THE BUSINESS OF BUSINESS: COMPARING CORPORATE SOCIAL RESPONSIBILITY INITIATIVES IN CHINA AND THE UNITED STATES

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TABLE OF CONTENTS

I. INTRODUCTION ...................................................................................................................................... 748

II. A BRIEF HISTORY OF CORPORATE SOCIAL RESPONSIBILITY: ORIGINS AND GOALS.......................................................... 750

III. CORPORATE SOCIAL RESPONSIBILITY IN CHINA ................................................................. 753
    A. Legislative Action .............................................................................................................................. 753
        1. Legislation ................................................................................................................................. 753
        2. The Chinese Constitution ........................................................................................................... 755
        3. Other Enactments and Methods of Implementation ................................................................. 756
    B. Scope, Limits, and Enforcement .................................................................................................. 757
    C. Societal Basis ................................................................................................................................. 757
        1. Socio-Historic Basis .................................................................................................................... 757
        2. Religious-Philosophical Basis ..................................................................................................... 758

IV. CORPORATE SOCIAL RESPONSIBILITY IN THE UNITED STATES ...................................... 761
    A. Legislative Action .............................................................................................................................. 761
        1. Model Codes and State Legislation ............................................................................................ 761
        2. Federal Forays into CSR .............................................................................................................. 762
    B. Scope and Enforcement ................................................................................................................... 764
    C. Social Basis ....................................................................................................................................... 765

V. COMPARING THE CHINESE AND AMERICAN APPROACHES .............................................. 766

VI. THE FUTURE OF CSR ................................................................................................................. 767
    A. Proposals Suggesting Further Government Intervention ........................................................... 767
        1. Corporate Conscience Committees ............................................................................................ 768
        2. Stringent SEC Monitoring ........................................................................................................... 768
        3. Criminal Penalties .......................................................................................................................... 769
    B. The Feasible Solution: Corporate-Led CSR ............................................................................... 770

VII. CONCLUSION ................................................................................................................................. 772

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I. INTRODUCTION

Peanut-themed parks, barista training, and cash donations supporting environmental causes might seem unrelated to the casual observer. In fact, these endeavors represent a global effort by corporations to increase their charitable giving and undertake socially responsible behavior that benefits their employees, consumers, and communities. At a time when popular movements rage “against greed, corporate influence, gross social inequality and other nasty byproducts of wayward capitalism,” corporate social responsibility initiatives are particularly relevant because they represent the nexus between corporate action, government regulation, and the welfare of individual citizens.

Popular distaste for corporations is not a new phenomenon. Contemporary scholars have addressed perceived problems with corporate misbehavior since the 1970s. As corporations continue to grow ever larger and acquire more global influence, the actions they take have the potential to affect individuals, environments, and states around the globe.

American and Chinese companies are arguably the most influential in the world. The United States and China are the world’s two largest economies, and China is the United States’ second largest, and most important non-North American, trade partner. In 2009, “U.S. goods and services trade with China totaled $390 billion.” The following year, the total goods trade between China and the U.S. was $457 billion. Given the enormity of the

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9 Id.
economic partnership between the United States and China, the approaches the two countries take towards implementing corporate social responsibility will undoubtedly have global effects. Therefore, it is important to develop a keen understanding of their respective approaches to Corporate Social Responsibility (CSR) and the implications their implementation methods have for corporations that conduct business worldwide and touch the lives of billions of people.

The differing approaches to corporate social responsibility seen in the People’s Republic of China and the United States demonstrate the strengths and weaknesses of CSR. A comparative study examining the social and legal history of CSR initiatives in both China and the United States will shed light on the different approaches and reveal a more effective model for the future.

This Note addresses the origins and history of CSR, compares the modern approaches to CSR which China and the United States have taken, and discusses the benefits of adopting a voluntary model of CSR in the future. Although dissatisfaction with corporate activity is not a new occurrence, neither the piecemeal American approach nor the top-down Chinese approach seems to have resulted in more socially responsible corporations. Therefore, this Note argues that government-instituted CSR, both legislative and regulatory, is ineffective and should be discontinued. Instead, corporations should be at liberty to choose whether or not to engage in socially responsible behavior as part of their general business plan.

Part II of this Note presents a general overview of the history and development of CSR, its origins, and the objectives it was intended to achieve. Part III describes CSR efforts in China. This Note takes a holistic perspective in exploring not only the legal foundation of CSR, but also the historical and social underpinnings for CSR as well. Part IV mirrors Part III in discussing the evolution of CSR in the United States, including legal initiatives and the socio-historic and philosophical bases for CSR. Part V draws a comparison between the two countries’ respective approaches to CSR and offers an analysis of effective CSR implementation efforts in each. Part VI applies the inferences drawn in Part V to current and future CSR initiatives and expands on the argument for minimizing government involvement in CSR and the advancement of corporate freedom. Finally, Part VII concludes this Note.
II. A BRIEF HISTORY OF CORPORATE SOCIAL RESPONSIBILITY: ORIGINS AND GOALS

The most basic legal issue underlying CSR is whether corporate directors owe a legal duty to take into consideration the effects of their decisions only on shareholders or on all stakeholders affected by the corporations’ actions. General principles of corporate social responsibility have been in existence for as long as businesses have operated. In the West, “[t]he bonds of trust and principles of good faith and fair dealing used by medieval merchants, guilds, and bodies corporate in the medieval lex mercatoria ("law of merchant") reflected that cooperative and beneficial public purpose and sense of mutual responsibility.” Principles of corporate social responsibility were also a fundamental part of business practice in colonial America:

Public purposes certainly characterized the companies chartered by the early American states. The state generally reserved to itself the power to determine what kinds of entity it would permit to come into existence, vetting both the identity of the promoters and the nature of the venture. Corporate social responsibility was thus encoded into the DNA of the firm, since the firm could not come into existence unless it could withstand a valid public purpose test.

