SYMPOSIUM ARTICLES

CHOOSE YOUR OWN MASTER: SOCIAL ENTERPRISE, CERTIFICATIONS, AND BENEFIT CORPORATION STATUTES

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In the wake of the most recent financial crisis, interest in social enterprise has increased exponentially. Disillusioned with the perceived shareholder wealth focus of corporate law, entrepreneurs, investors, customers, and governments have become more receptive to new paradigms. In the past four years, nineteen states have passed at least one of five different types of social enterprise statutes and many additional states are considering similar legislation. Focusing primarily on the benefit corporation form, this Article examines three main issues: (1) whether social enterprise statutes are potentially useful; (2) how social enterprise law can be improved; and (3) whether the social enterprise movement will be sustainable. First, regarding usefulness, this Article recognizes that the traditional legal framework already provides social entrepreneurs most of the flexibility they seek, but posits that the social enterprise statutes may better combat perceptions of a shareholder wealth maximization norm arising from existing for-profit corporation law (especially in Delaware). As a potential alternative to social enterprise statutes, this Article suggests that states like Delaware could simply amend their existing corporate codes to expressly allow for a societal- or environmental-focused objective in a corporation's charter. Second, regarding improvements to existing social enterprise law, the Article suggests: (i) statutorily requiring social

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entrepreneurs to choose their own primary master; (ii) recognizing modified versions of traditional corporate law concepts; (iii) lowering transaction and uncertainty costs; and (iv) eliminating or modifying certain mandatory rules. Third, regarding sustainability, this Article concludes that the most intensive social enterprise branding efforts should be left to the private sector organizations like B Lab; and social investors, perhaps using new vehicles like crowdfunding and Social Impact Bonds, must fill the funding gap left by hesitant traditional investors.

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INTRODUCTION

Yvon Chouinard, the esteemed founder of the outdoor apparel company Patagonia, Inc., opens his book, *Let My People Go Surfing: The Education of a Reluctant Businessman*, with these words:

> I've been a businessman for almost fifty years. It's as difficult for me to say those words as it is for someone to admit to being an alcoholic or a lawyer. I've never respected the profession. It's business that has to take the majority of the blame for being the enemy of nature, for destroying native cultures, for taking from the poor and giving to the rich, and for poisoning the earth with the effluent from its factories.
>
> Yet, business can produce food, cure disease, control population, employ people, and generally enrich our lives. And it can do these good things and make a profit, without losing its soul.[1]

Unfortunately, over the past dozen years, the headlines have not been dominated by corporations enriching lives. Rather, the media has focused on corporations—including Enron, WorldCom, Tyco, Adelphia, Lehman Brothers, Bear Stearns, AIG, BP, Massey, Olympus, and MF Global—that have led the way to massive economic, social, and environmental destruction.[2] In the wake of these headlining corporate misdeeds, some entrepreneurs, managers, governments, and investors have become more

1. YVON CHOUINARD, LET MY PEOPLE GO SURFING: THE EDUCATION OF A RELUCTANT BUSINESSMAN 3 (2006) [hereinafter CHOUINARD, BUSINESSMAN]. *See generally* YVON CHOUINARD & VINCENT STANLEY, THE RESPONSIBLE COMPANY (2012) (drawing on both authors' experience at Patagonia over the past forty years to "articulate the elements of responsible business for our time").

2. *See* Richard W. Hamilton, *The Crisis in Corporate Governance: 2002 Style*, 40 HOUS. L. REV. 1, 6–12, 20–28 (2003) (discussing the various corporate governance problems that came to light in 2001 and 2002, including the Enron, WorldCom, Adelphia, and Tyco scandals); Mark J. Roe, *The Derivatives Market's Payment Priorities as Financial Crisis Accelerator*, 63 STAN. L. REV. 539, 541, 549–55 (2011) (describing Lehman Brothers, AIG, and Bear Stearns's contributions to the financial collapse of 2008); Azam Ahmed & Ben Protess, *MF Global Investigator Sheds New Light on Chaos at Firm*, N.Y. TIMES, Feb. 7, 2012, at B4 (describing the MF Global scandal where approximately $1.2 billion in customer money was reported missing from the collapsed trading firm); Campbell Robertson & John Collins Rudolph, *Cleanup and Questions Continue*, N.Y. TIMES, Nov. 3, 2010, at A16–17 (reporting on the uncertainty of the long-term environmental damage caused by the BP oil spill in the Gulf Coast); Hiroko Tabuchi & Makiko Inoue, *Olympus Shareholders Vote in Favor of Directors*, N.Y. TIMES, Apr. 21, 2012, at B2 (stating that Olympus shareholders replaced the company's board of directors after the company admitted to hiding losses on investments for decades); Tom Zeller, Jr., *Shareholders Offer a Spate of Climate and Environmental Resolutions*, N.Y. TIMES, Feb. 19, 2011, at B3 (stating that the environmental destruction caused by the BP oil spill and the Massey coal mining accident led to an increase in shareholder resolutions relating to environmental issues at various oil and coal companies during the 2011 proxy season).

open to rethinking the traditional corporation.[3] From this openness has sprung an impassioned social enterprise movement.[4]

Recently, a number of states have passed statutes to facilitate the creation of social enterprises, businesses that focus on creating "blended value"[5] to benefit a triple-bottom line of "people, planet and profit."[6] To date, nine states—Illinois, Louisiana, Maine, Michigan, North Carolina, Rhode Island, Utah, Vermont, and Wyoming—have passed low-profit limited liability company ("L3C") statutes,[7] and twelve states—California, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, South Carolina, Vermont, and Virginia—have passed benefit corporation statutes.[8] Additional states are currently considering

3. In this Article, the term "traditional corporation" will be used to refer to non-social enterprise, for-profit corporations.

4. The term "social enterprise" has not been well-defined by the literature. In Europe, "[s]ocial enterprises, as defined by the UK law on the Community Interest Company in 2005, and by the Italian law on the *Impresa Sociale* in 2006, are public-benefit organisations that pursue the satisfaction of social needs through the imposition of at least a partial non-profit constraint and by devoting the majority of their positive residuals and patrimony to socially-oriented activities." Carlo Borzaga, Sara Depedri & Ermanno Tortia, *The Role of Cooperative and Social Enterprises: A Multifaceted Approach for an Economic Pluralism* (Euricse Working Papers, Working Paper No. 000 | 09, 2009). In the United States, the term has taken a broader meaning. Professor Cassady Brewer notes that "[p]opularly defined, social enterprise means using traditional business methods to accomplish charitable or socially beneficial objectives." Cassady V. Brewer, *A Novel Approach to Using LLCs for Quasi-Charitable Endeavors (A/K/A "Social Enterprise")*, 38 WM. MITCHELL L. REV. 678, 679 (2011); *see* MARC LANE, SOCIAL ENTERPRISE: EMPOWERING MISSION-DRIVEN ENTREPRENEURS 3–7 (2011) (discussing a variety of definitions for social enterprise and then defining social enterprise as any company with a significant mission-driven motive, regardless of whether profit is the primary objective). Some have suggested a narrower definition, arguing that social enterprises must "directly address social needs through their products and services or through the numbers of disadvantaged people they employ." Social Enterprise Alliance (SEA), *Social Enterprise: A Powerful Engine for Economic and Social Development*, SAGEGLOBAL at 1, http://www.sageglobal.org/files/pdf/social-enterprise-white-paper.pdf. This more narrow definition would exclude companies like Patagonia and Ben & Jerry's, which is not the intention of this Article. Here, the term "social enterprise" will be used broadly to refer to companies that "openly eschew" the shareholder wealth maximization norm in favor of societal focus. The term will also be used in this Article to refer to companies formed under one of the social enterprise statutes or certified, by an organization like B Lab, as a social enterprise.

5. ANTONY BUGG-LEVINE & JED EMERSON, IMPACT INVESTING: TRANSFORMING HOW WE MAKE MONEY WHILE MAKING A DIFFERENCE 10–11 (2011) (defining "blended value" to describe the mix of economic, social, and environmental value that social enterprises produce). Jed Emerson coined the term "blended value." *See Why Focus Our Conversation on the Nature of Value?*, BLENDED VALUE, http://www.blendedvalue.org/.

6. In his book CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (1997), John Elkington describes how social enterprises pursue a "triple-bottom line" to benefit "people, profit and planet."

7. *See Latest L3C Tally*, INTERSECTOR PARTNERS (Dec. 16, 2012), L3C, http://www.intersectorl3c.com/l3c_tally.html.

8. *State by State Legislative Status*, BENEFIT CORP. INFO. CTR., http://www.benefitcorp.net/state-by-state-legislative-status (last visited Dec. 16, 2012).

similar statutes.[9] Further, a few states have passed social enterprise statutes outside of the L3C and benefit corporation molds, including Maryland's benefit limited liability company statute ("BLLC"),[10] California's flexible purpose corporation statute ("FPC"),[11] and the State of Washington's social purpose corporation ("SPC").[12] Patagonia, mentioned in the opening paragraph of this Article, became one of the first California benefit corporations when the statute became effective in January of 2012.[13]

Within the social enterprise world, this Article focuses primarily, though not exclusively, on the benefit corporation model and its cousin, the Certified B Corporation.[14] Part I lays out the shareholder wealth maximization norm that the social enterprise movement attacks and analyzes concerns that social enterprise is attempting to solve a problem that does not exist. Part II examines the social enterprise solutions to the perceived problems associated with the shareholder wealth maximization norm, including solutions pre-dating the social enterprise statutes and certifications. Part III discusses the hurdles the social enterprise movement must clear for social enterprise statutes to be sustainable frameworks for business organizations. The Conclusion reiterates the Article's primary message: that whether traditional corporate statutes or new social enterprise statutes are utilized by a state, the statutes should expressly allow corporations to deprioritize shareholder value and should require that corporations choose their primary master while clearly stating their corporate objective.

I. THE SHAREHOLDER WEALTH MAXIMIZATION NORM

A. The Academic Debate

Should the directors of traditional corporations focus primarily on

9. *See* BENEFIT CORP. INFO. CTR., *supra* note 8 (showing that Connecticut, Michigan, North Carolina, and Washington, D.C. have introduced benefit corporation legislation); *see also* J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking*, 66 U. MIAMI L. REV. 1, 4 (2011) (stating that over seventeen other states are at some stage of considering L3C statutes).

10. MD. CODE ANN., CORPS & ASS'NS §§ 4A-1101 to -1108 (LexisNexis 2011).

11. CAL. CORP. CODE §§ 2500–2517 (West 2012).

12. WASH. REV. CODE §§ 23B.25.005–23.B.25.150 (West 2012). Also, the City of Philadelphia recently passed a sustainable business tax credit. PHILA., PA., CODE § 19-2604 (10)(a)–(d) (2011).

13. *See* John Tozzi, *Patagonia Road Tests New Sustainability Legal Status*, BLOOMBERG (Jan. 4, 2012, 7:57 AM), http://www.bloomberg.com/news/2012-01-04/patagonia-road-tests-new-sustainability-legal-status.html.

14. Currently, the two most popular social enterprise statutes are the benefit corporation and the L3C. For a more in-depth discussion of the L3C, see generally Murray & Hwang, *supra* note 9 (discussing the four major problems with the L3C statutes and proposing solutions).

shareholder wealth maximization in their decision-making? This question has been at the heart of scholarly debate for decades and has spawned numerous corporate theories and models, but no simple answers.

In the 1930s, through a series of articles in the *Harvard Law Review*, law professors Adolf A. Berle and E. Merrick Dodd famously sparred on this topic.[15] In these articles, Professor Berle argued in favor of shareholder wealth maximization as the objective of a corporation,[16] while Professor Dodd argued that a corporation should serve shareholders and other constituents.[17] In the 1970s, Milton Friedman famously stated, "There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits."[18] In the 1990s, Professor Stephen Bainbridge defended the "shareholder wealth maximization norm"[19] (which has been described as one element of

15. *See generally* A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931) [hereinafter Berle, *Corporate Powers as Powers in Trust*]; A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) [hereinafter Berle, *For Whom Corporate Managers Are Trustees*]; E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

16. *See* Berle, *Corporate Powers as Powers in Trust*, *supra* note 15, at 1049–50 (arguing that management should exercise its power "only for the ratable benefit of all the shareholders"); *see also* Berle, *For Whom Corporate Managers Are Trustees*, *supra* note 15, at 1365–67 (responding to Professor Dodd's article and the argument that stockholder profit should not be the sole focus of management).

17. *See* Dodd, *supra* note 15, at 1147–48, 1153–54 (arguing that corporations have a social purpose, in addition to a profit-making purpose).

18. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits,* N.Y. TIMES MAG., Sept. 13, 1970, at 32–33, 122–26, *available at* http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html [hereinafter Friedman, *The Social Responsibility of Business Is to Increase Its Profits*]; MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (2002) [hereinafter FRIEDMAN, CAPITALISM AND FREEDOM] ("Few trends could so thoroughly undermine the very foundation of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their shareholders as possible. This is a fundamentally subversive doctrine. If businessmen do have a social responsibility other than making maximum profits for stockholders, how are they to know what it is? Can self-selected private individuals decide what the social interest is? Can they decide how great a burden they are justified on themselves or their stockholders to serve that social interest?"). Also, in the 1970s, Professor Michael Jensen and Dean William Meckling published a highly-cited article that described corporate managers as "agents" for the corporate shareholder "principals." Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 303, 308 (1976). Professor Lynn Stout credits the Jensen and Meckling article and a book by Frank H. Easterbrook and Daniel R. Fischel as the origin of much of shareholder-focused thinking. *See* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 34–35 (2012); *see also* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991).

19. *See* Stephen M. Bainbridge*, In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423–25 (1993) [hereinafter Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm*] (arguing that corporate law is and should be committed to the

"shareholder primacy")[20] in his reply to Professor Ronald Green's argument for a "multi-fiduciary stakeholder perspective."[21] Also in the 1990s, the American Law Institute entered the debate with Section 2.01 (The Objective and Conduct of the Corporation) of its Principles of Corporate Governance.[22] From the late 1990s until the present, Professors Margaret Blair and Lynn Stout have written numerous articles on their team production theory, which rejects the shareholder wealth maximization norm and claims the board of directors should act like a "mediating hierarch" that considers all stakeholders and attempts to prevent stakeholders from exploiting each other.[23] In addition, the current

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shareholder wealth maximization norm set forth in *Dodge v. Ford Motor Co.*).

20. Shareholder primacy theory generally focuses on two questions: "First, which constituency's interests will prevail when the ultimate decision maker is presented with a zero sum game? Second, in which organ of the corporation is that ultimate power of decision vested?" Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 86 (2004) [hereinafter Bainbridge, *The Business Judgment Rule as Abstention Doctrine*]. In answering the first question, Professor Bainbridge and most shareholder primacy theorists agree that the shareholders' should prevail in the stated circumstances. *Id.* at 86 n.14; *see also* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 n.1 (1998) (explaining that the phrases "shareholder primacy norm" and "shareholder wealth maximization norm" are sometimes used interchangeably in academic literature). Professor Bainbridge, the father of director primacy, departs from shareholder primacists on the second question and argues that directors control the corporation. *See, e.g.*, Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 548–50 (2003) [hereinafter Bainbridge, *Director Primacy*]. Part I of this Article will primarily focus on the debate regarding the first question—which constituent's interest should ultimately prevail? The Article then examines the implications of social enterprise.

21. Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409, 1411–19 (1993).

22. AMERICAN LAW INSTITUTE: PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (1994). With Section 2.01, the ALI seems to have attempted to balance the two primary views. In Sub-part (a), the principle states that generally "a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain." *Id*. § 2.01(a). The drafters used "enhancing" over the stronger and more typical modifier "maximizing," but still acknowledge the shareholder and profit focus. Sub-part (b), however, which Sub-part (a) is subject to, states that "[e]ven if corporate profit and shareholder gain are not enhanced" the corporation is *obliged* to "act within the boundaries set by law" and *may* take into account *reasonable* ethical considerations and "*may* devote a *reasonable* amount of resources to public welfare, humanitarian, educational, and philanthropic purposes." *Id*. § 2.01(a)(3) (emphasis added). The guarded, careful language in Section 2.01 was likely necessary to achieve consensus and shows that this is an area of intense debate. Further, Comment (a) to the Section admits that "[p]resent law on the matters within the scope of § 2.01 cannot be stated with precision." *Id.* § 2.01 cmt. (a).

23. *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) [hereinafter Blair & Stout, *A Team Production Theory of Corporate Law*]; Margaret M. Blair & Lynn A. Stout, *Team Production in Business Organizations: An Introduction*, 24 J. CORP. L. 743, 745 (1999) [hereinafter Blair & Stout, *Team Production in Business Organizations*]; Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L. Q. 403 (2001) [hereinafter Blair & Stout, *Director Accountability and the Mediating Role of the Corporate Board*]; Margaret Blair,

Chancellor of the highly influential Delaware Court of Chancery, Chancellor Leo E. Strine, Jr., has entered the fray on at least three occasions—most recently in a 2012 *Wake Forest Law Review* article.[24]

For the purpose of this Article, the corporate governance scholars will be divided into two camps: (1) scholars who support the shareholder wealth maximization norm and (2) those who do not, including communitarian and team production scholars.[25] In extremely simple terms, scholars in the first group argue that it is and should be the directors' duty to focus on maximizing shareholder wealth as the primary corporate objective.[26]

Corporate Law and the Team Production Problem (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2037240 [hereinafter Blair, *Corporate Law and the Team Production Problem*]; STOUT, *supra* note 18.

