CONCEPTUAL AND INSTITUTIONAL INTERFACES BETWEEN CSR, CORPORATE LAW AND THE PROBLEM OF SOCIAL COSTS

Benedict Sheehy
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Dr. Benedict Sheehy†

ABSTRACT

CSR is now understood as “de facto business law” and is increasingly the preferred approach to addressing the social impacts of industry. CSR as a political agenda assumes a significant law reform agenda. As a construct, however, CSR is unclear and its interfaces with politics, social costs, and corporate law are at times obscure. In particular, much of the thinking about CSR fails to adequately take into account the systemic nature of social costs, the legal history and nature of the corporation, and law’s general response to social costs. In this regard, the CSR agenda fails to correctly connect problems, some of which are systemic in nature, with remedies. Further it often fails to take into account existing institutional relationships. This Article examines the conceptual constructs of and interplay between CSR, social costs, and the corporation, identifies the reform agenda, and discusses, as of yet unresolved issues in this growing area of theory and practice.

I. INTRODUCTION ................................................................. XXX
A. Historical Background: The Industrial Revolution and Large Industrial Organizations ............................................................ XXX
B. Impact of the Industrial Revolution on Law .................................... XXX
C. The Corporation and Industrial Production ..................................... XXX
D. Understanding the Problem: The Nexus of Issues ......................... XXX
E. The Socio-Political Context of CSR ......................................... XXX

† Benedict Sheehy, BTh, MA, JD, MA, LLM, PhD is an Associate Professor of Law at the University of Canberra. He received his education from institutions in Canada and Australia and is an experienced corporate lawyer. His scholarship on CSR has been published in leading legal, business, and social science journals around the globe.

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F. The Corporation and the Contest of CSR ........................................... XXX

II. THE SUBSTANTIVE CONCEPT OF SOCIAL COSTS ................................ XXX
   A. Economic Approaches to Social Costs ........................................... XXX
   B. Legal Approaches to Social Costs ............................................... XXX
   C. Political Approaches to Social Costs .......................................... XXX

III. SUBSTANTIVE CONCEPTS AND THE TASKS OF CORPORATE LAW .... XXX
   A. Task #1: Create a Legal Identity ............................................... XXX
   B. Task #2: Separate Group from Individual Identity ......................... XXX
   C. Task #3: Rules to Organize the Group ........................................ XXX
   D. Concluding Remarks on Tasks of Corporate Law ............................ XXX

IV. SUBSTANTIVE CONCEPTS OF CSR .................................................... XXX
   A. Disciplinary Approaches to CSR ............................................... XXX
   B. Business Approaches to CSR .................................................... XXX
   C. Political Approaches to CSR .................................................... XXX
   D. Legal Approaches to CSR ....................................................... XXX

V. INTERPLAY OF THE CONCEPTS .......................................................... XXX

VI. INTERPLAY BETWEEN INSTITUTIONS .................................................. XXX

VII. INTERPLAY WITH SOCIAL COSTS ..................................................... XXX
    A. Addressing Social Costs Through a CSR Reform of Corporate Law ......... XXX
    B. Addressing Social Costs and the Institutional Corporation ......... XXX

VIII. PRINCIPLES FOR AND OBJECTIONS TO LAW REFORM ................... XXX
    A. Socio-Political Reconfiguration ................................................. XXX
    B. Law Reform and Social Change .................................................. XXX
    C. Conceptual Core for Reform: From Ex Post to Ex Ante in Corporate Decision Making .................................................. XXX

IX. REFORMING CORPORATE LAW .......................................................... XXX
    A. Questions to Guide Reform ....................................................... XXX
    B. Better Models: Team Production Model and Hybrid Models ............. XXX
    C. Corporate Norms ..................................................................... XXX
    D. Institutional Environment .......................................................... XXX

X. CONCLUSION .................................................................................... XXX
I. INTRODUCTION

In its global survey of 3,400 companies, including the largest 250, KPMG declared that corporate sustainability reporting has become “de facto law for business.” What is more, the wide acceptance of sustainability reporting demonstrates the growing recognition and importance of the larger goal that is corporate social responsibility. Indeed, more broadly, corporate social responsibility (“CSR”) can now be properly defined as “international private business self-regulation,” based on a foundation of international norms, which address issues ranging from environmental protection to human rights. Corporate law scholarship has yet to come fully to terms with this changing social reality, and has yet to examine and address the full implications of this important and emerging area of law and practice.

The statement that sustainability reporting is de facto business law is critical because it not only signals changing institutions around sustainability reporting—a subcategory of CSR concerns—but more importantly, it signals a call for a potentially profound reform of corporate law itself. If CSR, is indeed becoming a mainstay of business law practice, a very clear understanding of what CSR means and its implications for corporate law is imperative for legal commentators and practitioners alike.

The relationship between CSR and corporate law contains political concerns. These concerns are the result of (1) the increasing pressure from civil society, government, and businesses themselves to engage in CSR, especially in the form of sustainability reporting; (2) the significant investment in CSR mechanisms by all types of businesses, from large businesses such as Microsoft, Walmart, and Apple, to lesser enterprises; and (3) the response thereto by governments around the world. As such,

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3 Id. at 631.
4 See 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, 54, 69–70 (2006); Jedrzej George Frynas, Corporate Social Responsibility in the Oil and Gas Sector, 2 J. WORLD ENERGY L. & BUS. 178, 178 (2009). These studies outline the efforts and effects of various actors such as NGO's on businesses leading to adoption of CSR. See also SPECIAL REPRESENTATIVE OF THE U.N. SECRETARY-GENERAL, SURVEY OF STATE CORPORATE SOCIAL RESPONSIBILITY POLICIES: SUMMARY OF KEY TRENDS (June 2010) (discussing various CSR policies implemented around the world).
legal and extra-legal constituencies need to understand CSR and its implications in order to make effective policy and investment decisions.

In broad terms, CSR is seen as an answer to a wide array of issues associated with the corporate form. These issues, referred to as “harms” by legal commentators and “social costs” by economists, are the result of industrialization. These harms include a wide range of issues from environmental degradation and pollution, to worker exploitation and consumer injuries.

The aim of this Article is to examine the theoretical landscape of and assumptions underlying CSR, social costs, and corporate law, and to investigate the coherence and compatibilities among the concepts with a view to gaining insight into the implications the growing interest in CSR is likely to have on law reform and practice. Not only is there a lack of clarity about the core conceptual constructs and the related assumptions, there is confusion about the interaction between the three phenomena. The problems resulting from these inadequately articulated constructs, assumptions, and interactions pose a challenge for enabling CSR to achieve its widely acknowledged potential.

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9 This article will review the familiar problem of understanding the contours of CSR. See Archie B. Carroll, Corporate Social Responsibility: Evolution of a Definitional Construct, 38 BUS. & SOC. 268 (1999) (discussing the evolution of the CSR construct and accompanying definitions and themes); Sheehy, supra note 2 (evaluating issues related to defining and contextualizing CSR in the modern landscape).
11 For a foundational explanation of the corporate form and the legal system built there around, see FREDERIC WILLIAM MATTLAND, THE CORPORATION AGGREGATE: THE HISTORY OF A LEGAL IDEA (1893).
12 While some may argue that the issue is simply a matter common to interdisciplinary analysis, I argue that it is not only an interdisciplinary problem between law, economics, and business organizational studies, but also a broader and more complex social issue that does not limit itself to disciplinary thinking in the first place.
A. Historical Background: The Industrial Revolution and Large Industrial Organizations

To identify the starting point for this argument, one needs to begin at an earlier point in history, namely, the Industrial Revolution. The Industrial Revolution provided the foundation for contemporary society with its mass production, consumer focus, and wage earning populace conducting exchange through markets. Perhaps the most momentous institutional change associated with the Industrial Revolution was the rise of the large industrial organization.

From a broad historical perspective, it is hard to overstate the significance of the rise of this new institution. The large industrial organization has simultaneously allowed for mass consumption, which raised the physical standards of living, and the creation of a new capitalist political class, which destabilized the pre-existing social structures, habits, and customs. The large industrial organization has been both a cause and result of massive changes in society, including reorganizing political economies from being rent-seeking hereditary aristocracies to capitalist democracies, or Marxist political economies which aim to shift power from capitalists to workers—both of which have entailed significant legal reforms.

With their demand for labor, large industrial organizations created mass wage-based employment. They changed the work habits of

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16 ROBERT E. LUCAS, JR., The Industrial Revolution: Past and Future, in LECTURES ON ECONOMIC GROWTH 109 (2002) (As a result of industrial production there was very significant increase in the quantity of lower cost goods so that a much greater proportion of the population was able consume goods previously only available to the upper classes).


hundreds of millions of people from diurnal agrarian and subsistence living to regimented factory shift-work wages, and later, office work. They also changed the way humans interact with the natural environment by changing the ways in which the earth’s resources are used, extracted, refined, and allocated. Large industrial organizations have also changed how goods are produced and distributed, what goods are valued, and how they are valued. And finally, the rise of the large industrial organization has created both new types of waste and pollution as well as new methods of waste treatment, recycling and disposal.

B. Impact of the Industrial Revolution on Law

In terms of the impact of industrialization on law, one can identify significant changes to pre-existing corporate law, trust law, and tort law, as well as the creation of whole new areas of law, such as securities law, labor law, and environmental law. Indeed, the social, industrial, and environmental changes precipitated by industrialization were bolstered by attendant changes to the law. Law, understood as the institutionalization of political decisions, addresses the establishment, maintenance, and reform of social orderings as well as interactions with the natural environment. Over the course of the last two centuries, law has established, maintained, as well as reformed, the social order to provide, among other things, the least disruption and greatest advantage to those with power in industry and politics.


21 Nelson Leonard Nemerow, Industrial Environmental History, in Industrial Waste Treatment 1, 1–9 (2007). All manner of new waste types have resulted from industrialization as new processes and products are created. For example, oil refining which generates a necessary input for much industrial production, generates significant pollution of a kind and quantity unknown prior to the industrial revolution. New waste management systems, such as clay-lined waste disposal sites to manage leachate, have been invented to address the new types of waste.


In the context of industrialization, legal reform has centered principally on facilitating economic interests and power, rather than on social goals. While there were instances in which justice and fairness were driving principles of law reform, these instances were limited to particular situations and were restricted in terms of who had resources to access the courts and hence to justice and fairness.24

Those with the power to make and change law are those with the necessary economic and political resources. For the most part, those people are also the ones who are able to take control of and dominate large industrial organizations.25 Powerful industrialists have been able to exerting influence over more and more areas of law, concentrating benefits to themselves while imposing social costs on the public.26 Where other members of society are able to unite and command some degree of power, those groups are able to engage in law reform to address their own needs and interests.27 When they do, they shift the distribution of industrialization’s costs and benefits back to the captains of industry, the industrialists and billionaires who largely focus on their own interests.28

C. The Corporation and Industrial Production

The role of the corporation in this context is contentious. Some scholars argue that the corporation is the vehicle that has enabled great forward strides in human development,29 while others equate the negative consequences of industrial activity with corporate activity.30 Critics of corporate industrial activity are either in favor of reforming corporate law,31 or in the more extreme, abolishing the legal corporation

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26 Sheehy, supra note 8, at 40–41.
28 Horwitz, supra note 22, at 140–159.
29 See e.g., Micklethwait & Wooldridge, supra note 20. There is a whole literature spawned to identify and support the use of the corporate form. The argument in its narrow, idealized legal form can be found in Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law (1991).
30 See e.g., David C. Korten, When Corporations Rule the World 278 (1st ed. 1995).
31 Jonathon Porritt, Capitalism: As if the World Matters 92 (2005) (Porritt, like others, suggests that the corporation needs to be reformed to force businesses to internalize externalities).
altogether. Both sides, however, are misguided to some degree in their assessment that the benefits and costs of industrial activity are the direct result of the corporation, and both at times conflate the ideas—the legal corporation and a business organization, the latter of which may take any one of several forms including trusts, partnerships, or some other similar form.  

