occurs within the importing country, regardless of where the physical harm occurs.”³¹⁵ Any contrary view perpetuates the untenable fiction, critiqued by Philip Allott, that individuals adhere to wholly separate domestic and international ethics systems, in which “one set of moral judgments . . . within our own national society” stands in stark contrast to “another set [imposed by international law] for everything that happens beyond the frontiers of our national society.”³¹⁶

The question then becomes how the international community should regulate trade measures that support potentially legitimate consumer process preferences. As Anne-Marie Slaughter has documented, the crafters of the Bretton Woods institutions originally expected the trade-liberalizing effects of the GATT to occur in conjunction with a package of institutions that would promote “economic and social cooperation.”³¹⁷ When the linchpin of that package — the International Trade Organization — failed to materialize, however, the GATT survived in a peculiar and potentially dangerous state, “removed from its intended context of global social and economic regulation.”³¹⁸ The questions left unanswered by that failure now confront trade scholars

Westphalian model depicts “states as isolated from each other and as the princip[al] object of loyalty of their subjects”).

³¹⁴ See BECK, *supra* note 11, at 67 (“Just like poverty or profits, *compassion is also becoming global*.”).

³¹⁵ Howse & Regan, *supra* note 58, at 279 (emphasis omitted); see also, e.g., Richard L. Revesz, *Federalism and Environmental Regulation: Lessons for the European Union and the International Community*, 83 VA. L. REV. 1331, 1344 (1997) (analogizing the psychological disutility caused by extraterritorial environmental harms to “physical spillovers”).

³¹⁶ See Philip Allott, The Josephine Onoh Memorial Lecture (Feb. 21, 1989), reprinted in INTERNATIONAL LAW AND INTERNATIONAL REVOLUTION: RECONCEIVING THE WORLD 16 (1989). But see Paul Krugman, *What Should Trade Negotiators Negotiate About?*, 35 J. ECON. LIT. 113, 115 (1997) (contending that trade is no more or less beneficial for an importing nation as a consequence of labor or environmental conditions abroad).

³¹⁷ See Anne-Marie Burley, *Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State*, in MULTILATERALISM MATTERS: THE THEORY AND PRACTICE OF AN INSTITUTIONAL FORM 125, 135–39 (John Gerard Ruggie ed., 1993).

³¹⁸ Robert Howse, *Managing the Interface Between International Trade Law and the Regulatory State: What Lessons Should (and Should Not) Be Drawn from the Jurisprudence of the United States Dormant Commerce Clause*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW, *supra* note 54, at 139, 143.

with unmistakable clarity: What are the appropriate bounds of social and moral concern within a global trading system that lacks a mechanism comparable in scope and strength to the GATT/WTO legal apparatus for expressing and evaluating noneconomic interests? In the absence of a more comprehensive scheme of social regulation to complement the international economic regime, what are the analytical guideposts for distinguishing an acceptable aspect of comparative advantage from an objectionable practice that an importing country can properly subject to compensatory trade measures?³¹⁹ What are the risks of promoting a multilateral trading organization that is vigorously committed to the notion of anticoercion when no adequately empowered international agencies exist to take up the role presently played, however clumsily, by “coercive” process-based trade measures?³²⁰

Even the dramatically evolved WTO, with its numerous substantive agreements and robust adjudicatory procedures, is ill-equipped to resolve issues as complex and significant as environmentally or socially motivated trade measures.³²¹ These limitations are especially evident

³¹⁹ Howse and Regan, for instance, attempt to distinguish between competitive advantages that are legitimate and those that are better characterized as negative externalities. *Compare* Howse & Regan, *supra* note 58, at 283 (stating that greater tolerance of the aesthetic blights caused by strip mining operations constitutes a genuine comparative advantage in that consumers should not care about the appearance of foreign abandoned strip mines), *with id.* at 281 (stating that “turtle-unfriendly” fishing poses externalities that affect the global population of turtles). *But see* John H. Jackson, *Comments on Shrimp/Turtle and the Product/Process Distinction*, 11 EUR. J. INT’L L. 303, 307 (2000) (noting the difficulty of determining “the extent to which a country can force another country to internalize ‘externalities’ that the other country may not think are ‘externalities’”).

³²⁰ In part because of this lack of strong international regulatory institutions, numerous scholars have argued that unilateral trade measures can play a constructive role in international decisionmaking under appropriate circumstances. *See, e.g.,* ESTY, *supra* note 59, at 144 (“The intrinsic difficulty of multilateral decision making and the lack of existing institutional structures for effective international environmental policymaking . . . makes unilateral action a necessary, if unfortunate, policy option in some circumstances.”); David A. Wirth & Douglas J. Caldwell, *Unilateral Trade-Based Measures for Protection of the Marine Environment*, in VALUES AT SEA: ETHICS FOR THE MARINE ENVIRONMENT 147, 160–67 (Dorinda G. Dallmeyer ed., 2003) (describing a variety of policy attributes of unilateral trade-based measures and concluding that such measures “are almost always understood as a second-best alternative to bilateral or multilateral cooperation but [are] at the same time desirable or necessary as an interim juncture in a policy trajectory designed to stimulate greater international cooperation”). The actual practical significance of unilateral trade measures in the environmental context is the subject of much dispute, however. *Compare* Parker, *supra* note 44, at 25–26 (2001) (“[B]ehind almost any strong, truly effective, international environmental agreement . . . in the world today . . . you are likely to find — at some key juncture in its past or present — the credible threat of unilateral or small group economic leverage.”), *with* Gaines, *supra* note 62, at 419–21 (arguing that the actual role of process-based trade measures in furthering environmental policy thus far has been limited).

³²¹ *See, e.g.,* Guzman, *supra* note 240, at 887 (“The relationship between trade and labor is exactly the sort of policy issue that is ill-suited to the [WTO Appellate Body].”); *see also* Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT’L L.J. 303, 305 (2004) (arguing that “[t]he WTO . . . must eventually either move forward by finding a way to incorporate more regulatory issues within its mandate or move backward and retreat to a narrower focus on trade, leav-

in the WTO's continuing, albeit more limited, reliance on the process/product distinction. By subjecting process-based trade measures to different, more strict scrutiny than product-based measures, the distinction seeks to deter disguised protectionism and territorial overreaching. Rather than clarifying discussions about the likelihood of disguised protectionism or the appropriateness of unilateral action, however, the formalistic — and nearly outcome-determinative — process/product distinction prevents such discussions from even occurring.³²² To be sure, abandoning the process/product distinction in favor of less exacting tests for trade discrimination³²³ leaves the separate question of territorial overreaching largely beyond the purview of the WTO.³²⁴ However, as noted above, restricting the focus of the WTO dispute settlement process in this manner may actually be helpful not only for furthering consumer sovereignty within the international economic system, but also for protecting the embattled WTO itself.³²⁵ The process/product distinction's contrary approach of requiring non-discriminatory, origin-neutral product regulations to be justified within the narrow and demanding confines of Article XX simply because they pertain to processes may be both textually unjustified³²⁶ and, in the long run, politically unsustainable.

2. *The Expressive Account.* — Extensive evidence indicates that consumers are willing to pay a premium for goods derived from certain production processes, even in the absence of appreciable differences in the resulting products. Among other items, such preferences

ing controversial topics such as the environment outside of its influence"). Precisely for this reason, a number of prominent commentators have advocated the creation of new international institutions to take on regulatory roles complementary to the WTO's deregulatory agenda. See Sanford E. Gaines, *The Problem of Enforcing Environmental Norms in the WTO and What To Do About It*, 26 HASTINGS INT'L & COMP. L. REV. 321, 342–51 (2003) (providing an overview and an enlightened critique of various proposals for a new global environmental regulatory organization).

³²² Cf. Hudec, *GATT/WTO Constraints on National Regulation*, *supra* note 58, at 626 (noting that under the process/product distinction, "governments must meet . . . high standards to justify 'origin-neutral' regulatory measures which are guilty of nothing more than transgressing certain abstract notions of 'likeness'").

³²³ For a description of several alternative tests for discrimination and protectionism that do not sweep as broadly as the process/product distinction, see pp. 593–95 and sources cited *supra* note 287.

³²⁴ For an argument that customary international law regarding the extent of jurisdictional authority should be used to resolve charges of territorial overreaching, see Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction — The Case of Trade Measures for the Protection of Human Rights*, 36 J. WORLD TRADE 353 (2002).

³²⁵ See *supra* pp. 568–69.

³²⁶ See Robert Howse, *From Politics to Technocracy — And Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94, 102 (2002) (noting that "there was no textual basis in Article XX . . . that provided a territorial or jurisdictional limitation on the policies or rationales for intervention that could be justified under the individual heads of that article").

have been demonstrated for non-GM foods,³²⁷ sustainably harvested timber,³²⁸ and fairly traded goods.³²⁹ These findings create something of a puzzle for the instrumental account of consumer process preferences. On that account, the goal of consumer activists is to generate a sufficient level of collective demand to change production processes in pursuit of shared goals such as the improvement of occupational safety or the elimination of racial discrimination. Process preferences therefore resemble a public good in that individual consumers may free ride on the altruistic expenditures of others, leading ultimately to an un-

³²⁷ See Gregory A. Baker & Thomas A. Burnham, *Consumer Response to Genetically Modified Foods: Market Segment Analysis and Implications for Producers and Policy Makers*, 26 J. AGRIC. & RESOURCE ECON. 387, 400 (2001) (finding that the presence of GM ingredients was an important concern for approximately 30% of respondents in a study); Wen S. Chern et al., *Consumer Acceptance and Willingness To Pay for Genetically Modified Vegetable Oil and Salmon: A Multiple-Country Assessment*, 5 AGBIOFORUM 105, 108 (2002) (reporting survey evidence of willingness to pay price premiums for non-GM vegetable oil ranging from 55–69% premiums for Norwegian respondents, 50–62% for American respondents, 33–40% for Japanese respondents, and 17–21% for Taiwanese respondents); JILL J. MCCLUSKEY ET AL., CONSUMER RESPONSE TO GENETICALLY MODIFIED FOOD PRODUCTS IN JAPAN 18 (Wash. State Univ., Research Paper TWP-2001-101, Sept. 21, 2001) (finding that consumers in Japan are willing to pay a premium of approximately 60% for non-GM noodles and tofu), available at <http://impact.wsu.edu/research/twp/01-101.pdf>; Catherine A. Mendenhall & Robert E. Evenson, *Estimates of Willingness To Pay a Premium for Non-GM Foods: A Survey*, in MARKET DEVELOPMENT FOR GENETICALLY MODIFIED FOODS 55, 58 (Vittorio Santaniello et al. eds., 2002) (reporting that 50% of survey respondents stated that they were very likely or somewhat likely to purchase non-GM foods at a premium of up to 20%); Charles Noussair et al., *Do Consumers Really Refuse To Buy Genetically Modified Food?*, 114 ECON. J. 102, 112, 117–18 (2004) (reporting that 35% of French consumers are unwilling to purchase GM foods and that 42% demand a price reduction in order to be willing to purchase GM foods); Matthew Rousu et al., *Are United States Consumers Tolerant of Genetically Modified Foods?*, 26 REV. AGRIC. ECON. 19 (2004) (finding reduced consumer willingness to pay for food containing genetically modified material); Abebayehu Tegene et al., *The Effects of Information on Consumer Demand for Biotech Foods: Evidence from Experimental Auctions*, USDA TECHNICAL BULL. NO. 1903, at 24 (Mar. 2003) (finding that American consumers discount their willingness to pay for GM-labeled foods by up to 14% under a variety of information settings).

³²⁸ See, e.g., Rachel Crossley et al., *Is There a Commercial Case for Tropical Timber Certification?*, in ECO-LABELLING, *supra* note 39, at 228, 237–38 (summarizing evidence of consumers' willingness to pay price premiums to obtain environmentally friendly timber); Markku Simula, *Timber Certification Initiatives and Their Implications for Developing Countries*, in ECO-LABELLING, *supra* note 39, at 206, 220–21 (describing a study in which 68% of consumers expressed a willingness to pay 1–15% price premiums for furniture made from sustainably harvested timber).

³²⁹ See KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, WHITE HATS OR DON QUIXOTES? HUMAN RIGHTS VIGILANTES IN THE GLOBAL ECONOMY 3–4, 41 (Nat'l Bureau of Econ. Research, Working Paper No. 8102, 2001) (reporting that 81% of consumers were willing to pay more for an item if it was made under "good conditions"); Univ. of Md., Program on International Policy Attitudes, *Americans on Globalization: A Study of US Public Attitudes*, http://www.pipa.org/OnlineReports/Globalization/global_rep.html (Mar. 28, 2000) (reporting that 76% of respondents indicated willingness to pay a \$5.00 premium for shirts made in a "safe and healthy" working environment over shirts made in a "harsh and unsafe" working environment); PATRICK DE PELSMACKER ET AL., ARE FAIR TRADE LABELS GOOD BUSINESS? ETHICS AND COFFEE BUYING INTENTIONS 9 (Universiteit Gent, Working Paper No. 2003/165, 2003) (reporting that survey respondents on average were willing to pay a 10% premium for fairly traded coffee).

derprovision of the desired incentives to change production processes.³³⁰ If the instrumental account is to explain consumers' preferences for processes, the question then arises: why is there such strong evidence of consumer willingness to act on process preferences despite the free rider problem? Why, for instance, did sales of organically produced dairy items — which, under organic certification guidelines, cannot be derived from rbST-treated cows — grow by more than five hundred percent from 1994 to 1999, reaching a total of \$600 million in the year 2000?³³¹

One simple answer is that, contrary to the predictions of the self-interested rational actor model underlying the free rider account, individuals frequently do exhibit concern for the welfare of others, just as consumers appear to do through their demand for goods manufactured without the use of processes believed to harm workers, animals, or the environment.³³² Within cognitive psychology and experimental economics, the clearest demonstration of such regard for others comes from the Dictator Game, in which one experimental subject (the “proposer”) allocates as he sees fit an endowment between himself and another individual (the “receiver”).³³³ Despite the clear ability to allocate all of the gains to themselves in these experiments, individuals in the proposer position almost always allocate a nontrivial amount of money to the receiver, often an amount equal to their own share.³³⁴ In a similar fashion, consumers who choose to purchase goods according to production processes may do so because they affirmatively desire to

³³⁰ See Guzman, *supra* note 240, at 893 n.31 (noting that “[t]he individual consumer has an incentive to purchase lower priced goods produced under poor labor conditions, relying on other consumers to bear the cost of the higher priced goods produced under core labor standards”); Robert Howse & Michael J. Trebilcock, *The Fair Trade–Free Trade Debate: Trade, Labor, and the Environment*, 16 INT’L REV. L. & ECON. 61, 72 (1996) (discussing the collective action problem created by process-labeled goods and concluding that “[u]nless she can be sure that most other consumers will do likewise, the individual consumer may well not consider it rational to avoid buying the product in question”).

³³¹ DIMITRI & GREENE, *supra* note 246, at 2–3. Again, it bears noting that organic agriculture preferences likely represent a cluster of consumer concerns, some of which are product-related and others of which focus on process characteristics. See *supra* note 246.

³³² See, e.g., Joseph Henrich et al., *In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies*, 91 AM. ECON. REV. 73, 77 (2001) (noting, based on experiments conducted in societies representing a wide variety of economic and cultural conditions, that “the canonical model of the self-interested material payoff-maximizing actor is systematically violated”). But see *infra* p. 628 (describing the view of scholars who believe that other-regarding behavior confers a “warm glow” benefit on donors sufficient to render their behavior consistent with the predictions of a self-interested utility maximization model).

