

# The Persistence of the Public/Private Divide in Environmental Regulation

*Yishai Blank and Issi Rosen-Zvi\**

*New modes of environmental regulation are said to have transcended the public/private divide. These new regulatory schemes — referred to as non-coercive orderings, self-regulation, co-regulation, meta-regulation and social regulation — set aside the formal nature of the regulating entity, the regulated entity, and the tools of regulation. Instead of asking whether the means, objects and formulators of the regulation are public or private, the focus lies on the substance and effectiveness of the regulation in mitigating environmental harms. In this Article we argue that despite these claims, often advanced by new governance proponents, the public/private divide is in fact alive and well, informing and impacting the ways in which various regulatory schemes are justified and legitimated. We exemplify this argument through an analysis of the role of three entities in international environmental regulation: the state (and its perception as sovereign), local governments, and civil society entities (both NGOs and business corporations). This Article then suggests three consequences of the persistence of the public/private dichotomy and its denial: it produces a “tilt” towards the private; it tends to hide conflicts and disagreements, projecting an image of a frictionless world; and it prevents an imagination of a different world that transcends the structure of social life embedded in it.*

## INTRODUCTION

The public/private divide in environmental regulation has, over the past two decades, been declared dead or dying.<sup>1</sup> The meaning of such statements is

---

\* Associate Professors, Tel Aviv University Faculty of Law.

1 See, e.g., Neil Gunningham, *Environmental Law, Regulation and Governance*:

that the formal nature of the *regulating* entity, of the *regulated* entity, and of the *tools of regulation* — be they “private” or “public” — is meaningless. Rather, what matters is the substance and effectiveness of the regulation in mitigating environmental harms. For example, while traditional regulation was promulgated exclusively by state agents, contemporary regulation is increasingly done also by non-state actors (such as transnational and subnational entities, nongovernmental organizations (NGOs) and business organizations).<sup>2</sup> While early twentieth-century regulation was hesitant to invade “private” spheres such as factories, current regulation seamlessly permeates both public and private domains. And while previously the regulatory tools were mostly command and control, the new regulation encompasses a wide array of innovative regulatory tools<sup>3</sup> that include softer non-coercive orderings, self-regulation,<sup>4</sup> co-regulation,<sup>5</sup> and meta-regulation.<sup>6</sup>

---

*Shifting Architectures*, 21 J. ENVTL. L. 179 (2009); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 423-32 (2004); Jason Morrison & Naomi Roht-Arriaza, *Private and Quasi-Private Standard Setting*, in OXFORD ENCYCLOPEDIA OF INTERNATIONAL ENVIRONMENTAL LAW 498 (Dan Bodansky, Jutta Brunnee & Ellen Hey eds., 2007); David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261 (2008).

- 2 The definition of “regulation” used in this Article is quite broad and follows Collin Scott, *Analysing Regulatory Space: Fragmented Resources and Institutional Design*, PUB. L., Summer 2001, at 329 (defining “regulation” as “any process or set of processes by which norms are established, the behavior of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behavior of regulated actors within acceptable limits of the regime”).
- 3 David Levi-Faur, *Regulation and Regulatory Governance* (Jerusalem Papers in Regulation & Governance Working Papers Series, Working Paper No. 1, 2010), available at <http://levifaur.wiki.huji.ac.il/images/Reg.pdf>.
- 4 IAN AYRES & J. BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 106 (1992); see Marc Schneiberg & Tim Bartley, *Organizations, Regulation, and Economic Behavior: Regulatory Dynamics and Forms from the Nineteenth to Twenty-First Century*, 4 ANN. REV. L. & SOC. SCI. 31 (2008).
- 5 Levi-Faur, *supra* note 3, at 11 (claiming that co-regulation is a regulatory scheme in which the responsibility for regulation is shared by the regulator and the regulated entities).
- 6 Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility*, in *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* 207 (Doreen McBarnet, Aurora Voiculescu & Tom Campbell eds., 2007) (showing that meta-regulation enables the regulated actors

This shift is understood to be a part of the greater movement from government to governance,<sup>7</sup> which resulted from a concentrated and rather successful effort to challenge both the centralized state as the main source of legality and legitimacy, and command and control regulation as its primary tool for advancing public policy. Governance — some refer to it as “new” — purports to respond to the resulting delegitimization of the state and its regulatory capacities by introducing a fluid, flexible, result-oriented and polycentric regulatory ideal. New governance is allegedly a “more participatory and collaborative model, in which government, industry, and society share responsibility in achieving policy goals. The adoption of governance-based policies redefines state-society interactions and encourages multiple stakeholders to share traditional roles of governance.”<sup>8</sup> The disappearance of the public/private divide in environmental regulation is, for proponents of new governance, yet another example of its rise and, as such, should be celebrated.<sup>9</sup>

In this Article we would like to critique the supposed demise of the public/private divide. We argue that despite the fading away of “private” and “public” as concepts that explicitly legitimate certain regulatory practices and institutions, they still permeate the sphere of environmental regulation in important ways and exert enormous power on the very regulatory structures that are said to have surmounted the divide between them. The public/private divide provides a powerful “conceptual vocabulary, organizational scheme, modes of reasoning and characteristic arguments”<sup>10</sup> that inform the efforts to regulate the environment. It does so since each side of the public/private dichotomy stands for a set of values, ideals and concerns that are still extremely important in liberal legal thinking. While “public” is a stand-in for politics, altruism, equality, participation, heteronomy, coercion, rigidity, and inefficiency, “private” is a surrogate for markets, egotism, discrimination, exclusion, autonomy, voluntariness, flexibility and efficiency.

As against the claims of the demise of the public/private divide, we argue that in fact it persists in at least three significant debates. First, we argue that the concept of sovereignty, which protects many states from international

---

to determine their own rules and standards, while the role of the regulator is limited to monitoring the integrity of the work of the compliance administration established by the regulated entities).

7 See, e.g., *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

8 Lobel, *supra* note 1, at 344-45.

9 *Id.* at 424-32.

10 Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 22 (David Trubek & Alvaro Santos eds., 2006).

environmental intervention, is a demonstration of the persistence of the public/private divide. This is the case, since sovereignty is Janus-faced: internally “the sovereign” is the incarnation of the public, yet viewed from the international plane it is understood to be a “private” actor. Hence, the trumping of sovereignty in debates about the legitimacy of state immunity from international regulation is proof of the resilience of the public/private divide (and the supremacy of the private).

Second, we address the growing involvement of local governments in environmental regulation, claiming that while this involvement is often depicted as proof of the transcendence of the public/private divide, it is in fact a demonstration of the reverse. Despite the common perception of them as public entities, localities are currently recast as semiprivate and semipublic creatures, a fact which supposedly proves the said demise. However, we argue that debates concerning the mode of authorization of localities to regulate the environment, as well as whether such local regulation is efficient and legitimate, are imbued with concepts that are analogous to both the public and the private.

Third, we turn to considering the new role of civil society entities in environmental regulation. While the involvement of such organizations, especially corporations, in environmental regulation is put forward as an example of the demise, here, too, we observe that the arguments often turn on the question whether such entities possess “private” or “public” traits. Although these terms themselves are usually avoided, surrogate concepts for “private” — efficient, voluntary, flexible, but also egotistical, narrow and myopic — and for “public” — democratic, egalitarian, and transparent, but also inefficient, coercive and rigid — are often utilized.

Getting rid of the public/private divide might, at first glance, seem a merely rhetorical gesture, since the abovementioned values and concerns are still paramount in the decision-making processes of legislators, administrators, and courts, and they still serve as good reasons for a particular course of action. However, this Article points to three possible effects of the persistence of the public/private dichotomy and its rhetorical denial. To start with, it produces a “tilt” towards the private, i.e., a tendency to prefer solutions and policies that promote “private” values. In addition, it tends to hide conflicts and disagreements, depicting an image of a frictionless world, where all interests can be neatly aligned. Finally, it obstructs us from imagining a different world that transcends the dull and dichotomous structure of social life embedded in it. Such imagining of a nonexistent “third” option — which is neither public nor private — might include the redefining of basic concepts such as profit-maximization and interests, and a structural transformation of the corporate entity itself.