The extreme and more contemporary rule asserting the concept of shareholder primacy was set forth in Dodge v. Ford Motor Co. There, the court endorsed the view that corporations are run solely for the benefit of shareholders:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and

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11 Joe W. Pitts III, Corporate Social Responsibility: Current Status and Future Evolution, 6 Rutgers J.L. & PUB. POL’Y 334, 343 (2009) (“Today’s corporations derive from ancient predecessors and have a long pedigree as instruments for collective social purpose, with CSR ‘in their DNA.’ ”).
12 Id. at 344.
13 Id.
does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.\textsuperscript{15}

In its rejection of stakeholder benefit trumping maximization of profit, \textit{Dodge v. Ford Motor Co.} represents the “high (or low!) water mark of [corporate social responsibility] doctrine.”\textsuperscript{16} In fact, “[a]side from \textit{Dodge}, there are no other cases that ‘actually operationalize the rule that corporations must maximize profits.’ ”\textsuperscript{17} Thus, \textit{Dodge} stands alone in its position that corporate activity should be undertaken to benefit stakeholders.

In the years following the \textit{Dodge} decision, legal scholars fiercely debated the issues it addressed.\textsuperscript{18} One of the earliest concise definitions of what is now known as corporate social responsibility was articulated during this era when Professor E. Merrick Dodd wrote, “those who manage our business corporations should concern themselves with the interests of employees, consumers, and the general public, as well as of the stockholders.”\textsuperscript{19}

The intellectual tug-of-war between the proponents of shareholder and stakeholder-primacy models did not end in the first half of the twentieth century, however. In the latter half of the century, Professor Milton Friedman rejected the developing CSR doctrine set forth by Professor Dodd and his intellectual descendants, instead advocating for a shareholder-primacy approach that elevated corporate profits above charitable giving and other activities deemed incompatible with profitmaking.\textsuperscript{20} Disdaining the CSR initiatives he conceptualized as “window-dressing,” Professor Friedman further argued that “‘there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.’”\textsuperscript{21}

\textsuperscript{15} \textit{Id.} at 684.
\textsuperscript{18} Compare Adolf A. Berle, Jr., \textit{Corporate Powers as Powers in Trust}, 44 \textit{Harv. L. Rev.} 1049 (1931) (arguing that corporate managers owe a fiduciary duty exclusively to the benefit of shareholders), with E. Merrick Dodd, Jr., \textit{For Whom Are Corporate Managers Trustees?}, 45 \textit{Harv. L. Rev.} 1145 (1932) (arguing that a broader characterization of corporate duty should include other stakeholders).
\textsuperscript{19} Dodd, \textit{supra} note 18, at 1156.
\textsuperscript{20} Friedman, \textit{supra} note 5.
\textsuperscript{21} \textit{Id.}
Present day proponents of Professor Friedman’s theories similarly characterize CSR efforts as little more than good advertising.22

On the other end of the ideological spectrum, Professor R. Edward Freeman advocated for a “strategic management” model that incorporated CSR principles into a comprehensive stakeholder-centric corporate governance scheme.23 Ethical considerations, he argued, are central to a corporate strategy that embraces corporate social responsibility.24 Professor Freeman’s portrayal of corporations as moral entities who must take their ethical responsibilities seriously is not obscure. His perspective is consistent with those of other scholars, who argue that “as actors in this world with both positive and negative impacts, corporations are best seen not as inherently immoral or moral but as collections of human beings who act together as agents with moral consequences—for good or ill.”25 Corporate social responsibility therefore exceeds standard laws and regulations and appeals to a more fundamental idea of right and wrong in the context of corporate behavior.26

On a global scale, more recent CSR initiatives have been characterized as a response to the “trade liberalization era of the 1990s,” when world-wide corporate activity became more commonplace due to tremendous advances in technology.27 Moreover, modern CSR represents the confluence of voluntary corporate efforts and the broader, governmental and supragovernmental regulatory schemes.28 Indeed, the nexus between public and private action leaves open to debate whether even voluntary CSR efforts are truly voluntary or just a response to government action.29 Some scholars have observed that “although state policies stand as constraints on supragovernmental ones, they work more as influences than as controls.”30

26 Li-Wen Lin, Corporate Social Responsibility in China: Window Dressing or Structural Change?, 28 BERKELEY J. INT’L L. 64, 64 (2010) (“CSR] suggests that companies should do more than they are obligated under applicable laws . . . .”); see also FREEMAN & GILBERT, supra note 24, at 5 (“Ethics and business go together.”).
27 Pitts, supra note 11, at 357.
28 Id. at 359.
29 Id.
Lastly, modern CSR is seen as a response to “unbridled [corporate] control [that] was exacerbating social inequalities and human rights violations while endangering the earth’s ecological systems and depleting natural resources.” CSR’s goals, therefore, are the betterment of mankind, society, and the environment in order to achieve a more peaceful world.

III. CORPORATE SOCIAL RESPONSIBILITY IN CHINA

A. Legislative Action

1. Legislation

On January 1, 2006 the most recent version of China’s Company Law became effective. This major piece of legislation provided the foundation for China’s “strong and mandatory, compliance and impact-oriented public action” implementation of corporate social responsibility. Its text, which mandates that companies “shall comply with the laws and administrative regulations, social morality and business morality” and “shall act in good faith, accept the supervision of the government and the general public, and bear social responsibilities,” codifies the obligation of businesses nationwide to observe the basic principles of CSR and provides a legal basis for corporate social responsibility in China.

The law is the product of much deliberation among both Chinese legal scholars and the National People’s Congress delegates who drafted the revision. As an amalgamation of views, Article 5 is subject to multiple interpretations. The predominant view is that Article 5 functions not as a fiat but as an exhortation. Alternatively, some scholars argue that corporate

34 Joëlle Brohier-Meuter, The Rise of CSR Public Policy in Asia: The Case of Southeast Asia and China, in RESPONSIBLE MANAGEMENT IN ASIA: PERSPECTIVES ON CSR 65, 84 (Geoffrey Williams ed., 2011).
35 Chinese Company Law, supra note 33, art. 5 (emphasis added).
36 Lin, supra note 26, at 70–71.
37 Id.
38 Id. at 96.
social responsibility is “part of [a business’s] fiduciary duties under the company law.” In either case, the law unequivocally makes the Chinese government a strong actor in the realm of corporate social responsibility.

In addition to differing perspectives on the actual effect of Article 5, a pertinent background issue is the acknowledged shortcomings of the developing Chinese legal system. While corporate social responsibility has technically been enacted, the “ambiguity and unpredictability in rules and deficiency in implementation [of Chinese law]” make it difficult to assess the practical status of the law governing CSR. Furthermore, the Chinese government frequently uses temporary trials to test new legislation, making it difficult to gauge the long-term effectiveness of CSR initiatives that are only implemented on a short-term basis.

