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NEW GOVERNANCE AND INDUSTRY CULTURE

*Karen Bradshaw Schulz**

New governance scholarship argues that a blend of public and private regulation is playing an increasing role in influencing firm behavior. Despite its burgeoning growth, new governance scholarship is critiqued as lacking practical examples. This Article begins to fill that void by conducting a new institutional economics analysis of forest sustainability certifications, an example of new governance. This Article analyzes the features of the domestic forest industry to trace why new governance emerged within it and has persisted for over seventy years. The industrial characteristics that contribute to this longstanding new governance regime include strong norms within the industry, a resource-type that favors user-developed rules, and robust competition among private actors to regulate the industry. These findings suggest that new governance may emerge as a regulatory tool to address environmental problems in other industries that possess similar characteristics. The Article also sheds light into the broader discussion of how to measure the “success” of new governance regimes. It identifies stakeholder involvement relative to the democratic process and displacement of other regulatory tools as two key considerations in evaluating new governance approaches.

INTRODUCTION

New governance—legal reform emphasizing the role of non-state actors in influencing behavior against a backdrop of the state¹—is an important emerging intellectual movement.² New governance scholars are “engaged in developing a broad menu of legal reform strategies that involve private industry and nongovernmental actors in a variety of ways while maintaining the necessary role of the state to aid weaker groups in order to promote overall

* Associate Professor of Law, Arizona State University, Sandra Day O’Connor College of Law. I appreciate comments provided by Bruce Huber, Jonathan Masur, Souvik Saha, Roger Sedjo, Jonathan Rose, Arden Rowell, Vanessa Casado Perez, and Ingrid Visseren-Hamakers. Thanks are also due to the workshop participants who commented on the paper at: The ASU Sandra Day O’Conner College of Law, The University of Illinois School of Law, the Society of Environmental Law and Economics, the Yale School of Forestry and Environmental Sciences Government, Environment and Markets Seminar Series, the Yale School of Forestry and Environmental Sciences Forest Forum, and the New York University Department of Economics Market Institutions and Economic Processes Workshop. The Bell Fellowship provided financial support to travel to research primary materials at the Forest History Society at Duke University, where Cheryl Oaks and Steve Anderson provided invaluable assistance.

1 See Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 983 (2007).

2 See Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 478 (2004).

welfare and equity.”³ A central feature of new governance is extralegal regulation that privileges private actors in rule setting and rule enforcement,⁴ which marks a shift from the previous state centric or market mechanism regulatory approaches.⁵

Although the term “new governance” appeared in the literature relatively recently,⁶ the underlying idea of private regulation against a backdrop of state enforcement is not new. This Article traces that idea through a review of literatures addressing corporate social responsibility;⁷ environmental nongovernmental organizations,⁸ and the study of norms in law and economics.⁹ Each of these literatures foreshadowed the emergence of new governance by observing that industrial action can be regulated by private regulatory schemes operating against the backdrop of state regulation.

Critiques of new governance scholarship center on the lack of detailed empirical studies illustrating the principles in action. Leading articles are critiqued as having a “high level of generality”¹⁰ and focusing on “ambiguous” and “scattered” policy assessments with innovations found “here and there.”¹¹ As a result, examples in the field appear “aberrational, idiosyncratic, or unproven, and the anecdotes and case studies heralding these developments unconvincing”¹² Adherents to new governance agree that there is a pressing need for detailed studies examining the circumstances of when non-state regulation succeeds.¹³

3 See Lobel, *supra* note 1, at 983.

4 *Id.*

5 See Guy Mundlak & Issi Rosen-Zvi, *Signaling Virtue? A Comparison of Corporate Codes in the Fields of Labor and Environment*, 12 THEORETICAL INQUIRIES L. 603, 606–07 (2011).

6 The term “new governance” first appeared in a 1996 article. See R.A.W. Rhodes, *The New Governance: Governing Without Government*, 44 POL. STUD. 652 (1996). In 2004, Orly Lobel published the article that “sound[ed] a clear alarm” that the movement was growing within legal literature. Karkkainen, *supra* note 2, at 478 (citing Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345–47 (2004)).

7 See Part I.A.1; see also Ronen Shamir, *The Age of Responsibilization: On Market-Embedded Morality*, 37 ECON. & SOC’Y 1, 7–8 (2008) (discussing the relationship between new governance and corporate social responsibility).

8 See Part I.A.2; see also Annecoos Wiersema, *A Train Without Tracks: Rethinking the Place of Law and Goals in Environmental and Natural Resources Law*, 38 ENVTL. L. 1239, 1241–44 (2008) (discussing a critical body of environmental law literature suggesting that traditional legal governance is outmoded and new forms of regulation involve “enhanced involvement of private actors in the traditionally public sphere of bureaucracy and its implementation”).

9 See Part I.A.3; see also Warren J. Samuels & Steven G. Medema, *Ronald Coase on Economic Policy Analysis: Framework and Implications*, in COASEAN ECONOMICS 161, 164 (Steven G. Medema ed., 1998).

10 Karkkainen, *supra* note 2, at 478.

11 *Id.* at 476.

12 *Id.* at 477.

13 See Lobel, *supra* note 1, at 982 n.206.

This Article joins in the task of providing examples of new governance¹⁴ to provide a detailed analysis of new governance operating within a particular industrial setting. It conducts a new institutional economics¹⁵ analysis of the industrial features that led to voluntary, market-based sustainability certifications for forests and forest products. Sustainability certifications are a voluntary, primarily private¹⁶ regulatory regime that incentivizes firms to conduct their operations in accordance with what the certification identifies as socially desirable standards.¹⁷ For reasons previously unexplored, the forest industry contains an unusually longstanding example of sustainability certifications.¹⁸

This Article presents a case study of sustainability certifications in the forest industry. First, it describes the emergence and interplay between the leading forest and wood product certifications.¹⁹ This Article provides a novel account of the first forest sustainability certification, The American Tree Farm System. A modern, comprehensive account of the history and development of the American Tree Farm System does not exist in scholarly literature across relevant disciplines—including law, natural resources, environmental sciences, corporate social responsibility, and forestry. Yet, the American Tree Farm System plays a crucial role in understanding the later proliferation of other sustainability certifications within the forest industry. It also highlights that sustainability certifications emerged not as private self-

14 For recent efforts to provide examples of new governance, see generally, Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago's Public Housing Reform Experiment*, 16 GEO. J. ON POVERTY L. & POL'Y 117 (2009) (examining how stakeholders take part in new governance); Julia Black, *Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis*, 75 MOD. L. REV. 1037 (2012) (examining the performance of four new governance techniques); Eric Tucker, *Old Lessons for New Governance: Safety or Profit and the New Conventional Wisdom*, Osgoode CLPE Research Paper No. 36/2012 (2012) (examining new governance models in OHS regulation).

15 See David M. Driesen, *Contract Law's Inefficiency*, 6 VA. L. & BUS. REV. 301, 334 (2011); Steven G. Medema, *Discourse and the Institutional Approach to Law and Economics: Factors that Separate the Institutional Approach to Law and Economics from Alternative Approaches*, 23 J. ECON. ISSUES 417 (1989) (exploring relationship between legal and economic processes in several theories of law and economics).

16 The earliest sustainability certifications operated in conjunction with state forestry agencies. See *infra* Part I.C.

17 See, e.g., COMM. ON CERTIFICATION OF SUSTAINABLE PRODS. & SERVS. NAT'L RES. COUNCIL, *CERTIFIABLY SUSTAINABLE?* 3 (2010) (explaining the role of third-party certification systems). The question of social desirability in setting standards raises the question of "social desirability to whom?" Certifiers may establish standards that are misaligned with the values that consumers purchasing a certified product would support. This creates an information problem because many consumers do not carefully study the details of the standards underlying a certification.

18 See Errol E. Meidinger, "Private" Environmental Regulation, Human Rights, and Community, 7 BUFF. ENVTL. L.J. 123, 126 (2000) (reviewing the Forest Stewardship Council's certification program).

19 Sustainable forest certifications have existed since the early 1940's, with a flurry of activity and competition arising in the 1990s. See Errol E. Meidinger, *The New Environmental Law: Forest Certification*, 10 BUFF. ENVTL. L.J. 211, 214–16 (2003).

regulation by an industry, but instead as a public-private partnership, in which state agency employees and industry actors worked together to enforce standards.²⁰

Second, this Article identifies the industrial features that contribute to the continuous, seventy-year existence of sustainability certifications within the forest industry. Drawing upon legal, sociological, and economic literature about forest use,²¹ it argues that the emergence of certifications in the forest industry are attributable to: (1) the existence of rich, well-developed norms among a merchant group comprised of large, industrial land managers and state foresters; (2) a resource-type that is conducive to user generation and enforcement of rules; and (3) a robust competition for private regulatory control over industry activity.

The findings provide a starting point for further research about both the conditions under which new governance can operate in practice²² and the broader discussion about when new governance is an appropriate means of regulating the behavior of industrial actors. Although forest sustainability certificates produced a significant “greening” of the industry,²³ their success both individually and collectively remains extremely controversial. This underscores that there is no agreed-upon set of metrics to evaluate new governance regimes. Two themes for evaluation of new governance regimes emerged from the forest sustainability certification case study: (1) the inclusiveness of diverse groups of stakeholders in new governance relative to democratic processes; and (2) the displacement of other, more stringent legislation by new governance regimes.

Part I situates new governance literature amidst existing scholarship. This Part argues that a new institutional economics analysis can address the void of practical examples within new governance literature. Part II provides a novel case study of the emergence of sustainability certifications within the domestic forest industry. Part III identifies norms, rule development and enforcement, and a robust market for regulation as the factors that contribute to the ongoing existence of sustainability certifications in the forest industry. Part IV situates the findings from forest sustainability certifications into the broader framework of understanding the industrial culture and con-

20 See *infra* note 123 and accompanying text.

21 Bruce Ackerman argues that lawyer-economists should “look to the sciences of culture . . . anthropology, sociology, and sociolinguistics” to address the perceived limitations of neoclassical economics. Bruce A. Ackerman, *Law, Economics, and the Problem of Legal Culture*, 6 DUKE L.J. 929, 941–42 (1986) (footnotes omitted). Similarly, George Priest suggested that “one must abandon the notion that law is a subject that can be usefully studied by persons trained only in the law.” George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 437 (1983). Priest argued that “the best writing about the legal system is interdisciplinary.” *Id.* at 440.

22 This Article highlights, but does not resolve, the problem of establishing metrics with which to evaluate the “success” of new governance. See *infra* note 86.

23 See Errol E. Meidinger, *The New Environmental Law: Forest Certification*, 10 BUFF. ENVTL. L.J. 211, 214–15 (2003).

ditions in which new governance strategies will emerge and whether they should be considered successful.

I. NEW GOVERNANCE AND INSTITUTIONAL ECONOMICS

A central critique of new governance literature is the lack of practical, real-world examples.²⁴ Existing examples in the field have been critiqued as idiosyncratic and unconvincing.²⁵ Thus, a central, unexplored inquiry in new governance literature is: What are the conditions—the underlying industrial culture—in which private regulation emerges?²⁶ Detailed institutional analysis is needed to further scholarly understanding. This Article provides a detailed look into conditions underlying a longstanding private-public partnership to govern resource use, using a new institutional economics approach. This Subpart outlines other literatures that anticipated new governance.

A. *New Governance in Existing Literatures*

Private forms of social regulation working in tandem with government institutions are rapidly supplanting older, state-centric models of market regulation.²⁷ New governance²⁸ focuses upon non-state actors governing their own behavior based on self-generated norms and rules,²⁹ with decreased reliance state enforcement powers.³⁰ New governance has been called a “third way”³¹ between regulation and market mechanisms, in which a global public

24 See Karkkainen, *supra* note 2, at 476.

25 *Id.* at 477.