The Article proceeds in four parts. Part I discusses the persistence of the public/private divide in global environmental regulation, focusing on the debate surrounding state sovereignty in global governance ordering. In Part II we turn to examining national environmental regulation and the dilemma concerning the involvement of local governments in such regulatory initiatives. Part III analyzes the role of civic and corporate entities. In Part IV we discuss the various consequences of the persistence of the public/private divide and its denial. We then conclude.

## **I. THE PERSISTENCE OF THE PUBLIC/PRIVATE DIVIDE IN GLOBAL ENVIRONMENTAL REGULATION: SOVEREIGNTY VS. GLOBAL GOVERNANCE**

Traditional types of regulation are rooted in the notion that sovereign states are the sole sources of authority within their jurisdiction and thus the only legitimate norm-setting institutions. Although “the sovereign” within a particular national order is conceptualized as the epitome of the public, when elevated to the international plane sovereign states have traditionally been understood to be “private” actors.<sup>11</sup> The sovereign state was theorized as an impermeable “black box,” autonomous, natural, and insular, whose will cannot be subjected to scrutiny by any international (or other national) actor. Any international regulation was thus dependent on the explicit agreement of the state, and international law was understood to be a form of consensual agreement between individual states.<sup>12</sup>

This “private” image was significantly eroded during the past century, especially after World War II and the fall of the Berlin wall. This erosion can be attributed to a number of developments, both material and ideological: the disastrous results of sovereignty under the Nazi and Soviet regimes, the unfolding of the idea of universal liberal humanism, the increasing flow of capital, goods, people, and ideas across national borders, and the globalization of international trade and supply chains. Thus, critics of sovereignty argue, states are in many cases no longer the optimal and most legitimate actor to manage their territories and populations; a growing number of contemporary problems and challenges require decision-making and implementation that goes beyond the state (immigration, climate change, labor standards and the economic crisis are high-profile examples). International regulation, it is

---

11 LASSA F.L. OPPENHEIM, *INTERNATIONAL LAW: VOLUME I, PEACE* (1905).

12 See Benedict Kingsbury, *Sovereignty and Inequality*, 9 *EUR. J. INT’L L.* 599, 601-02 (1998).

argued, can theoretically provide a viable alternative to state regulation since it can internalize all the externalities involved, thus preventing or at least ameliorating both the inefficiencies of national regulation and the risk of a “race to the bottom.”<sup>13</sup> As a result, new forms of global governance should and indeed have emerged.<sup>14</sup>

This is particularly true for environmental governance due to the growing realization of the borderless nature of the environment and the inability to contain its externalities within political boundaries. In various cases, arguments have been made against the ability of individual nations to regulate the environment as they see fit due to their interdependence, i.e., the fact that the outcomes of such regulation in any particular state are greatly influenced by the actions of other states.<sup>15</sup> Thus, contemporary environmental regulation is heavily reliant on global governance and international instruments and institutions. And indeed many international and transnational entities and conventions have been established since the 1970s in order to govern the environment, some of them responsible for the environment at large (e.g., the United Nations Environment Program (UNEP) and the Division for Sustainable Development (DSD)), while others focus on specific environmental issues, such as the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, the United Nations Framework Convention on Climate Change, the Vienna Convention for the Protection of the Ozone Layer, and the Stockholm Convention on Persistent Organic Pollutants.

The ceding of national authority to global and international norms and institutions is cited as proof of the public/private divide having been overcome in environmental regulation.<sup>16</sup> Sovereign states can no longer, given the growing interdependency between states, act within their territory as if it were a “private” sphere, immune from external intervention and regulation; nor

---

13 Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (1999).

14 Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 AM. J. SOC. 297, 298 (2007); Peter Evans, *Fighting Marginalization with Transnational Networks: Counter-Hegemonic Globalization*, 29 CONTEMP. SOC. 230, 235 (2000).

15 For a good exposé of this argument as well as various critiques of it, according to which under certain conditions national regulation does not necessarily lead to a race to the bottom even in today’s globalized economy, see Schneiberg & Bartley, *supra* note 4 at 36-41 (2008).

16 Some scholars argue for the need to maintain sovereignty, at least for the time being, in the absence of a better means of managing inequality, both within and among states. See generally Kingsbury, *supra* note 12.

should they act this way, since defining national territories as fully protected private-like spheres allows for internal discrimination, infringement of rights, and inequalities.<sup>17</sup> Thus, states' permeability and submission to global and international norms and institutions manifests the breakdown of the sharp dichotomy.

However, this story, as told by international jurists and new governance proponents, greatly overstates the demise of the public/private divide in the international arena. The failure of the most important international environmental agreements is a result of sovereign states' refusal to either join such agreements or commit themselves to external standards and regulations. For example, although all states signed the United Nations Framework Convention on Climate Change (UNFCCC<sup>18</sup>) already in 1992, the measures that the convention envisioned have utterly failed since the biggest greenhouse gas (GHG) emitters, most notably the United States, China and India, have refused to assume any obligations and restrictions.<sup>19</sup>

This basic fact — that, despite the weakening of the state, it still has the fundamental power to refuse “public” international law's encroachment upon its “private” sphere — is too often omitted from the optimistic tales about the public/private divide having been overcome in environmental regulation. Most scholars either take sovereignty for granted, simply assuming states' powers *vis-à-vis* the international,<sup>20</sup> or justify it due to the illegitimacy of international environmental regulation. This illegitimacy is attributed to the democratic deficit plaguing international organizations and institutions, as well as to the fact that the regulation they pursue is seen as a form of global-North imperialism.<sup>21</sup>

The incessant declaration that we have “overcome” the tired public/private split falsely lulls us into believing that our environmental policies are blind to the “anachronistic” spheres of nation-states, whereas in fact these spheres are often conceptualized as “private” and thus justify and legitimize a “do not

---

17 Yishai Blank, *Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance*, 37 *FORDHAM URB. L.J.* 509 (2010).

18 United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107.

19 Lavanya Rajamani, *Differentiation in the Emerging Climate Regime*, 14 *THEORETICAL INQUIRIES L.* 151 (2013).

20 States' de facto sovereignty is often exemplified through international law's lack of effective enforcement mechanisms. See Jutta Brunnée, *Enforcement Mechanisms in International Law and International Environmental Law*, in *ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS: A DIALOGUE BETWEEN PRACTITIONERS AND ACADEMIA* 1 (Ulrich Beyerlin et al. eds., 2005).

21 Rajamani, *supra* note 19.

interfere” approach. The protected sphere of the “sovereign” — i.e., private — nation-state is responsible for the failure of much of the most needed environmental regulation, since it has now become clear that as long as states continue to emit GHGs and other pollutants the process of climate change will probably continue.<sup>22</sup> Our blindness to the overt manifestations of states’ sovereignty is an effect of an overemphasis on the *internal* dimension — where the state interacts more with private actors — and on voluntary transnational developments. It is the *international* framework, where the territorial boundaries of states serve as almost impermeable walls that protect them from intervention, which is the main story. The most needed environmental regulation thus remains in the realm of utopian thinking, and the biggest causes of the global environmental calamities are left unaddressed due to the persistence of the public/private divide in international law and international relations.

## II. THE PERSISTENCE OF THE PUBLIC/PRIVATE DIVIDE IN NATIONAL ENVIRONMENTAL REGULATION: THE ROLE OF LOCAL GOVERNMENTS

The legitimacy of state regulation has come under attack over the past few decades. The political right accuses it of being too coercive and intrusive, too rigid, inefficient, and susceptible to capture by rent-seeking groups; while the left attacks it due to its lack of responsiveness to citizens’ needs, its oppression towards various minorities, its democratic deficit, and its tendency to advance the interests of economic and cultural elites.<sup>23</sup> New governance scholarship sees this crisis of legitimacy as an opportunity and as cause for a “renew deal” between governments and their citizens.<sup>24</sup> This renew deal involves transforming or even transcending the dichotomy between “public” government on the one hand, and “private” civil society on the other hand. Thus, non-coercive orderings, enforced self-regulation, co-regulation, and negotiated agreements, among others, serve as the epitome of the new evolutionary phase that purports to go beyond the state/society, public/private dichotomy.

