

## The Invisisble Hand of Law: Private Regulation and the Rule of Law

Joel Bakan

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### Recommended Citation

Bakan, Joel (2015) "The Invisisble Hand of Law: Private Regulation and the Rule of Law," *Cornell International Law Journal*: Vol. 48 : Iss. 2 , Article 1.

Available at: <http://scholarship.law.cornell.edu/cilj/vol48/iss2/1>

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# The Invisible Hand of Law: Private Regulation and the Rule of Law

Joel Bakan†

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## Introduction

The early 1980s—when “politics and ideology . . . turned arse-over-tit,” as E.P. Thompson once described it—was, in the less colorful language of David Harvey, a “revolutionary turning point in the world’s social and economic history.”<sup>1</sup> Law was not immune to the sweeping changes taking place.<sup>2</sup> Until the 1980s, and over the previous half century, law had served

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1. E. P. THOMPSON, *WRITING BY CANDLELIGHT* 211 (1980); DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005), *quoted in* JOEL BAKAN, *CHILDHOOD UNDER SIEGE: HOW BIG BUSINESS TARGETS YOUR CHILDREN* 9 (2011) [hereinafter BAKAN, *CHILDHOOD UNDER SIEGE*].

2. By “law” I refer to mandatory legal systems composed of rules, principles, and standards promulgated and enforced by sovereign state institutions, and recognized as authoritative and binding within their jurisdictions. See, e.g., Ronen Shamir, *Capitalism, Governance, and Authority: The Case of Corporate Social Responsibility*, 6 ANN. REV. L. & SOC. SCI. 531, 534 (2010) [hereinafter Shamir, *Capitalism, Governance and Authority*]. While pluralist, cosmopolitan, and postmodern approaches to law eschew rigid demarcations of law from other kinds of collective normativity, for the purposes of this paper—which traces the significance of the distinction between mandatory public law and voluntary private regulation—neglecting that demarcation would beg all the relevant questions. See, e.g., JEAN L. COHEN, *GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM* 44 (2012). I agree, for these purposes, with Jean L. Cohen’s characterization of the critique of legal pluralism: “By attaching the label ‘law’ indiscriminately to any form of coordinated rule-making,” she says, “legal pluralists tend to collapse the distinction between law and regulation, dissolve the legal code into  
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(albeit unevenly and incompletely) as the main institutional vehicle for policing corporations in aid of public interests, thereby protecting people, communities, and the environment from corporate excess and malfeasance.<sup>3</sup> Over the course of the 1980s and thereafter, however, law's protective role began to diminish, and privately promulgated voluntary regimes (hereinafter "private regulation"<sup>4</sup>) emerged in its place.<sup>5</sup>

Importantly, no such diminishment occurred in relation to law's parallel and prominent role in protecting corporations and their interests. Here, state legal regimes continued to operate as robustly as ever; incorporate companies; establish their mandates; protect their rights as "persons"; shield their managers, directors, and shareholders from legal liability; compel their officers to prioritize their "best interests" (typically construed as increasing shareholder value); articulate and enforce their contract and property rights; and repress dissidents and protesters who opposed their growing power. Corporations—indeed, corporate capitalism—could not exist without these legal foundations and supports, which taken together represent a massive infusion of state legal power into society.

Despite that massive infusion, many private regulation advocates and commentators presume that globalization eviscerates state legal power, and prescribe, on that basis, that private regimes should take law's place.<sup>6</sup> This Article challenges that presumption and prescription. Following examination of the rise of private regulation in Part I, Part II reveals how private regulation advocacy and commentary often obscure, and effectively render invisible, law's robust role in constituting and protecting corporations, thereby exaggerating globalization's alleged diminishment of state legal power. Part III claims that private regulation weakens the rule of law and its democratic potential, with the effect, Part IV explains, of exacerbating corporate threats to public interests.

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one among many normative-regulatory regimes, reduce legal decisions to policy choices, and thereby lose sight of the critical point of the exercise." See *id.* (paraphrasing, she notes, Martti Koskeniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1 (2007)).

3. Cf. Fabrizio Cafaggi & Andrea Renda, *Public and Private Regulation: Mapping the Labyrinth* 1, 1 (Ctr. Eur. Pol'y Stud., Working Paper No. 370, 2012) [hereinafter Cafaggi & Renda, *Labyrinth*].

4. I use the term "private regulation," rather than "transnational private regulation" (a common term in the literature) to connote that self-regulation and other forms of private regulation are advocated and active within states, as well as within international realms. See Ronen Shamir, *Socially Responsible Private Regulation: World-Culture or World-Capitalism?*, 45 L. & SOC. REV. 313, 313 (2011) [hereinafter Shamir, *Socially Responsible Private Regulation*].

5. See Cafaggi & Renda, *Labyrinth*, *supra* note 3, at 1-2, 7. While private regulation is often referred to in the literature as "soft law," I treat it as a non-legal albeit normative and regulatory practice, following the definition of law stated in note 2. Cf. Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J. L. & SOC. 20, 36 (2011) [hereinafter Cafaggi, *New Foundations*].

6. Notably, the literature on private regulation is vast and varied: while some commentators advocate its virtues and prescribe it, others limit their work to describing and analyzing its development, and still others are critical of it. Cafaggi & Renda, *Labyrinth*, *supra* note 3, at 4-5. This paper challenges the first group of scholars, draws upon the second, and is sympathetic to the third.

## I. The Rise of Private Regulation

Over the last several decades, a rapidly expanding network of private regulation regimes has emerged to create a new mode of international governance.<sup>7</sup> Taking a variety of forms, these regimes vary in their complexity, the range of organizations they include, and the degree to which they are monitored and enforced.<sup>8</sup> Corporate social responsibility (CSR) and related self-regulation programs rely upon voluntary standards and codes of conduct, promulgated by companies and industry groups, and sometimes monitored by third-party agencies.<sup>9</sup> NGO-led regimes invite outside, albeit private, agencies to set voluntary standards in cooperation with companies and industry groups, and often include monitoring mechanisms and reporting requirements.<sup>10</sup> Expert-led models feature organizations, such as the International Organization for Standardization, which establish norms for different industries and for industry as a whole.<sup>11</sup> Multi-stakeholder models involve collaborations among companies, NGOs, expert groups, industry associations, and governments to set and monitor standards (though, importantly, governments in these regimes serve as partners and supports rather than sovereign or legal regulators, thus eschewing traditional regulator-regulated hierarchies).<sup>12</sup>

While in theory private regulation norms may complement or crystallize into legal norms, in practice the gains of private regulation often come at the expense of public norms, “push[ing] the once-central ‘official’ or state law to the global edge,” as Muir-Watt describes it.<sup>13</sup> “Widespread advocacy for forms of private regulation in lieu of public regulation,” according to Caffagi and Renda, has led “governments [to] award priority

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7. See TIM BÜTHE & WALTER MATTLI, *THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY* 1-2 (2011); Saskia Sassen, *The State and Globalization*, in *THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE* 91, 91 (Rodney B. Hall & Thomas J. Biersteker eds., 2002); Kenneth W. Abbott & Duncan Snidal, *International Regulation Without International Government: Improving IO Performance Through Orchestration*, 5 *REV. INT. ORGAN.* 2 (2010); Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order*, *IND. J. GLOBAL LEGAL STUD.* 751, 751 (2011); Horatia Muir-Watt, *Private International Law Beyond the Schism*, 2 *TRANSNAT'L LEGAL THEORY* 347, 347 (2011).

8. Abbott & Snidal, *supra* note 7, at 4-9 (for a comprehensive review of these various types of regimes, with numerous examples).

9. See, e.g., *id.* at 7, 38 (describing GAP's individual labor rights scheme of 1992 and the International Council on Mining and Metals sustainable development principles of 2003).

10. See, e.g., *id.* (describing the Rugmark labeling scheme, created in 1994 to control child labor in the carpet industry; the CERES principles on environmental practice and reporting; and Amnesty International's Human Rights guidelines for Companies).

11. See, e.g., Filippo Fontanelli, *ISO and Codex Standards and International Trade Law: What Gets Said is Not What's Heard*, 60 *INT'L & COMP. L.Q.* 895, 900 (2011) (discussing various industry standards promulgated by the International Organization for Standardization).

12. See, e.g., Abbott & Snidal, *supra* note 7, at 2, 40 (discussing the 1997 Global Reporting Initiative's standards for social and environmental reporting and the 2004 World Fair Trade Organization's standards for fair trade).