³³³ See, e.g., Cass R. Sunstein, *What’s Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295, 1312–13 (2003).

³³⁴ In one classic experiment, for instance, proposers were offered a binary choice between an inequitable split (\$18, \$2) and an even split (\$10, \$10). More than three-quarters of the subjects chose the even split, despite the apparent sacrifice of self-interest entailed by their choice. Daniel Kahneman et al., *Fairness and the Assumptions of Economics*, 59 J. BUS. 285, 290–91 (1986).

improve the welfare of individual producers or otherwise influence manufacturing processes, even at the expense of their own economic interest and even if the goods that they purchase are physically indistinguishable from substitute offerings.

This explanation is consistent with the instrumental account described in the previous section, in which consumers' preferences for processes appear explicable and evaluable only with regard to the impact that such preferences have on actual conditions in relevant markets. An alternative hypothesis explored in this section is that, to the extent that consumers believe certain processes provide or support a particular public good — if, for instance, consumers believe that shade-grown coffee production helps to protect migratory birds³³⁵ — then process-labeled products provide consumers with a vehicle for expressing their belief in the overall public policy significance of the public good. Utility for the consumer on this account is not necessarily derived from effecting change in the world — from actually saving migratory birds — but from participating in a process whereby one is able to express a “vote” in favor of such change, whether or not it actually occurs. Support for this hypothesis comes from an extensive empirical literature on the importance of procedural characteristics to an individual's evaluation of outcomes and the institutional structures within which they occur.³³⁶ More generally, this hypothesis is consistent with Lawrence Friedman's claim that the postwar industrialized world is characterized by a strong cultural commitment to “expressive individualism.”³³⁷ From either perspective, the observed demand for process-labeled goods reflects in part the value that individuals place on the ability to express their moral and political views through the medium of conscientious consumption.

(a) *The Utility of Process.* — Psychologists repeatedly have found that the characteristics of adjudicatory processes influence participants' willingness to accept the desirability and legitimacy of judgments that result from those processes.³³⁸ Other things being equal,

³³⁵ See Holly Doremus, *Shaping the Future: The Dialectic of Law and Environmental Values*, 37 U.C. DAVIS L. REV. 233, 263 (2003) (noting the North American Commission on Environmental Cooperation's proposal to label appropriately produced coffee “bird-friendly”).

³³⁶ For an important early exposition of the theoretical view underlying later empirical work that emphasizes the importance of procedural characteristics of institutions “not only as a means to good results, but also as a means of implementing or serving process values such as participatory governance, procedural rationality, and humaneness,” see Robert S. Summers, *Evaluating and Improving Legal Processes — A Plea for “Process Values”*, 60 CORNELL L. REV. 1, 4 (1974).

³³⁷ LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 2–3, 35–47 (1990).

³³⁸ See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 66–76 (1988) (arguing that individuals value certain procedures not only for their influence over outcomes, but also for their intrinsic desirability as fair procedures); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 13–14, 117–24 (1975)

researchers have found that people are more likely to accept a decision as normatively desirable and legitimate if they perceive that they had an opportunity to express their viewpoint,³³⁹ that their input was meaningfully considered prior to adoption of the decision,³⁴⁰ that the decisionmaker treated them on an even-handed basis vis-à-vis other interested parties,³⁴¹ and that the decisionmaker treated them with dignity and respect.³⁴² Individuals apparently value these procedural characteristics both because they may afford an avenue for influencing the ultimate decision and, more importantly for present purposes, because they confer their own independent benefit on participants, irrespective of outcome.³⁴³ Although some scholars have expressed skepticism about this latter possibility,³⁴⁴ such doubts are mitigated in part by studies finding that individuals prefer outcomes in which they are allowed to voice an opinion on the disputed issue even when they know that their opinion will not affect the outcome³⁴⁵ and, indeed, even when they know that their opinion will be offered only after the decision already has been made.³⁴⁶ In short, “[t]he consistent message of this work is that individuals have an independent taste for fair pro-

(arguing that individuals express preferences for processes that they can control over processes controlled by a third party). Outside of psychology, Amartya Sen has been a leading proponent of the view that policymakers must pay attention to the desirability of procedures in addition to the outcomes that flow from them. See Amartya Sen, *Maximization and the Act of Choice*, 65 *ECONOMETRICA* 745, 750–63, 769–73 (1997); Amartya Sen, *Rationality and Social Choice*, 85 *AM. ECON. REV.* 1, 11–12 (1995). With regard to distributive equity, for instance, Sen notes that “it is hard to be convinced that we can plausibly judge any given utility distribution ignoring *altogether* the process that led to that distribution (attaching, for example, no intrinsic importance whatever to whether a particular utility redistribution is caused by charity, or taxation, or torture).” *Id.* at 12.

³³⁹ See LIND & TYLER, *supra* note 338, at 101–04.

³⁴⁰ See *id.* at 236.

³⁴¹ See Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 *J. PERSONALITY & SOC. PSYCHOL.* 850, 853–54 (1994).

³⁴² See LIND & TYLER, *supra* note 338, at 214; E. ALLAN LIND ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS’ VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES* 66 (1989).

³⁴³ See E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in *EVERYDAY PRACTICES AND TROUBLE CASES* 177, 189–92 (Austin Sarat et al. eds., 1998).

³⁴⁴ See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 *HARV. L. REV.* 961, 1212–14 n.613 (2001).

³⁴⁵ See Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 *J. PERSONALITY & SOC. PSYCHOL.* 72, 80 (1985).

³⁴⁶ See E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Non-instrumental Concerns in Fairness Judgments*, 59 *J. PERSONALITY & SOC. PSYCHOL.* 952, 957 (1990). Of course, these studies do not adequately respond to Louis Kaplow and Steven Shavell’s complaint that “most prior empirical work does not seem to have been designed in a manner that could . . . quantify actual tastes for procedures.” Kaplow & Shavell, *supra* note 344, at 1212 n.613. Further empirical work responding to this practical objection is desirable. For purposes of the argument made in this Article, it is sufficient to assume that the value of procedural utility is large enough to render the process/product distinction unreliable as an assumption about the determinants of consumer welfare.

cedures, which is primarily defined as having a voice in the decision-making process.”³⁴⁷

Further evidence of procedural utility exists in behavioral economic investigations of fairness norms in market interactions. Researchers have demonstrated, for instance, that individuals are far less likely to accept price increases that they perceive to be exploitative, such as those that occur during hurricanes, snowstorms, or other excess demand situations.³⁴⁸ Richard Thaler provides an especially elegant example of such fairness norms: individuals are willing to pay more to have their “favorite brand of beer” brought to them on the beach by a friend when they perceive the beer to originate from a “fancy resort hotel,” as opposed to a “run-down grocery store.”³⁴⁹ This study suggests that identical bottles of beer have different values for individuals depending on the bottles’ perceived origin, even when the individuals themselves have no experiential connection with that origin.³⁵⁰ In addition, procedural characteristics also appear to affect worker well-being; for instance, researchers have shown that self-employed people report higher satisfaction from their work than employed laborers, holding constant other important variables such as income and hours.³⁵¹ Similarly, job satisfaction among a nationally representative sample of over 28,000 British employees correlates significantly with the existence and frequency of opportunities for workers to express their views on compensation issues to superiors.³⁵²

Finally, evidence of procedural utility has been found in people’s reactions to political institutions, particularly with regard to the scope and nature of possibilities for individual participation in collective decisionmaking. As a recent literature review summarizes, “[c]itizens may gain procedural utility from such participation rights over and above the outcome generated in the political process, because they provide a feeling of being involved and having political influence, as

³⁴⁷ David A. Hoffman & Michael P. O’Shea, *Can Law and Economics Be Both Practical and Principled?*, 53 ALA. L. REV. 335, 384 (2002).

³⁴⁸ See Kahneman et al., *supra* note 334, at S297–98. A formal model that incorporates individuals’ concern for the manner in which other market participants treat them is available in Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281 (1993).

³⁴⁹ See RICHARD H. THALER, *THE WINNER’S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 31–32 (1992).

³⁵⁰ See *id.*

³⁵¹ See BRUNO S. FREY & MATTHIAS BENZ, *BEING INDEPENDENT IS A GREAT THING: SUBJECTIVE EVALUATIONS OF SELF-EMPLOYMENT AND HIERARCHY* (Inst. for Empirical Research in Econ., Univ. of Zurich, Working Paper No. 135, 2003).

³⁵² See MATTHIAS BENZ & ALOIS STUTZER, *DO WORKERS ENJOY PROCEDURAL UTILITY?* (Inst. for Empirical Research in Econ., Univ. of Zurich, Working Paper No. 127, 2002).

well as a notion of inclusion, identity and self-determination.”³⁵³ In one revealing study, Bruno Frey and Alois Stutzer surveyed 6000 residents of Switzerland whose opportunities for political involvement varied considerably among the country’s twenty-six cantons, which are subnational government districts with significant legislative authority.³⁵⁴ Controlling for a large number of determinants and correlates of subjective well-being, the researchers found that political participation rights, separate from any effect such rights entailed for desired political outcomes, had a significant effect on reported well-being.³⁵⁵

The lesson from this research for the process/product distinction seems plain: just as people derive utility from feeling as if they participate in certain types of labor or political decisionmaking processes, so too might consumers derive utility from participating in a marketplace that is rich with information about the consequences of consumption. Such a marketplace enables consumers to feel as if their purchasing behavior expresses a viewpoint on critical aspects of the global economy, even apart from consideration of any instrumental impact that such purchasing behavior might have on manufacturing processes.³⁵⁶ From this perspective, the determinative question for the process/product distinction is no longer simply whether consumer process preferences are ill-informed or misguided. Instead, theorists also must consider the existence and magnitude of procedural utility that consumers might derive from participating in a marketplace that affords

³⁵³ BRUNO S. FREY ET AL., INTRODUCING PROCEDURAL UTILITY: NOT ONLY WHAT, BUT ALSO HOW MATTERS 13–14 (Inst. for Empirical Research in Econ., Univ. of Zurich, Working Paper No. 10, 2003).

³⁵⁴ See BRUNO S. FREY & ALOIS STUTZER, BEYOND OUTCOMES: MEASURING PROCEDURAL UTILITY (Berkeley Olin Program in Law & Econ., Working Paper No. 63, 2002).

³⁵⁵ The researchers found that subjective well-being was higher in districts that afforded more substantial political participation rights. This positive effect occurred among both Swiss citizens and, to a smaller extent, foreign residents. Because foreign residents cannot avail themselves of participation rights, the researchers surmised that the disparity in the size of the positive impact reflected two different components of procedural utility: “People may have a preference for participation as an activity as well as a characteristic of an institution.” *Id.* at 16. In other words, for noncitizens — who could not value participation rights as an activity — the difference in perceived well-being must reflect in large part simply the value of living within a highly participatory political structure. See BRUNO S. FREY & ALOIS STUTZER, HAPPINESS AND ECONOMICS: HOW THE ECONOMY AND INSTITUTIONS AFFECT WELL-BEING 153–67 (2002) (providing an extensive analysis of this issue and related research).

³⁵⁶ Cf. Alan Strudler & Eleonora Curlo, *Consumption As Culture: A Desert Example*, in ETHICS OF CONSUMPTION: THE GOOD LIFE, JUSTICE, AND GLOBAL STEWARDSHIP, *supra* note 296, at 269, 277 (claiming “first, that the expressive function of goods is often important for understanding their appeal; second, that this expressive function is partly determined by the commercial process, which helps fix the images that we associate with goods; and third, that the expressive function of a good is ordinarily tied to its history”).

the opportunity to “vote” through private consumption on important matters of public policy.³⁵⁷

Despite its departure from conventional understandings, this account of process preferences may capture important aspects of consumer behavior: after all, an explanation similar to this one provides the best account of experimentally derived estimates of individual demand for public goods, including the type of environmental and social goods that frequently are threatened by harmful production processes and that motivate consumer process preferences. Beginning in the late 1970s, economists pioneered a contingent valuation method for pricing public goods in which survey respondents are asked to state their willingness to pay to preserve an increment of a public good, such as annual protection for one population of migratory birds.³⁵⁸ As Ilana Ritov and Daniel Kahneman note, however, the estimates derived from such surveys are best understood as expressing an attitude regarding “the perceived severity of an unsolved problem or unsatisfied need,” rather than actually being “motivated by the good that is to be acquired.”³⁵⁹ That is, individuals seem to adopt a voting mentality within the market medium of the contingent valuation survey. In a similar fashion, consumers who purchase shade-grown coffee may do so not because they are revealing their willingness to pay for the public good of migratory bird protection, but rather because they are at-

³⁵⁷ Cf. Robert Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 MICH. L. REV. 2329, 2333 (2000) (“[I]f citizens place a value on the capacity for self-government, paternalistic or technocratic responses even to admitted defects in the democratic process may well not result in overall gains to democratic welfare.”).

³⁵⁸ See Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269, 315–20 (1989). For overviews of the contingent valuation methodology, see ECONOMIC VALUATION WITH STATED PREFERENCE TECHNIQUES: A MANUAL (Ian J. Bateman et al. eds., 2002); and ROBERT CAMERON MITCHELL & RICHARD T. CARSON, USING SURVEYS TO VALUE PUBLIC GOODS: THE CONTINGENT VALUATION METHOD (1989).

³⁵⁹ Ilana Ritov & Daniel Kahneman, *How People Value the Environment: Attitudes Versus Economic Values*, in ENVIRONMENT, ETHICS, AND BEHAVIOR 33, 37–39 (Max H. Bazerman et al. eds., 1997); see also HOWARD MARGOLIS, SELFISHNESS, ALTRUISM, AND RATIONALITY: A THEORY OF SOCIAL CHOICE (1982) (arguing that individual contributions to public goods provide utility through the act of contribution, not through benefits flowing as a consequence of the contribution as in the case of an ordinary consumer purchase); Daniel Kahneman & Jack Knetsch, *Valuing Public Goods: The Purchase of Moral Satisfaction*, 22 J. ENVTL. ECON. & MGMT. 57 (1992) (concluding that contributions to public goods provide a sense of moral satisfaction, rather than more tangible benefits to the contributor); Daniel Kahneman & Ilana Ritov, *Determinants of Stated Willingness To Pay for Public Goods: A Study in the Headline Method*, 9 J. RISK & UNCERTAINTY 5 (1994) (finding that willingness to pay for public goods correlates with other responses, including moral satisfaction, judgments of the importance of a public issue, and statements of political support for government action). *But see* David A. Dana, *Existence Value and Federal Preservation Regulation*, 28 HARV. ENVTL. L. REV. 343, 368–72 (2004) (describing methodological advances in contingent valuation research that attempt to overcome earlier identified limitations).

tempting to express the strength of their conviction that such protection constitutes sound public policy.³⁶⁰

Somewhat ironically, an FDA research team discovered the importance of this procedural interest to consumers after informing focus group participants about the full extent of the use of GM ingredients in the U.S. food market. According to the researchers, “[t]he typical reaction of participants was not one of great concern about the immediate health and safety effects of unknowingly eating bioengineered foods, but rather *outrage* that such a change in the food supply could happen without them knowing about it.”³⁶¹ The FDA researchers found that “[v]irtually all participants” desired mandatory labeling of GM food products not because of any “compositional effect of the process on the food product,” but rather because of the simple fact of

³⁶⁰ In this respect, the expressive account of process preferences may suggest important new data sources for theorists who seek monetary measures of willingness to pay for public goods. Because consumers act on process preferences within a marketplace context that forces comparison of their expenditures to an enormous range of possible alternative uses of funds, the “vote” revealed by their behavior seems to avoid some of the chief conceptual complaints that have been raised against contingent valuation studies and other hypothetical means by which individuals are asked to translate their views into dollar amounts for policymaking purposes. See Murray B. Rutherford et al., *Assessing Environmental Losses: Judgments of Importance and Damage Schedules*, 22 HARV. ENVTL. L. REV. 51, 63–69 (1998) (providing an overview of limitations of conventional economic measurement techniques for valuing environmental goods); MATTHEW D. ADLER, FEAR ASSESSMENT: COST-BENEFIT ANALYSIS AND THE PRICING OF FEAR AND ANXIETY 46 (AEI-Brookings Joint Ctr. for Regulatory Studies, Working Paper No. 03-12, 2003) (describing the occasional anomalous finding in the contingent valuation literature that survey responses are insensitive to scope, such that individuals express nearly identical willingness-to-pay valuations regardless of the amount or size of the public good being acquired); cf. Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1167–70 (2002) (noting a “translation problem” whereby individuals have difficulty predictably translating “the intention to punish . . . onto a scale that can be used by the legal system, such as dollars of fine or months in jail”). Moreover, unlike most revealed-preference valuation methodologies, which attempt to infer the value that individuals place on nonmarketed goods from behavior that is merely assumed to include consideration of the good at issue, see Kysar, *supra* note 10, at 574–78 (noting that many observers have questioned the empirical foundation of wage-risk premium studies that attempt to provide an indirect measure of the monetary amount by which workers are voluntarily willing to risk their lives), process-distinguished goods make social or environmental policy goals an explicit and integral component of the purchasing decision. Cf. Lisa Heinzerling, *Markets for Arsenic*, 90 GEO. L.J. 2311, 2311–12 (2002) (suggesting that market evidence of willingness to pay for clean water could be inferred from the strong consumer rejection of Perrier bottled water following disclosure of benzene contamination in a shipment of the company’s products). Thus, to the extent that one seeks market expressions of individuals’ commitment to public goods, process preferences may represent an underutilized but promising source of evidence. See, e.g., *infra* p. 635 (describing a study by EPA economists that utilized organic food purchasing behavior as an indirect measure of parents’ willingness to invest resources in the prevention of harm to their children).