---

22 *Id.*; see also Yoram Margalioth & Yinon Rudich, *Close Examination of the Principle of Global Per Capita Allocation of the Ability of Earth to Absorb Greenhouse Gas*, 14 THEORETICAL INQUIRIES L. 191 (2013); Dan Rabinowitz, *In-Country Disparities in Greenhouse Gas Emissions and Their Significance for Politicizing a Future Global Climate Pact*, 14 THEORETICAL INQUIRIES L. 173 (2013).

23 See Blank, *supra* note 17, at 517-18.

24 See generally Lobel, *supra* note 1.



The growing involvement of local governments in environmental regulation is one of the prime examples of where this transcendence is occurring, according to new governance scholars. Over the past two decades, there has been growing discussion among policymakers, international and transnational organizations, and academics throughout the world concerning the involvement of local governments and of regions in regulating the environment.<sup>25</sup> Various unique characteristics of localities, such as proximity to their residents, relatively small size, and the large number of competing localities, make them particularly apt for experimentalism in new governance schemes. Contemporary localism is recasting localities as semiprivate and semipublic entities at the same time, no longer merely state agents entirely subsumed by their national governments.<sup>26</sup> This reshaping is being achieved through a renewed emphasis on localities' ability to generate wealth and economic growth, their need to be financially viable and self-reliant, and their capacity to promote good governance, on the one hand; and on their directly democratic potential and ability to reflect community values, on the other hand. As a result, local governments are cited as a prime example of the current fusion between the public and the private in new regulatory schemes, including environmental ones.

Yet despite the claim that current local governments demonstrate the transcending of the public/private divide, in fact the discourse over the legal authorization, efficiency, and political legitimacy of local regulation of the environment remains captive to the powerful dichotomy. Hence, the debate over the decentralization of environmental regulation manifests the persistence of the public/private divide rather than its disappearance.

As just mentioned, the debate regarding the role that localities should play in environmental regulation revolves around three important issues: first, the legal authorization of local governments to deal with environmental

---

25 See, e.g., Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT'L. L. 875 (2006) [hereinafter Blank, *The City and the World*]; Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT'L L.J. 263 (2006) [hereinafter Blank, *Localism*]; Colin Crawford, *Cities, Shantytowns and Climate Change Governance*, 36 FORDHAM URB. L.J. 211 (2009); Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 55 (2006); Mikael Granberg & Ingemar Elander, *Local Governance and Climate Change: Reflections on the Swedish Experience*, 12 LOC. ENV'T 537 (2007); Alice Kaswan, *Climate Change, Consumption, and Cities*, 36 FORDHAM URB. L.J. 253 (2009); Ileana M. Porras, *The City and International Law: In Pursuit of Sustainable Development*, 36 FORDHAM URB. L.J. 537 (2009); Hieke Schroeder & Harriet Bulkeley, *Global Cities and the Governance of Climate Change: What Is the Role of Law in Cities*, 36 FORDHAM URB. L.J. 313 (2009).

26 See Blank, *Localism*, *supra* note 25, at 264.

issues; second, the efficacy and economic efficiency of local regulation of the environment; and third, its political viability and legitimacy. These three issues are all interrelated, as they construct and reflect the contradictory conceptions of localities.

### **A. Legal Authorization**

Reasoning about the form, mode and interpretation of legal authorization often depends on the nature of the authorized entity as private or public. The classification of an entity as “public” serves as both an enabler and a constraint; the classification of an entity as “private” also both enables it and limits its ability to operate, albeit in different ways. While private entities are free to pursue almost any goal which they deem desirable unless specifically prohibited, public entities are bound by the ultra vires doctrine, even when they are broadly authorized.<sup>27</sup> At the same time, while public entities commonly possess substantial legal powers, including the power to tax, legislate and regulate, private entities very seldom hold such powers. Hence, in debates about the role of local governments in environmental regulation, their character as private or public entities is commonly used in order to both broaden and narrow their legal capacity to act.

More concretely, the classification of localities as public legal entities is one of the major arguments being deployed against their capacity to regulate environmental matters. Courts and other policymakers often identify the question concerning the legality of certain regulatory schemes as dependent on whether they are within cities’ powers, or whether the cities have exceeded their authority. For example, in some cases in the United States, where cities have tried to use their regulatory powers in order to combat air pollution and climate change, courts have enjoined them from doing so, based on the

---

27 Local governments are legally empowered in different ways in various jurisdictions throughout the world. The two most popular modes of authorization are “general competence” (or “home rule” in the United States) on the one hand, and a closed list of specific empowerments, on the other hand. According to the first mode, localities enjoy relatively broad powers, and are allowed to act in a wider array of matters that are “local” in nature. In the second mode, local governments are endowed with enumerated powers, which are strictly defined. Both modes of authorization manifest to varying degree the public nature of local governments, as they limit in significant, albeit different, ways their ability to engage in various activities.

constraints on their powers as public entities (due to the doctrines of ultra vires and of preemption).<sup>28</sup>

On the other hand, as public entities, localities possess a wide range of legal powers, which have been regularly applied to environmental issues. Local governments have traditionally regulated the environment by using their zoning, sanitation and public health powers, and by taxing and spending money on public parks, preservation efforts, and the like. In fact, in many jurisdictions, localities and regions (or states in federal regimes) were regulating their environments long before central states became active in this domain.<sup>29</sup> Very few currently challenge such powers, for historical reasons and since these powers have long been written into the authorizing legislation. Additionally, authorizing legislation can be and sometimes is generously construed as to allow local governments to adopt schemes that are protective of the environment. For example, when a city in Canada prohibited the use of pesticides within its territory, it was taken to court as performing an action that was outside of its legal powers. The Canadian Supreme Court, however, interpreted the authorizing act — that provided for regulation by municipalities “to protect the health and well-being of residents”<sup>30</sup> — as authorizing the city to enact the said by-law.<sup>31</sup>

Thus, the public nature of localities serves as both an enabler of their capacity to regulate environmental matters and a constraint on it. Yet in most contemporary debates this nature is being touted as a possible limit to new local powers, as well as a restraint on already existing ones.

---

28 *Ophir v. City of Boston*, 647 F. Supp. 2d 86 (D. Mass 2009) (enjoining Boston’s attempt to mandate an all-hybrid taxi fleet by 2015); *Metropolitan Taxicab Bd. of Trade v. City of New York*, 2009 U.S. Dist. LEXIS 52658 (striking down New York City’s policy of incentivizing taxi cabs to shift to hybrid or clean diesel vehicles).

29 *See, e.g.*, MARKUS DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* (2005); Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899 (zoning out of farm animals from residential urban areas by localities).

30 The Cities and Towns Act, R.S.Q. 1977 c. C-19 (Can.).

31 *See Ltee v. Hudson (Ville)*, [2001] S.C.R. 241 (Can.) (ruling that giving the town the right to enact the debated by-law was “consistent with principles of international law and policy,” and was thus a plausible reading of the authorizing statute, among other reasons).