China’s previous Company Law, enacted in 1994, was less explicit in its recognition of CSR. The fact that contemporary CSR doctrine was not then fully conceptualized in China partially contributes to the omission of clear language endorsing corporate social responsibility principles. Still, it is unnecessary to read the law liberally in order to discern the underlying CSR principles; for example, the textual basis for CSR in the 1994 Company Law comes from Article 14, which provided that “[c]ompanies must comply with the law, conform to business ethics, strengthen the construction of the socialist civilization, and subject themselves to the government and public supervision in the course of business.” However, values now considered central to CSR, specifically consideration for stakeholders such as employees, were “institutionalized into the corporate governance structure” by the 1994 Company Law.

Other legislative actions in China have contributed to the institutional adoption of corporate social responsibility in the country. The Harmonious Society Policy, proposed by President Hu Jintao and adopted by the Central Committee of the Communist Party of China, has serious implications for

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39 *Id.*
40 *Id.*
41 *Id.*
44 *Id.*
45 *Id.* at 69.
46 *Id.* at 68.
corporate social responsibility. Specifically, CSR policies are seen as a broad approach to Chinese governance, which promote the ruling party’s goals with respect to the economy, social stability, and environmental protection. In a more general sense, the Harmonious Society Policy adopts the principles of CSR in an effort to promote desired social outcomes—namely, “[closing] the gap between rural and urban development, unequal income distribution, insufficiency of household wealth, ecological degradation and lack of efficient use of resources.”

2. The Chinese Constitution

In addition to legislation adopting CSR, the basic principles enshrined in the Chinese constitution tacitly approve CSR. At its formation, the document was intended to promote the rights of workers and guarantee social benefits. Amendments in recent years have even backtracked slightly on China’s typical aversion to addressing human rights and have begun to protect certain human rights in the Chinese constitution. While many of China’s major corporations are still state owned enterprises (SOEs) controlled by the government (nearly a quarter of corporate assets are state-


48 Brohier-Meuter, supra note 34, at 70.

49 Id.

50 See XIANFA (1982) (China).

51 Id. art. 1; see also Lin, supra note 26, at 68 (“The Constitution of the People’s Republic of China states that the country is led by the proletariat and is based on the alliance of workers and peasants.”).

52 See Chris X. Lin, A Quiet Revolution: An Overview of China’s Judicial Reform, 4 ASIAN-PAC. L. & POL’Y J. 180, 193 (2003) (quoting the Chief Justice of the Chinese Supreme Court: “[T]he Constitution is the expression of the people’s power and the citizens’ rights.”). However, these new guarantees of freedom have negligible practical effects because the protections are not enforced by the Chinese legislature or judiciary organs and in fact are effectively destroyed through other government activities. See, e.g., Jianlan Zhu, Roadblock and Roadmap: Circumventing Press Censorship in China in the New Media Dimension, 30 U. LA VERNE L. REV. 404, 406 (2009) (discussing the contradiction between the Chinese constitution guaranteeing freedom of the press and low level press regulations).
owned), the constitution does now recognize and approve the existence of private sectors of the economy. Thus, the general underlying principles of the Chinese constitution seem to implicitly further some of the same goals incorporated by corporate social responsibility.

3. Other Enactments and Methods of Implementation

A multitude of other laws and regulatory enactments have been adopted to implement corporate social responsibility, including the Labour Contract Law, the Law on Prevention and Control of Water Pollution, and the Measures on Open Environmental Information. Such initiatives are consistent with the defining characteristic of Chinese CSR efforts: top-down planning that incorporates a diverse array of regulatory methods. The Chinese government primarily exercises power over CSR development through “(1) Company law including CSR; (2) CSR guidelines—even if these guidelines do not have the status of law, we can assume that they have regulatory power; [and] (3) [e]nvironmental requirements for credit and listing in stock exchange.” Other methods include quasi-judicial CSR Guidelines disseminated by public actors and policy statements encouraging traditional components of CSR, such as sustainable development, issued by the Chinese government. Examples of the aforementioned methods of CSR-regulation in China are numerous. Actors releasing CSR legislation, recommendations, guidelines, and regulations include the State-owned Assets Supervision and Administration Commission of the State Council (SASAC), the Ministry of Civil Affairs, the Ministry of Commerce, the State Forestry Administration, the China Banking Regulatory Commission (CBRC), the Ministry of Environmental Protection, stock exchanges, and provincial and municipal governments. These public actors have instituted everything from reporting requirements to the China Charity...
Awards, which present awards to both local and overseas enterprises for their financial donations.62

B. Scope, Limits, and Enforcement

While Chinese corporate social responsibility efforts have undergone an incredible expansion in recent years, some sectors are still neglected. For example, China still tends to exclude human rights from its conception of CSR and instead focuses on environmental and labor issues.63 Traditionally, the Chinese government dominated CSR and severely limited the role of non-governmental organizations (NGOs).64 Thus, only recently have NGOs begun to impact CSR in China.

China has taken a strong-handed approach to enforcement of its CSR initiatives. Violations of CSR mandates can result in fines, prison sentences, and even execution of responsible corporate officers.65 Such harsh penalties may or may not be effective, however, because enforcement is often uneven and there are discrepancies “between the law on the books and the law in practice,” with many of the mandatory CSR initiatives going largely unenforced.66

C. Societal Basis

1. Socio-Historic Basis

Chinese corporate social responsibility is strongly influenced by the historical role of state-owned enterprises as providers of “cradle-to-grave” social services and programs instituted by the socialist government.67 The evolution of the Chinese Company Law has struggled to synthesize a more capitalistic model where the goal is maximizing profits while simultaneously retaining a sense of corporate responsibility towards workers and unrepresented parties affected by a corporation’s decisions.68 Corporate social responsibility is a partial solution to the systemic transition problems

62 Id. at 77.
63 Id. at 77–80.
64 Id. at 90.
65 Id. at 81.
66 Lin, supra note 26, at 96.
68 Id.; see also Lin, supra note 26, at 90–91.
facing the Chinese government and its SOEs.69 Certain CSR initiatives, particularly those that benefit employees, may help reduce worker unrest as traditional social programs administering benefits to workers are discontinued by SOEs.70

2. Religious-Philosophical Basis

The philosophical underpinnings of Chinese society complement the values of corporate social responsibility, providing a strong societal foundation for CSR in China. Two primary Chinese traditions relate to CSR.