13. Muir-Watt, *supra* note 7, at 352.

to self- and co-regulatory solutions,” which in turn results in “key policy domains . . . increasingly be[ing] left in the remit of private players, with limited or no interference by public policymakers.”<sup>14</sup> Private regulation therefore often “operate[s] as a substitute for public regulation,” and, more than that, companies strategically deploy it “with a clear objective to preempt and avoid public regulation.”<sup>15</sup> For example, Frynas describes how oil companies invoked self-regulation initiatives to “stave off mandatory regulation” concerning compensation for spills.<sup>16</sup> Waters shows how Coca-Cola’s recent health initiatives were designed “to stave off regulatory changes (a proposed soda tax) . . . by embracing voluntary, self-enforced corporate initiatives.”<sup>17</sup> Similar examples are legion, reflecting broad-based corporate practice and advocacy in favor of private regimes, propelled mainly by corporate self-interest, though defended by companies as more effective than public regimes for protecting public interests.<sup>18</sup>

Many commentators similarly believe (though not for the same self-interested reasons) that private regimes can be more effective than their public counterparts.<sup>19</sup> This is especially so, they argue, in a world where globalization has significantly diminished the authority of states to regulate multinational corporations (MNCs).<sup>20</sup> MNCs operate transnationally

14. Cafaggi & Renda, *Labyrinth*, *supra* note 3, at 1-2.

15. *Id.* at 7.

16. Jędrzej G. Frynas, *Corporate Social Responsibility or Government Regulation? Evidence on Oil Spill Prevention*, 17 *ECOLOGY & SOC.* 4 (2012).

17. Rob Waters, *Coca-Cola’s “Frank Statement” A Slick Move To Stave Off Regulation*, *FORBES*, May 21, 2013.

18. Shamir, *Capitalism, Governance, and Authority*, *supra* note 2, at 544; See also BAKAN, *CHILDHOOD UNDER SIEGE*, *supra* note 1, at 57-64.

19. Cafaggi & Renda, *Labyrinth*, *supra* note 3, at 28 (“Private regulation is emerging as a viable solution for a number of problems faced by contemporary societies, and can be superior to traditional command and control regulation due to informational asymmetries, superior coordination, the need for trans-national cooperation and standardization, and also the superior flexibility and adaptability of de-ossified, privately implemented, designed and enforced rules”).

20. See, e.g., Cafaggi, *New Foundations*, *supra* note 5, at 23 (“The growth of TPR is often associated, if not made dependent upon, the shortcomings of the regulatory state as a global regulator”); *id.* at 25 (“Consensus exists over the weaknesses of nation states in regulating markets that operate across state boundaries. Similarly, the difficulties of individual states in securing compliance with fundamental rights have been underlined.”). Cafaggi & Renda, *Labyrinth*, *supra* note 3, at 5 (“The weaknesses of public regulation emerge more specifically at the transnational level where difficulties to coordinate, inconsistency between standard setting and enforcement, divergences between administrative and judicial enforcement and within the latter among domestic courts make transnational public regulation an insufficient response”). See also Monbiot et al., *Debating CSR, Democracy and Value Creation*, in *CSR AND BEYOND: A NORDIC PERSPECTIVE* 428 (Atle Mindttun ed., 2013) (“Strong democratic national regulation [is] highly problematic. I believe this regulatory paradise was lost with globalization and that even national states only have partial control over industry which operates across borders . . . . [A] return to strong national regulation is difficult, if not outright impossible.”); Abbott and Snidal, *supra* note 7, at 1-2 (“old international regulation”—state-led legality—is inevitably in decline, making necessary “new transnational regulation”—“the promulgation and implementation of non-legally-binding standards of behavior, applicable directly to private actors . . . in settings that have traditionally called for mandatory regulation”); Paul Verbruggen, *Gorillas in the Closet? Public and Private Actors in the*

in a globalized economy, and can thus elude domestic legal systems, they argue.<sup>21</sup> International law is of no help because corporations, as non-state actors, lie outside its traditional jurisdiction.<sup>22</sup> The resulting “regulatory gap,” they say, should be filled with private regulation<sup>23</sup> (though they tend to disagree on exactly how that should be done: what types of regimes work best in which situations; what lines of cooperation among states, international organizations, NGOs, and corporations are optimal; and whether, and to what extent, private regulations do and should crystallize into enforceable legal standards<sup>24</sup>). In the next Part, I argue that the presumption underlying these views—namely, that states’ regulatory authority has been diminished by globalization—is intelligible only if important exercises of that authority are rendered invisible.

## II. The Invisible Hand of Law

“[T]he general movement away from traditional state control of the commanding heights [of the economy] continues, leaving it more to the realm of the market,” observe Daniel Yergin and Joseph Stanislaw in their seminal work, *The Commanding Heights: The Battle for the World Economy*.<sup>25</sup> By implication, Yergin and Stanislaw presume that the “realm of the mar-

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*Enforcement of Transnational Private Regulation*, 7 REG. & GOVERNANCE 512, 513 (2013) (“[T]ransnational private regulation has emerged as a response to the lack, paucity or, outright failure of international state governance arrangements”); Backer, *supra* note 7, at 754–55, noting:

But globalization, with its de-emphasis on the integrity of the territorial borders of states, destroyed the old presumption of a substantially complete identity between subjects and objects of regulation. Because such private entities, especially large non-state actors, could avoid regulation in one single state by extending their operations into the territory of other states, it became easier for these entities to avoid political regulation and substitute themselves as new regulators of behavior, each within the scope of its enterprise operation.

See also Deirdre Curtin & Linda Senden, *Public Accountability of Transnational Private Regulation: Chimera or Reality?*, 38 J. L. & Soc. 163, 168 (2011). Curtin and Senden explain:

Furthermore, increasing globalization—economic trade, environmental, criminal, migration problems, and so on—has put a strain on national public regulation as an instrumental tool to steer economy and society, while transnational public structures and mechanisms for decision-making are not sophisticated enough to tackle these effectively. Self-regulation may then be resorted to out of sheer necessity or public actors may have to fall back on or cooperate with private actors to tackle a cross-border problem effectively, by bringing about some form of regulation, monitoring, and compliance mechanisms.

21. Backer, *supra* note 7, at 754–55.

22. Some suggest international law should, and increasingly does, recognize non-state actors and subjects, and that this approach should be pursued as an avenue for restoring public regulation of corporations, albeit at the international level. See Patrick Macklem, *Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction*, 7 INT’L. L. FORUM DU DROIT INTERNATIONAL 281 (2005) (offering a discussion and critique of this view).

23. See Abbott & Snidal, *supra* note 7, at 1–2; Cafaggi, *New Foundations*, *supra* note 5, at 23; Cafaggi & Renda, *Labyrinth*, *supra* note 3, at 5.

24. See, e.g., Cafaggi, *New Foundations*, *supra* note 5, at 25.

25. As cited in JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 154 (2004) [hereinafter BAKAN, *THE CORPORATION*],

ket” is something different than, indeed separate from, “traditional state control”—a presumption similarly implied by most arguments in favor of private regulation.<sup>26</sup> As a consequence of globalization, those arguments hold, MNCs (the “realm of the market”) are able to elude state law (“traditional state control”) and that, in turn, makes necessary the introduction of non-state, private regulatory measures.<sup>27</sup> When Abbott and Snidal describe “traditional state-based mechanisms” and “mandatory regulation” solely in terms of laws that constrain corporations, but not those that protect and enable them, law’s constitutive and enabling role is obscured.<sup>28</sup> When John Ruggie highlights “governance gaps created by globalization—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences,” those economic forces and actors are, again, implicitly detached from, rather than rooted in, societies’ governance and legal structures.<sup>29</sup> When, more generally, neoliberal notions “stress[ ] the importance of markets and open economies for growth and [seek] a more limited role for the state,” as Trubek describes them, the role of states in constituting and enabling markets and open economies is implicitly negated.<sup>30</sup> The same dynamic is manifest across the private regulation literature—law’s hand is noted for its role in constraining MNCs, while its role in creating and enabling MNCs is largely invisible.<sup>31</sup>

To understand this dynamic more fully, it is helpful to return to the work of legal realist scholars who, nearly a century ago, revealed the public legal underpinnings of private economic power.<sup>32</sup> The allegedly private, free, and voluntary market imagined by laissez-faire ideas, they argued, was in fact dependent upon coercive state power in the form of property and contract law, meaning the market was no less “public” than the regulatory regimes constraining it in aid of public interests.<sup>33</sup> As a result, “when the government intervened in private market relations to curb the use of certain private bargaining power,” as Barbara Fried describes Robert Hale’s conclusions, “it did not inject [legal] coercion for the first time into those relations. Rather, it merely changed the relative distribution of coercive

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26. *Id.*

27. See, e.g., Curtin & Senden, *supra* note 20, at 168.

28. Abbott & Snidal, *supra* note 7, at 315.

29. Penelope C. Simons, *International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights*, 3 J. HUM. RTS. & ENV’T 5, 11 (2012).