## B. Efficacy and Economic Efficiency

Whether localities or other geopolitical entities (such as states, regions or sub-local bodies) should regulate the environment often hinges on the question of their ability to do so effectively and efficiently. The economic discourse promises to answer this question by conceptualizing environmental regulation as a market with various entities of different scales — states, regions, counties, and localities — competing with each other over the control of such regulation. The relevant parameters for resolving the question of scale in a particular case are the ability of the entity to internalize its costs and benefits, economies of scale, and the natural/technological traits of the environmental resource (or hazard).<sup>32</sup>

Local governments are conceptualized in the economic discourse as semiprivate entities, despite their formal legal status as public state agents. According to the Tieboutian economic model of local governments, localities should be viewed as market commodities, with “consumer-voters” choosing among them based on their preferences.<sup>33</sup> Localities respond to these consumer demands by competing among themselves, thus enhancing efficiency, inducing fiscal responsibility, improving municipal services, and encouraging economic growth. In this view, localities are often better fit to regulate the environment than centralized state organs: the inter-local competition produces better maximization of existing individual preferences as regards the level of environmental protection.<sup>34</sup>

However, this privatized conception of subnational governments also serves as an argument *against* their involvement in environmental regulation. According to some critics, local environmental regulation would inevitably lead to attempts by localities to externalize the environmental costs (i.e., hazards) of various activities while internalizing only their benefits. Additionally, inter-local competition over the setting of environmental standards will result in a “race to the bottom” dynamic, with different localities trying to attract production and jobs into their jurisdiction by lowering such standards.<sup>35</sup> Moreover, since the environment is a global public good, coordination, cooperation and peer-participation on a global scale are essential to the success of any regulatory effort. The existence of a multitude of subnational actors, characterized by

---

32 See ROBERT COOTER, *THE STRATEGIC CONSTITUTION* (2000).

33 See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

34 Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996).

35 Cf. Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997).

inherent and incurable myopia and parochialism, thus leads invariably to the tragedy of the commons.<sup>36</sup> Consequently, according to public choice theorists, any action taken by subnational entities to deal with environmental issues of national or global scale is rendered both irrational and ineffective.<sup>37</sup> Cities should therefore have legal power to act only to the extent they can internalize all the costs of their action, which is not the case in most environmental issues.<sup>38</sup> And the power to regulate the environment should remain at the highest governmental level and must not be decentralized.<sup>39</sup>

The characterization of local governments as semiprivate entities leads to contradictory results: on the one hand, the Tieboutian model, by conceiving localities as commodities in a market — thus enjoying the efficient results of competition — renders them apt for regulating the environment; on the other hand, the very privateness of localities — their narrow self-interest, tendency to externalize costs, etc. — makes them inapt for this regulatory task.

Another aspect of the prevalent economic discourse is its oscillation between viewing local governments as private entities and viewing them as public entities. When compared with the state, localities are depicted in terms analogous to the “private” — competitive, flexible, and better able to respond to individual preferences. However, when local governments are compared with “real” private entities such as business corporations, they are portrayed as no less “public” than the central government: wasteful, overly bureaucratic, and ossified.

Indeed, while localities are, to economists and public choice theorists (new governance scholars included), more private than centralized states, they are still only “second best” to fully private entities.<sup>40</sup> This is manifest in, among other things, the regulatory tools that localities possess and develop *vis-à-vis* those of private industry. While localities are able to adapt more easily than

---

36 Garret Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243 (1968). For an application of Hardin’s theory to the global commons, see Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 *YALE L.J.* 2039, 2099 (1993); and Barton H. Thompson, Jr., *Tragedy Difficult: The Obstacles to Governing the Commons*, 30 *ENVTL. L.* 241, 253 (2000).

37 Daniel C. Esty, *Towards Optimal Environmental Governance*, 74 *N.Y.U. L. REV.* 1495, 1554 (1999).

38 COOTER, *supra* note 32.

39 See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *YALE L.J.* 1196 (1977).

40 See William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 *GEO. L.J.* 201 (1997).

central governments to new measures and technologies that can monitor and enforce environmental protection, they remain too big, are usually not the cheapest cost-avoiders, have permanent information deficits, and need to balance their environmental policy with many other interests and needs (especially their budgetary restraints). These deficiencies are, according to economists, inherent to the “public” nature of local governments, rendering them inferior to private industry as regulators of the environment.

### C. Political Viability and Legitimacy

As in our previous discussions regarding authorization and efficiency, when the political legitimacy and viability of local governments as regulators of the environment is considered, the various stand-ins for “public” and “private” are highly productive and determinative. The public nature of localities is manifested mainly in opposition to the illnesses of the representative-democratic central state. Although local governments in most jurisdictions are also governed by elected representatives, in many cases they offer a variety of schemes for lay participation in politics and citizens’ involvement in decision-making processes.<sup>41</sup> Such schemes include, for example, town hall meetings, and governing boards that include experts and elected laypeople alike (such as education and planning boards). In addition, the failings of representative democracy are ameliorated in the smaller and less populated jurisdictions of localities. In local governments, the ratio between the number of elected officials and the people whom they represent is far better than in central governments; it is easier to reach political compromises and agreements due to the smaller number of conflicting preferences and issues that needs to be addressed; and the ability of local officials to disperse and gather information to and from their residents is far better and cheaper. Thus, local governments are said to have become a more authentic embodiment of “public” values and therefore the most legitimate regulator of the environment.<sup>42</sup>

Yet the more dominant conception of local governments in this regard is that they, as a matter of fact, embody “private” traits such as pursuit of narrow self-interests, myopia, and favoring economic growth over other considerations. Moreover, localities’ unique characteristics — their smallness,

---

41 See Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 THEORETICAL INQUIRIES L. 113 (2005); John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485 (2002).

42 See Hills, *supra* note 41; McGinnis, *supra* note 41.

proximity to their residents, and lay participation in politics — render them more susceptible to capture by rent-seeking elites, corruption, and submission to the interests of local industry. Therefore, the political legitimacy of local environmental regulation is significantly diminished, as compared to that of central governments.

\* \* \*

The debate over the role of local governments in regulating the environment oscillates between viewing them, indeed conceptualizing them, as public entities and private ones. While in some cases the “public” nature of localities serves as an argument for vesting them with powers to regulate the environment, in other cases these very public traits render local regulation less legitimate and less efficient. Similarly, the “private” characteristics of localities also constitute a double-edged sword; at times justifying and authorizing local regulation, at other times delegitimizing it. Despite the apparent symmetry between the two “faces” of localities — the private and the public — where environmental regulation is concerned the balance between the traits associated with the “private” and those associated with the “public” seems to be tilted towards less local involvement.

This “tilt,” however, is both contingent and unstable. Indeed, some would argue that local governments have actually become more involved in environmental regulation over the past few decades. And when one examines international and global institutions, it is fairly obvious that this is, indeed, the case.<sup>43</sup> The United Nations and the World Bank, among others, are pushing for greater involvement of localities in implementing and executing various global and international environmental schemes. Moreover, local governments throughout the world are voluntarily adopting environmental regulation and assuming responsibilities that are more stringent than their states’.<sup>44</sup> And yet, in most jurisdictions, localities’ actual role in environmental regulation remains secondary, technical, and administrative, not fulfilling the potential that localists and new governance scholars attribute to them. Given the ambivalent nature of localities, the balance between local, state and global involvement in environmental regulation can easily shift in favor of the local. And crucially, this possible shift, as well as the current situation, is discursively dependent

---

43 See Ileana M. Porras, *The City and International Law: In Pursuit of Sustainable Development*, 36 *FORDHAM URB. L.J.* 357 (2008); Blank, *The City and the World*, *supra* note 25; Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 *URB. LAW.* 1 (2006).

44 See, e.g., Barak Y. Orbach & Kirsten H. Engel, *Micro-Motives for State and Local Climate Change Initiatives*, 2 *HARV. L. & POL’Y REV.* 119 (2008).

on the various stand-ins for the private and the public and on their continued justificatory power.