It is important to note at the outset that the negative consequences or social costs arising from industrialization are not necessarily attributable to the corporation. For hundreds of years prior to the industrial revolution, corporate law had little to do with industry. The use of the corporate form for industrial production only became common practice in the late nineteenth century in the United Kingdom and in the early twentieth century in the United States, which in earlier times favored trusts. From a legal perspective, corporate law is not designed to address industrial activities, nor is it designed to address many of the consequences of corporate decisions reflected in industrial production. Rather, corporate law has different purposes such as separating the property of members from property of the group, creating a distinct legal identity, and organizing the governance of internal relations, all discussed further in section 3 below.

While some may argue that corporate law should be reformed to shift the centers of corporate decision-making, or to develop new norms to redirect or limit liability shifting, these arguments about law are distinct from arguments about social costs, the negative consequences of industrial production, or are at least not necessarily related to them. The

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34 Maitland, supra note 11, at 486–89.


foregoing is not to say that industrialization has not been greatly facilitated by the corporation—it has and in this regard the utility of the corporation in industrialization, with its potential for both good and harm, has been long recognized. As noted corporate law scholar Adolph Berle observed, the corporation is “capable of becoming one of the master tools of society—[and] capable also of surprising abuse.” The corporation as a creature of law, however, is a neutral vehicle. How it is configured and used is a different and deeply political matter.

D. Understanding the Problem: The Nexus of Issues

To summarize the discussion to this point, the Industrial Revolution created a whole new way of living and resulted in a re-organization of society. It also gave rise to new forms of production and related social costs. In response, the law was reformed, and in important ways this legal reform has reinforced and concentrated benefits for the wealthy while widely distributing industrialization’s attendant social costs. Finally, the corporation has become the preferred legal vehicle for coordinating roles in industrial production. It is this nexus among industrialization, social costs, and the corporation that remains poorly understood despite significant commentary and scholarship in each area. In particular, the set of interrelationships between the corporate form, social costs, and CSR remains under-theorized. In part, the interrelationships are misunderstood because of a failure to: (1) clearly delineate and distinguish the concepts and phenomena of the legal corporation, directors, and shareholders; (2) distinguish between the legal corporate form and industrial organizations; (3) distinguish between social pressure and legal obligation; and (4) appreciate the nature, organization, and array of law’s approaches to problems such as the problem of social costs.

Some corporate law commentators see the issue of social costs as a failure of corporate law insofar as corporate law does not limit the negative externalities of corporate industrial activity. This failure of corporate law, it is argued, has driven people to propose significant legal reforms in order to bring corporate law in line with the broader principles of law writ large – that is, the beneficial ordering of society, and to

37 Adolph A. Berle, Jr., The Twentieth Century Capitalist Revolution 22 (1954).
39 Greenfield, supra note 38, at 126.
propose new and novel approaches to regulating the corporation. Greenfield, for example, argues that corporate law should aim “to serve the interests of society as a whole,” and do so particularly by “creating financial prosperity”. This approach is in contrast to the dominant shareholder primacy view in which the purpose of corporate law is to serve only shareholder interests in wealth without regard to non-shareholder interests and social costs.

Among the various approaches to social costs, CSR has come to command a significant amount of attention and resources. It holds special promise because it engages directly with industrial actors—including corporations—on the core issue of social costs. Yet CSR itself raises a number of difficult theoretical and conceptual issues. CSR poses significant problems for corporate law, particularly in terms of the theory of the corporation, but also in terms of specific rights and duties, such as directors’ duties. Further, lawyers must be prepared to answer the question: what happens when CSR’s “soft law” obligations conflict with opposing “hard law” obligations? Is it reasonable, for example, to expect that the corporation will escape environmental liabilities on the basis of having complied with CSR norms? Moreover, an investigation

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40 See, e.g., Doreen McBarnet, Corporate Social Responsibility Beyond Law, in THE NEW CORPORATE ACCOUNTABILITY 9–11 (Doreen McBarnet et al. eds., 2009) (discussing the interplay of CSR and the law and CSR as an approach to corporate regulation).

41 GREENFIELD, supra note 38, at 127, 134.


43 Sheehy, supra note 7, at 8; Sheehy, supra note 2, at 6. See also Kernaghan Webb, Understanding the Voluntary Codes Phenomenon, in VOLUNTARY CODES: PRIVATE GOVERNANCE, THE PUBLIC INTEREST AND INNOVATION 27 (Kernaghan Webb ed., 2004); Carroll, supra note 9, at 277 (providing a standard history).


into the rights and duties created or implied by CSR, such as those which may conflict with common understandings of corporate law, is a preliminary requirement. Accordingly, this Article examines two preliminary corporate law questions in relation to CSR. These are: first, is corporate law focused on regulating the same issues as those that concern CSR, specifically controlling social costs? Answering this question requires a consideration of the purpose and scope of corporate law. The second question asks: if corporate law is to be reformed to address social costs how should it do so?

To examine these questions, the Article is set out as follows. After the two following subsections which complete the Introduction, the second section addresses the concept and nature of social costs. The third section reviews corporate law, while the fourth investigates CSR. The fifth, sixth, and seventh sections examine the interplay between the concepts and institutions, and then social costs respectively. These are followed by section eight which investigates principles for law reform. The final section examines the issues and boundaries related to the reform of corporate law.

E. The Socio-Political Context of CSR

CSR includes a range of concepts that have changed over time. Early business leaders viewed CSR as a moral issue, a consequence and an acknowledgement of the responsibility that accompanied the power inherent in their role, which allowed them to control vast assets and to dictate the terms of the working lives of millions of employees. CSR was promoted by business leaders themselves in response to the perceived privileges bestowed on them by society. That model, referred to as “heroic managerialism,” has been replaced more recently by a narrower view of CSR in which corporate finance is the driving force.

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47 See e.g., Sheehy & Feaver, supra note 44, at 354.
50 For a full discussion of this theory, see Wells, supra note 27.
Under this new model, “the business case” is the main driver of CSR. It is a strategic version of CSR that has emerged as a response to external pressure from activist groups, whether consumer groups, NGO’s, environmentalist or other interest groups.

The current interest in and debate about CSR arises in the context of broader institutional transformation and transition, on both local and global scales. At the local level, the decline of civic institutions and intermediate associations, including the disappearance of institutions from religious bodies to trade unions, has left government largely alone to contest industrial interests. While this situation is not new—it was noted in the pioneering work of C. Wright Mills and others in the 1950s—it has been accelerated by the financialization of the economy, particularly since the 1980s, as an aspect of the larger drive towards economic globalization and globalization generally. These changes have been accompanied by the rise of large multinational corporations (“MNCs”) with their renewed interest in political lobbying and by the rise of the regulatory state with its consensus on CSR as a preferred solution to social costs.

The shift in CSR focus from moral response to a strategic tool coalesces with a broader shift in politics and in corporate legal theory toward neo-classical economic orthodoxy. The economists of this school were particularly interested in private, market based approaches to the


C. Wright Mills noted the shift in power from local citizens to corporate office holders, a shift which denied the value and power of local interests and governance in favor of unmitigated commercial interests. MILLS, supra note 25, at 44.

“Financialization” refers to the creation of financial instruments that allow the revenue streams of production and services to be traded to the extent that these instruments become of much greater interest and value than the underlying good or service. GERALD F. DAVIS, MANAGED BY THE MARKETS: HOW FINANCE RESHAPED AMERICA 18–19 (2009).

55 Wilks, supra note 51, at 261.


56 See also Peter Utting and José Carlos Marques, Introduction to CORPORATE SOCIAL RESPONSIBILITY AND REGULATORY GOVERNANCE: TOWARDS INCLUSIVE DEVELOPMENT? 1, 1–5 (Peter Utting & José Carlos Marques eds., 2010). See also STEPHEN WILKS, THE POLITICAL POWER OF THE BUSINESS CORPORATION 200 (2013).

allocation of scarce resources, and the “agency problem”—a particular branch of economics that arose in response to the issue of separation of ownership and control, in corporate law identified by Berle and Means.58 The concern of the neo-classical economists was that firm managers, as agents of investors, had considerable discretion with respect to use of organizational resources and could abuse that discretion to benefit themselves. The answer to this problem was initially worked out by Meckling and Jensen in their contractual theory of the firm59 which is essentially that the firm is nothing more than a particularly dense area of contracts, or nexus of contracts, in the market. Jensen later mobilized the solution with his creation of the “objective function”—that managers can be best monitored by focusing exclusively on share price.60 These economists and law and economic scholars developed the “shareholder primacy model” of the corporation61 which rose to prominence in the context of the Nixon administration’s economic positions and the thought leadership Chicago economists.62

The shareholder primacy model was accepted by many legal and corporate scholars and commentators as an accurate representation of the corporation normatively and positively.63 This model puts economic power at the pinnacle of the corporate hierarchy and subjugates all other interests. In essence, the assumption undergirding this model is that the sole purpose of the corporation, and hence its directors, is to maximize shareholder wealth and that there are no other legitimate or mandated legal, institutional, or organizational goals. The legal implication of shareholder primacy is that shareholder interests should dominate corporate decision-making and hence directors’ duties should be focused on this particular corporate constituent.64

63 See David K. Millon, Why Is Corporate Management Obsessed With Quarterly Earnings and What Should be Done About It?, 70 GEO. WASH. L. REV. 890, 892, 900–05 (2002); Stout, supra note 42. See also WILKS, supra note 51, at 13–15; SCIULLI, supra note 52, at 11–12.
64 Sheehy & Feaver, supra note 44, at 19.
There is not, as we shall see, a consensus on shareholder primacy in the legal academy. Indeed, the debate about the purpose of the corporation and focus of directors’ duties has been referred to as the Great Debate. The Great Debate can be characterized as a battle about control of the corporation, and in particular, about “whom should it serve.” It has been historically, as it is today, a battle between private initiatives by well-meaning business people, opportunistic strategists, and various academics and a story of cycles with fits, stops, and starts, and hotly contested politics. I turn next to examine the outlines of that story.

F. The Corporation and the Contest of CSR

The laws creating and regulating the corporation, the preferred form of the large industrial organization, were derived from a combination of lex mercatoria, ecclesiastical, Roman, and common law systems. The doctrines and principles of these legal systems and their particularized bodies of law governing corporations, in addition to the laws of contract, property, and tort, have contributed to the laws of control and direction of the corporate form as well as the practices of the large industrial organizations that use it. Law maintains the status quo. Historically, law has reinforced the social order and maintained the existing distribution of risks, opportunities, costs, and benefits reflecting the prevailing balance of power.

In medieval times, the struggle over corporate control reflected a battle between two competing institutional powers: the church and the secular power of monarchs and emperors. Each institution realized the political and economic importance of the control over bodies—both legal

66 The scholarship shows the debate is squarely focused on control. See Stephen M. Bainbridge, Director Primacy and Shareholder Disempowerment, 119 HARV. L. REV. 1735 (2006); Adolph A. Berle, Jr., Corporate Powers as Powers in Trust, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd, Jr., For Whom are Corporate Managers Trustees?, 45 HARV. L. REV. 1145 (1932); Fama, supra note 58; Jensen & Meckling, supra note 59; Sommer, supra note 49.
67 See, e.g., Bainbridge, supra note 66; Stout, supra note 42.
68 Paddy Ireland & Renginee G. Pillay, Corporate Social Responsibility in a Neoliberal Age, in CORPORATE SOCIAL RESPONSIBILITY AND REGULATORY GOVERNANCE: TOWARDS INCLUSIVE DEVELOPMENT 77–89 (Peter Uting & José Carlos Marques eds., 2010); Sheehy, supra note 2, at 625–636; Wells, supra note 6, at 77–78.
69 MAITLAND, supra note 11.
70 Law was not seen to be an independent system in the nineteenth century. Michael Lobban, The Politics of English Law in the Nineteenth Century, in JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW: FROM ANTIQUITY TO MODERN TIMES 102–137 (Paul Brand et al. eds., 2012). The legal realists first attacked the idea of law as an independent sphere.
The current battle over control of the corporation is also a political one, but it now wages on between an economic elite on one side and the democratic powers of activists, NGOs, and some parts of government on the other. Over 150 years ago, Abraham Lincoln, a champion of the republican values of liberty, equality and democracy, foreshadowed this current battle. Lincoln purportedly stated:

[Corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed.]