30. David M. Trubek, *Law, State, and the New Developmentalism: An Introduction*, in LAW AND THE NEW DEVELOPMENTAL STATE: THE BRAZILIAN EXPERIENCE IN LATIN AMERICAN CONTEXT 3, 6 (Helena Alviar Garcia et al. eds., 2013).

31. See, e.g., Cafaggi, *New Foundations*, *supra* note 5, at 23. Private regulation literature has increasingly viewed law’s potential to constrain MNCs as ineffective. See, e.g., *id.*

32. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927) [hereinafter Cohen, *Property*].

33. *Id.* at 22; Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933) [hereinafter Cohen, *Contract*]; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923).

power.”<sup>34</sup> As Hale himself described it, “we live . . . under two governments, ‘economic’ and ‘political,’” yet the former was effectively made invisible, he said, by *laissez-faire’s* presumption that economic governance (the market) is pre-political.<sup>35</sup>

By corollary, when corporate-constraining laws are rolled back or otherwise weakened, legal coercion is not diminished, but rather redistributed from, in Hale’s terms, the “political” to the “economic”<sup>36</sup>— from protecting public interests to enabling corporations and protecting their interests.<sup>37</sup> For example, coercive laws continue (now less constrained by other coercive laws) to:

- Transform groups of individuals into single corporate “persons,” with obligations and rights (including constitutional rights that serve as

34. BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 36 (2002).

35. *Id.* at 36. The Realists well understood the political effects of restricting conceptions of legal coercion to market-constraining regulations. By excluding market-enabling regulation, such as the laws of property, contract, and corporations from the realm of coercion, “freedom” was automatically equated with the absence of market-constraining regulation. Within this equation, regulations restricting markets with the aim of protecting social interests could only be conceived as limiting freedom, but never promoting it. The architects of the New Deal, many of whom were influenced by the Realists, understood the power of this ideological dynamic, and the need to debunk it when defending their regulatory programs. The Norris-LaGuardia Act, for example, a centerpiece of the New Deal’s protection of labor rights, explicitly stated in its preamble that corporate employers’ power was “developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association.” See BAKAN, *THE CORPORATION*, *supra* note 25, at 155 for further discussion of this subject.

36. In other words, public power is “more tightly connected to the interests of corporations and less so to the public interest,” as stated in BAKAN, *THE CORPORATION*, *supra* note 25, at 154.

37. See Marc Moore, *Is Corporate Law ‘Private’ (and Why Does it Matter)?* (2012) (unpublished manuscript) (on file at SSRN, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2192163](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192163)), for an excellent account of the public regulatory character of the law that constitutes corporations, and a critique of attempts to deny that character. See also Katharina Pistor, *Multinational Corporations as Regulators and Central Planners: Implications for Citizens’ Voice*, in *CORPORATIONS AND CITIZENSHIP* 233–34 (Greg Urban ed., 2014). Pistor explains:

Regulation and central planning are complementary means for advancing the interests of the MNC’s core operations in a world of multiple legal orders that create costs while also offering opportunities for new actors able to exploit them. . . . To a large extent, realizing these opportunities is made possible by national legal systems. National legal systems lend enforcement authority to the contracts by which MNCs enforce regulatory standards. They endorse private regulation as “industry practices” or the specification of standards set by national law. In addition, they accommodate MNCs in devising specific rules and regulations in ways that are compatible with the MNCs’ own standards— whether financial contracts or pollution standards for international transport and import companies. Moreover, by protecting the corporate shield they support MNCs’ central planning strategies, even if they come at the expense of other stakeholders in markets where foreign subsidiaries operate and their collapse may create substantial local costs. Viewed in this light, states are the handmaidens for the rise of MNCs as regulators and central planners.

hedges against public regulation<sup>38</sup>) separate from those of their owners and officers;

- Limit investors' liabilities to the amounts they invest, and thus reduce their exposure to risk, and also enable companies to evade tax and legal liability through subsidiary schemes;<sup>39</sup>
- Create and enforce corporations' contract<sup>40</sup> and property<sup>41</sup> rights (in the form of real, commercial, and intellectual property, as well as shares and other financial instruments);
- Implement new "command and control" policing of anti-corporate protestors—"heavy police presence, . . . increase[d] police powers[, and] surveillance of potential protest organizers, with databases of personalities and activities," as one commentator describes it;<sup>42</sup>
- Constitute and join international trade liberalization regimes that propel the very globalization processes that limit states' capacities to regulate MNCs in aid of public interests;<sup>43</sup>
- Require corporate directors and managers to prioritize the "best interests of the corporation" over all other interests—including social and environmental interests—in all of their decisions and actions.<sup>44</sup>

Making visible these different ways that law constitutes, enables, and protects MNCs disaffirms some key presumptions behind private regulation advocacy. No longer, for example, can globalization plausibly be presumed to diminish states' rule-making authority over MNCs when those MNCs are *dependent* on states' rule-making authority to exist and operate. No longer can a "governance gap" intelligibly be proposed when governance continues robustly, albeit in the service of MNCs, rather than in protecting others *from* MNCs. No longer can we imagine "a dearth of (state and non-state) normativities," as Muir-Watt describes it, when "despite and sometimes because of their multiplicity [extant normativities] do not achieve—and indeed may conspire to impede—the tethering of private interests in the name of the global good."<sup>45</sup>

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38. The U.S. Supreme Court has recently further extended constitutional protection to corporations in relation to political contributions through its decision in *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310 (2010). See also Joel Bakan, *Psychopaths, Inc.: On Corporate Personhood*, in *THE OCCUPY HANDBOOK* 353 (Janet Byrne ed., 2012) [hereinafter Bakan, *Psychopaths*].

39. See Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89-90 (1985).

40. See Cohen, *Contract*, *supra* note 33. See also John Fellas, Book Review: The Idea of Arbitration, by Jan Paulsson, 30 *ARB. INT'L* 3 (2014), available at <http://arbitration.org/fordjournals.org/content/30/3/589>.

41. See Cohen, *Property*, *supra* note 32.

42. PETER DAUVERGNE & GENEVIEVE LEBARON, *PROTEST INC.: THE CORPORATIZATION OF ACTIVISM* 59 (2014). See also Justin Bachman, *A Federal Effort to Reuse Military Gear Turned Cops Into Commandos*, *BLOOMBERG BUS. WK.*, (Aug. 14, 2014), <http://www.bloomberg.com/bw/articles/2014-08-14/ferguson-shooting-how-military-gear-ended-up-with-local-police>.

43. Simons, *supra* note 29, at 27.

44. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) for an example of a judicial articulation of this standard.

45. Muir-Watt, *supra* note 7, at 407. Per Muir-Watt, *id.* at 358:

What appears deeply problematic, therefore, is not that regulation is unavailable, nor indeed that it flows from sources beyond the sovereign state, but that whatever rules there are, these rules appear to lack a transcendent horizon of the

Particularly challenging for arguments favoring private regulation is the legal imperative that corporate directors and managers prioritize the “best interests of the corporation”—the last entry on the list above. Perhaps most directly, this norm reveals how mandatory law’s presence, and not only its absence, fuels corporate exploitation and harm. A long-standing debate within corporate law scholarship (and, to some extent, corporate law itself) asks whether the “best interests” of corporations are limited to shareholder value, or whether they also include social responsibilities.<sup>46</sup> Typical is the classic Dodd-Berle exchange, where Merrick Dodd argued that the corporation is “an economic institution which has a social service as well as a profit-making function,” while Adolfe Berle claimed that “all powers granted to a corporation or to the management of the corporation [are] at all times exercisable only for the ratable benefit of the shareholders.”<sup>47</sup> Though Dodd’s argument was, and remains, conceptually compelling, and continues to resonate with many scholars,<sup>48</sup> Berle’s shareholder value approach prevailed in practice and continues to dominate corporate law today. Even Lynn Stout, for example, a leading critic of the approach who argues it is illogical, harmful, and corrosive of the very purposes of corporate law, concedes it is “well accepted” in practice, and that “directors, executives, and employees in corporations . . . reasonably assume . . . the law requires them to maximize shareholder value.”<sup>49</sup>

The status of shareholder value as *the* governing legal norm for corporate decision-making and practice means, in effect, that MNCs are compelled by state law to prioritize shareholder value in the form of profit, performance, and growth, and, by corollary, are prohibited from pursuing social and environmental values as ends in themselves.<sup>50</sup> MNCs are, in short, controlled and commanded by law to limit their pursuit of social and environmental values unless such pursuit can somehow be aligned with their own financial interests.<sup>51</sup> Law—its “formal rules and stipulations, adversarial methods, enforceable means of dispute resolution, and command-and-control regulatory mechanisms,” as Shamir describes it<sup>52</sup>—is the source of these limitations and, more generally, of the dangerously self-interested tendencies of corporations.<sup>53</sup> However, none of that can be seen

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global good, and any sense of connectedness in terms of causal linkages and systemic risks. However much formal and informal law exists, it does little to rein in private interests.

46. LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 17 (2012).

47. *Id.*

48. *See id.*

49. *Id.* at 4, 25.

50. *See, e.g., Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

51. *See generally Dodge*, 170 N.W.

52. Shamir, *Capitalism, Governance, and Authority*, *supra* note 2, at 534.

53. Admittedly, this legal framework can be pushed against, and imaginatively worked within, by socially-minded corporate officers and employees. Convergence among social and environmental interests and corporate interests can be found, as “shared value” prescribes, making it possible for corporations to obey the legal imperative to prioritize their and their owners’ interests, while, at the same time, pursuing

or questioned, when, as is the case in much private regulation discourse, law's constitutive, enabling, and protective role for MNCs is invisible.

### III. Private Regulation and the Rule of Law

In *Whigs and Hunters*, historian E.P. Thompson describes a hideous episode in law's long history of enforcing class power.<sup>54</sup> England's eighteenth century Black Act punished with death suspected poachers on aristocrats' lands, demonstrating, as Thompson elaborates, how brutally unjust law can be.<sup>55</sup> Yet, Thompson observes, law can also be just and virtuous, a possibility immanent in our very belief that the Black Act is brutally unjust: "If I judge the Black Act to be atrocious," he says, "this is . . . according to some ideal notion of the standards to which the 'law,' as a regulator of human conflicts of interest . . . must always seek to transcend the inequalities of class power which, instrumentally, it is harnessed to serve."<sup>56</sup> History is replete with laws, like the Black Act, that unjustly magnify the power of the powerful and cause pain, horror, and dispossession for others.<sup>57</sup> Racial apartheid and segregation, colonialism, genocide, discrimination of all sorts, patriarchy, human rights and labor abuses— all have been articulated, justified, and executed through law.<sup>58</sup> Yet, history also reveals that law can, and sometimes does, fulfill Thompson's "ideal notion," standing up to injustice, including the very injustices it creates.<sup>59</sup>

Public regulation, in the form of legal regimes designed to protect public interests from harm at the hands of economic actors, is exemplary of Thompson's "ideal notion" of law. It was in the name of that "ideal notion," for example, that President Franklin Roosevelt promulgated his New Deal: a sweeping legal intervention in aid of public interests. "[W]e were not to be content with merely hoping for . . . [constitutional] ideals," he stated at the time, but "were to use the instrumentalities and powers of Government to actively fight for them . . . [and] against the misuse of private economic power."<sup>60</sup> More recently, in similar spirit, Robin West observes that "in the presence of [regulatory] law, the capitalist relin-

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social initiatives. Those initiatives will be necessarily narrow, however, as described above, and the reason for that narrowing is that mandatory state law demands such initiatives further corporate as well as social objectives. See, e.g., *A.P. Smith Mfg. v. Barlow*, 98 A.2d 581 (N.J. 1953)

54. See E.P. THOMPSON, *WHIGS AND HUNTERS* 267-68 (1977).

55. See *id.* at 268.

56. See *id.*

57. *Id.* at 266.

58. See, e.g., Jean Cohen, *supra* note 2.

59. See THOMPSON, *supra* note 54, at 269. As an ideal and aspiration, then, if not always in practice, the rule of law is arguably an "unqualified [human] good." See *id.* at 267. Cohen captures a similar notion in what she describes as the "Janus face of law": "we must be aware that juridification can entail the authorization of new power hierarchies as well as normatively desirable constructions and limits of public power." Jean Cohen, *supra* note 2, at 7.

60. THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, VOLUME TWO: THE YEAR OF CRISIS, 1933 5 (Samuel Rosenman ed., 1938), as cited in BAKAN, THE CORPORATION, *supra* note 25 (citing CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 57-58 (1993)).

quishes some economic power he or it possesses in law's absence, and the hierarchy created through wealth is regulated," thereby demonstrating that shared subjection to the sovereignty of law "displaces cruel and brutal realms of private sovereignty, and thereby serves egalitarian ends."<sup>61</sup>

Public regulation can thus be understood as animated and justified by "ideal notions" akin to those Thompson describes, even while its actual record falls notoriously short of those ideals (due in part to relentless industry pressure on governments before, during, and since the time of the New Deal<sup>62</sup>). Indeed, by the early 1980s, the very idea (and ideal) of public regulation as a means for protecting public interests was under attack, and with the ensuing rise of neoliberalism, cynicism and suspicion quickly set in.<sup>63</sup> Today, the inadequacies of public regulatory regimes are legion and notorious—agency capture, revolving doors (between industry and agencies), undue corporate influence through lobbying and electoral campaign financing, pork barreling and earmarking, corruption, underfunded and inadequate enforcement, and, of course, the pressures of globalization—and contribute to a growing chasm between the ideals of public regulation, and the actual operations of public regulatory systems.<sup>64</sup>

As a result, many today—private regulation advocates chief among them—believe public regulation is a lost cause and that its hierarchical, legal, and sovereignty-based control of MNCs should give way to heteroarchival, voluntary, and private norms.<sup>65</sup> New forms of global govern-

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61. ROBIN L. WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW* 173, 175 (2003). In a similar vein, West notes "the potential of law . . . to serve as a challenge to the preferences and desires that are otherwise reflected in, and gratified in, various exchange markets, and to do so . . . toward the end . . . of enhancing human wellbeing." *Id.* at 174. Importantly, however, while "public regulation" connotes mandatory legal regimes (ones composed of rules, principles, and standards promulgated and enforced by sovereign state institutions and recognized as binding within their jurisdictions), that does not limit it to strictly command-and-control regimes. There is a large and live debate about new modes of regulation that maintain a mandatory legal character—thus being neither private nor voluntary—while taking a non-command-and-control form. See, e.g., discussions of "co-regulation" in BAKAN, *CHILDHOOD UNDER SIEGE*, *supra* note 1, at 60, 64-65, 259; "principle-based regulation" in Paul Latimer and Phillip Maume, *PROMOTING INFORMATION IN THE MARKET FOR FINANCIAL SERVICES: FINANCIAL MARKET REGULATION AND INTERNATIONAL STANDARDS* 217-234 (2015); and "responsive regulation" in Christine Parker, *Twenty Years of Responsive Regulation: An Appreciation and Appraisal*, 7 *REG. AND GOVERNANCE* 2 (2013).

62. See BAKAN, *THE CORPORATION*, *supra* note 25 at 86.

63. See *id.* at 21.

64. See, e.g., *id.* at 162.

65. See generally Colin Scott et al., *The Conceptual and Constitutional Challenge of Transnational Private Regulation*, 38 *J. L. & Soc'y.* 1 (2011). One can challenge this view—as I do—while still acknowledging that 1) states have lost some control over their territories, borders, populations, and institutions (including corporations), especially as international organizations morph into global governors and regulators; 2) technological innovation fuels economic interdependence; 3) major corporations operate in multiple nations; and 3) environmental degradation, migration, human rights, and terrorism defy (and deny) state borders (see Jean Cohen, *supra* note 2). These factors may present challenges for mandatory legal regulation, but not reasons to abandon the project in favor of private alternatives.

ance require, they believe, “rethinking . . . the public-private divide,” taking “some caution against the risks of excessive legalization,” and prioritizing the search for “alternatives to legal control.”<sup>66</sup> Dethrone the rule of law as the governing norm for regulating MNCs (relegating it to some uncertain stature), they proclaim, and “rethink[ ] constitutional theory” to find new bases for legitimating regimes that exist outside the normal channels of legality and democratic accountability.<sup>67</sup>

Such prescriptions unmistakably diminish law to a lesser—and in some cases negligible—role in policing MNCs.<sup>68</sup> Law’s potential to fetter power in the name of justice, Thompson’s “ideal notion,” is abandoned in favor of faith in MNCs voluntarily to wield power justly.<sup>69</sup> Law’s power to “displace[ ] cruel and brutal realms of private sovereignty,” as West describes it,<sup>70</sup> is replaced with trust that MNCs will be less “cruel and brutal.” Law’s promise to “transcend the inequalities of class power which, instrumentally, it is harnessed to serve,” as Thompson describes it,<sup>71</sup> is betrayed by shifting regulatory power to institutional repositories of class power (MNCs). Finally, law’s power to protect public interests from MNCs, and therefore to work “against the misuse of private economic power,” as Roosevelt describes it,<sup>72</sup> is weakened in ways that enhance private economic power.<sup>73</sup>

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66. Scott, *supra* note 65, at 16.