First, in traditional Chinese culture, which is heavily influenced by Confucianism, profit-seeking is spurned in favor of the company’s “inherent social responsibilities.”71 Historically, business entities run by extended families were viewed as “an organic part of the larger community” with responsibilities toward stakeholders in the community as well as the entire country.72 Thus, Confucian philosophy’s hostility toward profit-making complements Chinese societal understanding of corporate social responsibility.73

Second, the Buddhist tradition in China has many parallels with corporate social responsibility. For example, Zen philosophy tends to encourage “values, norms and rules that shape the responsible business behaviour.”74

The East and South has been more content with inner-directed, intangible CSR (deeply rooted in cultural, tribal or religious traditions of community, respect and reciprocity). Examples include . . . the Chinese notion of xiaokang (‘harmonious society’).

The Zen of CSR also suggests that CSR has transformative power—that both companies and individuals can be changed by

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69 Jia, supra note 67 (“[S]ince China is still in its transition period of economic reform, it is inevitable that former [CSR-esque worker support programs] will . . . provide a stable environment for economic development.”).
70 Lin, supra note 26, at 88.
71 Id. at 85.
73 Id. at 1607 (“The main problem for Chinese business enterprises was the anti-mercantile attitude of orthodox Confucianism and its general ideological hostility to profit-seeking.”).
engaging with CSR, which points to . . . CSR as a form of self-transcendence.75

Additionally, scholarly studies of the influence of major world religions on business ethics have also noted a correlation between Buddhism and socially responsible corporate practices.76 Some scholars view CSR as a material aspect of Buddhism: “[I]n the economic field many Buddhist teachers argue that detachment from the purely material and a focus on social and environmental responsibility in production, distribution and exchange are consistent with and indeed central to the proper practice of the faith.”77 Particular aspects of CSR, especially environmental protection efforts, are very closely associated with Buddhist values, which “stem from the recognition of mutual interdependence of all things and the desire to avoid doing harm to any living thing.”78 More generally, Buddhists express “a clear preference for ethical business behaviour compared to non-believers.”79 Thus, closely held Chinese philosophy and religious traditions provide a solid foundation in Chinese society for the adoption of corporate social responsibility.

Finally, various socio-political issues have encouraged the development of CSR. Perhaps because SOEs were unaccustomed to authentic public accountability, responsible corporate behavior did not develop naturally among Chinese companies as the Chinese economy moved toward a market system where profit-making was encouraged.80 In recent years, current events, such as the tainted infant formula scandal,81 caused popular outrage and emboldened Chinese citizens to insist on increasing corporate accountability and social responsibility.82 Failure to address perceived

75 Id. at 502.
77 Id. at 232.
78 Id. at 233.
79 Id. at 235.
80 See Lin, supra note 26, at 90 (noting that some scholars posit that the sense of corporate irresponsibility embodied by some Chinese companies stems from “the political ambience in the initial stage of economic development”).
82 See Jim Yardley, Chinese Baby Formula Scandal Widens as 2nd Death is Announced, N.Y. TIMES, Sept. 15, 2008, at A6 (pointing out how, since the formula scandal, Chinese regulators have become more determined to crack down on company cover-ups and failures to announce defects in a timely manner).
environmental and economic shortcomings has prompted indignation among Chinese citizens dissatisfied with insufficient CSR practices. 83

Other factors, such as poor working conditions and inadequate CSR-influenced labor laws, also contribute to social ire. 84 Additionally, marginalization of underrepresented groups and the Communist Party’s focus on “boosting public ‘happiness’ rather than just GDP” has contributed to a stronger push towards implementation of effective CSR measures. 85

Placing a strong emphasis on social harmony is particularly imperative for Chinese officials because “[g]ood performance in improving living quality of the Chinese population is believed to be the most important pillar of the [Chinese Communist Party’s] political legitimacy.” 86 Propaganda is regularly distributed in an effort to publicize and praise the Communist Party’s supposed successes in improving social conditions and welfare. 87 Successful implementation of corporate social responsibility policies that promote social harmony and stability is therefore a key objective of the Chinese government. Absent a successful transition to a market economy—wherein the expected social programs historically administered by SOEs are protected and the worker’s influence as stakeholder is preserved—the Communist Party could potentially face intense scrutiny, in turn undermining its presently unchallenged rule. 88 Thus, corporate social responsibility in China is rightfully characterized as a mechanism for social and political stability in an evolving economic system.

83 Lin, supra note 26, at 91.
84 Id. at 92 (“Chinese workers have voiced their anger through their exodus from sweatshops.”).
86 Lin, supra note 26, at 93; see also JOSEPH FESMITH, CHINA SINCE TIANANMEN: THE POLITICS OF TRANSITION 9 (William Kirby ed., 2001) (noting the huge reform shift “from class struggle to economic modernization,” and the importance of performance legitimacy and the ways in which the Chinese political system can respond).
88 See Jia, supra note 67 (describing China’s gradual corporate change); see also Lin, supra note 26, at 88 (“How to properly settle the . . . employees without causing social unrest has been an important question. In the transitional period, balancing the interests of stakeholders in the SOEs is an important task, which therefore echoes some aspects of CSR.”).
IV. CORPORATE SOCIAL RESPONSIBILITY IN THE UNITED STATES

A. Legislative Action

1. Model Codes and State Legislation

Corporate social responsibility initiatives in the United States have been codified selectively, although the level of government that addresses CSR tends to have implications on how explicitly CSR principles are expressed. Model codes, state law, and federal statutes each take a different approach to the codification of CSR.

At the bottom of the statutory hierarchy, model codes take a moderate approach in implementing CSR. For example, the American Law Institute (ALI) expresses a permissive view towards CSR in its Principles of Corporate Governance. Under the ALI model statute, corporate directors are allowed to make decisions with ethical or humanitarian purposes in mind and may “devote a reasonable amount of resources to public welfare and philanthropic purposes, even if corporate profit and shareholder gain are not enhanced.” Such actions are neither banned nor mandated.