Thus, although the issue appears to be contemporary, the contest is not new. The corporation, in both historic and contemporary times, is regarded as a highly beneficial economic institution, but also as a dangerous political one, having the power to cause great harm.

Although social costs have been documented since the industrial revolution, they were not understood in earlier times to be the result of industrialization per se. In more recent years, as social costs increased significantly they have been correctly identified as being a consequence of industrialization. The social costs, or negative externalities, are generally most evident to communities directly affected by a specific industrial activity. The less evident, but arguably more important, social issues such as the takeover of public space and the political system and human. The current battle over control of the corporation is also a political one, but it now wages on between an economic elite on one side and the democratic powers of activists, NGOs, and some parts of government on the other. Over 150 years ago, Abraham Lincoln, a champion of the republican values of liberty, equality and democracy, foreshadowed this current battle. Lincoln purportedly stated:

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71 John Dewey, The Historic Background of Corporate Legal Personality, 35 YALE L.J. 655, 664 (1926).
75 Wells, supra note 6, at 116.
76 For further discussion of this phenomenon, see George Cheney, et al., Overview, in THE DEBATE OVER CORPORATE SOCIAL RESPONSIBILITY 3 (Steve Kent May et al. eds., 2007); Andrew Gamble & Gavin Kelly, The politics of the company, in THE POLITICAL ECONOMY OF THE COMPANY (John E. Parkinsson et al. eds., 2000); NOREENA HERTZ, SILENT TAKEOVER: GLOBAL CAPITALISM AND THE DEATH OF DEMOCRACY (2001); KORTEN, supra note 30; Lisa Whitehouse, Corporate Social
collapse of the labor market are only slowly coming to broader social awareness. While anti-corporate activists, including NGOs, have rallied to force corporations to address social costs, conservative think tanks, industry associations, and MNCs have generally responded in favor of maintaining the status quo.

Concern about social costs associated with industrialization, however, is not limited to activists. Social costs have become a concern for business executives themselves, many of whom have worked to address these social costs through a variety of programs. These programs range from charities and private initiatives such as ISO 26000, to international public programs such as the UN’s Global Compact, and publicly sponsored private organizations such as the Global Reporting Initiative. Other business executives have made personal efforts to take account of and ameliorate the greater negative social impacts of industrial activity.

While CSR has become a part of the dialogue within the business communities, the way in which CSR interacts with corporate law has received considerably less attention. It is often assumed that corporate law coalesces with CSR and that CSR can simply co-exist around the periphery of corporate law, enhancing and particularizing the law to the specifics of a particular corporate, organizational, and industrial context or simply provide a normative framework for interpreting corporate law

78 See generally SARAH A. SOULE, CONTENTION AND CORPORATE SOCIAL RESPONSIBILITY (2009).
79 See generally Diane Swanson, Top Managers as Drivers for Social Responsibility, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 227 (Andrew Crane et al. eds., 2008).
81 Although the terms corporate citizenship and global compact may have greater currency, the term CSR is better understood. Lisa Whitehouse, Corporate Social Responsibility, Corporate Citizenship and the Global Compact: A New Approach to Regulating Corporate Social Power?, 3 GLOBAL SOC. POL’Y 299, 306–09 (2003) (discussing the CSR and the goals behind the UN Global Compact).
84 See McBarnet, supra note 40, at 9–11.
and, including directors’ duties. CSR is, however, among other things, an effort to reform existing corporate law and provide new norms for corporate decision-making. However, whether such reforms, guidelines, and restraints are tolerable within the existing body of corporate law, let alone justified, has been hotly debated. With this background and context, I now turn to the second section, an examination of social costs.

II. The Substantive Concept of Social Costs

The social costs of large industrial organizations are significant. Social costs range from issues such as global warming and environmental collapse, the concentration of wealth and political power among a privileged elite, the corruption of democratic political systems, to issues of ubiquitous marketing, colonization of public space, and the commoditization of vast swathes of human activity all of which lead to social disruption on an unprecedented scale. There are three major

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86 For a discussion of how CSR has been so used over time, see Carroll, supra note 9; Soule, supra note 32.

87 See, e.g., Bainbridge, supra note 66; Sheehy & Feaver, supra note 44; Stout, supra note 42.


theoretical approaches to address the concept of social costs—economic, legal, and political—which will be discussed in turn below.

A. Economic Approaches to Social Costs

Orthodox neo-classical economic theory conceptualizes social costs as a type of market failure.\(^\text{93}\) Nobel prize winning economist Ronald Coase argued that social costs are a problem caused by inappropriate (government) allocation of private property rights with a corollary inadequate provision for trading of such rights.\(^\text{94}\) According to Coase, law constrains economically optimal, and impliedly, normatively and socially desirable allocations of private property rights.\(^\text{95}\) Applying Coase’s view to the economist’s nexus of contracts model of the firm, the issue is readily solved solely by expanding the number of participants with contractual rights in the nexus of contracts. In other words, if more people who are affected by a firm’s social costs were included in the corporate contract, they would be in a better position to bargain for compensation for the harms or social costs imposed.\(^\text{96}\)

Institutional economists in the tradition of Karl William Kapp\(^\text{97}\) provide a more robust conceptualization of social costs.\(^\text{98}\) Rather than viewing social costs as costs external to the corporation in the Pigouvian tradition, these scholars argue that social costs are the share of the total costs of production not borne by producers but shifted instead onto third parties: contemporary society, future generations, or society at large.\(^\text{99}\) In particular, Kapp defines social costs as:

[A]ll direct and indirect losses sustained by third persons or the general public as a result of unrestrained economic activities. These social losses may take the form of damages to human health; they may find their expression in the destruction or deterioration of property values and the premature depletion of natural resources.

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94 For the development of this theory in full, see Coase, supra note 10.
95 Id.
96 Sheehy, supra note 8, at 13; Sheehy, supra note 61, at 469.
wealth; they may also be evidenced in an impairment of less tangible values.100

In contrast to neo-classical economics, the institutional economists’ conceptualization grants the corporation no specific or particular role. Social costs and their resolution are not the consequence of a nexus of contracts. Rather they are the result of economic activity and production. Institutional economists see a solution to social costs in a reconfiguration of institutions, namely, a valuation of goods, services and processes on their utility value rather than transactional value.101 By reconceiving value, social costs are not mere externalities to transactions. Rather they are destructive of the utility value and thus are to be minimized throughout the lifecycle of the good, service, or process.

Although economists continue to examine the relationship between CSR and economic theories of the firm, they offer no complete and effective solution to the issue of social costs.102

B. Legal Approaches to Social Costs

The second major conceptual approach to social costs is through the law. Law does not differentiate between the social costs of large industrial organizations and harms caused by other actors. Law approaches these harms not through the lenses of production, consumption, or collective societal good;103 rather it does so primarily as a matter of individual rights and duties. Law does so on a variety of implicit politics and explicit principles, namely, entrenched privileges104 and fairness and justice.105 Law provides a number of solutions to the

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104 This is essentially the consequence of Nozick’s circular argument. See Robert NOZICK, ANARCHY, STATE, AND UTOPIA (1974).
problem of social costs through private law remedies such as those available through tort and property, and public law remedies such as those available through criminal, environmental, and tax laws, as well as social security laws and regulation. Indeed, the first public regulatory agency was established for the purpose of addressing large industrial organizations’ social costs stemming from the employment conditions in factories.\textsuperscript{106} In terms of private law, tort law, through the expansion of liability for workers’ injuries and consumer safety, has been developed substantially. Corporate law reform, however, has not addressed social costs\textsuperscript{107} except in a few instances, such as where directors’ personal liability, has been extended in certain cases such as liability for environmental harms or wages.\textsuperscript{108} Like economics, law has no comprehensive solution to social costs.

\section*{C. Political Approaches to Social Costs}

The third and final major conceptual approach to the problem of social costs is political.\textsuperscript{109} This approach relies on the dialogues in both private politics\textsuperscript{110} and public politics, being both formal and informal creation of and responses to institutional pressure. Public political responses are formal responses by governments and include law and policy statements. Private politics is informal, through interaction and discourse between two of the main institutional participants in CSR—large industrial organizations and civic society.\textsuperscript{111}

In the first instance, much of the CSR dialogue aimed at the general public is dominated by the large industrial organizations that purchase media, advertising, and programming and hire political lobbyists—which among other things contributes to the problem of “greenwash.”\textsuperscript{112} Conceptually, these large industrial organizations do not concern themselves much with social costs and certainly do not connect social costs and the corporation. Rather they frame the issue of social costs as

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\textsuperscript{106} On the Factories Act of 1802, 42 Geo. Ill c.73 and subsequent revisions as well as the establishment of the factories inspectorate, see J.L. HAMMOND & BARBARA HAMMOND, THE RISE OF MODERN INDUSTRY 255–56 (1926).
\textsuperscript{107} HARRIGAN, supra note 44, at 168–97.
\textsuperscript{109} See Doh & Guay, supra note 4, at 48.
\textsuperscript{110} SOULE, supra note 32, at 104–45.
\textsuperscript{111} Sheehy, supra note 2, at 637; Wells, supra note 27, at 321.
\textsuperscript{112} See discussion infra and sources cited infra note 166.
\end{flushleft}
matters of “consumer choice,” “ethical consumption,” and “brand image.” In other words, the large industrial organization views social costs as no more than problems bearing upon brand management, reputational risk, and related management concerns.

The second party to the CSR political discourse is a constellation of civil society actors including NGOs, community groups, and academic debate and scholarship. This second party is a large uncoordinated group with diverse and even conflicting demands. For example, environmental NGO’s might advocate better environmental protection while business orientated think tanks may advocate against such protections. In terms of social costs and the corporation, some CSR discussion tends to equate the two almost to the point of first making them synonymous and then rejecting them both equally and completely. In other words, the more radical political CSR discussion rejects even the existence of the corporate form and cannot accept even the most basic of the social costs arising from industrialization.

Although each of these three conceptual approaches to social costs—economic, legal and political—proposes solutions, each has limitations and poses its own problems. Accordingly, a wider ranging solution reaching deeper into the origins and causes of social costs holds significant appeal. Where social costs can be connected directly with the corporate form, some type of corporate control or corporate reform emerges as the preferred solution.

A core objective of some participants in the CSR movement is to reform corporate law and to reform corporate law so as to address social costs. In order to understand this agenda, however, it is necessary to understand the concept of the corporation and corporate law.

III. SUBSTANTIVE CONCEPTS AND THE TASKS OF CORPORATE LAW

The main complaint of CSR advocates and other corporate reformers about corporate law is its seeming failure to regulate the corporation’s negative externalities. These advocates point to any one or more of a long list of externalities, such as pollutants, harmful workplace practices, risky policies and products, and the impact of these

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114 Sheehy, supra note 2, at 626–33. See e.g., the discussion in Peter Uting, Corporate responsibility and the Movement of Business, 15 DEV. IN PRAC. 375, 375–76 (2005).
115 Sheehy, supra note 2.
116 Sheehy, supra note 2, at 625; Wells, supra note 6, at 79–80.
things on human and natural environments. This failure, in their view, is a failure of corporate law. This section identifies the nature and scope of corporate law, which in part answers the criticism of these concerned parties. It does so by using an historical analysis of corporate law to identify corporate law’s three main tasks. In identifying the tasks, it becomes clear how the issues raised by parties fall largely outside of the parameters of corporate law in its current form.