26 Lobel, *supra* note 1, at 982 n.206 (“[V]oluntary self-regulation . . . will work better in certain situations, especially when a particular set of incentives exists. The culture of the industry is significant More detailed research is required in order to understand these differences and accordingly adopt adequate policies.”).

27 See Mundlak & Rosen-Zvi, *supra* note 5, at 606–07 (“The world of regulation has undergone a major transformation over the last four decades, from the traditional state-centered ‘command and control’ regulation of the 1970s to market-based instruments (still marshaled by the state) that characterized the turn of the century, and then to the various types of new governance mechanisms that are in vogue today.”); see also Ronen Shamir, *Corporate Social Responsibility: Towards a New Market Embedded Morality?*, 9 THEORETICAL INQUIRIES L. 371, 372 (2008) (“As the analytical gaze shifts from state to non-state form of authority, research tells of the relocation of regulatory functions from public to private authorities” (internal citations omitted)).

28 See Lobel, *supra* note 6, at 343–44.

29 See Christine Parker, *The Pluralization of Regulation*, 9 THEORETICAL INQUIRIES L. 349 (2008) (examining the normative arguments for pluralism in regulation). New governance shares features with neoliberalism and has been associated with third way neoliberalism, existing between regulation and market solutions. See Joel Handler et al., *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 WIS. L. REV. 479, 511.

30 See Shamir, *supra* note 27, at 372.

31 Handler et al., *supra* note 29, at 511.

domain helps governments to produce effective action.³² In the international context,³³ the rise of new governance is attributable to the failure of traditional state governments to respond to the challenges of globalization and related environmental problems.³⁴

Although the uptick in new governance scholarship is recent, the idea of private regulation of commercial exchange is well-established in several strands of legal literature.³⁵ Corporate law, environmental law, and law and economics literatures point towards the importance of incorporating institutional analysis into the theoretical arguments of new governance.³⁶ This Subpart argues that existing literatures inform the theoretical underpinnings of new governance and provide a starting point for further inquiry of its operation in practice.

1. The Corporate Law Literature: Corporate Social Responsibility

An example of new governance is when an industry creates rules to control the behavior of firms within it. A recent example of such private regulation is found in the corporate law literature on corporate social responsibility. Corporate social responsibility describes industries and companies attempting to contribute to the resolution of societal problems although they are not legally required to do so.³⁷ The term “corporate social

32 See John Gerard Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, in TAMING GLOBALIZATION 93, 95–97 (David Held & Mathias Koenig-Archibugi eds., 2003) (“[A] global public domain is emerging [in which the territorial state is not the cardinal organizing principal], which cannot substitute for effective action by states but may help produce it.”).

33 For a discussion of new governance from an international perspective, see Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 421 (2000); Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 708 (2010). See generally LAW AND NEW GOVERNANCE IN THE EU AND THE U.S. (Gráinne de Búrca & Joanne Scott eds., 2006) (examining new governance from law and constitutionalism perspective, using case studies from Europe and the United States).

34 See THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE xv (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002); Ruggie, *supra* note 32, at 95–97.

35 Stefan J. Padfield, *Finding State Action When Corporations Govern*, 82 TEMP. L. REV. 703, 706 (2009) (“[H]istory suggests there is nothing new about the concept of corporations governing.”).

36 Because of its domestic focus, this Article does not focus upon the robust international law literature discussing new governance. See, e.g., Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT’L L. 501, 501 (2009) (describing the “new kind of international regulatory system” on the rise).

37 See VIRGINIA HAUFLE, A PUBLIC ROLE FOR THE PRIVATE SECTOR 31, 53, 81 (2001) (discussing the growing number of corporations that are self-regulating on issues of environmental, labor, and information privacy).

responsibility” was coined in the 1950s,³⁸ but firms have long engaged in voluntary over-compliance with socially-desirable objectives.³⁹ Modern corporate law literature is replete with analysis and examples of corporate social responsibility.⁴⁰

Corporate social responsibility is premised on a belief that corporations are well-situated to address social problems because of their financial resources, human talent, and influence.⁴¹ Companies engage in socially responsible activity for a variety of reasons, including: building their brand, developing a corporate culture of giving, attracting consumers, and preventing regulation.⁴² Corporate social responsibility targets a plethora of social issues, including labor relations, information privacy, and environmental issues.⁴³

A key dispute about corporate social responsibility is whether firms’ practices meaningfully increase social welfare or merely provide an illusion that firms are good citizens.⁴⁴ Todd Henderson and Anup Milani have expressed skepticism towards the assumption that firms—rather than non-profit entities or government agencies—are relatively better-positioned to obtain socially desirable objectives.⁴⁵ Supporters of corporate social responsibility suggest that industries are better-suited to promulgating rules and monitoring their observance within the industry group, rather than through external legal regulation.⁴⁶ They also note that while corporate codes were once considered public relations strategies, they have matured into genuine

38 Economist Howard Bowen coined the phrase ‘corporate social responsibility’ in a book published in 1953. See HOWARD R. BOWEN, *SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN* 8 (1953) (laying out the “social responsibilities of businessmen”).

39 See Marc Firestone, *A Quick Look at Two Areas of Doctrinal Difference Between EU and U.S. Decision Makers*, 20 TUL. J. INT’L & COMP. L. 1, 5–6 (2011) (noting that the “twenty-first-century boom in corporate social responsibility” is largely similar to antecedents from earlier eras); Padfield, *supra* note 35, at 706.

40 See, e.g., Shamir, *supra* note 7, at 7–8 (discussing the relationship between new governance ideas and a decline in state responsibility and increase in individual responsibility).

41 See Aaron K. Chatterji & Barak D. Richman, *Understanding the “Corporate” in Corporate Social Responsibility*, 2 HARV. L. & POL’Y REV. 33, 33 (2008).

42 See *id.*

43 See HAUFLER, *supra* note 37, at 31, 53, 81.

44 See, e.g., CORPORATE SOCIAL RESPONSIBILITY FAILURES IN THE OIL INDUSTRY 8–11 (Charles Woolfson & Matthais Beck eds., 2005) (challenging the oil industry’s claims of good corporate citizenship); Mundlak & Rosen-Zvi, *supra* note 5, at 658.

45 See generally M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571 (2009) (noting that for-profit corporations should only compete in the market for philanthropy when they can do so more efficiently than other market participants, namely non-profit organizations and government entities); see also D. Gordon Smith, *Response: The Dystopian Potential of Corporate Law*, 57 EMORY L.J. 985, 1008 (2008) (critiquing reform proposals that shift power away from shareholders and toward non-shareholder constituencies).

46 MATT RIDLEY, *THE ORIGINS OF VIRTUE* 202 (1996).

civil constitutions.⁴⁷ Such findings underscore the new governance tenant that private regulation, operating against a backdrop of government regulation, should play a role in controlling firm and industry behavior.

2. Environmental Law: Economic Tools for Preservation

A variety of regulatory approaches are used to address environmental problems. Prior to the 1990s, environmental objectives were typically pursued using top-down command and control regulation.⁴⁸ In the late 1980s, some leading environmental law scholars argued that environmental protections were best achieved using private market forces rather than regulation. In 1988, Bruce Ackerman and Richard Stewart argued that market mechanisms would save money and improve administrative efficiency.⁴⁹ Such arguments led to the adoption of marketable permits,⁵⁰ which were put into practice in 1990 through the Clean Air Act sulfur dioxide emissions trading program.⁵¹ The program was regarded as a success because it reduced costs and incentivized technological innovation.⁵²

Growing dissatisfaction with market-mechanisms is leading to increasing contemplation of private regulation as a mechanism to address global environmental concerns. Global problems like climate change called into question the efficacy of market mechanisms.⁵³ Scholars have begun to search for complements to market mechanisms to solve environmental problems.⁵⁴ Some suggest that new governance may provide new tools for addressing troubling environmental issues.⁵⁵

47 See Gunther Teubner, *The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination*, in CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND 203, 203–04 (Rainer Nickel ed., 2010).

48 Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171, 172–78 (1988).

49 *Id.* at 171.

50 See Robert W. Hahn & Gordon L. Hester, *Marketable Permits: Lessons for Theory and Practice*, 16 ECOLOGY L.Q. 361, 364–65 (1989).

51 See 42 U.S.C. §§ 7651-7651o (2006).

52 Jeremy B. Hockenstein et al., *Crafting the Next Generation of Market-Based Environmental Tools*, 39 ENV'T 13, 15 (1997).

53 See Ruggie, *supra* note 32, at 115–16; THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE, *supra* note 34, at 135; THINKING ECOLOGICALLY 105 (Marian R. Chertow & Daniel C. Esty eds., 1997).

54 See, e.g., Steven Bernstein & Benjamin Cashore, *Non-state Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?*, in HARD CHOICES, SOFT LAW 33, 34 (John J. Kirton & Michael J. Trebilcock eds., 2004).

55 See Wiersmema, *supra* note 8 at 1241–44.

3. Norms Literature

Norms literature critiques legal centralism in which government is the primary creator and enforcer of rules.⁵⁶ Within close-knit groups, extralegal, norm-based dispute resolution processes may be more efficient than formal legal structures.⁵⁷ Norms literature illustrates that industry actors define their own rules,⁵⁸ and that the success of transactions depend upon trust, which reliance upon formal legal dispute resolution systems may undermine.⁵⁹

In 1991, Robert Ellickson published the canonical book *Order without Law: How Neighbors Settle Disputes*,⁶⁰ which argued that norms—implicit rules of behavior reflecting shared understanding of expression of communal values⁶¹—governed how parties resolved conflict.⁶² Ellickson’s case study of cattle ranchers in rural Shasta County showed that conflict over problems such as cattle trespasses were not resolved by reliance upon law and courts but instead through use of norm-based resolution mechanisms.⁶³

Ellickson’s work gave birth to a vast progeny of norm case studies,⁶⁴ documenting norms in close-knit groups including tuna sellers,⁶⁵ cotton merchants,⁶⁶ diamond merchants,⁶⁷ and stand-up comedians.⁶⁸ These case

56 See ROBERT C. ELICKSON, *ORDER WITHOUT LAW* 138 (1991) (advancing a theory that seeks to predict the content of informal norms and show which norms fall beyond “the shadow of the law”). *Id.* at 1.

57 See *id.* at 40–45 (showing that norms rather than law govern disputes among ranchers in Shasta County, California); see also Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) [hereinafter Bernstein, *Private Commercial Law*] (discussing norms and non-legal rule systems in the cotton industry); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 138–43 (1992) [hereinafter Bernstein, *Opting Out*] (exploring how the non-legal system of rules and norms governing the diamond industry developed and endured).

58 See RIDLEY, *supra* note 46, at 204.

59 See LARRY E. RIBSTEIN, *Law v. Trust*, 81 B.U. L. REV. 553, 570 (2001).

60 ELICKSON, *supra* note 56, at 1.

61 See Elinor Ostrom & Xavier Basurto, *Crafting Analytical Tools to Study Institutional Change*, 7 J. INSTITUTIONAL ECON. 317, 322 (2011) (defining norms as “prescriptions about actions or outcomes that are not focused primarily on short-term material payoffs to self. . . . [M]ost norms are acquired in the context of a community in which the individual frequently interacts”).

62 ELICKSON, *supra* note 56.

63 *Id.* at 40–45.

64 Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 548–49 (1998) (noting the prevalence of case-study norms scholarship was so great that it formed a new school of legal thought termed “the New Chicago School”).

65 See Eric A. Feldman, *The Tuna Court: Law and Norms in the World’s Premier Fish Market*, 93 CAL. L. REV. 313, 313–14 (2006) (arguing that state law can “outperform informal group norms by satisfying the business needs of close-knit merchants while simultaneously contributing to the shared values that underlie the success of their future transactions”).

66 See generally, Bernstein, *Private Commercial Law*, *supra* note 57 (examining the rules, norms and institutions that make up the cotton industry).