67. *Id.* at 15–16.

68. At the same time this diminishes democracy, in light of the intrinsic link between the rule of law and democracy (at least within democratic orders). See BAKAN, *THE CORPORATION*, *supra* note 25, at 139. See also *infra* note 73.

69. See THOMPSON, *supra* note 54, at 268.

70. See WEST, *supra* note 61, at 175.

71. See THOMPSON, *supra* note 54, at 268.

72. See SUNSTEIN, *supra* note 60, at 57–58; Rosenman, *supra* note 60, at 5.

73. This undermines not only the rule of law, but principles of democratic governance as well. Shifting regulatory authority from public to private authorities results in a kind of “dedemocratization, as it denies ‘the people’, acting through their representatives in government, the only official political vehicle they currently have to control corporate behavior.” See BAKAN, *THE CORPORATION*, *supra* note 25, at 150. Private regulation advocates acknowledge this “democratic deficit,” and recognize that it raises legitimacy issues. Various solutions are offered. Some suggest “reconceptualiz[ing] the bases of legitimacy for [private regulation] regimes” and recognizing that private regulation “may constitute a new form of global democratic governance” where democratic potential lies with plural private actors (MNCs, NGOs, and civil society groups) combining to govern the behavior of MNCs. See Scott, *supra* note 65, at 14–15. Others find democratic potential within markets. Investors and consumers, they say, informed by media, NGOs, and internet savvy civil society groups, can choose to buy, and to buy from, companies that pursue social and environmental values, while boycotting those that do not, and thus express their democratic preferences. See, e.g., Ruth V. Aguilera, Deborah E. Rupp, Cynthia A. Williams & Jyoti Ganapathi, *Putting the S Back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations*, 32 *ACAD. MGMT. REV.* 836 (2007). These approaches, whether relying on NGOs, civil society groups, or consumer and investor markets, effectively dispense with the need for governance by public institutions with formal lines of democratic accountability to citizens. Instead they offer vague and unrealistic presumptions about the potential and likelihood of private institutions and actors coming together to govern in ways that manifest the fundamentally public values that lie at the heart of any meaningful conception of democracy. See also BAKAN,

Advocates of private regulation defend law's displacement by arguing that private voluntary norms can be at least as effective as mandatory legal norms in curbing "misuse of private economic power."<sup>74</sup> Key to that argument is the presumption that MNCs can do what private regulation prescribes for them—voluntarily promulgate and abide by meaningful social and environmental standards. For that presumption, and therefore private regulation itself, to be plausible, however, corporations must be understood as able to transcend narrow self-interest and to embrace meaningful social and environmental commitments. "Construction of a 'corporate conscience'" is necessary, as Ronan Shamir observes, for "securing a rationale for private and self-regulation."<sup>75</sup>

Construction of that conscience has been underway in the form of corporate social responsibility (CSR) since the 1980s, when private regulation first emerged.<sup>76</sup> Today, CSR is mainstream, a mantra for business leaders, a ubiquitous presence in marketing and public relations campaigns, and an organizing principle for earnest gatherings of NGOs, scholars, business leaders, and government officials.<sup>77</sup> All large companies, and most small ones, maintain well-publicized CSR plans, publish glossy CSR reports and websites, and staff CSR offices and vice-presidencies.<sup>78</sup> A burgeoning CSR industry provides infrastructural support, consulting services, and monitoring programs, while business schools feature CSR professorships, and offer CSR courses and degree programs.<sup>79</sup>

CSR undoubtedly lends putative support to claims that private regulation can replace or substantially supplement mandatory legal norms. When MNCs are understood as able and likely to consider social and environmental values in decisions and actions, it seems reasonable to believe that they can "assume the self-discipline that governments had required of them in the past," as Samir Gibara, former chair and CEO of Goodyear Tire describes it,<sup>80</sup> and thereby play the roles private regulation regimes demand of them. Reconceiving MNCs as socially responsible is therefore necessary for private regulation to be a plausible alternative to mandatory legal regulation. The evidence suggests, however, that it is not sufficient.

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THE CORPORATION, *supra* note 25, at c.6 (developing the argument against relying upon private orders to deliver democratic governance).

74. See Rosenman, *supra* note 60, at 5; Shamir, *Capitalism, Governance and Authority*, *supra* note 2, at 536.

75. See Shamir, *Capitalism, Governance and Authority*, *supra* note 2, at 536.

76. See Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HAR. BUS. REV. 1, 6 (Dec. 2006).

77. See, e.g., Simon Zadek, *Best Practice: The Path to Corporate Responsibility*, HAR. BUS. REV. 1, 39 (Dec. 2006).

78. See Porter & Kramer, *supra* note 76, at 5; Clive Crook, *The Good Company: A Survey of Corporate Social Responsibility*, THE ECONOMIST, Jan. 22, 2005, at 1-2.

79. See BAKAN, THE CORPORATION, *supra* note 25, at 16-59; Shamir, *Socially Responsible Private Regulation*, *supra* note 4, at 313, 324, 328; Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 AM. J. SOC. 297, 301 (2007); Crook, *The Good Company*, *supra* note 78, at 1-2.

80. See BAKAN, THE CORPORATION, *supra* note 25, at 27.

#### IV. The Limits of Private Regulation

The rise of CSR neither challenged nor changed the corporation's legal core, which still features the "best interest of the corporation" principle, and its requirement that managers and directors prioritize shareholder value.<sup>81</sup> The constraints imposed by the principle on corporations' pursuit of social and environmental values are indeed accepted by most CSR advocates, who ask companies to find synergies between business interests and other values, but not to sacrifice the former to the latter. "The essential test that should guide CSR is not whether a cause is worthy," as Porter and Kramer state, "but whether it presents an opportunity to create *shared value*—that is, a meaningful benefit for society *that is also valuable to the business.*"<sup>82</sup> A corporation's CSR agenda should seek opportunities to "achieve social and economic benefits simultaneously," to "reinforce corporate strategy by advancing social conditions," and to "make the most significant social impact and reap the greatest business benefits."<sup>83</sup>

Contemporary CSR is largely defined and inspired by Porter and Kramers' "shared value" approach,<sup>84</sup> which its advocates distinguish from earlier, narrowly strategic CSR—"hypocritical window dressing," as Milton Friedman once described it.<sup>85</sup> Though the latter may still define much corporate practice,<sup>86</sup> they say, the tide is turning. "Defensive, minimalist responses to social and environmental issues will be replaced by proactive strategies and investment in growing responsibility markets," according to Wayne Visser, who describes the new approach as CSR 2.0.<sup>87</sup> "Reputation-conscious public-relations approaches to CSR will no longer be credible

81. For an exploration of these limits, see *id.*

82. See Porter & Kramer, *supra* note 76, at 12 (2006) (emphasis added).

83. *Id.* at 16.

84. See DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* 19–21 (2005) for examples of the business case for CSR ("the typical business book on CSR consists either of examples of companies that have behaved more responsibly and thus have also been financially successful, or advises managers how to make their firms both responsible and profitable. Many of their titles and dust jackets tout the responsibility-profitability connection."). See also *THE BUSINESS OF SUSTAINABILITY: BUILDING INDUSTRY CASES FOR SUSTAINABILITY* (Ulrich Steger ed., 2004); Tom Casten, *Pro-Profit, Pro-Planet: How Adam Smith Can Help Us Solve the Climate Crisis*, RECYCLED ENERGY DEV. (April 2010); Monbiot, *supra* note 20, at 428–29. The philosophy underlying "shared value" and business-case CSR was first broadly articulated in PAUL HAWKEN, AMORY B. LOVINS & L. HUNTER LOVINS, *NATURAL CAPITAL: THE NEXT INDUSTRIAL REVOLUTION* (1999).

85. See BAKAN, *THE CORPORATION*, *supra* note 25, at 25–59; Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>.

86. "Many CSR efforts are little more than PR campaigns designed to promote corporate brands—by creating the *appearance* of being 'good corporate citizens,'" as a Harvard Business Review editorial states. "Result? CSR investments that deepen public cynicism and fail to generate *real* social change." *Redefining Corporate Social Responsibility*, On Point Collection, HAR. BUS. REV. 1, 1 (Dec. 2006). See also BAKAN, *THE CORPORATION*, *supra* note 25, at 28–59 and Bakan, *Psychopaths*, *supra* note 38, for examples of CSR as "hypocritical window dressing."