³⁶¹ ALAN S. LEVY & BRENDA M. DERBY, OFFICE OF SCIENTIFIC ANALYSIS & SUPPORT, FOOD & DRUG ADMIN. CTR. FOR FOOD SAFETY & APPLIED NUTRITION, REPORT ON CONSUMER FOCUS GROUPS ON BIOTECHNOLOGY (emphasis added), <http://www.cfsan.fda.gov/~comm/biorpt.html> (Oct. 20, 2000).

GM processing itself.³⁶² Seemingly puzzled by this response, the researchers later learned from participants that “[t]hey felt [GM product] labeling gave them an opportunity to register their view about the wisdom of food biotechnology, i.e., to support or not support the dissemination of the technology, apart from their views about the health and safety characteristics of the individual product.”³⁶³ In the focus group participants’ words, they wanted to “send a message” to biotechnology companies.³⁶⁴

(b) *The Market for Expression.* — The foregoing account of consumer process preferences sheds some light on the important constitutional questions presented by the *Kasky* litigation. Specifically, it demonstrates that when producers make process information available to consumers for use in their purchasing decisions, the transactions implicate the speech interests of both producers *and* consumers — and not merely as speaker and listener, but as speakers both. On the surface, Nike appears to be the only party speaking about significant public issues, such as developing-world labor standards, through its relevant advertisements and other communications. If one accepts the expressive account of process preferences, however, then Nike’s statements appear designed in significant part to attract consumers with process preferences and, as a result, to provide *consumers* with an opportunity to engage in purposeful, expressive activity through the medium of conscientious consumption.³⁶⁵ By purchasing sweatshop-free clothing or cruelty-free cosmetics, consumers signal that they are willing to expend resources to project an opinion or belief about the merits of certain production processes, even if the clothing or cosmetics that they acquire are otherwise indistinguishable from substitute wares. Manufacturers of process-distinguished goods, in essence, are selling consumers a voice.

Cultural studies accounts of consumer behavior hold that most modern consumption in wealthy industrialized nations serves this communicative function.³⁶⁶ Thus, just as the Nike “swoosh” logo is

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ See Reply Brief for the Petitioners, *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003) (No. 02-575), available in 2003 WL 1922453, at *7–8 (“[A]lthough a purchasing decision that reflects an ethical assessment of the seller based on the seller’s speech results in ‘commerce,’ what such speech induces is, in essence, further speech by the consumer about the entities with which he or she wishes to associate and the activities of which he or she wishes to signal approval or disapproval”); cf. Harper, *supra* note 261, at 415 (“A refusal to buy non-union [products] gains significance as self-definition, as well as expression, when that decision is associated with the decisions of others.”).

³⁶⁶ See, e.g., JEAN BAUDRILLARD, *Consumer Society*, in JEAN BAUDRILLARD: SELECTED WRITINGS 32, 49 (Mark Poster ed., 2d ed. 2001) (“Consumer behavior, which appears to be focused and directed at the object and at pleasure, in fact responds to quite different objectives: the

understood to signify an identity that consumers acquire by purchasing Nike products,³⁶⁷ process representations may signify political, social, or environmental viewpoints that consumers can express by buying, wearing, and using the represented goods. In that respect, process representations by manufacturers function quite similarly to trademarks, logos, brands, and other conventional product emblems that typically do not affect the compositional features of the product, but that nevertheless exert great influence over consumer decisionmaking.³⁶⁸ Significantly, scholars have long recognized that trademarks and other identity claims are difficult for consumers to verify and that, consequently, governments can help to maintain the integrity of the trademark's signaling function by preventing unauthorized trademark use.³⁶⁹ By policing the accuracy of manufacturer process representations, governments similarly can help to preserve the integrity of consumer "voting" in a marketplace where such claims would be equally, if not more, difficult for consumers to verify.

From this perspective, the asymmetric constitutional framework that attracted Nike's complaint — that is, a framework in which consumers receive core First Amendment protection but manufacturers do not, even when both are discussing issues related to manufacturing processes³⁷⁰ — may be more defensible than it initially appears. The

metaphoric or displaced expression of desire, and the production of a code of social values through the use of differentiating signs.”)

³⁶⁷ See, e.g., PETER K. LUNT & SONIA M. LIVINGSTONE, *MASS CONSUMPTION AND PERSONAL IDENTITY: EVERYDAY ECONOMIC EXPERIENCE* 166–71 (1992).

³⁶⁸ The precise factors motivating consumer interest in product marks are subject to continuing debate. See Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 *UCLA L. REV.* 621 (2004) (arguing that a semiotic analysis of trademark function provides more robust analysis than an economic analysis). In contrast to cultural studies depictions, economists believe that consumer responsiveness to brands reflects a rational choice by consumers to use manufacturer identity as a proxy for product quality or other salient product features that otherwise would entail significant search costs. See Kysar, *supra* note 274, at 1755–56. Both the cultural studies and economic accounts of trademark function are supported by Justice Harlan's consideration of the legitimacy of price premiums commanded by a product, Clorox Bleach, that was chemically indistinguishable from nonbranded alternatives. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 572 (1967). Justice Harlan rejected the FTC's argument that such premiums constituted strong evidence of anticompetitive behavior in the market for household goods, reasoning that brand names such as Clorox might serve legitimate functions that the FTC had failed to recognize and that such functions could justify price premiums even for physically indistinguishable products. As Justice Harlan wrote, “[i]t is not the [government's] function to decide which lawful elements of the ‘product’ offered the consumer should be considered useful and which should be considered the symptoms of industrial ‘sickness.’ It is the consumer who must make that election through the exercise of his purchasing power.” *Id.* at 604 (Harlan, J., concurring).

³⁶⁹ Indeed, laws against such unauthorized use date back to the Middle Ages. See Sidney A. Diamond, *The Historical Development of Trademarks*, 65 *TRADEMARK REP.* 265, 277–80 (1975).

³⁷⁰ See Brief for the Petitioners, *Kasky* (No. 02-575), available in 2003 WL 898993, at *28 (“If the full protections of the First Amendment apply to the allegations of [Nike's critics], so too they apply when Nike responds to those allegations.” (internal citations omitted)); Reply Brief for the Petitioners, *Kasky* (No. 02-575), available in 2003 WL 1922453, at *7 (describing the California

reason to monitor corporate process speech through false and deceptive advertising regulation is to ensure that misleading corporate representations do not subvert the *consumers'* free speech and associational interests. Importantly, it is not necessary to categorize the respective activities of manufacturers and consumers within these transactions as both commercial or both noncommercial speech.³⁷¹ Instead, goods that are labeled or advertised according to their manufacturing characteristics may simultaneously implicate commercial speech activities by product makers, and core expressive and associational activities by product purchasers.³⁷² On this view, the government's

consumer protection scheme as “underinclusive . . . because it excludes accusations calculated to discourage consumers from purchasing a particular manufacturer's products”).

³⁷¹ The Court has acknowledged that the First Amendment's protections extend “to the communication, to its source and to its recipients both.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976). The Court also has noted that “component parts of a single speech [may be] inextricably intertwined.” *Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 796 (1988). It has not, however, entertained in depth the possibility that the same transaction or activity could implicate different categories of speech depending on who is identified as the relevant speaker.

³⁷² Indeed, assuming that it abides by corporate law duties of fidelity to shareholder welfare, the corporation arguably *must* speak only in pursuit of the commercial goal of economic profit maximization. As Daniel Greenwood has written, “[w]hile real people must balance competing values, compare their own needs and those of others important to them, and make difficult choices between various aspects of our too-finite lives, corporations (or the role-constrained managers who decide for them) just maximize shareholder value.” Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1049 (1998). In light of this qualitative difference between corporate and noncorporate speech, Greenwood argues that the distinction between commercial and noncommercial speech should give way to a distinction between deliberative, volitional speakers and those speakers whose ends are predetermined by the dictates of corporate and agency law. *See id.* at 1055–66; *see also* Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 738–39 (1995) (arguing that abstracted speech that has no speaker, including commercial speech, should be conceived of as “institutional speech” rather than speech flowing from a human agent); Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235 (1981) (exploring in depth the institutional features of corporate speakers and arguing that states should have constitutional latitude to condition certain kinds of corporate speech on shareholder consent); Carl E. Schneider, *Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti*, 59 S. CAL. L. REV. 1227, 1259–61 (1986) (noting distinctions between “corporate speech” and “human speech”).

In many respects, Greenwood's analysis follows an earlier suggestion by Steven Shiffrin that C. Edwin Baker's prominent argument against the constitutional protection of commercial speech could be improved through an emphasis on “the structure of the corporation rather than the market structure in which the corporation participates.” Shiffrin, *supra* note 233, at 1246; *see* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 219 (1989) (asserting that corporate speech cannot “be attributed to the choice of a free agent”); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) (arguing that “unlike the broad categories of protected speech, commercial speech does not represent an attempt to create or affect the world in a way which can be expected to represent anyone's private or personal wishes”); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 652 (1982) (arguing that political speech by corporations “[does] not derive from the values or political commitments of any individuals”). In contrast to Greenwood, Baker, and other commentators, Martin Redish and Howard Wasserman argue that, “[v]iewed from [a] more complete social and economic perspective, the corporate form per-

monitoring of the accuracy of process representations would impinge only on the *commercial* speech of product manufacturers, and it would do so only in order to enable and support *fundamental* First Amendment activity by consumers.³⁷³

Acknowledging this state interest complicates significantly the effort to create a process/product distinction within commercial speech doctrine. A central pillar of Nike's support for such a distinction was the claim that, in the absence of heightened constitutional protection from liability, product manufacturers would be reluctant to divulge information regarding labor conditions and other processes voluntarily.³⁷⁴ This chilling argument, however, must be weighed against the complementary chilling of consumer demand that would occur if individuals no longer could depend on the veracity of process representations in a heavily manipulated marketplace. If individuals came to regard the process representations of manufacturers with substantial cynicism and distrust, such that their willingness to pay premiums for process-labeled goods diminished, then the economic motivation for manufacturers such as Nike to disclose process information would diminish as well.³⁷⁵ In that sense, it is not merely a question whether

forms an important democratic function in facilitating the personal self-realization of the individuals who have made the voluntary choice to make use of it." Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 237 (1998); see also *The Supreme Court, 1977 Term—Leading Cases*, 92 HARV. L. REV. 57, 165 (1978) ("[C]orporate political expression should be protected as the speech and associational activity of the individual owners.").

³⁷³ From this perspective, the *International Dairy* court similarly should have respected Vermont's attempt to effectuate the expressive and associational interests that consumers hold in being able to choose among controversial dairy processes. After all, the Supreme Court has observed that "because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'" *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (alterations in original) (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982)). When such disclosure requirements are seen as being deployed in service of an affirmative speech interest on the part of consumers, the case for disclosure becomes stronger.

³⁷⁴ Indeed, in a possibly strategic illustration of this point, Nike refused to issue the company's social responsibility report during the pendency of the *Kasky* appeal, citing concerns about potential lawsuits. See Allan Jenkins, *What Would You Do? Nike v. Kasky Case Puts Public Relations Campaigns Under New Scrutiny*, 20 COMM. WORLD, Apr.–May 2003, at 14; see also Reply Brief for the Petitioners, *Kasky* (No. 02-575), available in 2003 WL 1922453, at *14 (objecting to "the profound chilling effect" of the California court's decision and noting that "consumers might 'care' about virtually every aspect of corporate operations — however divorced from the qualities of the products being sold"); Brief for the United States as Amicus Curiae Supporting Petitioners, *Kasky* (No. 02-575), available in 2003 WL 899100, at *25–26 (arguing that substantial monetary liability "may cause even a company of Nike's size to refrain from presenting its side of the story, or to do so only in vague — and far less informative — generalities").

³⁷⁵ See *infra* pp. 625–27 (describing the classic economic justification for government regulation of "lemons markets" to prevent market unraveling when consumers lack ready means to verify product claims).

the threat of deceptive advertising liability would deter manufacturer disclosure of process information, but whether the threat of liability would have a more pronounced effect than the drying-up of consumer demand that would be wrought by a marketplace rife with false and deceptive process claims.³⁷⁶

Regardless of how this question is resolved, the Court at a minimum should acknowledge the expressive and associational interests that consumers exert through the act of purchasing products based on process characteristics.³⁷⁷ To do so, the Court must modify its untenable view that, on the one hand, companies “enjoy the full panoply of First Amendment protections for their direct comments on public issues,”³⁷⁸ while, on the other hand, “advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech.”³⁷⁹ In the case of easily recognizable consumer product firms such as Nike, these simultaneous contentions cannot stand: speech by consumer product firms is qualitatively different from other speech in that it comes paired with a steady flow of retail offerings whose social meanings are inextricably bound up with the identity and communications of the firm that offers them.³⁸⁰ Thus, the most significant question raised by a case such as *Kasky* may not be whether corporate process claims concern a commercial or a noncommercial subject, but instead whether they are accompanied by a trademark, brand, or similar signifier that is indelibly linked to specific commercial products in the mind of the consumer

³⁷⁶ In this respect, it may be highly relevant that the Court in previous cases has described advertising as especially durable. See *Bates v. State Bar*, 433 U.S. 350, 381 (1977) (“Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation.”); *Virginia State Board of Pharmacy*, 425 U.S. at 772 n.24 (1976) (“[T]he greater . . . hardness of commercial speech[] may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.”).

³⁷⁷ The Court has emphasized that “[a]dvertising, though entirely commercial, may often carry information of import to significant issues of the day.” *Bates*, 433 U.S. at 364. Beyond these spare statements, however, the Court has not examined in depth the specific consumer interests served by advertising and marketing.

