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Corporate Governance as Social Responsibility: A Research Agenda

By
Amiram Gill*

In the post-Enron years, corporate governance has shifted from its traditional focus on agency conflicts to address issues of ethics, accountability, transparency, and disclosure. Moreover, corporate social responsibility (CSR) has increasingly focused on corporate governance as a vehicle for incorporating social and environmental concerns into the business decision-making process, benefiting not only financial investors but also employees, consumers, and communities. Currently, corporate governance is being linked more and more with business practices and public policies that are stakeholder-friendly. This Article examines these developments and their impact on the formulation of a transnational body of legal norms by proceeding in three stages. First, the Article explores the recent transformations in the regulation of corporate governance and CSR and the shifts these two fields have experienced. Second, it reads these transformations as a convergence, taking place against the background of "New Governance" and encompassing both corporate self-regulation and efforts by social groups to make this regulation more effective ("meta-regulation"). Third, the Article discusses the prospects and challenges of this convergence by outlining a series of conceptual and methodological inquiries as well as policy ramifications to be pursued by scholars and practitioners in the fields of law and corporate conduct.

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I.
INTRODUCTION

Corporate governance has traditionally specified the rules of business decision making that apply to the internal mechanisms of companies. This set of norms and laws has, first and foremost, served to shape the relations among boards of directors, shareholders, and managers as well as to resolve agency conflicts.¹ Yet in the aftermath of Enron, corporate governance has emphasized issues that go beyond this traditional focus to touch on corporate ethics, accountability, disclosure, and reporting. As companies seek to assure regulators and investors that they are fully transparent and accountable, corporations have increasingly pledged their commitment to honest and fair corporate governance principles on a wide spectrum of business practices.²

Simultaneously, the corporate social responsibility (CSR) movement has developed the notion of corporate governance as a vehicle for pushing manage-

1. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991); Harold Demsetz & Kenneth Lehn, *The Structure of Corporate Ownership: Causes and Consequences*, 93 J. POL. ECON. 1155 (1985); Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819 (1981).

2. See, e.g., Joseph E. Murphy, *Can the Scandals Teach Us Anything? Enron, Ethics, and Lessons for Lawyers*, 12 BUS. L. TODAY 11 (2003), available at <http://www.abanet.org/buslaw/blt/2003-01-02/murphy.html>; William S. Lerach, *Plundering America: How American Investors Got Taken for Trillions by Corporate Insiders - The Rise of the New Corporate Kleptocracy*, 8 STAN. J.L. BUS. & FIN. 69, 106 (2002); Joel Seligman, *No One Can Serve Two Masters: Corporate and Securities Law After Enron*, 80 WASH. U. L.Q. 449 (2002).

ment to consider broader ethical considerations.³ CSR has drawn on the dramatic progress made by companies in recent decades in balancing shareholder goals with the need to reduce externalities that impact other stakeholders. Thus, CSR has joined the political endeavors to make corporations more attuned to public, environmental, and social needs by pursuing corporate governance as a framework for boards and managers to treat employees, consumers, and communities similarly to, if not the same as, stockholders.⁴

In view of these processes, large public companies have recently created mechanisms of corporate governance that seek to engender investor accountability and stakeholder engagement. Such mechanisms include CSR board committees, company units dealing with business ethics, corporate codes of conduct, non-financial reporting practices, and stakeholder complaint and dialogue channels, among others. All of these governance devices have normally been created on a voluntary basis to constitute what is referred to as “corporate self-regulation.”⁵

Institutional investors, regulators, NGOs, and social groups have generally responded by collaborating with the private sector to make self-regulation more enforceable and effective. Pension funds, consumer coalitions, non-profit organizations, and other groups have developed monitoring schemes that incorporate corporate governance aspects into their CSR guidelines, ratings, and best practices. For example, the California Public Employees’ Retirement System (CalPERS),⁶ one of the largest institutional investors in the United States,⁷ has used its proxy power to implement its Core Principles of Accountable Corporate Governance.⁸ The Dow-Jones Sustainability Indexes,⁹ which are among the

3. For example, prominent NGOs in the CSR field such as Business for Social Responsibility (BSR) have increasingly provided consulting services and offered their expertise on stakeholder engagement strategy for companies to structure their boards and managerial units in accordance with CSR principles. See *CSR Strategy and Structure*, <http://bsr.org/consulting/strategy.cfm> (last visited Jan. 29, 2008).

4. See generally *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 9-237* (Doreen McBarnet, Aurora Voiculescu & Tom Campbell eds., 2007) [hereinafter *NEW CORPORATE ACCOUNTABILITY*]; DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 16-46* (2005).

5. See generally CHRISTINE PARKER, *THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY* (2002); Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Industrial Perspective*, 19 *LAW & POL’Y* 363 (1997).

6. Welcome to CalPERS On-Line, <http://www.calpers.ca.gov/> (last visited Mar. 25, 2008).

7. Press Release, CalPERS, CalPERS Adopts New Asset Allocation Mix - Equalizes U.S., International Stocks; Hikes Private Equity, Real Estate (Dec. 17, 2007), <http://www.calpers.ca.gov/index.jsp?bc=/about/press/pr-2007/dec/calpers-adopts-new-asset-allocation-mix.xml> (last visited Apr. 16, 2008) (“CalPERS is the nation’s largest public pension fund with assets totaling more than \$250 billion”).

8. See, e.g., CALPERS, *CORE PRINCIPLES OF ACCOUNTABLE CORPORATE GOVERNANCE* (2007), available at <http://www.calpers-governance.org/principles/domestic/us/downloads/us-corpgov-principles.pdf>.

9. Dow Jones Sustainability Indexes, <http://www.sustainability-indexes.com/> (last visited Mar. 25, 2008).

most prominent CSR indexes in America, have paid close attention to corporate governance criteria while measuring corporate social and environmental performance. Such efforts are referred to as “meta-regulation” or “the regulation of self-regulation.”¹⁰

At the crossroads of corporate self-regulation and meta-regulation, scholars have recently pointed to an evolving interplay between corporate governance and CSR.¹¹ These inquiries can and should be read as indicating a convergence between corporate governance and social responsibility. On the one hand, corporate governance is gradually becoming a framework for ensuring the public interest in business as well as structuring the procedures by which a company demonstrates its good citizenship and commitment to various constituencies. On the other hand, CSR-driven social coalitions are increasingly focusing on corporate governance as mirroring the company’s conscience and long-term commitment to stakeholder accountability.

This Article identifies the key features and characteristics of an emerging body of norms that merges corporate governance with corporate social responsibility. It first explores and situates the synthesis between the two in the context of an evolving legal regime that mixes pro-shareholder preferences with pro-stakeholder considerations. Subsequently, the Article discusses the prospects and challenges of this governance-responsibility intersection, outlining a series of conceptual and methodological implications as well as policy ramifications.

The Article proceeds as follows: Part II explores the transformations that have taken place in the regulation of corporate conduct after the major corporate scandals of the early 2000s. Part III reviews the governance-CSR intersections addressed thus far in the research literature and offers a reading of these regulatory transformations as a convergence that hybridizes corporate governance with CSR via self and meta-regulation (and as part of the “New Governance” school of thought). Part IV discusses the prospects and challenges of the evolving intersection of corporate governance and CSR, first addressing the conceptual and methodological applications that the convergence of the two fields might have on the study, understanding, and perception of business law and then joining the public policy debate over corporate reform to discuss the advantages and shortcomings of the governance-CSR intersection.

10. Christine Parker, *Meta-Regulation: Legal Accountability to Corporate Social Responsibility*, in *NEW CORPORATE ACCOUNTABILITY*, *supra* note 4, at 207. See generally RONNIE D. LIPSCHUTZ, *GLOBALIZATION, GOVERNMENTALITY AND GLOBAL POLITICS: REGULATION FOR THE REST OF US?* (2005); Bronwen Morgan, *The Economization of Politics: Meta-Regulation as a Form of Nonjudicial Legality*, 12 *SOC. & LEGAL STUD.* 489 (2003); JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000); Jody Freeman, *The Private Role in Public Governance*, 75 *N.Y.U. L. REV.* 543 (2000).

11. See, e.g., Lawrence E. Mitchell, *The Board as a Path Toward Corporate Social Responsibility*, in *NEW CORPORATE ACCOUNTABILITY*, *supra* note 4, at 279. See also Ruth V. Aguilera, Cynthia A. Williams, John M. Conley, & Deborah E. Rupp, *Corporate Governance and Social Responsibility: A Comparative Analysis of the UK and the US*, 14 *CORP. GOVERNANCE: AN INT’L REV.* 147 (2006).