24. *See* Leo E. Strine, Jr., Lecture and Commentary, *The Social Responsibility of Boards of Directors and Stockholders in Charge of Control Transactions: Is There Any "There" There?*, 75 S. CAL. L. REV. 1169, 1175 (2002) [hereinafter Strine, *The Social Responsibility of Boards of Directors and Stockholders in Charge of Control Transactions*] (stating that Delaware courts have given directors substantial freedom in making decisions in the best interest of the corporation, outside of change of control transactions); Leo E. Strine, Jr., Keynote Address, *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1 (2007) [hereinafter Strine, *Toward Common Sense and Common Ground?*]. Here, Chancellor Strine appears to take a middle ground in this debate, stating that corporations are akin to "social institutions," but recognizing that corporations have "the ultimate goal of producing profits for stockholders." *Id.* at 3. *See also* Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 151–54 (2012) [hereinafter Strine, *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*] (siding with the defenders of the shareholder wealth maximizing norm and stating that "[t]he well-intentioned efforts of many entrepreneurs and company managers, who have a duty to their investors to deliver a profit, to be responsible employers and corporate citizens is undoubtedly socially valuable. But it is no adequate substitute for a sound legally determined baseline. By so stating, I do not mean to imply that the corporate law requires directors to maximize short-term profits for stockholders. Rather, I simply indicate that the corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders.").

25. WALTER A. EFFROSS, CORPORATE GOVERNANCE: PRINCIPLES AND PRACTICES 4–22 (2010) (describing different models and theories of the corporation). *See* Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm*, *supra* note 19, at 1428–29 (defending the shareholder wealth maximizing norm); Blair & Stout, *A Team Production Theory of Corporate Law*, *supra* note 23, at 247, 248–55 (describing team production theory); David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1378–84 (1993) (describing the communitarian viewpoint).

26. *See generally* Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm*, *supra* note 19. The text accompanying this footnote focuses on fiduciary duties because Professor Bainbridge does not "think it's useful to ask the question of 'what purpose does the law mandate the corporation pursue?'" Instead, Bainbridge argues "it is far more preferable to operationalize this discussion as a question of the fiduciary duties of corporate officers and directors than as a corporate purpose." Stephen Bainbridge, *Is It Useful to Think About Corporations as Having a "Purpose"?*, PROFESSORBAINBRIDGE.COM (May 6, 2012, 1:56 PM), http://www.professorbainbridge.com/professorbainbridgecom/2012/05/is-it-useful-to-think-about-corporations-as-having-a-purpose.html. Questions about the purpose of a corporation and the object of officer and director fiduciary duties are often closely tied.

Communitarians and team production theorists, on the other hand, posit that directors should widen the aperture and focus on the corporation as a whole, including various non-shareholder stakeholders, such as employees, creditors, and even the society at large.[27] The debate continues today, as within mere weeks of each other in 2012, corporate law academics vigorously debated the shareholder wealth maximization norm on corporate law blogs.[28] Chancellor Strine published a law review article entitled *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*,[29] economist Paul Rubin defended shareholder wealth maximization in the *Wall Street Journal*,[30] Professor Margaret Blair uploaded a working paper on team production theory that argued that shareholder wealth maximization thinking is in decline,[31] and Professor Lynn Stout published a book entitled *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public*.[32]

These debates over whether directors must or should focus shareholder wealth as an exclusive or primary value have been repeated in countless forms, without much movement towards a satisfying consensus.[33]

This Article recognizes that occasionally some cited commenters are addressing the former, and some the latter, often without clear distinction. For the purpose of this Article, both questions are looked at together, as they both impact the same core question of how corporations should be governed.

27. *See* EFFROSS, *supra* note 25, at 19–22. *See generally* Blair & Stout, *A Team Production Theory of Corporate Law*, *supra* note 23.

28. *See, e.g.*, Stephen Bainbridge, *The Shareholder Wealth Maximization Norm*, PROFESSORBAINBRIDGE.COM (May 5, 2012 12:51 PM), http://www.professorbainbridge.com/professorbainbridgecom/2012/05/the-shareholder-wealth-maximization-norm.html; Haskell Murray, *Benefit Corporations: Traditional Paradigm*, THE CONGLOMERATE (May 3, 2012), http://www.theconglomerate.org/2012/05/benefit-corporations-corporate-purpose.html#comment-519407841.

29. *See* Strine, *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, *supra* note 24.

30. Paul H. Rubin, *A Tutorial for the President on "Profit Maximization,"* WALL ST. J., May 24, 2012, at A17 (stating that "[a]ny argument against 'profit maximization' is an argument against consumer welfare").

31. *See* Blair, *Corporate Law and the Team Production Problem*, *supra* note 23.

32. *See generally* STOUT, *supra* note 18. Academics debating the shareholder wealth maximization norm "are often like ships passing in the night." *Cf.* William Klein, *Criteria for Good Laws of Business Association*, 2 BERKELEY BUS. L.J. 13, 15 (2005). For example, opponents of the norm focus on the problems stemming from directorial focus on *short-term* profits, while many proponents of the norm recognize that a short-term focus can have a devastating impact and focus instead on the obligation to maximize (or "enhance") *long-term* shareholder wealth. *Compare* STOUT, *supra* note 18, at 50–52 (likening shareholder primacy to fishing with dynamite), *with* Bainbridge, *Director Primacy*, *supra* note 20 (stating that director primacy theory supports the shareholder wealth maximization norm "pursuant to which directors are obliged to make decisions based solely on the basis of *long-term* shareholder gain") (emphasis added).

33. *See* Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 631 (2009) ("[S]ince the 1930s, the debate concerning the purpose of the corporation has pervaded modern corporate law. Even today, the question of whether the purpose of the

B. Dodge v. Ford *and Day-to-Day Decisions*

Proponents of the benefit corporation legislation have focused on two main cases to show the need for their bill: *Dodge v. Ford*[34] and *eBay v. Newmark*.[35] Benefit corporation supporters also focus on Ben & Jerry's "forced" takeover by Unilever as an example of why states and companies need benefit corporation statutes.[36] This section will address *Dodge v. Ford*, and the next section, which focuses on areas of heightened scrutiny, including the evaluation of takeover defenses, will address *eBay v. Newmark* and the Ben & Jerry's situation.

In *Dodge v. Ford*, the Michigan Supreme Court famously ordered Ford to make a cash distribution to its shareholders despite Henry Ford's claim that he wished to use the excess capital in the corporation to benefit society.[37] Proponents of benefit corporation legislation tend to gloss over the fact that *Dodge v. Ford* is not a Delaware case ("Delaware is recognized as a pacesetter in the area of corporate law"),[38] is nearly 100

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corporation is to serve the interests of shareholders—to the exclusion of all other interests—or whether it can also consider the interests of other corporate constituencies remains unsettled."). *See generally* Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385 (2008); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005); Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865 (1990); Ian B. Lee, *Corporate Law, Profit Maximization, and the "Responsible Shareholder*,*"* 10 STAN. J.L. BUS. & FIN. 31 (2005); Brian M. McCall, *The Corporation as Imperfect Society*, 36 DEL. J. CORP. L. 509 (2011); Millon, *supra* note 25, at 1378–84 (stating that the rift between corporate law theorists is "deep and likely to persist"); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063 (2001); Smith, *supra* note 20; Judd F. Sneirson, *The Sustainable Corporation and Shareholder Profits*, 46 WAKE FOREST L. REV. 541 (2012); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189 (2002).

34. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

35. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010).

36. *See, e.g.*, Angus Loten, *With New Law, Profits Take Back Seat*, WALL ST. J., Jan. 19, 2012, at B1, B5 (arguing that the socially-focused Ben & Jerry's was forced to sell to Unilever against the wishes of its founders). Loten also cites Ben & Jerry's current chairman for the proposition that if benefit corporations had existed in 2000 (and Ben & Jerry's was a benefit corporation) the sale would not have happened. *Id. See also* April Dembosky, *Protecting Companies that Mix Profitability, Values*, NPR MORNING EDITION (Mar. 9, 2010), http://www.npr.org/templates/story/story.php?storyId=124468487. Co-founder Ben Cohen is cited for stating that Ben & Jerry's social mission would have been safer if the company had remained independent, but corporate law appeared to side with shareholders. *Id. But see* Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 230–37 (2010) (arguing that corporate law did not require that the board of directors sell the company to Unilever).

37. *See generally Dodge*, 170 N.W. at 668.

38. *In re* Prudential Ins. Co. Derivative Litig., 659 A.2d 961, 969 (N.J. Super. Ct. Ch. Div. 1995); *see* 1 STEPHEN A. RADIN, THE BUSINESS JUDGMENT RULE 6–11 (6th ed. 2009) (compiling numerous quotes from courts of various jurisdictions recognizing Delaware courts as leaders in the area of corporate law).

years old, and "was atavistic even at its date of publication."[39] The theories vary on why so few cases like *Dodge v. Ford* exist. The Delaware Chancellors who called the case "atavistic" write that "[t]here is a reason why *Dodge v. Ford* is in all the books: there are no other cases that really stand for the position of shareholder sovereignty as opposed to director sovereignty."[40] Similarly, Professor Stephen Bainbridge argues that the director primacy model and abstention-style business judgment rule explain why the shareholder wealth maximization norm is rarely enforced like it was in *Dodge v. Ford*.[41] In contrast, Professor Gordon Smith argues against a broad application of the shareholder wealth maximization norm and explains *Dodge v. Ford* as a close corporation case involving minority shareholder oppression, not widely applicable outside of that context.[42] Professor Lynn Stout explained away *Dodge v. Ford* as a "judicial mistake" from "a state court [Michigan] that plays only a marginal role in the corporate law arena."[43]

Even though they may disagree on why, commenters appear to agree that the *Dodge* court's ordering of directors to act in favor of shareholders (in the day-to-day context) is a rare outcome.[44] Numerous corporate law cases,

39. William T. Allen & Leo E. Strine, Jr., *When the Existing Economic Order Deserves a Champion: The Enduring Relevance of Martin Lipton's Vision of the Corporate Law*, 60 BUS. LAW. 1383, 1385 n.7 (2005).

40. *Id. See* DEL. CODE ANN. tit. 8 § 141(a) (2012) (stating that "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of the board of directors"); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (stating that "[t]he business judgment rule is an acknowledgment of the managerial prerogatives of Delaware directors under Section 141(a)").

41. *See* DEL. CODE ANN. tit. 8 § 141(a); *Aronson*, 473 A.2d at 812; *see also* Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, *supra* note 20, at 86 (explaining that "the business judgment rule is justified precisely because judicial review threatens the board's authority"); Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm*, *supra* note 19; Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1 (2002) [hereinafter Bainbridge, *The Board of Directors as Nexus of Contracts*]; Stephen M. Bainbridge, *Director Primacy*, *supra* note 20, at 547; Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006) [hereinafter Bainbridge, *Director Primacy and Shareholder Disempowerment*].

42. Smith, *supra* note 20, at 323 ("Conflicts among shareholders have long been analyzed under the doctrine of minority oppression rather than the shareholder primacy norm. Despite the link between the modern doctrine of minority oppression and the shareholder primacy norm, the shareholder primacy norm is broader than necessary to resolve problems of minority oppression in closely held corporations.").

43. *See* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 168, 176 (2008). Stout also argues that "*Dodge v. Ford* is indeed bad law, at least when cited for the proposition that the corporate purpose is, or should be, maximizing shareholder wealth. *Dodge v. Ford* is a mistake, a judicial 'sport,' a doctrinal oddity largely irrelevant to corporate law and corporate practice." *Id.* at 166. *But see generally* Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177 (2008) (challenging Professor Stout's reading of *Dodge v. Ford*).

44. *See* Allen & Strine, *supra* note 39, at 1385 n.7; *see also* Smith, *supra* note 20, at 288 ("Although it is possible for shareholders to prevail on claims that the board of

including casebook classics from various jurisdictions (like *A.P. Smith Manufacturing Co. v. Barlow*[45] and *Shlensky v. Wrigley*[46]), exhibit this view.[47] When the business judgment rule is applicable, Delaware courts "will not question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value."[48] However, this lack of enforcement of the shareholder wealth maximization norm does not mean the norm does not exist. Cases like *Dodge v. Ford* are rare because the business judgment rule is so powerful, and defendants are not generally so open about eschewing shareholder interests. Chancellor Strine explained in a recent law review article why Henry Ford did not get the benefit of the business judgment rule on the dividend payment issue:[49]

> Under [the business judgment] rule, the judiciary does not second-guess the decision of a well-motivated, non-conflicted fiduciary. Fundamental to the rule, however, is that the fiduciary be motivated by a desire to increase the value of the corporation for the benefit of the stockholders. By confessing that he was placing his altruistic interest in helping workers and consumers over his duty to stockholders, Henry Ford made

directors violated the shareholder primacy norm, such cases are extremely rare . . . ."); Franklin A. Gevurtz, *Getting Real About Corporate Social Responsibility: A Reply to Professor Greenfield*, 35 U.C. DAVIS L. REV. 645, 648–50 (2002) ("*Dodge* is one of the rare cases in which a court found directors abused their discretion in refusing to declare dividends. . . . The practical upshot of cases like *Dodge* and *Wrigley* is that, by and large, courts have not scrutinized business decisions to see whether directors sacrificed profit maximization to advance the interests of employees, creditors, customers, and the community. Instead, the courts almost invariably accept some rationale as to how the business decisions were in the long-range interest of the shareholders."); Macey, *supra* note 43, at 180 ("[T]here are no cases other than *Dodge v. Ford* that actually operationalize the rule that corporations must maximize profits. The goal of profit maximization is to corporate law what observations about the weather are in ordinary conversation. Everybody talks about it, including judges, but with the lone exception of *Dodge v. Ford*, nobody actually does anything about it."); WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 298 (3d ed. 2009) (noting that *Dodge v. Ford* "is one of the few decisions by a U.S. Court to enforce shareholder primacy as a rule of law").

45. 98 A.2d 581, 583–84 (N.J. 1953).

46. 237 N.E.2d 776, 780–81 (Ill. App. Ct. 1968).

47. In both *A.P. Smith* and *Shlensky*, the court chose not to interfere with decisions that had tenuous connections to shareholder wealth—in *A.P. Smith*, a gift from the corporation to Princeton University, and in *Shlensky*, a decision to not install lights at Wrigley Field.

48. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010); *accord* Aronson v. Lewis, 473 A.2d 805, 812 (1984).

49. Dodge v. Ford Motor Co., 170 N.W. 668, 684–85 (Mich. 1919) (noting that Ford *did* receive protection for the business decision to expand the business, but not for the decision regarding dividend payments).

it impossible for the court to afford him business judgment deference.[50]

Ford could have argued that he wished to pay his employees more in order to reduce turnover and encourage productivity and thus increase the long-term profits of shareholders. On the community issue, Ford could have argued that he wished to provide a less expensive car to engender goodwill and increase sales, which, even with lower margins, could increase long-term profits of shareholders. But Ford did not close the loop. Instead, Ford openly rejected the shareholder wealth maximization norm and paid for it.[51] After *Dodge v. Ford*, most defendants (and their lawyers) seem to have realized they need to tie altruistic motivations back to long-term shareholder value, making cases like *Dodge v. Ford* exceedingly rare.

C. Ben & Jerry's, eBay v. Newmark*, and Heightened Scrutiny*

In addition to *Dodge v. Ford*, the *eBay v. Newmark* case and the Ben & Jerry's takeover situation have been trumpeted by proponents of benefit corporation legislation as examples of why such legislation is needed. Too many promoters of benefit corporations gloss over, or ignore, the fact that both the *eBay* case and the Ben & Jerry's situation were examined in the narrow takeover defense or conflicted-interest contexts and therefore evaluated with scrutiny enhanced from the day-to-day situations described in Part II.B.[52] Many proponents also seem to ignore that a majority of states (though not Delaware) have constituency statutes that provide some protection to directors, even in the takeover context.[53]

The *eBay v. Newmark* case has been cited *ad nauseam* in the lobbying for benefit corporation statutes.[54] In *eBay*, craigslist erected numerous defensive measures in response to disagreements with its minority

50. Strine, *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, *supra* note 24, at 147–48 (emphasis added).

51. Macey, *supra* note 43, at 189–90 (claiming that the *Dodge v. Ford* case would have likely had a different outcome if Henry Ford had simply stated that he was attempting to maximize shareholder value).

52. *See, e.g.*, Jay Coen Gilbert, *TedX Philly - Jay Coen Gilbert - On Better Business*, YOUTUBE, at 9:40–10:20 (Dec. 1, 2010), http://www.youtube.com/watch?v=mGnz-w9p5FU (stating that the *eBay* case required maximizing of shareholder wealth, without mentioning that the actions overturned by the court were subject to heightened scrutiny); Loten, *supra* note 36, at B1, B5 (describing the "forced" sale of Ben & Jerry's).

53. *See* Michal Barzuza, *The State of State Antitakeover Law*, 95 VA. L. REV. 1973, 1989, 2040 tbl.6 (2009); *see also* William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 35–36 (2009).

54. *See, e.g.*, William H. Clark & Larry Vranka, *The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form That Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public* 11–13 (Jan. 26, 2012), *available at* http://www.benefitcorp.net/storage/The_Need_and_Rationale_for_Benefit_Corporations_-_April_2012.pdf; *see also* Gilbert, *supra* note 52, at 9:40–10:20.

shareholder, eBay, and in an alleged effort to protect the community-focused culture of craigslist.[55] Former Chancellor Chandler ordered rescission of certain of craigslist's defensive measures, including its poison pill, and stated:

> Promoting, protecting, or pursuing nonstockholder considerations must lead at some point to value for stockholders. When director decisions are reviewed under the business judgment rule, this Court will not question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value. Under the *Unocal* standard, however, the directors must act within the range of reasonableness.[56]

The former Chancellor also wrote:

> Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. . . .
>
> Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law.[57]

Unlike *Dodge v. Ford*, the conduct that the court challenged in *eBay v. Newmark* was not "every day" decision-making and was not afforded business judgment rule protection. Instead, the court evaluated the poison pill (also known as "the Rights Plan") in *eBay* under the intermediate scrutiny of the *Unocal* standard and evaluated the right of first refusal/dilutive issuance under the even more exacting "entire fairness"

55. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 6–7 (Del. Ch. 2010). It is ironic that eBay plays the role of the capitalist villain in the pitches by social enterprise proponents because eBay's co-founder Jeff Skoll established the Skoll Foundation and the Skoll Centre for Social Entrepreneurship. *See* Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 625 (2007). The Skoll Foundation was created in 1999, is a world leader in social enterprise, and has "awarded more than $315 million, including investments in 91 remarkable social entrepreneurs and 74 organizations on five continents." *About*, SKOLL FOUNDATION, http://www.skollfoundation.org/about/ (last visited Nov. 11, 2012).