³⁷⁸ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 n.5 (1980) (citing *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980)).

³⁷⁹ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 n.7 (1985) (quoting *Central Hudson*, 447 U.S. at 563 n.5).

³⁸⁰ Compare the Court’s famous assertion that “[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); see also *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 193–94 (1999) (noting that “[e]ven under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment”). For an examination of how the Court’s acceptance of corporate identity as a relevant distinguishing feature in electoral speech cases might have been incorporated into an analysis of *Kasky* had the case not been dismissed, see *Developments in the Law—Corporations and Society*, 117 HARV. L. REV. 2169, 2289–90 (2004).

and that becomes a part of her effort to shape and project images, ideas, and attitudes through purposeful consumption choices.

3. *The Ethical Account.* — Just as food products made from GM ingredients have permeated the U.S. market without widespread consumer awareness, an unknown but potentially substantial percentage of chocolate purchased in the United States derives from cocoa beans harvested by enslaved children in West Africa.³⁸¹ Growing numbers of consumers and activist organizations are seeking to raise awareness of this connection between the chocolate trade and child slavery, as well as to identify alternative confectionary manufacturers that do not obtain cocoa beans from farms using exploited child labor.³⁸² Individuals who seek to avoid purchasing or consuming “slavery chocolate” in this manner (or “conflict diamonds,”³⁸³ to take another salient example)

³⁸¹ See Brian S. Woods & Kate Blewett, *Slavery: The Ivory Coast, West Africa*, 17 N.Y.L. SCH. J. HUM. RTS. 869, 872 (2001) (speculating based on interviews with West African cocoa producers that “the hands of slaves have touched almost half the world’s chocolate”). In its 2001 human rights report, the U.S. State Department cited an international agency’s estimate that some 15,000 children between the ages of nine and twelve had been sold into forced labor in the Ivory Coast. See U.S. DEP’T OF STATE, 1 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2001, at 209 (2002), available at http://www.house.gov/international_relations/107/78290b/pdf. A subsequent study by the International Institute of Tropical Agriculture found that, although the majority of children working in West African cocoa plantations were either paid by or related to farmers, up to 12,000 remaining children were at high risk of forced labor. See INT’L INST. OF TROPICAL AGRIC., CHILD LABOR IN THE COCOA SECTOR OF WEST AFRICA: A SYNTHESIS OF FINDINGS IN CAMEROON, CÔTE D’IVOIRE, GHANA, AND NIGERIA (Aug. 2002), available at <http://www.iita.org/news/cocoa.pdf>. For an analysis of the complexities posed by child labor within international trade law, including the difficulty of defining forced labor, see Federico Lenzerini, *International Trade and Child Labour Standards*, in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 301, at 287, 290–95. For a discussion of slave labor in the global economy generally, see Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973 (2002).

³⁸² See *Encouraging Sustainable, Responsible Cocoa Farming*, at <http://www.fhidc.com/cocoa/index.asp> (last modified July 9, 2003). Their efforts have resulted in media coverage and, more importantly, an industry-wide commitment to eliminate child slavery and other abuses of child laborers from the global chocolate trade by the year 2005. *Id.* In addition, the Sanders Amendment, an appropriations rider adopted in 1997, forbids border officials from allowing importation of products made by forced or indentured child labor. See Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, § 634, 111 Stat. 1272, 1316 (1997). The International Labor Rights Fund filed a petition with the U.S. Customs Service on May 30, 2002, charging that customs officials were failing to prohibit the importation of cocoa harvested by enslaved children. See Int’l Labor Rights Fund, *Child Labor in the Cocoa Industry*, at <http://www.laborrights.org/projects/childlab/cocoa.htm> (June 2003). In 2003, after officials had failed to act on the petition, the group brought suit in federal court along with two fair trade organizations as additional named plaintiffs. See First Amended Complaint, Int’l Labor Rights Fund v. Bush, Civ. No. 03-1316 (D.D.C. July 2003), available at <http://www.laborrights.org/projects/childlab/cocoa%20complaint%20amended.pdf>. The complaint was dismissed in 2004 on the ground that the Court of International Trade held exclusive jurisdiction over the controversy. See Int’l Labor Rights Fund v. Bush, Civ. No. 03-1316 (D.D.C. Aug. 18, 2004).

³⁸³ See Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOBAL TRADE 1, 1 (2003) (“At the hands of rebels, dictators, and terrorists, diamonds have crystallized into a source of financing for conflict and

may do so because they actively desire to aid child laborers or simply because they wish to project an opinion or belief through their purchasing behavior about this lamentable aspect of the global economy. On the other hand, consumers may accept that their actions — whether understood instrumentally or expressively — can exert only limited influence in a world of six billion individuals, but nevertheless seek resigned solace in the knowledge that they are not complicit with practices that they regard as immoral. As Howse and Regan observe, “[s]ome people do not want to benefit from or be associated with what they regard as wickedness even if they are unable to prevent it.”³⁸⁴

This inward orientation of process preferences is particularly well-demonstrated by consumers of kosher products, whose aim is not to avoid complicity with evil but to promote association with good. By seeking out kosher food products, observant individuals are not attempting to influence changes in the way that food is produced or even to express an attitude about kosher food as a public matter. Rather, their behavior seems directed toward *personal* moral practice: “[E]ating only kosher food is seen as a way of elevating oneself spiritually.”³⁸⁵ In a similar fashion, the coalition of litigants who challenged the FDA’s decision not to label GM food products included individuals who simply “believe that their religion forbids consumption of foods produced through rDNA technology.”³⁸⁶ Vegetarian consumers likewise have expressed concern over their inability, in the absence of mandatory labeling, to discern whether genetic material derived from animals has been inserted into GM plants.³⁸⁷ In addition, although still fairly early in its development, the process of cloning livestock for human con-

civil wars, which have caused the deaths of more than two million people.”). In May 2003, the WTO granted a waiver allowing nations that are participating in the Kimberley Certification Scheme — a multilateral attempt to eliminate the trade in conflict diamonds — to impose trade restrictions on nonparticipating nations. As Joost Pauwelyn notes, the WTO’s grant of a “waiver” carries the negative implication that other process-based trade measures, including even those adopted multilaterally, are suspect under the GATT. See Joost Pauwelyn, *WTO Compassion or Superiority Complex?: What To Make of the WTO Waiver for “Conflict Diamonds”*, 24 MICH. J. INT’L L. 1177, 1198–99 (2003).

³⁸⁴ Howse & Regan, *supra* note 58, at 275; see also Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 709 (2003) (“People suffering from moral taint are not blamed for the conduct that produced it . . . because they had no control over the conduct But people often feel shame, and are stigmatized by others, as a result of their association with the wrongful conduct.”).

³⁸⁵ Benjamin N. Gutman, *Ethical Eating: Applying the Kosher Food Regulatory Regime to Organic Food*, 108 YALE L.J. 2351, 2363 (1999).

³⁸⁶ Alliance for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 170 (D.D.C. 2000).

³⁸⁷ See Kim JoDene Donat, Note, *Engineering Akerlof Lemons: Information Asymmetry, Externalities, and Market Intervention in the Genetically Modified Food Market*, 12 MINN. J. GLOBAL TRADE 417, 427 (2003).

sumption is likely to attract a considerable degree of religious and ethical objection if it becomes significantly commercialized.³⁸⁸

As these examples demonstrate, consumer process preferences can be understood not from the standpoint of their effect on the external world or their utility as mechanisms for public expression, but rather simply from the premise that consumption often is an intensely personal activity with significant moral consequences. As Eric Freyfogle notes: “To buy a product is inevitably to become tied to its history and to accept a level of responsibility for its future.”³⁸⁹ Many consumers seem to share this view, such that their own sense of moral well-being is affected by the nature and degree of knowledge that they hold regarding product processes, irrespective of the impact that such processes, or indeed their own behavior, may have. Like the expressive account of consumer process preferences, this ethical account provides an independent basis for regarding such preferences as worthy of respect by policymakers. That is, even if instrumental concerns do not justify support of process preferences according to a regulator’s technical or scientific assessment, one still must acknowledge the intrinsically personal nature of the act of purchasing and the conventional liberal refusal to scrutinize or judge such inwardly directed behaviors.³⁹⁰

Some forms of liberalism, however, deny the legitimacy of process preferences on the basis that they are not purely internal, but rather

³⁸⁸ See Alexandra Hawkins, *Protecting Human Dignity and Individuality: The Need for Uniformity in International Cloning Legislation*, 14 *TRANSNAT’L LAW.* 243, 255–56, 268–80 (2001) (describing the process of livestock cloning and providing an overview of legal and political responses to the controversy provoked by cloning technologies).

³⁸⁹ ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 194 (2003).

³⁹⁰ See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 55 (1980) (noting that the liberal principle of neutrality “does not distinguish the merits of competing conceptions of the good”); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 191 (1985) (“[Liberalism] supposes that political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life.”); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272–73 (1977) (observing that the liberal conception of equality mandates that government “must not constrain liberty on the ground that one citizen’s conception of the good life of one group is nobler or superior to another’s”); JOHN RAWLS, *POLITICAL LIBERALISM* 303–04 (1993) (“A crucial assumption of liberalism is that equal citizens have different and indeed incommensurable and irreconcilable conceptions of the good. . . . [L]iberalism . . . tries to show both that a plurality of conceptions of the good is desirable and how a regime of liberty can accommodate this plurality so as to achieve the many benefits of human diversity.”). Of course, the coherence and desirability of this traditional liberal view has been the subject of much debate. See, e.g., Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 *SAN DIEGO L. REV.* 763, 793 (1993) (arguing that liberals who endorse neutrality overlook the fact that “no neutral principle for selecting the baseline that defines neutrality has been established”); Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 *U. PA. L. REV.* 549, 550 (1993) (noting that “[a]lthough liberalism is sometimes associated with neutrality regarding alternative conceptions of the good . . . the status of neutrality as a defining characteristic of liberalism is quite contestable — even among liberals”).

frequently hinge on the characteristics or conditions of other individuals.³⁹¹ Of particular concern is the possibility that individuals will act on process information in ways that serve discriminatory purposes, such as avoiding goods because of a producer's support for civil rights³⁹² or even using nominally neutral process-based distinctions to further racially prejudicial aims.³⁹³ In part for this reason, some view the process/product distinction itself as an important component of the liberal market's approach to combating prejudice. As Gail Heriot writes, "liberalism postulates a preference structure in its citizens that may or may not exist: that citizens generally derive utility from the physical properties of the goods they purchase, not from the religious preference or any other private data about the producer or vendor."³⁹⁴ Even the economist William Hutt, whose expansive view of consumer sovereignty provides an important element of the normative case in favor of market liberalism,³⁹⁵ nevertheless believed that the impersonality of market relations was essential to the attainment of liberty and tolerance.³⁹⁶

The danger that process information may serve discriminatory or otherwise illicit purposes is, of course, real. Thus, like the various GATT/WTO tools that attempt to ferret out disguised discrimination against nations, legal controls still must ensure that process preferences do not discriminate against producers based on a protected status, as opposed to a social or environmental production decision that the

³⁹¹ Many scholars, for instance, have argued that it is difficult to exclude sadistic or otherwise antisocial preferences once one admits any form of other-regarding preference. Cf. Hausman & McPherson, *supra* note 22, at 690 n.31 (noting that "[t]he satisfaction of some preferences . . . seem[s] to have nothing to do with an individual's own well-being" and that many have argued that these preferences should be excluded from one's understanding of individual well-being). *But see* Kaplow & Shavell, *supra* note 344, at 1339–50 (arguing in principle against the notion of excluding other-regarding preferences from welfare analysis, but concluding that many objectionable other-regarding preferences will in practice be denied satisfaction under such an analysis); Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1681–83 (2003) (describing the attempt to exclude objectionable preferences in this manner and concluding that "[i]t seems both impossible and undesirable to separate between self-regarding and other-regarding preferences").

³⁹² For instance, during the civil rights struggle, white supremacists greeted black consumer campaigns with commercial activism of their own: "By the mid-1960s white supremacists were countering black consumer boycotts with 'buy-ins' designed to support spurned merchants and their own boycotts of white retail businesses owned by those considered race traitors." COHEN, *supra* note 2, at 187–88.

³⁹³ See Marion Crain, *Colorblind Unionism*, 49 UCLA L. REV. 1313, 1322 (2002) (describing use of union-made labeling campaigns to exclude and harm nonwhite workers).

³⁹⁴ Gail L. Heriot, *The New Feudalism: The Unintended Destination of Contemporary Trends in Employment Law*, 28 GA. L. REV. 167, 181–82 (1993).

³⁹⁵ See *supra* p. 584.

³⁹⁶ See Joseph Persky, *Retrospectives: Consumer Sovereignty*, 7 J. ECON. PERSP. 183, 187–88 (1993).

manufacturer has made and — significantly — can unmake.³⁹⁷ However, it bears stating the obvious point that racially discriminatory preferences are objectionable *not* because they concern processes, but because they concern race. In that sense, the process/product distinction sweeps too broadly as a tool for tolerance, threatening to undermine not only discriminatory behavior, but also longstanding and firmly held practices of ethical consumption. For instance, kosher food standards include process-based rules concerning acceptable handlers, methods of preparation, and other practices that do not affect the nutrition, taste, or other tangible aspects of the food products themselves.³⁹⁸ Thus, in a legal environment that fully embraced the process/product distinction, government efforts to support kosher certification programs³⁹⁹ would become vulnerable to challenge on grounds in addition to the Establishment Clause complaints that have proven formidable thus far.⁴⁰⁰

Moreover, many observers believe that the liberating anonymity of product markets has become *too* liberating in the present global era. Transnational production chains shield individuals from far more than merely the demographic identity of producers. They also shield individuals from much of the social and environmental impact of private consumer decisionmaking, fostering an “institutionalized ignorance”⁴⁰¹ within the product marketplace at the very moment that government officials are urging individuals to regard consumer expenditure as their central function as citizens and, moreover, that proponents of cost-benefit analysis are urging regulators to rely on individual market behavior in order to infer the determinants of public policy. Proponents of labeling and other efforts to ensure consumer access to process information seek to counterbalance this constitutive anonymity of markets by making transparent to consumers the relationships that their decisions have with distant actors and distant places. These proponents seek to recontextualize consumption within specific communities and ecologies, hoping ultimately that individual purchasing decisions will begin to approximate the conceptual and rhetorical significance that “voting with one’s dollars” has been given within the framework of market liberalism.⁴⁰²

³⁹⁷ See Harper, *supra* note 261, at 426–34 (providing a detailed analysis of the appropriate limits of a consumer’s right to boycott).

³⁹⁸ See Gutman, *supra* note 385, at 2363–65.

³⁹⁹ See *id.* at 2369 (“At least twenty-two states have statutes prohibiting the fraudulent representation of non-kosher food as kosher.”).

⁴⁰⁰ See *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 416 (2d Cir. 2002); *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1337 (4th Cir. 1995); *Randav’s County Kosher, Inc. v. State*, 608 A.2d 1353, 1353 (N.J. 1992).

⁴⁰¹ See *supra* p. 536.

⁴⁰² See *supra* p. 527.