II. REGULATING CORPORATE CONDUCT IN THE POST-ENRON ERA

A. Corporate Governance: From Agency to Accountability

In the public marketplace of ideas, the term “corporate governance” has recently been described as “the set of processes, customs, policies, laws and institutions affecting the way in which a corporation is directed, administered or controlled.”¹² Yet the substance attributed to this definition has changed quite dramatically over the past years, shifting from a functional, economic focus on agency problems within a private law sphere to a public policy approach that seeks to protect investors and non-shareholder stakeholders. The evolution in the perception of corporate governance reflects broad changes in the socio-legal view of business corporations.¹³

For decades, a controversy over the nature and purpose of the corporation articulated a fundamental tension in corporate law.¹⁴ This controversy had its roots in the 1919 *Dodge v. Ford Motor Company* decision holding that a corporation must strive to maximize its shareholder-value.¹⁵ A debate played out in the academic arena between Columbia Professor Adolf A. Berle and Harvard Professor E. Merrick Dodd, with the former taking a shareholder-centric position and the latter calling for greater non-stockholder considerations.¹⁶

Until not long ago, corporate governance aligned almost completely with the shareholder primacy wing of this debate, being primarily concerned with the structure and functioning of the board and its relations with other corporate organs *vis-à-vis* the purpose of maximizing profits. The core premise of corporate

12. Corporate Governance, http://en.wikipedia.org/wiki/Corporate_governance (last visited Mar. 25, 2008).

13. JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* (2004) (exploring the evolution of the corporate entity as a powerful, often harmful social and legal institution); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004) (tracing the dominant knowledge structures that underline contemporary corporate regulation and policymaking); Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1986) (analyzing the historical development of the corporate personality notion in American legal thought).

14. This controversy has been extensively debated in the literature. For a recent overview of the debate, see Judd F. Sneirson, *Doing Well by Doing Good: Leveraging Due Care for Better, More Socially Responsible Corporate Decision-Making*, 3 CORP. GOVERNANCE L. REV. 438 (2007).

15. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes”).

16. E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931). For an overview of the legal debates over corporate responsibility throughout the twentieth century, see C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77 (2002).

governance relied on the famous analysis by Berle and Means describing and analyzing the agency problems that surface when corporations separate the ownership rights given to their stockholders from the broad judgment reserved for managers on how to best maximize shareholder-value.¹⁷ In order to allow shareholders to trust managers with their investments, the business community looked to corporate governance to enable reduction of these agency problems.¹⁸ By focusing on agency conflict resolution, the corporate governance discourse not only accepted the dominance of the shareholder primacy model but also the law and economics view of economic efficiency.¹⁹ This approach set forth guidelines for business decision making based on a neoclassical perception of cost-benefit analysis and value-maximization ends,²⁰ often excluding stakeholder interests and overlooking environmental and social externalities caused by corporate conduct.²¹

It was only after the major corporate scandals of the early 2000s that corporate governance gained attention as a public policy topic. Proposals for corporate reform called upon legislators and businesses to allow greater scrutiny over accounting maneuvers and more transparency to prevent managers from engaging in fraud.²² The Sarbanes-Oxley Act, which introduced comprehensive accounting reform for public companies and severe penalties for failures to comply,²³ divided pro-business and pro-regulation advocates over the value of these reformative approaches and their political effects.²⁴

As a result, corporate governance has gradually become a realm for busi-

17. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

18. See generally *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* (Reinier Kraakman et al. eds., 2004).

19. Steven M.H. Wallman, *Understanding the Purpose of a Corporation: An Introduction*, 24 J. CORP. L. 807 (1999); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277 (1998); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

20. In their classic book, EASTERBROOK & FISCHER, *supra* note 1, provide concrete examples for these premises from the areas of corporate contracts, limited liability, voting, fiduciary duties, the Business Judgment Rule, and corporate control transactions.

21. LYNN L. DALLAS, *LAW AND PUBLIC POLICY: A SOCIOECONOMIC APPROACH* (2005). For a general critique of Law and Economics, see Duncan Kennedy, *Law and Economics from the Perspective of Critical Legal Studies*, in 2 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 465 (Peter Newman ed., 1998); Mark Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics"*, 33 J. LEGAL EDUC. 274 (1983).

22. In 2002, following the Enron crisis, President Bush announced his "Ten-Point Plan to Improve Corporate Responsibility and Protect America's Shareholders" focusing on corporate governance reform. See *The President's Leadership in Combating Corporate Fraud*, <http://www.whitehouse.gov/infocus/corporateresponsibility/> (last visited Jan. 23, 2008).

23. Public Company Accounting Reform and Investor Protection (Sarbanes-Oxley) Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18 U.S.C.).

24. Scott Harshbarger & Goutam U. Jois, *Looking Back and Looking Forward: Sarbanes-Oxley and the Future of Corporate Governance*, 40 AKRON L. REV. 1 (2007).

ness due process where corporate managers are required to make decisions with a strong internal monitoring system that protects investors first and foremost.²⁵ Good corporate governance in the years after Enron and WorldCom has often meant corporate morals and ethical behavior find their expression in accountability mechanisms, transparency, and disclosure.²⁶ Where there was once a private law discourse of value-maximization there has lately emerged a semi-public law debate where managers use governance as a synonym to describe their duties of care, fairness, and fiduciary responsibility.²⁷

The agency focus associated with “old school” corporate governance has gradually yet overwhelmingly cleared the way for a “new school” focus on ethics and accountability.²⁸ Subsequently, the new public view of the field currently acknowledges that corporate governance is no longer merely about maximizing stock-value but rather about “the relationships among the many players involved (the stakeholders) and the goals for which the corporation is governed. The principal players are the shareholders, management and the board of directors. Other stakeholders include employees, suppliers, customers, banks and other lenders, regulators, the environment and the community at large.”²⁹

Notwithstanding these shifts towards accountability, large portions of the corporate governance public discourse and academic literature have generally remained devoted to “old school” goals. These wings have recognized many of the due process trends in corporate governance but have linked them primarily to the board’s capacity to increase profits for shareholders.³⁰ Emphasizing corporate honesty and fairness has frequently if not typically served to empower financial investors (for instance, by providing them with a stronger voice and greater proxy power) rather than stakeholders who own no stock in the company.³¹

25. See Gedeon J. Rossouw, *Business Ethics and Corporate Governance: A Global Survey*, 44 *BUS. & SOC’Y* 32, 36 (2005).

26. *The Good, the Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 *HARV. L. REV.* 2123 (2003); Brian A. Warwick, *Re-inventing the Wheel: Firestone and the Role of Ethics in the Corporation*, 54 *ALA. L. REV.* 1455 (2003); Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 *IOWA L. REV.* 697 (2002).

27. See Guhan Subramanian, Op-Ed, *Board Silly*, *N.Y. TIMES*, Feb. 14, 2007, available at <http://www.nytimes.com/2007/02/14/opinion/14subramanian.html>.

28. See generally LAWRENCE MITCHELL & MICHAEL DIAMOND, *CORPORATIONS: A CONTEMPORARY APPROACH* (2004).

29. *Supra* note 12.

30. Bernard Black, Brian Cheffins, & Michael Klausner, *Outside Director Liability*, 58 *STAN. L. REV.* 1055, 1089-91 (2006); see also Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 *HARV. L. REV.* 1641 (2006); Joseph A. Grundfest, *Advice and Consent: An Alternative Mechanism for Shareholder Participation in the Nomination and Election of Corporate Directors*, in *SHAREHOLDER ACCESS TO THE CORPORATE BALLOT* (Lucian Bebchuk ed. 2005).

31. Paddy Ireland, *From Amelioration to Transformation: Capitalism, the Market, and Corporate Reform*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND*

These recent developments in corporate accountability signal a growing tension between corporate governance's engagement with shareholder and stakeholder interests. As discussed below, the CSR movement has played an increasingly important role in reconciling this tension and making corporate governance as a whole more attuned to constituency concerns.