67 See Bernstein, *Opting Out*, *supra* note 57, at 138–43.

studies used ethnographic research to demonstrate that close-knit groups with shared values developed a set of norms that governed a shared understanding among that group of “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done.”⁶⁹

B. *New Institutional Economics*

This Article provides a new institutional economics analysis of the industrial features under which new governance emerges as a strategy to solve environmental problems. New institutional economics incorporates institutional laws, rules, customs, and norms into economic analysis.⁷⁰ Ronald Coase is a leading proponent of studying the institutions in which economic transactions and regulatory regimes occurred.⁷¹ Coase provides the classic example of going beyond “blackboard economics”⁷² to study the law as it is, and drawing lessons from real-world findings.⁷³ Coase suggests that studying the process of exchange without specifying the institutional setting “makes little sense”⁷⁴ and “is as if one studied the circulation of the blood without having a body.”⁷⁵

Coase believes that institutional details are particularly relevant when analyzing policy formation, providing a necessary complement to theoretical analysis. He argues that policy formation must understand how various institutions—firms, markets, and regulations—work in practice.⁷⁶ Legal scholars have, at times, returned to Coase’s focus on institutional details to provide

68 See Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1787–88 (2008) (noting that despite a strong norm against stealing jokes, when a joke is copied comedians do not sue for copyright infringement).

69 Cass R. Sunstein, *Social Norms and Social Rules*, 96 COLUM. L. REV. 903, 914 (1996).

70 For an overview of new institutional economics and its interaction with legal thought, see ERIC G. FURUBOTN & RUDOLF RICHTER, *INSTITUTIONS AND ECONOMIC THEORY* (1998); *HANDBOOK OF NEW INSTITUTIONAL ECONOMICS* (Claude Menard & Mary M. Shirley eds., 2005). For a useful collection of papers on new institutional economics, see COASEAN ECONOMICS, *supra* note 9.

71 A sampling of Coase’s institutional economics research includes the following: R. H. Coase, *How Should Economists Choose*, in *ESSAYS ON ECONOMICS AND ECONOMISTS* 15 (1994); R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); R. H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960).

72 Warren J. Samuels & Steven G. Medema, *Ronald Coase on Economic Policy Analysis: Framework and Implications*, in *COASEAN ECONOMICS*, *supra* note 9, at 164 (discussing Coase’s call for economists to move away from “blackboard economics” toward more realistic assessments of policy outcomes (internal quotation marks omitted)).

73 *Id.* at 165.

74 *Id.* (quoting R. H. Coase, *The Institutional Structure of Production*, 82 *AM. ECON. REV.* 713, 718 (1992)).

75 Ronald H. Coase, *The New Institutional Economics*, 140 *J. INSTITUTIONAL & THEORETICAL ECON.* 229, 230 (1984).

76 See Ronald H. Coase, *Discussion*, in *ECONOMICS OF FISHERIES MANAGEMENT* 60, 61 (A.D. Scott ed., 1970).

context and nuance to law and economic analysis.⁷⁷ This has primarily occurred within the norms literature, in which case studies providing excellent accounts of institutional detail abound.⁷⁸ But, legal scholars have largely left the work of identifying institutions and analyzing their inner workings to social scientists.⁷⁹

Recently, legal scholars have re-engaged with studying institutions using a new institutional economics approach.⁸⁰ The rise of “new institutional economics” has spilled over to law and economics, reenergizing the immersion of legal scholars in institutional details. Legal scholars have recently taken a new institutional economics approach to environmental law,⁸¹ labor law,⁸² speech institutions,⁸³ and contract law.⁸⁴

This Article provides a “gritty, detail-oriented”⁸⁵ new institutional economics analysis of new governance. To drill down to the appropriate level of industry detail, a great deal of narrowing must be done. This Article focuses on sustainability certifications, a subset of corporate social responsibility, which is a subset of private regulation. Within sustainability certifications,

77 See, e.g., NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994) (noting how Coase reveals an innovative perception of institutional implications); Neil K. Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350, 1351 n.1 (1981) (noting that Coase has “continuously revealed a creative perception of the basic institutional implications in economic analysis”).

78 Among the proliferation of case studies are articles documenting norms in industries: Feldman, *supra* note 65 (discussing tuna salesmen); Bernstein, *Private Commercial Law*, *supra* note 57 (discussing cotton merchants); Bernstein, *Opting Out*, *supra* note 57 (discussing diamond merchants); Olliar & Sprigman, *supra* note 68 (discussing comedians).

79 See Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 847 (2008) (integrating the lessons of institutional economics with Justice Holmes’s marketplace of ideas metaphor).

80 See David M. Driesen, *Contract Law’s Inefficiency*, 6 VA. L. & BUS. REV. 301, 334 (2011) (“An economic dynamic approach derived from institutional economics holds great promise for further improving our understanding of . . . law generally.”); Steven G. Medema, *Discourse and the Institutional Approach to Law and Economics: Factors that Separate the Institutional Approach to Law and Economics from Alternative Approaches*, 23 J. ECON. ISSUES 417, 417–18 (1989) (“This article explore the rhetoric of the interrelations between legal and economic processes as expounded in neoclassical law and economics, critical legal studies, and neo-institutional law and economics.”).

81 Nicholas Mercurio & Michael D. Kaplowitz, Essay, *Performance Indicators for Natural Resource and Environmental Policy: Contributions from American Institutional Law and Economics*, 11 DUKE ENVTL. L. & POL’Y F. 139 (2000) (applying an institutional law and economics approach to developing performance indicators for natural resource and environmental policy).

82 See Wenona T. Singel, *The Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487, 489–91 (2008) (applying new institutional economics to tribal labor laws).

83 See Blocher, *supra* note 79, at 822.

84 Driesen, *supra* note 80, at 302.

85 Blocher, *supra* note 79, at 847.

this Article examines the forest industry, in which new governance practices have operated for over seventy years.⁸⁶

C. Sustainability Certifications

Sustainability certifications communicate that participating firms are following a set of practices that supposedly enhance social welfare.⁸⁷ The certifier—typically an industry group or NGO⁸⁸—establishes a set of criteria reflecting a goal that it believes will appeal to consumers, such as “dolphin safe” or “fair trade.”⁸⁹ The organizing body creates a logo that firms meeting the criteria can place on their product, production facility, or website to market their products. The certifier often monitors firms to assure compliance with certification criteria. Consumers express preferences towards certain kinds of manufacturing processes or ingredients by purchasing certified products, relying upon the certifiers’ assurance that products bearing that

86 There are numerous important questions about the metrics with which the “success” of sustainability certifications within forest industry, or any industry, should be measured. The “success” of certifications in forestry could potentially be described in terms of the longevity of sustainability certifications within the industry, a consensus based upon siviculture analysis that they produce better forest outcomes than laws alone, Meidinger’s suggestion that they have “greened” the forest industry, or increasing formalization or inclusion of standards. See BENJAMIN CASHORE ET AL., GOVERNING THROUGH MARKETS: FOREST CERTIFICATION AND THE EMERGENCE OF NON-STATE AUTHORITY 11 (2004) (exploring “non-state market-driven” governance methods and systems in the forestry context); Meidinger, *supra* note 18, at 123. But, each of these criteria can and should be questioned. See Tracey M. Roberts, *Innovations in Governance: A Functional Typology of Private Governance Institutions*, 22 DUKE ENV’T L. & POL’Y F. 67, 72 n.17 (2011) (“[D]espite an appearance of ‘representativeness,’ the composition of the institution is not an accurate signal as to whether the institution is undertaking voluntary regulation that will have an overall beneficial effect on the greater community.”).

Questions must also be raised about the extent to which this private regulation has displaced government regulation; the opportunity costs of resources allocated to sustainability certifications; and the costs of certification on stakeholders including small timberland owners. There is considerable controversy concerning the relative merit of various sustainability certifications within the forest industry, but this academic debate has primarily occurred within schools of forestry and environmental science. Interdisciplinary scholars, particularly those with legal, sociological, and business backgrounds, can provide valuable perspectives to better define the metrics used to measure success in new governance.

87 For a taxonomy of private regulation, see Roberts, *supra* note 86, at 77–78.

88 The guidelines or standards associated with sustainability certifications are developed and monitored by non-state actors. See COMM. ON CERTIFICATION OF SUSTAINABLE PRODS. & SERVS., *supra* note 17.

89 Notably, firms can simply put these claims on their products without the certification process. Certifying lends legitimacy to these claims, however, as a third party assurance mechanism. See Margaret M. Blair et al., *The New Role for Assurance Services in Global Commerce*, 33 J. CORP. L. 325, 343 (2008) (analyzing how the rapid development of third party assurance systems in business is facilitating the spread of global norms for acceptable business behavior).

logo have been produced in accordance with the organizing bodies' guidelines.

Firms' motivation to participate in certification programs can include: market pressure, seeking access to broader markets, capturing price premiums, desire to forestall regulation, or desire to undermine more rigorous sustainability programs.⁹⁰ Sustainability certifications are active in fishing,⁹¹ chemical companies,⁹² conflict-free diamonds, fair trade coffee, tea, cocoa, and cotton.⁹³ Certification programs are lauded as promoting transparency, accountability, and public participation⁹⁴ relative to traditional regulatory regimes.⁹⁵ They "encourage proactive industry, reduce transactions costs and accelerate achievement of environmental targets due to less legal action and conflict."⁹⁶ Certifications transmit business practices to other parts of the world, particularly in environments where government regulation fails.⁹⁷

To situate sustainability certifications in the literatures discussed above,⁹⁸ they are an example of new governance, in which private actors regulate firm behavior against a backdrop of limited state involvement or enforcement but in parallel with existing governmental regulations on the industry. Corporate law scholars view sustainability certifications as a tool in the toolbox of corporate social responsibility, a form of third party assurances to substantiate claims of responsibility and insure uniform adherence to industry best practices.⁹⁹ Environmental law scholars have heralded the rise in sustainability certifications as the emergence of a post-market mechanism regime in which the state is dethroned as the sole regulatory power and pri-

90 See James M. McElfish, Jr. et al., *Inventing Nonpoint Controls: Methods, Metrics and Results*, 17 VILL. ENVTL. L.J. 87, 200 (2006).

91 See MARINE STEWARDSHIP COUNCIL, <http://www.msc.org/> (last visited Mar. 7, 2012). For a discussion of the Marine Stewardship Council, see Robert L. Glicksman, *Sustainable Federal Land Management: Protecting Ecological Integrity and Preserving Environmental Principal*, 44 TULSA L. REV. 147, 198–99 (2008) (extending "the trust concept beyond these areas by applying it to domestic federal public natural resources law in ways that current law does not accomplish"); *id.* at 150.

92 See Neil Gunningham, *Environment, Self-Regulation, and the Chemical Industry: Assessing Responsible Care*, 17 L. & POL'Y. 57–109 (1995) (examining self-regulation as a means for environmental protection).

93 See Blair et al., *supra* note 89, at 343–44.

94 See COMM. ON CERTIFICATION OF SUSTAINABLE PRODS. & SERVS. *supra* note 17, at 10.

95 See Dinah A. Koehler, *The Effectiveness of Voluntary Environmental Programs: A Policy at a Crossroads?*, in VOLUNTARY ENVIRONMENTAL PROGRAMS 11, 21 (Peter deLeon & Jorge E. Rivera eds., 2010); Mario Rizzo, *Which Kind of Legal Order? Logical Coherence and Praxeological Coherence*, J. DES ECON. ET DES ETUDES HUMAINES 497, 498 (1999). For a comprehensive comparison between sustainability certifications and government regulation, see COMM. ON CERTIFICATION OF SUSTAINABLE PRODS. & SERVS. *supra* note 17, at 10–13.