### III. THE PERSISTENCE OF THE PUBLIC/PRIVATE DIVIDE IN NATIONAL ENVIRONMENTAL REGULATION: THE ROLE OF CIVIC AND CORPORATE ENTITIES

The competition we have described between national and local governments as well as between national and global entities over the regulation of the environment are only two examples of much broader competition. In the new governance worldview, many contemporary problems and challenges require decision-making and implementation by different entities, be they territorial, functional, or governmental, regardless of their formal character as private or public. In this sense, new governance scholarship sees the world as comprised of many potential sources of authority that operate in a vast and diversified “market of authorities.” Thus, national and local governments are competing with business organizations, multinational and transnational corporations (MNCs and TNCs), global financial institutions, nongovernmental organizations (NGOs) and social movements as participants in the field of environmental regulation, profoundly changing the regulatory landscape.<sup>45</sup> The radical idea of new governance is that where regulation is concerned, there is no a priori difference between public and private entities, between governments and non-governments, and between politics and the market, nor should there be a preference for either side of these dichotomies. And this idea exemplifies most powerfully the demise of the public/private divide as a helpful dichotomy in legitimating regulatory schemes.

Despite the seeming disappearance of the dichotomy, however, surrogate concepts are being utilized in order to determine which entity is best suited to regulate the environment. In other words, arguments for and against the regulation of the environment by civil society entities hinge upon their efficiency, voluntariness, or self-interestedness — all surrogates for “private” — as well as on their participatory nature, inclusiveness or inefficiency — the various stand-ins for “public.” Furthermore, even though private corporations internalize environmental concerns into their decision-making processes, profit-seeking remains their paramount logic, overshadowing any other consideration. The involvement of NGOs and civil society organizations in environmental regulation is being criticized for being either too “private” or too

---

45 Ronen Shamir, *Capitalism, Governance & Authority: The Case of CSR*, 6 ANN. REV. LAW & SOC. SCI. 531, 536 (2010); Vogel, *supra* note 1, at 262.



“public.” The first line of critique relies on these entities being nondemocratic, nonrepresentative and motivated by narrow interests; the second line of critique rests on the “public” traits of civil society organizations such as inefficiency and susceptibility to capture.

### **A. Business Entities as Regulators**

Among the new potential and actual regulators of the environment, corporations, especially MNCs and TNCs, play a key role. For many years corporations approached environmental regulation as something that is imposed from above and devoted a lot of effort and money to resisting it.<sup>46</sup> In the new governance era, the story goes, their attitude dramatically changed and business corporations began to display responsible and moral behavior. Corporations became active participators in a host of regulatory practices, both through public-private initiatives such as co-regulation and negotiated agreements,<sup>47</sup> and by adopting unilateral voluntary practices. Such practices include taking part in certification programs or the adoption of codes of conduct and publishing externally audited corporate social responsibility (CSR) reports in an effort to improve their environmental and social performances.<sup>48</sup>

This growing involvement is explained in two ways. The first is celebratory: business involvement in environmental regulation is genuinely and profoundly transforming the corporations and has the potential to significantly enhance environmental protection. The second explanation is more skeptical and critical, viewing the growing involvement of business corporations in environmental regulation as a cover-up, “green-washing,” a cynical strategy aimed at appeasing the public and averting state-mandated regulation. Both explanations, however, remain captive to the public/private divide.

The first explanation, the “business case” for corporate environmental responsibility, recasts “public” considerations as “private” by arguing that over the long run it is good for business to protect the environment since such considerations have market value, thus potentially increasing profits. Corporations engage in environmentally-oriented CSR practices because CEOs, facility managers and other decision-makers within the firms believe that integrating social and environmental values into their firms’ operation

---

46 ANDREW J. HOFFMAN, *FROM HERESY TO DOGMA: AN INSTITUTIONAL HISTORY OF CORPORATE ENVIRONMENTALISM* (2001).

47 Gunningham, *supra* note 1, at 193.

48 *Id.* at 193.

is good for business.<sup>49</sup> According to this approach, for corporations to join voluntary programs and go beyond mere compliance with state regulation is a sound business strategy. Environmental self-regulation, in this view, is a manifestation of corporate self-interest because it improves the reputation of corporations, attracts new investors, strengthens stakeholders' relationships, has positive effects on employees, serves as a general corporate risk-management device, and, as a result, increases the share value of the business.<sup>50</sup>

Another way to describe the recasting of public values as private-corporate ones is that corporations are undergoing a process of "moralization" in which they internalize public values into their profit-seeking calculus. As Ronen Shamir describes: "Novel configurations of responsive and meta-regulation and subsequent displays of private and self-regulation represent for many a progressive attempt to create a viable regime that may better ensure corporate compliance with social concern over environmental . . . issues."<sup>51</sup> This genuine internalization of environmental concerns by some corporate officers is the best guarantee for a sustainable and long-lasting corporate commitment to such concerns.

Yet even though corporations promulgate social and environmental norms and operate in a regulatory terrain that was until not long ago the sole domain of public authorities, supposedly rendering irrelevant the public/private divide, this divide is still extremely important in legitimating environmental regulation and setting its limits. First, new governance prefers corporate self-regulation over state regulation since it is voluntary, non-coercive, market-driven and bottom-up, i.e., terms analogous to the private. Second, and as a consequence of this supremacy of the private, new governance proponents advocate claims of a general "private" immunity from state intervention in corporate actors'

---

49 IRA JACKSON & JANE NELSON, *PROFIT WITH PRINCIPLES* (2004); Jonathan C. Borck & Cary Coglianese, *Beyond Compliance: Explaining Business Participation in Voluntary Environmental Programs*, in *EXPLAINING REGULATORY COMPLIANCE: BUSINESS RESPONSES TO REGULATION* 139, 142 (2011).

50 Lee Burke & Jeanne. M. Logsdon, *How Corporate Social Responsibility Pays Off*, 29 *LONG RANGE PLAN.* 495 (1996); Bryan W. Husted, *Risk Management, Real Options, Corporate Social Responsibility*, 60 *J. BUS. ETHICS* 175 (2005); Lance Moir, *What Do We Mean by Corporate Social Responsibility?*, 1 *CORP. GOVERNANCE* 16 (2001); Karen E. Schnietz & Mark J. Epstein, *Exploring The Financial Value of a Reputation for Corporate Social Responsibility During a Crisis*, 7 *CORP. REPUTATION REV.* 327 (2005); Sankar Sen, C.B. Bhattacharya & Daniel Korschun, *The Role of Corporate Social Responsibility in Strengthening Multiple Stakeholder Relationships: A Field Experiment*, 34 *J. ACAD. MARKETING SCI.* 158 (2006).

51 Shamir, *supra* note 45, at 535.

environmental responsibility practices. Third, public considerations and private ones are still understood by many to be distinct in kind, with the former's adoption into the corporate decision-making process being dependent on the goodwill of corporate officers and shareholders. Thus, this recasting still maintains a clear distinction between "private" and "public" considerations, and only those that can be translated into economic profits are to be taken into account.

The second, more pessimistic and skeptical explanation views the attempt to describe corporations as having internalized public values into their decision-making processes as a sham. Critical observers argue that, in fact, corporations are still motivated solely by private profit-seeking. Corporate claims of having adopted public values and considerations are merely rhetorical, made in order to deflect the threat of more stringent mandatory governmental regulation,<sup>52</sup> or from fear they would become the target of "name and shame" campaigns by civil society organizations. According to this story, corporations with the assistance of market-friendly bodies such as market-oriented NGOs (MaNGOs) distribute the message of voluntarily framed environmental responsibility and successfully deflect the prospects of political interference in the form of binding governmental regulation. Furthermore, "public" regulation is portrayed by corporate advocates as an inefficient top-down uniform legislation that limits corporate flexibility, fosters "creative compliance" and a race to the lowest common denominator, impedes innovation, spurs the crowding out of intrinsic moral motivations, and thus ends up thwarting the environmentally responsible behavior of corporations.<sup>53</sup> As a result, instead of being a real instrument of change, corporate environmentally responsible practices have become an opportunity for green-washing.