56. *eBay*, 16 A.3d at 33 (mentioning that Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1990) "did not hold that corporate culture, standing alone, is worthy of protection as an end in itself").

57. *eBay*, 16 A.3d at 34–35 (emphasis added).

standard.[58] Thus, the *eBay* case, confined to its facts, controls only in the narrow and more scrutinized takeover defense and conflicted-interest contexts.[59]

In his 2012 *Wake Forest Law Review* article, however, Chancellor Strine recently provided reason to think *eBay* may actually provide guidance in the broader debate regarding the shareholder wealth maximization norm. Chancellor Stine wrote:

> From a different political perspective come those who seem to take umbrage at plain statements like the Chancellor's [in *eBay*] for unmasking the face of capitalism. These commentators seem dismayed when anyone starkly recognizes that as a matter of corporate law, the object of the corporation is to produce profits for the stockholders and that the social beliefs of the managers, no more than their own financial interests, cannot be their end in managing the corporation.[60]

Despite the need to recognize that *eBay v. Newmark*, unlike *Dodge v. Ford*, was mostly analyzed under heightened scrutiny, *Dodge* and *eBay* have a fair bit in common. In both cases, strong-willed defendants *openly admitted* that their focus was not on maximizing shareholder wealth—not in the short term, not in the long term, not at all.[61] Henry Ford and the founders of craigslist *confessed* to the court that they made their decisions with the primary objective of benefiting non-shareholder stakeholders, appeared to have "openly eschew[ed] stockholder wealth maximization," and did not make serious attempts to tie their decisions back to benefits for the shareholders.[62] Both the Michigan Supreme Court in 1919 and the Delaware Court of Chancery in 2010 found this stance unacceptable.[63] Had the defendants made more of an effort to tie their decisions to long-term shareholder wealth maximization, the courts may have come to different conclusions.[64]

58. *Id.* at 28–48.

59. *Id.*

60. Strine, *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, *supra* note 24, at 151.

61. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("It is said by appellants that the motives of the board members are not material and will not be inquired into by the court so long as their acts are within their lawful powers. As we have pointed out, and the proposition does not require argument to sustain it, *it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others*, and no one will contend that, if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders, it would not be the duty of the courts to interfere.") (emphasis added); *eBay*, 16 A.3d at 34–35.

62. *eBay*, 16 A.3d at 35.

63. *See Dodge*, 170 N.W. at 684; *eBay*, 16 A.3d at 34–35.

64. *See supra* Part I.B; *see also* ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 44, at 298 (noting that *Dodge v. Ford* was an odd case because Henry Ford openly

Like *Dodge* and *eBay*, the Ben & Jerry's takeover by Unilever in 2000 may be informative, but it has been simplified and exaggerated by certain proponents of benefit corporations and social enterprises in general.[65] Even given the enhanced scrutiny applied in the takeover context, there is serious doubt as to whether Ben & Jerry's *had* to sell to Unilever.[66] The Ben & Jerry's situation was never tested by the courts, as the company was ultimately sold to Unilever in April of 2000 for $326 million.[67] If the situation had been brought to court, the case would have been virtually impossible for the plaintiffs to win. Even if the Ben & Jerry's founders decided not to sell, then openly admitted during a lawsuit to "eschewing shareholder wealth maximization" (like the defendants in *Dodge* and *eBay*), they would have had the added protection of Vermont's constituency statute.[68]

This and the previous section have shown that certain social enterprise proponents may have overstated the need for benefit corporation statutes, as existing corporate law—whether through the business judgment rule, constituency statutes, or express provisions in the corporate law of states outside of Delaware—already provides significant protection to directors who choose to favor or consider non-shareholder stakeholders in their decisions.[69] Despite this protection, however, the corporate law in most states is not crystal clear and lawyers and managers may be risk averse. Typically, shareholders are the only stakeholders with standing to bring a

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admitted that he focused on stakeholders other than shareholders). Similarly, the founders of craigslist openly admitted their non-shareholder focus. *eBay*, 16 A.3d at 34–35. The founders of craigslist could have argued that eBay's adding of advertisements to the website would have upset craigslist users and would have limited craigslist's growth possibilities, reducing goodwill and long-term profits. The craigslist owners could have pointed to myriad ways that eBay's plan for the company was inconsistent with *long-term* shareholder wealth maximization, and the court would have probably hesitated to question that reasonable judgment, even under *Unocal*'s intermediate scrutiny.

65. *See* Loten, *supra* note 36, at B5.

66. Page & Katz, *supra* note 36, at 233–242 (arguing that Ben & Jerry's founders had a number of options to protect the company from a takeover, if they wished to do so, including: erecting takeover defenses, avoiding *Revlon* duties, and utilizing capital structure solutions). *Cf.* Jennifer J. Johnson & Mary Siegel, *Corporate Mergers: Redefining the Role of Target Directors*, 136 U. PA. L. REV. 315, 330–31 (1987) (calling *Unocal* a "toothless standard"); *accord* Mark J. Loewenstein, *Unocal Revisited: No Tiger in the Tank*, 27 J. CORP. L. 1, 3 (2001).

67. *$326 million persuades Ben & Jerry's to sell out*, SEATTLE TIMES (Apr. 13, 2000), http://community.seattletimes.nwsource.com/archive/?date=20000413&slug=4015122.

68. *See* Page & Katz, *supra* note 36, at 236 (noting that not only did Vermont have a constituency statute, but that the statute was dubbed the "Ben & Jerry's Law" because it was adopted in 1998, at least in part, to protect Ben & Jerry's from a takeover like the one that occurred in 2000).

69. *See* Kerr, *supra* note 55, at 633–34 (arguing that socially and environmentally friendly activities can be "smart business" and arguing that the business judgment rule will generally protect traditional corporations that choose to engage in such activities).

derivative action for a breach of fiduciary duty, so directors may choose to favor shareholders even if the business judgment rule and/or constituency statutes provide significant cover.[70] Also, corporate directors are not normally as knowledgeable about the intricacies of corporate law as many of the law professors, who after decades of debate, still lack agreement on a single corporate governance model or objective of the corporation. This lack of clarity in corporate law and scholarship is something that proponents of the benefit corporation legislation can correctly point to as troubling.

D. Persistent Common Perception and Power of the Norm

What is clear from the previous three sections is that there is confusion regarding whose interest directors should primarily focus on when making decisions.[71] Despite all of the academic debate, the *persistent common perception* seems to be that directorial duties require placing shareholder wealth at the forefront.[72] The perception may stem from the pronouncements of courts in *Dodge* and *eBay*, from various academic articles, from education in business and law schools, and from the popular media.[73] The perception—as the phrase "shareholder wealth maximization

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70. *See* J. Haskell Murray, "*Latchkey Corporations": Fiduciary Duties in Wholly Owned, Financially Troubled Subsidiaries*, 36 DEL. J. CORP. L. 577, 580 (2011) [hereinafter Murray, *Latchkey Corporations*] (discussing how shareholders are normally the only stakeholders with standing to bring a derivative fiduciary duty lawsuit, but explaining that Delaware courts have given creditors standing when the corporation is insolvent).

71. *See supra* Part I.A–C.

72. *See, e.g.*, Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 654–55 (2006) (citing research by the Aspen Institute Business and Society Program that "found that the norm of shareholder wealth maximization was implicit in most business school courses, and so powerful that it did not need to be defended"); Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263, 1288 (1992) ("Directors seem to believe that their legal duty is to the stockholders."); Lyman Johnson & Bill Callison, Comment to *Benefit Corporations: The Traditional Paradigm*, THE CONGLOMERATE (May 3, 2012), http://www.theconglomerate.org/2012/05/benefit-corporations-corporate-purpose.html (opining that the "conventional wisdom" is that the objective of a corporation is to maximize shareholder wealth); Mary C. Gentile, The Aspen Inst. Bus. & Soc'y Program, Address at the European Academy of Business in Society's Third Annual Colloquium: Corporate Governance and Accountability: What Do We Know and What Do We Teach Future Business Leaders? 3–4 (Sept. 27, 2004), *available at* http://www.caseplace.org/references/references_show.htm?doc_id=306381.

73. *See supra* Part I.B–C (discussing the *Dodge* and *eBay* cases and noting the academic literature regarding the shareholder wealth maximization norm); *see also* Hamilton, *supra* note 2, at 35 ("It has long been accepted doctrine that the primary goal of publicly held corporations should be to maximize the wealth of shareholders. . . . This proposition is accepted dogma in law and finance textbooks and is taught in law and business schools throughout the country.") (internal citations omitted). For popular media, consider Michael Douglas's famed "greed is good" speech in WALL STREET (Twentieth Century Fox 1987). Michael Douglas's character, Gordon Gekko was supposed to be a villain (and ends up in jail for insider trading), but many viewers admired the character's "profit at any cost" attitude and some told Douglas that they

norm" suggests—has arguably risen to the level of a widely recognized and influential norm.[74]

The shareholder wealth maximization norm has infiltrated corporate America. For example, the Business Roundtable listed as a guiding principle that it "is the responsibility of management, under the oversight of the board, to operate the corporation in an effective and ethical manner to produce long-term value for shareholders."[75] Further, as noted in the *Harvard Business Review*, "in an important 2007 article in the *Journal of Business Ethics*, 31 of 34 directors surveyed (each of whom served on an average of six Fortune 200 boards) said they'd cut down a mature forest or release a dangerous, unregulated toxin into the environment in order to increase profits. Whatever they could legally do to maximize shareholder wealth, they believed it was their duty to do."[76] In a 2008 law review article, Professor Lynn Stout recognized that in the minds of many people "corporations exist to make money for their shareholders. Maximizing shareholder wealth is the corporation's only true concern, its *raison d'être*."[77] Three years later, Professor Stout released a book titled *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public*.[78] Professor Stout's book

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were inspired to seek jobs on Wall Street because of his character. *See, e.g.*, David C. McBride, *For Whom Does This Bell Toll*, DEL. LAW., Fall 2009, at 28, 29. It is interesting that many of the decision makers in the most recent economic crisis were in their late teens and twenties—likely the age of WALL STREET'S targeted audience—at the time of the film's release in 1987.

74. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 235 (1999) (defining norms as "those normative constraints imposed not through the organized or centralized actions of a state, but through the many slight and sometimes forceful sanctions that members of a community impose on each other"); *see* Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1709 (1996) (stating that "[w]e say about most norms that people bound by them feel an emotional or psychological compulsion to obey the norms; norms have moral force"); Roe, *supra* note 33, at 2064 (stating that "[b]ecause norms are usually congruent with practices, institutions, and laws, knowing which element is critical is hard"); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1013 (1997) (stating that "all of us internalize rules and standards of conduct with which we generally try to comply"); Sneirson, *supra* note 33, at 545 ("Even if no law requires shareholder primacy, a prevalent social norm can have much the same effect."). Professor Sneirson cites the following valuable resources on the subject: Richard H. MacAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996); Symposium, *Norms & Corporate Law*, 149 U. PA. L. REV. 1607 (2001).

75. BUSINESS ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 2 (2010).

76. Loizos Heracleous & Luh Luh Lan, *The Myth of Shareholder Capitalism*, HARV. BUS. REV., Apr. 2010, http://hbr.org/2010/04/the-myth-of-shareholder-capitalism/ar/1 (citing Jacob M. Rose, *Corporate Directors and Social Responsibility: Ethics versus Shareholder Value*, 73 J. BUS. ETHICS 319 (2007)).

77. Stout, *supra* note 43, at 164.

78. STOUT, *supra* note 18, at 32 (stating that "[a]s far as the law is concerned, maximizing shareholder wealth is not a requirement; it is just one possible corporate

recognizes that the shareholder wealth maximization norm is engrained into our culture and into the minds of many decision makers.[79] While some may argue that the shareholder wealth maximization norm is a myth or at least rarely enforced, the norm is a powerful one and seems to have persistently impacted common perception about the duties of the directors of traditional corporations.[80]

II. SOLUTIONS FOR SOCIAL ENTERPRISE

If the purported problem is overemphasizing shareholder wealth maximization by directors—whether because of law, myth, perception, or norm—social enterprise attempts to provide a solution by increasing the emphasis on the concerns of other corporate constituents.

A. Pre-Existing Solutions

Legal solutions for social entrepreneurs predate 2008, the year the initial social enterprise statute was passed in the United States.[81] First, limited liability companies ("LLCs") are famously flexible, and operating agreements can be altered to meet the needs of social entrepreneurs.[82] Second, entrepreneurs with a social bent could use affiliated foundations or nonprofit entities along with for-profit entities to effectuate their objectives.[83] Third, some state statutes already explicitly allow a social or

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objective out of many"). Professor Stout also takes issue with the argument for shareholder wealth maximization as a normative matter.

79. *Id.* at 3 (stating that "[s]hareholder value thinking is endemic in the business world today").

80. *See* Sneirson, *supra* note 33, at 545.

81. *See* J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273, 273 (2010) (stating that "Vermont enacted the Nation's first 'low-profit limited liability company' (L3C) legislation in 2008"). *See generally* VT. STAT. ANN. tit. 11, §§ 3001(27), 3005(a)(2), 3023(a)(6) (West 2010).

82. *See, e.g.*, Brewer, *supra* note 4, at 680 (noting the increasing use of LLCs by social entrepreneurs); LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 7–9 (2010) (discussing the flexibility of uncorporations, including LLCs).

83. Chick-fil-A, Starbucks, and Google are a few of the major corporations that use both profit and nonprofit entities to achieve their ultimate objectives, which include certain social goals. Chick-fil-A founder and CEO, Truett Cathy, also founded the WinShape Foundation, which offers foster care services, college scholarships, marital support, and outdoor camps for children. *See* WINSHAPE FOUNDATION, http://www.winshape.com/ (last visited Nov. 11, 2012). The WinShape Foundation is listed on Chick-fil-A's website and appears to be closely connected to the corporation. *WinShape Foundation*, CHICK-FIL-A, http://www.chick-fil-a.com/Company/Winshape (last visited Nov. 11, 2012) [hereinafter, *WinShape Foundation,* CHICK-FIL-A]; *Starbucks Foundation*, STARBUCKS, http://www.starbucks.com/responsibility/community/starbucks-foundation (last visited Nov. 11, 2012) (The Starbucks Foundation was founded in 1997 to fund literacy programs. The foundation has expanded to serve a variety of social and environmental needs.); GOOGLE FOUNDATION, http://www.google.org/foundation.html (last visited Nov. 11, 2012); GOOGLE.ORG,

environmental focus.[84] Social entrepreneurs seeking to use the corporate form could simply incorporate in one of those states, and then, if desired, could search the market for a branding mechanism, such as B Lab's "Certified B Corporation."[85]

Currently, it is not crystal clear whether Delaware corporate law is flexible enough to give comfort to the social entrepreneur, but as described above, there are a number of other options for the social entrepreneur.[86] Additionally, the Delaware legislature is traditionally extremely responsive to the needs of the market, and one suggested solution in this Article is to have Delaware amend its corporate statute to explicitly provide social entrepreneurs with the flexibility they seek.[87]

Despite all of the preexisting solutions, social entrepreneurs desire

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http://www.google.org/ (last visited Nov. 11, 2012). The Google Foundation is run by Google.org, a philanthropic arm of Google, Inc., which promotes Google's community initiatives and philanthropic work. *See* Dana Brakman Reiser, *Charity Law's Essentials*, 86 NOTRE DAME L. REV. 1, 34–35 (2011) (discussing Google's use of multiple entities to reach its corporate goals); Carter G. Bishop, *Sectorization & L3C Regulatory Arbitrage of Joint Ventures with Nonprofits* (Suffolk Univ. Law Sch. Research Paper No. 12-19, Apr. 23, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045034 (arguing that the existing nonprofit joint venture should be preferred over and utilized instead of the social enterprise form L3C).

84. *See, e.g.*, OR. REV. STAT. § 60.047 (2011) (amended in 2007 to explicitly allow inclusion in the articles of incorporation a "provision authorizing or directing the corporation to conduct the business of the corporation in a manner that is environmentally and socially responsible"); *see also* Stephen M. Bainbridge, *Does eBay Spell Doom for Corporate Social Responsibility*, PROFESSORBAINBRIDGE.COM, (Dec. 6, 2010, 12:26 PM), http://www.professorbainbridge.com/professorbainbridgecom/2010/12/does-ebay-spell-doom-for-corproate-social-responsibility.html (stating that if a company, such as "Ben & Jerry went public with a [corporate social responsibility] provision in their articles" he would have no objection).

85. *See The Non-Profit Behind B Corps, Certified B Corporations*, B LAB, http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps (last visited Nov. 11, 2012).

86. *See, e.g.*, Stephen M. Bainbridge, *Beneficial Corporations*, PROFESSORBAINBRIDGE.COM (May 25, 2009, 11:45 AM), http://www.professorbainbridge.com/professorbainbridgecom/2009/05/beneficial-corporations.html ("State law arguably does not permit corporate organic documents to redefine the directors' fiduciary duties. In general, a charter amendment may not derogate from common law if doing so conflicts with some settled public policy. In light of the well-settled shareholder wealth maximization policy, nonmonetary factors charter amendments therefore appeared vulnerable. This problem seems especially significant for Delaware firms, as Delaware law became increasingly hostile to directorial consideration of non-shareholder interests in the takeover decision-making process.").