B. Corporate Social Responsibility: From Ethics to Business Judgment

As in the realm of corporate governance, there has been ongoing debate regarding the definitions and interpretations of the term "corporate social responsibility." Upon emerging in the political and academic landscape several decades ago, CSR related first and foremost to the conceptual challenges raised by scholars and advocates who criticize corporate America's shareholder primacy ethos.³² CSR offered theoretical insights as to why companies should not be treated solely as their shareholders' private property but rather as semi-public enterprises based on sophisticated transactions and relational contracts among investors, managers, and employees.³³ For example, scholars suggested that applying the contractarian approach to corporate law (which portrays the corporation as a voluntary "nexus of contracts")³⁴ as well as the realistic approach (which paints the corporation as a separate legal personality akin to a human being)³⁵ should not result in giving superior property rights to shareholders over employees. Rather, they posited, workers who invest their labor as an input in the enterprise should enjoy legal recognition of their residual interest in the company's assets.³⁶

Moreover, the CSR literature drew on critiques of the law and economics school of thought to challenge the economic rationales behind shareholder centralism. Social welfare-driven approaches to corporate law and policy proposed that business efficiency should not only aim at higher stock prices, but also at internalizing environmental and social externalities and acknowledging the often

POSSIBILITIES 197 (Joanne Conaghan, Richard Michael Fischl, & Karl Klare eds., 2002).

32. For an overview of the normative arguments set forth in this context, see Reuven S. Aviyonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 813-18 (2005).

33. A key model that offers an understanding of the Board of Directors as mirroring the interests of various constituencies can be found in Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

34. Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. LAW 779, 782-84 (2006); Melvin A. Eisenberg, *The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 825-26 (1999).

35. David S. Allen, *The First Amendment and the Doctrine of Corporate Personhood: Collapsing the Press-corporation Distinction*, 2 JOURNALISM 255 (2001).

36. See, e.g., Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283 (1998). For a discussion on the property rights justification for shareholder primacy, see Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119 (1990); William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992).

unequal distributive consequences of creating corporate surpluses.³⁷ These critical theories, primarily in the social sciences, relied on moral arguments associated with justice, fairness, and communitarianism.³⁸ They also endorsed doctrinal approaches that reject the exclusivity of cost-benefit analysis and the exclusion of distributive aspects from efficiency models focused on maximizing each transaction's dollar-value.³⁹ Instead, CSR promoted the stakeholder theory, incorporating stakeholder interests and making various constituencies participants in how companies are run and operated on a daily basis.⁴⁰

While some commentators still regard these conceptual challenges as the essence of CSR, today they are more commonly viewed as part of a general theoretical debate over corporate structure that is not linked directly to the CSR movement.⁴¹ Several scholars developed these theories during the 1990s and 2000s to propose new corporate regulations that go beyond CSR and touch on concrete and enforceable legal rules. This body of scholarship, frequently entitled "Progressive Corporate Law," rejects the voluntary nature of CSR with its focus on self-regulatory ethics, and suggests far more comprehensive, mandatory changes in the fundamental legal structure of corporations.⁴²

Corporate social responsibility itself has taken a different path altogether. In many ways, it was clear from the outset that the CSR movement neither sought to challenge the market framework in which it was positioned nor aimed to criticize the fictional corporate entity introduced in the early twentieth century. CSR was not about reinforcing the New Deal welfare state or introducing egalitarian policy amendments inspired by distributive justice philosophies.⁴³ Instead, it was about working with businesses, within the existing political and

37. For proposals to progressively reform corporate law and policy, see generally DALLAS, *supra* note 21; Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 89, 117 (2005); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992).

38. See generally Kent Greenfield, *Corporate Social Responsibility: There's a Forest in those Trees: Teaching about the Role of Corporations in Society*, 34 GA. L. REV. 1011 (2000). For a critique of how normative justifications attributed to CSR become part of the neo-liberal logic rather than undermine it, see Ronen Shamir, *The Age of Responsibilization: On Market Embedded Morality*, 37 ECON. & SOC'Y (forthcoming, 2008).

39. For a recent comprehensive critique of the existing foundations of corporate legal thought, see KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* (2006).

40. Regarding stakeholder theory, see generally THOMAS DONALDSON & LEE E. PRESTON, *THE STAKEHOLDER THEORY OF THE CORPORATION: CONCEPTS, EVIDENCE, AND IMPLICATIONS* (1995); R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* (1984).

41. Sneirson, *supra* note 14.

42. Greenfield, *supra* note 38; Kellye Y. Testy, *Capitalism and Freedom—For Whom? Feminist Legal Theory and Progressive Corporate Law*, 67 L. & CONTEMP. PROBS. 87 (2004); LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* (2001). A much-cited work in which a group of scholars came together to offer company law reform touching on a range of concrete legal issues is PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995).

43. Mitchell, *supra* note 11.

economic landscape, to make companies adopt ethical guidelines, incorporate stakeholder concerns, and more efficiently internalize the costs externalized onto the environment and society.⁴⁴

On the ground, this market-friendly approach offered companies the opportunity to decide for themselves a suitable scope for their practice of social responsibility.⁴⁵ The voluntary nature of the concept invited businesses to develop stakeholder engagement programs that increased their competitiveness, and launch marketing campaigns that emphasized their humanistic, democratic values as “corporate citizens.” Businesses also declared their commitment to the idea that issues such as human rights, workers’ rights, and protecting the environment could accompany profit-maximization goals.⁴⁶ This is often referred to as the “Triple Bottom Line” consisting of people, planet, and profit components.⁴⁷

As a result, the CSR movement was gradually absorbed into the corporate ethos, part of a new consensus on the broader judgment that managers should exercise in the course of doing business.⁴⁸ CSR units have become highly-visible, with some corporations marking themselves as leading players in initiating CSR programs and public relations endeavors.⁴⁹ Moreover, CSR-related concepts and ideas are finding their way into the heart of the curriculum at many MBA programs. CSR has also increasingly been studied as a strategic tool to maximize profits, with extensive literature in business administration and economics testing the possible correlation between adopting CSR programs and improving performance.⁵⁰

44. VOGEL, *supra* note 4.

45. For a recent survey on how corporations choose to incorporate CSR aspects into their Human Resources practices, see 2007 CORPORATE SOCIAL RESPONSIBILITY PILOT STUDY: UNITED STATES, AUSTRALIA, INDIA, CHINA, CANADA, MEXICO AND BRAZIL (Society for Human Resource Management ed., 2007), available at http://www.shrm.org/hrresources/surveys_published/2007%20Corporate%20Social%20Responsibility%20Pilot%20Study.pdf.

46. See, e.g., the Corporate Citizenship websites of Coca-Cola (<http://www.thecocacolacompany.com/citizenship/index.html>), Gap (<http://www.gapinc.com/public/SocialResponsibility/socialres.shtml>), McDonalds (<http://www.mcdonalds.com/usa/good/report.html>), Nike (<http://www.nikebiz.com/responsibility/>), Wal-Mart (<http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=217>).

47. JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (1998).

48. ANDREW W. SAVITZ, THE TRIPLE BOTTOM LINE: HOW TODAY’S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL, AND ENVIRONMENTAL SUCCESS—AND HOW YOU CAN TOO (2006).

49. Ronen Shamir, *Mind the Gap: The Commodification of Corporate Social Responsibility*, 28 SYMBOLIC INTERACTION 229 (2005).

50. See generally Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, 84 HARV. BUS. REV. 78, 78-92, 163 (2006); Raymond J. Fisman, Geoffrey Heal, & Vinay B. Nair, *Corporate Social Responsibility: Doing Well by Doing Good?* (The Wharton School, Working Paper, Sept. 2005), available at http://finance.wharton.upenn.edu/~vbnair/Research_files/CSR.pdf; Claudia H. Deutsch, *For Wall*

Not surprisingly, all of these processes brought about what Ronen Shamir refers to as the “de-radicalization” of CSR,⁵¹ echoing a growing critique of the industry by those seeking social change. In fact, as CSR has become a business-sensitive, if not business-driven practice, critics point out that original social change motives have been surrendered to the marketing interests of big corporations and the neo-liberal logic of private ordering more generally.⁵² Notably this line of critique underscores a growing concern among scholars and policy advocates who fear CSR has become a cynical public relations tool.⁵³

Parallel to this mainstreaming of CSR, a wave of public interest advocacy led by regulators and NGOs increasingly aims to insert more enforceable tools to oversee corporate accountability and social responsibility.⁵⁴ These tools include public monitoring campaigns, litigation that addresses human and workers’ rights violations by multinational corporations (MNCs), and—in more rare instances—“soft” legislation.⁵⁵ These tools seek to improve corporate engagement with CSR by making public groups and coalitions participants in shaping the field.⁵⁶

A tension has emerged between what has grown to be the two wings of CSR: the voluntary, pro-self regulation wing and the mandatory, pro-regulation wing. This growing tension makes it extremely difficult to characterize CSR using a single term, as it now refers to so many competing features and notions. As Shamir defines it, CSR is “[t]he social universe where ongoing negotiations over the very meaning and scope of the term social responsibility take place.”⁵⁷

Nonetheless, there is no dispute that in today’s corporate arena, CSR has completed its journey from the political margins to the business mainstream. The movement no longer portrays itself as a radical counter-argument to profit-

Street, Increasing Evidence that Green Begets Green, N.Y. TIMES, July 19, 1998, available at <http://query.nytimes.com/gst/fullpage.html?res=9A04E4DD1230F93AA25754C0A96E958260&scp=1&sq=For+Wall+Street%2C+Increasing+Evidence+that+Green+Begets+Green&st=nyt>.

