

Poverty Offsetting

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INTRODUCTION

The market now offers consumers an expanding array of options to offset the harms of their consumption.¹ Travel websites and politicians alike sell the advantages of carbon offsetting. But offsetting options need not be limited to correcting for environmental harm; consumption is also associated with worker exploitation and people struggling with poverty. Individuals can and do respond to such poverty-related harms by altering their consumption decisions and by making voluntary supplemental payments following consumption. This Essay explores the possibility of poverty offsetting. Building upon carbon offsetting's basic insight—that people should correct for the negative externalities of their consumption—poverty-offsetting institutions would enable individuals to correct for the poverty-related harms associated with their consumption.

Although the convenient accounting of consumers and producers often serves to deny the existence of harms tied to consumption, many forms of consumption are associated with poverty and poverty-related externalities. By emphasizing that consumption is not an isolated activity but, instead, implicates the consumer in the entire line of production and distribution, poverty-offsetting institutions can help change the norms surrounding consumption. Poverty offsetting offers the possibility of raising general awareness of the relationship between consumption and poverty. Consumer indifference to the conditions and wages received by workers in the production of particular products helps ensure both that prices are kept low and that many people continue to lead lives marked by poverty. Even if some such production practices arguably raise living standards compared to the false alternative of unemployment, people are, or should be, troubled by the poverty associated with their consumption. Awareness of the true social costs of consumption hopefully will lead to consumer-demanded improvements in how goods make it to the market, but even if it does not do so immediately, poverty-offsetting institutions provide a direct mechanism for socially minded consumers to correct for the harms of their consumption.

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¹This Essay is a companion piece to Ezra Rosser, *Offsetting and the Consumption of Social Responsibility*, 89 WASH. U. L. REV. 27 (2011).

By treating production processes as irrelevant or of secondary importance except in rare circumstances, market practices and market regulations implicitly suggest that consumers should not concern themselves with the production processes behind particular goods and that supplemental offsetting payments are nonsensical.² At its core, offsetting amounts to a voluntary supplemental payment—motivated by a sense of social responsibility—made in connection with consumption. It is hard to understand why people would make such payments if people are nothing but wealth maximizers. Rational market actors seek goods at the lowest price, and this downward price pressure is but an example of the power of competition to improve human well-being. From this perspective, the ideal market is one with minimal government involvement and maximum space for entrepreneurs to seek out new opportunities. Without question, capitalism, coupled with increased global trade, has improved the lives of many people across the globe.³ Indeed, frequently using the rising standards of living in Asia as the best contemporary example, some argue that capitalism has been the single most important tool in the fight against poverty. Attention to production processes, the thinking goes, is misguided in light of the dynamic power of capitalism. Concern for anything other than low price threatens to kill the golden goose.

At the extreme, free-market ideologues deny the need for the existing production governance laws promulgated and administered by the federal government domestically, to say nothing of the possibility of enhanced international worker protections and rights. Far-right politicians and media outlets accordingly stir up their base with periodic calls to abolish or impose severe funding cuts on agencies such as the Environmental Protection Agency and the Occupational Safety and Health Administration. Similarly, proposals to increase the minimum wage or support the ability of workers to unionize inspire an inevitable backlash with rhetoric that suggests that the U.S. economy would collapse were all workers to earn a living wage. The intellectual purity of free-market ideology is strained slightly by general acknowledgement that slavery and child labor is wrong, that companies ought to be prevented from simply dumping their waste into neighboring rivers, and that government should protect consumers from defective products. But

² For more on the process/product distinction, see generally Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525 (2004).

³ See Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 HARV. L. REV. 1528, 1531 (2008) (book review). The debate on whether capitalism alleviates or causes poverty is, not surprisingly, expansive. See Lee Anne Fennell, *Interdependence and Choice in Distributive Justice: The Welfare Conundrum*, 1994 WIS. L. REV. 235, 251–52 (1994) (summarizing both sides of the debate). My view is that antipoverty advocates, even as they push for a better structure and improved social safety net, ought to acknowledge the transformative aspects of capitalism. See also Rosser, *supra* note 1, at 89 n.213 (discussing the relationship between capitalism and poverty). But see Barbara Stark, *Jam Tomorrow: Distributive Justice and the Limits of International Economic Law*, 30 B.C. THIRD WORLD L.J. 3, 14 (2010) (noting that the premise that trade boosts economic growth and reduces poverty and inequality “has been criticized as the self-serving ideology of the developed states”).

whether out of intellectual precommitment to free trade or willful blindness to problems in how goods are produced, free marketers seem largely indifferent to whether our trading partners meet even these minimum standards, much less heightened environmental and workplace standards.

Bucking the assumptions of free-market advocates and the rich literature that assumes a flattened view of product competition in which price trumps all other considerations, American consumption patterns attest to the concern that many people have for how goods are produced and the conditions of workers.⁴ Fair trade goods and certifications, once the province of specialty stores such as Ten Thousand Villages, grace the aisles of groceries, clothing stores, and even the low-price king, Wal-Mart. Activism, particularly on college campuses, and media attention made the term “sweatshop” mainstream and forced major brands to respond to accusations that they were exploiting workers in their factories overseas. Historically, boycotts have been used to protest everything from the slave trade to colonialism to inadequate pay for migrant workers. Finally, preferences for locally or domestically produced goods—promoted through, for example, the “Made in the USA” campaign—reflect general concern about the decline in American manufacturing and awareness that price alone should not necessarily determine consumption choices.⁵ But even as these examples⁶ refute the standard assumption of consumer indifference to the supply chain and production processes, they also highlight the limited nature of the options currently available to socially minded consumers.

This Essay looks at the possibilities offered by offsetting to correct for the poverty-related harms of consumption and to facilitate socially responsible consumption. Although underexplored and underinstitutionalized, poverty offsetting promises to help consumers better integrate their social values with their consumption patterns. What poverty offsetting provides is a way for consumers to act upon their values without asking them to give up all forms of consumption associated with poverty-related harm. This is particularly important when it comes to poverty because the position that we should renounce consumption altogether or limit our consumption to unambiguously socially perfect products is largely untenable. Not only are few of us (besides perhaps priests) willing to live the life of an ascetic, but also if we were to drastically reduce our level of consumption, even if the reductions were limited to those products associated with poverty, the poor could be harmed by the resulting general economic decline. Although sometimes derided as little more than the selling of consumption indulgences, offsetting is

⁴ Or, put differently, “Consumers . . . often have ‘preferences for processes.’” Kysar, *supra* note 2, at 529.