87. *See infra* Part II.D; *see also* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1068 (2000) (noting that part of Delaware's success in competing for corporate charters is attributable to "the responsiveness of the Delaware legislature"); *accord* Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1799 n.13, 1810 n.76 (2002).

solutions without attendant doubt and clearly fitted to their needs. The next two sections examine the two primary responses: social enterprise certifications and social enterprise statutes.

B. Social Enterprise Certifications

Before any social enterprise statutes were passed in the United States, various private organizations were certifying social enterprises. The most popular certifier is a nonprofit organization named B Lab, which began dubbing companies "Certified B Corporations" in 2007.[88] B Lab likens its certification of companies to the certification of coffee as "Fair Trade" or the certification of buildings as "LEED certified" and, as of October 2012, there were more than 600 Certified B Corporations accounting for a total of over $4 billion in revenue.[89]

With the advent of the benefit corporation statutes, which B Lab has championed, many in the popular media, and even some attorneys, fail to articulate the difference between Certified B Corporations and statutorily formed benefit corporations.[90] Confusingly, both are sometimes referred to as "B Corps."[91] Certified B Corporations are certified by B Lab, while benefit corporations are formed under the state law of one of the states that

88. Mary Catherine O'Connor, *Corporations with Benefits*, TRIPLE PUNDIT (Dec. 1, 2011), http://www.triplepundit.com/2011/12/corporations-benefits; *The Nonprofit Behind B Corps*, *supra* note 85. Other social enterprise certifiers include Green Seal Business Certification and Sustainable Farm Certification. *Selecting a Third Party Standard: List of Standards*, B LAB, http://www.benefitcorp.net/selecting-a-third-party-standard/list-of-standards) (listing various third-party standards that may be used by benefit corporations, but which also separately certify social enterprises). The author suggests that "Certified B *Corporation*" should be changed to "Certified B *Company*" because B Lab certifies a wide range of entity forms, including LLCs, LLPs, and cooperatives. As of September 18, 2012, 209 of the approximately 600 Certified B *Corporations* were actually LLCs, three were LLPs, three were BLLCs, 24 were sole proprietors, and several were cooperatives. E-mail from Heather Van Dusen, B Lab (Sept. 18, 2012, 15:22 EDT) (on file with author).

89. *What are B Corps?*, B LAB, http://www.bcorporation.net/what-are-b-corps, (last visited Nov. 25, 2012); *The Non-Profit Behind B Corps*, B LAB, http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps (last visited Nov. 25, 2012).

90. *See, e.g.*, Haskell Murray, *Etsy Becomes a Certified B Corporation*, THE CONGLOMERATE (May 9, 2012), http://www.theconglomerate.org/2012/05/etsy-becomes-a-certified-b-corporation.html [hereinafter Murray, *Etsy Becomes a Certified B Corporation*] (where this author's post led to the correction of Etsy's press release, which originally used the two terms interchangeably in the body of their announcement); Haskell Murray, *Certified B Corporations v. Benefit Corporations*, THE CONGLOMERATE (May 3, 2012), http://www.theconglomerate.org/2012/05/certified-b-corporations-v-benefit-corporations.html [hereinafter Murray, *Certified B Corporations v. Benefit Corporations*]; *Certified B Corp*, B LAB, http://benefitcorp.net/what-makes-benefit-corp-different/benefit-corp-vs-certified-b-corp (last visited Nov. 11, 2012) ("[B]enefit corporations and Certified B Corporations are often, and understandably, confused. Both are sometimes called B Corps by mistake or as shorthand.").

91. Murray, *Certified B Corporations v. Benefit Corporations*, *supra* note 90.

have passed benefit corporation statutes.[92] Benefit corporations must be measured against a "third-party standard," but the standard does not have to be B Lab's B Impact Assessment.[93] B Lab conducts on-site reviews of randomly selected Certified B Corporations, whereas no such review is mandatory for merely being a benefit corporation.[94] A company can be both a Certified B Corporation and a benefit corporation, but there are plenty of examples of companies that are one but not the other.[95]

C. Benefit Corporation and Other Social Enterprise Statutes

Beginning in 2008, a plethora of social enterprise statutes have sprung up to service the needs and wants of social entrepreneurs. This Article focuses on the most popular corporate form of social enterprise, the benefit corporation. Benefit corporation statutes have passed in twelve states and legislation is pending in a number of additional states.[96] Maryland passed the first benefit corporation statute in 2010.[97] The benefit corporation statutes expressly *require* the consideration of various non-shareholder stakeholders, unlike the typical *permissive* constituency statute.[98] In

92. *See* J. Haskell Murray, *Benefit Corporations: State Statute Comparison Chart* (Aug. 1, 2012) (unpublished chart), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556 (summarizing the provisions of the various benefit corporation statutes).

93. *See generally Selecting a Third Party Standard: List of Standards, supra* note 88 (listing various potential third-party standards).

94. *Make it Official*, B LAB, http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/120 (last visited Dec. 15, 2012).

95. *Compare The Non-Profit Behind B Corps*, *supra* note 89, *with Find a Benefit Corp*, BENEFIT CORP. INFO. CTR., http://www.benefitcorp.net/find-a-benefit-corp/search (last visited Nov. 11, 2012).

96. *See Benefit Corp. Legislation*, B LAB, http://www.benefitcorp.net/state-by-state-legislative-status (last visited Nov. 11, 2012) (listing the benefit corporation "enacted legislation" and the "introduced legislation"); *see also* Murray, *supra* note 92.

97. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01.

98. *Compare* MODEL BENEFIT CORP. LEGIS. § 301(a) (B Lab Jan. 26, 2012), *available at* http://www.benefitcorp.net/storage/Model_Legislation.pdf (requiring the consideration of various constituencies), *and* Murray, *supra* note 92, *with* Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 461 n.290 (2002) (noting the permissive nature of most constituency statutes). Even the one state Professor Fairfax mentions as being mandatory, Connecticut, has amended its constituency statute to be permissive. CONN. GEN. STAT. ANN. § 33-756(d) (2012). Unless otherwise noted, the Model Benefit Corporation Legislation refers to the January 26, 2012 version of the legislation. After this Article was already deep in the editing process, the July 30, 2012 version of the Model Benefit Corporation replaced the January version. MODEL BENEFIT CORP. LEGIS., (B Lab July 30, 2012), *available at* http://www.benefitcorp.net/storage/documents/Model_Benefit_Corporation_Legislation.pdf [hereinafter MODEL BENEFIT CORP. LEGIS. July 2012]. The July 30, 2012 version contains relatively minor revisions, and the current state benefit corporations statutes have not yet been amended to reflect those changes. The two most significant changes (the two percent shareholder standing threshold and the ability to opt-into director liability) are both mentioned below and were both influenced by a draft of this Article. E-mail from

addition, the benefit corporation statutes require pursuit of a "general public benefit."[99] Also, the benefit corporation statutes generally require an annual benefit report, provide for a benefit enforcement proceeding, and require a super majority vote to properly adopt or terminate benefit corporation statutes.[100] Maryland is the only state with a benefit LLC statute, which largely follows the benefit corporation statutes, but is built on the LLC platform.[101]

The L3C is a social enterprise statute also built on the LLC platform and is adopted in nine states. The idea for the L3C entity form originated with Robert Lang, CEO of the Mary Elizabeth & Gordon B. Mannweiler Foundation, to take advantage of program-related investments ("PRIs") from foundations.[102] However, a number of entrepreneurs have formed L3Cs without giving great weight to the possibility of receiving PRIs and instead have used the form simply as an LLC-based social enterprise form.[103] The academic literature and corporate bar have generally been quite hostile toward L3Cs, stating that the entity form does not currently help entrepreneurs obtain PRIs more easily and that the tranching model suggested by the L3Cs' initial creator is unworkable.[104]

William H. Clark, Jr. (Oct. 29, 2012, 10:46 EDT) (on file with author).

99. *See* MODEL BENEFIT CORP. LEGIS. § 201 (defining "general public benefit" as "[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation"). Most of the state benefit corporation statutes closely follow the model legislation. *See* Murray, *supra* note 92.

100. *See* MODEL BENEFIT CORP. LEGIS. § 401; *see also* Murray, *supra* note 92.

101. MD. CODE ANN., CORPS. & ASS'NS §§ 4A-1101 to -1108; Telephone Interview with William H. Clark, Jr., Partner, Drinker Biddle & Reath (Jan. 23, 2012). Mr. Clark, who is also the co-author of the Model Benefit Corporation Legislation, noted that he knew of no current plans to expand beyond Maryland with the benefit LLC legislation. *See* E-mail from William H. Clark, Jr. (Oct. 29, 2012, 10:22 EDT) (on file with author) (confirming that there is still no plan to pursue benefit LLC legislation). Mr. Clark stated that LLC law is generally flexible enough to accomplish social enterprise purposes. The benefit LLC legislation was introduced and championed by Maryland state senator and American University Washington College of Law professor Jamie Raskin. Amy Kincaid, *ChangeMatters and Substance151 Become the Nation's First Benefit LLCs*, CHANGEMATTERS (June 1, 2011), http://changematters.com/640/changematters-substance-become-nations-first-benefit-llcs/.

102. Murray & Hwang, *supra* note 9 (providing a more in-depth look at L3Cs); Arthur Wood, *Comments on the L3C* 1–2 (Am. Cmty. Dev. 2010), *available at* http://www.americansforcommunitydevelopment.org/downloads/commentsonl3cbyarthurwood.pdf (noting that Robert Lang created the L3C concept and claiming that the L3C "makes it easier to do PRI's").

103. Elizabeth Schmidt, *Vermont's Social Hybrid Pioneers: Early Observations and Questions to Ponder*, 35 VT. L. REV. 163, 178 (2010) ("[M]ost of the respondents [to the author's survey] acknowledged that the possibility of PRI funding was either unimportant or not a major reason they chose the L3C business form.").

104. *See* Carter G. Bishop, *The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243, 245–46 (2010) (questioning the tranche investment plan and then stating that the L3C "will likely continue to endure the same scrutiny as any other charitable venture into the business world. If so, the L3C regulatory mission will fail, and indeed, its older LLC cousin will continue its

California and Washington have each created their own unique statutory solutions. In addition to passing a benefit corporation statute, California passed the Corporate Flexibility Act of 2011 to facilitate the formation of flexible purpose corporations ("FPCs").[105] According to the California law, the articles of an FPC must include one or more of the following in its statement of corporate purpose:

> One or more charitable purpose activities that a nonprofit public benefit corporation is authorized to carry out . . . [or] promoting positive short-term or long-term effects of, or minimizing adverse short-term or long-term effects of, the flexible purpose corporation's activities upon any of the following: (i) The flexible purpose corporation's employees, suppliers, customers, and creditors. (ii) The community and society. (iii) The environment.[106]

As their name suggests, FPCs are much more flexible than benefit corporations. Unlike benefit corporations, FPCs are not required to pursue the "general public benefit," are not required to consider the various stakeholders listed in the benefit corporation statute, and are not required to be assessed against a third-party standard.[107] The State of Washington passed a statute allowing the formation of "social purpose corporations" ("SPCs"), effective June 7, 2012.[108] Consideration of social purposes is permissive for directors of SPCs, which distinguishes the SPC statute from the mandatory consideration required by the benefit corporation statutes.[109]

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presence."); Daniel S. Kleinberger, *A Myth Deconstructed: The "Emperor's New Clothes" on the Low-Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879, 880 (2010) [hereinafter Kleinberger, *A Myth Deconstructed*] (calling the L3C "a snare and a delusion"); Murray & Hwang, *supra* note 9, at 49–51 (offering a more optimistic view of L3Cs but noting governance and financing issues in need of reform); *see also* Daniel S. Kleinberger, *ABA Business Law Section, on Behalf of Its Committees on LLCs and Nonprofit Organizations, Opposes Legislation for Low-Profit Limited Liability Companies (L3Cs)* (Wm. Mitchell Coll. of Law 2012), *available at* http://open.wmitchell.edu/facsch/228 (including a letter and attachment sent to Minnesota Representative Steve Simon on April 19, 2012 arguing against L3C legislation). *See generally* Callison & Vestal, *supra* note 81.

105. CAL. CORP. CODE § 2500 *et seq.*

106. *Id.* § 2602(B)(2)(A)–(B). In addition, California's Corporate Flexibility Act also requires that the corporations be operated for the "benefit of the long-term and the short-term interests of the flexible purpose corporation and its shareholders." *Id.* § 2602(b)(1)(A)–(B).

107. *See* Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 594 n.22 (2011) (explaining some of the differences between benefit corporations and FPCs). *Compare* CAL CORP. CODE § 2500, *with* MODEL BENEFIT CORP. LEGIS. Some may suggest that the flexibility of FPC statutes will make flexible purpose corporations more susceptible to greenwashing than benefit corporations.

108. WASH. REV. CODE § 23B.25.005–150.

109. *Compare id.* § 23B.20.050(2) ("[Directors] *may* consider and give weight to one or more of the social purposes of the corporation as the director deems relevant.") (emphasis added), *with* MODEL BENEFIT CORP. LEGIS. § 301(a) ("[Directors] *shall*

D. Potential Statutory Solutions and Challenging the Norm

Two statutory solutions to address the concerns of social entrepreneurs who complain about the profit-focused nature of traditional corporate law may be appropriate for state legislatures to consider. The first would be for states to amend their traditional corporate statutes to expressly acknowledge that the corporation can choose its objective or master, even if that master is not enhancing shareholder wealth.[110] Second, and alternatively, legislatures could consider adopting a *thoughtful* social enterprise statute(s)—or modify their current social enterprise statutes—to address the issues raised in Part III below.[111] Both solutions allow corporations to opt into a higher level of social and environmental responsibility, unlike constituency statutes, which generally do not expressly provide similar freedom.[112]

The first solution—amending the existing corporate statute—is the most simple as it does not require a new statute. However, it may be confusing to courts and investors to have both social enterprises and traditional corporations formed under the same statute. The second solution—a separate social enterprise statute—may appeal to shareholder wealth maximization proponents because by leaving traditional corporate law unaltered it arguably allows the norm to continue, while still allowing the free market, through competition, to determine if a non-shareholder focus will prove itself useful and sustainable.[113] In addition, a separate statute

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consider the effects of any action or inaction upon: [listed stakeholders].") (emphasis added).

110. Some may argue that corporations are already free (similar to LLCs) to dictate their objective, even if it departs from the shareholder wealth maximization norm, in their articles of incorporation (at least if done as an initial matter, before shareholders purchase shares). If this is the case, state legislatures, including Delaware, should consider making the freedom to focus on non-shareholder stakeholders explicit in their corporate statutes to calm the fears of risk-adverse managers and lawyers. Oregon has already made such ability explicit in its corporate statute. *See* OR. REV. STAT. § 60.047 (2011); *see also* Jason C. Jones, *The Oregon Trail: A New Path to Environmentally Responsible Corporate Governance?*, 54 ST. LOUIS U. L.J. 335, 347–49 (2009) (discussing the purpose and rationale of this aspect of Oregon's law). If legislatures choose this route, however, they should be careful to require corporations to clearly state their objective and choose one *primary* master. Without a primary master or objective, corporate law would lose its guiding function and lose much of the very little accountability it currently provides. *See infra* Part III.A–B.

111. *See* Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1382–84 (2011) (arguing that the social enterprise answer to the corporate social responsibility debate may be one that both libertarians and progressive corporate law proponents may find palpable).

112. J. Robert Brown, Jr., *Discrimination, Managerial Discretion and the Corporate Contract*, 26 WAKE FOREST L. REV. 541, 542 (1991) (stating that contractarians favor freedom of contract and take "the position that managers and owners should have complete freedom to negotiate over all terms of the corporate charter").

113. *See, e.g.*, Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 885 (1997) (reviewing PROGRESSIVE CORPORATE LAW (Lawrence E.

may help break the power of the shareholder wealth maximization norm, as it would be difficult for even the densest director to think his or her job is to maximize shareholder wealth when the entity itself is formed under a social enterprise statute and has a name like "benefit corporation" or "social purpose corporation."[114] The social enterprise statutes have already prompted intense attacks on the shareholder wealth maximization norm from the popular media, and the social enterprise movement has begun to change the tenor of education (though more in business schools than law schools, currently).[115] If the second alternative—a separate social

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Mitchell ed. 1995)) ("Here then is the essential conservative contractarian: one who seeks to reconcile conservative principle and economic theory by duplicating Russell Kirk's ability 'consistently to favor free markets, private property, competition, and at the same time to champion virtue.'"); Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, *supra* note 18, at 133 (praising "open and free competition" in the same article he disparages corporate social responsibility).

114. *See supra* Part I.D (discussing the power of the persistent common perception linked to the shareholder wealth maximization norm).