A. Task #1: Create a Legal Identity

In the first instance, corporate law creates a legal identity for an office, group, or endeavor. It identifies and marks out a space in the social sphere for this group or endeavor, and grants it a distinct identity. A few historical examples from medieval corporate law, from which modern corporate law is derived, are illustrative. In the 1481 case Abbot of St. Benet v. Mayor and Commonalty, the law of corporations distinguished the human religious community of the abbot and the monks as a legal corporation legally distinct from the surrounding community. Likewise, the Merchants of Venice were a corporate body distinct from the rest of the populace of London. Their endeavor was marked out and protected by the grant of corporate status. The King of England is a corporation sole, marking that legal role, as distinct from the human, that executes a special governance role in that society. In the contemporary era, Santa Clara County v. Southern Pacific Railroad Company, 118 U.S. 394 (1886) in the United States and Salomon v. A. Salomon & Co. Ltd. (1897) A.C. 22 in the United Kingdom further reified the separate corporate entity doctrine by holding the corporate body as a legal entity in its own right separate and apart from the human persons involved.

This creation of a special social space, and particularly its legal recognition, is significant as it allows humans to engage in different endeavors and to occupy different roles. One may be a member of the

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118 See SOULE, supra note 32, at 104–45.
119 GREENFIELD, supra note 38, at 2–5.
120 For a robust discussion of the issues related to defining CSR, see Sheehy, supra note 2.
122 MAITLAND, supra note 11, at 7 n.1 (citing Abbot of St Benet’s (Halme) v. Mayor and Commonalty of Norwich, Y.B. 21 Edw IV, 7, 12, 26, 67 (1481) (Eng.)).
123 Id at 10-12.
borough of Aylesworth, a member of a family, an employee, and a member of a church at the same time. None of these roles needs to contradict or preclude the others, or put at risk or encroach on the rights and duties associated with the others. The corporate form facilitates multiple, distinct, simultaneous roles.

B. Task #2: Separate Group from Individual Identity

Corporate law’s second task is to distinguish the corporation from its members. Corporate law does so in two respects. First, it distinguishes the corporation’s rights and duties and sets those apart from the rights and duties of its members. This distinction caused considerable difficulty for lawyers in medieval times and again in the nineteenth century, in the form of the “corporate personality” and “metaphysical fiction” debates.126 These debates centered on the question: what is the corporate body?

Again it is helpful to return to medieval corporate history. Maitland discusses a case from the 1481 Yearbook in which the Abbot of Hume was in litigation with the corporation of the Mayor, Sheriffs, and Commonalty of Norwich for non-payment of a bond.127 The abbot had extracted the bond from an imprisoned mayor as a condition of the latter’s release. The lawyers struggled through the logic that a corporate body is not the same as a human body, and in particular that the powers exercised, the rights and duties of the humans, were not co-terminus with those of the corporation.128 Only by delimiting the two could a group proceed with the execution of its concern without a particular individual, and it is the corporate law that accomplishes its task.129 In the nineteenth century, as the corporate legal theory changed from viewing the corporation as a mechanism for developing public works granted in exchange for monopoly trading rights to a private finance mechanism, corporate law again struggled to find a foundation for private rights in the corporation.130

The second way corporate law distinguishes the corporation from its members is by distinguishing both entities’ respective property. This aspect of the task has proven to be less challenging than distinguishing between corporate and individual rights and duties. That is, the law more easily distinguished, for example, the land and church buildings belonging to St. Bartholomew, administered by the Abbot, from the property of the Abbot himself. Again, in the above mentioned example of the Abbot and

126 HORWITZ, supra note 22, at 112.
127 MAITLAND, supra note 11, at 7 n.1 (citing Abbot of St Benet’s (Hulme) v. Mayor and Commonalty of Norwich, Y.B. 21 Edw IV, 7, 12, 26, 67 (1481) (Eng.)).
128 Id.
129 MAITLAND, supra note 11.
130 HORWITZ, supra note 22, at 69–76.
the Mayor of Norwich, the law had no difficulty in recognizing who owed the debt—the corporation. The issue in that case was essentially “who was the corporation?”

C. Task #3: Rules to Organize the Group

Corporate law’s third task concerns the creation of rules regulating the actors within the corporate group.131 These rules create the corporate organs, distinguish directors and members from one another, create and allocate corporate powers, and stipulate how those powers are to be exercised. The development of internal governance rule-making, recognized since medieval times, has occurred over time by the efforts of legislatures and lawyers who render services to specific corporations, and by judges who have developed common law.132 In contemporary law, an example is found in the case of *Automatic Self-Cleansing Filter Syndicate Co Ltd v. Cunninghame* [1906] 2 Ch. 34, which sets out the limitations of shareholders’ rights to direct the company. Contemporary legislation such as the Delaware General Corporation Law §141(a), the Canadian Business Corporations Act, the Companies Act of the U.K., and Australia’s Corporations Act 2001 all provide examples of rules of internal governance.

D. Concluding remarks on tasks of corporate law

The three tasks of corporate law just identified do not satisfy those concerned with the normative issues stemming from the negative consequences of industrial production—the problem of social costs. The basic criticism is that corporate law should but fails to address outsiders or stakeholders.133 While corporate law does address outsiders, it does so tangentially or only in very limited instances as, for example, when in liquidation, corporate law shifts control away from insiders in favor of external creditors.134 The latter rule eliminates corporate free-riding on outsiders in terms of credit—a different matter from free-riding on the natural or social environment, or even free-riding on employees whose wages are subject to theft by employers in the contemporary United

132 1 WILLIAM BLACKSTONE, *COMMENTS ON THE LAWS OF ENGLAND* 369 (Univ. of Chicago Press 1979) (1765).
134 E.g., *Australian Corporations Act 2001* s 556.
The doctrine of piercing the corporate veil as an oppression remedy is left for those very rare instances in which judges can be persuaded to invade the private sphere of corporate decision making on behalf of those oppressed outsiders to visit the consequences of unconscionable behavior on the individual decision makers.\(^{136}\)

The political and normative dimensions of corporate law are subtler than the positive dimensions just discussed. The former include social privileges granted to members, rights to externalize costs, and the political influence that comes with the economic power of concentrated wealth.\(^ {137}\) Corporate law’s failure to explicitly deal with these normative matters has resulted in substantial support for both the CSR and anti-corporate movements.\(^ {138}\) These failures are the motivators of the CSR social justice concerns of privileging the rights of capital over labor, economics over environment, and the political concentration of power on economic bases over democratic, rights-based distributions.

The foregoing analysis of the three tasks of corporate law provides a functionalist account that demonstrates that corporate law did not develop with the control of social costs as a foundational principle. It is evident that concerns about these social costs are not related to corporate law \textit{per se}. Rather, concerns about these externalities are exclusively the consequences of industrialization, which have been exacerbated by the corporate form. The corporate form facilitates social costs in two ways. First, the corporate form allows great industrialization to occur by the pooling of capital. Second, the corporate form protects directors and shareholders from the consequences of social costs, which may encourage increased generation of externalities in order to further increase the internalized benefits.\(^ {139}\) As Greenfield explains it, these corporate law doctrines concentrate power in the hands of the few for the benefit of a


\(^{138}\) Soule, supra note 32, at 29–53; Ireland & Pillay, supra note 68, at 77–79.

\(^{139}\) See Sheehy, supra note 8.
few, with the result that “law has created an entity that is guaranteed to throw off as many costs and risks onto others as it can.”

This positive analysis is not a normative argument for either reforming or keeping corporate law as it is; rather, it is an explanation of the current configuration of the law of corporations. The point of this descriptive analysis is that corporate law has developed with a different focus and different objective than the social and environmental concerns of interest to CSR reformers. The legal corporation is not designed to control social costs. CSR, however, has a different agenda to which I turn next.

IV. Substantive Concepts of CSR

The substantive concepts of CSR are less clear than the concepts of social costs and corporate law. In fact, a review of the literature identifies a multiplicity of definitions of CSR. CSR has been defined as everything from a mere marketing ploy and management strategy referred to as “greenwash,” to a normative ordering in management priorities, a dialogue among the various interested parties, to private regulation and public international soft law. CSR encompasses a wide range of interests: academics interested in theoretical concerns of various disciplines, financiers concerned about maximizing returns on debt and equity, corporate executives concerned about reputational matters as well as social issues, humanitarian NGOs concerned with issues like

140 GREENFIELD, supra note 38, at 16.
142 See discussion infra and sources cited infra note 166.
144 Andrew Crane, et al., The Corporate Social Responsibility Agenda, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 5 (Andrew Crane et al. eds., 2008).
145 Id. See also Elisabet Garriga & Domène Mélé, Corporate Social Responsibility Theories: Mapping the Territory, 53 J. BUS. ETHICS 51, 61 (2004); Sheehy, supra note 2, at 625, 632.
146 There is a wide range of people contributing to various handbooks, dictionaries and encyclopaedias on CSR.
toxic emissions and slave labor. Some groups focus on conceptualizing changes to the corporate form, while others focus on environmental issues and social impacts. Still others focus on the business opportunity that can arise from the strategic use of CSR. Perhaps the core problem in CSR is the underlying normative debate about what should CSR be focused upon, with what motivations and how agreed goals should be achieved. To understand this debate better, a further examination of CSR approaches is warranted.

A. Disciplinary Approaches to CSR

A range of disciplines address CSR, its development, critique, and reform. For example, the business-related disciplines adopt economic values, norms, and preferences, and substantively focus on issues such as the relationship between corporate financial performance (“CFP”) and corporate social performance (“CSP”), marketing implications associated with ethics, CSR management systems, and organizational issues. Academic lawyers’ analysis may adopt either economic norms or legal equitable norms and focus on the derivative rights and duties related thereto. Alternatively, lawyers may examine CSR as a form of voluntary private regulation. Political scientists often focus on norms surrounding the legitimacy of private regulation and its negative

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149 Sheehy, supra note 2, at 626–27. See also Cheney et al., supra note 76, at 9, 11; Gerald Hanlon, Rethinking Corporate Social Responsibility and the Rule of the Firm—On the Denial of Politics, in THE OXFORD HANDBOOK ON CORPORATE SOCIAL RESPONSIBILITY 166–69 (Andrew Crane et al. eds., 2008).


151 See e.g., DAVID CHANDLER, STRATEGIC CORPORATE SOCIAL RESPONSIBILITY: SUSTAINABLE VALUE CREATION (4th ed. 2017).

152 Sheehy, supra note 2, at 629 (“All disciplines have their own biases which are inherent in their methods and normative agendas: none is value free. In their consideration of CSR the disciplines make distinct contributions but inevitably traverse toward their own methodological and epistemological goals). See also Hanlon, supra note 149, at 158–60.

153 Sheehy, supra note 2, 625–33. See also Doménech Melé, Corporate Social Responsibility Theories, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 47 (Andrew Crane et al. eds., 2008).

154 See Orlitzky et al., supra note 1477.


156 Adam Winkler, Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History, 67 L. & CONTEMP. PROBLEMS 109 (2004). See also Sheehy & Feaver, supra note 44.

157 Sheehy, supra note 85, at 103–08.
implications for democracy.\textsuperscript{158} Finally, sociologists may view CSR as a matter of changing institutional norms and organizational responses to the environment.\textsuperscript{159}

\textbf{B. Business Approaches to CSR}

The business disciplines view CSR as a matter of business ethics or a matter of strategy.\textsuperscript{160} As a matter of business ethics, they tend to view CSR through the lens of the moral obligations of organizational citizens or members of society.\textsuperscript{161} In this regard, they argue that as moral actors, businesses cannot simply operate by a minimalist approach to legal compliance.\textsuperscript{162} Rather, businesses must act in a way that reflects the reality of the situation: they are powerful contributors or “corporate citizens” that ought to seek the wider good of society rather than narrowly construed self-interest.