⁵ Problematically, companies can wrongfully take advantage of this consumer preference for nationally produced goods. See Emek Basker, *The Causes and Consequences of Wal-Mart’s Growth*, 21 J. ECON. PERS. 177, 192–93 (2007) (discussing media coverage of Wal-Mart putting “Made in the USA” labels on products produced overseas).

⁶ For other examples that show that “consumer decisions can be directly political,” see Michael Schudson, *The Troubling Equivalence of Citizen and Consumer*, 608 ANNALS AM. ACAD. POL. & SOC. SCI. 193, 198 (2006).

perhaps the best way for individuals to correct for the production and consumption externalities of their consumption.

The first glimmer of poverty offsetting as a routine market practice can be seen in the end-of-the-checkout-line charitable donation request. Although probably most prevalent in grocery stores, charitable solicitations by store employees at the moment of purchase are increasingly a standard part of the shopping experience. Whether you are getting movie tickets or paying for your goods at an electronics outlet, the end-of-the-checkout-line request has become ubiquitous. The request comes just when you have your wallet open and when—in light of the nature of the goods purchased and your ability to make unnecessary purchases—you might be particularly willing to donate. But, despite glimpses of consumer concern about production processes, such donations and other forms of poverty offsetting remain peripheral to consumer expectations and the way that we conceptualize the basket of products we consume. Equally significant, such calls to donate are generally open ended and not tied to the goods purchased or the harms associated with particular consumption choices.

Carbon offsetting offers a pointed contrast. Compared to carbon offsetting norms, poverty offsetting as it currently exists is underdeveloped and underinstitutionalized. Decades of educating the public and lobbying efforts are finally paying dividends for the environmental movement: people generally know that their consumption of gasoline, for example, imposes negative externalities on the atmosphere. Partisan debate about how to address climate change aside, environmentalists deserve credit for having established a baseline societal understanding that environmental harms are often associated with consumption. Among those consumers with disposable income, a norm of making supplemental carbon offset payments is emerging.⁷ This norm is reinforced by the range of service providers and multiple ways that consumers can offset their carbon emissions. The environmental offset market offers offset options tied to household energy consumption, vehicle use, airplane travel, and even weddings. Depending on the provider consumers pick, their offset payments can go towards everything from methane capture and reforestation to alternative energy projects and carbon market credits. The environmental field has taken the lead in defining offsetting and establishing norms of consumption that recognize production and consumption externalities. In practice, therefore, poverty offsetting likely will follow the path blazed by environmental offsetting, with third-party providers playing a critical transactional role collecting offset payments from consumers and distributing these proceeds directly to the impacted producers or indirectly to non-profits aiding those communities. Similarly, a mature poverty offset market would support a range of providers who would compete on everything from ease of use and service quality to transparency and measurable outcomes. Poverty offsetting, and to some extent carbon offsetting as well,

⁷ See Marc N. Conte & Matthew J. Kotchen, *Explaining the Price of Voluntary Carbon Offsets*, 1 CLIMATE CHANGE ECON. 93, 93–95 (2010).

is in its nascent stage, which means that it would be overly speculative to define fully the evolution of offset institutions. But the future growth and direction of poverty offsetting is predicted, and informed, by the rise in carbon-offsetting options and the related emergence of consumption-offsetting norms.

The focus of this Essay is the relationship between poverty offsetting and the state. In an earlier paper, *Offsetting and the Consumption of Social Responsibility*, I explored the rise in offsetting and the motivations behind offsetting.⁸ Taking off from there, this Essay begins, in Part I, by sketching the contours of what an institutionalized form of poverty offsetting might look like. The goals of such an institution are increasing awareness of the poverty-related harms of consumption and transferring offset payments to impacted communities. Part II discusses the relationship between poverty offsetting and the state, moving from a thin conception of the state as merely a market regulator to a thick understanding of the state as dynamically influencing and responding to the market. Poverty-offsetting behavior can provide regulators with information about consumer recognition of the need for market regulation and, by highlighting market shortcomings, might change societal norms towards a stronger and more involved state when it comes to the market. In Part III, I consider the citizen-consumer identity and the place of economic tools in the fight against poverty in light of offsetting. I argue that antipoverty advocates need to move beyond utopian rights discourse and take seriously what markets can do to lessen poverty. Although this conclusion will strike some readers as heretical, I believe poverty offsetting not only invites unexpected allies to join the fight against poverty but also embodies the pragmatic idealism the consuming public is prepared to embrace.

I. POVERTY-OFFSETTING INSTITUTIONS

The primary goal of poverty offsetting is to change the social norms that surround consumption. By confronting the possibility of making supplemental payments to alleviate the poverty associated with consumption, consumers hopefully will consider and better understand the harms of consumption. This goal is grounded in an appreciation of the role social norms can play in human behavior and public policy. Nobel laureate Douglass North writes:

Institutions are the rules of the game of a society, or, more formally, are the humanly devised constraints that structure human interaction. They are composed of formal rules (statute law, common law, regulations), informal constraints (conventions, norms of

⁸ Rosser, *supra* note 1. One way to think about how these two pieces relate is that the first is broader—covering offsetting, not just poverty offsetting—and more theoretical, while this Essay has a narrower focus and is more pragmatic.

behaviour and self-imposed codes of conduct), and the enforcement characteristics of both.⁹

This definition highlights that the distinctions sometimes made between formal and informal rules may not be determinative of behavior.¹⁰ In some instances informal institutions (social norms) can work as well or better than formal institutions (laws).

Creation of formal mechanisms for consumers to make offset payments is an important first step, but the particular details of such mechanisms are less important than the effect such mechanisms could have on consumption norms. An institutionalized set of poverty-offset options would call attention to the relationship between consumption externalities and global poverty. Just as societal knowledge of global warming and consumption externalities is a necessary precondition for making headway on climate change, there is tremendous value in getting people to consider the production processes underlying the products they purchase. The idea that consumption is *causing* poverty need not ground the recognition that social responsibility extends to consumption choices. Although some people will attribute causation to consumer indifference toward production standards and worker treatment, it is enough if individuals recognize that the goods they consume are problematically associated with poverty.¹¹ Poverty offsetting, by calling attention to this association, can help replace consumer apathy regarding product origins with awareness of the human costs of the products, and their low prices, enjoyed by consumers.

Consumer indifference—to whether suppliers pay workers a living wage or a pittance, for example, or whether the production process ends up condemning an area to poverty through excessive resource depletion—manifests itself through the primacy of price.¹² The goal of increasing recognition of the poverty-related externalities of consumption would be to

⁹ Douglass C. North, *The New Institutional Economics and Third World Development*, in *THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT* 17, 23 (John Harriss et al. eds., 1995).