115. The media has been abuzz about the new social enterprise forms, spawning thousands of articles in various magazines, newspapers, and blogs over the past months. In June 2012 alone, there were 1,334 articles returned for a LexisNexis news search for the term "social enterprise." LEXISNEXIS, http://www.lexisnexis.com (follow "News & Business" hyperlink under "Search"; then follow "News" hyperlink and select "News, All" database; then use the "Terms and Connectors" search for "social enterprise") (search last performed June 7, 2012). *See* Kerr, *supra* note 55, at 630 & n.43 (discussing an increase in search results for the term "social entrepreneur"). Business and law schools have also caught social enterprise fever, adding significant social enterprise-focused offerings to their curriculum and hosting social enterprise symposia. *See, e.g.*, Stacey Blackman, *Social Entrepreneurship and the M.B.A.*, U.S. NEWS & WORLD REP. (Aug. 12, 2011), http://www.usnews.com/education/blogs/MBA-admissions-strictly-business/2011/08/12/social-entrepreneurship-and-the-mba; John A. Byrne, *Social Entrepreneurship: The Best Schools & Programs*, POETS & QUANTS (Aug. 13, 2010), http://poetsandquants.com/2010/08/13/social-entrepreneurship-the-best-schools-programs/ (discussing business school programs in social enterprise, including: the Duke University's Fuqua School of Business's Center for the Advancement of Social Entrepreneurship, Harvard Business School's Social Enterprise Initiative, Northwestern University Kellogg School of Management's Social Enterprise at Kellogg (SEEK) Program, Oxford Saïd Business School's Skoll Centre for Social Entrepreneurship, Stanford Graduate School of Business's Center for Social Innovation, Yale University's School of Management's Program on Social Enterprise). In addition, New York University is the home of The Catherine B. Reynolds Foundation Program in Social Entrepreneurship. *Catherine B. Reynolds Foundation Program for Social Entrepreneurship*, NEW YORK UNIV., http://www.nyu.edu/reynolds/index.flash.html (last visited Nov. 11, 2012). Emory University recently announced a research center called Social Enterprise @ Goizueta. Goizueta Newsroom, *Social Enterprise Announced as Research Center*, EMORY UNIV. GOIZUETA BUS. SCH. (Apr. 4, 2012), https://newsroom.goizueta.emory.edu/gnr/2012/04/04/social-enterprise-at-goizueta-now-a-research-center/. Law schools appear to be lagging behind the business schools a bit in the adoption of social enterprise-focused programs (perhaps because the law itself is lagging behind the business developments, or perhaps because many law professors are skeptical of the new social enterprise forms). Nonetheless, social enterprise has become a popular symposium topic at law schools over the past few years, and a few prominent schools have begun taking significant interest in social enterprise. For example, New York University School of Law funds a social entrepreneurship fellowship. *NYU Fellowships in Entrepreneurship, Social Entrepreneurship, and Innovation*, NEW YORK UNIV. L. SCH., http://www.law.nyu.edu/leadershipprogram/socialenterprise/index.htm (last visited

enterprise statute—is chosen, however, the law will have to address issues with the current statutes, discussed in Part III, for the social enterprise forms to be useful and sustainable.

III. SEEKING SUSTAINABILITY FOR SOCIAL ENTERPRISE

"Sustainability" is perhaps the most overused word in the social enterprise space, yet ironically, serious questions exist about the sustainability of the various social enterprise entity forms.[116] As discussed above, the two primary social enterprise entity forms in the United States are the benefit corporation and the L3C.[117] This Section focuses on the benefit corporation, as the author has addressed L3Cs in an earlier article, but many of the suggestions may be applicable across social enterprise forms, with some variations and exceptions.[118]

A. Board Guidance and Prioritizing Priorities

If you don't know where you're going, you might end up somewhere else.[119]

One of the primary problems with the current benefit corporation statutes is the lack of guidance the statutes provide for boards of directors. Directors of benefit corporations are told they *must* consider the effects of

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Nov. 11, 2012). The University of Washington School of Law now has a Social Entrepreneurship and Nonprofit Law Clinic and the Georgetown University Law Center will open a similar clinic in the fall of 2013. *ELC Social Entrepreneurs & Non-Profits*, UNIV. OF WASH. SCH. OF LAW, http://www.law.washington.edu/clinics/entrepreneurial/clients/nonProfit.aspx (last visited Nov. 11, 2012); *Social Enterprise and Nonprofit Clinic*, GEORGETOWN LAW, http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/social-enterprise/index.cfm (last visited Nov. 11, 2012). In addition, a few law schools, including the author's own school, have very recently added a social enterprise course to the curriculum. Moreover, the social enterprise fellowship opportunities for recent law and business graduates have mushroomed in recent years. *See 50+ Fellowship Programs for Social Innovators*, INNOV8SOCIAL (Oct. 24, 2011), http://www.innov8social.com/2011/10/50-fellowship-programs-for-social.html.

116. *See* Brakman Reiser, *supra* note 107, at 593 ("[The] benefit corporation lacks robust mechanisms to enforce dual mission, which will ultimately undermine its ability to expand funding streams and create a strong brand for social enterprise as sustainable organizations."); Kleinberger, *A Myth Deconstructed*, *supra* note 104, at 881 ("The 'L3C' is an unnecessary and unwise contrivance."); Murray & Hwang, *supra* note 9, at 51–52.

117. *See supra* Part II.C.

118. *See generally* Murray & Hwang, *supra* note 9.

119. TOBY KEITH & BOBBY PINSON, SOMEWHERE ELSE (Show Dog–Universal Music 2011), *lyrics available at* http://www.cowboylyrics.com/lyrics/keith-toby/somewhere-else-30645.html (last visited Nov. 11, 2012). This line likely stems from the similar saying attributed to humorist and former professional baseball player and manager, Yogi Berra. *Yogi Berra, Sayings and Ripostes*, LINGUISTIC HUMOR, http://www.ling.upenn.edu/~beatrice/humor/yogi-berra.html (last visited Nov. 11, 2012) ("If you don't know where you're going, you might not get there.").

any action on such diverse groups as: (1) shareholders; (2) employees ("of the benefit corporation, its subsidiaries and its suppliers"); (3) customers; (4) community and society; (5) "the local and global environment"; (6) "the short and long term interests of the benefit corporation"; and (7) "the ability of the benefit corporation to accomplish its general public purpose and any specific public benefit purpose."[120] Since Biblical times, it has been well recognized that people cannot properly serve two masters, much less seven or more.[121]

Directors would benefit from having a primary master and a clear objective. One of the reasons the shareholder wealth maximization norm has been so widely followed by traditional corporations may be because it provides a clearer corporate objective than many of the argued-for alternatives.[122] Without clear guidance and without a clear master, many directors of benefit corporations and other social enterprises will likely default to seeking their own self-interest or their own objectives.[123] Professor Lynn Stout and others reject the need for a single metric and have argued that directors, like other human beings, balance the interest of various corporate stakeholders.[124] Among other examples of balancing by human beings, Professor Stout points to the ability of people to balance

120. *See, e.g.*, MODEL BENEFIT CORP. LEGIS. § 301(a); *see also* Murray, *supra* note 92 (showing the standard of conduct for directors adopted by the various states, which track, in most instances, the model legislation). The mandatory nature of this provision of the benefit corporation statutes differentiates benefit corporation statutes from most constituency statutes and from the flexible purpose and social purpose statutes. *See supra* Part II.C.

121. *Luke* 16:13 ("No one can serve two masters. Either you will hate the one and love the other, or you will be devoted to the one and despise the other. You cannot serve both God and money.").

122. Having shareholders as the focus of directorial attention may also make matters (relatively) easier for judges. Strine, *The Social Responsibility of Boards of Directors and Stockholders in Charge of Control Transactions*, *supra* note 24, at 1173 n.11 ("By permitting directors to justify their actions by reference to more diffuse concerns [than those of shareholders], the (already challenging) judicial task of adjudicating fiduciary compliance arguably becomes impossible."). This Article does not argue that the shareholder wealth maximization norm provides perfectly clear guidance for directors of traditional corporations, but merely that it provides better guidance than other proposed alternatives. For example, shareholders often have conflicting interests due to, among other things, varied investment time horizons. Bainbridge, *Director Primacy and Shareholder Disempowerment*, *supra* note 41, at 1745.

123. *See* Roe, *supra* note 33, at 2065 ("[A] stakeholder measure of managerial accountability could leave managers so much discretion that managers could easily pursue their own agenda."); Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 1013 (1992) ("There is a very real possibility that unscrupulous directors will use nonshareholder interests to cloak their own self-interested behavior.").

124. STOUT, *supra* note 18, at 107–09 (arguing that the need for a single metric, championed by economist Michael Jenson in his article *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 BUS. ETHICS Q. 235, 238 (Apr. 2002), is overstated and "ignores the obvious human capacity to balance").

work and family.[125] This Article admits that directors do and should balance various stakeholder interests and does not argue for myopic focus on a *single* metric, but rather posits that clear corporate *priorities* can make that difficult balancing job easier.[126]

Using Professor Stout's work/family example of balancing can help illustrate the point. Clearly defined priorities can help an individual make difficult decisions in the constant work/family balance. If an individual prioritizes family over work, that obviously does not mean that every decision leads to direct, short-term benefits for the family. For example, on occasion, that family-primacy individual will rightly choose to stay late at work and miss dinner. While that individual decision may have seemed to prioritize work over family, viewed in the long-term, the family *may* benefit from the resultant career security. Even if the long-term benefits do not actually come to fruition, most would agree that the individual should not be judged for her well-intentioned decision.

The fact that humans certainly balance interests of various constituents, however, does not mean that priorities are unimportant. Priorities can help guide and can also provide weightings for the costs and benefits of any decision.[127] Also, priorities most clearly help in critical situations.[128] To continue with the work/family example, in a zero-sum game, how does one decide between work and family when the outcome of that decision is of critical importance to both?[129] If an individual has clearly stated that

125. *Id.* at 108 ("[S]hopkeepers balance the hope of making one more sale against the desire to get home in time for the family dinner."). Professor Stout admits that balancing, in both the corporate and personal context, is difficult. *Id.*

126. This Article does not defend the claim that shareholder wealth *maximization* should be the *sole* focus of directors of traditional corporations, but it is more sympathetic to the argument that *long-term* shareholder wealth *enhancement* should be the *primary* focus of traditional corporations. Of course, as the ALI Principles of Corporate Governance note, this priority cannot overcome the requirement to follow the law. AMERICAN LAW INSTITUTE, *supra* note 22, at § 2.01. Also, the *long-term* focus allows for many decisions that appear to benefit most directly stakeholders other than shareholders in the *short-term*. Virtually no companies can be successful for its shareholders in the *long-term* without considering other stakeholders.

127. In a zero-sum game, priorities will help determine which stakeholder should win, as the prioritized stakeholder's benefits and costs will be weighted more heavily.

128. In the corporate context, decisions involving potential takeovers, discussed in Parts I.C and III.B.3, are among the most critical decisions faced by directors. Decisions regarding takeovers also often most clearly pit various corporate stakeholders against one another. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1164 (1981) (noting the serious conflicts between stakeholders that arise in the takeover context).

129. The most common critical decision in the work/family context is a career decision that requires a family move. Of course, in some cases, moving for a new job is in the best interest of the family, but on occasion, the decision to move has incredibly large costs for the family and equally large benefits for one's career. When the costs for two or more constituents are high, in opposite directions, priorities can be extremely helpful in resolving the issue.

family is a higher priority than work, this critical decision is more easily answered. Even if the priorities are not clearly stated, priorities will still drive the decision. Transparency as to the priorities makes things clearer to all involved and makes it less likely that the individual will drift from his or her true priorities.[130] Similarly, directors would benefit from a clear corporate objective that includes specific corporate priorities.[131]

Proponents of the benefit corporation statutes may argue that the clear benefit corporation objective is to increase "net stakeholder value."[132] This approach is already embedded in the model benefit corporation statute, which defines "general public benefit" as "[a] material positive impact on society and the environment, *taken as a whole*, assessed against a third-party standard, from the business and operations of a benefit corporation."[133] Current benefit corporation statutes do not allow directors to abandon the "general public benefit purpose" in favor of a more specific master or mandate.[134] Rather, the benefit corporation statutes require that any "specific public benefit purpose" be adopted *in addition* to the "general public benefit purpose." The "general public benefit purpose" concept, as used in the current benefit corporation statutes, is both too vague and too confining.

The mandate that a benefit corporation pursue a "general public benefit purpose" is too vague because it does not provide a practical way for directors to make decisions. Over forty years ago, Milton Friedman wrote that "[t]he discussions of the 'social responsibilities of business' are

130. Personally, the author has been greatly helped by documenting his priorities (in a Google document) and referring to them often. Even with the documentation, balancing is challenging and necessary. But clearly listing priorities, in order, aids in difficult decision-making and can act as a reminder to take time for the "important" things even if they are not "urgent." *See* STEPHEN R. COVEY, THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE: RESTORING THE CHARACTER ETHIC 151–82 (2004) (defining "Quadrant II activities"—activities that are not urgent, but are important—and discussing how most people do not spend enough time doing Quadrant II activities).

131. For example, if a corporation such as Patagonia lists the environment as a high (or primary) priority, the high ranking will likely inform the directors' decisions. *See* CHOUINARD, BUSINESSMAN, *supra* note 1, at 3. Patagonia's founder, Yvon Chouinard, admits that the corporation cannot avoid all environmental harm (and still operate as a sustainable corporation), so Patagonia attempts to "cause no *unnecessary* harm to the environment." CHOUINARD & STANLEY, *supra* note 1, at 3, 15 (emphasis added). The high prioritization of the environment has also led to a number of decisions, such as switching to organic cotton, even if the decisions were likely to harm corporate profitability. *Id.* at 48–52.

132. *See, e.g.*, *The New ABC's of California Corporations*, KAYE & MILLS, http://www.kayemills.com/articles/new-abcs-of-california-corporations.html (last visited Nov. 11, 2012) (stating that benefit corporation law shifts "the corporate purpose from maximizing shareholder value to maximizing stakeholder value").

133. MODEL BENEFIT CORP. LEGIS. § 102(a).

134. *Id.* § 201(b) ("The identification of a specific public benefit under this subsection does not limit the obligation of a benefit corporation under [the general public benefit purpose] subsection.").

notable for their analytical looseness and lack of rigor."[135] Recently, a number of organizations, like B Lab's Global Impact Investing Rating System ("GIIRS"), have begun attempting to apply some rigor to the measurement of social and environmental impact.[136] In addition, the Impact Reporting and Investment Standards ("IRIS") has been "developed to provide a common reporting language for impact-related terms and metrics" within the social enterprise space.[137]

Further, Social Return on Investment ("SROI") is a method of identifying stakeholder interests and helps measure a company's improvement in addressing those interests.[138] In short, SROI aspires to help develop and choose the indicators for individual companies, while IRIS attempts to help standardize definitions and indicators to facilitate comparison of companies.[139] In a project focused more on traditional U.S. public corporations, but which may still prove useful in some ways to social enterprises, the Sustainability Accounting Standards Board ("SASB") is "engaged in the creation and dissemination of sustainability

135. Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, *supra* note 18, at 133.

136. B Lab analogizes GIIRS "to Morningstar investment rankings and Capital IQ financial analytics." GLOBAL IMPACT INVESTING RATINGS SYSTEM, http://giirs.org/ (last visited Nov. 11, 2012). There are numerous organizations, other than B Lab, that are also trying to quantify social and environmental impact. *See Selecting a Third Party Standard: List of Standards*, *supra* note 88 (mentioning that there are over 100 raters of corporate sustainability and listing a dozen third-party standards, including B Impact Assessment, Global Reporting Initiative, Green Plus, Green Seal, Green America Business Network, ISO 26000, and Sustainability Quotient). As the social enterprise market matures, there is likely to be consolidation of these ratings systems, which will make the choosing of a third-party standard simpler for directors, but will also bring the specter of self-interested actions by the powerful rating companies similar to the problems posed by only three main credit rating agencies, Moody's, S&P, and Fitch. *See generally Wall Street and the Financial Crisis: The Role of Credit Rating Agencies: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov't Affairs*, 111th Cong., (2010), *available at* http://www.hsgac.senate.gov/imo/media/doc/Financial_Crisis/042310Exhibits.pdf (containing 581 pages of information about the credit rating agencies' role in the most recent financial crisis, including the memorandum to the Members of the Permanent Subcommittee on Investigations, Exhibit No. 1a, which provides a helpful summary of the investigation); Patrick Kingsley, *How Credit Agencies Rule the World*, THE GUARDIAN (Feb. 15, 2012, 15:00 EST), http://www.guardian.co.uk/business/2012/feb/15/credit-ratings-agencies-moodys?INTCMP=SRCH (describing the tremendous power of the "Big Three" credit rating agencies).

137. *About IRIS*, IMPACT REPORTING & INVESTMENT STANDARDS, http://iris.thegiin.org/about-iris (last visited Nov. 11, 2012). IRIS was created by the Rockefeller Foundation, B Lab, Acumen Fund, and the Global Impact Investing Network ("GIIN"). *See History*, IMPACT REPORTING & INVESTMENT STANDARDS, http://iris.thegiin.org/history (last visited Nov. 11, 2012); *see also* BUGG-LEVINE & EMERSON, *supra* note 5, at 10–11.

138. *What is Social Return on Investment (SROI)?*, THE SROI NETWORK INT'L., http://www.thesroinetwork.org/what-is-sroi (last visited Nov. 11, 2012).

139. Attempting to standardize the measurement of various social and environmental outcomes is an ambitious and challenging project.

accounting standards."[140]

While there has been significant movement in the rigor of measuring social and environmental impact since the days of Milton Friedman, boards of directors still do not have a simple, yet adequate guide to help them pursue the "general public benefit" and the interests of all the various stakeholders listed in the benefit corporation statute. How should benefit corporation directors resolve an issue that requires harming some stakeholders, but benefiting others? For example, how should directors weigh harm to the environment against harm to employees? Of course, it would be wonderful if all decisions could simply benefit all stakeholders, but that is not possible with many decisions.[141] Even if directors are simply attempting to maximize net stakeholder value, the question of how to measure and compare stakeholder value remains largely unanswered.[142]

Ironically, "general public benefit" is not only too vague, but it could be argued that it is too confining as well. *Requiring* social enterprise directors to consider an unprioritized group of stakeholders while also requiring a corporate purpose that looks at societal and environmental impact *as a whole* is not only unworkable, but could also exclude corporations with a more specific mission.[143] A corporation with a focused and specific public

140. SUSTAINABILITY ACCOUNTING STANDARDS BOARD (SASB), http://www.sasb.org/ (last visited Nov. 11, 2012). Like the Financial Accounting Standards Board ("FASB") establishes financial accounting and reporting standards, SASB is attempting to establish recognized standards for sustainability accounting. *See* Alicia Plerhoples, *Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 TENN. J. BUS. L. 221, 257 (2012).