The strategic approach to CSR includes an array of views, from improved branding and financial performance, to risk management and human resourcing. CSR in this view is perhaps amoral and is certainly not driven by ethics. Rather, the argument for CSR rests on the business case, an economic argument.\textsuperscript{163}

Finally, both ethical and economic approaches to CSR in the business literature engage in stakeholder discussion. The analysis is focused on how management should deal with parties involved with the firm—either on the basis of ethics or strategy.\textsuperscript{164}

\begin{itemize}
\item \textsuperscript{161} \textsuperscript{162} See De George, supra note 160.
\item \textsuperscript{163} \textsuperscript{164} Forest L. Reinhardt, \textit{Environmental Protection and the Social Responsibility of Firms: Perspectives from Law, Economics, and Business} 184 (Bruce L. Hay et al. eds., 2005).
\item \textsuperscript{165} \textsuperscript{166} R. EDWARD FREEMAN, \textit{STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH} 44–45 (1984); Sheehy, supra note 36. See also Graham Kenny, \textit{The Stakeholder or the Firm?: Balancing the Strategic Framework}, 34 J. BUS. STRATEGY 33 (2013).
\end{itemize}
C. Political Approaches to CSR

An examination of the wide range of political views and concerns both within and beyond the academy about CSR reveals its own set of disagreements. There is neither a consensus about the appropriate objectives of CSR, nor is there agreement about the extent to which CSR’s operational effects on organizations are normatively desirable. There is no agreement about the extent and nature of responsibility of industrial enterprises, and as a result, no conclusion as to what appropriate measures of effectiveness would be.\(^{165}\)

Although none of the three disciplines just reviewed agree, all have opinions about the following critical issues:

- What constitutes responsible corporate behavior;
- Whether CSR can or should force large industrial organizations to achieve socially desirable goals; and
- How individual enterprises should be organized and how their performance should be measured.

Although some parties still advocate using CSR as a mere marketing tool and without regard to substantive CSR activities, they are a declining minority with the significant majority opposing that strategy as “greenwash.”\(^{166}\) Turning to law, it is possible to find a more stable and inclusive definition of CSR.

D. Legal Approaches to CSR

Although the CSR discussion has been dominated by management scholars who define CSR as a hierarchy of values, and focus on CSR as an organizational phenomenon, newer legally-oriented work defines CSR in a way that aligns with KPMG’s observation that CSR is “de facto business law.” In this view, CSR is a form of “international private business regulation.”\(^{167}\) In fact, arguably the strongest definition of CSR

\(^{165}\) Sheehy, supra note 2, at 627, 635–43; Sheehy, supra note 85, at 103–05, 110.


\(^{167}\) Sheehy, supra note 2, at 627, 635–43; Sheehy, supra note 85, at 103–05, 110.
is a “private self-regulatory initiative, incorporating public and private international law norms seeking to ameliorate and mitigate social costs and promote public good by industrial organizations.” From a legal perspective, making CSR claims should entail real, tangible goals such as the protection of human rights, labor rights, and environmental sustainability. Norms have been created, and standards and metrics have been developed. These legal norms include such instruments as the UN conventions on the environment and human rights, OECD Principles of Corporate Governance, OECD Principles for Multinational Enterprises, and similar normative frameworks. And, as a matter of legal principle, organizations holding themselves out as adopting these norm frameworks ought to have an obligation to answer in court for their compliance or lack thereof.

V. INTERPLAY OF THE CONCEPTS

What the foregoing discussion demonstrates is that CSR starts from a radically different point of departure than corporate law. It is grounded in socio-political norms rather than law and addresses a much wider array of issues, many of which are outside of the scope of contemporary corporate law. Basically, CSR addresses a range of social costs through prescribing behavior and it advocates various organizational and production reforms in industrial organizations.

The starting point of CSR is the large footprint, both social and environmental, made by the large industrial organization. CSR is not about private legal rights and duties associated with a legal entity. Instead, the existence of the broad-based CSR dialogue is an acknowledgement of the wide distribution and significant impacts of large industrial organizations. These acknowledgements include historically and to varying degrees, an acceptance of the political power that large industrial organizations wield. Their political power follows from their economic power, which is facilitated in the first instance, however, by the legal

168 Sheehy, supra note 2, at 639. See also Sheehy, supra note 85, at 104–05.
170 E.g., UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/AboutTheGC/index.htm. The United Nations Global Compact is a UN led organization that identifies a group of norms for businesses that wish to engage in CSR. These norms are drawn from a range of treaties dealing with issues from the environment, through labor to human rights.
173 See Sheehy, supra note 2, at 625–26, 632.
rights and duties associated with the corporate form. This coalescence of ideas about power and obligations, from legal, political, and economic perspectives in and around the large industrial organization is the core conceptual hub or nexus where corporate law, law more broadly, CSR and social costs meet.

CSR can be distinguished from corporate law by its different focal points. In terms of organizations, corporate law is focused on the legal entity and its rule frameworks, while CSR is focused on large industrial enterprises and not the legal entity per se. That is to say, the focus of CSR is on the enterprise as a whole, not the individual legal bodies. Indeed, the focus is not on just any enterprise, but rather those enterprises that are large enough to create significant social costs.

CSR and corporate law also differ in terms of decision-making. CSR emphasizes the decisions and ethics of human actors as “business ethics” of organizations, and places less of an emphasis on role-differentiated ethics—the different types of decisions considered ethical when in different roles. In contrast, corporate law focuses on humans acting as agents in their socially and legally distinct roles as corporate officers, and grants greater weight to the legal protections afforded people in those roles. The discrete and strict division between those roles, from the perspective of corporate law, is, as argued above, critical to legal orderings. To ignore those distinctions undoes one of the major innovations of corporate law—the distinction of office from individual. This re-organization of rights and duties so that directors, for example, bear a high level of personal liability, however, is precisely what one stream of CSR stakeholder thinking pursues. Thus, the conceptual interplay between CSR and corporate law reveals not only distinct focal points, but also a deep incompatibility in certain critical aspects of organizational focus and role differentiation.

On the issue of personal liability, corporate law protects directors and officers from personal liability as agents, except in very limited circumstances, through the doctrines of directors’ duties. This

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174 This is the basic argument of ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1968). See also JOHN E. PARKINSON, et al., THE POLITICAL ECONOMY OF THE COMPANY (2000); SCIULLI, supra note 52; WILKS, supra note 55, at 10; SHEEHY, supra note 61, at 190.

175 Wells, supra note 6, at 80.

176 Id.


178 See Bakst, supra note 108 (discussing directors’ personal liability for environmental harms).

179 Usually limited to instances of fraud or misuse of the corporate form. See Perpetual Real Estate Services, Inc. v. Michaelson Properties, Inc., 974 F.2d 545, 546 (4th Cir. 1992).
corporate law doctrine serves the dual function of allowing directors to focus on corporate objectives as distinct from their own personal agendas, such as keeping their personal assets secure,\textsuperscript{180} while still providing relief where directors have intentionally harmed the company. By way of contrast, CSR—again through business ethics arguments—tends to disregard the corporate veil while advocating for personal liability or responsibility for a wide range of business decisions and actions.

Moreover, unlike corporate law, CSR is not overly concerned with the organization’s internal governance rules. The exception to this generalization is the important discussion on the role of stakeholders.\textsuperscript{181} In that area, CSR disputes the narrower corporate law focus on shareholders\textsuperscript{182} associated with shareholder primacy,\textsuperscript{183} and argues for a distribution of rights to other parties, the stakeholders. Further, CSR has little interest in matters of corporate constitutions or corporate property, again with the exception of stakeholders’ interests in the larger concern of the social impact of industrial uses of the corporate form.\textsuperscript{184}

The normative debate in CSR concerns the political issues of: who, in what capacities, using what rights, and for what purposes, the power of the corporation should be used. Corporate law has answered these political questions in favor of certain corporate insiders—the officers and members—for at least 150 years. The CSR debate is particularly concerned about those instances where the corporation is engaged in industrial production.\textsuperscript{185} The corporation at law, as noted, is a neutral vehicle available for a wide array of uses.

CSR advocates believe the broader community should be granted some form of rights as stakeholders to exercise a share of power in corporate decision-making to ensure that the community receives not only social costs, but also the benefits of industrial activity.\textsuperscript{186} Understandably, corporate conservatives prefer to continue to exercise

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\textsuperscript{180} See, e.g., discussion of creditor proofing in the context of trust law reform in Christopher Paul, Innovation or a Race to the Bottom? Trust—Modernization in New Hampshire, 7 U. N.H. L. REV. 353, 368–70 (2016).

\textsuperscript{181} Sheehy, supra note 36, at 198–202; Sheehy & Feaver, supra note 44, at 349, 354–57.


\textsuperscript{184} Sheehy, supra note 36, at 195.

\textsuperscript{185} Sommer, supra note 49, at 35.

\textsuperscript{186} R. Edward Freeman, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 44–45 (1984); Sheehy, supra note 36, at 200; Stout, supra note 42, at 1171. See generally Andrew Crane, et al., THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY (2008).
power themselves for their own private interests.\textsuperscript{187} For corporate law scholars and reformers alike, the implications of granting non-shareholders and non-directors rights are not clear and the issue of re-opening the corporation to the polity of highly questionable desirability.\textsuperscript{188} Opening the corporation may be an important part of the solution to social costs; however, it would require a significant reform of corporate law and related institutions—a political discussion that is well beyond the scope of this Article.

In sum, there is significant friction between CSR and corporate law, both in terms of the structure of industrial organizations and the rights and duties within them. While there is less friction between the two in terms of acknowledging power and obligation, in other areas the interplay between CSR and corporate law is far from untroubled and indeed in clear conflict.

\textbf{VI. INTERPLAY BETWEEN INSTITUTIONS}

Institutionally, CSR and law come from opposite ends of the public-private divide. On the one hand, law, as a public good, is clearly located institutionally on the public end of the spectrum. On the other hand, CSR is a private regulatory initiative.\textsuperscript{189} As a form of private regulation, CSR, in comparison to public law, has both benefits and drawbacks. It benefits in that it has the ability to include a wider number of stakeholders and the ability to act, react, and reform quickly on both local and global scales in response to any number of emerging issues. It suffers, however, from a lack of democratic input,\textsuperscript{190} from not being able to access public regulatory resources such as legal authority and public finances,\textsuperscript{191} and as a result, from a related lack of public credibility, particularly concerning enforcement of CSR claims.

\textsuperscript{187} See Bainbridge, supra note 66, at 1739.
\textsuperscript{188} See, e.g., Welling, supra note 45, at *2.
\textsuperscript{189} CSR is posited as an alternative by social and environmental advocates to what are perceived to be failures of public law on the one hand, and by corporate conservatives, as an effort to avoid public law on the other. Ronen Shamir, \textit{Corporate Social Responsibility: A case of Hegemony and Counter-Hegemony, in LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY} 92 (Bonaventura De Sousa Santos & César A. Rodríguez-Garavito eds., 2005); Webb & Morrison, supra note 1588, at 107.
\textsuperscript{191} Sheehy, supra note 85, at 104.
Recent institutional analyses of CSR view it as an effort to re-embed industrial production into the social system.192 The problem so conceptualized is the consequence of a specific social actor, namely, the legal corporation, which pursues its financial self-interest unrestrained by social inhibitions or mores.193 In other words, the corporation is a social and environmental alien, not subject to impacts from either the social or natural environments, whereas the other actors in the same institutional context are all humans subject to both social and natural environments. Through this lens the task of CSR is to re-embed the legal actor in the human environment.

This institutional conceptualization of CSR as re-embedding the corporation into society in some way addresses a fundamental problem in corporate law. This problem was expressed colorfully by jurists of a bygone era, who lamented that the corporation has “no body to kick or soul to be damned.”194 In more recent times, the epithet used is “psychopathic,”195 demonstrating a failure to act within the constraints of social conventions and norms. Where CSR has been effective in re-connecting the industrial enterprise with local communities, it has done so by effectively limiting social cost generation and re-embedding production.196

Having examined the nature and parameters of social costs, corporate law, and CSR discretely and the conceptual and institutional interplay between the latter two concepts, I now turn to an analysis of the interplay among CSR, corporate law, and social costs.