51. Ronen Shamir, *The De-Radicalization of Corporate Social Responsibility*, 30 CRITICAL SOC. 669, 671 (2004).

52. DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005).

53. ROBERT REICH, *SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE* (2007) (arguing that CSR is a “pale substitute” for regulation which fails to replace the need for a campaign finance reform that would reduce corporate influence over the political process).

54. Jonathan P. Doh & Terrence R. Guay, *Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective*, 43 J. MGMT. STUD. 47 (2006).

55. For a discussion of the recent use of these tools by social groups, see Parker, *supra* note 10.

56. Morton Winston, *NGO Strategies for Promoting Corporate Social Responsibility*, 16 ETHICS & INT’L AFF. 71 (2002).

57. Ronen Shamir, *Corporate Responsibility and the South African Drug Wars: Outline of a New Frontier for Cause Lawyers*, in *THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE* 38 (Austin Sarat & Stuart Scheingold eds., 2005).

maximization. Rather, CSR is a business strategy to make the ultimate goals of corporations more achievable as well as more transparent, demonstrate responsibility towards communities and the environment, and take the interests of groups such as employees and consumers into account when making long-term business decisions.⁵⁸

III. THE CONVERGENCE OF CORPORATE GOVERNANCE AND RESPONSIBILITY?

A. Intersections and the "New Governance"

As corporate governance becomes increasingly driven by ethical norms and the need for accountability, and corporate social responsibility adapts to prevailing business practices, a potential convergence between them surfaces. Where there were once two separate sets of mechanisms, one dealing with "hard core" corporate decision-making and the other with "soft," people-friendly business strategies, scholars now point to a more hybridized, synthesized body of laws and norms regulating corporate practices.

Extant research offers a conceptual background for how the two fields have begun to converge, relying on executive fiduciary duties, stakeholder engagement, and economic analysis of management incentives to engage in CSR.⁵⁹ The scholarship also addresses how companies incorporate stakeholder-friendly business strategies,⁶⁰ examines the role of shareholder and board activism in pushing for social responsibility,⁶¹ and provides quantitative assessments of re-

58. *Just Good Business*, ECONOMIST, Jan. 18, 2008, available at http://www.economist.com/business/displayStory.cfm?story_id=10491077.

59. For fiduciary duty aspects, see Lyman Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597 (2005); Blair & Stout, *supra* note 33. For stakeholder aspects, see Mitchell, *supra* note 11. For economic analysis, see Craig Mackenzie, *Boards, Incentives and Corporate Social Responsibility: The Case for a Change of Emphasis*, 15 CORP. GOVERNANCE: AN INT'L REV. 935 (2007); Jason Scott Johnston, *Signaling Social Responsibility: On the Law and Economics of Market Incentives for Corporate Environmental Performance* (U. of Penn, Inst. for Law & Econ Research Paper 05-16, 2005), available at <http://ssrn.com/abstract=725103>.

60. Adam Winkler, *Corporate Law or the Law of Business? Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109 (2004); Michael Bradley, Cindy A. Schipani, Anant K. Sundaram, & James P. Walsh, *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 9 (1999).

61. Aguilera et al., *supra* note 11 (comparing between institutional investor activism in the United States and United Kingdom); Adam J. Sulkowski & Kent Greenfield, *A Bridle, a Prod and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals and the Ultra Vires Doctrine as Methods for Controlling Corporate Behavior* (Boston College Law School Research Paper No. 76, 2005), available at <http://ssrn.com/abstract=775125> (reviewing shareholder and employee strategies to use corporate law to affect corporate behavior); Thomas W. Joo, *A Trip Through the Maze of "Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV.

porting practices, indexes, and ratings that link governance with responsibility.⁶² Finally, scholars suggest models for pursuing this emerging frontier through greater involvement on behalf of the board of directors,⁶³ and utilize a comparative approach to cross the border between corporate governance and accountability.⁶⁴

The potential convergence of corporate governance and CSR is frequently read against the backdrop of the New Governance theory which identifies a growing involvement of the private sector in shaping public policy and regulation.⁶⁵ In the face of global economic transformations, scholars argue that the regulatory power of the state has become increasingly decentralized.⁶⁶ Therefore, “hierarchical command-and-control” regulation⁶⁷ is being replaced by a mixture of public and private, state and market, traditional and self-regulation institutions that are based on collaboration among the state, business corporations, and NGOs.⁶⁸

Those public policies which were traditionally imposed by formal regulatory bodies, such as workplace antidiscrimination and environmental protection boards, are now being collaboratively addressed through participation, negotiations, and dialogue between the public and private sectors.⁶⁹ Accordingly, the

735 (2003) (assessing the SEC proposal to provide shareholders with a louder voice in board composition in the context of racial diversity among directors).

62. Lori Holder-Webb, Jeffrey R. Cohen, David Wood, & Leda Nath, *The Supply of Corporate Social Responsibility Disclosures Among U.S. Firms* (Feb. 28, 2007), available at <http://ssrn.com/abstract=970330>; Ans Kolk, *Sustainability, Accountability and Corporate Governance: Exploring Multinationals' Reporting Practices* 18 *BUS. STRATEGY & ENV'T.* 1 (2008); Meir Statman, *Socially Responsible Indexes: Composition and Performance* (Jan. 2005), available at <http://ssrn.com/abstract=705344>; Craig Deegan, *The Legitimizing Effect of Social and Environmental Disclosures—A Theoretical Foundation*, 15 *ACCT., AUDITING & ACCOUNTABILITY J.* 282 (2002); Reggy Hooghiemstra, *Corporate Communication and Impression Management—New Perspectives Why Companies Engage in Social Reporting*, 27 *J. BUS. ETHICS* 55 (2000).

63. Mitchell, *supra* note 11.

64. See generally YADONG LUO, *GLOBAL DIMENSIONS OF CORPORATE GOVERNANCE* (2006); Arthur R. Pinto, *Globalization and the Study of Comparative Corporate Governance*, 23 *WIS. INT'L L.J.* 477 (2005); CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J. Roe eds., 2004).

65. Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* 1-14 (Lester M. Salamon ed., 2002).

66. Yuval Feldman & Orly Lobel, *Behavioral versus Institutional Antecedents of Decentralized Enforcement in Organizations: An Experimental Approach* (San Diego Legal Studies Paper No. 07-126, Nov. 2007), available at <http://ssrn.com/abstract=1031853>.

67. Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 *ADMIN. L. REV.* 1071 (2005).

68. For a discussion of employment disputes, organizational compliance, financial regulation, and employee misconduct, see Orly Lobel, *Setting the Agenda for New Governance Research*, 89 *MINN. L. REV.* 498 (2004).

69. See, e.g., David Hess, *Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency*, 17 *BUS. ETHICS Q.* 455 (2007); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal*

regulatory tools themselves are changing; they no longer consist solely of legislative or administrative acts, but also include market-oriented institutions that enforce business transparency, disclosure, reporting, and monitoring practices, as well as internal sanctions to tackle individual misconduct.⁷⁰ The primary challenge for New Governance arrangements is how to create the appropriate atmosphere and conditions for these tools to work as effectively as possible.⁷¹

The most common critique of New Governance arrangements is that they are in fact deregulation in disguise.⁷² Critics argue that the decline of state regulation at the expense of private ordering symbolizes a conservative, pro-business movement that hides deregulation behind a curtain of unrealistic promises for self-regulation. However, the New Governance literature presents a far more complex vision that in many ways rejects deregulation as its political agenda.