¹⁰ A simpler proposed contrast such as, “[a] norm is a practice and a law creates an obligation,” risks overstating the difference between formal and informal rules because norms can be subject to a range of enforcement mechanisms and be felt as obligations. Saul Levmore, *Norms As Supplements*, 86 VA. L. REV. 1989, 1989 (2000).

¹¹ Although it is beyond the scope of this paper and at least the early project of poverty offsetting, a more expansive understanding of the harms of consumption would consider not only production externalities but also connection between consumption and inequality. See, e.g., Juliet Schor, *The New Politics of Consumption: Why Americans Want So Much More Than They Need*, BOS. REV. (1999), available at <http://www.bostonreview.net/BR24.3/schor.html> (arguing that consumption practices “exacerbate and reproduce class and social inequalities” and perhaps worsen income inequality).

¹² Low prices force suppliers to reduce input costs—including wages and worker safeguards—to be able to hit price points. The rise of a few firms with sufficient market share in the commercial sector that they can dictate terms to suppliers (Wal-Mart is the leading example of such a company) contributes to the price and input cost pressure felt first by production companies and ultimately by their workers. See Justin R. Watkins, Comment, *Always Low Prices, Always at a Cost: A Call to Arms Against the Wal-Martization of America*, 40 J. MARSHALL L. REV. 267, 289–93 (2006).

change how consumers relate to the market and could be met even if few people actually make offsetting payments.¹³ A dominant message of our society is that individual worth is correlated with possessions and with consumption levels. This cultural value pushes people to concern themselves with what they can purchase and often to be (willfully in some cases) blind to production and consumption externalities. Changing social norms so that we take some responsibility for the association between poverty and many of our purchases involves first exposing people to the idea of social harm associated with consumption. Final goods are best understood as being situated at the end of a production process that should matter to consumers. Exposure to the related ideas that consumption sometimes is linked to poverty and that a partial solution is available through offsetting will not convince everyone to contribute financially. But exposure to poverty offsetting might inspire dialogue and more critical consideration of the nature of consumption. Moving consumers from apathy to awareness of production externalities sets the stage for individuals to act as socially responsible consumers and even perhaps as citizens.

Poverty offsetting's second goal is to improve the lives of the poor, to reach those who live in poverty even as they produce the goods we consume. By funneling voluntary offset payments back to the communities suffering the social externalities of production, poverty-offset payments could support communities and workers struggling with poverty associated in one way or another with production and consumption externalities. For all the academic criticism of the limited utility of individual carbon offsetting in light of the immensity of the problem of global warming, the desire of a subset of consumers to *voluntarily* make supplemental payments to correct for consumption harms suggests there might be a market for poverty offsetting. Socially responsible consumption to date is largely understood in terms of environmental impact: the use of renewable resources, clean energy inputs, sustainable production practices, and reduced packaging. Except for the limited market in fair trade certified goods, social responsibility rarely is thought to include the relationship between consumption and worker pay, for example. By providing another mechanism for consumers to correct for the harms associated with the goods they consume, the scope of socially responsible consumption can be extended to include the whole range of products, independent of whether companies choose to participate in certification regimes.

As a practical matter, the second goal is less amorphous and more pragmatically challenging. Offering consumers a well-publicized and well-placed poverty-offset option may be enough to raise awareness of poverty-related consumption harms and thereby meet the primary goal. (Branding

¹³ By focusing on social norm change as the primary goal, independent of the extent to which individuals make offset payments, I hope to reaffirm the social aspect of norms. The primary shortcoming of methodological individualism when it comes to social norms is that it treats norms as simply reflecting individual utility functions and fails to recognize how norms shape "the architecture of choice." Robert Ahdieh, *Beyond Individualism in Law and Economics*, 91 B.U. L. REV. 43, 60 (2011).

these offset institutions would be important, of course, and is best left to experts, but I like the sound of GoodBuy, BuyRight, or, if it did not violate intellectual property rules, ConsumptionPass.) But meeting the second goal, creating a workable offset scheme, involves a number of institutional compromises. Although it would be easy to devise an offset scheme in a world of perfect information and zero transaction costs, we do not live in such a world.¹⁴ The formal institutions of poverty offsetting would, therefore, have to embrace a certain degree of ambiguity both in setting the offset terms and in distributing the gathered funds on the back end. Resort to average-based models on the receipt side—average harm associated with particular products or particular product types and average level of family consumption—is a necessary second-best solution to the near impossibility of setting the offset amount to the shopping habits of each individual consumer. Similarly, since it is overly utopian to suggest that offset payments will reach the particular workers associated with each purchase, as a pragmatic compromise funds would need to be directed to poor communities.

Making poverty offsetting work requires reducing the project's information challenges and related burden on consumers. Companies dedicate considerable resources to tracking consumer behavior and purchasing trends. When you swipe your loyalty card at many grocery chains, coupons tied to your prior purchases are handed to you after checkout. Companies use real-time information about customer purchases to determine how they use shelf space and to move from large inventories to just-in-time delivery. The information challenge of poverty offsetting is not that the information is not being collected, it is that those who hold the information are not likely to share the information they collect on consumption behavior and even individual consumers. Firms producing and selling products associated with social externalities are likely to strongly oppose the poverty-offsetting idea. Besides, making such data public would provide valuable information to competing firms. The information challenges are even greater on the supply side where the last thing most companies would want to do is acknowledge or call attention to negative production externalities.

Beset by information challenges and companies that will oppose the project, for poverty offsetting to work, customers have to be offered simple and transparent offset options.¹⁵ Consumers do not track all their purchases or investigate the way that each product came to market; therefore, a poverty-offset scheme would have to rely upon a mix of self-reporting and consumption approximations. Consumers could, for example, self-report the amount of clothing they purchased in the past year and be offered an average-based offset. The amount of the offset would be based upon the associa-

¹⁴ See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 15 (1990); Reza Dibatj, *Beyond Facile Assumptions and Radical Assertions: A Case for "Critical Legal Economics,"* 2003 UTAH L. REV. 1155, 1162–66 (2003).

¹⁵ For an example of a less than transparent consumption-as-charity program, see Sarah Dadush, *Profiting in (RED): The Need for Enhanced Transparency in Cause-Related Marketing*, 42 N.Y.U. J. INT'L L. & POL. 1269 (2010).

tion between clothing purchases and poverty, averaging factors such as extent to which clothing suppliers pay a poverty wage, whether the country of manufacturing origin provides legal protection for workers, *etc.* As our understanding of the association between poverty and production/consumption externalities grows, the clarity and identification of the relevant factors will also progress. Just as TerraPass offers travelers carbon offsets that vary depending on whether they are flying regionally or cross-country, poverty-offsetting options could be calculated by product, by product type, or even by annual consumption across all types of products.