In addition to associating process preferences with class- or status-based distinctions, proponents of the process/product distinction also more directly attack contemporary process preferences by attempting to discredit or trivialize their basis as ethically coherent and significant actions. For instance, a federal district court described the FDA's failure to require GM food labeling as merely a "potential inconvenience"⁴⁰³ to "religious leaders" who feared that their anti-GM convictions would become impossible to maintain in a marketplace saturated with unlabeled GM ingredients.⁴⁰⁴ More subtly, prominent consumer law commentator Howard Beales discounts the interest of vegetarians in GM labeling by arguing that a plant modified to include genetic material from animals "does not acquire 'animal-like' characteristics any more than a plant fertilized with manure does."⁴⁰⁵ He neglects to consider, however, the fact that animals undoubtedly were bred, caged, and handled during development of the genetically altered product — a fact that may matter significantly to vegetarians who are motivated by animal welfare concerns. More fundamentally, by resting the definition of "animal" purely on functional characteristics of the modified organism, Beales usurps the authority of individuals to determine for themselves how newly extant life forms should be treated for religious and moral purposes.

Other critics charge that process preferences do not reflect an ethically defensible vision of consumer behavior when viewed in light of the diversity of values and conditions that prevail among foreign nations. Robert Hudec, for instance, notes that accepting the legitimacy of process preferences within international trade law might allow product regulation to be overcome by "an excess of zeal" from the "essentially moral claims" of consumers.⁴⁰⁶ Other scholars more strongly regard advocates of linking consumption to process characteristics as "irrational moral fanatics, prepared to sacrifice global economic wel-

⁴⁰³ Alliance for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 181 (D.D.C. 2000) ("While the Court recognizes the potential inconvenience the lack of labeling presents for Plaintiffs, Defendant's decision [not] to mandate labeling of genetically modified foods does not 'substantially' burden Plaintiffs' religious beliefs.").

⁴⁰⁴ *Id.* at 170.

⁴⁰⁵ Beales, *supra* note 36, at 110. Less credible individuals also have attempted to discredit the ethical basis of process preferences. A spokesperson for the American Forest and Paper Association, for instance, described consumer demand for sustainably harvested timber products as "blackmail" and an "extortion campaign." Greg Winter, *Timber Company Reduces Cutting of Old-Growth Trees*, N.Y. TIMES, Mar. 27, 2002, at A14.

⁴⁰⁶ Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 95, 149 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

fare and the pressing needs of the developing countries for trivial, elusive, or purely sentimental goals.⁴⁰⁷

One frequent version of this concern holds that, by seeking to avoid the fruits of exploited labor, consumers may contribute to market dynamics that ultimately leave developing world workers with an even worse fate than they currently endure.⁴⁰⁸ In part for this reason, Lawrence Summers questions the desire of consumers to avoid purchasing sweatshop goods:

[M]any believe that it is wrong to buy imported products produced by workers who are paid less than a specified minimum wage of some sort. We all deplore the conditions in which so many on this planet work and the paltry compensation they receive. And yet there is surely some moral force to the concern that as long as the workers are voluntarily employed, they have chosen to work because they are working to their best alternative. Is narrowing an individual's set of choices an act of respect, of charity, even of concern?⁴⁰⁹

Summers strikes upon an insightful way of posing the ethical dilemmas created by a world of great economic integration and inequity. The difficulty, however, is that by eliminating a consumer's informational basis for evaluating these complex dynamics and deciding for herself, the process/product distinction *also* narrows an individual's set of choices. By itself, the aim of maximizing individual choice simply will not resolve these dilemmas.⁴¹⁰

Moreover, despite the potential unintended consequences of process-based purchasing decisions, individual consumers can maintain consistency in their moral selfhood by simultaneously supporting foreign aid, human rights treaties, international labor agreements, and other mechanisms whereby the lives of workers in the developing world are improved. Critics of process preferences instead try to force on consumers an unwarranted catch-22: either purchase a product whose production processes consumers oppose, or implicitly adopt a position that they equally abhor. The dichotomy is misleading because it conflates the individual consumer's ethical responsibility with the variety of historical, political, and economic circumstances that have combined to place developing world laborers in a position of great

⁴⁰⁷ Howse & Trebilcock, *supra* note 330, at 61 (characterizing critiques of the connection between free trade and environmental and labor interests).

⁴⁰⁸ See sources cited *supra* note 41; see also BROWN ET AL., *supra* note 41, at 41–51 (observing that multinational firms tend to provide higher wages and better working conditions in developing nations than local counterpart firms).

⁴⁰⁹ *Economics and Moral Questions*, HARV. MAG., Nov.–Dec. 2003, at 63, 64.

⁴¹⁰ Cf. Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152, 157 (1970) (using other-regarding preferences to demonstrate a fundamental inconsistency between certain notions of individual freedom of choice and the welfare-maximizing paradigm of Pareto optimality).

need and vulnerability. Yet consumers do not adopt anemic foreign assistance programs; nations do. Thus, individual consumers may seek to avoid slavery-tainted chocolate even as they support multilateral action to stop the trade in children and the conditions of abject poverty that give rise to it. Compelling consumers instead to purchase slavery chocolate on pain of abandoning children to starvation charges consumers with consequences that they neither condone nor support. It stretches the bounds of complicity beyond fact or reason.⁴¹¹

When, on the other hand, individual consumers' ethical preferences *are* reflected in national policies, such as through unilateral trade measures, a further moral objection must be addressed. Specifically, noted trade scholar Jagdish Bhagwati argues that if developed nations and their consumers insist on "impos[ing] [their] ethical preferences on other communities and nations"⁴¹² through mandatory process-based trade measures, then they generally should pay compensation to the affected producers: "[i]f it is right in the Christian tradition to buy indulgences to pay for one's vice, perhaps one should not object to a proposal to pay for one's virtue."⁴¹³ Despite its appeal, Bhagwati's argument confuses the obligation to aid poor nations with an obligation to do so specifically by importing goods from poor nations. If there were an independent duty to purchase cocoa from West Africa, then consumers might be under an obligation to pay producers for the right to avoid eating slavery chocolate, as Bhagwati suggests.⁴¹⁴ Such a

⁴¹¹ Similarly misleading is the United States's attempt to convert the GM food dispute into a binary choice between accepting GM products and relegating billions to poverty and starvation. See *supra* p. 564. Currently, experts generally agree that there is enough agricultural capacity to feed the world without GM food technologies, and that hunger and malnourishment are instead primarily attributable to poverty, dislocation, corruption, and other political and economic causes. See, e.g., Ellen Messer, *Food Systems and Dietary Perspective: Are Genetically Modified Organisms the Best Way To Ensure Nutritionally Adequate Food?*, 9 *IND. J. GLOBAL LEGAL STUD.* 65, 68 (2001). Thus, a decision to avoid supporting GM foods is not necessarily tantamount to a decision to prolong starvation, particularly if the consumer seeks to support the elimination of world hunger through other means.

⁴¹² Bhagwati, *Trade and the Environment: The False Conflict?*, *supra* note 311, at 170, 174–75; see also JAGDISH BHAGWATI, *IN DEFENSE OF GLOBALIZATION* 157–58 (2004) (arguing that "the rich and powerful countries that wish to propagate their moral preferences, whether widely held or idiosyncratic, should proceed to subsidize the PPMs that they advocate . . . , putting their own resources where they claim their moral preferences are").

⁴¹³ Bhagwati, *Trade and the Environment: The False Conflict?*, *supra* note 311, at 175.

⁴¹⁴ Bhagwati's argument parallels the view of trade scholars who regard the GATT as creating a general right of market access, as opposed to a negative right to be free from discriminatory treatment. Compare Bartels, *supra* note 324, at 383 (positing that "under the law of the WTO there *is* a right to trade") with Howse & Regan, *supra* note 58, at 276 (defending the view that "[s]o far as its general purpose and structure are concerned, GATT creates only a negative right of non-discrimination"). Reflecting the former conception, Michael Strauss argues in an unpublished paper that process-based trade measures may constitute "efficient breaches," whereby nations intentionally violate their contractual commitments under GATT in order to promote welfare-maximizing internalization of the social and environmental externalities of production. Strauss

conception, however, upsets the normative argument in favor of free trade, which, after all, presumes that consumers make purchases in order to improve their welfare and that expanding opportunities for such trading in turn will increase overall welfare. Bhagwati's argument instead turns the trading system into a wealth transfer device in which consumers must make resource contributions to developing nations in order to avoid purchasing products that they regard as objectionable.⁴¹⁵

As this section has attempted to demonstrate, often lurking within process-related disputes are personal convictions of a nature and magnitude that liberal societies traditionally have regarded as sacrosanct. Moreover, notwithstanding the occasional critiques advanced by proponents of the process/product distinction, the ethical coherence and legitimacy of these grounds for process preferences are not easily discredited. Therefore, particularly at a time when consumption occupies such a strong position of influence over culture and identity,⁴¹⁶ analysts should be hesitant to discount the importance of religious or ethical grounds for consumer decisionmaking. To be sure, as proponents of the process/product distinction sometimes press, the historical progression from *Gemeinschaft* to *Gesellschaft*⁴¹⁷ did help to obscure a variety of racial, ethnic, and religious characteristics of producers that now are recognized as inappropriate bases for consumer distinction.⁴¹⁸ Nevertheless, the anonymity of today's global product markets also

argues that such breaches should be accompanied by compensation to the developing nation, at least until multilateral consensus is achieved that the externality is indeed a cost or a market failure that should be redressed through regulation rather than regarded as a legitimate aspect of comparative advantage. See Strauss, *supra* note 63 (manuscript at 35–37); see also Candice Stevens, *Trade and the Environment: The PPMs Debate*, in *SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW* 239, 246–47 (Winfried Lang ed., 1995) (proposing a compensation principle by which regulating nations must pair unilateral process-based trade measures with technical and financial assistance to help ensure compliance by developing nations).

⁴¹⁵ Moreover, as Howard Chang notes, such an approach might create perverse incentives for nations to increase their level of an offensive activity in order to maximize the payments that they receive. See Howard F. Chang, *An Economic Analysis of Trade Measures To Protect the Global Environment*, 83 *GEO. L.J.* 2131, 2154–56 (1995); Howard F. Chang, *Carrots, Sticks, and International Externalities*, 17 *INT'L REV. L. & ECON.* 309, 314 (1997) (noting that states may adopt bad policies to extract concessions).

⁴¹⁶ Cf. Bruce Ledewitz, *Corporate Advertising's Democracy*, 12 *B.U. PUB. INT. L.J.* 389, 460 (2003) (“The great American debate of the twenty-first century . . . is going to be about the relationship of our consumption lifestyle to everything else — nature, population, wealth, our own happiness, and the divine.”).

⁴¹⁷ See FERDINAND TÖNNIES, *COMMUNITY & SOCIETY* 33–35 (Charles P. Loomis ed. & trans., Mich. State Univ. Press 1957) (1887) (describing the transition from traditional agrarian “*Gemeinschaft*” to modern industrialized “*Gesellschaft*”).

⁴¹⁸ See Heriot, *supra* note 394, at 182 (noting that the “multiplicity of relationships [in modern market societies] makes it a bit easier to buy into the liberal notion that one should be indifferent to the religious or other private preferences of the persons from whom one purchases otherwise identical goods”).

threatens to exclude any basis for expressing communal awareness or concern through consumer action, an exclusion that will become ever more glaring as individuals are urged to define and assert themselves nearly exclusively through the market.

B. Process Preferences in Global Civil Society

Rather than being scientifically unfounded, nakedly protectionist, or ethically inconsistent, consumer process preferences instead offer an important vehicle through which individuals influence the world, express their views on public issues, and fashion their moral identity in an era of extraordinary interconnectedness, complexity, and dynamism in the market. Although consumers undoubtedly suffer from some informational deficiencies with regard to the meaning and significance of various manufacturing practices, the case for wholesale irrationality or unreliability of process preferences is unpersuasive. Policymakers therefore should grapple with purportedly unreliable preferences by seeking to inform and educate consumers openly, rather than by categorically eliminating processes as a basis for consumer distinction or regulatory decisionmaking. Similarly, although the reality of building political constituencies frequently means that process-based trade restrictions are fashioned or implemented in discriminatory ways, international trade law should combat such efforts by examining trade restrictions for discriminatory aims and effects directly, not by using a restriction's focus on manufacturing processes as a rudimentary proxy for protectionism. The process/product distinction, in short, should be discarded as a conceptual device within law and policy.

Jettisoning the process/product distinction, however, does not resolve underlying questions regarding the proper role of process preferences within policymaking, particularly at the international level. As a theoretical matter, such preferences do not fit comfortably within the framework of market liberalism, which tends to assume that consumer desires are private and self-interested. In contrast, process preferences often appear both public and other-regarding. Nor do process preferences enter smoothly into the project of regulatory cost-benefit analysis, which seeks to replace valuations that occur through collective processes with information gleaned from the privately undertaken tradeoffs of market actors. Unlike the traditional view, which holds that “[m]arket processes evoke self-interested choices whereas political processes encourage other-regarding ones,”⁴¹⁹ process preferences instead implicate all four categories: the market, politics, consumerism,

⁴¹⁹ Lewinsohn-Zamir, *supra* note 4, at 382.

and citizenship all are present when athletic shoe purchases raise salient issues of economic justice and human rights.⁴²⁰

Instead of denying this convergence through an artificial distinction between processes and products, policymakers should grapple directly with the interests at stake in process-related disputes. Toward that end, this section begins by describing the standard framework for justifying and evaluating government intervention in the market for consumer information. Through an analogy to an ingenious recent study of altruistic preferences, it then argues that consumer process preferences are highly context-dependent. Regulation of process information therefore cannot be a straightforward effort to maximize existing preferences, but rather must reflect a choice between competing preference orderings that exist within many individuals and that, at least in part, can be enabled or disabled by alteration of the relevant decisionmaking context. This section concludes by arguing in favor of respecting, rather than suppressing, preferences that evince concern for other populations, other generations, and other life forms.⁴²¹ The case for such process preferences is based not on their simplistic veneer of virtue,⁴²² but rather on the belief that process preferences capture the displaced moral and political sentiments of individuals acting in a world fixated on consumption.

1. *The Inevitability of Regulation.* — In its rejection of Vermont's effort to ensure consumer access to information regarding the use of rbST by dairy producers, the *International Dairy* court argued that "those consumers interested in such information should exercise the power of their purses by buying products from manufacturers who voluntarily reveal it."⁴²³ Although rhetorically powerful, the court's viewpoint overlooks the conventional economic explanation for product labeling regulation, which emphasizes the fact that manufacturers

⁴²⁰ Cf. Carol M. Rose, *Environmental Faust Succumbs to Temptations of Economic Mephistopheles, or, Value by Any Other Name Is Preference*, 87 MICH. L. REV. 1631, 1635–39 (1989) (noting the theoretical limitations of a citizen/consumer dichotomy that rigidly associates public-regarding and private-regarding preferences, respectively, with the two categories).

⁴²¹ In a context analogous to the regulator's choice of whether to encourage process preferences, Richard Thaler and Cass Sunstein argue in favor of "libertarian benevolence" by regulators in the construction of choice settings that impact the welfare of third parties. Specifically, Thaler and Sunstein detail wide differences in organ donation rates depending on whether nations adopt "opt-in" or "opt-out" donation schemes, and argue that policymakers "can often deliver significant benefits to third parties simply by switching the default rule." Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1192–93 (2003).

⁴²² See *supra* pp. 617–18 (describing moral arguments against recognition of other-regarding preferences).