96 Koehler, *supra* note 95, at 14.

97 Blair et al., *supra* note 89, at 330. This transmittal may, however, undermine local and indigenous practices. *Id.*

98 See *supra* Part I.A.

99 See Blair et al., *supra* note 89, at 343–44.

vate actors take a larger role in controlling firm behavior.¹⁰⁰ Law and economics literature situates certifications as reflective of the idea that “production can be accomplished either through a series of market transactions and contracts, or under the guidance and control of a hierarchical governance structure within a firm.”¹⁰¹ Norms scholars, who have yet to comment directly on certifications, will likely view them as a new iteration of extralegal regulation similar to previously observed forms of industry self-governance.

In sum, sustainability certifications are a blend of corporate social responsibility, private regulation, and new governance. Forestry certifications are a longstanding example of a sustainability regime that has, arguably, produced positive environmental and social outcomes.¹⁰² Despite this, little research has been undertaken to analyze how forest sustainability certifications emerged and the conditions under which they have long played a role in industry practices. What are the institutional characteristics underlying the emergence of this form of private regulation in forest industry? This inquiry provides much-needed information about the institutional features in which proposals for new governance regimes to resolve environmental problems can develop.

II. NEW GOVERNANCE IN THE FOREST INDUSTRY

This Part contains an original case study of the first forest sustainability certificate, the American Tree Farm System, which started in 1940s. The case study is constructed from primary materials archived at the Forest History Society at Duke University. The analysis provides key, previously unexplored information about the industrial characteristics that gave rise to voluntary self-regulation within the forest industry. Then, it briefly describes the key features of newer, competing certifications.

A. *An Overview of Forest Sustainability Certifications*

There are three primary sustainability certifications for timberland and timber products in the United States.¹⁰³ In 1941, the American Tree Farm

100 See Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 EUR. J. INT'L L. 47, 53 (2006) (describing the non-formal administrative law certification programs for the global forest regulatory system).

101 Blair et al., *supra* note 89, at 326.

102 This is not to suggest that sustainability certifications are an unqualified success. For a discussion of the difficulty in defining success in new governance approaches and the considerations that I argue should be encompassed in such assessments, see Section IV.

103 Other certification regimes, including the Programme for the Endorsement of Forest Certification (a certification created in Europe), also operate in the United States. See *Caring for our Forests Globally*, PEFC, www.pefc.org (last visited Mar. 7, 2013); Carolyn Fischer et al., *Forest Certification: Towards Common Standards?* 1, 4 (May 2005) (unpublished manuscript) (on file with author).

There are an assortment of failed certification systems that began but did not gain traction within the forest industry and thus no longer exist, including the National Wood-

System certification was created to identify landowners who provided good stewardship of their land through responsible forest practices.¹⁰⁴ In 1993, an environmental nongovernmental organization spearheaded the Forest Stewardship Council certification, which verifies that wood is harvested using legal logging practices from the forest of origin as lumber moves through the supply chain.¹⁰⁵ In 1994, the forest industry responded to the creation of the FSC certification by starting a third forest sustainability certification: the Sustainable Forestry Initiative.¹⁰⁶ Forest sustainability certifications have received considerable scholarly attention.¹⁰⁷ This Article does not reiterate the important but already well-studied topics of providing comprehensive overviews of certifications,¹⁰⁸ the multitude of forestry certification standards available at the state and national level,¹⁰⁹ international certifications with limited following in the United States,¹¹⁰ efforts made to control climate change through forest policy,¹¹¹ or a detailed methodology of how auditing

land Owners Association and Backyard Forest Certifications. See Box 25, *Back Yard Tree Farms*, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA.

104 Tree Farm Certification, AM. TREE FARM SYS., <http://www.treefarmssystem.org/certification-american-tree-farm-system> (last visited Mar. 7, 2013).

105 *Our History*, FOREST STEWARDSHIP COUNCIL, <https://us.fsc.org/our-history.180.htm> (last visited Mar. 3, 2013).

106 *Basics of SFI*, SUSTAINABLE FORESTRY INITIATIVE, <http://www.sfiprogram.org/who-is-sfi/basics-of-sfi11/> (last visited Mar. 7, 2013).

107 A driving force of sustainability scholarship is Yale University's School of Forestry and Environmental Studies, which opened the "Yale Program on Certification," to "maintain[] a strong focus on forest certification as one unique and potentially revolutionary policy approach that harnesses the power of the marketplace to encourage compliance with environmental and socially responsible standards." YALE PROGRAM ON FOREST POLICY AND GOVERNANCE, YALE, <http://www.yale.edu/forestcertification/> (last visited Mar. 7, 2012).

108 For a comprehensive overview of various certification programs within the legal literature, see Meidinger, *supra* note 18, at 126 (providing an overview of the Forest Stewardship Council, International Organization for Standardization's ISO 14000, and the American Forest and Paper Association's Sustainable Forestry Initiative).

109 There are a multitude of forestry certification standards—Errol E. Meidinger, the legal scholar who has written most about forest certifications, counted between six and twenty certification programs in 2003, while another article stated that there were over fifty forestry certification standards in 2009. Meidinger, *supra* note 19, at 216 ("Starting with the Forest Stewardship Council (FSC) in 1993, forest certification programs proliferated rapidly."); see also Stephen Del Percio, *Revisiting Allied Tube and Noerr: The Antitrust Implications of Green Building Legislation & Case Law Considerations for Policymakers*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 239, 242–51 (2009) (providing an overview of USBGC's response to the criticisms of the LEED system).

110 For a discussion of two international certifications, the Confederation of European Paper Industries and Pan European Forest Certification (which have been adopted by both European and non-European companies but are not widespread throughout the United States), see Carolyn Fischer et al., *Forest Certification: Towards Common Standards?* 1, 4 (Resources for the Future, Discussion Paper 05-10, 2005).

111 See generally, Meinhard Doelle et. al., *New Governance Arrangements at the Intersection of Climate Change and Forest Policy: Institutional, Political and Regulatory Dimensions*, 90 PUBLIC

and monitoring is carried out.¹¹² It does, however, provide a novel account of the previously overlooked American Tree Farm System and outlines the key features of the more recent certifications. This case study lays the foundation for analyzing the industrial culture in which new governance emerged as a mechanism for obtaining environmental goals. This case study both contributes to the discussion of the conditions under which new governance is likely to emerge and the more controversial topic of how new governance efforts should be evaluated.

B. *The American Tree Farm System*

Virtually all scholars who have studied forestry certification programs attribute the beginning of forestry certification programs to the establishment of FSC in the early 1990s. But, in fact, the American Tree Farm System (“ATFS”) began identifying some forests as sustainably managed fifty years prior to the advent of the FSC. Unlike other forest certifications, the ATFS is tied to the timberland rather than the timber products produced from it.

Because there is little substantive information about the American Tree Farm System in legal scholarship,¹¹³ this section presents a somewhat

ADMIN. 37, 37 (2012) (using four case studies to investigate the “intersection between forest management and climate policy”).

112 Andrew Long, *Auditing for Sustainable Forest Management: The Role of Science*, 31 COLUM. J. ENVTL. L. 1, 44 (2006) (stating that FSC provides the best guarantee that an operation is sustainable by employing a consistent and highly detailed definition of “sustainable”).

113 Westlaw reveals eight results for “American Tree Farm System.” None of these results yields substantive information about the organization, its history, or development. See Del Percio, *supra* note 109, at 242 (discussing the battle between LEED and other rating systems which gives rise to potential antitrust implications to adopting the LEED rating system); Jody M. Endres, *Agriculture at a Crossroads: Energy Biomass Standards and a New Sustainability Paradigm?*, 2011 U. ILL. L. REV. 503, 507 n.15 (noting that the U.S. Scientific Certification Systems do not have a comprehensive sustainability regime for biomass cropping); Blake Hudson, *Promoting and Establishing the Recovery of Endangered Species on Private Lands: A Case Study of the Gopher Tortoise*, 18 DUKE ENVTL. L. & POL’Y F. 163, 208 (discussing the “Forested Flyways Gopher Tortoise Initiative” implemented by landowners from the American Tree Farm System in conjunction with conservation groups and government agencies); Jeffrey W. King, *An Overview of Green Construction Rating Programs*, in NEW DEVELOPMENTS IN GREEN CONSTRUCTION LAW 85 (2011) (listing the American Tree Farm System as one of several wood certification systems); McElfish et al., *supra* note 90, at 119 (discussing interviews with industry insiders about certification programs and listing the American Tree Farm System as one of the three certifications followed in Tennessee); Meidinger, *supra* note 19, at 216 n.8 (listing the forest certification programs included in a report from the Confederation of European Paper Industries); William C. Siegel & Wade Ballou, Jr., *The “Primarily for Sale” Provisions of Sections 1221 and 1231 of the Internal Revenue Code as Related to Timber Transactions*, 39 ARK. L. REV. 73, 92 (1985) (listing as the facts of a tax case that the plaintiff was a member of the American Tree Farm System); J. Jared Snyder, *Regional Greenhouse Gas Initiative Model Rule*, in GLOBAL WARMING 647 (ALI-ABA, 2008) (discussing the battle between LEED and other rating systems which gives rise to potential antitrust implication to adopting the LEED rating system).

extended history about the organization, which is vital to understanding why new governance emerged within the industry. This case study is constructed from primary materials archived at the Forest History Society at Duke University.

1. Inception and History of the American Tree Farm System

Domestic timber harvest practices underwent a large shift in the first half of the twentieth century: firms shifted from viewing the forest as a single-extraction “timber mine” to a sustained yield “tree farm.” Weyerhaeuser Timber Company was an early adopter of the forest-as-a-tree-farm philosophy. On June 12, 1941, the company devoted a 120,000 acre timberland near Elma, Washington as a “Tree Farm,” a renewable resource, forest management program.¹¹⁴ The positive publicity generated by the Weyerhaeuser Tree Farm prompted West Coast members to recommend that the National Lumber Manufacturers Association sponsor a national Tree Farm program.¹¹⁵ In early 1941, the National Lumber Manufacturers Association resolved to establish a national tree farm system¹¹⁶ called the “American Tree Farm System” (ATFS).¹¹⁷

“Tree Farm” was defined as “an area dedicated to the growing of forest crops for commercial purposes, protected and managed for continuous production.”¹¹⁸ Private landowners were granted the right to use the name “Tree Farm” if they met four standards, including: (1) using land for the production of forest crops, (2) providing reasonable protection from fire, insects and disease, and from damage by excessive grazing, (3) harvesting crops in a manner to assure future crops, and (4) furnishing information as requested regarding the progress of the Tree Farm.¹¹⁹

In exchange for meeting these standards, the organization provided timberland owners an insignia that signified that the land was maintained

114 *American Tree Farm System History*, THE FOREST HISTORY SOCIETY, <http://foresthistor.org/ATFS/> (last visited Mar. 7, 2013) [hereinafter FOREST HISTORY SOCIETY].

115 James C. McClellan, *Analysis of the American Tree Farm System*, at 1. Report for the American Forest Products Industries, Inc. Box 1, TF History General 1 Folder, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA.

116 Richard Lewis, *Tree Farming: A Voluntary Conservation Program*, 25 J. FOREST HIST. 166, 168 (1981).

117 *Id.* at 166.

118 *What is a Tree Farm?* Box 1, Folder 1, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA (“[T]he production and management . . . assures a continuous growing forest and repeated forest crops.”); *Why Tree Farms*, Box 1, Folder 1, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA.

119 Joint Committee on Forest Conservation, *West Coast Tree Farms: The Next Step in Timber Growing in the Douglas Fir Region*, 3 (1943). Some state organizations of Tree Farm Systems maintained individual standards of forest practices in addition to these universal standards. *What is a Tree Farm?* Box 1, Folder 1, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA.

according to the ATFS standards.¹²⁰ Participants posted the tree farm insignia signs on their property and used it in their letterheads and advertising.¹²¹ Tree Farms were sponsored regionally in the West and by state in the East and Midwest.¹²² In eastern and central states, state forestry departments administered the program—including promoting, inspecting, and approving the certification and dedication of Tree Farms.¹²³ In the West, Forest Practice Committees comprised of industrial foresters administered the programs.