At the initial stage, poverty offsetting should not be presented as a perfect charitable product, but rather as a mechanism open to improvement and responsive to the discussions sparked by the offset option. Creativity and flexibility are likely to be more important than rigid understandings of how poverty-offsetting theory should translate into program design. To encourage buy-in to the notion of offsetting, it may be useful to phase in the options, tying them at first to large purchases or to products that have known externalities or that are already associated with extremely low salaries for workers or other forms of exploitation. A partial solution to the information challenges of tracking consumption and consumption harms could involve linking offset payments to credit or debit card usage. Banks already engage in extensive tracking of individual consumer behavior and frequently make this data available to their consumers. Teaming up with financial institutions not only provides a possible way to work around the information obstacles, but also, by using their resources to facilitate post-consumption transfers, might open up a new line of business for banks. Creating such partnerships, however, is likely to take time and should be approached with caution until norms change such that consumers expect to be offered poverty-offset options. Another possibility is that bar code reader apps could be created to help consumers easily track their consumption using their cell phones. But in the meantime, the buyer-side information required for poverty offsetting is likely to require individual record keeping and self-reporting.

The money generated by poverty-offset payments would flow to the poor communities negatively impacted by production and consumption externalities. Here too transparency regarding an evolving understanding of such harms and the effective use of these supplemental payments would be paramount. Fortunately, while offsetting knowledge and practice is just emerging, the non-profit sector and international aid organizations have decades of experience with the same and similar communities. Money collected by one or more umbrella poverty-offset institutions could handle the distribution of funds by channeling them through existing non-profits that serve the poor communities impacted by production and consumption externalities. As is true with other domestic and international assistance efforts,

the targeted communities should be included in the decision making regarding how to use offset funds.¹⁶

Poverty offsetting would not end poverty but would help communities in need. Poverty offsetting is not the sum total of our obligations to the poor and offsetting alone is unlikely to raise enough money to put much of a dent in global poverty figures. But just because we acknowledge that offsetting will not be a magic bullet does not mean it cannot make an incremental difference. Poverty offsetting need not displace existing antipoverty efforts of governments, international bodies, and civil society; ideally, it would run parallel to and support other efforts. The idea behind poverty offsetting does, however, suggest that the baseline of our responsibility needs to be raised at least to correct for the harms we benefit from through consumption. The early phase of poverty offsetting is likely to be rocky, with many lessons—on what merits an offset, how offset payments should be structured, and what to do with the money collected—only available with time and experience. But as the project matures and social norms begin to embrace the formal institutions of poverty offsetting, the mechanism can develop into a novel and important way of correcting for the harms of consumption. Eschewing the ideological purity of advocating that the poor enjoy the paper rights enshrined in international agreements and proclaimed by politicians, poverty offsetting provides a pragmatic approach to working on the hardships inherent in the association between consumption and poverty.¹⁷

¹⁶ The debates about the role community groups should play in the aid projects span more than a half century. See, e.g., Kurt Finsterbusch & Warren A. Van Wicklin III, *Beneficiary Participation in Development Projects: Empirical Tests of Popular Theories*, 37 *ECON. DEV. & CULTURAL CHANGE* 573 (1989); Morris E. Opler, *Problems Concerning Official and Popular Participation in Development Projects*, 2 *ECON. DEV. & CULTURAL CHANGE* 269 (1954); Trevor Parfitt, *The Ambiguity of Participation: A Qualified Defence of Participatory Development*, 25 *THIRD WORLD Q.* 537 (2004). That being said, international organizations and funders have started taking seriously the procedural value and substantive contributions that come through the involvement of impacted communities. See, e.g., WORLD BANK, *SCALING UP LOCAL & COMMUNITY DRIVEN DEVELOPMENT (LCDD): A REAL WORLD GUIDE TO ITS THEORY AND PRACTICE* (Hans P. Binswanger-Mkhize et al. eds., 2009), http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1237844546330/5949218-1237844567860/Scaling_Up_LCDD_Book_rfiles.pdf (on file with the Harvard Law School Library) (discussing World Bank community-based efforts); see also Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 *BERKELEY J. INT'L L.* 570 (2009).

¹⁷ Sidney Shapiro and Christopher Schroeder explain:

The pragmatist rejects the idea that the rationality of a belief can be established by reference to a metaphysical concept. Instead, an idea is rational if it 'leads us into more useful relations with the world.' In public policy, an idea is therefore rational when it solves some specific problem better than existing beliefs and understandings.

Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 *HARV. ENVTL. L. REV.* 433, 469 (2008) (citations omitted).

II. POVERTY OFFSETTING, THE MARKET, AND THE STATE

The relationship between poverty offsetting and the market can be characterized in two very contradictory ways. On the one hand, poverty offsetting can be set up as a challenge to the free market. By calling attention to the myriad ways in which production and consumption impose negative social externalities, poverty offsetting can be viewed as a threat to market and free trade mythology. So long as firms follow the law, free-market purists might say, consumers need not—and should not!—be concerned that their consumption might be associated with poverty. On the other hand, poverty offsetting might be thought of as fortifying the free market. Using the terms and theoretical framework of economists, poverty offsetting merely seeks to perfect the market. Instead of supporting a more radical reconsideration of the market, poverty offsetting uses voluntary payments to mirror a property-rights approach to social harms by asking that individuals internalize the externalities of their consumption.¹⁸ Yet, removed from the ideology of these two characterizations, the relationship between poverty offsetting and the market falls between these two extremes. This section proceeds in two parts. First, I raise the possibility that offsetting can provide valuable information regarding demand for increased market regulation. Second, I argue that poverty offsetting can help build support for reigning in production externalities and for an enlarged understanding of the state's role in the market.