⁴²³ *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996). Similarly, by endorsing the United States's labeling guidelines while simultaneously rejecting the MMPA import ban, the *Tuna/Dolphin* panel seemed to endorse the view that the market activity of consumers provides a more legitimate source of influence over foreign production practices than the political activity of citizens and their representatives. See *supra* pp. 540–47.

often lack strong incentives to make such voluntary product-related disclosures⁴²⁴ and that consumers often do not have sufficient means to verify manufacturer claims that are made.⁴²⁵ As George Akerlof famously demonstrated, under such conditions a market unraveling may occur in which consumer doubt over manufacturer claims leads to suboptimal product standards.⁴²⁶ Government regulation can effectively respond to such situations by mandating minimum product quality levels or policing the veracity of manufacturer disclosures.⁴²⁷

When demand is sufficiently high, voluntary third-party certification schemes may develop to guarantee the accuracy of manufacturer processing claims, as was the case with organic labeling prior to the promulgation of federal standards.⁴²⁸ Economic modeling suggests, however, that voluntary disclosure schemes along these lines will not be forthcoming when an insufficient proportion of consumers comprehend the significance of the disclosed information,⁴²⁹ a market structure that may be likely to accompany the early reception by consumers of goods with technologically complex characteristics. On the other hand, where consumer interest is sufficiently widespread to spur the development of voluntary certification schemes, the very proliferation of such schemes may give rise to conflicting standards and consumer

⁴²⁴ See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: A Response to Market Manipulation*, 6 ROGER WILLIAMS U. L. REV. 259, 325 (2000) (describing market conditions under which manufacturers might not disclose product information that consumers would desire to know).

⁴²⁵ See W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTITRUST* 781–85 (2d ed. 1995) (noting that “[o]ne of the rationales for market failure is that consumers do not have perfect information regarding the safety of the products they purchase,” and that product labeling regulations can play a constructive role in remedying information deficits). For this reason, economists refer to products that express nonverifiable attributes as “credence goods.” See Russell Korobkin, *The Efficiency of Managed Care “Patient Protection” Laws: Incomplete Contracts, Bounded Rationality, and Market Failure*, 85 CORNELL L. REV. 1, 27–28 (1999).

⁴²⁶ See George A. Akerlof, *The Market for “Lemons”: Qualitative Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 488–90 (1970).

⁴²⁷ VISCUSI ET AL., *supra* note 425, at 781–83. For instance, environmental marketing guidelines issued by the Federal Trade Commission were designed to respond to consumer complaints that product manufacturers were making dubious environmental claims. In essence, the market for environmentally benign production processes had become one of Akerlof’s “lemons markets,” characterized not by legitimate, accurate process information, but rather by rampant environmental “greenwash.” See David Hoch & Robert Franz, *Eco-Porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 ALB. L. REV. 441, 441–44 (1994).

⁴²⁸ See Elise Golan et al., *Economics of Food Labeling*, 24 J. CONSUMER POL’Y 117, 161–62 (2001).

⁴²⁹ See Michael J. Fishman & Kathleen M. Hagerty, *Mandatory Versus Voluntary Disclosure in Markets with Informed and Uninformed Customers*, 19 J.L. ECON. & ORG. 45, 45 (2003).

confusion, ultimately raising a new ground for government intervention, as was the case, again, with respect to organic agriculture.⁴³⁰

Even in a situation where these types of market failures justify government regulation as a theoretical matter, one still may ask whether the benefits of labeling outweigh its administrative and other costs. Consumer advocates tend to think of labeling as an essentially costless alternative to more elaborate means of product regulation. In actuality, however, labeling entails significant costs, both direct⁴³¹ and indirect.⁴³² Indeed, in light of the magnitude of such costs and the purported absence of health or safety dangers from processes such as genetic engineering, some commentators have described process labeling as simply a matter of wealth distribution between concerned and nonconcerned consumers. On this account, mandatory labeling schemes provide an implicit subsidy to concerned consumers because all market participants share labeling costs, rather than only consumers who express a preference for labeling. “With voluntary labeling,” in contrast, “consumers who value the information are the ones who must pay the costs associated with it.”⁴³³

⁴³⁰ See Golan et al., *supra* note 428, at 162 (describing support for federal organic standards among organic food producers and processors in light of potentially conflicting third-party standards).

⁴³¹ For instance, according to a meta-analysis of cost studies conducted by the European Commission, mandatory segregation and labeling of GM food products might increase the cost of grain by 6–17%. See EUROPEAN COMM’N, DIRECTORATE-GENERAL FOR AGRICULTURE, ECONOMIC IMPACTS OF GENETICALLY MODIFIED CROPS ON THE AGRI-FOOD SECTOR: A FIRST REVIEW 82 (2000). For that reason, a major plank of the United States’s argument against Europe’s GM regulations has been that the labeling requirement would cost U.S. companies an estimated four billion dollars per year. See Michelle K. McDonald, Note, *International Trade Law and the U.S.-EU GMO Debate: Can Africa Weather This Storm?*, 32 GA. J. INT’L & COMP. L. 501, 508 (2004).

⁴³² A principal indirect cost of labeling is the risk that additional labeling requirements will undermine the effectiveness of existing product warnings and instructions. See Noah, *supra* note 35, at 314 (suggesting that “[p]erhaps public education campaigns should be used in instances where consumers need to understand the environmental consequences of their choices,” rather than mandatory imposition of product labels that might interfere with more traditional types of product warnings); W. Kip Viscusi, *Individual Rationality, Hazard Warnings, and the Foundations of Tort Law*, 48 RUTGERS L. REV. 625, 661–66 (1996) (classifying such problems under the headings of “label clutter,” in which a single product bears an excessive amount of warnings and information, and “label proliferation,” in which labels of varying severity and importance appear on numerous products). The risk of such problems in the context of process preferences may be especially strong given that, as the court in *International Dairy* emphasized, “there is no end to the information that states could require manufacturers to disclose about their production methods.” *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996). It seems more likely, however, that states would require disclosure only of information in which consumers had expressed sufficient interest to galvanize public support for mandatory labeling legislation. The view that such laws would differ significantly in scope from the class of disclosure requirements that could be defended by states on traditional police power grounds presumes that consumer concerns are especially likely to be scientifically unfounded or to be manipulated by interest groups for socially harmful purposes. As section II.A argued, however, the case for the categorical unreliability of process preferences is unpersuasive.

⁴³³ Beales, *supra* note 36, at 112–13.

The problem with this analysis is that it treats concerned and non-concerned citizens as ossified categories, rather than as categories that are partially constituted by the very governmental decision whether to require labeling. If consumers do not have stable preferences for processes — if, for instance, consumer choices are partially contingent on prior labeling decisions by regulators — then costs and benefits alone will not determine whether to mandate labeling. Recent experimental work in psychology suggests that this may well be the case. As noted above, consumer willingness to differentiate among products based solely on processes seems consistent both with the view that consumers are attempting to shift resources to an “other” that is affected by the relevant process,⁴³⁴ and with the view that consumers are attempting to express the strength of their viewpoint or attitude regarding the process-related issue through the medium of consumption.⁴³⁵ In a parallel fashion, researchers have disagreed whether observed altruistic behavior in psychological experiments truly stems from a regard for others or whether individuals obtain a psychological benefit from giving that is of sufficient magnitude to render their behavior consistent with the predictions of self-interested utility maximization.⁴³⁶ To theorists of the latter viewpoint, altruism is best understood as simply another consumption good from which individuals derive utility, rather than as a violation of the premise that individuals seek to maximize their personal welfare by satisfying well-behaved, self-interested preferences.⁴³⁷

A fascinating recent study, however, seriously challenges the notion that individuals have stable preferences for either fairness or “warm glow” sentimentality.⁴³⁸ The study used new variations of the Dictator Game⁴³⁹ to demonstrate that individuals’ propensity to engage in altruistic behavior is context-dependent and, critically, seems to be a function of how directly and unambiguously their actions are related to the welfare of others.⁴⁴⁰ In classic Dictator Game experiments, in-

⁴³⁴ See *supra* section II.A.1, pp. 582–601.

⁴³⁵ See *supra* section II.A.2, pp. 601–14.

⁴³⁶ See James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 *ECON. J.* 464, 464–65 (1990) (contrasting “pure altruism” that is motivated only by a desire to alter another’s outcomes with “warm glow” altruism that is motivated in part by psychological effects from giving); Robyn M. Dawes & Richard H. Thaler, *Anomalies: Cooperation*, 2 *J. ECON. PERSP.* 187, 192 (1988) (describing “impure altruism” as a “satisfaction of conscience, or of noninstrumental ethical mandates”).

⁴³⁷ See James Andreoni & John Miller, *Giving According to GARP: An Experimental Test of the Consistency of Preferences for Altruism*, 70 *ECONOMETRICA* 737, 737 (2002).

⁴³⁸ See Jason Dana et al., *Exploiting Moral Wriggle Room: Behavior Inconsistent with a Preference for Fair Outcomes* (June 24, 2003) (unpublished manuscript, on file with the Harvard Law School Library), available at http://emlab.berkeley.edu/users/webfac/dellavigna/e218_f03/Fair.pdf.

⁴³⁹ See *supra* pp. 603–04.

⁴⁴⁰ See Dana et al., *supra* note 438, at 5.

dividuals in the role of proposer know that the split chosen will affect the outcome experienced by the receiver because the payments are known and immediate. In the new experiments, however, researchers introduced uncertainty regarding outcomes in order to demonstrate that people's willingness to engage in altruistic behavior is related to their ability to avoid apparent responsibility for the well-being of others, a cognitive outlet that the researchers aptly term "moral wriggle room."⁴⁴¹

In one experimental variation, for instance, subjects faced with a binary choice between equitable and inequitable divisions behaved consistently with previous results (almost three-quarters selected the equitable division).⁴⁴² Additional subjects, however, were presented with a choice setting in which only their own payoffs and not those of the receiver were revealed.⁴⁴³ Experimenters told subjects that the payoff choice they faced would either match the classic condition (a choice between \$6 for themselves and \$1 for the receiver, or \$5 for both the proposer and the receiver), or would be a reversal of the standard receiver payoffs such that the \$6 proposer payoff became strictly dominant ((\$6, \$5) or (\$5, \$1)).⁴⁴⁴ Given this uncertainty about the receiver's payoff, subjects in the partially blind condition did not know whether selecting \$5 for themselves would lead to an equitable result. The catch, however, was that subjects could reveal the receiver's payoffs simply by pressing a computer button.⁴⁴⁵ In other words, subjects could — without cost — place themselves in the position of knowing whether their choice would lead to equity or inequity.

Consistent with the researchers' hypothesis that significant numbers of individuals would take advantage of this "moral wriggle room" to behave self-interestedly, nearly half of the subjects chose to remain ignorant of the payoffs they faced.⁴⁴⁶ Of those subjects who chose to reveal the payoffs, behavior was consistent with the levels of altruism demonstrated in classic Dictator Games (seventy-five percent chose the equitable payoff as between (\$6, \$1) and (\$5, \$5)).⁴⁴⁷ Of those who chose to remain ignorant, however, subjects overwhelmingly selected the self-interested allocation.⁴⁴⁸ Even when viewed together, the revealing and nonrevealing subjects demonstrated a significantly lower

⁴⁴¹ *Id.* at 5–6.

⁴⁴² *Id.* at 12.

⁴⁴³ *Id.* at 8.

⁴⁴⁴ *Id.* at 8–9.

⁴⁴⁵ *Id.* at 9.

⁴⁴⁶ *Id.* at 12.

⁴⁴⁷ *See id.* at 12, 13 tbl.2.

⁴⁴⁸ *See id.* at 13 tbl.2.

willingness to engage in altruistic behavior than subjects in the classic choice setting.⁴⁴⁹

This study has important implications for the process/product discussion. First, it helps to explain why the delivery and control of process information has become such a contested issue in domestic and international product regulation. Absent some bridging device such as labeling, the degree of attenuation between acts and consequences in modern consumer product settings is typically severe. For the ordinary consumer, “[a]s commodity chains grow longer and more complex, and production systems more dynamic, it becomes harder to contextualize production in terms of its social and ecological ramifications.”⁴⁵⁰ Therefore, even if consumers know on some level that their purchases might contribute to a social or environmental outcome that they do not desire, the consumer marketplace generously offers them a cognitive alibi by obscuring such information from immediate view.⁴⁵¹ Vermont’s blue dot labeling scheme sought to eliminate precisely this kind of “moral wriggle room” by making salient — at the point of purchase — the connection between consumer choice and the welfare of animals and small dairy producers.⁴⁵²

The second, and related, lesson of the recent Dictator Game study is that policymakers cannot choose the degree of process information to make available to consumer decisionmakers by examining existing preferences, for such preferences cannot be evaluated without reference to some prior specification of consumers’ informational context. Importantly, without adopting normative criteria beyond the maxim of

⁴⁴⁹ See *id.* at 14.

⁴⁵⁰ Ken Conca, *Consumption and Environment in a Global Economy*, in CONFRONTING CONSUMPTION 133, 145 (Thomas Princen et al. eds., 2002).

⁴⁵¹ See MATTHEW RABIN, MORAL PREFERENCES, MORAL CONSTRAINTS, AND SELF-SERVING BIASES 3 (Berkeley Dep’t of Econ., Working Paper No. 95-241, Aug. 16, 1995) (noting that consumers may avoid even costless knowledge acquisition regarding worker conditions to avoid being put in a position of moral constraint: “[w]hen her beliefs tell her it is morally okay to engage in an enjoyable activity, an agent will avoid gathering further information that might jeopardize [sic] her moral green light”), available at <http://emlab.berkeley.edu/users/rabin/Moral.Preferences.pdf>.

⁴⁵² Conversely, the biotech industry may correctly fear that mandatory labeling would spell the end of GM food products. See Elizabeth Becker, *U.S. Delays Swing Europe over Ban on Modified Food*, N.Y. TIMES, Feb. 5, 2003, at A6 (quoting the U.S. Agriculture Department undersecretary for food safety as stating that labeling “implies that there is something wrong with genetically modified food”); Elizabeth Becker & David Barboza, *Battle over Biotechnology Intensifies Trade War*, N.Y. TIMES, May 29, 2003, at C1 (quoting a spokesperson for the American Soybean Association as saying that labeling is “the equivalent of putting a skull and crossbones on the packages, saying these things are bad”); Paul Elias, *Labels for Genetically Modified Food Are a Political Hot Potato in the U.S.*, MIAMI HERALD, July 5, 2003, at 6B (quoting spokesperson for the Grocery Manufacturers of America as viewing required GM ingredient disclosure as “a black label”). In one study of European consumers, for instance, willingness to pay for GM foods declined by approximately 30% when subjects’ attention was drawn to a product ingredient list disclosing the use of GM ingredients. See Charles Noussair et al., *Do Consumers Not Care About Biotech Foods or Do They Just Not Read the Labels?*, 75 ECON. LETTERS 47, 48 (2002).

individual utility maximization, policymakers have no agreed-upon method for making these analytically prior decisions.⁴⁵³ The process/product distinction has been offered as a bright line rule for limiting the consumer's information set exclusively to product-related characteristics that threaten personal harm to the consumer, but such personal physical and economic risks hardly exhaust the universe of information about which consumers express strong interest. Nor can scientific evidence requirements of the sort contained in the SPS Agreement⁴⁵⁴ provide an adequate decisionmaking tool, given that consumer demand for process information encompasses a much wider and richer range of considerations than merely those consequences of consumption that are scientifically demonstrable.