VII. INTERPLAY WITH SOCIAL COSTS

The analysis to this point has demonstrated that the interplay between corporate law and CSR are in some significant ways incompatible and incommensurate. The analysis has revealed, however, that the real issue is not the corporation per se. Rather, the concern is social costs, some clearly tangible and measurable and others less so, all

194 Quote attributed to Edward, First Baron Thurlow. See John Poynder, LITERARY EXTRACTS 268 (1844).
195 BAKAN, supra note 193, at 56.
196 Mark Granovetter, ECONOMIC ACTION AND SOCIAL STRUCTURE: THE PROBLEM OF EMBEDDEDNESS, 91 AM. J. SOC. 481, 498 (1985); Sheehy, supra note 8, at 49–52; Sheehy, supra note 85, at 117–23.
consequent to industrial production exacerbated by the corporate form. According to the views of some parties, whether CSR activists, anti-corporate activists or disinterested scholars who look to CSR as a private market based solution to social costs as an alternative or remedy for public law’s failure, many of these social costs are not without public legal remedy. The problem from the advocates’ point of view, however, is that the remedies do not form part of corporate law—the result perhaps of an incomplete shift of the corporation from the public to the private side of the public-private divide. Rather, these remedies have been assigned to other areas of law, namely tort, contract, environmental law, and labor and employment law. At the institutional level, these issues have been assigned or left to these areas of private law through the legal, political, and electoral process, which are reflected in the economic system. Each of the areas of law just mentioned deals with externalities differently, starting from different principles and using different doctrines. Why is it the case that there is this diversity of principles and doctrines dealing with social costs?

First, the range of human problems addressed by torts, contracts, and other areas of law are not limited to the narrow scope of corporate industrial activity. These areas of law address a range of problem types through their related distribution of rights and duties and provide different remedies through the organization of their doctrines and remedies. The principles and processes developed within each area of law have been developed to address, for example, the harms actionable in tort in a consistent manner, regardless of how particular problems were produced or who produced them—whether individuals or collectives. Torts, breaches of contracts, social disruption, and destruction of the natural environment are regularly committed by natural persons and are not unique to the corporate form. From this point of view, there is no need to deal with these issues in a way that is part of corporate law or peculiar to businesses organizations of any specific type.

A. Addressing Social Costs Through a CSR Reform of Corporate Law

197 Sheehy, supra note 8, at 50–51.
198 See e.g., Leonid Polishchuk, Corporate Social Responsibility or Government Regulation: An Analysis of Institutional Choice, 52 PROBS. ECON. TRANSITION 73, 73–94 (2009).
199 HORWITZ, supra note 22, at 70–73.
200 See generally WILKS, supra note 55.
201 See generally Whitehouse, supra note 76.
Adding social costs to the discussion of the interface between corporate law and CSR creates a new layer of complexity. As noted, some CSR advocates suggest that these issues—i.e. legal control of social costs—should be core aspects of corporate law.\(^\text{203}\) For these advocates, the corporation, which has seen dramatic reform since its medieval inception through the nineteenth century, is ready for yet another set of major reforms. Essentially, they see a two-part solution. First, these CSR advocates favor an expansion of corporate law that would address all the activities carried on by corporate actors including of course the non-financial and related consequences of those activities. In particular, corporate law would regulate not only things such as the corporation’s right to enter contracts, but would also prescribe substantive content, including, for example, the rights and duties of employees. Further, corporate law would restrict the nature and type of industrial activities carried on by the corporation so as to limit environmental consequences and to take account of other community concerns.

Second, these CSR advocates favor addressing gaps in current institutional accountability structures. The nineteenth century saw the advent of limited liability and the protection of directors as agents, both of which resulted in a great increase in the corporation’s financial and political power. The reforms favored by CSR advocates would match these expanded rights and powers by expanding corporate duties to protect the community. In this vision of corporate law reform, the expansion of rights and power should be matched by parallel restraints on and accountability for the rights and power of corporations. A corollary of this proposition is that the corporate controllers, i.e. the directors and officers, will not only have greater responsibilities, but will also need broader discretion to discharge those responsibilities. With this increased discretion under a reform there must also be more clearly articulated parameters than general fiduciary duties and a general duty of care to reformed stakeholders.\(^\text{204}\) This conception of corporate law reform seeks to align corporate law with a more political conceptualization of the corporation than the simplified economic model of shareholder primacy.

These reform proposals require a reconsideration of the seminal corporate law debate about directors’ duties to society, which began with

\(^{203}\) See historical discussion in Ireland & Pillay, supra note 68, 82–85.

\(^{204}\) This issue of expanded discretions is appropriately a matter of great concern discussed in detail below. See also argument in Sheehy, supra note 36; and consideration of existing discretions relating to CSR in Sheehy & Feaver, supra note 44.
Berle and Dodd in the 1920s, Berle and Dodd were concerned about the large industrial organizations, and the related role of the corporation in society of their day. They had observed the amassing of great power and wealth by these business corporations and noted the great impact that these corporations’ operations and activities had on society. Finally, they both worried about the power of directors who controlled the corporations, and more specifically, about how to ensure that directors used their power benignly if not benevolently. Berle in particular focused on the power of directors and managers in the exercise of their discretion over the vast assets of the industrial empires, and the potential abuse of those powers to divert corporate power and assets to serve their own personal ends.

Berle was concerned that the parties whose money these directors managed had little control over those director managers—an issue he identified along with the economist Gardiner Means as the separation of ownership and control. Berle’s proposed solution for reining in directors and protecting investors was to make directors accountable to shareholders. His view, shared by others, has become the basis for the previously discussed economic orthodoxy of shareholder primacy.

Nevertheless, in terms of corporate law reform, reflecting the great power of these corporate enterprises Berle and Means suggested:

[T]he law of corporations, accordingly, might well be considered as a potential constitutional law for the new economic state, while business practice is increasingly assuming the aspect of economic statesmanship.

Dodd, by way of contrast to Berle’s shareholder primacy, focused on the broader issue of the political power of large business corporations. He argued that corporate law should “protect the nation from corporations.” Like Berle, Dodd focused his discussion of corporate

205 Berle & Means, supra note 174. See also discussions in Chen & Hanson, supra note 35, at 33–37; Sommer, supra note 49 (revisiting the debate in full); Wells, supra note 6, at 79–99.


207 Berle, supra note 66, at 1050–74.

208 Berle & Means, supra note 174, at 6.

209 Matthew T. Bodie, AOL Time Warner and the False God of Shareholder Primacy, 31 J. Corp. L. 975, 977–82 (2006); Sheehy & Feaver, supra note 44, at 361–80; Smith, supra note 42, 280–83; Stout, supra note 42, at 1174–77; Wells, supra note 6, at 80.

210 Adolf A. Berle & Gardiner C. Means, The Modern Corporation and Property 313 (1st ed. 1932). This position has also been taken more recently by some. See, e.g., Sculli, supra note 52, at 180, 190–95, 232.

211 Dodd, supra note 66, at 1157.

212 Wells, supra note 6, at 87.
law reform on the reforming of directors’ duties. However, Dodd’s view was that shareholders were not uniquely vulnerable to corporate exploitation.213 Dodd suggested that corporations’ directors should take account of social needs, and viewed the separation of ownership and control as an opportunity to exploit corporate wealth for the betterment of society.214

Over the intervening decades, both conservative215 and progressive216 legal scholars have advanced these opposing views of corporate law. Unlike some CSR advocates, progressive legal scholarship has not sought the destruction of the corporate form, nor has its intention been to eject shareholders from the corporation. Rather, the objective has been to add to the discussion table other parties whose rights and interests are affected by the corporation, but currently inadequately protected.217 These progressive legal scholars argue that addressing such rights is a matter of fundamental justice.218 The basic premise of their argument is that where people’s rights are affected, whether by such means as publicly-imposed taxes or privately-imposed social costs, their rights must be recognized as legitimate in the political arena and compensated for. Failing this, people have a right, and legitimate reason, to take to the streets—a matter of immediate concern since the Berle-Dodd debate219.

To review, CSR advocates propose several corporate law reforms to address social costs. Namely, corporate law should be expanded to include corporate control of and/or liability for all corporate activities. Further, corporate law should be expanded to also include within the scope of directors’ duties and discretions a broader range of actors including those currently excluded parties bearing social costs.

B. Addressing Social Costs and the Institutional Corporation

The core institutional issue is the nature and role of the corporation as a legal, economic, and political institution.220 The legal view, as

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213 Dodd, supra note 66, at 1156–63.
214 Id.; Chen & Hanson, supra note 35, at 36.
215 See e.g., Bainbridge, supra note 66; Smith, supra note 42.
216 See e.g., Harrigan, supra note 44; Millon, supra note 133; Eric W. Orts, The Complexity and Legitimacy of Corporate Law, 50 WASH. & LEE L. REV. 1565 (1993).
218 Orts, supra note 216.
219 Dodd, supra note 66, at 1155 (noting social responsibility as a way to “face the Russian challenge”).
220 Corporate models express the different disciplinary, political and ethical perspectives. Each model proposes a different understanding of the corporation. In particular, each model proposes a different 1) nature of the corporation, 2) purpose, 3)
discussed above, is that the corporation is a fiction created by the law. It is a norm free actor in the legal system. It bears rights and duties appropriated to it just like any other actor in the legal system. Social costs interact with the legal corporation only to the extent that they inhabit the legal system and they exist in the legal system only insofar as they constitute rights, such as the right to pollute, or a duty, such as a duty created by consumer protection laws. These rights and duties are not moral rights; rather they are exclusively legal rights, the infringement of which is actionable at law. In this institutional view the corporation is a neutral actor within the legal system—not privileging any particular party or disadvantaging any other, and certainly not a systemic actor.

The neo-classical economic view of the corporation as an institution can be put succinctly: the corporation’s role is the unimpeded creation of wealth, irrespective of the distributions of wealth, poverty and social costs. Distributions fall to the field politics, a position advocated by orthodox economists and political conservatives alike. This position views social costs as irrelevant to the business corporation qua institution and as something to be addressed by government, or other institutions of society such as charities or religious bodies.

One political institutional view is that the corporation functions as a governance institution: an intermediary association regulating working lives, production, and environmental impacts. Such a view of the corporation demonstrates both its role in creating social costs and its potential in addressing the same. It provides an insightful functionalist account of the corporation, and provides relevant new opportunities for thinking about how corporate regulation, both public and private, might be conceived.

This view is founded upon a different normative basis than the economists’ view. Rather than the economists’ exclusive focus on wealth creation, the political institutional view suggests that the large corporation should be charged with balancing wealth creation with the creation of jobs, and with balancing the production of goods and services with the

boundaries—who is included and excluded, and 4) connection to society. These four analytical models serve as compass points for understanding the implications of models for CSR. The models compete seeking to propose alternative ways of thinking and each has its own embedded normative implications. The normative dimension of these models is critical because it indicates what the corporation “should” be like, in contrast to an explanatory model, which simply serves to illustrate or enlighten the users. I have dealt with this matter elsewhere, see Sheehy, supra note 26.

221 See e.g., Jensen, supra note 60; Milton Friedman, The Social Responsibility of Business is to Increase its Profits, N.Y. TIMES MAg., Sept. 1970, at 32.

ecological limitations of the planet—i.e. sustainability. This view also suggests that the large corporation be charged with balancing distributions of the currently private benefits of corporate law—for example, the executive compensation debates\textsuperscript{223}—with the widely distributed social costs.