A. *State-Structured Markets and the Information of Offsetting*

Politics and ideology shape how we see the market and how we understand the state's role in setting the terms of market exchange. Poverty-offsetting behavior can help reveal areas where there is a need and demand for regulation to limit market externalities. Despite claims that President Obama is turning the country into a socialist state, the market economy is thriving and in no danger of losing its structural support. Similarly, the idea that a platonic ideal of the ("free") market exists independent of the state and is not shaped by the state is also false and misleading.¹⁹ This section assumes the administrative state's role in defining the market and the terms of trade and asks what such a state should do in response to, or in connection with, offsetting. At a minimum, poverty offsetting should be regulated in ways that defend against the possibility of industry capture and provide a basic level of consumer protection. But the state could play a more engaged role. Should poverty offsetting succeed in its primary goal of changing the social norms that surround consumption, the state could use offsetting as a

¹⁸ For more on the assignment of property rights as a solution to externalities, see Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

¹⁹ Robert Ahdieh appropriately criticizes "the relative inattention of law and economics to questions of where markets come from [T]he literature simply assumes the existence of markets, as something in the state of nature." Ahdieh, *supra* note 13, at 74.

way of better understanding its dual role as market regulator and market actor. Rather than being seen as wholly outside the realm of regulation, poverty offsetting could provide a feedback mechanism on consumer demand for market modifications in areas such as employment standards and social protections in free trade agreements.

Although offsetting is only an emerging phenomenon and so far is concentrated on the problem of global warming, the need for regulatory oversight is already apparent. Poverty offsetting fits in the grey area between regulation (requiring companies to solve the externality problem) and charity (giving money to those excluded from the benefits of global capitalism), and it shares the same dangers of industrial capture common to both government policy and public interest work. The competition on price, not emissions reductions, in carbon offsetting and the explosion of for-profit offset providers suggests that corporate greenwashing has probably already found at least a partial home in this corner of the offset market.²⁰ Though the nomenclature for the equivalent in poverty offsetting does not yet exist, corporations certainly have an incentive to exaggerate improvements in factory conditions, for example, and deny the need for offsetting. Organizations providing poverty offsets similarly will be tempted to overemphasize the effectiveness of the antipoverty efforts funded through the offset payments they collect. The dangers of capture and inflated accounts of success are not unique to offsetting. In the non-profit world generally, there is the increasing acknowledgment of the need to develop and utilize appropriate systems of metrics so that the sector can move beyond reliance upon anecdotal accounts of success.

With the practice to date largely taking an ad hoc form, exemplified by the end-of-the-checkout-line request, there has been little need to be concerned about the tax and consumer protection implications of poverty offsetting. But successful poverty-offsetting institutions would change that. One of the shortcomings of the end-of-the-checkout-line request is that the donor does not get to claim a charitable deduction for his or her contribution. Records are not typically kept of individual donors, and the company that left the collection jar or box near the register often takes credit for raising the funds contributed by their customers. Although it could be argued that you as an individual should not be able to claim a deduction for simply correcting for the harms associated with your own behavior, there is a clear tax benefit to routing otherwise isolated donations through a poverty offset provider.²¹ Additionally, rather than being a donation that does not necessarily

²⁰ See Rosser, *supra* note 1, at 73–74 (discussing the pricing of carbon offsets); see also Jeffrey J. Minneti, *Is It Too Easy Being Green? A Behavioral Economics Approach to Determining Whether to Regulate Environmental Marketing Claims*, 55 *LOY. L. REV.* 653, 653–55 (2009) (discussing greenwashing).

²¹ The charitable deduction only benefits those taxpayers whose deductions exceed the standard deduction, typically high-income homeowners able to take advantage of the mortgage tax deduction. Since poverty offsetting would be a voluntary supplemental payment, however, the class of contributors is likely to see value in being able to take advantage of this deduction.

relate to the goods purchases, poverty offsetting would make explicit the connection between the voluntary payment and the preceding consumptive decisions. Institutionalizing poverty offsetting would bring post-consumption charitable contributions more fully within the scope of consumer protection laws and under the purview of enforcement agencies. Because offset providers would generally be channeling funds through existing non-profits, policing overhead expenses and the percentage of funds that accomplish their intended ends would be critical. Ensuring offset funds were used in ways that accorded with consumer expectations would be the work of charity monitoring organizations and, to a lesser extent, the regulatory state.

The emergence of offsetting, including poverty offsetting, hints at the need for greater state involvement in the market. By blurring the line between regulation and charity, poverty offsetting improves our understanding of the social and consumer interests of individuals by creating a novel feedback mechanism. In so doing, poverty offsetting invites the state to openly participate in pushing greater social recognition of the need to acknowledge and respond to production and consumption externalities. In some cases, offset-inspired state engagement may take the form of greater regulation.²² More generally, offsetting provides a way for consumers to nudge the state to pay greater attention to social harms when establishing market and trade rules. Regulation is not necessarily the end goal: offsetting highlights the importance of an array of responses by large and small institutions, including civic society. Indeed, some of the value of offsetting as voluntary supplemental payments would be lost if regulation caused across-the-board cost increases for all consumers. Poverty offsetting neither rejects regulatory oversight of consumption externalities nor serves as a tool of the administrative state, but instead highlights the need for a dynamic and ongoing reevaluation of how consumers and governments account for production and consumption externalities.

Individuals make offset payments because they are aware, most often correctly, that their consumption imposes costs that the market does not ask them to bear. By voluntarily taking on these costs, socially responsible consumers correct for the harms of their consumption and also indirectly comment on the externalities presently permitted. As a regulator, the state navigates between a *laissez-faire*, anything-goes approach and one that protects citizens from being harmed by an unchecked market. Although sometimes enacted *ex ante*, regulations and market policing frequently come *ex post*, after the failures of allowing the market to self-regulate become apparent. Thus, the Triangle Shirtwaist Factory Fire of 1911 led to improved conditions for workers; the burning of Cleveland's Cuyahoga River in 1969 contributed to the formation of the Environmental Protection Agency; and

²² See Grant M. Hayden & Stephen E. Ellis, *Law and Economics After Behavioral Economics*, 55 KAN. L. REV. 629, 629 (2007) ("Structuring incentives on any kind of large scale is a job for governments, and the tool they use is the law."). Although this may over-generalize the uniqueness of the government's role and the primacy of formal law, the government can play a critical role supporting offset norms.

today Congress is struggling with how to react to problems in the housing market exposed by the mortgage crisis. Although it is probably impossible, and perhaps even undesirable, to free politics from its tendency to be more reactionary than prophylactic, offsetting could provide the state useful feedback in advance of a market crisis or an eye-opening event.