87. WAYNE VISSER, *THE AGE OF RESPONSIBILITY: CSR 2.0 AND THE NEW DNA OF BUSINESS* 147 (2011).

and so companies will be judged on actual social, environmental and ethical performance. . . . [E]ach dimension of CSR 2.0 performance will be embedded and integrated into the core operations of companies.”<sup>88</sup>

Major MNCs are now embracing such ideas and have been over the last decade, expanding their mandates and missions to include “creating shared value, not just profit per se,” as Porter and Kramer describe it,<sup>89</sup> by integrating new obligations into core operations, and assuming leadership roles in solving social and environmental problems. In that spirit, CEOs from fourteen major MNCs, including Nike, Microsoft, and Coca-Cola, jointly declared at the 2008 Davos World Economic Forum that corporations are at a “new frontier in corporate global citizenship and a new era in public-private partnership,”<sup>90</sup> now responsible not only for governing themselves, but also for “building better governance systems and public institutions” for society as a whole.<sup>91</sup> Implicit in this declaration is the new corporate ethos manifest in new approaches to CSR, whereby corporations appear as advocates for social and environmental values rather than threats to them, leaders in the search for solutions to global problems rather than contributors to them, and partners with governments rather than subordinates to them.<sup>92</sup>

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88. *Id.*

89. Michael E. Porter & Mark R. Kramer, *Shared Value: How to Reinvent Capitalism and Unleash a Wave of Innovation and Growth*, HARV. BUS. REV. 62, 64 (Jan./Feb., 2011).

90. Press Release, Business for Social Responsibility, BSR News from Davos: Businesses Urged to Take Part in Greater Public-Private Cooperation to Strengthen Global Governance (Jan. 25, 2008, 9:15 AM), available at [http://www.csrwire.com/press\\_releases/22401-BSR-News-from-Davos-Businesses-Urged-to-Take-Part-in-Greater-Public-Private-Cooperation-to-Strengthen-Global-Governance](http://www.csrwire.com/press_releases/22401-BSR-News-from-Davos-Businesses-Urged-to-Take-Part-in-Greater-Public-Private-Cooperation-to-Strengthen-Global-Governance).

91. *Id.*

92. Companies commonly boast today of social leadership roles that go beyond traditional CSR commitments to avoid causing harm. At Nikeinc.com, for example, one clickable button, labeled “Sustainable Business Performance Summary,” leads to material reflecting those traditional commitments, while a second, “Nike Better World,” accesses material that highlights Nike’s efforts and leadership on broader social issues (through, for example, a program that funds a children’s hospital with proceeds from shoes designed by patients, and another that brings “sport and all of its benefits to Native American and Aboriginal communities in North America”). See *Sustainability*, NIKE, <http://nikeinc.com/pages/responsibility> (last visited Dec. 6, 2012). In similar spirit, Microsoft makes the traditional CSR promise to “minimize the environmental impact of our business operations and products,” while also undertaking to “create technology solutions that help individuals and businesses around the world address their environmental impact.” See *Corporate Citizenship*, MICROSOFT, <http://www.microsoft.com/about/corporatecitizenship/en-us/working-responsibly/principled-business-practices/environmental-sustainability/> (last visited April 25, 2015). Coca-Cola partners with Oxfam and the World Wildlife Fund to “protect the land rights of farmers and communities in the world’s top sugarcane-producing regions, advancing its ongoing efforts to drive transparency and accountability across its global supply chain,” while also promoting social and environmental causes beyond its operations and supply chains, such as protecting polar bears, helping typhoon victims, and curbing alcohol impaired driving. See, e.g., *2013/2014 Coca-Cola Sustainability Report*, COCA-COLA, <http://www.coca-colacompany.com/stories/#TCCC> (last visited April 25, 2015); *Sourcing Sustainability: Coke Takes Leadership Role to Protect Land Rights of Farmers and Communities*, COCA-COLA (Nov. 7, 2013), <http://www.coca-colacompany.com/stories/sourcing-sustainably-coke-takes-leadership-role-to-protect-land-rights-of-farmers-and->

There are good reasons to be skeptical,<sup>93</sup> however, especially when, as already noted, new approaches to CSR demand only that corporations share value with social and environmental concerns, but not sacrifice it to those concerns. As such, while the new CSR undoubtedly inspires broader social and environmental initiatives from MNCs, its demand that corporations pursue social and environmental good only when it helps them do well—that CSR initiatives necessarily “intersect with [an MNC’s] particular business,” as Porter and Kramer describe it<sup>94</sup>—profoundly narrows possibilities.

Take, for example, Shell Oil, which recently signed the Trillion Tonne Communique, the self-proclaimed “progressive business voice” on climate change.<sup>95</sup> On first glance, Shell, currently involved in some of the world’s most controversial fossil fuel development and exploration, seems a surprising party to the Communique, not least because it is the only major oil company to sign on.<sup>96</sup> Shell—a sixty percent partner in the Athabasca Oil Sands Project,<sup>97</sup> major backer of the Keystone Pipeline,<sup>98</sup> and heavily involved across the globe in hydraulic fracturing (“fracking”)<sup>99</sup>—is regularly targeted by protestors,<sup>100</sup> environmental and climate change advo-

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communities; *Coke Raises More than \$2 Million to Save Polar Bears*, COCA-COLA, <http://www.coca-colacompany.com/our-company/coke-raises-over-2-million-to-save-polar-bears> (last visited April 25, 2015).

93. The “rhetoric of governments ‘partnering’ with industry continues to resonate,” as Lorne Sossin has observed, though, as he states, there are good reasons to be skeptical (and many are) “of the idea that we can better manage risk by empowering industry to watch over itself.” See Lorne Sossin, *Runaway Train: Assessing Risk in the Aftermath of Lac-Mégantic*, THE WALRUS (July/Aug., 2014), <http://thewalrus.ca/runaway-train/>. For further discussion of government-corporate partnerships, see generally BAKAN, THE CORPORATION, *supra* note 25.

94. Porter & Kramer, *supra* note 76, at 11.

95. The Prince of Wales Corporate Leaders Group, *The Corporate Climate Communiqués*, UNIVERSITY OF CAMBRIDGE INSTITUTE FOR SUSTAINABILITY LEADERSHIP (2014), available at <http://www.climatecommuniques.com/> (last visited April 25, 2015); The Prince of Wales Corporate Leaders Group, *Trillion Tonne Communique: Frequently Asked Questions*, UNIVERSITY OF CAMBRIDGE INSTITUTE FOR SUSTAINABILITY LEADERSHIP 1 (April 2014), [http://www.climatecommuniques.com/~media/Files/Communique%202014/The\\_Trillion\\_Tonne\\_Communique\\_FAQ.pdf](http://www.climatecommuniques.com/~media/Files/Communique%202014/The_Trillion_Tonne_Communique_FAQ.pdf).

96. See *id.* at *Who’s Signed?*, available at <http://www.climatecommuniques.com/Whos-Signed/View-All.aspx> (last visited April 25, 2015).

97. SHELL OIL, OIL SANDS PERFORMANCE REPORT 2013 1, 14 (2013), <http://s00.static-shell.com/content/dam/shell-new/local/country/can/downloads/pdf/oil-sands/oil-sands-performance-report-2013.pdf>.

98. See Christine Dobby, *Economic benefits will likely win Keystone XL approval: Shell*, THE FIN. POST (Oct. 24, 2011), [http://business.financialpost.com/news/energy/economic-benefits-will-likely-win-keystone-xl-approval-shell?\\_lsa=73a5-0352](http://business.financialpost.com/news/energy/economic-benefits-will-likely-win-keystone-xl-approval-shell?_lsa=73a5-0352).

99. Tom Bawden, *Shell sets its sights on a leading role in fracking*, THE INDEPENDENT (Jan. 31, 2013), <http://www.independent.co.uk/news/business/news/shell-sets-its-sights-on-a-leading-role-in-fracking-8476222.html>.