141. Bainbridge, *Director Primacy*, *supra* note 20, at 600 n.261 (noting that "[e]ven if shareholder and nonshareholder interests are often congruent, it nevertheless remains the case that some situations present zero-sum games" whereby the directorial decision results in certain stakeholder winners and certain stakeholder losers).

142. The author recognizes that shareholder value may also be difficult to define, as different shareholders have different goals, but currently there is much more consensus on measuring shareholder value (for example, using a discounted cash flow model) than on measuring stakeholder value. STOUT, *supra* note 18, at 86–94 (noting the differing interests and investment horizons among various types of shareholders).

143. *See Benefit Corporation—Legal Provisions and FAQs*, B LAB, 2–3, http://www.bcorporation.net/resources/bcorp/documents/Benefit%20Corporation%20-%20Legal%20Provisions%20and%20FAQ.pdf (last visited Nov. 2, 2012) (stating that the statute prevents a company from adopting a narrow specific purpose and then ignoring "general public benefit"); *see also* J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change,* 2 AM. U. BUS. L. REV. 85 (2012). California's Corporate Flexibility Act, which allows the formation of "flexible purpose corporations" allows entrepreneurs the freedom to provide for a more specific corporate mission without the restrictive mandates of the benefit corporation statute. CAL. CORP. CODE § 2602(b); *see* Plerhoples, *supra* note 140, at 228 (noting the permissive nature of California's Corporate Flexibility Act). California does not currently have a constituency statute and the California Corporate Flexibility Act, which allows for the formation of flexible purpose corporations, appears to serve as a de facto opt-in constituency statute. *See generally* Dana Brakman Reiser, *The Next Big Thing: Flexible Purpose Corporations*, 2 AM. U. BUS. L. REV. 55 (2012).

purpose at its core is more likely to pursue that purpose because the objective is more easily identified by directors.[144] A more specific public purpose (or a prioritizing of certain stakeholders within a more general public purpose) would also provide a more workable system of board accountability.

B. Board Accountability

The benefit corporation statute is said to be an antidote to "greenwashing" and faux corporate social responsibility ("faux CSR").[145] But without at least some minimal level of board accountability, the benefit corporation statute could be an avenue to greenwashing and faux CSR rather than an antidote to them. In fact, if an appropriate accountability framework is not erected, benefit corporations could allow an unprecedented amount of rent-seeking and could allow greater management entrenchment than permitted in other entity forms.[146]

Benefit corporation statutes state that directors *must* consider multiple stakeholders in each and every decision they make.[147] As has been long recognized, if the law asks directors to serve multiple masters, it becomes difficult to hold the directors accountable *at all*.[148] In the same vein, early

144. A clear statement of priorities could also stem a flood of potential benefit corporation litigation because if priorities are identified from the beginning there is a greater chance that shareholders who choose to invest will have similar goals and interests. Courts could use well-settled rules of contract interpretation to interpret the statement of corporate objective, including the corporation's primary focus.

145. *Benefit Corporation—Legal Provisions and FAQs*, *supra* note 143, at 2 ("The 'general public benefit' purpose helps prevent abuse of this legislation by corporations interested in green-washing."). Jay Westerveld, an American environmentalist, is credited with coining the term "greenwashing" in 1986, and the term generally refers to companies making exaggerated or untrue statements about its environmentally friendly practices. Miriam A. Cherry & Judd F. Sneirson, Chevron, *Greenwashing and the Myth of "Green Oil Companies*,*"* 3 WASH. & LEE J. ENERGY, CLIMATE & ENV'T 133, 140–41 (2012) [hereinafter Cherry & Sneirson, Chevron, *Greenwashing and the Myth of "Green Oil Companies"*]. *See generally* Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 1002–09 (2011) [hereinafter Cherry & Sneirson, *Beyond Profit*] (coining the term "faux CSR" and proposing reforms to address false or misleading claims by a company about corporate social responsibility).

146. The rent-seeking in benefit corporations may rise to unprecedented levels because benefit corporations have the ability to be as profitable as traditional corporations, yet managers have a new set of excuses for selfish behavior, namely the various constituents that the statute *mandates* they consider. *Cf.* Dennis Honabach & Roger Dennis, *The Seventh Circuit and the Market for Corporate Control*, 65 CHI.-KENT L. REV. 681, 688 n.38 (1989) (describing constituency statutes, which the benefit corporation statutes resemble in some respects, as "rent-seeking statutes").

147. *See* MODEL BENEFIT CORP. LEGIS. § 301. Obviously, merely "considering" various stakeholders is not very demanding of benefit corporation directors, but the mandatory nature of the command makes it more onerous than permissive constituency statutes.

148. *See* Berle, *For Whom Corporate Managers Are Trustees*, *supra* note 15, at 1367 ("When the fiduciary obligation of the corporate management and 'control' to stockholders is weakened or eliminated, the management and 'control' become for all

commentators on social enterprise have noted that the imposition of multiple masters makes it difficult to hold directors accountable and may permit directors to seek their own self-interest by using one of the many masters as pretext.[149] Chancellor Strine colorfully criticized benefit corporation statutes as existing in a:

> [F]ictional land where you can take other people's money, use it as you wish, and ignore the best interests of those with the only right to vote. In this fictional land, I suppose a fictional accountability mechanism will exist whereby the fiduciaries, if they are a controlling interest, will be held accountable for responsibly balancing all these interests. Of course, a very distinguished mind of the political left, Adolph Berle, believed that when corporate fiduciaries were allowed to consider all interests without legally binding constraints, they were freed of accountability to any.[150]

As suggested in the previous Section, directors should be given clear guidance by either the statute or the benefit corporation's governing documents to allow for a workable governance system that includes at least some minimal level of board accountability.[151]

Once the issue of clear guidance is addressed, an enforcement mechanism, or at least the potential for enforcement, can aid in corralling the natural selfish urges of directors and can also aid in creating a norm that directors may follow. Humans are, by their very nature, self-seeking.[152] A rule that attempts to curb the self-seeking nature of directors will not be

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practical purposes absolute."); William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and* The Modern Corporation, 34 J. CORP. L. 99, 129 (2008) ("The key insight that Berle attributed to these corporate lawyers is that a management-coordinated, multiple constituency system simply would not work."); EASTERBROOK & FISCHEL, *supra* note 18, at 38 ("[A] manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither.").

149. *See, e.g.*, John Tyler, *Negating the Legal Problem of Having "Two Masters": A Framework for L3C Fiduciary Duties and Accountability*, 35 VT. L. REV. 117, 142–44 (2010) (noting the problems associated with multiple masters, but asserting that "[t]here is but one master in the L3C-charitable, exempt purposes"); Brakman Reiser, *supra* note 107, at 599–600 ("The broad discretion benefit corporation statutes accord to directors can likewise be faulted for giving directors unbridled discretion, with which they might pursue social good or might pursue foolish or self-serving practices."); Murray & Hwang, *supra* note 9, at 39–41 (suggesting a clear ordering of priorities for L3Cs).

150. Strine, *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, *supra* note 24, at 150 (citing A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note,* 45 HARV. L. REV. 1365, 1367 (1932)).

151. *See supra* Part III.A.

152. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (6th ed. 2003) ("[M]an is a rational maximizer of his ends in life, his satisfactions—what we shall call his 'self-interest.'"). *But see* STOUT, *supra* note 18, at 96–99 (arguing that most people are not "psychopaths" and challenging "[c]onventional shareholder value thinking [that] presumes that investors . . . care only about their own material circumstances").

very effective without some potential consequences.[153] Most benefit corporation statutes currently state that a "benefit enforcement proceeding" is the only way to enforce the above directorial mandate.[154] The benefit enforcement proceeding cannot result in monetary damages.[155] As a default, only a shareholder, a director, or the holder of five percent or more of the benefit corporation's parent can bring a benefit enforcement proceeding.[156] This enforcement structure can be improved, but is actually not as far removed from the enforcement structure of traditional corporate law as it may seem because, as a practical matter, traditional corporate law provides more in the way of guidance than accountability.[157] As described below, an improved structure would require a clear statement of the corporation's objective and allow for dissenters' rights when the objective is changed or the corporation ceases to be a benefit corporation. Further, an improved benefit corporation statute would provide for the ability to opt-into monetary liability for directors.[158] The corporate governance

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153. As discussed above, some of these consequences may be legal consequences and some may be social consequences stemming from the violation of established norms. While a norm can be quite powerful, a legal rule without *any* real consequences seems unlikely to spawn a strong norm. *See supra* Part II.D.

154. *See* MODEL BENEFIT CORP. LEGIS. §§ 303–305.

155. *Id.* §§ 301, 305.

156. *Id.* § 305. Other persons may be given standing to bring a benefit enforcement proceeding in the articles or bylaws of the benefit corporation. *Id.* In the most recent version of the Model Benefit Corporation Legislation, a two percent ownership threshold was set for shareholder standing. MODEL BENEFIT CORP. LEGIS. § 305(b)(2)(i). This change stemmed, in part, from a conversation between the author and the drafter of the Model Benefit Corporation Legislation, Bill Clark, about the fear of potential frivolous lawsuits against the directors of a benefit corporation by shareholders with extremely small financial stakes in the corporation, but a strong interest in one or more of the various stakeholders listed in the statute. E-mail from William H. Clark, Jr., *supra* note 98. At a recent symposium hosted by the University of California Hastings College of Law on October 19, 2012, the author suggested to the audience, including Bill Clark, that the ownership threshold should be a sliding scale that decreases as the size of the company increases. Amassing two percent of the outstanding stock in a large company, or organizing a group of investors who do, could be a significant hurdle. Alternatively, the statutes could provide a set dollar threshold, such as the ownership of $2,000 or more in stock in the benefit corporation.

157. *See supra* Part I.B-C (describing some of the extremely rare cases where the shareholder wealth maximization norm has been enforced). For a recent example of guidance, without accountability, see also *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 450–52 (Del. Ch. 2012), where Chancellor Strine strongly criticized the actions of the officers and directors of El Paso, yet denied the plaintiffs' request to preliminarily enjoin the proposed merger. *See also* Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847, 860–64 (2009) (describing the serious scolding of the directors in *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) despite no holding of liability); Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 WM. & MARY L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1995734 (noting the "pervasive divergence between standards of conduct and standards of review" in corporate law).

158. Allowing the ability to opt-into monetary liability for directors would both maximize freedom on the issue of liability and default to the option most likely to be

structure of benefit corporations should use much of traditional corporate law framework, albeit with a different primary objective than increasing shareholder value.

1. Dissenters' Rights

Currently, the California benefit corporation statute is the only statute that expressly provides for dissenters' rights when a corporation transitions to and from benefit corporation status.[159] B Lab has not promoted dissenters' rights because a transition to or from benefit corporation status is not a liquidation event, and thus corporations may not have the available capital to pay dissenters.[160] If states do not recognize dissenters' rights, benefit corporations are likely to face lawsuits from shareholders who object to the altering of the fundamental nature of their investment.[161] Virginia has addressed this problem by requiring 100% shareholder approval (as opposed to the more typical two-thirds vote)[162] for the transition from traditional corporation to benefit corporation.[163] While the Virginia solution eliminates the dissenting shareholder problem, the solution is suboptimal because it also makes it nearly impossible for a larger corporation to make the switch to a benefit corporation, even if the vast majority of its shareholders are in favor of such a move.[164]

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agreed upon if there were no transaction costs. *Cf.* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS 4–6 (2008) (explaining the idea of "libertarian paternalism," which appreciates freedom to choose and sets defaults carefully). While this Article was in the editing process, and after a draft of the Article was posted on SSRN, this suggestion was adopted by the most recent draft of the Model Benefit Corporation Legislation. MODEL BENEFIT CORP. LEGIS. § 301(c). The drafter of the legislation, Bill Clark, credited a draft of this Article as a source of the change. E-mail from William H. Clark, Jr., *supra* note 98.

159. CAL. CORP. CODE §§ 14603–14604. During the editing of this Article, Massachusetts passed its benefit corporation statute, which includes appraisal rights similar to California's dissenters' rights. MASS. GEN. LAWS ANN. ch. 156E, §§ 5, 8 (West 2012). The Massachusetts statute, however, only expressly provides for appraisal rights when a company adopts benefit corporation status and is silent on rights that may arise when a company terminates its benefit corporation status. *Id. See* J. Haskell Murray, *Massachusetts Benefit Corporation Statute*, SOCENT LAW (Dec. 1, 2012), http://socentlaw.com/2012/12/massachusetts-benefit-corporation-statute/.

160. *See* Clark & Vranka, *supra* note 54.

161. VA. CODE ANN. §§ 13.1-785 to -786 (2012).

162. *See, e.g.*, CAL. CORP. CODE § 14603-04; HAW. REV. STAT. ANN. §§ 420D-3 to -4 (LexisNexis 2011); MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-03 to -04; N.J. STAT. ANN. §§ 14A:18-3(a) to (4)(a) (West 2011); S.C. CODE ANN. § 33-38-230 (West 2012); VT. STAT. ANN. tit. 11A, §§ 21.05 to 06.

163. VA. CODE ANN. § 13.1-785.

164. *Cf.* Guhan Subramanian et al., *Is Delaware's Antitakeover Statute Unconstitutional? Evidence from 1988–2008*, 65 BUS. LAW. 685, 716 (2010) (finding that, between 1990 and 2008, no hostile bidder was able to obtain the tender of 85% or more of the outstanding shares through a tender offer). Professor Subramanian's study is relevant here because it shows the logistical difficulty of getting more than 85% of shareholders, not to mention 100%, to vote for anything, even if it is clear that the proposal is in the best interest of the shareholders.

Each benefit corporation statute should expressly provide for dissenters' rights to protect shareholders from a fundamental change to the company in which they invested. To prevent abuse, the dissenters' rights should only be available to shareholders who notify the corporation in a timely fashion regarding their objection and agree to accept the amount the court determines to be "fair value" for the shares.[165] These requirements lessen the chance that shareholders would object for improper motives, as there would be a chance that the shareholders will get less than they believe the corporation is worth.

2. *Duties of Care and Loyalty in Benefit Corporations*

While academics have often noted that multiple masters lead to no accountability, in practice, the benefit corporation statutes may already provide for similar amounts of accountability, though not as much guidance, as traditional corporate law.[166] Duty of loyalty lawsuits are generally the only type of corporate governance lawsuits with any real teeth, in terms of liability, in traditional corporate law.[167] These types of duty of loyalty lawsuits appear to be available to plaintiffs in the benefit corporation context, though case law has yet to provide guidance.[168] After *Stone v. Ritter*, Delaware law became clearer that the duty of loyalty addressed not only the self-interested actions of directors, but that the duty of loyalty also required directors to act "in good faith to advance the best interests of the corporation."[169] In the nonprofit context, some states recognize a duty of obedience, which is "sometimes referred to as a way of describing the board's obligation to remain faithful to the organization's

165. Delaware has a detailed statute and rich body of case law dealing with valuing shares in the merger context that might be helpful for courts to reference in determining "fair value" in the social enterprise dissenters context. *See* DEL. CODE ANN. tit. 8, § 262. *See generally* Lawrence A. Hamermesh & Michael L. Wachter, *The Fair Value of Cornfields in Delaware Appraisal Law*, 31 J. CORP. L. 119 (2005).

166. *See supra* notes 148 & 149.

167. *See* Stephen M. Bainbridge, *Much Ado About Little? Directors' Fiduciary Duties in the Vicinity of Insolvency*, 1 J. BUS. & TECH. L. 335, 367 (2007) ("Whether or not the board exercised reasonable care is irrelevant" under traditional corporate law because of the business judgment rule.); *see also* Murray, *Latchkey Corporations, supra* note 70, at 584 ("[T]he business judgment rule and the exculpatory charter provisions, such as those authorized by the Delaware General Corporation Law section 102(b)(7), have taken most of the bite out of the duty of care.").

168. While managers of benefit corporations may have more ways to mask their self-interested decisions, the courts could presumably still hold managers liable for blatant actions that appear to be taken to benefit the manager individually as opposed to the corporation. More subtle selfishness, however, will be easier for a manager to hide if the benefit corporation is not forced to make its priorities clear.

169. Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 629–30 (2010); *accord* Stone v. Ritter, 911 A.2d 362, 369–70 (Del. 2006).

purpose and mission."[170] But Delaware's broad conception of the duty of loyalty would be sufficient to encompass claims against benefit corporation directors who allegedly failed to pursue or create a general or specific public benefit and claims against directors who abuse their positions to harm the benefit corporation through their selfish actions. On the other hand, legal actions alleging a duty of care violation rarely lead to liability, on that claim, under traditional corporate law.[171] In reaction to the rare finding of liability in *Smith v. Van Gorkom*,[172] the Delaware legislature passed Delaware General Corporation Law Section 102(b)(7), which allowed the elimination of monetary liability for breaches of the duty of care.[173]

Benefit corporation statutes eliminate the possibility of monetary liability for both the directors and the benefit corporation for failure to pursue the general or specific public purpose of the benefit corporation.[174] The statutes contain no provisions allowing a benefit corporation to opt-into monetary liability if it so chooses.[175] There seems to be no good reason to prevent benefit corporations from opting into a regime where directors can be liable for monetary damages. The Delaware General Corporation Law Section 102(b)(7) requires corporations to include a provision in their certificates of incorporation that eliminates monetary liability for certain types of claims.[176] The vast majority of Delaware corporations have Section 102(b)(7) clauses in their certificates of incorporation, suggesting that the default should be elimination of monetary liability for duty of care claims.[177] While traditional Delaware

170. Thomas Lee Hazen & Liza Love Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. PA. J. BUS. L. 347, 356 (2012).

171. David A. Hoffman, *Self-Handicapping and Managers' Duty of Care*, 42 WAKE FOREST L. REV. 803, 805 n.7 (2007) (noting the "toothless maw" of the duty of care).

172. 488 A.2d 858, 893 (Del. 1985) (reversing the Delaware Court of Chancery and holding that the directors breached their fiduciary duties to the stockholders by failing to adequately inform themselves and failing to fully disclose all material information).