In order to function effectively as a tool for regulation, New Governance highlights the need for public scrutiny and enforcement, but also promotes new regulatory structures requiring companies to follow growing public expectations for accountability. In fact, studies show that internal governance policies that emphasize social responsibility through transparency and coordination have been more successful in bringing about ethical corporate conduct than traditional command-and-control structures.⁷³ Moreover, contrary to more traditional forms of regulation, proponents of New Governance believe these structures can and should be designed to rely less on state-dictated preferences and more on public-private collaboration, flexibility, and pragmatism.⁷⁴ Empirical evidence suggests that corporations are more willing to consider effective ways of enforcing compliance standards and processes, as well as share more information, when they operate in a collaborative climate that allows them to perform their own monitoring.⁷⁵ Finally, studies have shown that enforcing environmental protections

Thought, 89 MINN. L. REV. 342 (2004).

70. The issue of social enforcement exercised within companies and organizations requires a careful identification of those particular behaviors and misconducts that allow an internal enforcement system as well as those which may serve the interest of the organization at the expense of the public unless formally regulated. See Feldman & Lobel, *supra* note 66, at 9.

71. For an illustration of these challenges in the CSR context, see John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement* (UNC Legal Studies Research Paper No. 05-16, 2005), available at <http://ssrn.com/abstract=691521>.

72. Guy Mundlak, Eva Schram & Els Sol, *Hard Law/Soft Law Hybrids as a Conceptual and Policy Framework: Looking at the Regulation of Temp Agency Work in Highly Regulated Countries* (on file with author).

73. PHILIP SELZNICK, THE COMMUNITARIAN PERSUASION 101 (2002); Andy Hochstetler & Copes Heith, *Organizational Culture and Organizational Crime*, in CRIMES OF PRIVILEGE (Neal Shover & John Paul Wright eds., 2001); JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).

74. See, e.g., Bradley Karkkainen, *New Governance in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004).

75. See, e.g., Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC'Y REV. 691 (2003).

through non-conventional regulatory tactics may also enhance corporate compliance with financial and workplace protections.⁷⁶

The complex mixture of governance and responsibility that characterizes the post-Enron corporate transformation demonstrates a decentralization of regulatory power away from the state to the private sector and public monitors, and reveals an emerging set of rules and norms. The growing number of codes of conduct, best practices, and guidelines initiated by businesses, regulators and administrative agencies serve as a primary source of business regulation. At this juncture, New Governance finds its strongest expression in the field of corporate conduct as it encompasses two of the most important socio-legal patterns that enable the convergence of corporate governance and CSR: self-regulation and meta-regulation. The sections below address these specific patterns.

B. Corporate Self-Regulation

As the authority and power of the nation-state dramatically decline in the global era, non-state actors and transnational bodies are increasingly engaged in creating regulatory schemes and devices for businesses.⁷⁷ Corporate self-regulation, as encouraged by international agencies, social groups, and business-related entities has gained overwhelming attention as it emerges as a complement to, if not a substitute for, formal governmental regulation.⁷⁸

One highly visible, frequently debated form of self-regulation is the corporate code of conduct. In contrast to private business codes that regard transactional and contractual aspects of commerce,⁷⁹ codes of conduct address corporate ethics, moral guidelines, and key CSR issues such as human rights, labor, the environment, and sustainable development. Throughout the 1990s, such codes were adopted by MNCs, particularly those with a strong presence in developing countries with weak state-based regulatory systems.⁸⁰

For example, in 1999 the Leon H. Sullivan Foundation proposed an international code of corporate conduct known as the Global Sullivan Principles of Social Responsibility. The Principles cover a broad range of CSR issues, including employee freedom of association, health and environmental standards, and

76. Christine Parker & Vibeke Nielsen, *Do Corporate Compliance Programs Influence Compliance?* (U. of Melbourne Legal Studies Research Paper No. 189, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=930238.

77. See, e.g., John W. Cioffi, *Governing Globalization? The State, Law, and Structural Change in Corporate Governance*, 27 J.L. & SOC'Y 572 (2000).

78. PARKER, *supra* note 5; Gunningham & Rees, *supra* note 5.

79. Eddy Wymeersch, *Corporate Governance Codes and Their Implementation* (U. of Gent Fin. Law Inst. Working Paper No. 2006-10, 2006) available at <http://ssrn.com/abstract=931100>.

80. Harry Arthurs, *Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES*, *supra* note 31, at 471.

sustainable development.⁸¹ The Principles have since inspired Fortune 500 companies to pledge to modify their internal policies in order to meet the guidelines set forth.⁸²

Two major critiques have surfaced with respect to codes of conduct. The first echoes concerns regarding New Governance and criticizes the free market ideology underlying self-regulation.⁸³ In response, advocates of the codes of conduct posit arguments similar to those set forth in the New Governance context more generally, namely that analysis of the codes' potential for engendering change requires more complex doctrinal and empirical understanding.⁸⁴

The second critique contends that, as a practical matter, codes have failed to actually improve corporate behavior worldwide, thus serving merely as lip service.⁸⁵ Indeed, many agree that even codes backed by a strong monitoring system might not generate ground-level change, unless accompanied by appropriate changes in business culture and decision-making.⁸⁶

Another recent trend in self-regulation that has drawn attention is non-financial reporting. First published in the 1990s in response to a series of environmental disasters, non-financial corporate reports increasingly cover a much wider range of corporate policies.⁸⁷ The non-financial reporting trend seeks to not only inform the public of existing CSR policies implemented by the reporting firm but also to provide incentives for companies to ensure transparency and create channels for dialogue with their stakeholders.⁸⁸ In other words, corporate disclosure aside, the virtue of reporting is that it encourages companies to create better mechanisms for long-term accountability to their constituencies.

Nevertheless, such reporting is still largely a voluntary concept, despite the recent attempts to mandate non-financial corporate reporting. Some companies have chosen to incorporate governance and CSR issues into their annual financial reporting, creating what have become known as "integrated reports."⁸⁹

81. The Global Sullivan Principles, <http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp> (last visited Mar. 26, 2008).

82. Gordon Leslie Clark & Tessa Hebb, *Why Do They Care? The Market for Corporate Global Responsibility and the Role of Institutional Investors* (Sch. Of Geography and the Env't, Univ. of Oxford, Working Paper, 2004), available at http://www.communitywealth.org/_pdfs/articles-publications/state-local/paper-clark.pdf.

83. See, e.g., Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401 (2001).

84. See, e.g., Peer Zumbansen, *The Parallel Worlds of Corporate Governance and Labor Law*, 13 IND. J. GLOBAL LEG. STUD. 261 (2006).

85. Richard M. Locke & Monica Romis, *Beyond Corporate Codes of Conduct: Work Organization and Labor Standards in Two Mexican Garment Factories* (MIT Sloan Research Paper No. 4617-06, 2006), available at <http://ssrn.com/abstract=925273>.

86. See, e.g., PROGRESSIVE CORPORATE LAW, *supra* note 42.

87. Kolk, *supra* note 62.

88. Hess, *supra* note 69, at 3.

89. Kolk, *supra* note 62.

Many others have published special CSR reports (i.e., Sustainability or Triple Bottom Line reports), often conducted according to the Global Reporting Initiative (GRI) Guidelines.⁹⁰

Scholars have responded with a growing interest in this reporting wave. Thus far, researchers have addressed the conceptual goals and roles of reporting in encouraging corporate accountability,⁹¹ especially in the context of environmental disclosure policies.⁹² Researchers have also surveyed CSR reporting practices adopted by U.S. firms⁹³ and those adopted by MNCs linking governance with sustainability.⁹⁴ Additional studies have assessed the accomplishments and failures of reporting in achieving accountability,⁹⁵ particularly with regard to transparency⁹⁶ and stakeholder engagement.⁹⁷ Still others have proposed new strategies, including the adoption of other transparency models from U.S. laws⁹⁸ or mandatory social reporting.⁹⁹

Both codes of conduct and non-financial reporting trends illustrate how corporate self-regulation serves as one of the most notable vehicles for linking governance with responsibility. Through various strategies and instruments, self-regulation has subjected businesses with a mixture of supervisory principles that reflect the convergence of corporate governance and CSR. A push for stronger external supervision over self-regulation catalyzed this process, a pattern to which this Article turns to in the next section.

C. Corporate Meta-Regulation

Non-state actors and transnational agencies previously undertook regulatory efforts to control corporate behavior under an umbrella of self-regulation.

90. Sustainability Reporting Guidelines, available at <http://www.globalreporting.org/ReportingFramework/G3Guidelines>.

91. Hess, *supra* note 69.

92. Sylvie Berthelot, Denis Cormier, & Michael Mgnan, *Environmental Disclosure Research: Review and Synthesis*, 22 J. ACCT. LITERATURE 1 (2003).