Yet, these critical scholars do not dispute the "private" nature of corporations. On the contrary, they entrench and perpetuate it by arguing that business entities are inherently "private," understood as self-interested, exclusive and market-oriented, as opposed to the "public," conceived as altruistic, inclusive, democratic and political. Therefore, these critics continue, instead

---

52 Borck & Coglianese, *supra* note 49, at 157.

53 See Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory: A Survey of Empirical Evidence*, 15 J. ECON. SURVEYS 589 (2001); Orly Lobel, *Crowding Out or Ratcheting Up?: Fair Trade Systems, Regulation, and New Governance*, in FAIR TRADE, CORPORATE ACCOUNTABILITY AND BEYOND: EXPERIMENTS IN GLOBALIZING JUSTICE 313 (Kate Macdonald ed., 2009); Deborah E. Rupp & Cynthia A. Williams, *The Efficacy of Regulation as a Function of Psychological Fit: Reexamining the Hard Law/Soft Law Continuum*, 12 THEORETICAL INQUIRIES L. 581 (2011); Ronen Shamir, *Socially Responsible Private Regulation: World-Culture or World-Capitalism?*, 45 LAW & SOC'Y REV. 313, 322 (2011).

of extending new governance models further, what is called for is a return to classic governmental mandatory regulation.<sup>54</sup> Hence, not only the proponents but also the opponents of corporate environmental responsibility are still in the grasp of the public/private divide.

## B. Civic Organizations as Regulators

Corporate entities are not the sole private regulators that have emerged to prominence in recent years. They compete and cooperate with other civil society organizations, such as NGOs, social movements and local communities, which work strategically to shape market preferences, create new forms of consciousness, and, more generally, impose their own views of environmental responsibility on corporations. One common story concerning the involvement of civil society organizations in environmental governance is that they have entered this field following their failure to convince national and international regulators to issue mandatory regulation, backed by sanctions, to protect the environment, as well as their frustration with the many successful challenges to regulation from trade-oriented bodies in both the national and international arenas.<sup>55</sup> As a result, they have augmented their efforts to impact state and supra-state regulators with new governance tools, which have come to be known as “civil regulation.”

Civil regulation positions civil society organizations in a complex relationship *vis-à-vis* business corporations, on the one hand, and governmental entities, on the other hand, working both with and against them at the same time. Civic organizations employ adversarial strategies both to challenge environmentally irresponsible behavior by corporations, and to criticize governments for their lax environmental regulation or deficient enforcement. They do so by using various forms of media, gathering and disseminating information, monitoring state regulation and its implementation, organizing high-profile “name and shame” campaigns, orchestrating consumer boycotts all around the globe, and leading legal challenges against state entities.<sup>56</sup> But civic organizations

---

54 Shamir, *supra* note 53, at 322; Shamir, *supra* note 45, at 539, 545.

55 Vogel, *supra* note 1, at 264-65.

56 Gunningham, *supra* note 1, at 196. Some of these campaigns, such as those against Shell and Nike, were so successful that brand-sensitive corporations are now willing to “voluntarily” adopt social and environmental norms, not mandated by national or international law, in order to make sure they do not fall prey to the next campaign. More recently, civil society organizations have begun to simultaneously also cooperate, both informally and formally, with corporations, moving “from boycotts to global partnerships.” See Joseph Domask, *From Boycotts to Global Partnerships: NGOs, the Private Sector, and the Struggle*

also cooperate with both corporations and governments. Such cooperation can take different forms, the most prominent of which are the many eco-labeling and certification programs that have emerged in the recent decade, in which NGOs set the standards, require external monitoring and certify compliance,<sup>57</sup> and lobby for environmental legislation and regulation.

These complex relationships, although depicted as another example of the withering away of the public/private divide, actually rely upon and even reinforce it. While abstaining from explicitly using the term “private” to describe the nature of civil regulation, its supporters mention a host of surrogate traits such as voluntariness, flexibility, and responsiveness. Conversely, instead of emphasizing the more public characteristics of these organizations, they legitimate civic involvement in regulation by referring to the unique ability of civil organizations to serve the genuine interests of the public, due to their detachment from populist and “captured” politics. Thus, although civic involvement in environmental regulation might be understood as demonstrating the drift away from the distinction, it is, in fact, merely a terminological shift.

Opponents of civil regulation are also caught in the grasp of the public/private divide, albeit in a different, negative way. Some critics point out that such organizations are “too private”: nondemocratic, self-appointed, nontransparent, non-accountable, and representing narrow interests or interest groups. These traits render civic organizations illegitimate regulators of the environment. Other critics, however, stress the “too public” nature of these civic entities: inefficient, bureaucratic, and susceptible to capture by rent-seeking elites. Such characteristics raise serious concerns regarding their aptitude to regulate the environment.

We have thus far demonstrated that the purported demise of the public/private divide is grossly overstated. It has not disappeared, but rather has been replaced by a set of analogous values and ideals. In lieu of “public” one finds references to participation and democracy, but also to coercion and inefficiency. And instead of “private” there is a host of surrogate concepts such as discrimination, myopia and exclusion, on the one hand, and voluntariness, flexibility and efficiency, on the other hand. Hence the disappearance of the

---

*to Protect the World's Forests, in* GLOBALIZATION AND NGOS: TRANSFORMING BUSINESS, ENVIRONMENT AND SOCIETY 157 (Jonathan P. Doh & Hildy Teegan eds., 2003).

57 Tim Bartley, *Certification as a Mode of Social Regulation, in* HANDBOOK OF THE POLITICS OF REGULATION 441 (David Levi-Faur ed., 2011), available at <http://regulation.huji.ac.il/papers/jp8.pdf>. A certification program can become more “public” if a governmental agency decides to adopt it as a prerequisite for participation in a public program.

public/private dichotomy is, in fact, merely a discursive displacement, while the underlying values remain almost intact.

#### **IV. THE CONSEQUENCES OF THE PERSISTENCE OF THE PUBLIC/PRIVATE DIVIDE**

If, as we have shown in the previous Parts of this Article, the underlying values of the public/private divide are still important, the denial of the foundational dichotomy might paradoxically lead to its entrenchment, potentially resulting in three detrimental effects. First, the rhetoric of the demise of the dichotomy enables the tilt of new environmental regulation towards the private, which might lead to regressive consequences. Hence, new governance schemes consistently prefer solutions that advance efficiency, voluntariness, entrepreneurship and competition — all values closely related to “the private.” Second, the argument that the public and the private are no longer antagonistic to each other but, rather, are compatible and point to the same regulatory results, is part of a larger ideological shift, marked by an effort to replace conflict and discord with cooperation and alignment of interests. The fantasy of a frictionless and harmonious world is a driving force behind the said collapse of the public/private divide, thus for those skeptical of such a utopia, these claims merely hide the reality of strife and conflict rather than change it. Third, the division of the world of environmental regulation into a dichotomy in which there is only public and private excludes the possibility of a “third” option, which is distinct from both the public and the private. Claims that the divide has been overcome and that a new synthesis has emerged mistakenly present new environmental regulation as a third way, which is neither public nor private. But if, as we have demonstrated, these new regulatory schemes are not much more than a reorganization of the same elements and same concepts, the claims of transcendence merely hide the need to develop a real and viable third option and impede the possibility of doing so.

##### **A. The “Tilt” Towards the Private**

Despite the disappearance of the public/private dichotomy, many fundamental concepts, such as interest, profit, and stakeholder, are in fact based on preexisting ideas about self and other, private and public. Put differently, in order to understand how courts and regulators interpret what “interest” is — e.g., when they construe the operative term “best interest of the corporation/stockholders” — it is necessary to see that they are only concerned with the financial self-interest of those who own stock in the corporation. Left out

are nonfinancial interests as well as interests of non-stockholders. Implicitly, therefore, courts and regulators still hold onto a rigid distinction between “private” interests — narrowly understood as merely financial and relating to oneself — and “public” interests, which are potentially broader both in terms of the types of interests that they involve and in their being other-regarding.

Courts and regulators do not state that they give precedence to private interests over public ones. They simply assume that where business corporations are concerned, the objective and natural meaning of the term “interest” is the private rendition of it. Similarly, “profit” is conceived in a narrow and self-centered manner, excluding nonfinancial gains and profits accruing to a wider range of parties, such as employees, service providers, local communities and perhaps even the environment at large. Despite the supposed absorption of public values into the logic of the profit-maximizing corporation, which has been hailed by new governance proponents, “profit” is still initially understood to be a “private” matter. Thus, the said public values are not only secondary to the private ones, but are also outside what courts and regulators understand as the neutral and natural meanings of the terms “profit” and “interest.”