100. See, e.g., Phuong Le, *Shell Oil Plan in Seattle Draws Protestors*, THE COLUMBIAN (Jan. 29, 2015), <http://www.columbian.com/news/2015/jan/28/shell-oil-plan-in-seattle-draws-protesters/>; *Nigeria: Shell Workers ‘Blocked’ by Protestors*, BBC NEWS AFRICA (Apr. 3, 2012), <http://www.bbc.com/news/world-africa-17600042>.

cates,<sup>101</sup> and ambitious regulators.<sup>102</sup> “We’re very conscious,” states Marvin Odum, president of Shell Oil in the United States, “of the fact the world is likely moving to a place of regulating carbon in some respect.”<sup>103</sup>

Joining that movement, rather than opposing it, and working to ensure it yields favorable results for the company, has been key for Shell and helps explain why it signed the Communique. “What’s important to us, and what our primary push has been with governments,” says Odum, “is ensuring . . . that [regulations are] market-based systems to allow carbon regulation to happen at the lowest possible cost.”<sup>104</sup> Cap-and-trade is the preferred approach, he says, “one of the clearest examples of a market-based system.”<sup>105</sup> Carbon capture and storage is another option, says Odum, “a great example of efforts to reduce carbon emissions from oil sands.”<sup>106</sup> The ultimate goal, says Odum, is to find the “right policy framework—like a price on carbon—that companies could do on their own.”<sup>107</sup>

Shell’s preference for voluntary market-based regulation is well-served by the Communique which, in line with “shared value” CSR, articulates a “pro-business” position, presumes climate change solutions “can and should be delivered in ways that create new business opportunities, and keep costs manageable,” and prescribes “policies that work with the market to incentivize the private sector.”<sup>108</sup> These proposed solutions—which explicitly include Odum’s preferred approaches of carbon pricing, capture, and storage<sup>109</sup>—should, the Communique states, “lead to economic benefits, while insulating the global economy from risks caused by a planet that warms beyond two degrees.”<sup>110</sup>

Shell really has nothing to fear from the Communique and indeed much to gain by supporting it. Not only does the Communique endorse market-driven regulatory solutions, including the very ones Shell advocates, but it also helps “shap[e] the narrative” on business and climate change—as the Communique describes one of its goals<sup>111</sup>—in favor of those solutions, while simultaneously signaling to consumers and governments that the company cares and is doing something about climate

101. See Phuong Le *supra* note 100; Anastasia Killian, *Environmental Groups Continue Attempts to Thwart Arctic Oil Exploration*, FORBES (June 18, 2012), [http://www.forbes.com/fdc/welcome\\_mjx.shtml](http://www.forbes.com/fdc/welcome_mjx.shtml).

102. See, e.g., Hal Bernton, *Shell’s Plan to Increase Oil Trains in Anacortes Hits Snag*, SEATTLE TIMES (Feb. 23, 2015), <http://www.seattletimes.com/seattle-news/shells-plan-to-increase-oil-trains-in-anacortes-hits-snog/>; Ben Geman, *Inside Big Oil’s Fight over Arctic Drilling Rules*, NAT’L J. (Sept. 24, 2014), <http://www.nationaljournal.com/energy/inside-big-oil-s-fight-over-arctic-drilling-rules-20140924>.

103. James Cowan, *Why Keystone XL Will Be Approved: One-on-one with Shell Oil President Marvin Odum*, CANADIAN BUS. (Apr. 3, 2013), <http://www.canadianbusiness.com/economy/good-news-for-canadian-oil/>.

104. *Id.*

105. *Id.*

106. *Id.* See also SHELL OIL, *supra* note 97.

107. Cowan, *supra* note 103.

108. *Frequently Asked Questions*, *supra* note 95, at 5.

109. *Id.* at 3.

110. *Id.* at 5.

111. *Id.* at 2-3.

change. Most importantly, by signing the Communique, Shell endorses an initiative, putatively “progressive,” that implicitly de-legitimizes the use of mandatory legal restrictions to combat climate change, including restrictions that could curb Shell’s continued oil sand development, frustrate hydraulic fracturing, and bar construction of new pipelines.

Shell’s endorsement of the Communique is typical of “shared value” CSR; the company’s core business strategies remain in place, while its reputation is boosted and its “best interests” promoted, or at least not curtailed. Similar dynamics can be found across companies and industries.<sup>112</sup> Coca-Cola, for example, uses renewable and recyclable plant-based plastics to make its bottles,<sup>113</sup> while Starbucks’ Ethos Water contributes pennies for each bottle sold to help raise awareness about the fact that “more than 1 billion people on our planet can’t get clean water to drink.”<sup>114</sup> Yet neither company is likely to embrace the broadly held view that “bottled water represents the very antithesis of what sustainability means,” as Luke Upchurch of Consumers International describes it,<sup>115</sup> and thereby to cease production of bottled water altogether.

Similarly, British American Tobacco produces purportedly reduced-risk products and promotes biodiversity around tobacco fields, “creat[ing] shared value for [its] shareholders and society,” as CEO Nicandro Durante states,<sup>116</sup> and thus claims to be socially responsible. Yet for the World Health Organization (WHO), and many others, the tobacco industry’s business model is itself socially irresponsible—an “inherent contradiction”<sup>117</sup>—not in the least because of companies’ calculated strategies to “subvert,” in WHO’s words, “the role of governments and of WHO in implementing public health policies to combat the tobacco epidemic.”<sup>118</sup>

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112. See PETER DAUVERGNE & JANE LISTER, *ECO-BUSINESS: A BIG-BRAND TAKEOVER OF SUSTAINABILITY* (2013) (describing the efforts of leading international corporations to employ sustainability as a business tool).

113. *PlantBottle Technology™ Tops 2014 Sustainable Bio Awards, COCA-COLA*, <http://www.coca-colacompany.com/coca-cola-unbottled/coca-cola-first-consumer-brand-company-to-win-industry-champion-award> (last visited April 25, 2015).

114. *Ethos® Water Fund*, STARBUCKS, [www.starbucks.com/responsibility/community/ethos-water-fund](http://www.starbucks.com/responsibility/community/ethos-water-fund) (last visited April 25, 2015).

115. Luke Upchurch, *Can Bottled Water Ever Really Be Sustainable?*, THE GUARDIAN (June 6, 2013), <http://www.theguardian.com/sustainable-business/can-bottled-water-be-sustainable>.

116. British American Tobacco, Sustainability Summary, *Sustainability: Why It Matters* 1, 2 (2012), [http://www.bat.com/group/sites/uk\\_\\_9d9kcy.nsf/vwPagesWebLive/DO9DCL3P/\\$FILE/medMD95XPJA.pdf?openelement](http://www.bat.com/group/sites/uk__9d9kcy.nsf/vwPagesWebLive/DO9DCL3P/$FILE/medMD95XPJA.pdf?openelement).

117. World Health Organization, *Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control*, 3d Sess, FCTC/COP3(7) 1, 7 (Nov. 2008), [http://www.who.int/fctc/guidelines/adopted/article\\_5\\_3/en/](http://www.who.int/fctc/guidelines/adopted/article_5_3/en/). Article 27 of the Guidelines states: “The corporate social responsibility of the tobacco industry is, according to WHO, an inherent contradiction, as industry’s core functions are in conflict with the goals of public health policies with respect to tobacco control.” On that basis, the document explicitly recommends against private regulation. Article 21(3.3) states: “Parties should not accept, support or endorse any voluntary code of conduct or instrument drafted by the tobacco industry that is offered as a substitute for legally enforceable tobacco control measures.”

118. *Id.* at 1.

These examples (and there are many others that might be added) show how CSR, even in its newly broadened ideations, remains limited and problematic: one step forward, perhaps, for its providing some protection of social and environmental values, but three steps back for molding regulatory debates to prioritize business interests, helping justify governments' retreat from mandatory norms, and promoting narratives of corporate change to pacify potential critics.<sup>119</sup> It would, of course, be different if there were broad convergence among business, social, and environmental interests. In reality, however, the social and environmental initiatives that plausibly converge with business interests constitute a "very narrow subset that involve little cost, little risk, and little disruption to business as usual," as Charles Eisenstein describes it.<sup>120</sup> That is the conclusion not only of commentators,<sup>121</sup> but also many CEOs who report feeling caught in cycles of "individual, small-scale projects, programs and business units with an incremental impact on sustainability metrics," while "their responsibilities to more traditional fundamentals of business success, and to the expectations of markets and stakeholders, are preventing greater scale, speed and impact."<sup>122</sup> Sustainability cannot be achieved, these CEOs believe, "without radical, structural change to markets and systems."<sup>123</sup>

The limits of "shared value" CSR, and, by implication, private regulation, are profound, which is likely the reason "no significant move has been made [through private regulation] . . . to tame multinational corporate misconduct in respect of [major global issues]."<sup>124</sup> When social and environ-

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119. Stacey Mitchell similarly describes Walmart's sustainability programs as "one step forward and three steps back" as quoted in Dauvergne & Lister, *supra*, note 112, at 23. Dauvergne & Lister add that "the big brand takeover of sustainability is shifting the purpose and goal of sustainability governance toward the need to create business value." *Id.* at 25.