93. Holder-Webb et al., *supra* note 62.

94. Kolk, *supra* note 62.

95. Hess, *supra* note 69, at 4; Craig Deegan, *The Legitimizing Effect of Social and Environmental Disclosures—A Theoretical Foundation*, 15 ACCT. AUDITING & ACCOUNTABILITY J. 282 (2002); Hooghiemstra, *supra* note 60.

96. Hess, *supra* note 69; Amanda Ball, David Owen, & Rob Gray, *External Transparency or Internal Capture? The Role of Third-Party Statements in Adding Value to Corporate Environmental Reports*, 9 BUS. STRATEGY AND THE ENV'T 1 (2000).

97. Hess, *supra* note 69, at 4-5; PARKER, *supra* note 5; David L. Owen, Tracey Swift, & Karen Hunt, *Questioning the Role of Stakeholder Engagement in Social and Ethical Accounting, Auditing, and Reporting*, 25 ACCT. F. 264 (2001).

98. Hess, *supra* note 69.

99. Ans Kolk, *Trends in Sustainability Reporting by the Fortune Global 250*, 12 BUS. STRATEGY & ENV'T 279 (2003); Justine Nolan, *Corporate Accountability and Triple Bottom Line Reporting: Determining the Material Issues for Disclosure* (UNSW Law Research Paper No. 2007-15, 2007), available at <http://ssrn.com/abstract=975414>.

At present, however, there is a common distinction between the mechanisms adopted by companies and financial institutions to govern their internal policies (e.g., self-regulation) and those pursued by external social actors to monitor self-regulation by looking at it from the outside. “Meta-regulation,”¹⁰⁰ as the latter set of mechanisms is known, is characterized by three major features deriving from the voluntary, private nature of business associations.

First, meta-regulation is carried out by social groups that participate in the process—from employee and consumer coalitions, to public-interest groups and international NGOs, to courts and legislators—rather than exclusively by regulators. Second, meta-regulation focuses on making self-regulation of corporate conduct more effective rather than on replacing it with formal binding laws. Third, since enforceable legal frameworks are scarce in the context of voluntary stakeholder corporate governance, meta-regulation focuses on non-legal measures,¹⁰¹ and engages in ground-level activism, advocacy, and media campaigns.

Scholars have devoted substantial attention to investigating efforts undertaken by civil society actors (e.g., NGOs and non-profits) and corporations to mandate self-regulation.¹⁰² As to the former, these efforts have, thus far, concentrated on such strategies as working with companies to build their CSR tools through consulting and training¹⁰³ and publishing stock market indexes and ratings that measure CSR performance.¹⁰⁴ As to the latter, the literature on corporate meta-regulation also observes the growing efforts to enforce voluntary CSR through binding legal frameworks. Such studies have focused on MNCs in particular and extensively discuss the utility of international law and transnational litigation in achieving global corporate accountability.¹⁰⁵

Through the use of “outreach” programs, administrative agencies such as

100. For studies exploring the concept of meta-regulation, see PARKER, *supra* note 5; HARM SCHEPPEL, *THE CONSTITUTION OF PRIVATE GOVERNANCE: PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS* (2005); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLAL. REV. 1 (1997).

101. Such non-legal measures include best practices, indexes, ratings, guidelines, principles, advisory products, and publications. See generally Parker, *supra* note 10.

102. PARKER, *supra* note 5.

103. Kees Bastmeijer & Jonathan M. Verschuuren, *NGO-Business Collaborations and the Law: Sustainability, Limitations of Law, and the Changing Relationship between Companies and NGOs*, in *CORPORATE SOCIAL RESPONSIBILITY, ACCOUNTABILITY, AND GOVERNANCE: GLOBAL PERSPECTIVES* 314 (Istemi Demirag ed., 2005).

104. See, e.g., Statman, *supra* note 62 (empirically evaluating the differences among social responsibility indexes and their characteristics compared to non-CSR company indexes).

105. See generally SARAH JOSEPH, *CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION* (2004); LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); Hari M. Osofsky, *Local Approaches to Transnational Corporate Responsibility: Mapping the Role of Subnational Climate Change Litigation*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 143 (2007); Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC'Y REV. 635 (2004); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 34 U.C. DAVIS L. REV. 705 (2002).

the Securities and Exchange Commission (SEC), the Occupational Safety and Health Administration (OSHA), and the Environmental Protection Agency (EPA) have played an increasingly large role in making CSR more binding.¹⁰⁶ Notable examples include granting business licenses and permissions conditioned upon integrity and disclosure performance,¹⁰⁷ whistleblower protections,¹⁰⁸ government-sponsored auditing schemes and tax incentives,¹⁰⁹ and using a company's implementation of a compliance program as a basis for sentencing guidelines used to determine corporate criminal liability.¹¹⁰ Courts also are more attentive to how a company conducts its own voluntary compliance program. Internal procedures are often considered when brought before the court as a defense against a liability claim or when a company is sued for punitive damages (e.g., in an employment discrimination suit).¹¹¹

Meta-regulation, like the parallel mechanism of self-regulation, is a vehicle through which corporate governance and social responsibility merge and create a regulatory synthesis. The changing nature of corporate monitoring, the identity of the social regulators participating in the process, and the substantive mechanisms unfolding to control corporate behavior indicate the important role of meta-regulation in this convergence. Section IV will discuss the applications and implications of this synthesis on the study and regulation of corporate conduct.

IV. PROSPECTS AND CHALLENGES

A. Conceptual and Methodological Applications

The merging of corporate governance with corporate social responsibility affects how academics study, understand and analyze corporate law and policy. In today's transnational climate, this synthesis corresponds broadly with the complexity of evolving business norms. Business associations are increasingly embedded in layers of rules stemming from multiple sources, including corporate law, securities and antitrust regulation, labor and employment law, tax law, environmental law, commercial law, and consumer protection law. These fields generally include both "hard" law, such as federal and state statutes, and "soft" law, such as codes and standards.¹¹²

106. Feldman & Lobel, *supra* note 66, at 1, 8.

107. Parker, *supra* note 10.

108. *See, e.g.*, Feldman & Lobel, *supra* note 66.

109. Parker, *supra* note 10.

110. John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 313-36 (2004); Murphy, *supra* note 26, at 704.

111. Feldman & Lobel, *supra* note 66.

112. *See, e.g.*, Zumbansen, *supra* note 84 (analyzing the embeddedness of corporations in layers of rules of both business and employment protection natures); SANFORD JACOBY, THE EMBEDDED CORPORATION: CORPORATE GOVERNANCE AND EMPLOYMENT RELATIONS IN JAPAN

Corporate self-regulation and meta-regulation, read against the New Governance literature, capture a central element in the complexity of business law. That is, these regulatory patterns accompany socio-legal changes in market economies, highlighted by the fall of state authority and the rise of private ordering.¹¹³ As the legal landscape changes, a more complex understanding of corporations is required: one that acknowledges and pursues the synthesis between old and new legal institutions, orthodox and novel social concepts, and conservative and liberal political conceptions.¹¹⁴

Institutional and political duality is a key feature in the emerging intersection of governance and responsibility. Corporate governance and CSR have begun to form a unified body of norms¹¹⁵ that constitutes a new and very different "constitution of the firm."¹¹⁶ Corporate governance is abandoning its sole focus on agency conflicts to enable managers and investors to pursue stakeholder participation. At the same time, CSR has gained mainstream acceptance by both incorporating business concepts it once neglected and emphasizing its own strengths as a value-creation tool.¹¹⁷

The traditional separation between corporate law as a field dealing with investor-manager relations, and non-corporate legal fields relating to other corporate constituencies (e.g., labor),¹¹⁸ can no longer be maintained. For example, the presence of CSR board committee members and institutional investor activists on corporate boards of directors¹¹⁹ as employee representatives indicates that corporate governance has changed its approach to company-worker relations.¹²⁰ However, the assimilation of notions of responsibility and accountabil-

AND THE UNITED STATES (2005) (comparing the implementation of corporate governance and employment law tools of various forms by Human Resources departments in U.S. and Japanese companies).

113. Lobel, *supra* note 67 (addressing the fall of formal regulation); Arthurs, *supra* note 78 (studying corporate codes of conduct as an emerging sphere of labor market private ordering).

114. Zumbansen defines this embeddedness as "Transnational Corporate Governance," suggesting that Transnational Law (TL) should not be understood merely as a set of rules relating to globalization (e.g., international trade law) but also as a methodological tool to comprehend the cross-boarder transformations that corporate governance (and, in the case of his analysis, labor law) are experiencing. See Zumbansen, *supra* note 84, at 299-305.