States largely take a similar approach as the Principles of Corporate Governance. Simply put, state “[c]orporate law neither statutorily imposes a duty to maximize profits nor mandates profit maximization as the sole purpose of the corporation.” In Pennsylvania, for example, corporate directors are permitted to “consider . . . [t]he effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located.” Pennsylvania’s statute represents the permissive approach because it gives directors the freedom to make unprofitable decisions, thus preserving the fundamental principle of corporate law, the business judgment rule.

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89 See PRINCIPLES OF CORP. GOVERNANCE § 2.01 (1992) (allowing a corporation’s objective to focus on profit).
90 Choudhury, supra note 17, at 643.
91 PRINCIPLES OF CORP. GOVERNANCE, supra note 89.
93 Choudhury, supra note 17, at 640.
95 Einer Elhauge, Sacrificing Corporate Profits in the Public Interest, 80 N.Y.U. L. REV. 733, 738 (2005) (“Corporate managers have never had an enforceable legal duty to maximize corporate profits. Rather, they have always had some legal discretion (implicit or explicit) to sacrifice corporate profits in the public interest . . . . [T]he implicit version of this discretion could not be eliminated without destroying the business judgment rule that is the bedrock of corporate law.”).
Delaware case law also reflects this permissive approach.\textsuperscript{96} The permissive statutory approach, giving directors the discretion to make business decisions in the interests of corporate social responsibility rather than in the pursuit of profits, is firmly established in the United States. No state places the onus of pure profit-maximization on directors, but all have enacted statutes allowing directors to make “unprofitable corporate donations.”\textsuperscript{97}

Equitable rules also play a role in CSR implementation.\textsuperscript{98} For example, Professor Adolf Berle suggested what would effectively be a broad expansion of the fiduciary duty of directors enforced by courts of equity.\textsuperscript{99} This approach characterized directors as holding the assets of the corporation in trust for the shareholders.\textsuperscript{100} Unlike typical legislative or regulatory approaches, Professor Berle’s theory envisions that the activities of directors would be subject to review by courts of equity which would “impose strict duties on corporate managers.”\textsuperscript{101} Despite Professor Berle’s influence on the debate over CSR, his theory in \textit{Corporate Powers as Powers in Trust} has gained little traction and is not widely accepted.\textsuperscript{102}

2. Federal Forays into CSR

Corporate social responsibility was initially seen as a state matter, and states traditionally have had jurisdiction over business and commercial law. In the twenty-first century however, the federal government has not been silent with regards to CSR legislation and policy.\textsuperscript{103} Historically, states were tasked with authority over corporate governance and the federal government maintained power to regulate securities,\textsuperscript{104} but “the relative powers of the

\textsuperscript{96} See, e.g., Paramount Commc’ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1990); Theodora Holding Corp. v. Henderson, 257 A.2d 398, 405 (Del. Ch. 1969) (construing Delaware law “to authorize any reasonable corporate gift of a charitable or educational nature”).
\textsuperscript{97} Elhauge, \textit{supra} note 95, at 738.
\textsuperscript{98} Wells, \textit{supra} note 10, at 89.
\textsuperscript{99} \textit{Id.} at 88–89.
\textsuperscript{100} \textit{Id.} at 90.
\textsuperscript{101} \textit{Id.} at 90–91.
\textsuperscript{102} \textit{Id.} at 90–91.
\textsuperscript{104} \textit{Id.} at 167–76 (describing the creation of federal power to regulate securities through the Securities Act of 1933, the Securities Exchange Act of 1934, and creation of the Securities and Exchange Commission).
federal government and the states have shifted over the last seventy-five
years, particularly in response to corporate crises and scandals.”

For example, Congress tentatively approached federal CSR legislation in
the wake of the Enron scandal when skepticism toward corporate actors
reached a fever pitch. One interpretation of the fall of Enron theorizes that
“Enron’s business model exemplifies the pathology of the ‘shareholder
value’ system . . . . The company’s focus on short-term stock price
appreciation, in part the result of the share options granted to senior
management, was the cause of its downfall.” In other words, the profit-
maximization model, which Enron took to the extreme, encourages
irresponsible decision-making and causes companies to make short-term
decisions with negative long-term consequences. The solution, according
to some scholars, is to return discretion to directors who can then take both
short-term profit and long-term corporate well-being and responsibility into
account.

In response to the collapse of Enron and a series of related corporate
scandals, Congress passed the Sarbanes-Oxley Act which sought to preclude
Enron-style events from occurring in the future. Although Sarbanes-Oxley

105 Id. at 176.
106 Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7217 (2002); see also Five Years Under the
Thumb: Corporate America Is Learning How to Live with the Tough Regulations Introduced
com/node/9545905/story_id=9545905 (“The Sarbanes-Oxley Act, widely known as SOX,
was signed into law on July 30th 2002 by George Bush, who called its tough new rules the
‘most far-reaching reforms of American business practices since Franklin Roosevelt was
president’. The hope was to restore public confidence in American business, which had been
badly shaken by huge corporate scandals, such as those which led to the bankruptcies of
Enron and WorldCom.”).
107 Simon Deakin & Suzanne J. Konzelmann, Corporate Governance after Enron: An Age of
Enlightenment?, in AFTER ENRON: IMPROVING CORPORATE LAW AND MODERNISING
SECURITIES REGULATION IN EUROPE AND THE US 156 (John Armour & Joseph A. McCahery
eds., 2006).
108 Id.; see also Theresa A. Gabaldon, The Story of Pinocchio: Now I’m a Real Boy, 45 B.C.
L. REV. 829, 844 (2004) (“[C]orporate managers engaged in behavior that resulted in a
deceptive portrayal of the corporation’s financial state. The behavior presumably was
motivated by the actors’ belief that this portrayal would positively affect the market worth of
the corporation in question . . . .”).
109 See, e.g., Larry E. Ribstein, Market vs. Regulatory Responses to Corporate Fraud: A
antidotes to fraud are active and vigilant markets and professionals with strong incentives to
investigate corporate managers and dig up corporate information.”).
Search, 87 J. PAT. & TRADEMARK OFF. SOC’Y 689, 703 (2005) (stating that “[i]n response to
professional studied ignorance, as well as even more serious issues brought to light in Enron
and Worldcom, Congress passed the Sarbanes-Oxley Act of 2002, which requires higher
standards of professional responsibility for lawyers practicing before the SEC, as well as
is not explicit CSR legislation, the Act’s underlying rationale correlates strongly with corporate social responsibility. In fact, some scholars recognized the opportunity Sarbanes-Oxley created to incorporate CSR into federal law:

As we contemplate the integrity of corporate accounting statements [explicitly addressed by Sarbanes-Oxley], we can continue to contemplate the fairness of corporate actions... [I]t may appear that strategies for assuring that corporate managers neither lie about nor steal corporate assets also are helpful in preserving the environment, improving the lives of workers, and enhancing product quality.