Offsetting behavior partly reveals our preferences about whether there is too much or too little regulation in a particular area of the economy. Although it runs counter to the project of this paper, if it turns out that people are more willing to buy environmental offsets than poverty offsets, this may be a signal, *however imperfect*, that regulating environmental externalities may be more politically feasible than regulating economic externalities. Or imagine that consumers had a range of options for poverty offsetting: one, for example, tied to bringing worker pay up to a minimum standard and another correcting for dangerous work conditions. Although corrective policies may be preferable regardless of which of these two options gets the greatest response, the success or failure of different offset options could provide useful information about where the need for regulatory change is most pressing.²³ Politicians already rely heavily on polling data when deciding what issues to tackle, but because it is associated with a payment, offsetting *may* do a better job of revealing preferences and their intensity.²⁴

The likelihood that poverty offsetting could provide useful information about the market to the state is perhaps greatest with regard to the positions of the United States on international commerce and its trading partners. Democratic and Republican presidents alike have championed trade liberalization as a core component of our domestic economy and our economic relations with the rest of the world. Accordingly, we have entered into an ever-expanding number of free trade agreements and bilateral trade agreements, not to mention the multinational trade regimes that we have joined, such as the World Trade Organization. Through such agreements we generally expect tariff walls to fall and foreign investors not to be discriminated

²³ There are many scholars who question the utility and appropriateness of using market information, often by emphasizing that private decision making is not equivalent to social or civic decision making. See, e.g., Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 *CARDOZO L. REV.* 431 (1996); Lisa Heinzerling, *Markets for Arsenic*, 90 *GEO. L.J.* 2311 (2002); Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 *YALE L.J.* 377 (1998); Mark Sagoff, *We Have Met the Enemy and He Is Us or Conflict and Contradiction in Environmental Law*, 12 *ENVTL. L.* 283, 286 (1982). But as Kysar notes, Sagoff and others' "powerful arguments failed to slow the movement toward greater reliance on private market decisions as the standard for government provision of public goods . . ." Kysar, *supra* note 2, at 528 (highlighting, in particular, Mark Sagoff's contribution to the consumer/citizen preference debate).

²⁴ It is worth emphasizing that willingness to offset would only *help* determine political demand. As is true of cost-benefit analysis (CBA), willingness to offset should not be treated "as gospel or as some magic formula for deriving truth [It is simply] a pragmatic decision-making tool that can help illuminate issues but need not dictate outcomes." Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 *COLUM. J. ENVTL. L.* 191, 201 (2004) (giving Cass Sunstein credit for qualifying his advocacy for CBA-based decision making).

against.²⁵ Our commitment to free trade is a commitment to the free flow of capital and goods, not to the free movement of peoples or the establishment of a shared set of production standards. Workers producing the same product, consequently, can expect dramatically different wages and conditions, depending on factory location. Offshoring of American jobs is but one predictable result; others include lax environmental standards and under-enforcement of labor protections in countries desperate for foreign direct investment.²⁶ As a result, poverty offsetting will often functionally be a way for consumers to correct for production externalities permitted by our trading partners but not allowed within the United States.

B. *Poverty Offsetting and Corrective Regulation*

The most significant payoff from poverty offsetting is likely to be the space it creates for consumers to push back against the externality-laden, laissez-faire approaches to market regulation. In theory, and hopefully in practice, the norms underlying offsetting support a strengthened, energized state that is less timid when it comes to market regulation and market interventions. The social harms associated with the continual search for the lowest possible production costs are only beginning to be understood. But there is room for poverty offsetting to help dampen capital mobility and incentivize better business standards and formal rights for workers. As the norms surrounding offsetting develop, consumers may begin to look at pricing differently. Rather than simply hunting for the good with the lowest price, consumers might compare the true cost of competing goods across countries with different production process standards. If offsetting becomes socially expected and sufficiently robust, the cost of an article of clothing produced in a poverty wage country, for example, would no longer be limited to its low price tag. Instead the offset payment would have to be added to this low price and that sum compared with the price of the good produced in a country that does not permit the social harms of poverty wages to be externalized from production. Voluntary offset payments could also provide a gauge of consumer dissatisfaction with free trade policies that do not incorporate environmental or social minimums.²⁷ The willingness of people to make offset

²⁵ See Frank Emmert, *Labor, Environmental Standards and World Trade Law*, 10 U.C. DAVIS J. INT'L L. & POL'Y 75, 84–85 (2003) (summarizing what countries agree to by joining the WTO).

²⁶ See *id.* at 76–77 (“Higher standards for labor and the environment make the production of goods and services more expensive. This can give a competitive advantage to a firm in a country that does not share or enforce these standards.”).

²⁷ Incorporating such norms is fairly easy, and the United States has done so with several recent bilateral investment treaties that carve out space for states to protect social values and the environment without being subjected to suit by foreign investors. See also Catherine Jean Archibald, *Forbidden by the WTO? Discrimination Against a Product When Its Creation Causes Harm to the Environment or Animal Welfare*, 48 NAT. RESOURCES J. 15 (2008) (arguing that process and production method distinctions fit within the framework of the international trade regime); Steve Charnovitz, *The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT'L L. 59 (2002) (same).

payments could help determine the amount of political demand, among a subset of the consuming public, that exists for the United States to step back from laissez-faire free trade policies.²⁸ Those who question trade liberalization are often accused of either not understanding Ricardo or as advocating out of self-interest.²⁹ But offset payments could help policymakers understand the extent to which U.S. consumers are willing to act on a sense of social responsibility and support related policy changes that transcend national borders and narrow self-interest.³⁰

Amending free trade policies is but an example of the sort of nudge that poverty offsetting could give the state.³¹ The primary way this is done in a democracy is through the ballot box and the direct election of representatives, something that seems more like a push than a nudge. But as American identity becomes increasingly wrapped up in consumer identity, the importance of opening up new mechanisms for policymakers to hear consumer voice when it comes to market practices should also be recognized. Markets can nudge politicians to rein in government debt (by discounting government issued bonds), for example. But through offset payments and social norm changes, poverty offsetting can provide an additional mechanism to nudge the state.

But do the social-norm changes associated with poverty offsetting nudge the state towards an enlarged appreciation for its role in the market and an increased willingness to act? Or fundamentally does poverty offsetting support the position of those who imagine an idealized space for markets to function independent of state “interventions”? Though I think the former is more likely, it is arguably the latter. By selling what some consumers will treat as a consumption indulgence or a license to consume, free of guilt, poverty offsetting raises a moral hazard problem. It also suggests that a market mechanism can solve the problems of the market, and by so

²⁸ Sungjoon Cho notes that the United States, for example, could “condition market access upon compliance with minimum labor standards . . .” Sungjoon Cho, *Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma*, 5 CHI. J. INT’L L. 625, 634 (2005) (summarizing the view of Sandra Polaski that this would lower poverty and inequality for developing countries that complied). But Cho then argues against such conditioned access by noting that without capacity-building assistance, “regulatory unilateralism works to undermine free trade in the form of either further protectionism or development failure.” *Id.* at 643–45. For an overview of the debates that surround unilateral imposition of labor standards on trading partners, see David J. Doorey, *In Defense of Transnational Domestic Labor Regulation*, 43 VAND. J. TRANSNAT’L L. 953 (2011).