115. Yohanes E. Riyanto & Linda A. Toolsema, *Corporate Social Responsibility in a Corporate Governance Framework* (National University of Singapore Department of Economics, Working Paper No. 0703, 2007), available at <http://nt2.fas.nus.edu.sg/ecs/pub/wp/wp0703.pdf>

116. Zumbansen, *supra* note 84, at 268.

117. See, e.g., *Just Good Business*, *supra* note 58; Porter & Kramer, *supra* note 50.

118. MICHAEL P. DOOLEY, *FUNDAMENTALS OF CORPORATION LAW* (1995).

119. Marleen O'Connor, *Labor's Role in the American Corporate Governance Structure*, in *CORPORATE GOVERNANCE: LAW, THEORY AND POLICY* (Thomas W. Joo ed., 2004); Stewart J. Schwab & Randall Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1030 (1998), Jennifer G. Hill, *At the Frontiers of Labour Law and Corporate Law: Enterprise Bargaining, Corporations and Employees*, 23 FED. L. REV. 204 (1995); Katherine V.W. Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73 (1988).

120. Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151

ity into corporate governance runs the risk, unless designed effectively, of serving merely as superficial re-labeling. When *The Economist* recently asked over 1,000 executives “how [their] organization[s] define corporate responsibility,” 31.4% of the respondents answered “maximizing profits and serving the interests of shareholders.”¹²¹ This was the second most common answer, after “taking proper account of the broader interests of society when making business decisions,” chosen by 38.4% of respondents.¹²² As these numbers illustrate, there is a fine line between approaching responsibility as a rhetorical tool for maintaining shareholder primacy or realizing it as a transformative tool for change.

The conceptual applications of corporate governance and social responsibility carry methodological implications. Not surprisingly, the study of corporate governance is gradually incorporating such concepts as non-financial accountability, ethical codes and standards of conduct, socially driven investment and fiduciary duties, board diversity, stakeholder engagement, sustainability reporting, and socially responsible business strategies.¹²³ Simultaneously, the study of social responsibility requires paying much closer attention to shareholder activism and proxy voting, board and committee composition, fiduciary duties, managerial units, disclosure policies, board chair and CEO statements, executive compensation, and auditing and external verification.¹²⁴

Meta-regulation is also bound to draw more scholarly emphasis as a less familiar form of corporate law-making. Adjusting to the emergence of new regulators in the corporate realm, business law studies should assess how corporate regulation is being reshaped, both from within the business community, as well by external actors using soft law tools. Feldman and Lobel write about the potential of studying New Governance:

First, a better understanding of the factors that contribute to informal enforcement can provide policymakers with additional legal strategies for effective compliance. Second, it could direct policy makers to areas in which the state should invest in formal enforcement, instead of relying on ineffective social enforcements.

U. PA. L. REV. 1861 (2003).

121. ECONOMIST INTELLIGENCE UNIT, GLOBAL BUSINESS BAROMETER JANUARY 2008, available at <http://www.economist.com/media/pdf/Barometer2.pdf>.

122. *Id.*

123. See, e.g., Sandra Dawson, *Balancing Self-Interest and Altruism: Corporate Governance Alone is Not Enough*, 12 CORP. GOVERNANCE: AN INT'L REV. 130 (2004).

124. Testy mentions that there are many social movements that seek to engage in progressive corporate law issues, but so far, there has been little crossover work between the movements. Therefore, it is vital that a dialogue begin and that coalitions be formed between progressive corporate law and social movements. The distance between the corporate field and other fields is diminishing. While in the past it was extremely rare to find progressive lawyers dealing with corporate law and corporate lawyers addressing public-interest issues, this is no longer the case. Corporate law is increasingly seen as a site of “liberation, not just oppression.” Moreover, critical legal scholars are increasingly becoming comfortable, even eager, to discuss economics and corporate structure. Kelye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements to Corporate Governance*, 76 TUL. L. REV. 1227, 1247-1251 (2002).

The recognition of [New Governance] mechanisms that rely on co-enforcement also contributes to more effective traditional command-and-control strategies, as it allows agencies to target their resources in a more sophisticated manner.¹²⁵

The study of corporate meta-regulation could shed light on the changes initiated in corporate law and policy by groups of all types: small, influential non-profits like As You Sow,¹²⁶ large, consulting-oriented NGOs like Business for Social Responsibility (BSR),¹²⁷ international organizations such as the World Bank¹²⁸ and the International Labor Organization (ILO),¹²⁹ regional and transnational coalitions like the Organization for Economic Co-operation and Development (OECD),¹³⁰ and national associations such as the Social Investment Forum (SIF).¹³¹ The involvement of these groups in shaping corporate norms is relatively new but already intensive, thus inviting legal and organizational analysis of their strategies.

In addition, corporate governance has lately drawn on the emergence of research that utilizes socio-legal methods.¹³² This research indicates a developing interest in the social and cultural impact of concrete mechanisms of corporate governance. Looking ahead, socio-legal studies will be challenged to respond to meta-regulation and its effects on corporate governance by engaging in not only quantitative but also qualitative inquiries consisting of in-depth observations, field exploration, individual interviews and case studies.

Comparative studies within business law will also expand as the field adapts to the intersection between governance and CSR. Numerous studies have already utilized a comparative approach, examining, for example, how legal systems worldwide treat the role of boards and investors in monitoring managerial conduct,¹³³ the degree to which cross-border models of governance affect CSR decision-making,¹³⁴ how reporting practices that link governance to sustainability vary among United States, European, and Japanese firms,¹³⁵ and how institutional investors push for CSR on corporate boards in the United States and the

125. Feldman & Lobel, *supra* note 66, at 9.

126. As You Sow: Corporate Accountability, Shareholder Action and Toxics Reduction Home Page, <http://www.asyousow.org/> (last visited Apr. 4, 2008).

127. Business for Social Responsibility Home Page, <http://bsr.org/> (last visited Apr. 4, 2008).

128. The World Bank Home Page, <http://www.worldbank.org/> (last visited Apr. 4, 2008).

129. International Labour Organization Home Page, <http://www.ilo.org/> (last visited Apr. 4, 2008).

130. Organization for Economic Co-operation and Development Home Page, <http://www.oecd.org/> (last visited Apr. 4, 2008).

131. Social Investment Forum Home Page, <http://www.socialinvest.org/> (last visited Apr. 4, 2008).

132. Beth Ahlering & Simon Deakin, *Labor Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity?*, 41 *LAW & SOC'Y REV.* 865 (2007).

133. Aguilera et al., *supra* note 11.

134. Bastmeijer & Verschuuren, *supra* note 103.

135. Kolk, *supra* note 62.

United Kingdom.¹³⁶ This comparative scholarship should also be applied to substantive topics and geographic regions that have not been examined thus far.¹³⁷

Further exploration of this comparative perspective will also add to the ongoing debate in corporate law scholarship regarding the convergence or divergence of corporate regulation. On one side of the controversy, scholars have argued that corporations worldwide are converging on the Anglo-American shareholder-centric approach, thereby excluding non-shareholder concerns from the boundaries of corporate law. Famously writing in 2001 on *The End of History for Corporate Law*, Hansmann and Kraakman followed Fukuyama's assertion that the end of the Cold War marked the ultimate triumph of the market ideology, specifically ending any real dispute over the effectiveness of the shareholder primacy model.¹³⁸ In response, critics stressed that the United States has diverged politically from other parts of the world post-9/11, and corporate policy exemplifies this divergence.¹³⁹ More importantly, studies have provided evidence that models of governance emphasizing the role of stakeholders prevail in highly-developed economies such as Germany and Japan.¹⁴⁰ Some suggest that even within the United States, businesses are increasingly converting to stakeholder-oriented structures,¹⁴¹ a claim supported by this Article as well.

These conceptual and methodological inquiries may invite new voices to take part in the evolving scholarly debate, such as those working in public interest law, or those investigating broader themes of accountability.¹⁴² The convergence of CSR and corporate governance may provide practitioners, policymakers, regulators, businesses, and NGOs with tools to address the changing landscape of corporate regulation. Those interested in business trends might look at whether and how companies are changing their approaches to corporate governance, while those interested in CSR will explore the incorporation of governance devices into reports, indexes, and ratings, and those studying social change will test the impact of non-profits and public-interest groups on business.