This naturalized and privatized understanding of concepts such as profit and interest causes a systematic tilt towards regressive outcomes. The problem with such a tilt is that it is done almost unknowingly, and is not a product of a deliberate and well thought-through decision-making process. Although the policymaker might sometimes “balance” public considerations against the need to maximize profits or to protect the interests (or property rights) of shareholders, he or she will, on average, feel pressured to protect the private party against such public encroachment.<sup>58</sup>

## **B. The Fantasy of a Frictionless World**

New governance scholarship claims that we have moved to a world where the conflict between the public and private has already disappeared. The collapse of this fundamental conflict reflects another basic tenet of new governance theory, according to which the tension between efficiency and morality has dissolved, since the two have proven to be aligned. Instead of balancing between inherently conflicting interests — between the private interests of corporations and individuals and the public good, or between egoism and altruism — new governance literature claims that these supposedly competing interests are, in fact, united. Neoliberal and new governance literature denies any conflict between “private” and “public” values and ideals, and claims that there is a perfect alignment between them. Environmental regulation thus manifests

---

58 MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987).

this alignment by claiming to advance efficiency, competition and personal responsibility, but also participation, deliberation and mutual dependency. The disappearance of conflict is one of the hallmarks of contemporary iterations of new governance with its varied reform projects. The competing considerations and values are seen as emanating from the same moral foundations rather than from a fundamental conflict between the private and the public.

The business case for corporate self-regulation of the environment is a prime example of this conciliatory impetus. There is no need to balance the economic interests of the corporation against the need to protect the environment, goes the claim, but, rather, the protection of the environment *is* itself economically efficient. Economy, in other words, is moral. Although this claim might sound like an empirical argument about the factual efficiency of certain environmental measures, it is actually a normative and ideological statement, legitimizing self-regulation. Due to the manipulability of the cost-benefit analysis, many of the costs involved in protecting the environment are presented as being dwarfed by the benefits that accrue to the corporation following such measures.<sup>59</sup>

However, while legitimizing self-regulation, the argument from efficiency also *delegitimizes* other forms of regulation, which do not pass muster applying the cost-benefit analysis. Indeed, the move from state-generated command and control regulation to corporate self-regulation means that (almost) only “efficient” regulation — that is, regulation that is cost-effective to the corporation — is morally and politically legitimate and should be adopted. This move also suggests that the corporation is best situated to perform this cost-benefit calculus and to design tailored regulatory measures, since it possesses the relevant information regarding the costs and benefits, as well as the unique characteristics of the regulated corporation.

In fact, the alignment of efficiency and environmental considerations both reflects and reinforces the indignation of “the public” as coercive, inefficient, captured and bureaucratic, clearly inferior to the private — voluntary, efficient, and therefore legitimate. The uniqueness of this indignation paradoxically arises from the fact that contrary to the traditional conservative distrust of the state, new governance proponents support and justify regulation, albeit of a different sort and resting on different grounds. New governance thus reorients regulation and the logic of the state in the direction of the private, despite its claim to having overcome the public/private divide.

In this sense, new governance theory is part and parcel of neoliberalism, as a political theory that reconceives the relationship between state and society,

---

59 See, e.g., Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002).



politics and the market, and the public and the private. Despite its ostensible embrace of public values such as democracy, participation, and deliberation, neoliberalism is heavily biased towards favoring the “private.” Efficiency, competition, entrepreneurship, personal responsibility, and flexibility are characteristics that are associated with “private” entities, and often take precedence over open and public deliberation, and free and equal participation. And although new governance depicts the relationships between state and society and between the public and the private as based on equal partnership, it in fact prefers and advances the private and the values associated with it.

### **C. The Disappearance of a “Third”**

The resilience of the powerful public/private divide results in a blindness to conceptual options that are neither public nor private. And the claims that this dichotomy has been transcended lead to complacency with solutions that remain, in fact, in its grasp. Despite new governance scholars’ depiction of new environmental regulation — flexible, responsive, bottom-up, coauthored by the regulator and the regulated — as a mark of the demise of the public/private divide, both the corporation and the state remain inherently the same as before. One of the prime examples of the unchanged nature of “the private” is the fact that corporations are still conceptualized, theoretically and doctrinally, as profit-maximizing and owing their primary duties of loyalty to their shareholders, leaving out the public as a whole. Profit-maximizing, however, is ideologically defined. As Gerald Frug argues:

[T]he argument that “shareholders” have an “interest” only in “profit maximization” plainly denies that they are human beings with many conflicting desires. People are treated as wanting, in their capacity as shareholders, things that as consumers or workers they may well detest. Moreover, although market theory demands that managers objectively comply with shareholders’ desires, it is clear that the managers must use their discretion in order to do so. This discretion, however, permits them to deduce contradictory courses of action from the profit-maximization slogan. Whether managers raise their own salaries or lower them, contribute to political action committees or refuse to do so, break the law or comply with it, all their actions can be seen either as profit-maximizing or as non-profit-maximizing.<sup>60</sup>

---

60 Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1362 (1984).

Furthermore, corporate policy is portrayed as governed largely by the shareholders' subjective interest. Yet the shareholders' interest is not discovered by asking them what they want, but instead is defined narrowly as the fully objectified abstraction of "profit-maximization," attributable to all shareholders of all corporations.<sup>61</sup> Additionally, the category of "stakeholders" — supposedly marking a real transformation in the nature of the corporation — is only slightly wider than that of shareholders, and the duties of care which corporations owe to such stakeholders are nonbinding and depend on the goodwill of the corporation.<sup>62</sup> Thus, if profit-maximization, shareholders' interests, and stakeholders were differently defined, corporate management would have to pursue a different path. For instance, if it were the case that stricter environmental standards are good for business, corporate management would be obligated to adopt them, due to its duty to pursue profit-maximization. Consequentially, courts would have to overturn management's decisions not to do so, thus making such "voluntary" environmental standards in fact mandatory.

Redefining profit-maximization and shareholders' interests is not the only "third" option that could transcend the public/private divide. Another option is a profound conceptual and structural transformation of the corporate entity itself. Corporations can and should be understood as being no less public than they are private. Indeed, seeing them as entities established by the public and for the public — even if in the unique form of a "private" entity — could reverse the foregrounding of their private nature. Thus, corporations need to be infused with communal values in their regular business management, turning them into a form of participatory democracy. Such structural changes might involve the inclusion of environmental NGOs in the corporation's board of directors, issuing a "golden share" to the government in matters pertaining to the environment, and, more generally, subjecting the corporation to greater

---

61 *Id.* at 1307-08.

62 See JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* 187-88 (2006) (showing that some scholars advocate more stringent regulation of private corporations precisely for the reason that corporations have become as powerful and rich as some states, and since they are acting as de-facto regulators); Dan Danielson, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 *HARV. INT'L L.J.* 411, 412 (2005) (showing that corporations shape the regulatory landscape not only in developing countries but in developed countries as well. They do so by using their immense economic and political power to influence decision-makers through lobbying and campaign contributions, as well as by directly shaping regulation through sophisticated interpretations, evasions, and by making rules where none exist.).

democratic-participatory control.<sup>63</sup> This way, private corporations could serve as vehicles for the creation of “new forms of human association based upon the communal tie created by the pursuit of common goals.”<sup>64</sup>

A similar reconceptualization becomes possible also in the realm of local governments once the public/private dichotomy is destabilized. As various scholars have convincingly argued, cities are, in fact, complex and multifaceted creatures that defy easy categorization as either public or private.<sup>65</sup> Instead of merely oscillating between the public nature of the city on the one hand and its private traits on the other, it might be possible to imagine the city as offering a third option. Such an option would be based on the unique characteristics of localities, which render them intermediary entities. Localities are in fact struggling to normatively mediate between the “private” interests of the local community and the national interests of the entire “public.” They are indeed

---

63 Polanyi argued that the construction of a “self-regulating” market necessitates the separation of society into economic and political realms. The free market’s attempts to separate itself from the fabric of society and to “subordinate the substance of society itself to the laws of the market” are countered by society’s natural response to protect itself from the social dislocation imposed by an unrestrained free market, resulting in what he called the “double movement.” The double movement, which is based on a series of oppositions such as market/society, economics/politics, and private/public, is, however, unsustainable due to the many internal contradictions that end up in the collapse of both market and society. He therefore proposes to transcend this dualism through the great transformation, namely the conscious subjection of the market to democratic society. KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGIN OF OUR TIME* (1944).