²⁹ See Rosser, *supra* note 1, at 58–59 (providing a brief overview of Ricardo’s explanation of the gains made possible by free trade coupled with the power of comparative advantage).

³⁰ An interesting alternative proposal blending government action with a market-based mechanism worth considering is a government supported social-responsibility certification scheme that would comply with free trade rules by allowing the continued importation of non-certified goods. See Jessica Karbowski, Note, *Grocery Store Activism: A WTO Compliant Means to Incentivize Social Responsibility*, 49 VA. J. INT’L L. 727, 738–745 (2009).

³¹ See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (rev. ed. 2009) (arguing that slight changes in policy, incentives, or design can help people make better choices). But as used here, we can also think about ways in which people could nudge the state towards better governance practices and regulation.

doing arguably sidesteps regulation. Akin to Alan Greenspan's belief that the housing bubble would solve itself, which led the Federal Reserve to fall asleep at the wheel prior to the Great Recession, poverty offsetting arguably encourages regulators to develop a trust-the-market attitude. If consumers are correcting for the harms of their consumption, there is little need to adopt corrective command-and-control regulations that would, for example, guarantee worker rights. The problems of global inequality and global poverty, as well as the structural rules that facilitate the continued consumption behavior of privileged consumers, are immense. And one message that might come out of poverty offsetting, that a voluntary supplemental payment will solve these problems, is dangerous and counterproductive.³²

Conservatives and business interests enjoy the upper hand in American debates about the government's role in the market. Even the election of a Democratic president who campaigned on the slogan "change" and whose administration assumed power in the wake of the near collapse of the financial system and a series of bank bailouts has not changed that. The mythologies of laissez-faire capitalism (the poor deserve their poverty and the state should not interfere with the market) have a strong hold on the public imagination and discourse regarding state-market interactions. Progressives have been unable to offer up a vision that competes with the Ayn Rand/Rand Paul vision of limited government and minimal market regulation. The best they can do is to continue marching down the well-used paths defending the pillars of the New Deal, a worthy cause but hardly a rallying cry.³³

The possibility that social norms inculcated by poverty offsetting will support a stronger state is situational, not categorical. If America were marked by citizens actively questioning market results and the increasing inequality—that is, if our class consciousness approached that of our race consciousness—then a market-based mechanism for responding to production externalities might weaken the state. But when the baseline is general consumer (and scholarly) indifference to consumption harms, poverty-offset norms and the recognition of consumption harms can open up political space for the government to take a more active role in regulating the market.³⁴ "It depends" is not the sort of declaration that accompanies most proposals, but only after acknowledging the weakened position of state regulation vis-à-vis the ideology of the laissez-faire market does poverty offsetting make sense

³² Writing of similar dangers in cause-marketing campaigns, Barbara Stark observes, "[p]ursuant to the cultural logic of late capitalism, global poverty would be addressed by *shopping*, that is, by the very overconsumption that perpetuates it." Stark, *supra* note 3, at 29.

³³ Relevant to this Essay, New Deal politicians, besides helping improve the social safety net, also emphasized the "connections between good citizenship and consumption . . . Consumer spending provided a bulwark against the external threats of communism and fascism." Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 *BROOK L. REV.* 827, 908–09 (2004); see also Steven Wilf, *The Making of the Post-War Paradigm in American Intellectual Property Law*, 31 *COLUM. J.L. & ARTS* 139, 148 (2008).

³⁴ See Schor, *supra* note 11 (noting that "in the 1960s and early '70s, a far-reaching critique of consumer culture was a part of our political discourse," but this was short-lived and "critics adopted a more liberal point of view, and deferred to individuals on consumer issues").

as a progressive response to market failures. The idea of the platonic market, separate from government regulation, has such a hold on the public imagination that tools structured as market-based may be uniquely able to call attention to consumption harms. Poverty offsetting is primarily valuable as a way of changing the norms that surround consumption by helping to bring about recognition that an individual's seemingly isolated act of consumption has social consequences. Such recognition should create greater possibilities for political, collective responses to production and consumption externalities.

III. CONSUMER POLITICS

The consumption of social responsibility through offset payments opens up the possibility of progress by leveraging consumerism and market structures in the fight against poverty where rights-based efforts have stalled. Treating consumption as a moral issue runs counter to the separation of identity into discrete, hermetically sealed categories. By providing a tool for individuals to bring their social commitments to bear on their consumption behavior, poverty offsetting blurs the lines between aspects of our personhood and upsets the notion that consumer identity is fundamentally distinct from one's identity and role as a citizen.³⁵ Positively, by forcing us to recognize the spillover effects sometimes associated with consumption, poverty offsetting may make us better consumers. But in so doing, might poverty offsetting make us worse citizens?

Poverty offsetting suggests that individuals can meet their minimal social obligations through offset purchases. Engagement as a citizen may take a backseat if people can simply buy their way out of being politically active and involved in shaping collective solutions to social problems.³⁶ Since only a small fraction of consumers will be able to afford offsets and choose to make such supplemental payments, poverty offsetting may have the unfortunate effect of allowing those with the most resources to be able to remove themselves from politics. Even those who do not purchase poverty offsets may feel that the existence of such an option justifies not working on alternative antipoverty efforts, in much the same way that the possibility of redistribution through taxation is used by conservative economists to disparage and discredit less efficient welfare programs. Although an offsetting option increases an individual's voice as a consumer, it may also facilitate exit from the individual's role as citizen.³⁷

³⁵ See *id.* ("Consumption is perhaps the clearest example of an individual behavior which our society takes to be almost wholly personal, completely outside the purview of social concern and policy.").

³⁶ See Dadush, *supra* note 15, at 1305–07 (discussing this possibility in the context of cause marketing).

³⁷ See Rosser, *supra* note 1, at 40 n.35 and accompanying text.

My view on the possibility that poverty offsetting will harm both American identity as citizens and political involvement is that the die has already been cast. Regardless of whether offsetting is offered or not, we have become a nation of consumers first and citizens second.³⁸ This may not be true when pushed by major events such as 9/11, but in ordinary times and with ordinary politics, we engage in consumption even as we disengage from politics and civic society. For decades, the privileged have removed themselves from the problems of poverty and race, by moving first to the suburbs and, when that was not enough, then to gated communities, private (or elite public) schools, and upscale malls.³⁹ But recognizing the decline in civic and political engagement does not necessarily mean there is cause for despair. To argue against offsetting as a way to advance the social good because it embraces a consumption-based approach assumes that the line between our consumer- and citizen-identities ought to be defended. Why should it? It seems to me that a socially responsible consumer may be better than an apathetic citizen.⁴⁰ Moreover, improving the social norms surrounding consumption may provide a better path to move consumers towards citizenship than asserting that social responsibility should not inform how we behave as consumers and resisting corrective mechanisms simply because they are market-based.