A socio-economic institutional view is that the problem of social costs is not a matter of the corporation at all. Instead, it is ultimately a matter of a dis-embedded economy.\textsuperscript{224} It is a problem resulting from the separation of the production of goods and services from their social and ecological contexts. Moreover, further removing labor from the production equation by the financialization of the economy has destroyed the basic social contract.\textsuperscript{225} In other words, by focusing on the financial economy independently of the productive economy, the potential for a socially embedded economy is wholly undermined. According to this view, the better approach to addressing social costs is to reorganize and reorder the institutions of industrial production, including the legal corporate form, so as to re-embed them.\textsuperscript{226} Thus, the contemporary corporate form, which has facilitated if not led to ecological destruction, and which ignores the concerns of less powerful parties who make up the majority of society,\textsuperscript{227} must be reformed to re-embedded production and the corporation in society.\textsuperscript{228} Such re-embedding, it is argued, would lead to a decline in social costs.\textsuperscript{229}

In sum, the issues at the intersection of corporate law, CSR, and social costs cannot be reconciled from within any particular dialogue, literature, or discipline. Rather, it is only by stepping back from the

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\bibitem{224} See generally POLANYI, supra note 73.


\bibitem{226} See e.g., J. Rogers Hollingsworth & Robert Boyer, \textit{Coordination Of Economic Actors And Social Systems Of Production, in CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS} 1–49 (J. Rogers Hollingsworth & Robert Boyer eds., 1997) (discussing institutional configurations).


\bibitem{228} Sheehy, supra note 7, at 45-51.

\bibitem{229} Amstutz, supra note 192, at 359–97; Sheehy, supra note 7, at 21.

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particular discourses and taking a broader view that these concepts and
the interplay between them demonstrate the discordant nature of the
institutions and the institutional complexity necessarily involved in their
resolution.

VIII. PRINCIPLES FOR AND OBJECTIONS TO LAW REFORM

This review and analysis of the concepts, interplay, and institutions of
CSR, corporate law, and social costs drives at the conclusion that there is
likely to be a variety of approaches available to address social costs. The
primary question is which reform approach is preferable? Is it a private
CSR approach? Is it broad, public, socio-political institutional reform?
Or is it a narrower corporate law reform approach? While voluntary CSR
has had some successes, it is far from a viable, comprehensive solution to
social costs. Accordingly, I turn next to focus on the two other options
of institutional reform and corporate law reform in sequence.

A. Socio-political Reconfiguration

Broad, public, socio-political institutional change is the most difficult
option. It occurs in the great upheavals of society—revolutionary,
dictatorial rise, political collapse, or some other catastrophic method of
change. Changes of this type are usually opposed by elites who benefit
from existing institutional configurations and often costly to the populace
at large. Pursuing a broad social reform agenda is both riskier and less
likely to be successful in addressing the social costs of business. Thus
although the ultimate solution to the dramatic environmental challenges
faced by contemporary society will no doubt require some monumental
reform of socio-political orderings and related economic activity, given
the obstacles, disruption and costs involved in such changes, lesser,
incremental steps are likely preferable, easier to undertake and will start
the process of societal adaptation to a changing environment more
quickly.

I turn next to consider addressing social costs via legal reform.

B. Law Reform and Social Change

For law to remain a credible source of authority in a society, it must
have justifications that are recognized by and broadly acceptable to the
populace. As Dodd stated in his article concerning directors’ duties,
“public opinion… ultimately makes law.”230 Law must be able to justify its rules to the public. The challenge for precedent driven, backwards looking law, was put pithily by Oliver Wendell Holmes: “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”231 The nature and extent of social costs, the limitations of current legal approaches to their resolution, and the role of the corporation in their creation suggest that corporate law reform should be considered comprehensively.

Advocates of corporate law reform encounter two main objections. First is the conservative thesis that corporate law has achieved its zenith and that we are now at “the end of history for corporate law.”232 Basically, this view is that Anglo-American corporate law has achieved perfection in the shareholder primacy model and is now the example to be emulated across the globe. In a subsequent review of this thesis, Hansmann, one of the authors of that original article, observed:

[In] continental Western Europe, [there is] a broad disquiet about the standard shareholder-oriented model. The perceived problem, at its core, seems to be that this model gives excessive rein to market forces in general-in the share market, the labor market, the product market, and elsewhere-and that the result is excessive social instability…. this disquiet may also reflect a broader concern about social efficiency. For many individuals, social stability may have sufficient value to merit the sacrifice of a substantial amount of productivity as measured, as it conventionally is, in terms of the net value of market transactions. If so, the legitimacy of the standard shareholder-oriented model may suffer in the long term, however much it may be in ascendance now.233

In sum, Hansmann recognizes that the trade-offs required in the dis-embedded shareholder model do not have universal appeal. While they are strongly appealing to the shareholder-investors, their appeal to the broader populace is considerably weaker.

Progressive scholars such as Adam Winkler have demonstrated that this view was both premature and too narrowly construed.234 A longer

230 Dodd, supra note 66, at 1148.
231 Oliver W. Holmes, The Path of the Law, 10 HARV. L. REV. 457, 469 (1897).
232 For the origin of this phrase, see Henry Hansmann & Reinier H. Kraakman, The End Of History For Corporate Law, 89 GEO. L. J. 439, 439 (2001).
234 See generally Winkler, supra note 156 and Stout, supra note 62.
view of history demonstrates that a considerable interplay of stakeholders has been taking place in shaping business activity, that CSR has been at play for much of that history, and that a considerable swath of the American community is no more content with shareholder primacy than their European counterparts.235

The second objection to corporate law reform is that the public social concerns of CSR fall outside the boundaries of private corporate law.236 This argument is premised on the view that law must follow its centuries old normative pathway, following doctrines and precedents, which form a coherent body of law. In this view, law cannot be ruled by social facts. Yet corporate law, like all law, as Dodd and Holmes noted, has often needed to do just that: incorporate social facts and find new ways to articulate and justify outcomes.237 As we have seen in the above discussion of medieval law, corporate law has followed a trajectory of development and change like all other areas of law.238

At times, reform requires an iconoclastic approach. As social philosopher John Dewey observed in relation to the problem of corporate personality, “[w]e often go on discussing problems in terms of old ideas when the solution of the problem depends upon getting rid of the old ideas, and putting in their place concepts more in accord with the present state of ideas and knowledge.”239 As further noted by sociologist of law, Philip Selznick, in his discussion of large industrial organizations, the development of law “is not based on abstract postulates; nor does it reflect the moral preferences of the observer. Incipient law is emergent positive law, responsive to, and made possible by, particular social circumstances.”240

The main changes in social circumstances driving corporate law reform are industrialization and recent de-industrialization with dramatically increased social costs, related changes in manufacturing and distribution-related technology, and the increased wealth of firms such that they have resources to address social costs.241 As Selznick presciently observed, “the growing importance of large-scale organizations carries with it the likelihood that new claims of right will emerge.”242

235 Id. at 122–23.
236 Moore, supra note 103, at 4–8. Noted in Winkler, supra note 156, at 111.
239 John Dewey, supra note 71, at 657.
241 Consider for example, discussion in DAVIS, supra note 54, at 59–101. See also and Amstutz, supra note 192.
242 SELZNICK, supra note 240, at 33.
It is not that corporate law has made no changes since the mid-nineteenth century to address CSR concerns. Beyond Berle and Means, pressures of the Cold War led to the consideration of the corporation as a social institution, and led courts to approve of corporate charitable giving. Indeed, more broadly, contemporary directors’ duties clearly recognize the social imperatives of CSR, as for example, allowed in constituency statutes and other judicial and legislated law reform.

The necessity for corporate law reform to address changed social circumstances, as well as new rights claims, has been discussed in the courts. Acknowledging the reality of corporate power, social responsibility, and the need to adjust corporate law norms, Justice Berger of the Supreme Court of British Columbia opined in *Teck Corp Ltd v. Millar*:

>a classical theory that once was unchallengeable must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting bona fide in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of the shareholders.... if they observe a decent respect for other interests lying beyond those of the company’s shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company.

This opinion is expressed in more general terms by Kent Greenfield who observed “corporate law, just like every other area of common and statutory law, is predicated upon our collective political decisions about what we want our society to look like.” The law’s task therefore, is to define, delimit, and distribute rights and duties, and then, in this instance, reform the corporation to reflect the broader societal values and, in particular, values with respect to social costs.

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243 See, e.g., discussion in Winkler, supra note 156, at 119–25.
244 Wells, supra note 27, at 329–32.
245 Sheehy & Feaver, supra note 44.
246 Id. at 357.
248 Id. at 313–14.
249 GREENFIELD, supra note 38, at 37.
C. Conceptual Core for Reform: From *Ex Post* to *Ex Ante* in Corporate Decision Making

The two main conceptual challenges facing reformers seeking to address social costs are institutional and systemic. From an institutional point of view, contemporary legal solutions are limited to ex post solutions. That is, law addresses harms after the fact preferring to maximize freedom and liberty rather than preventing parties from acting in the first place. The second issue is systemic: for example, getting a significant piece of litigation through the slow, procedure-bound, expensive, and complex legal system is an arduous process. *Law as a system* only awards remedies once an issue has been litigated to judgment or settled. From a legal system point of view, these processes and remedies, are fine as they are, preserve law’s focus on its core concern of justice.

From a broader social point of view, however, this configuration of society’s institutions or approach to control and remedy of social costs is suboptimal. It appears to be less effective in terms of advancing the main concerns of preventing social costs or redistributing them more fairly, and indeed, seems to favor the production of social costs. That is, the current configuration of corporate law, the legal system and the economic system allow profits to be made and distributed among the insiders in the first instance, and then compensation to be paid ex post facto to outsiders via government taxation or on an ad hoc basis in those relatively rare instances when injured parties have the resources, determination, and patience to litigate a matter through to its conclusion, or extract a settlement.

Accordingly, if there is to be an effective reconfiguration of institutions and systems, it should begin by examining the creation of social costs in the first instance—i.e. a matter of decision-making within the corporate enterprise. Such a reconfiguration would shift affected parties and their related rights and duties from their current corporate law position as outsiders to insider positions contributing to decision-making. This model is not as radical as it may seem at first having had success in Germany among other jurisdictions and, for example, need not grant voting rights in decision making. Simply a place at the negotiating table, or a right to information, may go a considerable distance to solving problems.

250 Sheehy, supra note 8, at 25.
251 Sheehy, supra note 61, at 500, 506–08.
Further, large industrial organizations could be reconfigured to include more input and/or interests of the surrounding community, or at the very least, require the corporate enterprise to crystallize and disclose its politics. Doing so could force it to integrate community concerns, or at least to some degree draw those concerns into the politics of corporate decision-making. Reconfiguring and reforming decision-making structures and processes within the corporation could facilitate an ex ante preventative approach to social costs rather than the traditional ex post facto approach, an approach of sporadic remedies in response to specific complaints of harms after they have occurred.

Such an ex ante approach has much to recommend it. First, an ex ante approach allows managers to manage, rather than simply respond to ex post facto liability or to the blunt fiat of regulators. Further, it would provide the opportunity for a broad spectrum of holistic preventative measures and a wider consultation about alternatives. It would also provide input from a wider array of affected parties or communities, as well as their evaluation of costs and benefits rather than simply being imposed upon by the business enterprise and subjected to the views and values of management.

These different perspectives and pressures could spark innovation, reduce social costs and improve sustainability. Thus, a different industrial enterprise model could be developed. Such a model could use an ex ante approach, preventing social injury in the first instance rather than depending on the ex post, ad hoc legal process or government tax-based compensation schemes. While the general shift of focus from ex post to ex ante and a related reconfiguring of internal structures and procedures provides a conceptual framework for corporate law reform, the details of how these reforms could be best conceptualized, implemented, and supplemented needs careful thought. The next section provides some details on the proposed reforms.