64 Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1072 (1980). On the infusion of communal values into business management, see ELTON MAYO, *DEMOCRACY AND FREEDOM* (1919); ELTON MAYO, *THE HUMAN PROBLEMS OF AN INDUSTRIAL CIVILIZATION* (1933); PHILIP SELZNICK, *LEADERSHIP IN ADMINISTRATION* (1957); Philip Selznick, *Foundations of the Theory of Organization*, 12 AM. SOC. REV. 23 (1948).

65 Frug explicates that the division of corporations into either public or private occurred in the nineteenth century as an attempt by liberal scholars and jurists to resolve the anomalous status of corporations. Corporations were viewed as both right holders and power wielders, therefore as both protectors of individual rights and a threat to them. Liberal thinkers, who envisioned a world neatly divided between individual rights holders and state power, divided corporations into either public or private. In this newly formed division, cities were defined as “creatures of the state” and thus “public,” while business corporations were conceptualized as protecting individual (property) rights and thus “private.” Frug, *supra* note 64, at 1099-109.

both voluntary and coercive: on the one hand, at least when compared to the state, cities' residents choose to live in them rather than move elsewhere; on the other hand, cities possess coercive powers over their residents, backed by enforceable sanctions. And localities, more than any other governmental or private entity, are both bureaucratic and directly participatory.

Viewing localities as neither public nor private (or as both) bears the potential to overcome some of the intractable tensions that plague legal, economic and public choice theory with regard to environmental regulation. As argued above, global public goods, such as the environment, require coordination, cooperation and peer-participation on a global scale for the success of any regulatory effort. According to economic and public choice theory, the existence of a multitude of localities and other subnational actors, characterized by myopia and parochialism, leads invariably to the tragedy of the commons.<sup>66</sup> Consequently, any action taken by localities to deal with environmental issues of a national or global scale is rendered both irrational and ineffective.<sup>67</sup> Legal theory follows, arguing that cities, therefore, should have legal power to act only to the extent they can internalize all the costs of their actions, which is not the case in most environmental issues.<sup>68</sup> Therefore the power to regulate the environment should remain at the highest governmental level and must not be decentralized.<sup>69</sup> But since, as discussed above, states are also incapable of effectively exercising their regulatory power over the environment, and international bodies are unable to pass binding regulation, we have reached a regulatory dead end (eventually leading to the devolution of regulatory powers to private entities).

Yet the understanding of cities as parochial and self-interested creatures is often a self-fulfilling prophecy. It prompts national legislators, administrators and courts to issue rules and develop doctrines that "privatize" the city and weaken its public function, turning it into a market actor that is captive to a "fee for service mentality."<sup>70</sup> Therefore, if we refuse to view localities as inevitably myopic and parochial, what seems to be a dead end might become an opportunity. And, in fact, localities operate in ways that demonstrate their potential and the inaptitude of the theories that conceptualize them

---

66 Hardin, *supra* note 36.

67 Esty, *supra* note 37.

68 COOTER, *supra* note 32.

69 See Stewart, *supra* note 39.

70 Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23 (1998); Porras, *supra* note 25. A radical version of this privatized notion of cities is the recent decision by the government of Honduras to sign a deal with private investors for the construction of three privately-run cities with their own legal and tax systems. See *Honduras Signs Deal to Create Private Cities*, N.Y. TIMES, Sept. 5, 2012.

as either private or public. Indeed, as many a study has shown, contrary to what public choice theory predicts, local governments currently engage in initiatives to regulate a multitude of environmental issues of different scale, both independently and in cooperation with other cities, as well as with states, non-state actors and even international bodies.<sup>71</sup>

Local initiatives are not restricted to traditional environmental issues such as waste disposal and recycling, or water or air pollution; rather, some cities are involved in global attempts to lower their carbon footprint and combat climate change.<sup>72</sup> Many local governments that are addressing climate change (those in the United States, for instance) are doing so in the absence of their national government's participation in the Kyoto Protocol,<sup>73</sup> and without a binding obligation to reduce GHG emissions. Such initiatives reveal the potential of cities to resist their theorization as either self-interested or as purely state agents, as they are willing to shoulder the costs of local climate change initiatives when the benefits are shared not only nationally, but also planet-wide.<sup>74</sup>

The ongoing attempts to impose the public/private distinction upon local environmental regulatory initiatives distort the potentially positive role of

---

71 Porras, *supra* note 25.

72 See, e.g., Crawford, *supra* note 25; Engel, *supra* note 25; Granberg & Elander, *supra* note 25; Kaswan, *supra* note 25; Schroeder & Bulkeley, *supra* note 25.

73 Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162.

74 These initiatives have been explained by economists and public choice theorists as manifesting local self-interest. Some argue that climate change regulation can be the source of local economic benefits. Others argue that it provides political opportunities to local officials who take strong stands against what are perceived as entrenched industrial interests, thus aligning themselves with a more progressive high-profile energy agenda. Economic and political opportunism aside, for some local governments, taking action to reduce climate change is just being responsive to their voters' preferences and in other cases it is motivated by a desire to attract the type of residents who are interested in such environmental actions. See Kirsten H. Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. L. 1015 (2006); Orbach & Engel, *supra* note 44. Be that as it may, for our purposes it is important to note the wide and rich motivations and considerations that cities take into account as part of their decision-making process on environmental issues, which is a far cry from the dull repertoire attributed to them by both those who condemn them as mere creatures of the state and thus inefficient, rigid and political and those who denounce them as rent-seeking entities motivated by narrow self-interest in a private corporate-like fashion.

cities as regulators of the environment due to their unique nature. Freeing cities from the grip of the public/private divide, and understanding them as the complex creatures they are, may enable them to become agents of change acting in the interest of other cities as well as other nations around the globe. Such measures would go beyond the illusion of the demise of the public/private divide, would in fact overcome it and render it obsolete.

## CONCLUSION

The public/private divide, we have argued, plays a part in perpetuating the social order in which cities, states and international bodies are weakened and environmental responsibility is de-radicalized, thus hindering any effort to seriously transform the results of the power play among state, market and society. If our analysis is correct, the only hope for a radical transformation in the way the environment is regulated lies in the ability to transcend the public/private divide and replace it with a “radical democracy”<sup>75</sup> that alters the very logic of operation of current institutions as well as their self-understanding, thus changing the institutions themselves. Without a paradigm shift, there will be no chance for real change in the way the environment is governed, a change that proves sustainable and reverses current trends of global degradation for our benefit as well as that of future generations. Of course, no results are, or can be, guaranteed. While radical democratic transformation in current institutions and their logic of operation could bring about an improved environment, it could also unleash forces that lead us in the opposite direction. Nonetheless, there are indications that the former is more likely.

If the argument we make in this Article sounds utopian that is because it is. But as critical legal scholars have pointed out repeatedly, utopia is not an anathema, if we understand it “as a vision of the world derived from unrealized and unfulfilled tendencies in current society that threaten to break through the existing order and cause its transformation.”<sup>76</sup>

---

75 See Frug, *supra* note 64, at 1070 (quoting KARL MANNHEIM, *IDEOLOGY AND UTOPIA* (Louis Wirth & Edward Shils trans., 1936)).

76 See ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS* (1985).