From its inception in 1941, growth of the ATFS was rapid.¹²⁴ Tree Farms comprised 120,000 acres of timberland in 1941, 5 million acres in 1942, 7.5 million acres in 1943, and 17 million acres in 1949.¹²⁵ The certification standards were very low initially, with many certifications granted in recognition of established management.¹²⁶ Four hundred landowners in Alabama and Arkansas were largely certified without on-the-ground inspection of their property.¹²⁷ A “publicity man,” rather than a forester, conducted the program in those states.¹²⁸ The certification came under scrutiny,¹²⁹ criticized of being used to “cover up for a lack of sound conservation practices.”¹³⁰ Further, there was a misperception among the public that the ATFS was a tax dodge exempting landowners from taxes.¹³¹

120 See Memo Dated March 31, 1945 Box 1, Folder 1, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA.

121 See American Tree Farm Systems, Box 1, Folder 1, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA.

122 McClellan, *supra* note 115, at 8.

123 See *id.* at 8–9; see also Donald W. Smith, *New Life for America's Tree Farms*, Southern Forest Institute Inc. NEWS (undated) Box 3, TF Historical 2, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA (“ATFS won enthusiastic support from . . . many state forestry agencies. State forestry personnel in all but a few states quickly became active inspectors.”).

United States Forest Service foresters (federal employees) were prohibited from participating in the Tree Farm program except on their own time, until 1988. Don Smith, *U.S. Forest Service Involvement in the Tree Farm Program*, Memorandum to Southern Tree Farm Chairman (October 6, 1988) Box 3, TF Historical 2, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA.

124 See *id.*

125 See Paul F. Sharp, *The Tree Farm Movement: Its Origin and Development*, 23 AG. HIST. 41, 41 (1949).

126 See *id.* at 42.

127 McClellan, *supra* note 115, at 6.

128 See *id.*

129 See *id.* at 7; see also Editorial, *What's In a Name*, 40 J. FORESTRY 595, 596 (1942) (noting that the singular focus on the growing of wood for commercial purposes “[d]isregarded many other products and services that forestry produces, such as forage, wildlife, recreation, amelioration of climate,” etc.).

130 IWA-CIO Resolution adopted at its internal convention. Woodworker, 10/8/52, Box 1, TF History General #2, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA.

131 See McClellan, *supra* note 115, at 2.

By 1946, about half of the states participated in the ATFS, each with regional organization and certification criteria.¹³² In 1946, the National Lumber Manufacturers Association delegated responsibility for the ATFS to the subsidiary American Forest Products Industries. In 1954, the central organization polled industry stakeholders on a variety of topics in an effort to improve the reputation of the program.¹³³ Stakeholder input ultimately led to the November 5, 1954 adoption of the “Principles of the American Tree Farm System,” which specified the definition, sponsorship, purpose, requirements, and inspection of Tree Farms.¹³⁴

Despite early growth, the ATFS was at risk of collapse by the late 1960s due to insufficient funding and inattentive leadership.¹³⁵ Industrial foresters did not believe that the Tree Farms produced public relations benefits and viewed tree farm inspections as unpaid work.¹³⁶ Only ten states had functioning Tree Farm organizations.¹³⁷

In 1968, the American Forest Institute, the successor to American Forest Product Industry, assumed responsibility for the ATFS.¹³⁸ It began a large campaign to rejuvenate the ATFS,¹³⁹ including re-inspecting tree farms, excluding under-performing timber operations, and bolstering state tree farm organizations.¹⁴⁰ The success of the certification continued to wax and wane from the 1970s to 1990s.¹⁴¹

Throughout the 1990s and early 2000s, the ATFS instituted a number of measures to increase the credibility of its certification.¹⁴² Key among the changes at the ATFS was independent, third-party certification of landowner compliance with certification standards. Today, credible sources, like the

132 *See id.*

133 *See id.* at 3.

134 *American Farm System Timeline*, THE FOREST HISTORY SOCIETY, <http://foresthistor.org/ATFS/timeline.html> (last visited Mar. 7, 2013).

135 *See* FOREST HISTORY SOCIETY, *supra* note 114.

136 *See* McClellan, *supra* note 115, at 20.

137 Lewis, *supra* note 116, at 169.

138 Smith, *supra* note 123, at 4.

139 *See id.*

140 *See* Lewis, *supra* note 116, at 169.

141 *Compare* Lewis, *supra* note 116, at 169 (“By the mid-1970s, the integrity of the national system had been reestablished, and the program was once again growing.”), *and* FOREST HISTORY SOCIETY, *supra* note 114 (“After many years of struggle and retrenchment, in the 1990s the American Tree Farm System emerged as a truly national program with universally accepted national codes and standards.”).

142 For example, in 1991, the American Forest Council hired a consulting firm to assess internal and external perceptions of the American Tree Farm System. *See, e.g., A Survey on the Image of Tree Farms and Tree Farmers (As perceived by American Adults)* (January 1991); *A Survey on Tree Farming and the Tree Farm Program (As Perceived by Certified Tree Farmers)* (January 1991) Tree Farm Review, Box 3, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA.

accounting firm Price Waterhouse Coopers, conduct risk assessments necessary to evaluate whether landowners are meeting certification standards.¹⁴³

2. Factors Animating the Creation of the American Tree Farm System

It is useful to contextualize the emergence of the ATFS against the backdrop of the conservation movement and timber industry at the time of the inception of the program. Members of the forest industry created the ATFS to address perceived problems of dwindling supply, threatened government regulation, risk created by wildfire, and negative public perception.¹⁴⁴ Each of these factors is discussed below.

First, the forest industry was struggling to adapt to declining virgin timber stands.¹⁴⁵ Prior to the late 1920s, commercial logging operations were typically conducted as final-period transactions in which landowners would purchase property, clear cut it, and then sell or abandon it.¹⁴⁶ Forest resources were approached as a “timber mine” from which the resource was extracted a single time.¹⁴⁷ Conservationists anticipated that the decline of virgin (previously-uncut) tree stands would force the timber industry to adopt conservative forestry techniques.¹⁴⁸ In 1927, David Mason introduced the idea of “sustained yield” forestry, advocating for limiting the number of

143 Brigitte Johnson, *Nearly 783,000 Acres of Newly Certified Forestland Give Boost to Alabama’s Paper Industry*, AMERICAN TREE FARM SYSTEM (Sept. 20, 2011), <http://www.treefarm-system.org/alabama-acres> (noting that Price Waterhouse Cooper conducted a risk assessment confirming that privately owned Alabama forestlands complied with the American Tree Farm System certification standards).

144 Other, less well-documented, motivations may have also prompted industry actors to create the ATFS. For example, shortly after the enactment of the Tree Farm Program, Congress enacted legislation to tax profits gained from timber harvest as capital gains, rather than income, producing a lower tax rate. Wilson Compton, *Why Tree Farms? Taxation and Tree Farms*, in J.C. McClellan TF History, Box 1, Folder 1, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA.

Further, in 1941, the National Lumber Manufacturers Association entered into a National Lumber Decree (a consent decree) enjoined the organization from restricting or increasing the quantity of timber produced *except* in furtherance of sustained forest managements in accord with principles of forest management—a program that ATFS likely satisfied. See National Lumber Decree, (May 6, 1941) J.C. McClellan TF History, Box 1, Folder 1, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA. Several scholars commenting on this Article, including Jonathan Rose, have suggested that the antitrust implications of sustainability certifications across industries is a topic worthy of future study.

145 For a discussion of this problem, see Samuel T. Dana, *Industry Discovers Forestry*, MICH. ALUMNI Q. REV. 331, 332 (Summer 1952).

146 FOREST HISTORY SOCIETY, *supra* note 114 (“For decades, high tax rates on forestland gave timberland owners little incentive to hold on to the lands and reforest them after logging. Rather, it was cheaper to buy timberlands, log them, and then walk away and default on the taxes.”).

147 Lewis, *supra* note 116, at 166.

148 See Sharp, *supra* note 125, at 42 (citing Walker B. Tilley, *American Tree Farms*, 42 J. FORESTRY 796, 797 (1944)).

cut trees each year to ensure the continued capacity of the forest to provide wood product.¹⁴⁹ In 1929, author Stewart H. Holbrook challenged this single-use of timberlands and coined the term “timber farming” to reflect a concept of timberland being cut and re-harvested.¹⁵⁰ Conservationist Gifford Pinchot supported the view that forestry should operate as tree farming.¹⁵¹

Second, and in a related point, members of the timber industry sought to avoid government regulation or public ownership of timberlands.¹⁵² In 1941, the United States Forest Service announced that there were two alternatives for managing forests: either public ownership of timberland or national regulation of forestry practices.¹⁵³ Industrial timberland owners objected to national regulation¹⁵⁴ and instead proposed self-regulation¹⁵⁵ or state regulation¹⁵⁶ of forest practices. Forest Service Chief Lyle F. Watts criticized the creation of the ATFS as an attempt by industry to avoid federal regulation of private timberlands.¹⁵⁷ One publication described the success of the industry in offsetting the push for public forests and national regulation as “[winning a] major policy battle with the United States Forest Service by the use of public relations.”¹⁵⁸

Third, wildfire threatened the viability of commercial sustained-yield forestry,¹⁵⁹ particularly because timberlands were self-insured.¹⁶⁰ Tree Farms were viewed as an opportunity to educate the public about the importance of

149 David T. Mason, *Putting the Brakes on Timber Production*, (1927) Manuscript Collection, File: Mason, David T., American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA.

150 *Id.* There is some argument about when the term was coined, with one author attributing it to a 1917 speech by M.L. Alexander, commissioner of the Louisiana Department of Conservation. See Virgil W. Cothren, *A New Look at the American Tree Farm System*, Speech presented at 1973 Meeting of the Southern Forest Institute, Atlanta, Georgia (Feb. 20–21, 1973), “TF Historical 2,” Box 3, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA.

151 GIFFORD PINCHOT, *BREAKING NEW GROUND* 31–32 (1947).

152 See Sharp, *supra* note 125, at 43.

153 *Id.* at 43 (citing U.S. FOREST SERVICE, *REPORT OF THE CHIEF OF THE FOREST SERVICE* 13 (1941)).

154 For a discussion of the legal challenges industry posed to federal regulation of forestry, see Louis Hamill, *Public Relations Programs and Forest Land Use*, 53 *GEOGRAPHICAL REV.* 459, 460 (1963). See also Dana, *supra* note 145, at 337 (discussing regulatory challenges).

155 See Sharpe, *supra* note 125, at 43.

156 For a discussion of support of state legislation by the forest industry to avoid the “danger of ‘regimentation from outside the state[,]’” see Editorial, *supra* note 129, at 595.

157 *American Tree Farm Systems*, Box 1, Folder 1, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA.

158 Hamill, *supra* note 154, at 459.

159 See generally Karen M. Bradshaw, *An Overview of Modern Wildfire Law*, 21 *FORDHAM ENVTL. L. REV.* 445 (2010) (explaining that the threat of wildfire diminishes the viability of ongoing timber operations).

160 See Karen M. Bradshaw, *Norms of Fire Suppression Among Public and Private Landowners*, in *WILDFIRE POLICY* 89, 94–95 (Karen M. Bradshaw & Dean Lueck eds., 2012).

fire prevention.¹⁶¹ In conjunction with the advent of the ATFS, Weyerhaeuser invested in an infrastructure of lookout towers, telephone lines, and roads to enable firefighting efforts.¹⁶² The Tree Farm movement was applauded as “accomplishing a feat of indoctrination unparalleled in conservation history” by arousing public interest in the danger of wildfire where the Forest Service and conservation efforts had failed.¹⁶³

Fourth, the industry sought to respond to the changing public perception of forestry.¹⁶⁴ Managers sought to portray themselves as conservators, rather than devastators, of forest resources.¹⁶⁵ The ATFS adopted what were, at the time, considered best practices, beyond what was legally required and yet still fueled by a profit motive.¹⁶⁶ Participation with the ATFS was not, however, philanthropic preservation of swaths of timberland¹⁶⁷, but instead a mechanism to secure ongoing commercial production.¹⁶⁸

Over time, the public relations component of the ATFS became increasingly important. A 1967 report noted that the ATFS was “the first, last and best hope the industry has of demonstrating to small landowners, govern-

161 See Jamie Lewis, *American Tree Farm System Turns 70*, PEELING BACK THE BARK BLOG (June 12, 2011), <http://fhsarchives.wordpress.com/2011/06/12/american-tree-farm-system-turns-70>.