136. Aguilera et al., *supra* note 11.

137. Zumbansen, *supra* note 84.

138. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO L. J. 439 (2001).

139. Kent Greenfield, *Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders? September 11th and the End of History of Corporate Law*, 76 TUL. L. REV. 1409 (2002).

140. Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 136-138, 150 (1999).

141. Winkler, *supra* note 60.

142. Testy, *supra* note 124.

Finally, from a normative perspective, studying the convergence of corporate governance and CSR carries policy ramifications for companies, regulators, and social actors. Understanding this convergence will inform how parties can work to stimulate economic performance, corporate governance and accountability best practices, effective self-regulation, social change, and a more prosperous business environment for both investors and stakeholders. A preliminary outline of these ramifications follows.

B. Policy Ramifications

The hybridization between corporate governance and corporate social responsibility is typically viewed by the mainstream in the business community and in the CSR movement as an innovative process that holds promise for markets as well as society.¹⁴³ However, many have expressed concern regarding the potential policy outcomes of this process—from both a business and social change perspective. Business advocates often fear that dedicating considerable efforts to meeting social and environmental demands will distract managers from focusing on financial wealth creation and serving the interests of investors.¹⁴⁴ These advocates agree with Nobel Prize winner Milton Friedman that, “the social responsibility of business is to increase its profits,”¹⁴⁵ and that the more corporate governance is preoccupied by non-business activities, the less it will fulfill its designated role. On the other hand, CSR-skeptics who seek public policies aimed at achieving economic justice have serious reservations about the direction the stakeholder movement is taking. They argue that, if CSR becomes preoccupied with business decision-making, the movement—already critiqued as one that essentially helps corporations market themselves more effectively—will become even more corporate-friendly and less effective in promoting eco-

143. Media coverage of CSR practices in business during recent years has frequently taken such an approach. See, e.g., Cornelia Dean, *Executive on a Mission: Saving the Planet*, N.Y. TIMES, May 22, 2007; Adi Ignatius, *Meet the Google Guys*, TIME, Feb. 20, 2006, available at <http://www.time.com/time/magazine/article/0,9171,1158956,00.html>; Steven Greenhouse, *How Costco Became the Anti-Walmart*, N.Y. TIMES, July 17, 2005, available at <http://www.nytimes.com/2005/07/17/business/yourmoney/17costco.html>. For an account of how environmental sustainability integrates into business models and economic policy, see PAUL HAWKEN ET AL., NATURAL CAPITALISM: CREATING THE NEXT INDUSTRIAL REVOLUTION 1-21, 144-169 (1999).

144. See, e.g., Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 14 J. APPLIED CORP. FIN. 8, 10-13, 16-20 (2001) (suggesting an “Enlightened” model that acknowledges stakeholder interests but maintain value-maximization as the firm’s long-term objective); Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 857-862 (1997) (reviewing PROGRESSIVE CORPORATE LAW, *supra* note 42, and offering a conservative version of the law and economics analysis of corporate law).

145. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAGAZINE, Sept. 13, 1970, available at <http://select.nytimes.com/gst/abstract.html?res=F10F11FB3E5810718EDDA0994D1405B808BF1D3&scp=1&sq=The+Social+Responsibility+of+Business+it+to+increase+its+profits&st=p>.

conomic justice.¹⁴⁶

A growing voice within the research literature takes a more intricate approach to this policy debate. This approach acknowledges all of the limitations mentioned above, but chooses to pursue the potential of corporate governance, CSR, and their interaction in reconstructing markets. The proponents of this approach often share many of the concerns expressed by the CSR-skeptics but are captivated by the opportunity of turning companies into semi-public entities and creating a more democratic business environment via corporate responsibility.¹⁴⁷

The two areas most likely to face the long-term challenges highlighted by this policy debate are business regulation and social change advocacy. In a public atmosphere that places emphasis on corporate ethics and social responsibility, the regulation of business and finance may undergo changes that would mitigate some of the current focus on profit maximization. The current wave of meta-regulation and “soft” law may inevitably shift more efforts from the legislature to public coalitions, NGOs, investment groups, and other social players. This shift may also encourage administrative agencies to extend their collaboration with the private sector and further engage in sentencing guidelines and incentives for self-enforcement.¹⁴⁸

Substantively, business regulation—whether “hard” or “soft”—is likely to become socially-conscious and absorb some of the “Triple Bottom Line” practices that increasingly link business with sustainability, broadly defined.¹⁴⁹ Voluntary mechanisms may become mandatory, self-imposed sanctions may be subject to greater scrutiny and enforcement, but most importantly, the study and practice of CSR is likely to introduce new managerial institutions that can co-exist with growing public, social, and environmental expectations of corporate conduct.¹⁵⁰

Social change advocacy is already responding to the governance-responsibility convergence by engaging in a vigorous debate over the future of CSR, as described earlier.¹⁵¹ One can expect that the conceptual disagreement

146. Mitchell, *supra* note 11, at 279-284; REICH, *supra* note 53, at 168-209; Testy, *supra* note 124, at 1238-1240.

147. See generally the works linking CSR to legal frameworks of action in the new corporate accountability, *supra* note 4; Zumbansen, *supra* note 84, at 269; PARKER, *supra* note 5, at 31-62, 292-302.

148. Feldman & Lobel, *supra* note 66, at 8 (“Designed effectively, self-regulation can create a virtuous cycle of ethical behavior in private organizations. Indeed, the emerging insight of the modern research on regulation is that decentralized enforcement is one of the key factors in successful societal implementation of governmental rules”).

149. Mark Kramer & John Kania, *Changing the Game*, STAN. SOC. INNOVATION REV. 22, 25-29 (Spring 2006), available at http://www.ssireview.org/pdf/2006SP_feature_Kramer_Kania.pdf.

150. Kent Greenfield, *Saving the World With Corporate Law?*, 12-16, 23-31, (Boston College Law School, Research Paper No. 130, 2007) available at <http://ssrn.com/abstract=978242>.

151. See Greenfield, *supra* note 36; SAVITZ, *supra* note 48; Shamir, *supra* note 49; Shamir, *supra* note 51.

between change agents who favor CSR and those who are critical of it will not prevent the movement from strengthening and deepening its interface with corporate governance. In fact, the growing voice that seeks a “third way” between endorsing CSR and rejecting it is likely to gain support not only in academia but also among practitioners and activists.¹⁵²

Similar to the potential outcomes in business regulation, social change advocacy will likely adapt to changes that are both formative and substantive in nature. Formative changes will potentially present new tactics for socially-sensitive investors, NGOs, and public-interest organizations to work more closely with businesses to try and modify corporate practices through dialogue and negotiations. Changing tactics may also yield the devotion of more resources to consulting and providing guidance and expertise, at the expense of more traditional legislative or administrative advocacy.¹⁵³

The latter category of potential changes may lead the social justice movement to embark on new journeys, such as proposing concrete steps for business law and policy reform. For example, public groups in the CSR field may recommend new guidelines for companies on how to disclose social information¹⁵⁴ and how to compensate their shareholders and executives while increasing other stakeholders’ share of the pie.¹⁵⁵ Such proposals for corporate reform from the public and non-profit sectors could maintain the long-term goals of social welfare while accommodating business needs that are inherent to the creation of economic wealth in market economies.

V. CONCLUSION

Corporate governance and corporate social responsibility have become hard to distinguish in the global economic landscape. Their convergence in the face of regulatory, business, and social changes in transnational markets has evoked debate and controversy over both the potential and limitations of corporate accountability mechanisms. Recently, scholars and practitioners in many fields have looked beyond their traditional perceptions to explore how synthesizing governance and responsibility may affect existing practices in business and social advocacy. This Article offers a framework to approach this evolving study, suggesting that while the synthesis between corporate governance and CSR poses serious challenges to how we currently apply business law and policy, it may also generate innovative concepts and methodologies. Pursuing the emerg-

152. For a recent example of public-interest litigation trying to use voluntary CSR and corporate codes of conduct to establish enforceable protections for workers’ rights, see *Jane Doe v. Wal-Mart Stores, Inc.*, available at <http://www.laborrights.org/creating-a-sweatfree-world/wal-mart-campaign/resources/1018>

153. Bastmeijer & Verschuuren, *supra* note 103.

154. Cynthia Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999).

155. Greenfield, *supra* note 37, at 109-14; Mitchell, *supra* note 11, at 276-79.

ing frontier of corporate governance as social responsibility is a platform for new research and new policies that, if designed effectively, may generate a more equitable global business environment.