Federal securities laws, which preceded Sarbanes-Oxley, are another area of federal regulation of corporate behavior. Actions taken by the Securities Exchange Commission, including the promulgation of the Shareholder Proposal Rule and insider trading restrictions, along with Congressional acts such as the Foreign Corrupt Practices Act are examples of federal forays into corporate governance and practices. Again, while these laws do not explicitly mandate CSR, they do lay a foundation for more federal involvement in the CSR behavior of corporations.

B. Scope and Enforcement

Corporate social responsibility in the United States incorporates a number of diverse interests. The activities involved in CSR historically were “seen as mainly ‘donations to social and artistic causes and other such acts of corporate philanthropy.’” In relation to those affected by the corporation,
CSR in the United States also seeks to define the “duties large business organizations might have to their workers, customers, neighbors, and the public at large.” Ultimately, American CSR attempts to motivate corporate managers and directors to take into account the needs not only of shareholders but of workers, consumers, and communities when making business decisions.

C. Social Basis

The social basis for CSR in the United States is broad and diverse. From a moral-humanist perspective, corporations often use cooperation with CSR policies to appear virtuous and to relate to their communities. However, some religious groups—particularly those of the Abrahamic tradition—tend to view socially responsible corporate behavior as a tenet of their faith. Codes of conduct promulgated by religious groups promote values common to CSR, such as justice, mutual respect, stewardship, and honesty.

Historical factors may also contribute to the social acceptance of corporate social responsibility. For instance, some scholars posit that CSR developed as a response to the perceived irresponsibility of corporations in the years preceding the Great Depression. Others suggest later social movements contributed more to the adoption of CSR.

Socio-political traditions in the United States may also explain an affinity towards CSR doctrine. In the United States, businesses have typically been given the freedom to engage in economic activity subject to the

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118 Wells, supra note 10, at 77.
119 Id. at 79.
121 See, e.g., AN INTERFAITH DECLARATION: A CODE OF ETHICS ON INTERNATIONAL BUSINESS FOR CHRISTIANS, MUSLIMS AND JEWS (Nov. 30, 1992), available at http://institute.jesdialogue.org/fileadmin/bizcourse/INTERFAITHDECLARATION.pdf (stating that a dialogue between a group of Christian, Jewish and Muslim thinkers and business leaders led to the drafting of a Declaration of International Business Ethics which focused on supplanting the emerging value system of dishonesty and selfishness with one of integrity and generosity).
123 See Wells, supra note 10, for a more comprehensive discussion of the evolution of the Berle- Means debate during the Depression Era.
124 FREEMAN & GILBERT, supra note 24, at 88 (“Rooted in the post-World War II social environment, particularly the social movements in the 1960’s, models of corporate social responsibility were developed to enable managers to understand the societal obligations incurred by their firms.”).
125 Id.
government’s supervision and oversight.\textsuperscript{126} Professor Freeman observed that, “[t]he business-government relationship in the U.S. has been founded on the principles of the ‘watch-dog,’ i.e., it is the legitimate role of government to regulate business in the public interest, and to enforce strict anti-trust laws to insure adherence to market principles.”\textsuperscript{127} Such an attitude is consistent with CSR’s blend of corporate and political action.

V. COMPARING THE CHINESE AND AMERICAN APPROACHES

There are multiple points of comparison and contrast between CSR in the United States and CSR in China. One of the obvious differences between the two approaches is the federal nature of CSR legislation. In China, as previously discussed, the governing Company Law is a law of nationwide impact, enacted and enforced by the national government of the People’s Republic of China.\textsuperscript{128} In contrast, the federal government in the United States has been less active in regulating corporate activity in this country.\textsuperscript{129}

Such nationwide legislation in China is arguably more enforceable, at least on a statutory basis, than legislation implemented by individual U.S. states. Whereas China’s Company Law sets forth unambiguous and mandatory language implementing CSR, state statutes in the U.S. generally take a permissive approach and do not contain affirmative language similar to the Chinese statute.\textsuperscript{130} This may be due to the fact that China has taken a top-down approach to CSR implementation, which fits naturally with its communist scheme of governance. The United States, on the other hand, has likewise taken the approach natural to its federalist bottom-up government: selective state implementation followed by federal encroachment on corporate social responsibility issues.

The obvious conclusion—that textual differences in the respective statutes mean China’s statute is better implemented, must be taken with a caveat. In practice, it is unlikely the Chinese statute allows for more effective enforcement of CSR than U.S. statutes do because of the general ambiguity and uneven enforcement that plagues Chinese law. Thus, neither country has truly established a mechanism to effectively mandate, enforce, and oversee the implementation of corporate social responsibility.

\textsuperscript{126} FREEMAN, supra note 23, at 13.
\textsuperscript{127} Id.
\textsuperscript{128} Chinese Company Law, supra note 33.
\textsuperscript{129} Wells, supra note 10, at 118–23 (discussing how failure of federal chartering means state law primarily governs corporations).
\textsuperscript{130} Compare Chinese Company Law, supra note 33, with 15 PA. CONS. STAT. § 1715 (2012).
Another difference between CSR in the U.S. and China is the motivation behind its propagation. In the United States, CSR is seen as a moral obligation of companies, properly overseen by the government, which improves the relationship between the corporation and individuals. On the other hand, CSR in China is a means to an end—namely the maintenance of the regime’s political stability and firm hold on power in China. The contrasting motives the United States and China have for adopting CSR may be partially explained by the countries’ different sources of political legitimacy—representative government in the United States and communist government in China—but this topic is outside the scope of this Note.