162 See *American Tree Farm System History*, *supra* note 146.

163 Sharp, *supra* note 125, at 44.

164 The Tree Farm movement is considered “an inspired public relations program” for supporting self-regulation of forestry activities by emphasizing private conservation efforts. Lewis, *supra* note 147, at 168. Little is known about the strategy to change public perception of forestry, although appeals to the public about the conservation efforts of the American Tree Farm System extend from the very public initial dedication of tree farms to later television advertisements featuring celebrities including Andy Griffith and Jimmy Carter. See *Inventory of the American Tree Farm System Records, 1924–2007*, FOREST HISTORY SOCIETY, http://www.foresthistory.org/ead/American_Tree_Farm_System.html (last visited Mar. 7, 2013).

165 See Dana, *supra* note 145, at 333 (“Corporations may be soulless, but the individuals who run them are not. . . . [T]hey prefer public recognition as conservators, rather than as devastators, of a basic resource.”).

166 At the public dedication of this Clemons tree farm, Governor Arthur B. Langlie said, “This isn’t a charity, but a business venture. If it succeeds, it will set the pace for millions and millions of acres of timberland.” Shaun Trujillo, *New Collection: American Tree Farm System Records*, PEELING BACK THE BARK BLOG (June 22, 2010), <http://fhsarchives.wordpress.com/2010/06/22/new-collection-american-tree-farm-system-records> (embedding a video of a Weyerhaeuser Company public service announcement developed in celebration of the fortieth anniversary of the Clemons Tree Farm).

167 See Dana, *supra* note 145, at 335 (“The Crown Zellerbach Corporation states frankly: ‘There is nothing philanthropic about these tree farms.’”).

168 *How to Start a State Tree Farm Program*, Box 1, Folder 1, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA (“No [one] should start a Tree Farm without first determining that it will be a profitable venture. Tree Farms are for the commercial production of forest products and are not to be confused with efforts to grow trees for esthetic purposes.”).

ment officials, politicians and people in general that it cares.”¹⁶⁹ In 1983, an employee of the Weyerhaeuser Company recommended that the ATFS be developed into a marketing agency.¹⁷⁰ In 1991, the ATFS commissioned a report about public perception of its program.¹⁷¹

The emergence of the American Tree Farm System marks the advent of a sustainability certification within the timber industry. Fifty years after the creation of this certification, two new certifications emerged, developed by the Forest Stewardship Council and the Sustainable Forest Initiative. Below is a brief summary of these certifications, details of which are well-documented in environmental law.

C. Subsequent Sustainability Certifications

1. Forest Stewardship Council

In the 1980s, “environmental [nongovernment organizations] raised public concerns about rapid deforestation, . . . [including] clear-cutting practices in North America.”¹⁷² Government regulation was failing to address deforestation.¹⁷³ In 1993, a coalition of non-governmental organizations lead by the World Wide Fund for Nature started the nonprofit Forest Stewardship Council, a certification regime.¹⁷⁴

FSC accredits third-party auditors to certify forestry firms who comply with sustainable forest management practices.¹⁷⁵ The sustainability standards and governance of the organization are controlled by nongovernmental organizations with ties to environmental, social justice, and industry representatives.¹⁷⁶ Voting membership is comprised of an economic chamber representing commercial interests, a social chamber for socially beneficial forest management interests, and an environmental chamber for environmentally friendly forest stewardship.¹⁷⁷ FSC is an umbrella organization that sets certification standards for independent certifiers, who determine that harvesters meet compliance standards prior to marketing their wood as FSC certified.¹⁷⁸

169 Archie Crafo, What If We Didn't Have a Tree Farm Program, Address to Southern Forest Institute—Area III (May 13, 1971) (citing Lincoln Research Center Report, *Challenge of the Seventies* (1967)).

170 Letter from T.J. Ebner, Weyerhaeuser Co., to Don Smith, Chief Forester, SFI (January 24, 1983) Box 3, TF Historical 2 Folder, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA.

171 See *supra* note 142.

172 Fischer et al., *supra* note 110, at 1.

173 See generally BENJAMIN CASHORE ET AL., CONFRONTING SUSTAINABILITY (2006), available at http://environment.research.yale.edu/documents/downloads/o-u/report_8.pdf (providing an overview of forest certification in the developing world).

174 See *id.* at 8.

175 *Id.*

176 *Id.*

177 Fischer et al., *supra* note 110, at 3.

178 *Id.*

FSC describes its standards as “the highest social and environmental requirements in the forestry sector,”¹⁷⁹ an assessment with which leading academics¹⁸⁰ and environmentally conscious companies seemingly agree.¹⁸¹ Williams Sonoma catalogues bear the FSC logo,¹⁸² and Wal-Mart¹⁸³ and Lowe’s prefer FSC over other certification standards.¹⁸⁴ Empirical studies show that FSC produces quantifiable, positive impacts on forests.¹⁸⁵ “FSC’s key alliances are with environmental [nongovernmental organizations] and buyers groups, as well as [its] certified producers and sellers.”¹⁸⁶ Despite its popularity with environmental groups and commentators, FSC initially experienced somewhat limited success with large industrial actors¹⁸⁷ and was, at first, primarily adopted by smaller timberland owners.¹⁸⁸

2. Sustainable Forestry Initiative Certification

Forestry landowners were skeptical and hostile towards the founding of the FSC because it was created by nongovernmental organizations rather than members of industry.¹⁸⁹ But, forest industry insiders recognized the value of sustainability certifications as a mechanism to improve their public

179 Glicksman, *supra* note 173, at 199 (internal quotation marks omitted).

180 See, e.g., Andrew Long, *Auditing for Sustainable Forest Management: The Role of Science*, 31 COLUM. J. ENVTL. L. 1, 44 (2006) (“For the consumer seeking to purchase forest products from a well-managed source, FSC certification provides the greatest guarantee that an operation’s management is sustainable.”); Meidinger, *supra* note 19, at 222 (“At present, the FSC operates the most demanding certification program . . .”).

181 Williams-Sonoma differentiates between FSC and SFI certification, noting that “FSC is the gold standard when it comes to forest products certification systems.” *Volume 2: Williams-Sonoma—NewPage Case Study the Ecology of Sustainability*, AWARENESS INTO ACTION: THE SUSTAINABLE ENTERPRISE, <http://www.awarenessintoaction.com/casestudies/NewPage-Williams-Sonoma-fsc-sfi-certification-pefc.html> (last visited Mar. 7, 2013) (internal quotation marks omitted). Williams-Sonoma pressed its supplier for catalogue materials to work with companies that obtained FSC certification, not SFI certification. See *id.*

182 See *id.*

183 See WALMART, SUPPLIER SUSTAINABILITY ASSESSMENT 20, 28, (2009), available at http://www.bpaww.com/Bpaww_com/HTML/iCompli/Downloads/2012/CSR/Walmart_Sustainability_Assessment.pdf.

184 Fischer et al., *supra* note 110, at 8.

185 See Deanna Newsom et al., *Does Forest Certification Matter? An Analysis of Operation-Level Changes Required During the SmartWood Certification Process in the United States*, 9 FOREST POL’Y & ECON. 197, 206 (2006) (“Our empirical analysis of FSC-certified operations provides practical evidence that forest certification does have quantifiable on-the-ground impacts, assuming all conditions are implemented.”).

186 Meidinger, *supra* note 18, at 220–21 (footnote omitted).

187 See Benjamin Cashore et al., *The United States’ Race to Certify Sustainable Forestry: Non-State Environmental Governance and the Competition for Policy-Making Authority*, 5 BUS. & POL. 219, 220 (2003).

188 See Jeffrey Hayward & Ilan Vertinsky, *High Expectations, Unexpected Benefits What Managers and Owners Think of Certification*, J. FORESTRY, Feb. 1999, at 13, 16.

189 See Meidinger, *supra* note 100, at 54 (2006). Interestingly, American, European, and Canadian forest industries each developed an industry-sponsored certification standard to compete with the externally created FSC standard. See Fischer et al., *supra* note

image without competing with one another on environmental issues.¹⁹⁰ In the 1990s, the forest industry developed the Sustainable Forestry Initiative (SFI) as an outgrowth of the pre-existing American Forest and Paper Association.¹⁹¹ SFI has undergone significant changes over time. Critics have described the initial standard as a vague code of standards. Early SFI standards did not commit to indigenous and traditional use rights, worker safety, or to local, employment, and community involvement.¹⁹² In response to ongoing public scrutiny of the program and a desire to compete with FSC, SFI institutionalized its practices and structure.¹⁹³ SFI began promoting third-party audits in 1998,¹⁹⁴ now operates under the control of a multi-stakeholder board,¹⁹⁵ and has developed requirements pertaining to indigenous and traditional use rights, worker safety, local employment, and community involvement.¹⁹⁶

III. INDUSTRIAL CULTURE UNDERLYING THE EMERGENCE OF NEW GOVERNANCE

Despite extensive scholarship on forest sustainability certifications, there is limited analysis as to why certifications have lasted a particularly long time within the forest industry. The void is understandable because many of the leading researchers of forest certifications are themselves entrenched within schools of forestry, rendering the unique characteristics of the industry unremarkable to them.¹⁹⁷ Legal scholars have focused on the features¹⁹⁸ or potential effects¹⁹⁹ of certifications rather than on the characteristics of the forest industry.

This Article addresses this void by examining the question: why have sustainability certifications played an ongoing role in governing the forest indus-

110, at 4–6 (describing the Pan European Forest Certification, SFI, and Canadian Standard Association).

190 See Meidinger, *supra* note 18, at 205–06.

191 See Benjamin Cashore et al., *Forest Certification (Eco-labeling) Programs and Their Policymaking Authority: Explaining Divergence Among North American and European Case Studies*, 5 *FOREST POL'Y AND ECON.* 225, 232–33 (2003).

192 *Id.* at 209. In 1996, however, the American Forest and Paper Association established a stand-alone initiative to improve workplace safety. *Id.* at 218.

193 *Id.* at 216–17.

194 Cashore et al., *supra* note 187, at 233.

195 Fischer et al., *supra* note 110, at 5.

196 Email correspondence with Kathy Abusow, President & CEO, Sustainable Forestry Initiative Inc. March 2, 2012) (on file with author). For a discussion of institutionalization of forest sustainability certifications, see generally Roberts, *supra* note 87, at n. 17.

197 See *supra* text accompanying note 107.

198 See generally Long, *supra* note 112 (discussing the role of science in various forest auditing regimes); Meidinger, *supra* note 18 (providing an overview of private regulatory efforts).

199 See generally Meidinger, *supra* note 18 (providing an overview of private regulatory efforts); Meidinger, *supra* note 19, at 216 (“Starting with the Forest Stewardship Council (FSC) in 1993, forest certification programs proliferated rapidly.”).

try for over seventy years? What features of the forest industry contribute to the ongoing certification program within it? This analysis draws upon legal, economic, and sociological literatures to argue that the features present within the forest industry are key to the sustained presence of private regulation within it.²⁰⁰

Three features are inexorably linked to the longevity of forest sustainability certifications: (1) strong, preexisting norms within the industry, (2) an industrial model in which industry actors have superior information relative to bureaucrats on which to formulate rules, and (3) competition among private regulators to set and enforce meaningful rules.