173. DEL. CODE ANN. tit. 8, § 102(b)(7).

174. *See* MODEL BENEFIT CORP. LEGIS. §§ 301, 305.

175. *See* E-mail from William H. Clark, Jr., *supra* note 98 (noting that the Model Benefit Corporation Legislation has been modified to incorporate this suggested change due, at least in part, to a draft of this Article).

176. DEL. CODE ANN. tit. 8, § 102(b)(7).

177. *See, e.g.*, *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 752 (Del. Ch. 2005) ("The vast majority of Delaware corporations have a provision in their certificate of incorporation that permits exculpation to the extent provided for by section 102(b)(7)."); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983) (stating that default terms should be created by asking, "What arrangements would most bargainers prefer?"); Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 700 (1982) ("[T]he legal system should supply rules that mimic the *ex ante* agreements shareholders would reach if they could bargain for and enforce their agreements costlessly.").

law may not provide the correct default, at least it allows private ordering regarding potential liability for breaches of the duty of care. Benefit corporation statutes should allow that choice as well, but with a default of exculpating liability because the majority of corporations will likely opt to do so if one assumes no transaction costs.

Benefit corporation statutes do allow shareholders to request injunctive relief if directors fail to pursue or create a general public benefit or the corporation's specific public benefit purpose.[178] As a practical matter, however, these injunctive claims may be rarely brought unless an action for injunctive (non-monetary) relief is made worthwhile for plaintiff attorneys, or they may be brought too frequently if the awarding of attorneys' fees is too generous or made too often.[179] The California benefit corporation statute, for example, expressly states that courts should award attorneys' fees to successful plaintiffs, but only if the court finds that the defendants' failure to comply with the statute was "without justification."[180] This is quite a high standard, as it probably should be, but again, the statute should allow for private ordering and allow a lower standard for liability and fee awards, such as "success on the merits," if desired by a benefit corporation.

3. Takeovers and Takeover Defenses in Benefit Corporations

Takeovers, in the "market for corporate control," are often considered one way to discipline managers and keep them accountable.[181] Some may argue that benefit corporation statutes destroy this path to accountability as well. However, takeovers could still discipline management in the benefit corporation context. Courts that apply a *Unocal*-like intermediate scrutiny to corporate takeover defenses could still apply the same two-pronged

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178. *See generally* MODEL BENEFIT CORP. LEGIS. §§ 301–305. One can rightly wonder how courts will address these requests for injunctive relief. Already overburdened courts will not likely warm to the idea of policing the pursuit of general or specific public benefit purpose.

179. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 670 (1986) (noting the importance of legal rules establishing "the fee arrangements under which these plaintiff's attorneys are compensated" and stating that "these rules create an incentive structure that either encourages or chills private enforcement of law").

180. CAL. CORP. CODE § 14623(d).

181. *See* Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 112–19 (1965); *see also* Easterbrook & Fischel, *supra* note 177, at 698 ("Transactions in corporate control often produce gains for the corporation. Substitution of one set of managers for another, for example, often produces gains because assets increase in value under better management."); Henry G. Manne, *The "Higher Criticism" of the Modern Corporation*, 62 COLUM. L. REV. 399, 411 (1962) ("[O]utsiders are attracted to the potential gain they may make by buying the shares *and* managing the company efficiently.") (emphasis in original). Constituency statutes, in the states that have adopted them, already provide significant, though not absolute protection, for directors of traditional corporations.

test—(1) there must be a reasonable ground to believe a threat to corporate policy and effectiveness and (2) the defensive measure must be reasonable in relation to the threat posed by the hostile bid—but the threat and reasonableness would simply be evaluated through the lens of a corporate objective different than pursuing shareholder value, namely the benefit corporation's specified objective.[182] For companies like craigslist, in the 2010 case of *eBay v. Newmark*, described above, the advent of benefit corporations could be a godsend.[183] Currently, Delaware does not have a benefit corporation statute, but had craigslist been incorporated as a benefit corporation, in a different state, the outcome of the case would have likely been different, even if that different state followed *Unocal* in the application of its traditional corporate law.[184] Moreover, the Delaware courts require even more of a shareholder focus in the *Revlon* context, where a break-up of the business has become inevitable or directors have initiated an active bidding process to sell the corporation, than they do under the *Unocal* standard.[185]

The benefit corporation statute may provide a better platform than traditional corporate law for erecting defensive measures to protect a corporation's pursuit of a non-shareholder focused objective. Successful social enterprises, including benefit corporations, may be prime hostile takeover targets because of the ability for acquirers to easily cut costs (those social and environmental programs that are not profitable) and make sizeable short-term profits.[186] Benefit corporation law, and social enterprise law in general, should protect vulnerable social enterprises from takeover threats, but the protection should not be absolute, as absolute

182. Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 955–56 (Del. 1985). *Unocal* scrutiny, though enhanced from that applied to day-to-day decisions, still provides directors with great discretion, and Delaware courts only consider whether the directors' actions were within a "range of reasonableness." *See, e.g.*, Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 48 n.18 (Del. 1994). Shareholders of benefit corporations would have little, if any, room to complain, if the specified objective was made clear in the benefit corporation's articles of incorporation prior to the shareholders' investment.

183. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34–36 (Del. Ch. 2010). The defensive measures erected by craigslist appear reasonable in relation to the threat to craigslist's apparent corporate objectives, which included providing valuable services to the community.

184. *See supra* Part I.C.

185. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986); *see also* Paramount, Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1989); Lisa M. Fairfax, *Achieving the Double Bottom Line: A Framework for Corporations Seeking To Deliver Profits and Public Services*, 9 STAN. J.L. BUS. & FIN. 199, 219 (2004) (stating that only in the limited context of *Revlon* "do courts require directors to focus solely on profit maximization"). This required focus on profit maximization is a requirement that social entrepreneurs fear, and while the situations, where the rules in *Revlon* apply, as modified by its progeny, are admittedly limited, those situations can be of critical importance to various corporate stakeholders.

186. *See* Plerhoples, *supra* note 140, at 233–36.

protection would allow for complete director entrenchment.[187] If the defensive measures are not reasonable in relation to the threat to the specified objective of the benefit corporation, then the appropriate court should invalidate the defensive measures.

4. *The Purpose Judgment Rule*

Despite the need for some potential accountability, corporate law places and should place directors at the helm.[188] To protect the authority of directors, most directorial decisions receive the protection of the business judgment rule.[189] Something similar to the business judgment rule should exist in the benefit corporation context for many of the reasons the rule exists in the traditional corporation context.[190] Perhaps the rule, in the benefit corporation context, would be better termed the "purpose judgment rule," as directors would be determining how to best pursue the stated objective of the corporation.[191] With the protection of this rule, only if a director of a benefit corporation consciously failed to carry out her duties in good faith, knowingly violated the law, or prioritized her own self-interest, would the real possibility of liability exist. This aspect of the corporate governance framework for benefit corporations would mirror, in many ways, the corporate governance framework of traditional corporations, albeit with different objectives envisioned by the two types of abstention

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187. In a forthcoming article, the author will further explore benefit corporations in the mergers and acquisitions context. J. Haskell Murray, *Defending Patagonia: Mergers & Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L. J. (forthcoming 2013) (invited symposium article) (on file with the author).

188. *See supra* notes 40 & 41 and accompanying text. *Cf.* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 836–44 (advocating for increasing shareholders' role in corporate governance, but acknowledging that "[t]he basic and longstanding principle of U.S. corporate law is that the power to manage the corporation is conferred on the board of directors").

189. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 52 (Del. 2006) ("[Delaware] law presumes that 'in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.'" (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984))); Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, *supra* note 20, at 109 ("[T]he business judgment rule is justified precisely because judicial review threatens the board's authority."); *see id.* at 108–09 (citing Nobel laureate economist Kenneth Arrow for the proposition that "the power to hold to account is ultimately the power to decide").

190. *See* Murray, *Latchkey Corporations, supra* note 70, at 615–16 ("[C]ourts employ the business judgment rule because: (1) it encourages board service; (2) it encourages risk taking; (3) courts recognize that directors are generally better situated to make business decisions than judges; (4) courts recognize that the statutory regime provides responsibility for managing the corporation to directors, not shareholders; and (5) courts recognize that unhappy shareholders can always vote the directors out of office.") (internal citations and quotations omitted).

191. The name "purpose judgment rule" sprung from a conversation with Professor Joseph Leahy of South Texas College of Law at the Southeastern Law Scholars Conference hosted by the Charleston School of Law on October 29, 2011.

doctrines. As discussed below, additional and more onerous accountability could be added by those providing private branding, but enforcement provided by the courts should be extremely limited, as to respect the authority of the board of directors of the benefit corporations.[192]

C. Transaction and Uncertainty Costs in Social Enterprise

One purpose of social enterprise statutes could be to minimize transaction costs for social entrepreneurs by setting default rules. Currently, however, benefit corporation statutes mostly increase, not decrease, transaction costs for social entrepreneurs. First, each benefit corporation must prepare and make available an annual benefit report.[193] The statutes do not provide much guidance regarding the required details of these annual benefit reports, but the benefit reports have the potential of being burdensome for small social enterprises and some state statutes expressly require that the reports be provided at no cost to the shareholders.[194] Second, a number of the benefit corporation statutes require the appointment of a benefit director who is required to draft an opinion each year regarding the benefit corporation's pursuit (or non-pursuit) of its general and any specific public benefit.[195] Third, the C-corporation law, upon which the benefit corporation statute is based, is often thought of as less friendly to small business than LLC law (or S- or close corporation law).[196] Maryland is the only state to have adopted a benefit LLC statute.[197] Some may argue that LLC law does not need additional sections addressing social enterprise because the current statutes are heavily contract-based and are flexible enough for social entrepreneurs to set up a socially-focused LLC. Both the benefit LLC and the benefit corporation statute, however, could help social entrepreneurs by setting "off-the-rack" defaults to accommodate entrepreneurs who do not have the

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192. *See infra* Part III.D.2.

193. *See* MODEL BENEFIT CORP. LEGIS. § 401.

194. *See, e.g.*, N.J. STAT. ANN. § 14A:18-7(a); *see also* MODEL BENEFIT CORP. LEGIS. § 302.

195. *See, e.g.*, N.J. STAT. ANN. § 14A:18-7(a), (c). Of course, an existing director can be appointed the benefit director, but the additional responsibilities (such as overseeing the drafting of the benefit report and opining on the pursuit of the general and any specific public benefit purpose) may lead the director to demand higher compensation.

196. *See, e.g.*, Howard M. Friedman, *The Silent LLC Revolution—The Social Cost of Academic Neglect*, 38 CREIGHTON L. REV. 35, 43–44 (2004) (describing the mandatory rules in corporate law that are often ill-suited for smaller businesses and describing the default rules present in LLC statutes that decrease transaction costs); *see also* Geoffrey Christopher Rapp, *Preserving LLC Veil Piercing: A Response to Bainbridge*, 31 J. CORP. L. 1063, 1090 (2006) (stating that LLCs "have become dominant" in the small business context).

197. MD. CODE ANN., CORPS & ASS'NS §§ 4A-1101 to -1108.

resources to create nuanced governance documents.[198] The increasing automation of organizational documents will also help cut down on transaction costs associated with forming a social enterprise.[199] The drafting of model organization documents has been done for the L3C form,[200] and the increased automation of these types of documents could be helpful in lowering transaction costs for the many small social enterprises.[201]

In addition, the legal changes introduced by social enterprise statutes may carry with it large uncertainty costs.[202] Professor Van Alstine explains that "[n]egative uncertainty costs . . . reflect the loss of the accumulated experience with a legal regime over time. Positive costs, on the other hand, reflect the uncertainty created by doubts over the precise meaning of, and simple lack of familiarity with, a new body of law."[203] The negative uncertainty costs will remain until sufficient case law emerges regarding aspects of the benefit corporation statutes that are currently far from clear, including: the fiduciary duties of a benefit corporation director, the details of the benefit report requirements, and which "third-party standards" will

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198. Professor Ribstein writes that the lower contracting cost "can make a critical difference for smaller firms that may have higher drafting, planning and litigation costs per dollar of capitalization than do larger ones." RIBSTEIN, *supra* note 82, at 26–27 (discussing the reasons for business association statutes, including reducing contracting costs and filling gaps in contracts); *see* THALER & SUNSTEIN, *supra* note 158, at 8 (noting the power of inertia and arguing that default rules should be carefully chosen to help improve society). Perhaps, for example, the benefit report and benefit director requirements could be waived for small benefit corporations for the first few years of the corporation's existence. The drafters of social enterprise legislation might benefit from referring to the state statutes on "close corporations," which were adopted, in part, to help decrease transaction costs for small corporations with relatively few shareholders.

199. *See, e.g.*, *Why Koncision?*, KONCISION CONTRACT AUTOMATION, http://www.koncision.com/why-koncision/ (last visited Aug. 31, 2012) (describing Koncision Contract Automation, a company that employs technology to make the contract drafting process more efficient). Professors Larry Ribstein and Richard Susskind have written at more length on how technology can be utilized to decrease legal transaction costs. *See* Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 780–81 (2010); RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES 29–32 (2008). Of course, the increased automation of legal documents is not without risks.

200. *Model L3C Articles of Organization and Model Operating Agreement*, AMS. FOR COMMUNITY DEV., http://www.americansforcommunitydevelopment.org/downloads/ModelL3CArt.ofOrg.&Oper.Agree.-VermontCompliant.pdf (last visited Nov. 11, 2012).

201. Clark & Vranka, *supra* note 54, at 27 (stating that most businesses interested in benefit corporation legislation are "private, small, and growing ('cash poor')"); Dana Brakman Reiser, *For-Profit Philanthropy*, 77 FORDHAM L. REV. 2437, 2451 (2009) (noting that most social enterprises are small businesses). Admittedly, it may be difficult to automate organizational documents for social enterprises, which will likely have a wide variety of objectives.

202. *See* Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 822–36 (2002) (discussing the uncertainty costs arising from legal change).

203. *Id.* at 823.

be acceptable to the courts. In addition, positive uncertainty costs will stem from the planning costs undertaken to deal with the risk stemming from the current lack of clarity in and the current lack of familiarity with this new area of law.[204] A way to quickly lessen these uncertainty costs is to provide more clarity in the benefit corporation statutes, but the vague areas of the statutes (like fiduciary duties) may be purposefully vague and may be better addressed by case law that will develop over time.

D. Branding: Community, Customers, and Investors

1. Benefits of Branding

One of the most talked about benefits that social enterprise offers to its owners is branding. The benefits of a social enterprise brand have the potential to be significant. If the brand is more than mere greenwashing and actually provides some assurance that the company is attempting to improve society and the environment, then the social enterprise community, customers, and investors will likely respond more favorably.

Social enterprise communities are already springing up around the various social enterprise brands. Most notable are the communities involving Certified B Corporations, benefit corporations, and L3Cs.[205] Social enterprise communities often provide their members with significant discounts, access to service providers, and a sense of identity.[206] A solid social enterprise brand gives companies the ability to quickly identify other companies with similar ultimate goals and these similarly minded companies can lend helping hands to one another.

Branding is also beneficial because it can help customers and investors quickly identify socially and environmentally responsible companies. Customers are already tiring of greenwashing, and a social enterprise brand with a backbone should be welcome.[207] Likewise, while some investors

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204. *Id.* at 829.

205. *B Corp. Community*, B LAB, http://www.bcorporation.net/community (last visited Nov. 30, 2012); *Latest L3C Tally*, *supra* note 7. As explained below, there is a difference between private and public branding. The Certified B Corporation community is a result of private branding, while the benefit corporation and L3C communities spring from a public brand. *See infra* Part III.D.2.

206. *See* Usha Rodrigues, *Entity and Identity*, 60 EMORY L.J. 1257, 1314 (2011) ("The identity theory of nonprofits also offers insight into [social enterprise]."); *id.* at 1318 ("Clearly individuals can derive some identity or warm-glow benefits from financial transactions and are willing to sacrifice financial gain to do so."); *Save Money and Access Services*, B LAB, http://www.bcorporation.net/become-a-b-corp/why-become-a-b-corp/save-money-and-access-services (last visited Nov. 30, 2012) ("Through access to over 80 service partnerships, B Corps have enjoyed more than $5 Million in savings and accessed technology, talent, and expertise for their businesses.").

207. *See, e.g.*, Jeffrey J. Minneti, *Is It Too Easy Being Green? A Behavioral Economics Approach to Determining Whether to Regulate Environmental Marketing Claims*, 55 LOY. L. REV. 653, 653–57 (2009) (noting the proliferation of

may want to invest in socially and environmentally friendly companies, they remain wary of unsupported claims.

2. Private Branding v. Public Branding

There are two possible types of branding of social enterprises: private branding and public branding. Part II.B noted the basic differences between the B Corp certification given by B Lab (private branding) and the benefit corporation status achieved by incorporating under one of the available state statutes (public branding).

In only four years (2008 to 2012), we already have five different types of social enterprise statutes in the United States alone (L3C, benefit corporation, FPC, SPC, and BLLC).[208] If the state competition focuses solely on building newer, shinier brands, the proliferation of statutes could continue, creating an unnecessarily tangled web of corporate law.[209] If, however, the competition simply focuses on providing the best solution to social entrepreneurs, competition between the states could lead to an improved and more useful entity form.[210]

A flexible corporate code, coupled with a meaningful private brand (such as, perhaps, B Lab's B Corp certification), could meet and exceed the stated goals of the benefit corporation statute.[211] Private organizations are better equipped than state governments to build nuanced brands and to police them.[212] Ideas about what constitutes a "good" company vary significantly, and there is room for various privately created social

greenwashing).

208. *See supra* Introduction.

209. While corporations, LLCs, and LLPs may have all developed their own brands, in one sense of the word, the primary purposes of statutes allowing for those brands extend beyond simply creating a new brand.