On a related note, Chinese CSR has focused more on corporate social responsibility initiatives that further ideals acceptable to the Communist Party of China. Often, these include environmental objectives and more protective labor standards rather than protection for human rights or civil liberties.¹³¹ Unlike China, which limits the scope of CSR, corporate social responsibility in the United States is much broader and more inclusive of everything from traditional charitable giving to ensuring corporations comply with established human rights standards in the pursuit of profit.¹³² It is difficult to say which approach is more objectively effective because there are numerous methods of measuring the effectiveness of CSR.¹³³

The underlying commonality between the respective approaches of China and the United States is the apparent presumption that the government necessarily must become involved in the development and implementation of CSR initiatives. Admittedly, both have taken slightly different approaches and have enacted different gradations of CSR at various levels of government. Fundamentally, though, both still rely on government regulations to compel positive behavior by corporations.

VI. THE FUTURE OF CSR

A. Proposals Suggesting Further Government Intervention

A number of proposals support increased government involvement in CSR and corporate conscience activities and regulations. Government regulation is seen as a necessary solution to the perceived problems of

¹³¹ Lin, supra note 26, at 74–75.
¹³² Pitts, supra note 11, at 337–39.
¹³³ Different methods of measuring CSR include public opinion regarding corporations, the absolute value of donations and corporate giving, and the percentage of corporate earnings directed towards charity. It is even more difficult to measure the value of non-monetary gifts.
corporate indifference or unwillingness to engage in socially responsible activity.\(^{134}\)

1. Corporate Conscience Committees

The first major proposal is the government-mandated establishment of corporate conscience committees.\(^{135}\) According to proponents, conscience committees would be given the task of ensuring the corporation was undertaking appropriate CSR initiatives; such efforts are quaintly characterized as a corporate Jiminy Cricket.\(^{136}\)

This proposal has several insurmountable obstacles. Most fundamentally, the creation of corporate conscience committees would do little more than provide additional procedures for corporations to comply with while failing to ensure an objectively effective outcome.\(^{137}\) The inherently advisory nature of conscience committees would place the duty to produce recommendations on a few, while removing responsibility from other entities within the corporation who logically should share the burden of implementing social responsibility.\(^{138}\) From an “outsider” perspective, such “[a] proposal that does no more than ritually invoke the services of the same group of middle-aged white male and white male wannabes is . . . apt to fall prey to the criticism that it is a counterproductive standard operating procedure,” and fails to take into account diverse perspectives on social responsibility.\(^{139}\) Finally, it is unclear how the government would oversee the establishment of conscience committees.\(^{140}\)

2. Stringent SEC Monitoring

A related proposal suggests additional monitoring and disclosure requirements by the Securities and Exchange Commission (SEC).\(^{141}\) Proponents argue that the SEC has the authority to “require disclosure of socially relevant, but non-material, information,” and presupposes that

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\(^{134}\) Gabaldon, supra note 108, at 829–34 (noting “the intervention of conscience is necessary” and detailing several government-initiated proposals).

\(^{135}\) Id. at 863.

\(^{136}\) Id. at 858–59.

\(^{137}\) Id. at 859.

\(^{138}\) Id. at 861.

\(^{139}\) Id. at 864.

\(^{140}\) Id. at 863–64.

\(^{141}\) Wells, supra note 10, at 134–35.
forcing companies to disclose their activities will cause them to engage in more CSR behavior.142

Increased disclosure mandated by the SEC, however, suffers from the same process-related problems of the preceding proposals. Simply ordering companies to disclose their inner-workings will not necessarily incentivize them to engage in CSR; but even supposing it did, disclosure requirements give negligible direction toward the types of programs proponents assume will be adopted.143

3. Criminal Penalties

The third proposal, which addresses the enforcement shortcomings inherent in the abovementioned proposals, would resort to an alternative method of government regulation: criminal enforcement for corporate indifference.144 Such a penal approach would undoubtedly increase the incentive for corporate officers and directors to engage in more socially responsible behavior.145 Unlike the proposals grounded in process, however, it could also result in corporate flight to jurisdictions that do not have criminal enforcement for failure to implement CSR.146 Criminalizing the failure to act also dredges up the controversial and long-standing debate over the legal liability for nonfeasance or omissions rather than malfeasance or positive wrong-doing.147 Finally, the potential for criminal liability complicates the relationship between the corporation and its managers as the parties seek to manage risk.148

Another potential drawback is the tendency of government enforcement mechanisms to become even more draconian.149 Faced with avoidance or

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142 Id. For a detailed discussion of the SEC’s ability to implement CSR-type disclosure requirements, see Cynthia A. Williams, The Securities and Exchange Commission and Corporate Social Transparency, 112 HARV. L. REV. 1197 (1999).
143 Wells, supra note 10, at 136.
144 Gabaldon, supra note 108, at 864.
145 Id. at 867.
146 Id.
147 See Melody J. Stewart, How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability, 25 AM. J. CRIM. L. 385, 386–87 (1998) (noting criminal enforcement of omissions is a “controversial and an emotional issue” that has been debated for almost a century).
noncompliance, government regulation must become even more adept at delving into the inner workings of corporations and overseeing minute operating details to ensure compliance with CSR policies and regulations. The backlash against such measures is demonstrated by business leaders’ dissatisfaction with the oversight provisions contained in Sarbanes-Oxley.\textsuperscript{150} While businesses must operate under the rule of law, eventually regulations become so onerous to business that the enforcement costs outweigh any positive aspects.\textsuperscript{151} Obviously, corporations should be punished by law for engaging in fraud or other illegal activities. At some point however, business decisions must be left to management without the presence of a government regulator supervising their every move.

Proposals recommending increased government involvement in CSR issues have fatal flaws that cannot be overcome due to the aforementioned inherent enforcement problems and dilemmas regarding government oversight and deference to the business judgment of the corporation’s leadership. A model that is independent of ineffective government regulation—but still promotes the positive goals of CSR—is therefore needed.