These lessons are not lost on participants in process-related disputes. By discrediting process information as a legitimate ground for consumer decisionmaking, proponents of the process/product distinction advocate a marketplace in which consumers satisfy their personal interests unimpeded by concern for the welfare of others.⁴⁵⁵ In contrast, by downstreaming process information, environmentalists, labor activists, and other "availability entrepreneurs"⁴⁵⁶ advocate a marketplace in which consumers behave in accordance with the altruistic ideals that the entrepreneurs themselves hold and that consumers also ex-

⁴⁵³ Thus, governments cannot easily follow the suggestion of two international trade scholars that, in order to comply with GATT Article III, process-based trade measures should be adopted only when "market perception comes first," such that "government regulation cannot be deemed to anticipate or guide consumer perceptions." Marco Bronckers & Natalie McNelis, *Rethinking the "Like Product" Definition in GATT 1994: Anti-Dumping and Environmental Protection, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW* 345, 376 (Thomas Cottier & Petros C. Mavroidis eds., 2000); see also Frieder Roessler, *Beyond the Ostensible: A Tribute to Professor Robert Hudec's Insights on the Determination of the Likeness of Products Under the National Treatment Provisions of the General Agreement on Tariffs and Trade*, 37 J. WORLD TRADE 771, 776-777 (2003) (arguing that the WTO's *Appellate Body Asbestos Report*, *supra* note 54, permits nontangible product characteristics to enter into GATT Article III analysis only if the market differentiates products on the basis of these characteristics in the absence of government regulation).

⁴⁵⁴ See *supra* note 164 and accompanying text.

⁴⁵⁵ This aim need not be viewed as anti-welfarist, given the discomfort that some individuals appear to experience from being put in a position of explicit moral responsibility. In fact, one reading of the psychological experiments described in this section is that many individuals experience greater well-being when they avoid cognitive awareness of the implications of their choices for others. Supporting this reading, a subsequent study found that individuals were willing to incur an immediate cost in order to avoid the position of proposer in a Dictator Game. Subjects were given a choice between distributing \$10 between themselves and a receiver or "exiting" the game and receiving \$9, in which case the receiver would never know that there was a game being played. Thirty percent of subjects chose to accept this \$9 offer in order to avoid making a choice, despite the fact that a rational self-interested actor would have stayed in the game to capture all \$10. See JASON DANA ET AL., WHAT YOU DON'T KNOW WON'T HURT ME: COSTLY (BUT QUIET) EXIT IN DICTATOR GAMES 9 (Carnegie Mellon Univ. Dep't of Social and Decision Sci., Working Paper, Aug. 24, 2004).

⁴⁵⁶ See Kuran & Sunstein, *supra* note 43, at 687-88.

press in alternative choice settings. Neither set of behaviors can be said to reveal “true” preferences; rather, the capacity to behave in altruistic ways is a function of context and the degree to which decisionmaking environments make it clear that consumers’ choices will impact the well-being of others. When regulating process information, therefore, policymakers must make openly normative judgments about the types of consumer behavior that they wish to inspire.⁴⁵⁷ In essence, they must choose between encouraging consumers to behave as purely self-interested purchasers or, as the next section describes, as citizen-consumers who approach their role with the burdens of the world in mind.

2. *The Heroic Consumer.* — Any society of a sufficient magnitude must confront the following three basic tasks: allocating resources among competing uses, distributing wealth among citizens, and setting an aggregate level or scale of human impact within the environment.⁴⁵⁸ Economists and political scientists acknowledge the fundamental nature of the first two tasks. The third, however, typically is disaggregated into a host of technical market failure concepts such as public goods problems, negative externalities, information asymmetries, and so on. Such concepts in the environmental context essentially function as surrogates for the more basic question that tends not to be asked directly: how much of the ecological superstructure upon which all life and activity depends does a society wish to divert for human use?⁴⁵⁹ The international salience of the concept of sustainability indicates that this scale aspect of collective governance is becoming more widely recognized and appreciated. A society that maintains a sustainable scale is understood to be one that does not threaten the welfare of future generations by excessively drawing down natural resource stocks, by overtaxing the assimilative capacity of pollution sinks, or by otherwise impairing the viability of ecological support systems.⁴⁶⁰

⁴⁵⁷ Cf. McCluskey, *supra* note 3, at 876 (concluding that contemporary political debates should focus “on the underlying question of *which* individuals and *what kinds of* communities our markets should be structured to protect and to benefit”).

⁴⁵⁸ See HERMAN E. DALY, *BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT* 50–51 (1996) (“The term ‘scale’ is shorthand for ‘the physical scale or size of the human presence in the ecosystem . . .’”).

⁴⁵⁹ One also may think of the scale question as posing unique distributional questions — namely, how should natural resources be distributed to other life forms and other generations? Indeed, it is primarily this aspect of the scale question that prevents conventional concepts of market failure from adequately fulfilling the role served by the concept of scale. See Douglas A. Kysar, *Law, Environment, and Vision*, 97 NW. U. L. REV. 675, 688–91 (2003); Douglas A. Kysar, *Sustainability, Distribution, and the Macroeconomic Analysis of Law*, 43 B.C. L. REV. 1, 40–44 (2001) [hereinafter Kysar, *Sustainability*].

⁴⁶⁰ See DALY, *supra* note 458, at 52 (“Sustainability is probably the characteristic of optimal scale on which there is most consensus.”).

In simplified terms, the post–World War II policy consensus in America has been to focus government effort on the maximization of allocative efficiency and the support of economic growth.⁴⁶¹ This policy is thought to reduce pressure on the government to engage in large-scale redistributive efforts because individuals have the opportunity of upward mobility in a constantly burgeoning economy.⁴⁶² By implication, therefore, the optimal scale of the economy has always been taken to be “bigger.”⁴⁶³ Through a steady drumbeat of market rhetoric and defining episodes such as the 1959 “kitchen” debate between Richard Nixon and Nikita Khrushchev, this consensus eventually acquired more than a purely instrumentalist cast. As historian Lizabeth Cohen describes, “[f]aith in a mass consumption postwar economy . . . stood for an elaborate, integrated ideal of economic abundance and democratic political freedom, both equitably distributed, that became almost a national civil religion from the late 1940s into the 1970s.”⁴⁶⁴ Charles McGovern locates the emergence of this “civil religion” even earlier, arguing that by 1940 “American people fitfully but firmly [had come] to equate the consumer with the citizen, a consumer standard of living with democracy, and the full participation in such an economy of spending and accumulation with being an American.”⁴⁶⁵

⁴⁶¹ See COHEN, *supra* note 2, at 11 (using the term “Consumers’ Republic” to describe “a strategy that emerged after the Second World War for reconstructing the nation’s economy and reaffirming its democratic values through promoting the expansion of mass consumption”).

⁴⁶² See Lizabeth Cohen, *The New Deal State and the Making of Citizen Consumers*, in GETTING AND SPENDING: EUROPEAN AND AMERICAN CONSUMER SOCIETIES IN THE TWENTIETH CENTURY, *supra* note 253, at 111, 123 (noting that “the participation of the mass of Americans in purchasing goods not only became the ideal route to capitalist prosperity for the nation, but also seemed to promise a citizenry of economic equals, without necessitating a direct attack on inequality”).

⁴⁶³ For a classic exception, see E.F. SCHUMACHER, *SMALL IS BEAUTIFUL: A STUDY OF ECONOMICS AS IF PEOPLE MATTERED* 17–18 (1973).

⁴⁶⁴ COHEN, *supra* note 2, at 127. The consumer movement of the 1970s did not change this basic outlook, but instead reinforced it by continuing a trend away from public-regarding aspects of consumer behavior, such as concern for the welfare of workers, and toward more private issues, such as product safety and fair pricing. See *id.* at 359. Nor did the civil rights movement ultimately threaten the premises of the postwar consensus: “Despite the radical potential of consumer organizing appreciated by the Ella Bakers of the civil rights movement, attention to democratizing the marketplace reinforced the Consumers’ Republic’s orientation toward ‘expanding the pie’ to make it larger and more encompassing, and disinterest in redistributing economic resources to achieve more fundamental socioeconomic equity.” *Id.* at 190.

⁴⁶⁵ Charles McGovern, *Consumption and Citizenship in the United States, 1900–1940*, in GETTING AND SPENDING: EUROPEAN AND AMERICAN CONSUMER SOCIETIES IN THE TWENTIETH CENTURY, *supra* note 253, at 37, 37. As McGovern notes, advertising and marketing executives consciously played a key role in furthering these developments: “In metaphors equating consumers with citizens and purchasing with voting, admen portrayed consumption as the true exercise of the individual’s civic role and public identity; consumption was the ritual means of affirming one’s nationality as an American.” *Id.* at 43.

Regardless of the precise timeline, the “citizen-consumer,” exemplified by the Consumers’ White Label Campaign and the civil rights consumer activism of the twentieth century,⁴⁶⁶ gave way to a vision that Cohen calls the “purchaser as citizen.”⁴⁶⁷ Individuals could still desire to benefit the general good through their purchasing activities, but now, almost miraculously, the goal required no sacrifice of personal interests: “Out of the wartime conflict between citizen consumers, who reoriented their personal consumption to serve the general good, and purchaser consumers, who pursued private gain regardless of it, emerged a new postwar ideal of the purchaser as citizen who simultaneously fulfilled personal desire and civic obligation by consuming.”⁴⁶⁸ The continuing influence of this purchaser-as-citizen vision is evident in omnipresent media invocations of consumer confidence and consumer spending as indicators of national welfare. As noted at the outset of this Article, it also was especially palpable during the effort to equate national recovery from the events of September 11, 2001 with increased consumer spending.⁴⁶⁹ As one major automaker’s advertising campaign put it, the way to “Keep America Rolling” was through commodified purchase.⁴⁷⁰ And lots of it.

During the last two decades, however, Cohen argues that the concept of “a new combined *consumer/citizen/taxpayer/voter* has gained influence,” such that “self-interested citizens increasingly view [even] government policies like other market transactions, judging them by how well served they feel personally.”⁴⁷¹ Instead of equating private consumer spending with the general good, Cohen argues that the new American individual has abandoned entirely the notion of a general good and instead views all of social interaction as a competitive game in which the individual’s role is simply to satisfy her own interests.⁴⁷² The government’s role, on this account, is merely to offer goods and services like any other retail seller.⁴⁷³ According to Cohen, politicians have reacted to these developments by speaking of themselves and

⁴⁶⁶ See *supra* pp. 584–86 & note 262.

⁴⁶⁷ COHEN, *supra* note 2, at 8–9.

⁴⁶⁸ *Id.* at 119. As an instructive example of this shift, consider the monthly program of the Consumer Conference of Greater Cincinnati, which in 1946–47 included topics such as “Your Country’s Welfare Needs Your Wise Buying” and “Consumer’s [sic] Responsibility to Themselves and Other Consumers,” while in 1947–48 pertinent topics became “Do You Have Drycleaning Troubles?,” “Know Your Plastics,” and “Oh Lady Does Your Dress Fit?” *Id.* at 135.

⁴⁶⁹ See *supra* pp. 526–27.

⁴⁷⁰ See David Teather, *Motor City Kingpin Who Kept America Rolling: Interview, Richard Wagoner, CEO, General Motors*, GUARDIAN, July 20, 2002, at 30.

⁴⁷¹ COHEN, *supra* note 2, at 9.

⁴⁷² *Id.* at 396–97.

⁴⁷³ Cf. AMAN, *supra* note 13 (manuscript at ch. 1, at 33–36, 54–59) (describing the emergence of a self-conscious “government as business” model during the last four U.S. presidential administrations).

their policies exclusively in market terms. Rather than offer a coherent vision of collective welfare, contemporary politicians instead assemble a package of issues targeted to attract a collection of distinct segments of the voting population.⁴⁷⁴ Previously public or social subjects such as education, health care, and social security become merely another market in which politicians ask consumers whether they are getting their dollar's worth from government services.⁴⁷⁵

This latter trope dovetails nicely with the academic risk reform literature, which repeatedly emphasizes the possibility that Americans could be getting more “bang for their buck” from environmental, health, and safety expenditures.⁴⁷⁶ Indeed, the ascendance of cost-benefit analysis can be seen as a further entrenchment of the consumer at the center of public policy, given that it seeks to hinge government provision of public goods on preferences that are revealed by individuals acting in their capacity as market actors, whatever those individuals might express when acting as voters or in other social roles. To give just one concrete example, EPA economists have examined a parent's willingness to pay premium prices for organic baby food as an indirect measure of the monetary value of an infant's life — a value that regulators may then use to set government health and safety standards that aim to protect children more generally.⁴⁷⁷ The heroic role of the consumer, then, is becoming even more heroic. Long understood to include a patriotic obligation continually to increase expenditure on material goods, the consumer's role also is being cast as an unwitting mechanism for collective valuation.

The resurgence of process preferences provides a curious footnote to this apparent triumph of market liberalism. Specifically, if the current consensus approach to collective governance focuses on the pursuit of individual welfare maximization in order to increase continually the size of the aggregate pie — while letting distributive equity and sustainable scale be achieved on a more ad hoc, ex post basis — then consumers in many respects seem to be resisting this neoliberal view of the world. Because consumption is now a principal vehicle by which

⁴⁷⁴ See COHEN, *supra* note 2, at 342 (arguing that politicians “at best construct a composite vision out of the specialized interests of their distinct constituencies, and at worst avoid discussing any common good at all”).

⁴⁷⁵ See *id.* at 397 (“Whereas from the 1930s to as late as the 1970s, to refer to the consumer interest was also to appeal to some larger public good beyond the individual's self-interest, the ubiquitous invocation of the consumer today — as patient, as parent, as social security recipient — often means satisfying the private interest of the paying customer, the combined consumer/citizen/taxpayer/voter whose greatest concern is, ‘Am I getting my money's worth?’”).

⁴⁷⁶ See Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7, 39–40 (1998).

⁴⁷⁷ See KELLY B. MACGUIRE ET AL., WILLINGNESS TO PAY TO REDUCE A CHILD'S PESTICIDE EXPOSURE: EVIDENCE FROM THE BABY FOOD MARKET 3 (Nat'l Ctr. for Env'tl. Econ., Working Paper No. 02-03, 2002), available at [http://yosemite.epa.gov/EE/epa/eed.nsf/ffb05b5f4a2cf40985256d2d00740681/8bd3cacb5bdb7be185256bb300492be9/\\$FILE/2002-03.pdf](http://yosemite.epa.gov/EE/epa/eed.nsf/ffb05b5f4a2cf40985256d2d00740681/8bd3cacb5bdb7be185256bb300492be9/$FILE/2002-03.pdf).

individuals are connected to a globalized world that includes social injustice and ecological fragility, it is also through consumption that those individuals' hesitations and objections are becoming most apparent. Thus, rather than waiting for post-market wealth transfers and ameliorative environmental, health, and safety regulations, consumers of process-distinguished products instead express preferences for sustainable, equitable outcomes through their market purchases *ab initio*.⁴⁷⁸ Just as individuals do not evaluate GM foods in the compartmentalized fashion of federal regulators,⁴⁷⁹ they also do not evaluate market transactions, wealth distribution, and environmental quality as wholly separable concepts requiring wholly separate methods of satisfaction and control.

This resurgence of process preferences also stands in tension with the long-held view of scholars that individuals are more likely to express public-regarding values while acting in their role as citizens than as consumers.⁴⁸⁰ In contrast to this traditional view, political scientist

⁴⁷⁸ For instance, consumers purchase organically produced, fairly traded goods at least in part because they desire a society where producers receive a "fair" return for the fruits of "sustainable" production practices. Similarly, the decisions to oppose rbST, GM foods, and sweatshop clothing all can be construed as decisions about the levels of wealth inequality and/or ecological risk that individuals believe are appropriate, not as a matter of personal welfare, but as a matter of social policy. Marketing researchers already are devising a vocabulary for these developments, even as many academics resist them on a theoretical level. Compare Imkamp, *supra* note 13, at 200 (noting based on survey results that "[t]he ecological perspective on consumer products seems to have broadened" to include concerns about production and distribution impacts on the environment, as well as concerns about the absolute level of consumption that individuals undertake), and A.W. Browne et al., *Organic Production and Ethical Trade: Definition, Practice and Links*, 25 FOOD POL'Y 69, 71 (2000) (noting that "ethical trading, reinforced by organic concepts of production, contributes to the accumulation of both natural and social capital, through greater sustainability of natural resources and increased access by producer groups to networks of production and trade"), with Kysar, *Sustainability*, *supra* note 459, at 22–28 (describing a debate between conventional and ecological economists regarding the proper analytical treatment within economics of sustainability and notions of environmental limits to growth).