IX. REFORMING CORPORATE LAW

This section reviews what might be done to reform corporate law to address the problem of social costs. It incorporates some CSR thinking about social costs as well as solutions proposed by CSR proponents and progressive corporate law scholars. It commences with a consideration of questions which orientate the inquiry.

A. Questions to Guide Reform

There are two core questions to be asked. First, what rights and duties has corporate law created for the corporation and its insiders? And
second, can the corporation continue to prefer insiders’ private claims and ignore outsiders’ claims concerning social costs?

Greenfield observes that the corpus of corporate law is unique in this sense:

instead of creating a governance system that would help internalize the concerns of customers, employees, or society in general, the system of corporate governance … establishes shareholder interests as supreme and centralizes decision making so that those interests are served. Other stakeholders are left to depend on mechanisms outside corporate law, primarily in the form of express contracts or government regulation, both seriously imperfect, to protect their interests.252

The important thing to remember is that this position—as the Hansmann and Kraakman article demonstrates253—is not inevitable. This section proceeds by considering better models for the corporation as business organization, reformation of corporate norms, and of the institutional environment—specifically institutions touching upon short termism.254 I turn next to the specifics of reform.

B. Better Models: Team Production Model and Hybrid Models

The core CSR issue for the development of a reformed corporate model is the extent to which stakeholder considerations can and should be expected to affect operations. In considering this question, it is important to ensure that reform avoids destroying the important achievements of corporate law, retaining its strengths.

Fortunately, there are corporate models available.255 One model that allows such reform is a re-conceptualization of the corporation proposed by Blair and Stout.256 Their model of the corporation, called the ‘team production model’ could provide the basis for a reform that enables

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252 GREENFIELD, supra note 38, at 17.
253 See Hansmann & Kraakman, supra note 232.
254 One note that bears mention is the ideological commitment to shareholder primacy. The decision to prioritize to the exclusion of all other stakeholders is deeply embedded in economic, business and legal literature, education and practice. Shareholder primacy itself is a major obstacle to sustainability. Addressing that issue is beyond this article and readers interested in the topic are referred to Carol Liao, Limits to Corporate Reform and Alternative Legal Structures, in COMPANY LAW AND SUSTAINABILITY: LEGAL BARRIERS AND OPPORTUNITIES 274 (Beate Sjafjell & Benjamin J. Richardson eds., 2015).
255 See Sheehy, supra note 61, at 500–12 (reviewing a number of proposed models).
256 Blair & Stout, supra note 222, at 250–57, 276–87.
corporate governance to take better account of social costs. Blair and Stout argue that the corporation is an effective form of organization because it concentrates and secures firm-specific investment by team members, allowing specialization and so improving productivity.\(^\text{257}\) If team members were to be given a role in corporate governance, meaning decision-making or consultation at a higher level within the organization, they would be able to provide ex ante controls for at least some of the social costs incurred by large industrial enterprises.\(^\text{258}\)

Taking Blair and Stout’s model further, there is no reason to limit reform to the operational concerns of immediate employees. The air employees breathe, the water they drink, and more broadly, the local community upon whom they rely for their physical and psychological well-being, may well be considered as contributing to the team. Interestingly, as polluted air and water are already actionable in tort, why not bring representative rights bearers into the decision-making process in the first place? Could other community interests too be included in corporate decision-making to varying degrees? Essentially, from equitable and risk management perspectives a stakeholder model that more effectively includes the consideration of social costs ex ante is better than a shareholder model.\(^\text{259}\)

A basic issue is that communities, unlike distant shareholders, are not dedicated to making profit. Local employee team members are concerned about the sustainability of their communities—their economic wellbeing as determined by jobs, tax revenues, and related benefits—as well as ecological and social sustainability. The argument is not that these stakeholders be involved in all financial decisions, or budgeting or dividends, but only in those major decisions that significantly impact or alter the enterprise’s environmental or social impact. Of course, many of these decisions will have financial implications; however, the issue here is to include stakeholders’ voices and to ensure that non-financial values are added to the decision-making matrix.

In certain instances, such as a plant closure, there is reason to argue that staff should be given some type of rights, for example a right to purchase the plant or a right of first refusal in a takeover, or in very limited instances, a right of veto. Such suggestions are not far-fetched. Where existing organizational arrangements are insufficiently profitable for external investors, other options, such as employee buyout and

\(^{257}\) Id. at 271–328.

\(^{258}\) GREENFIELD, supra note 38, at 142-57.

\(^{259}\) Sheehy, supra note 36, at 216–35. Contrary to basic stakeholder theory, all the diverse stakeholders’ concerns cannot become the focus of management attention. Rather, they need to be sorted and organized to better inform management about how the business should be run. See Graham Kenny, The Stakeholder or the Firm? Balancing the Strategic Framework, 34 J. BUS. STRATEGY 33 (2013).
reorganization of ownership structures putting workers in control of production, often do provide viable solutions. While a veto could be designed to be used only on rare occasions, such as blatant asset stripping, its location in the hands of stakeholders would work as a caution and a brake on directors who might otherwise be inclined to take socially riskier and more potentially harmful decisions for the effected communities—i.e., those that bear the social costs for the benefit of shareholders.

While such a reform proposal is likely to invite much criticism, it provides an important and serious alternative to the ex post solutions currently offered by law. The proposed reform allows ex ante prompt, informal, markedly less expensive or collaboratively negotiated solutions by affected parties—and hence both politically legitimate and practically preferable—to the problems of social costs and ex post legal remedies.

Another emerging model in a number of jurisdictions is a modified corporation known variously as a ‘community interest company,’ a ‘community contribution company’ and a ‘low profit limited liability company’. Each of these models shifts the focus away from singular focus on financial gain to a combined financial and social model. These models have innovative ways of solving the problems of charitable institutions, which rely on gifts, as well as ensuring they do not become targets of short-term speculation. They are currently only minimally used; however, as a corporate law experiment they will need to run for several years before a clear understanding of their value and operations can be developed, and their potential as a more widely used model for addressing social costs can be evaluated.

I turn next to consider the reform of norms for corporations.

C. Corporate Norms


262 See discussion in Liao, supra note 254, at 292–302.
In his review of potential corporate law reform, Professor Bryan Horrigan has identified ten areas that should be addressed to facilitate and integrate CSR norms. 263 His list follows:

1. Preconditions established for incorporation and continued corporate existence (so that corporations which breach those conditions can have their charters or incorporations revoked);
2. Corporate objectives and powers expanded to facilitate corporate philanthropy and corporate community investment;
3. Directors’ and officers’ duties and defences expanded to allow stakeholder-sensitive business judgments;
4. Business risk management requirements strengthened to take account of CSR-related business risks;
5. Corporate disclosure and reporting obligations expanded to increase financial and sustainability reporting requirements;
6. Shareholder (and stakeholder) participation in corporate decision-making and governance;
7. Consideration and treatment of employee, creditor, and other stakeholder interests in corporate governance and decision-making;
8. Creation of incentives for and removal of disincentives to socially responsible corporate behavior, for example, matching regulatory treatment and business opportunities to business track records of regulatory compliance and corporate citizenship;
9. Creation of more specific standards for corporate behavior (e.g., corporate conduct meeting SRI requirements); and
10. Conferral of standard-setting authority on others (e.g., legal backing for CSR-related accounting, auditing, and other standards set by official and professional regulators). 264

Horrigan’s reforms are a mix of internal corporate law and external regulatory reforms which would produce a broad effect on corporate

264 Id.
governance. These reforms include significant shifts to focus on the reduction of generation of social costs ex ante.

D. Institutional Environment

Moving beyond the corporation is necessary to address social costs, and such a move must include changes in the institutional environment. Some scholars have made specific institutional reform recommendations in this vein. Lawrence Mitchell and David Millon have both suggested reforms. While Millon has made proposals that would reduce short-term pressures, which in turn would facilitate CSR expenditure,265 Mitchell has suggested changes to capital gains tax regimes in the automobile industry, director elections being held every five years, capitalizing workers, and changing tax deductions, among others as ways to reduce short termism.266 These proposals reflect new conceptualizations of directors and staff and draw new boundaries that could facilitate CSR concerns in decision-making. Such proposals, if adopted, would allow directors to reduce social costs and generate truly productive benefits for society, as opposed to the limited financial benefits for shareholders and financial markets of the current institutions.

X. Conclusion

At their core, the concepts of CSR, corporate law and social costs are all related to the problems brought on by unfettered industrial production. Fortunately, they are not natural phenomena beyond the reach of human control. Rather, they are all social inventions and subject to change.267 What drives both the creation of harms and their innovative resolutions is human decision-making. The systems and value structures of a society lead its decision-makers, and it is up to every society to configure its systems and institutions in a way that sustains its population both now and in the future. Resolving, or at least understanding these issues, is an important first step in progressing toward a cleaner planet, a fairer society, and a better workplace—achieving value from CSR investment and progressing toward CSR’s objectives.

While the corporation is certainly one of law’s finest inventions, its ongoing utility will require appropriate attention to context—i.e. its social and ecological context. The boundaries between corporate law and social

265 See Millon, supra note 63. Recent analysis challenges these proposals. See Mark J. Roe, Corporate Short-Termism—In the Boardroom and in the Courtroom, 68 BUS. L. 977 (2013).

266 Mitchell, supra note 148, at 302–06.

267 For an robust discussion of this topic, see Sheehy, supra note 7.
costs demand revisiting, and in particular, rethinking current runaway social costs.

We live in a world that faces a combined set of challenges: ecological collapse, business capture of democratic governments, and fragmentation of society through inequality. It is not that corporate law cannot be reformed to take better account of these problems. Rather, given its historical place on the private side of the public-private divide,268 it has not been developed to take account of the externalities—a situation exacerbated by the general dis-embedding of the economy269 and the triumph of conservative thought in politics.270

The question to be addressed by legal thinkers, CSR advocates, political scientists, economists, and ultimately legislators, is whether a reform of corporate law to internalize externalities can and should be undertaken, and if so, how such reform is to be done. The potential to mitigate social costs is greatest before they are generated. Where those production processes are housed in corporations, amending corporate law to allow them to be addressed internally should be an important approach to reform.

I have suggested that a host of issues fit comfortably under the CSR umbrella. Further, I have argued that the disconnect between the distinct concepts of corporations, social costs, and CSR hamper efforts to do more good and less harm in the processes of industrial production. While the core of the problem might be described as a dis-embedding of the economy, examining the constructs and their interplay leads to the conclusion that a fundamental re-norming and reform is desirable, and further, that such reform needs to lead to a re-embedding of the economy in its social context rather than having society continuing down the path of a financialized economy. The reasons for this position form the basic premises underlying CSR, namely, that the economic system is to serve society, not vice-versa and further, that the preservation of the ecology for the long-term survival of the species is infinitely valuable.

The current model of industrial production has driven marked social changes and significant environmental harms. A growing response to these issues and significant investment has seen CSR become “de facto business law.”271 CSR, however, does not stand alone. Rather, along with corporate law and the institutions of business, it forms part of the larger social environment. By providing better understanding of the concepts and interplay of CSR, law, and social costs, some direction for reform becomes clearer. This reform is imperative for the success of the larger

268 Moore, supra note 103, at 4–8.
269 Amstutz, supra note 192.
270 Winkler, supra note 156, at 110.
271 KPMG INT’L COOP., supra note 1, at 2.
project of sustaining human society in an ecologically viable way, while also maintaining industrial organization and making the best use of the corporation.

Such reforms require fresh and innovative thinking about social institutions, including the corporation and the organization of industrial production. These institutions rest ultimately on political will—always a capricious issue in any reform. In the absence of a broader social consensus about the nature and role of the corporation, on the one hand, and need to preserve the earth’s ecology for future generations on the other, proposed reforms are less likely to occur. Concerning the future, however, one is always hopeful. In the societies of the Western world, Asian countries and other parts of the world, people can and do change their preferences and priorities as we respond to changing environments both social and natural.

272 For an examination of the politics challenging CSR reform, see Sheehy, supra note 2.