Poverty offsetting draws upon consumer identity, but doing so is not the same as conceding to a stripped down version of citizenship. Pragmatically, poverty offsetting can draw upon the primacy of consumption today to strengthen our commitment to help poor communities.⁴¹ Use of a market mechanism should not, however, obscure the goals of such a project, though its form might invite more people to participate. The poverty-offsetting framework is built around correcting for harms enjoyed by individual consumers, something that should resonate with those who see themselves as conservatives and even libertarians. Moral calls to action on poverty have been tried and politically are derided as the ideas of bleeding heart liberals. Asking that the market improve through voluntary payments and that people correct for externalities associated with their consumption avoids this trap. The point is not that there is something wrong with being liberal—despite

³⁸ See Eric J. Arnould, *Should Consumer Citizens Escape the Market?*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 96, 105 (2007) (“[W]e live in a historical moment in which market-mediated consumer culture is the dominant social fact.”).

³⁹ See, e.g., SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 83–124 (2004).

⁴⁰ See Stephano Zamagni, *Religious Values and Corporate Decision Making: An Economist’s Perspective*, Keynote Address at Religious Values and Corporate Decision Making: An Interdisciplinary Interfaith Conference for Corporate Executives and Legal Counsel (2006), in 11 FORDHAM J. CORP. & FIN. L. 573, 581 (2006) (“The consumer as customer is somebody who utilizes his or her purchasing power to maximize a utility function under constraint. The consumer as citizen is somebody who wants more, wants also to express his or her cultural identity and his or her moral sentiments . . .”).

⁴¹ See Arnould, *supra* note 38, at 105 (highlighting the utility of rooting progressive practices in market forms).

the fear politicians have of being so labeled⁴²—but that using market mechanisms may be a way to reach out to new allies and find political support in unlikely places. People who believe in the power of the market to lift people out of poverty ought to be concerned about production externalities and may feel compelled to voluntarily offset those harms until those externalities become associated with property rights.

Those who care about poverty have not yet found a home in the economics-obsessed world of politics and policy today. The rights wave in poverty law peaked with *Goldberg v. Kelly*,⁴³ in which the Supreme Court, citing Charles Reich's *The New Property*,⁴⁴ recognized a right to welfare assistance.⁴⁵ But that case was decided forty plus years ago (before I was born in fact); the present Court seems primarily interested in protecting corporate interests, not the interests of the poor. Welfare reform, by making welfare no longer a right and allowing states to set their own standards for the social safety net, dealt a severe blow to the poverty law community. In its wake, the poverty law community was left at a loss for how to proceed: Should rights-based advocacy continue to be the norm or do new tools need to be found? Certainly, work could be, and was, done at the local level. But the direction of future work remains unclear.

Economics has become the preeminent tool for analyzing policy, and the law and economics approach has claimed a corresponding perch above alternative ways of judging what works.⁴⁶ Justice, equity, and even the common law all bend in one way or another to the theoretical world view of economics, rational actor assumptions, and assertions of the primacy of efficiency.⁴⁷ In part because those who care about poverty have largely withdrawn from the field, the economics approach that dominates is a particularly conservative one that prioritizes market incentives above all else. The challenge for progressives, and progressive administrations, is to use economic and market tools for social ends, to reclaim the right to engage in policy debates that draw upon economics and to create space for a broader

⁴² See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 912 (1996) (noting the change in the social understanding of "liberal" to an insult).

⁴³ *Goldberg v. Kelly*, 397 U.S. 254, 261–63 (1970).

⁴⁴ Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

⁴⁵ *Goldberg*, 397 U.S. at 261–63.

⁴⁶ See, e.g., Shapiro & Schroeder, *supra* note 17, at 435 ("[P]olicy analysts typically operate within a single discipline dominated by its connections to economics . . ."); Hayden & Ellis, *supra* note 22, at 629 ("[T]he law and economics movement has become, by almost any measure, the most dominant school of legal thought in the last half a century.").

⁴⁷ The same can be said of some behavioral law and economics approaches that draw attention to social norms by prioritizing standard law and economics values. See W. Bradley Wendel, *Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation*, 77 IND. L.J. 1, 8 (2002) ("If a rational-choice theory of law is objectionable because of its overriding concern with efficiency or aggregate wealth maximization, at the expense of fairness, then a rational-choice theory of social norms can be criticized in the same terms.").

understanding of what markets can do.⁴⁸ Stepping up to this challenge does not mean giving up on the idea that people should have basic economic rights, but it does involve taking the fight to where the debates are and to where unlikely allies might be found. This Essay suggests one way that, rather than advocating for formal rights with insufficient substance, we could begin working on projects that take advantage of the place in our society of both consumerism and market-based thinking.

CONCLUSION

Consumption and poverty are ubiquitous; poverty offsetting offers the possibility of using the strengths of the former to make progress on the latter. By locating an obligation to the poor in production and consumption externalities, poverty offsetting accomplishes two important things. First, poverty offsetting grounds the baseline level of responsibility in correcting for the harms of consumption that benefit consumers, answering the standard critique that moral obligations to the poor are unbounded. Second, it provides a mechanism to change the social norms that surround consumption. The current understanding of consumption as outside of the scope of political concern shields our consumer identity from our commitments to social responsibility. Offsets can be tailored to any manner of consumption, freeing socially responsible consumption from the subset of fair trade product categories. Once we acknowledge the multiple layers of our personality and identity, and we strip away the pretense that our consumer identity should be walled off, we can admit the possibility that social responsibility might in some context be best furthered by a market-based approach. Laments about consumerism coupled with defenses of our distinct identity as citizens not only fail to reflect the ascendancy of our consumer identity but also may mischaracterize the ideal mix of identities. Instead of seeing citizen and consumer as belonging to separate boxes, maybe we should aim for a fluid and dynamic relationship between consumer-citizens and citizen-consumers. Moving from ad hoc post-consumption donations to charity to institutionalized poverty offsetting will allow consumers to better correct for the harms associated with consumption, and will create more space for market-based antipoverty work and for active state engagement with the market.

⁴⁸ For an excellent discussion of how academics might productively participate in such efforts, see Dibadj, *supra* note 14, at 1195.