A. *Norms among Industrial Foresters*

Theorists have hypothesized that there is a link between strong, existing social structures and the success of regulation—if a private regulatory regime conforms to existing social structures, it has a greater likelihood of success.²⁰¹ This section identifies and discusses the norms in the forest industry that have played a crucial role in the longevity of sustainability certifications.

1. Norms in Industrial Forestry

The forest industry operated under norms and private rules before the advent of new governance.²⁰² Forest managers conducted themselves according to a set of norms governed by reputational bonds and social sanctions.²⁰³ Both industrial and government foresters (that is, employees of state and federal forestry agencies) operated under a shared set of norms.²⁰⁴ Disputes between foresters were resolved using norm-based dispute resolution mechanisms, without reliance upon the laws governing the conflict.²⁰⁵ This cooperation diminished, however, when state and federal agencies evolved to prioritize goals other than commercial timber harvest.²⁰⁶

Systems of norms are most robust when participants have: (1) repeated interactions, (2) a great deal of information about each other, and (3) a small number of group members.²⁰⁷ The forest industry features each of these characteristics. Foresters comprise a small group constrained by stringent licensing requirements. They typically attend one of a handful of col-

200 See *supra* note 21 and accompanying text.

201 See Bernstein & Cashore, *supra* note 54, at 34 (“Criteria of legitimacy . . . are thus contingent on historical understandings . . . at play and the shared norms of the particular community or communities granting authority”); Meidinger, *supra* note 18, at 129 (“[Certifications] rely heavily on preexisting social and economic networks to amplify their credibility.”).

202 See Bradshaw, *supra* note 160, at 99.

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.*

207 DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 12 (1990).

leges offering forestry degrees, work for private industry for decades prior to obtaining managerial positions, and interact regularly both commercially and socially.²⁰⁸ Further, there are a limited number of companies that conduct commercial timber operations. Large timber operators enjoy considerable economies of scale and have subsumed smaller companies as industry profit margins lowered. Thus, the relatively high barrier to entry to becoming either a landowner or a forester historically produced a small, homogeneous group of industry actors.²⁰⁹

Foresters working for competing firms regularly transact on issues ranging from snow removal to fire protection.²¹⁰ They cooperate to finance, build, and maintain private road systems, enforce trespassing violations, resolve issues of timber trespass, and extinguish wildfires. Contracts are enforced using a variety of norm-based enforcement mechanisms rather than legalized dispute resolution techniques.²¹¹ Industry actors have a strong sense that relationships should be governed by a spirit of cooperation and well-established norms.²¹² Foresters stringently enforce best practices and punish those who violate shared norms.²¹³

Three specific norms within the timber industry seemingly propel high participation rates in certification regimes; the norms of: (1) cooperation for the sake of relationship preservation—a sense that land managers will transact in the future and thus need to preserve relationships instead of seeking maximum individual benefit in each transaction, (2) industry protection—acting in solidarity against perceived threats of regulation or boycott, and (3) participation—that established land managers participate in maintaining and promoting the forest industry through participation in licensing boards, industry organizations, alumni organizations, agency appointments, and conferences.

2. Norms and the Sustainability Certifications

Pre-existing norms, rules, social sanctions, and merchant groups enabled the forest industry to respond quickly to the creation of the NGO-created FSC certification. Foresters used preexisting industry groups—the American

208 See Bradshaw, *supra* note 160, at 98.

209 Recently, however, transactions of large timberland parcels in the Northeast have shifted from transfers between industry actors to include other buyers, including conservationists and financial companies investing in timberland, such as REITs and TIMOs. For a discussion of changing timberland holding and transfer practices, see LLOYD C. IRLAND ET AL., *LARGE TIMBERLAND TRANSACTIONS IN THE NORTHERN FOREST 1980–2006*, at 17–18 (Yale Univ. Sch. of Forestry & Envtl. Studies, Global Inst. of Sustainable Forestry Research Paper No. 011, 2010).

210 See Bradshaw, *supra* note 160, at 98–99.

211 *Id.*

212 *Id.*

213 See McElfish et al., *supra* note 90, at 118–19 (stating that a government agent being interviewed about complaints filed with a Tennessee agency noted that the complaints came from members of the forest industry itself).

Paper and Forest Products Association and its subsidiary Sustainable Forestry Initiative (SFI)—to develop a competing private regulatory system. Incorporating certifications into existing institutions allowed an almost immediate response—SFI was transformed into a certifying organization within one year of the establishment of FSC.

Notably, the forest industry was already familiar with the idea underlying sustainability certifications—many landowners were participants in the ATFS for decades prior to the advent of FSC or SFI.²¹⁴ Thus, ATFS laid the groundwork of educating foresters about the day-to-day details of participating in a certification system. ATFS also illustrated benefits to certification regimes beyond the illusory price premium.

This important point has received little recognition. A key incentive for firms to participate in certification regimes is that companies participating in its program will have access to broader markets and command a price premium for certified goods.²¹⁵ But, the price premium has proven nonexistent for forest products: empirical evidence repeatedly indicates that neither certification produces a price premium for participants.²¹⁶ Further, industrial foresters know there is not a price premium for certified timber²¹⁷ and have known that it was likely an illusion as early as the late 1960s.²¹⁸

Why, then, do profit-maximizing businesses continue to participate in costly certification schemes that do not appear to produce a positive return on investment? The explanation appears to rest in the strength of norms to participate in industry groups, cooperate with other landowners, and protect the industry against threats of increased environmental regulation. Further, industry certifications served to reinforce norms of cooperation among the industry.²¹⁹ Thus, sustainability certifications both satisfy and reinforce the norm requiring foresters to participate in industry activities.

214 Although the ATFS certifies timberland rather than timber products, the underlying concept of sustainability certification is the same in both cases.

215 See McElfish et al., *supra* note 90, at 200.

216 See COMMITTEE ON CERTIFICATION, *supra* note 17, at 14 (noting that forest certifications do not provide a price premium); Fischer et al., *supra* note 110, at 1 (“[P]rice premiums have been elusive for [timber] producers.”); McElfish et al., *supra* note 90, at 200 & n.576 (noting that certifications do not provide a price premium).

217 See McElfish et al., *supra* note 90, at 119 (noting that a forester interviewee said that if there was a premium price for certified wood, then “everyone would want to ‘jump on the bandwagon’”).

218 James C. McClellan, *Critique of Lincoln Report: “Challenge of the Seventies,”* at 4, Box 1, TF General History 4 Folder, American Tree Farm System Records, Library and Archives, Forest History Society, Durham, NC, USA (“Only two companies now give a bonus to tree farmers for their wood. With the paper industry being a low profit industry the bonus idea is probably impractical.”).

219 Don Smith, *Why Be A Tree Farmer? (What the Tree Farmer Gets from the American Tree Farm Systems)*, 1 Inter-Office Memorandum (August 31, 1977), Box 3, TF Historical 2 Folder, Duke Forest History Society (describing landowners who became Tree Farmers as gaining “‘brother-in-law’ status” with others in the industry).

B. Forest Users have a Comparative Advantage at Developing Rules Regulating Forest Use Relative to Bureaucrats

Users often have superior rule-making ability relative to bureaucrats because of their particularized knowledge of their setting and situation.²²⁰ Forest certifications, at their core, create a set of rules that companies must follow;²²¹ the sanction for violating rules is losing the ability to advertise a product as certified. Unlike government regulatory regimes, industry-produced sustainability certifications are developed and enforced by resource users. This section draws upon sociological, ecological, and economic studies of rules governing forest usage²²² to argue that the nature of the forest industry was particularly well-suited for the emergence of new governance regulation.

Nobel laureate Elinor Ostrom devoted a significant portion of her career to studying how communities respond to rules governing the protection of forests. Relying upon a large, international database of worldwide forestry practices, Ostrom debunked two myths about forestry practice with direct relevance to this project. Her empirical studies of rules regulating forest use indicated that user-generated and enforced rules are superior at preventing deforestation relative to top-down regulation developed and enforced by outsiders.

First, Ostrom disproved that local people are unable to make rules appropriate for governing resources.²²³ Ostrom's empirical research indicated that forest usage and protection rules generated by local users produced superior protection against deforestation relative to externally-developed rules.²²⁴ Users make appropriate decision-makers in environmental contexts, where they may be the first to detect resource deterioration and recovery, and thus be able to adjust the rules accordingly.²²⁵

Sustainability certificates within the forest industry benefit from the quick transmission of information among users. Orly Lobel argues that new

220 See F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 524 (1945); see also Ostrom & Basurto, *supra* note 61, at 319 (explaining resource users who have some independent decision making ability "frequently achieve better economic (as well as more equitable) outcomes than when experts do this for them"); Mario J. Rizzo & Douglas Glenn Whitman, *The Knowledge Problem of New Paternalism*, 2009 BYU L. REV. 905, 922–24 (2009) (analyzing the ability of individuals to make choices compared with policymakers' abilities).

221 See Ostrom & Basurto, *supra* note 61, at 322.

222 See generally PEOPLE AND FORESTS (Clark C. Gibson et al. eds., 2000) (containing a collection of essays with case studies of forestry practices in different areas around the world).

223 See Tanya Hayes & Elinor Ostrom, *Conserving the World's Forests: Are Protected Areas the Only Way?*, 38 IND. L. REV. 595, 614–16 (2005).

224 Ostrom & Basurto, *supra* note 61, at 319.

225 See Margaret A. McKean, *Common Property: What Is It, What Is It Good for, and What Makes It Work?*, in PEOPLE AND FORESTS, *supra* note 222, at 45 ("The resource users are the first to detect evidence of resource deterioration and resource recovery and so need to be able to adjust rules to ecological changes and new economic opportunities.").

governance requires the “protection and encouragement of individuals within the organization to point to problems and to engage in active dissent.”²²⁶ The flat organizational structure of the industry groups governing the ATFS allowed ideas to be quickly transmitted, considered, and developed. The ATFS began with a single company initiating an idea, which was transmitted from a regional industry association to a national industry association within one year. Industry actors were continuously surveyed for ideas on how to improve the certification through letters, surveys, and studies.

Entrusting users with rulemaking authority does not necessarily result in overexploitation of the resource. For example, Margaret Blair identifies forest communities that systemically under-harvest their forests relative to sustainable production levels so as to provide should a higher level of resources be needed in the future.²²⁷ Ostrom has demonstrated that “[w]hen residents do not believe that the government has the right to regulate their resource use, they will often find ways to resist or sabotage . . . regulations.”²²⁸

Second, Ostrom debunked the myth that top down enforcement is needed to protect forests.²²⁹ John Terborgh has argued that a top-down approach must be taken to enforce resource rules because local communities are unable to manage their resource systems alone.²³⁰ Ostrom tested this theory by looking to several case studies. She disputed Terborgh’s analysis, finding that enforcement was more effective when enforced by forest users.²³¹

Sociological literature about forests suggests that land users are uniquely situated to adapt rules to changing economic and ecological conditions. Foresters are experienced at developing rules about their land usage to reflect “ecological changes and new economic opportunities.”²³² They do so in a variety of formal and informal ways, including developing comprehensive timber harvest plans that are the basis for logging operations and deciding when in a forest life cycle to harvest and sell timber. Foresters also exhibit broad capacity to self-enforce rules.²³³ They regularly oust trespassers from land and follow fire safety practices.²³⁴ Foresters self-enforce rules or, when norm-based enforcement fails, refer rule violations to government law enforcement agencies.

226 Orly Lobel, *New Governance as Regulatory Governance*, in OXFORD HANDBOOK OF GOVERNANCE 75 (David Levi-Faur ed. 2012).

227 McKean, *supra* note 225, at 45–46 (noting that Japanese villagers near Mt. Fuji prefer environmentally conservative use, but are comfortable knowingly overusing forest commons during a depression because their systemic underuse during good times allows occasional overuse).