⁴⁷⁹ See *supra* p. 590.

⁴⁸⁰ See Lewinsohn-Zamir, *supra* note 4, at 378–79. This traditional view is premised on the fact that, unlike the market, which requires individuals to make contributions to public goods without guaranteeing equal levels of contributions from other beneficiaries, the ballot box ensures that individuals will have to contribute only if their peers do as well. After all, as Amartya Sen has put it, "it would be amazing if the payment I am ready to make to save nature is totally independent of what others are ready to pay for it, since it is specifically a social concern. The 'lone ranger' model of environmental evaluation confounds the nature of the problem at hand." Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 925 n.78 (1996) (citing Amartya Sen, *Environmental Evaluation and Social Choice: Contingent Valuation and the Market Analogy*, 46 JAPANESE ECON. REV. 23, 29 (1995)). In addition to this perceived failure of markets to provide an appropriate framework for the pursuit of collective goals, some theorists argue that markets also actively undermine other potential frameworks: "The market enhances the liberty of people to act as individual consumers; it undercuts severely their liberty to act otherwise." FREYFOGLE, *supra* note 389, at 197. On this view, fostering a greater role for process preferences may have the unintended effect of encouraging consumer behavior to function merely as a palliative act that distracts individuals from more meaningful and collective responses to social and

Deborah Lynn Guber's recent review of environmental beliefs and behaviors finds a "paradox of marketplace success and ballot-box failure" for environmental issues over the last decade.⁴⁸¹ Citing James Buchanan's classic work on individual choice,⁴⁸² Guber argues that a critical component of an individual's willingness to engage in activity designed to support environmental causes or other public goods hinges upon the perceived efficacy of that activity.⁴⁸³ Significantly, the apparent rise of apathy in the public sphere has been accompanied by a contrasting rise of faith in the power of markets to satisfy individual wants.⁴⁸⁴ In an era of substantial skepticism regarding the effectiveness of political action, therefore, individuals may now regard the market as a more promising route to public-regarding change than the government.

From this perspective, making process information available to consumers through product labels and other means constitutes an effort to enable and coordinate behavior among individuals who wish to express regard for the welfare of others, but who lack confidence in alternative mechanisms for public expression.⁴⁸⁵ As Dan Kahan has noted, individuals' willingness to contribute to public goods is in part a function of their perceptions regarding the behavior of others: if one believes that shirking is widespread, one will be less inclined to contribute; if one believes that contributions are widespread, one will be more inclined to contribute.⁴⁸⁶ In the case of process-labeled products, the mere existence of such products on store shelves signals to the consumer that a sufficient number of other individuals are purchasing the goods to support their commercial availability, a signal that in turn encourages purchases by those individuals who are inclined to recipro-

environmental conditions. See Michael Maniates, *Individualization: Plant a Tree, Buy a Bike, Save the World?*, in CONFRONTING CONSUMPTION, *supra* note 450, at 58–59.

⁴⁸¹ DEBORAH LYNN GUBER, *THE GRASSROOTS OF A GREEN REVOLUTION: POLLING AMERICA ON THE ENVIRONMENT* 155 (2003).

⁴⁸² James M. Buchanan, *Individual Choice in Voting and the Market*, 62 J. POL. ECON. 334 (1954).

⁴⁸³ See GUBER, *supra* note 481, at 160.

⁴⁸⁴ See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1292–93 (2003) ("At least in the United States, the last few decades have been marked by an increased faith in markets and a corresponding decrease in support for public institutions.")

⁴⁸⁵ Cf. Lewinsohn-Zamir, *supra* note 4, at 404 ("If . . . individuals are generally other-regarding in their views on public goods, efforts to reduce feelings of hopelessness and facilitate cooperation in the private sphere may be fruitful.")

⁴⁸⁶ See Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 72 (2003); see also Bruno S. Frey & Stephan Meier, *Pro-Social Behavior in a Natural Setting*, 54 J. ECON. BEHAV. & ORG. 65, 66–67 (2004) (finding evidence of "conditional cooperation" among a sample of students deciding whether to contribute to social funds administered by a university).

cate the other-regarding gestures of their fellow consumers.⁴⁸⁷ Naturally, this ability to overcome “hopelessness”⁴⁸⁸ in the consumer marketplace should increase in strength as individuals continue to embrace the view that the market is an efficacious and reliable mechanism for change — even collective change.⁴⁸⁹

Evidence also suggests that the process-inflected nature of contemporary consumer product markets should increase in significance as income levels rise. Through numerous empirical studies, economists have identified a suggestive statistical relationship between per capita income levels and the stringency of environmental standards that are chosen by different nations. Although this literature is not without important exceptions and ambiguities, scholars have widely interpreted it to support the proposition that “only when we get sufficiently rich can we afford the relative luxury of caring about the environment.”⁴⁹⁰ On an individual level, evidence similarly suggests that income is a strong determinant of one’s willingness to pay for products such as or-

⁴⁸⁷ Cf. Valerie S. Folkes, *Recent Attribution Research in Consumer Behavior: A Review and New Directions*, 14 J. CONSUMER RES. 548, 551 (1988) (noting that “[c]onsumers prefer to believe that others share the same preferences and consumption habits,” and describing a study in which “nonconservationists justify their irresponsible behavior by believing that most others waste energy”); John Thøgersen, *Psychological Determinants of Paying Attention to Eco-Labels in Purchase Decisions: Model Development and Multinational Validation*, 23 J. CONSUMER POL’Y 285, 307 (2000) (noting that “it is likely that consumer belief in the environmental significance of responsible purchase behaviour is strengthened by a strong prevalence because it makes it more credible that consumers can make a difference by choosing such products”); KARINE NYBORG ET AL., GREEN CONSUMERS AND PUBLIC POLICY: ON SOCIALLY CONTINGENT MORAL MOTIVATION 17–18 (Univ. of Oslo Dep’t of Econ., Working Paper Memorandum No. 31/2003,) 2003 (reporting results of a modeling exercise demonstrating that “[h]igh adoption rates . . . influence consumers’ propensity to interpret product adoption as a matter of moral responsibility”).

⁴⁸⁸ Lewinsohn-Zamir, *supra* note 4, at 379 (using this term to describe the collective action dilemma that accompanies the pursuit of public goods in market settings).

⁴⁸⁹ One specific reason such an increase might occur is that process preferences appeal to a broader range of citizens than does more conventional government environmental regulation. Thus, although political ideology correlates strongly with willingness to vote for a political candidate primarily because the candidate took strong environmental positions, no correlation appears to exist between ideology and willingness to purchase environmentally safe or biodegradable products. “Consumer choice, in this sense, does seem to transcend ideology and in doing so allows environmental products to appeal to a wider audience.” GUBER, *supra* note 481, at 168; see also James A. Roberts, *Will the Real Socially Responsible Consumer Please Step Forward?*, BUS. HORIZONS, Mar.–Apr. 1996, at 79, 79, 82 (developing a scale measuring “responsible consumer behavior” and finding little variance in individual responses due to demographic variables).

⁴⁹⁰ BJØRN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD 33 (2001). For a discussion of the limitations and complications of the literature, see Douglas A. Kysar, *Some Realism About Environmental Skepticism: The Implications of Bjørn Lomborg’s The Skeptical Environmentalist for Environmental Law and Policy*, 30 ECOLOGY L.Q. 223, 249–52 (2003).

ganic food and fairly traded goods.⁴⁹¹ Perhaps, then, consistent with the environmental protection narrative on a national level, consumers will begin to express ever more concern regarding the processes that lie behind products as they become better able to afford the “luxury” of ethical or environmental purchasing.

As Susan Strange writes, the “shift away from states and towards markets is probably the biggest change in the international political economy to take place in the last half of the twentieth century.”⁴⁹² Paired with the global integration of economies, this shift has left in its wake a variety of “democracy deficits,”⁴⁹³ perhaps best typified by the lack of an international labor or environmental regulatory organization comparable in scope and authority to the WTO. To the extent, therefore, that process preferences reflect the moral and political desires of individuals who lack more direct means of effectuating their beliefs, such preferences may represent a significant vehicle for countering the distortions wrought by these deficits of democracy. To be sure, the ultimate impact that consumers may exert through process preferences is limited by the nature of market activity,⁴⁹⁴ and thus, advocates of process reforms can only view consumer activity as a complement to, rather than a substitute for, more direct regulatory efforts to achieve

⁴⁹¹ Cf. Arnab K. Basu et al., *Eco-Labeling and Stages of Development*, 7 REV. DEV. ECON. 228, 228–29 (2003) (finding a relationship between national income and eco-friendly purchasing like an Environmental Kuznets Curve).

⁴⁹² SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* 43 (1996).

⁴⁹³ AMAN, *supra* note 13 (manuscript at ch. 4, at 1).

⁴⁹⁴ See, e.g., *id.* (manuscript at introduction, 17–18) (noting that “enhancing a person’s power as a consumer” is limited as a democratic enhancement tool because consumer activities “are inevitably reactive” and do not involve “deliberative . . . participat[ion] in the creation of new options”); Kysar, *Law, Environment, and Vision*, *supra* note 459, at 716–27 (noting that some determinants of environmental impact, including, most critically, consumption and population levels, are not redressed by technological advances in resource efficiency alone); Barton H. Thompson, Jr., *What Good Is Economics?*, 37 U.C. DAVIS L. REV. 175, 186–90 (2003) (arguing that “ethical beliefs . . . frequently fall victim to personal convenience or cost considerations” and should therefore be complemented by regulatory tools that alter economic incentives). The threat of deception by manufacturers poses an especially serious challenge to the efficacy of consumer activity as a regulatory tool. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1425–27 (1999); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 724–43 (1999). Indeed, famed conservationist Aldo Leopold offered an uneasy endorsement of consumer activism for precisely this reason, warning that “hitching conservation directly to the producer-consumer relation instead of to the government . . . would present the professional advertiser with an opportunity for euphemized deception and equivocation vastly larger than cigarettes. The more complex the product or process, the wider the field for the trained hoodwinker.” ALDO LEOPOLD, *Land-Use and Democracy*, in *THE RIVER OF THE MOTHER OF GOD AND OTHER ESSAYS BY ALDO LEOPOLD* 295, 300 (Susan L. Flader & J. Baird Callicott eds., 1991). Such opportunities for deception underscore the need to reject Nike’s arguments, which, if accepted, would impair the ability of states and litigants to police manufacturer process claims. See *supra* pp. 610–14.

their policy goals. Nevertheless, in an era that increasingly regards the consumer and her pursuit of individual welfare as a central orienting concept of law, politics, and culture, outlets for public-regarding consumer expression should not be dismissed out of hand.

As this Part has attempted to demonstrate, process preferences cannot be easily dismissed as erroneous or inappropriate; indeed, they provide a legitimate, important determinant of consumers' hedonic and moral well-being. Moreover, because they appeal to individuals' strong identification as consumers,⁴⁹⁵ because they provide a sensation of personal autonomy and influence that seems to be lacking in contemporary political spheres,⁴⁹⁶ and because, more broadly, they fit well alongside a conglomeration of forces that have placed the market and the consumer unequivocally at the center of twenty-first-century life,⁴⁹⁷ process preferences also may provide one of democracy's best hopes for public engagement in the new century. For this reason alone, policymakers should reject the process/product distinction in its various guises and instead become sensitive to the notion that process preferences provide an answer — partial and unsatisfying, but in many respects inescapable — to the vexing question, “how is political activity possible in the global age.”⁴⁹⁸

CONCLUSION

By fostering ever greater market connections and economic opportunities, globalization helps to catalyze the expansion of commercial relations and commercial activities within public life. Previously distanced market actors become linked not only by commodity chains, but also by social and ecological feedback mechanisms of potentially devastating magnitude. As Peter Singer observes, both the events of September 11, 2001, and the problem of climate change are manifestations of the same underlying economic, cultural, and environmental forces — forces that have bound all of humanity, in essence, into “one world.”⁴⁹⁹ Accordingly, many consumers have come to view them-

⁴⁹⁵ See COHEN, *supra* note 2, at 410.

⁴⁹⁶ See GUBER, *supra* note 481, at 169 (“In short, while scholars have long suspected that low perceptions of efficacy are an ‘effective deterrent’ to environmental behavior, evidence . . . suggests that actions taken in the marketplace might help Americans to feel better about their own ability to effect environmental change.”).

⁴⁹⁷ See Freeman, *supra* note 484, at 1292 (“Privatization coincides with other political and economic developments — including globalization, free trade, market integration, and deregulation — that similarly reinforce an ideological preference for private over public ordering and market over noneconomic values.”).

⁴⁹⁸ BECK, *supra* note 11, at 132.

⁴⁹⁹ See PETER SINGER, ONE WORLD: THE ETHICS OF GLOBALIZATION 1 (2002). Although Singer's observation is particularly poignant in present times, it does not express a dramatically new idea. In 1795, Immanuel Kant wrote that “[t]he peoples of the earth have thus entered in

selves as purchasing with their disposable dollars not only products, but also shares of responsibility in the moral and ecological economy that produces them. On their surface, the fluorescent aisles of modern retail environments tell only tales of abundance. Globalization, however, has enhanced the flow of information, not merely goods, and information regarding processes increasingly is finding its way downstream. Consumers are responding accordingly.

As consumer awareness and demand for process information increases, however, the impetus to regulate access to such information grows as well. As this Article describes, in a number of areas of law and policy, the mechanism being employed to engage in such regulation is a fairly rigid conceptual distinction between processes and products. This process/product distinction has been invoked to question the authority of an importing nation to ban or label products that are developed using processes deemed objectionable by its citizens; to rationalize ignoring overwhelming consumer support for mandatory labeling of food products that contain genetically engineered ingredients; and to narrow the constitutional conditions under which states may force manufacturers to disclose process information or to face legal challenges for disclosing false or misleading process information.

These efforts to restrict the informational environment of consumers exist uncomfortably within a global political climate that increasingly embraces market liberalism and the rhetoric of consumer choice as its fundamental guideposts. Although this tension currently encompasses only a handful of legal policy disputes concerning a few salient process-related issues, it nevertheless seems likely to grow in significance. If civic life reduces to market life — if individuals come to agree with Secretary Evans that going “back to the stores” constitutes the most important “sacrifice” that they can make for the well-being of the nation⁵⁰⁰ — then private consumer activities will become an even more critical vehicle for public-regarding expression. Similarly, if the trend toward a “cost-benefit state”⁵⁰¹ continues to grow — if private market behavior displaces other, more traditional means for determining government environmental, health, and safety standards — then the struggle for control over the consumer’s decisionmaking environment only will intensify in scope and severity. In that regard, dolphin-safe tuna, GM foods, rbST, and *Kasky* may represent only the opening shots in an emerging battle to determine the degree of “moral wriggle

varying degrees into a universal community, and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*.” IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in *POLITICAL WRITINGS* 93, 107–08 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991).

⁵⁰⁰ See *supra* pp. 526–27.

⁵⁰¹ See *supra* p. 527.

room” that governments and producers will afford their consumers. Although the eventual outcome of such a battle is unknown, one thing at present does seem clear: the process/product distinction is far too meager of a conceptual device to bear the weight of these controversies.