120. Charles Eisenstein, *Let's Be Honest: Real Sustainability May Not Make Business Sense*, THE GUARDIAN, Sustainable Business Blog (Jan. 8, 2014, 09:33 AM), <http://www.theguardian.com/sustainable-business/blog/sustainability-business-sense-profit-purpose>.

121. See, e.g., Megan Bowman, *The Limitations of Business Case Logic for Societal Benefit & Implications for Corporate Law: A case study of climate friendly banks* (2014), presented at 2014 Conference on Empirical Legal Studies (CELS), Univ. of Cal. at Berkeley, November 6-8, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2489116](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2489116); Andrew Hoffman, *Climate Change Strategy: The Business Logic Behind Voluntary Greenhouse Gas Reductions*, 47 CAL. MGMT. REV. 21, 23 (2005); Markus J. Milne, Helen Tregidga and Sara Walton, *Words Not Actions! The Ideological Role of Sustainable Development Reporting*, 22 ACCT., AUDITING & ACCOUNTABILITY J. 1211, 1241 (2009); Crawford Spence, *Social and Environmental Reporting and Hegemonic Discourse*, 20 ACCT., AUDITING & ACCOUNTABILITY J. 855, 875 (2007).

122. United Nations Global Compact, *Accenture CEO Study on Sustainability 2013: Architects of a Better World* 1, 11 (2013), <http://www.accenture.com/SiteCollectionDocuments/PDF/Accenture-UN-Global-Compact-Acn-CEO-Study-Sustainability-2013.pdf>.

123. *Id.* at 5. Despite these survey results, the idea that business rather than government should take the lead in solving social and environmental problems continues to have much resonance among business leaders and commentators. See, e.g., Marc Gunther, *Corporate Executives Gather at U.N. for a Go at Fixing Sustainability*, THE GUARDIAN (Nov 21, 2014), [www.theguardian.com/sustainable-business/2014/nov/21/future-corporation-united-nations-regulation-government](http://www.theguardian.com/sustainable-business/2014/nov/21/future-corporation-united-nations-regulation-government).

124. Muir-Watt, *supra* note 7, at 382.

mental interests depend for their protection on measures that must cohere with business interests, the “severe hardship, injustice, imbalance and crisis linked to the rise of private global rulers”<sup>125</sup> are likely to go largely unchecked. Even Porter and Kramer acknowledge that “social agendas” do not always align with corporate and industry interests, and that in many instances, “NGOs or government institutions . . . are [thereby] better positioned to address them.”<sup>126</sup> Yet they, along with many other CSR and private regulation advocates, continue to promote the notion that corporations—“the most powerful force for addressing the pressing issues we face”<sup>127</sup>—should take the lead on social and environmental issues, while governments retreat to positions as “rule takers” from their traditional roles as “rule makers.”<sup>128</sup>

## Conclusion

It has been more than thirty years since Dean Paul Carrington chastised critical legal studies scholars for “profess[ing] that legal principle does not matter,” calling on them to resign their law school posts.<sup>129</sup> His portrayal of critical legal studies was a caricature and his prescriptions shrill,<sup>130</sup> but his central claim that legality must be defended against nihilism bears repeating as private regulation proponents “profess that legal principle does not matter,” or matters less, for constraining MNCs in aid of public interests.<sup>131</sup> “The time is ripe,” Galit Sarfaty observes, to reassert the need “for corporate accountability through mandatory regulations,” especially as we slide into broad acceptance of non-legal regulation in lieu of law.<sup>132</sup> Though voluntary commitments may help companies “deflect[] state regulation and express[] their good ‘corporate citizenship,’” the “need for binding regulation” remains.<sup>133</sup>

There is also, however, a need to consider the “binding regulations” already in place that serve to constitute corporations, enable their operations, and protect their interests. As Part II reveals, these tend to be downplayed by private regulation advocates and commentators who, as a result, make exaggerated claims about globalization’s diminishment of state legal authority.<sup>134</sup> Corporations, as this Article argues, are legal constructs, created only through the operation of state law. They are rooted within and

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125. *Id.* at 406.

126. Porter & Kramer, *supra* note 76, at 64.

127. *Id.*

128. See Cafaggi & Renda, *Labyrinth*, *supra* note 3, at 21.

129. See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1994).

130. See Gary Minda, *Of Law, the River and Legal Education* 10 NOVA L. REV. 705, 705 (1985-1986); *Nihilism and Academic Freedom: Introduction and Correspondence*, 35 J. OF LEGAL EDUC. 180 (1985).

131. See Carrington, *supra* note 129, at 227.

132. See Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VA. J. INT’L L. 97, 115-16 (2013).

133. See *id.*

134. See generally Part II, *supra*. See also Abbott & Snidal, *supra* note 7; Cafaggi & Renda, *Labyrinth*, *supra* note 3.

operate through domestic legal systems, tethered to and manifesting state sovereignty in every decision and action they take. There is no “regulatory gap,” no corporate space transcending state sovereignty, but only multiple corporate nationals operating in multiple nations—multinational corporations, but never truly transnational ones.<sup>135</sup>

It follows that when corporations adversely affect social and environmental interests, it is because they are enabled, incentivized, and licensed to do so by mandatory state law. By corollary, law can disable, dis-incentivize, and limit that license, which is why, despite the alleged ravages of globalization, there are, as Patrick Macklem observes, “multiple opportunities for holding corporations domestically accountable.”<sup>136</sup> States can, for example, assert jurisdiction over local companies operating in other nations;<sup>137</sup> revoke their charters;<sup>138</sup> refuse to limit their liability in relation to foreign subsidiaries;<sup>139</sup> condition access to markets on compliance with domestic standards;<sup>140</sup> and participate in international regimes that demand promulgation and enforcement of domestic standards, thus deploying public international law to, in Macklem’s words, “rebuild . . . the state’s capacity to regulate, in the name of [social interests], multinational corporate power.”<sup>141</sup>

Rebuilding that capacity is neither simple nor easy. In the developed world, political inertia and corporate influence work against states, creating robust extra-territorial jurisdictions over the corporations they create and enable (as the fate of the Alien Torts Act, a law with some potential in that regard, illustrates).<sup>142</sup> In the developing world, and often the developed world too, regulatory laws and regimes can be poorly conceived, under-enforced, corrupted, and unduly influenced by industry.<sup>143</sup> As in every other area of human endeavor, a gap exists here between actual practice and ideal possibility. Building effective public and democratic governance of the global economy is what is needed to narrow that gap, a project requiring much work both domestically and internationally.

135. I am indebted to Gerardo Otero for this insight, as related to me in conversation.

136. See Macklem, *supra* note 22 at 281.

137. See generally Joel P. Tractman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT’L L.J. 47 (1993).

138. See, e.g., BAKAN, *THE CORPORATION*, *supra* note 25, at 157-8.

139. See Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 80, 85-89 (1991).

140. See Macklem, *supra* note 22, at 289.

141. *Id.* It is difficult to see opportunities to rebuild domestic and democratic regulation if we accept the conceits of “transnationalism.” See Gerardo Otero, *Transnational Globalism or Internationalist Nationalism: Neoliberal Capitalism and Beyond*, 38 LATIN AM. PERSP. 109, 114 (2011) (“Simply accepting the neoliberal transnational capitalist class’s terrain of struggle, transnational globalism, [diverts us from] proposing new terms of engagement focused on a reconstituted, popular-democratic nation-state.”).

142. See, e.g., Julian G. Ku, *Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute*, 107 AM. J. INT’L L. 835, 835, 840-41 (2013) (citing *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (rejecting universal jurisdiction of the Act on separation of powers grounds)).

143. See, e.g., BAKAN, *THE CORPORATION*, *supra* note 25, 85-110.

The private regulation movement effectively abandons that project, prescribing instead alternatives to public and democratic governance that elevate market values and actors to governing status. The result is to make regulation an “adjunct to the market,” in Polyani’s words, and thus to create a global economy in which “social relations . . . [are] embedded in the economic system” rather than the “economy . . . embedded in social relations.”<sup>144</sup> As this Article has argued, the case for private regulation is unconvincing because it depends upon ignoring, thereby making invisible, the real and robust role law plays in enabling and protecting MNCs. Bringing that role to light is important not only for revealing the true and disturbing vision underlying private regulation—a world where public power promotes private interests, while public interests depend on private power for protection—but also for making visible the urgent need and many possibilities for finding better ways forward.

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144. See Muir-Watt, *supra* note 7, at 421; Shamir, *Capitalism, Governance and Authority*, *supra* note 2, at 535 (describing this situation as the “economization of authority”).