228 Hayes & Ostrom, *supra* note 223, at 600.

229 *See id.* at 611–14.

230 *See id.*

231 *Id.* at 613.

232 McKean, *supra* note 225, at 45.

233 *See supra* notes 213–215 and accompanying text.

234 Bradshaw, *supra* note 160, at 100–03.

But, Ostrom's study of rule generation focused on forest users, not merely forest owners. The value of user-generated rules raises a concern about forest sustainability certifications and new governance more broadly: whether it is appropriately inclusive of stakeholders. At inception, the ATFS included only government and private foresters and did not include broader stakeholder groups. Therefore, the early iteration of this certification seemingly had fewer opportunities for stakeholder input relative to democratic, legislative processes. Recently, forest certifications have broadened inclusion of stakeholders—including conservation groups and indigenous peoples—when developing rules for certification. But, questions about the relative inclusiveness of stakeholder perspectives remains an important concern when assessing the success of new governance regimes.

C. *Competition to Regulate*

Corporate law scholars have observed that the private sector is likely to self-regulate in the face of strong social pressure to reform its practices.²³⁵ Industry actors evaluate the success of self-regulation in relation to other private and public regulatory regimes.²³⁶ This section discusses the strong public and political pressures surrounding the forest industry, industry perception of those pressures, and the extent to which these conditions led to the successful development of forest sustainability certifications. It begins by discussing the historic and current interaction between government regulatory bodies. Then it discusses competition among various certifiers in the “market to regulate”—spheres in which private regulatory regimes compete against government regulation and one another.

1. Government Regulation

Forest sustainability certifications emerged both to fend off government regulation and to regulate where government failed to do so. A central motivation for the creation of the AFTS was to forestall federal regulation of forestry practices. This threat of “drastic [f]ederal legislation” caused early leaders of the ATFS to be careful and factually correct in their marketing claims.²³⁷ Public critiques of the ATFS by the Chief of the Forest Service and

235 See, e.g., Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 451 (2011) (“An important external factor that brings private companies together in search of a common organizing principle is a crisis of public confidence in the industry. The private sector is more likely to self-regulate if there is strong political and societal pressure for it to reform its practices . . .”).

236 See Peter Grajzl & Andrzej Baniak, *Industry Self-Regulation, Subversion of Public Institutions, and Social Control of Torts*, 29 INT'L REV. L. & ECON. 360, 363 (2009).

237 W.B. Greeley, Secretary-Manager of West Coast Lumbermen's Association, Letter to Charles R. French at American Forest Products Industries, Inc. (January 15, 1943), Box 1, “Clements TF Correspondence 1946–66.”

others caused industry actors to be cautious when making claims about the success of the program.²³⁸

Prior to the advent of the ATFS, the Forest Service made many failed attempts at national regulation of timberland cutting and management.²³⁹ The forest industry argued that states and industry actors were best positioned to create and enforce rules appropriate for local timber practices. Decades later, FSC was created in response to continuous government inaction. Conservation groups were frustrated by the inability and unwillingness of national governments to address deforestation, and so implemented an extra-governmental regulatory regime.

In some ways, certification served as a middle course between top-down and bottom-up regulation: national standards were broad and responsive to stakeholder input and state standards focused on particular timber types. Enforcement through local inspectors allowed flexibility for local conditions. But, this observation raises an issue that lies at the heart of assessing the desirability of new governance strategies: the concern that new governance approaches may displace more robust regulatory regimes that would otherwise emerge. In the forestry context, the crucial question is whether the emergence of sustainability certifications complemented other regulatory tools to produce environmental benefit or displaced potentially more stringent legislation.

2. Competition Among Certifiers

Kenneth Abbot and Duncan Snidal assert that competition among regulators can exert pressure for would-be regulators to raise standards.²⁴⁰ This section argues that the competitive market to regulate forest practices has improved the standards of each certifier.

Notably, independent industry-sponsored competitors to FSC have arisen in every country where FSC has gained traction.²⁴¹ Competition between FSC and SFI certifications is intense. Organizations supporting SFI have brought antitrust litigation against organizations—such as the LEED green building certification—which favor FSC products.²⁴² Organizations supporting FSC, in turn, seek to undermine the credibility of SFI through direct-to-consumer public relations campaigns.²⁴³

238 There is a file folder of similar letters in the first decade of the ATFS in which members write to organizational leaders strongly cautioning against exaggeration of the success of the program.

239 See Hamill, *supra* note 158, at 459–60.

240 Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the Law*, in *THE POLITICS OF GLOBAL REGULATION* 44, 78 (Walter Mattli & Ngaire Woods eds., 2009).

241 See CASHORE ET AL., *supra* note 173, at 8.

242 For a discussion of this litigation, see Roberts *supra* note 86.

243 Alliance for Credible Forest Certification, FSC/SFI Comparisons, http://web.archive.org/web/20120121105129/http://credibleforestcertification.org/sfi_facts/fscsfi_comparisons. (last visited June 11, 2013).

The emergence and continued competitiveness of FSC has improved forestry practices by motivating SFI to develop and change and vice versa. Errol Medininger comments:

While SFI began in part as a rear-guard action to halt the continuing decline in timber industry credibility while heading off more stringent regulation, it nonetheless seems to represent a significant greening of the American forest products industry. The SFI principles to which the industry has committed would have been almost unthinkable even a decade ago.²⁴⁴

Thus, competing private regulatory systems within the forest industry have contributed to converging, improving practices. There remains, however, the important question of whether this improvement would have occurred if not for the threat of government regulation and public pressure to improve environmental practices.

IV. THE ROLE OF INDUSTRY CULTURE IN NEW GOVERNANCE

New governance scholars suggest that private regulation provides a valuable complement to government regulation, but provides limited examples of new governance regimes in practice. This Article addresses the issue head-on by applying a new institutional and economics analysis to the following questions: What industrial features give rise to new governance regimes? What features contribute to the endurance of certifications over time? This Section argues that the case study of forest certification tells us much about when new governance is likely to emerge. But, forest certifications do not offer a magic bullet of judging the success of new governance regimes—instead, it provides a mixed account in which extra-governmental regulation has improved over time but is impossible to compare with legislation or treaties that might have otherwise been enacted.

The “success” of sustainability regimes are at once hotly contested and well-studied, suggesting there is no easy answer as to whether this form of regulation should be evaluated as a success. Thus, this Article provides insight into the likelihood of new governance regimes to emerge in industries with a pre-existing system of norms, a resource type best governed by users, and competing private regulatory systems to spur continual improvement. Through its exploration of an early forerunner to modern new governance approaches, this Article highlights both the successes and limitations of new governance.

A. *Corporate Social Responsibility*

The corporate social responsibility literature describes sustainability certifications as if they were a self-contained unit. The case study of forestry certification regimes pushes back against this limited frame of analysis and encourages scholars to take a broader look at the entire environment surrounding the industry.

244 Meidinger, *supra* note 18, at 217.

For example, corporate literature explains that firms are motivated to join certification regimes because of a price premium or broadened market access. In the case study of forest certifications, however, participants know that there is no price premium but continue to participate in the certification. They do so citing fears of poor public perception, boycott of non-certified products, and lessened market access for non-certified goods. Each of these “sticks” is an enforcement mechanism that is not unique to sustainability certifications, but is rather also a lever affecting other areas of firm life.

Competition is decried as creating “green noise” that confuses consumers, with little attention paid to the benefits of competition. In the case of forestry, initial and ongoing competition has improved each of the certification regimes operating within the United States. Further, the ongoing “threat” of governmental regulation is also at play.

A competitive regulatory environment is an important feature of private regulation. If a private regulator exercises a monopoly over regulation, it is unclear whether actors will be motivated to fully integrate external stakeholder concerns and maximize enforcement. In contrast, a competitive regulatory environment in which multiple regulators compete creates better outcomes. In other words, we cannot think of certifications as operating in a vacuum, but must instead envision them as operating in a complex and dynamic system of stakeholders. Further study into the market for regulation is needed to tease out the interplay between competing regulatory regimes in corporate social responsibility efforts.

B. *Private Regulation*

Forest certifications are an example of new governance, in which private regulatory regime operates against the backdrop of existing state and federal laws.²⁴⁵ They are voluntary systems of rules developed, monitored, and enforced by non-state actors (largely industry groups or environmental non-governmental organizations).

Certifications have several features we can expect to find in private regulatory regimes, namely a strong similarity to government regulation operated by non-government actors.²⁴⁶ Certifications show the viability of self-regulation as a complement to government regulation. When the costs of self-regulation are lower than the cost of compliance with externally imposed regulation, self-regulation may still be positively perceived.²⁴⁷ The increase in legitimacy and use of sustainability certifications support optimism about the power of private regulations to produce socially beneficial outcomes in some circumstances.

245 See Bernstein & Cashore, *supra* note 54, at 37–38.

246 See Meidinger, *supra* note 18, at 129.

247 See Grajzl & Baniak, *supra* note 236, at 363.

C. *New Governance*

The new governance model envisions non-state actors regulating behavior against a loose backdrop of limited government involvement. The rise of new governance is tied to the failure of government to solve emerging problems. Similarly, forest sustainability certification regimes arose against a backdrop of failed multilateral governance.²⁴⁸ Attempts to forge a binding international convention to manage forest use failed so notably that most states and even prominent nongovernmental organizations strongly oppose a global forest convention.²⁴⁹ In this failure of state action, private regulation of the “multilevel multiplayer” kind envisioned by new governance scholars emerged.

The example of forest sustainability certifications represents an important incremental step in establishing the viability of the new governance model. It is inconclusive in evaluating the full extent to which private regulatory regimes will succeed in a new governance framework. The longevity and argued success of forest sustainability certifications provides promise for new governance, although longevity should not be conflated with success. Against a backdrop of weakened government involvement and enforcement, private stakeholders created a robust umbrella of private governance that accommodates competing regulatory systems. In the forest context, new governance approaches accommodate a variety of stakeholders. Further, new governance systems are improving over time—producing governing processes that are more inclusive and environmental results that are welfare-enhancing. Important questions remain, however, about the relative involvement of stakeholders and stringency of standards relative to government regulation through democratic process.

D. *Implications*

This Article looks at new governance from a different lens, studying not the regulation or regulators but instead the institutional environment in which new governance emerges. The case study provides the detailed institutional analysis currently lacking from new government literature. There are several institutional features—such as the existence of strong norms and a sustainability certification program that has continually operated for over seventy years—that may not be duplicable in other industries.

Further study of new governance is necessary. Analysis of the experience of private regulation in other fields will provide crucial windows of insight into whether the features of forestry that contributed to the success of new governance within it are generalizable and, if so, how widely they can or should be duplicated. This Article provides a much needed example of new governance in action. The institutional details transform theoretical ideas

248 For a detailed overview of the failure to reach state-sponsored international agreements on forestry practices, see Radoslav S. Dimitrov, *Hostage to Norms: States, Institutions and Global Forest Politics*, 5 GLOBAL ENVTL. POL. 1 (2005).

249 See Bernstein & Cashore, *supra* note 54, at 47–49.

into examples and supportable conditions under which industrial culture contributes to a long-standing new governance regime.

CONCLUSION

This Article begins by introducing the idea of new governance—in which private regulatory regimes complement rules set and enforced by state actors. It illustrated the trend of new governance flowing through corporate, environmental, and law and economics literature. A key, unanswered question emerged: what industrial features give rise to new governance? To answer the question, this Article provided a new institutional economics account of the sustainability certifications in the forest industry. Detailed analysis of industrial characteristics indicated three features contribute to the longevity of private regulation in the industry: (1) strong, preexisting norms, (2) industry actors with a competitive advantage in setting rules, and (3) a robust market for public and private regulation. This suggests that proposals to solve environmental problems using new governance should first analyze whether these institutional features are present, and therefore available to support the implementation of new governance approaches.