\textbf{B. The Feasible Solution: Corporate-Led CSR}

The most effective model for the future of CSR is a corporation-led, market-oriented, consumer-driven corporate social responsibility doctrine. This proposal does not suffer from the same weaknesses of government-initiative proposals; in fact, its strengths mirror the weaknesses of the other proposals. One author sums up the argument this way:

\begin{quote}
Ironically, businesses are probably the best solution that we can have to the challenges that face us as a society, because they are the ones that can innovate, can produce solutions, and can be part of the engine of development that will eventually bring developing countries out of poverty that may, just may, have a whisker of a chance of achieving sustainability.\textsuperscript{152}
\end{quote}

\textsuperscript{150} Gabaldon, \textit{supra} note 108, at 854.
Indeed, corporations themselves, not governments, have the strongest incentive to create partnerships with their communities, cultivate good relations with stakeholders, and promote well-being because neglecting to do so will result in diminished revenue or even business failure. Successful corporations, such as Starbucks, recognize this fact. For example, that company’s CEO, Howard Schultz, recently said, “We can’t wait for Washington. Business leaders have to step up and do our part.” Businesses and other private actors are capable of affecting appropriate CSR activities. Market forces provide the necessary incentive for corporations and private actors to essentially regulate themselves. Indeed, “[c]ivil regulation theory proposes that businesses are being regulated by civil society (rather than governments), through the dual effect of negative impacts from conflict and benefits from collaboration.” “[C]ivil society vigilance, consumer buying power, and socially responsible business leadership” are also contributing factors to a self-regulation model.

Other forces also contribute to and facilitate corporate social responsibility today. For example, modern technology has made a private-actor driven model technologically feasible because consumers and watchdog groups are increasingly able to access information about the corporations with which they interact.

The changing nature of corporate giving also dovetails with a corporation-centric, rather than government-centric, model of CSR. One Wal-Mart Foundation director recently said: “Gone are the days when people can just put money behind a good idea. We want to support good ideas, but

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154 Jargon, supra note 2.
155 Id.
156 Milton Friedman, Introduction to Leonard E. Read, I, PENCIL (1958) (“I know of no other piece of literature that so succinctly, persuasively, and effectively illustrates the meaning of both Adam Smith’s invisible hand—the possibility of cooperation without coercion—and Friedrich Hayek’s emphasis on the importance of dispersed knowledge and the role of the price system in communicating information that ‘will make the individuals do the desirable things without anyone having to tell them what to do.’ ”).
157 Jem Bendell, Civil Regulation, in THE A TO Z OF CORPORATE SOCIAL RESPONSIBILITY 75 (Wayne Visser et al. eds., 2007).
159 Pitts, supra note 11, at 337 (“This historically unprecedented degree of technology-driven transparency, scrutiny, and accountability is likely the most important and enduring of all the drivers for CSR.”).
160 Id.
good ideas that have an impact. Corporations are simply in a better position to identify and engage in meeting the needs of local communities; legislation and regulations, particularly on the federal level, would be unwieldy and inefficient.

There is some indication that in practice, CSR may in fact be moving naturally towards a corporation-initiated model:

Starbucks isn’t alone in its quest [to launch job programs in local communities]. The traditional method of corporate giving, in which companies write checks to charities, is being replaced by efforts to work directly with communities and other constituents. According to a recent report from the Committee Encouraging Corporate Philanthropy, a CEO-membership organization dedicated to increasing the level of corporate giving . . . there are long-term financial benefits to strengthening communities in which companies do business.

In sum, business leaders are increasingly aware of the symbiotic relationship between businesses and their communities—the financial well-being of each is promoted by the success of the other.

Recent efforts by corporations such as Starbucks to change the way businesses engage in CSR activities is a step in the right direction because it recognizes that the most effective CSR programs are led by businesses with a holistic interest in their communities. It also signifies a move away from criticism of CSR as mere “public relations” and renders the argument that CSR is simply a “window-dressing” irrelevant.

VII. CONCLUSION

The corporate social responsibility movement began with good intentions. Indeed, its proponents seek the betterment of the individual and society. However, the increasing role of government in implementing CSR has hindered, rather than helped, the movement as a whole.

While China’s recent trend toward implementation of CSR is certainly admirable, the federally mandated legislation and heavy regulation it has relied on to achieve its CSR goals have only increased bureaucracy. In


162 Jargon, supra note 2.

163 Coors & Winegarden, supra note 22.
reality, CSR in China has been ineffective thus far. Neither has heavy-handed implementation made Chinese CSR significantly more effective than CSR in the United States. Corporate social responsibility in the U.S., on the other hand, has taken a tepid approach by granting statutory approval to CSR and skirting the edge of true CSR regulation without actually taking affirmative steps to implement it. Neither the approach taken by China nor the United States approach captures the most effective model of CSR, because both rely on government action to achieve desired CSR outcomes. To the contrary, there is evidence that market forces, not government, have encouraged the development of CSR in China. “Because they are required by their foreign partners to take responsibility for the social and environmental impacts of their business activities, Chinese companies are incentivized to develop CSR awareness.”

For the reasons discussed above, insurmountable enforcement problems doom government-mandated CSR. Instead of continuing to tweak an unworkable government-led model, the United States and China should look to a corporation-led model that provides the proper incentives for corporations to protect the interests of their stakeholders through a market-oriented system. Although such a model might not have been feasible in years past, increasing consumer awareness and technology that can keep large corporations socially accountable is now readily available in the United States and rapidly spreading in China. These advancements provide an effective framework for CSR today.

Furthermore, the underlying principles of CSR already mesh well with the culture, history, and social philosophies of both China and the United States. If there truly is popular and well-grounded social support for CSR practices, such behavior should develop naturally as corporations evolve.

Support exists in the business community for corporate-led CSR that responds directly to the needs of individuals and communities without the inevitable delays and distortions caused by government regulation and process. China and the United States need to adopt a corporate-led approach to CSR that will allow effective CSR measures to flourish.

As world economic leaders, China and the United States have the opportunity to influence the rest of the world. By letting companies develop CSR initiatives that best address the needs of individuals and communities, the underlying goals of corporate social responsibility—namely more satisfied consumers, better treatment for workers and the environment, and more socially engaged corporations—will be achieved.

164 Chen, supra note 81, at 420.
A business-led model of corporate social responsibility is the only practicable model of CSR because it places incentives on the proper actors—corporations—while eliminating the enforcement problems inherent in government legislation and regulations that are unevenly applied, as in China, or that lack teeth or any affirmative effect, as in the United States.

The workable, corporate-driven model does not succumb to the enforcement problems of government regulation models, but rather surpasses them in actual effectiveness. Traditional market forces, coupled with greater technological consumer oversight capabilities, make the corporate-led CSR model more feasible than ever before. China should begin to repeal its legislation and regulations enforcing CSR and instead focus on improving transparency, and allow consumer awareness and involvement to continue to increase. Likewise, the United States should scale back its more aggressive corporate social responsibility measures and allow businesses to make CSR decisions within the bounds of the law.