210. RIBSTEIN, *supra* note 82, at 28 (noting the success of the limited liability company and suggesting that "experimentation through interjurisdictional competition" may be the best way to determine the optimal number of business forms).

211. *See* Clark & Vranka, *supra* note 54, at 15 (noting the main goals of the benefit corporation legislation are addressing the corporate purpose debate, increasing accountability, and improving transparency). If the corporate code of a state expressly allowed for a society- or environment-focused objective, the accountability and transparency could be handled by private organizations with the threat of removing the company's certification for non-compliance.

212. *Cf.* Lloyd Hitoshi Mayer & Brendan M. Wilson, *Regulating Charities in the Twenty-First Century: An Institutional Choice Analysis*, 85 CHI.-KENT L. REV. 479, 494 (2010) (noting that state attorney generals have little time to monitor charities due to constraints on the attorney generals' time and resources). The benefit corporation proponents may argue that the super-majority shareholder vote to terminate benefit corporation status is a statutory protection not found in private branding. For example, directors of companies that are only certified privately and not formed under a social enterprise statute may simply decide to stop applying for certification one year. This problem, however, is easily solved by a contractual provision in the company's organizing documents requiring a super-majority shareholder vote prior to any decision to cease applying for the private branding.

enterprise brands that focus on the interests of different groups. While courts could police the most obvious violations—such as fraud and self-interested decisions—the more rigorous accountability could come from the private organizations and their members, which may have the motivation and the resources to build and maintain a valuable brand.[213]

E. Capital Raising and Financial Sustainability

For social enterprises to be more than a passing fad, they will have to be able to raise money.[214] Currently, many think social enterprises occupy a no man's land, between for-profit entities and nonprofit entities.[215] The sections below briefly discuss potential avenues for social enterprise capital raising and routes to financial sustainability.

1. Tax Advantages

Tax advantages could give potential investors reason to invest in social enterprises. The City of Philadelphia has recently provided a tax credit for a few sustainable businesses, but it is an extremely limited credit and, in this economic environment, most other cities and states are unlikely to follow suit.[216] In any event, if tax breaks for social enterprise became more

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213. *See, e.g.*, *Make it Official*, B LAB, http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/120 (last visited Nov. 30, 2012) (stating that B Lab conducts an on-site review of ten percent of the Certified B Corporations each year.) Potentially, private branding organizations, or even the benefit corporation statutes, could also require corporate giving similar to the giving that Patagonia already does (the greater of 1% of revenues and 10% of profits) to provide some backbone to that social enterprise community. CHOUINARD, BUSINESSMAN, *supra* note 1, at 73. Few things speak louder on the issues of corporate priorities than how corporations allocate their resources.

214. *See* Brakman Reiser, *supra* note 107, at 609–10 (arguing that obtaining access to sufficient capital from third parties is a practical obstacle for social entrepreneurs); Laura Burke, *Is the Social Enterprise Bubble About to Burst?*, GOOD (Feb. 2, 2012, 5:30 AM), http://www.good.is/post/is-the-social-enterprise-bubble-about-to-burst/ (suggesting that one of the reasons for the rise in social enterprises popularity is the disenchantment with traditional for-profit companies that were at the center of the most recent economic downturn).

215. *See* Brakman Reiser, *supra* note 107, at 610 (questioning whether sufficient capital will exist for dual mission enterprises); Murray & Hwang, *supra* note 9, at 42–43 (2011) (arguing that most traditional investors will hesitate to invest in L3Cs); Callison & Vestal, *supra* note 81, at 279–85, 291–93 (2010) (discussing flaws in the L3C form, which attempts to satisfy both traditional investors and foundations); Bishop, *supra* note 104, at 243–44 (calling capital formation, while attempting to serve two masters, "particularly difficult"); Kleinberger, *A Myth Deconstructed*, *supra* note 104, at 891–94 (explaining the difficulty of raising money for an L3C).

216. *Philadelphia First City to Offer Green Biz Tax Incentives*, SUSTAINABLEBUSINESS.COM (Dec. 4, 2009, 9:56 AM), http://www.sustainablebusiness.com/index.cfm/go/news.display/id/19350 ("For tax years 2012 through 2017, twenty-five eligible businesses will receive a tax credit of $4,000 to be used against the gross receipts portion of the Business Privilege Tax. Companies can be classified as certified sustainable businesses once they are certified as B Corporations . . . .").

widespread, traditional businesses may argue that those tax breaks facilitate unfair competition from social enterprises that are merely thinly disguised for-profit entities. Without tax breaks (and if projected monetary returns for social enterprise lag behind traditional companies), social enterprises will have to raise capital from investors who value—and believe the enterprise will provide—positive social and environmental outcomes to compensate for the potentially less favorable monetary returns.[217]

2. *Foundations and Impact Investors*

How selfish so ever man may be supposed, there are evidently some principles in his nature, which interest him in the fortunes of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.[218]

Not all investors are driven by profit alone. Foundations and an emerging class of social investors (also known as "impact investors") seem willing to sacrifice some profit if a company can further social and/or environmental goals.[219] Foundations represent a tremendous potential source of capital for social enterprises with approximately $600 billion in assets in the United States alone.[220] Proponents of the L3C form have attempted to tap into this treasure chest to receive easier access to PRIs from foundations, but to date the IRS has not agreed to treat L3Cs any differently than traditional for-profit forms.[221]

Estimates of the size of the socially responsible investment market vary wildly, depending, in large part, on how broadly "socially responsible" is defined. The Forum for Sustainable and Responsible Investment, using a broad definition, estimates that Sustainable and Responsible Investing

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217. Yasemin Saltuk et al., *Insight into the Impact Investment Market: An In-Depth Analysis of Investor Perspectives and Over 2,200 Transactions*, J.P. MORGAN SOCIAL FINANCE RESEARCH, 3 (Dec. 14, 2011), *available at* http://www.jpmorganchase.com/corporate/socialfinance/document/Insight_into_the_Impact_Investment_Market.pdf. Sixty-two percent of investors stated that they would sacrifice financial return for positive societal impact. All of the respondents that would not sacrifice returns, and two-thirds of those who would, stated that they believed one must sacrifice profits in order to make a positive impact. *Id.*

218. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 1 (D.D. Raphael & A.L. Macfie eds., Oxford Univ. Press 1976) (1759).

219. *See generally* CREATIVE CAPITALISM: A CONVERSATION WITH BILL GATES, WARREN BUFFET, AND OTHER ECONOMIC LEADERS (Michael Kinsley ed., Simon & Schuster Paperbacks 2008); *see also* Timothy Smith, *Institutional Investors Find Common Ground with Social Investors,* 1622 PLI CORP. 283, 289 (2007) (stating that socially motivated investors consider not just profits, but also consider the company's social and environmental impact).

220. Philanthropy News Digest, *Foundations Increasingly Use Investment Assets to Achieve Their Missions, Report Finds*, FOUND. CTR. (Oct. 26, 2011), http://foundationcenter.org/pnd/news/story.jhtml?id=359000002.

221. *See* Callison & Vestal, *supra* note 81, at 273–74 (stating that Congress has not enacted the tax legislation lobbied for by L3C proponents).

("SRI") accounts for "$3.07 trillion out of $25.2 trillion in the U.S. investment marketplace."[222] "Impact investing" funds, which tend to use a more narrow definition and are made up of "investments intended to generate positive [social and/or environmental] impact alongside financial return," have begun entering the scene at an increasing pace.[223] Even some of the most prestigious and traditional of investment banks are sticking their toes into the "impact investing" pool.[224] In December of 2011, J.P. Morgan and the Global Impact Investing Network ("GIIN") produced a thirty-page document analyzing the state of the "impact investing market."[225] They defined impact investment as an "[i]nvestment intended to create positive impact alongside financial return" and analyzed 2,200 investments, totaling over $4 billion.[226] Ninety-four percent of the survey of random institutional or high net worth clients said that impact investing was either "in its infancy and growing (75%) or about to take off (19%)."[227] The United Kingdom's government created Big Society Capital, which will potentially invest hundreds of millions of British pounds, to serve as a cornerstone impact investor and to leverage additional private capital.[228] In the United States, "the Overseas Private Investment Corporation committed [$285 million] to catalyze [$875 million] of investment into six impact investment funds in emerging markets," and the U.S. Small Business Administration has pledged $1 billion "over five years to support domestic

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222. *See Sustainable and Responsible Investing Facts*, THE FORUM FOR SUSTAINABLE & RESPONSIBLE INV., http://ussif.org/resources/sriguide/srifacts.cfm (last visited Nov. 30, 2012) (stating that "one or more of the three core sustainable and responsible investing strategies-screening, shareholder advocacy, and community investing" had to be used to qualify as SRI).

223. *See J.P. Morgan Social Finance*, J.P. MORGAN CHASE & CO., http://www.jpmorganchase.com/corporate/socialfinance/social-finance.htm (last visited Nov. 30, 2012) (describing J.P. Morgan Social Finance, which "was launched in 2007 to service the growing market for impact investments"); *see also* Rahim Kanani, *The State and Future of Impact Investing*, FORBES (Feb. 23, 2012, 9:36 AM), http://www.forbes.com/sites/rahimkanani/2012/02/23/the-state-and-future-of-impact-investing/ (stating that some of the largest banks in North America and Europe have created "impact investing" products). *See generally Investing for Impact*, CREDIT SUISSE (Jan. 2012), *available at* https://infocus.credit-suisse.com/data/_product_documents/_shop/336096/investing_for_impact.pdf.

224. *See supra* note 223 and accompanying text (showing that J.P. Morgan, Credit Suisse, and other large banks have entered the social finance or "impact investing" space).

225. *See generally* Saltuk et al., *supra* note 217 (updating a 2010 research study).

226. *Id.* at 2–3.

227. *Id.* at 5. Within ten years, the respondents thought that impact investments would constitute five percent of institutional investment and approximately ten percent of high net worth clients' portfolios. *Id.* at 5–6.

228. *See id.* at 7; *see also Big Society Capital: How We Are Funded*, BIG SOC'Y CAP., http://www.bigsocietycapital.com/how-we-are-funded/ (last visited Nov. 30, 2012) (stating that the "Merlin banks"—such as Barclays, HSBC, Lloyds Banking Group, and RBS—have each agreed to invest £50 million into Big Society Capital and the transfers from the English share of dormant accounts could reach £400 million).

businesses operating in underserved communities."[229] Moreover, GIIN's global online database of impact investment funds (ImpactBase) lists over 200 funds after less than two years of the database being online.[230]

Foundations and impact investors serve as potential sources of capital for social enterprises, but both will likely be concerned with many of the issues discussed above, such as board accountability and objectively measuring the societal and environmental benefit created.

3. *Crowdfunding*

Crowdfunding, defined as the use of the Internet to raise money through small contributions from a large number of investors,[231] could be a useful tool for social entrepreneurs.[232] Some social enterprises might attempt to focus their crowdfunding efforts outside of the scope of federal securities regulation, like the microloan provider Kiva and the funding platform Kickstarter, by making clear that there is no profit potential for those contributing.[233] The recent Jumpstart Our Business Startups Act ("JOBS Act") created a federal securities exemption for certain types of crowdfunding.[234] The SEC has yet to enact rules regarding this exemption,

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229. Saltuk et al., *supra* note 217, at 7; *see* OVERSEAS PRIVATE INVESTMENT CORP., http://www.opic.gov/ (last visited Nov. 30, 2012) (declaring that the OPIC is "the U.S. Government's development finance institution").

230. Saltuk et al., *supra* note 217, at 8. *See generally* IMPACTBASE, http://www.impactbase.org/ (last visited Nov. 30, 2012) (showing 203 active funds as of Oct. 29, 2012).

231. C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 10 (2012); *see* Joan MacLeod Heminway & Shelden Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879, 880–82 (2011) (describing the various definitions of the term crowdfunding).

232. *See generally* Murray & Hwang, *supra* note 9 (proposing crowdfunding from social investors to fill the gap left by traditional investors in the capital structure of L3Cs).

233. *About Us*, KIVA, http://www.kiva.org/about (last visited Sept. 17, 2012) (Kiva has provided more than $368 million in loans through 167 microfinance field partners as of October 29, 2012. No interest is charged on Kiva loans.); *FAQ*, KICKSTARTER, http://www.kickstarter.com/help/faq/kickstarter%20basics?ref=nav (last visited Nov. 30, 2012) (Since Kickstarter's launch on April 28, 2009, "over $350 million has been pledged by more than 2.5 million people, funding more than 30,000 creative projects"; backers do not get ownership in the projects and "Kickstarter cannot be used to offer financial returns or equity, or to solicit loans.").

234. *See* Jumpstart Our Business Startups Act, Pub. L. No. 112-106 §§ 301–305, 126 Stat. 306, 315–23 (2012); *see also* Oan Salisbury, *The SmartMoney Report: Green Light for Hedge-Fund Ads Means Caution on Main Street*, WALL ST. J., Apr.17, 2012, at C10. Eliot Spitzer referred to the JOBS Act as the "Bring Fraud Back to Wall Street Act." Susanne Craig & Ben Protess, *Wall Street Examines Fine Print in a Bill for Start-Ups*, N.Y. TIMES DEALBOOK (Apr. 4, 2012, 8:43 PM), http://dealbook.nytimes.com/2012/04/04/wall-st-examines-fine-print-in-a-new-jobs-bill/. Evaluating the merits of the JOBS Act is beyond the scope of this Article. For scholarly analysis of the crowdfunding exemption, mostly prior to the passing of the JOBS Act, see generally Bradford, *supra* note 231 (noting that registration of crowdfunding is prohibitively expensive in most situations and proposing that an

and, before that time, it is unlawful for issuers to purport to rely on the crowfunding exemption to the federal securities laws.[235] Even after crowdfunding rules are enacted, some social enterprises may simply wish to avoid the hurdles erected by the JOBS Act altogether and crowdfund using a Kiva or Kickstarter model. Other social enterprises, however, may wish to offer investors the potential to profit and may find the crowdfunding exemption works well for their business models. The potential blended value return offered by social enterprises, which may often be a below-market *financial* return, may be more appealing to a large number of people who only have to part with small amounts of money than it would be to a few people investing very large amounts of money. Additionally, in many instances a social enterprise will be a local endeavor. Raising $1 million from a few high net worth individuals living across the country might be difficult, but a social entrepreneur may be able to raise the same $1 million spread out over many local residents, all of whom have a personal connection to the social enterprise's community.[236] At least one website specifically dedicated to assisting social enterprises crowdfund has already been erected.[237]

4. Social Impact Bonds

A Social Impact Bond generally involves a contingent contract between a government and a private organization.[238] Under these contingent contracts, the private organization earns all or most of its payment from the

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exemption similar to the one contained in the Entrepreneur Access to Capital Act); Heminway & Hoffman, *supra* note 231, at 880 (noting that many small businesses struggle or fail to receive adequate financing because of the significant costs associated with complying with securities laws and regulations); Thomas Lee Hazen, *Crowdfunding or Fraudfunding? Social Networks and the Securities Laws—Why Any Specially Tailored Exemption Should be Conditioned on Meaningful Disclosure*, 90 N.C. L. REV. 1735 (2012) (arguing against proposals for a crowdfunding exemption from the Securities Act of 1933 that do not include significant investor protection measures).

235. *Information Regarding the Use of the Crowdfunding Exemption in the JOBS Act*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/spotlight/jobsact /crowdfundingexemption.htm.

236. *Cf. Discover Projects,* KICKSTARTER, http://www.kickstarter.com /discover/most-funded?ref=sidebar (last visited Nov. 30, 2012) (showing examples of multiple online raises over $1 million without even promising any equity in the company).

237. *See* Anne Field, *New Crowdfunding Site for Social Enterprises to Tap the JOBS Act*, FORBES (May 11, 2012, 12:04 PM), http://www.forbes.com/sites/annefield /2012/05/11/new-crowdfunding-site-for-social-enterprises-to-tap-the-jobs-act/ (describing the business of Impact Trader, which was created by John Jordan and Josh Hibben to facilitate crowdfunding for social enterprises); *see also* IMPACT TRADER, http://www.impacttrader.com/ (last visited Nov. 30, 2012).

238. *Let's Hear Those Ideas*, ECONOMIST, Aug. 12, 2010, http://www.economist.com/node/16789766; *Social Impact Bonds*, SOC. FIN., http://www.socialfinance.org.uk/work/sibs (last visited Feb. 12, 2012).

government by achieving certain performance targets, which usually include the provision of social services and resultant public sector savings.[239] Social Impact Bonds, sometimes referred to as "Pay for Success Bonds," shift some of the risk inherent in a given social services project from the government to the market.[240] Under the Social Impact Bond model, also called a "contingent return model," inefficiencies in social service projects should be reduced by subjecting the projects to market forces.[241] Investors in Social Impact Bonds only get paid if the social service project is successful, and even if the project is successful, investors are usually only entitled to a portion of the overall governmental savings.[242]

In September 2010, Social Finance, an organization in the United Kingdom that focuses on social business, issued its first Social Impact Bond, called the "One* SIB."[243] One* SIB's objective is to "reduce re-offending amongst male prisoners leaving HMP Peterborough [a prison in England] who have served a sentence of less than 12 months."[244] Payment to the One* SIB investors is contingent on the project achieving at least a 7.5% reduction in the re-offending rate and certain bonuses are paid for exceeding that threshold.[245] In the United States, Vermont has begun following the United Kingdom's lead and has recently introduced legislation to "create a social impact bonds study committee to determine whether opportunities exist for the use of social impact bonds in Vermont."[246] Additionally, President Obama's 2012 budget proposed setting $100 million aside for pilot programs involving "Pay for Success Bonds."[247]

These Social Impact or Pay for Success Bonds could be part of the social enterprise capital raising solution. These bonds, like social enterprise, address hybrid solutions and attempt to harness the power of the market for

239. *See supra* note 238.

240. David Leonhardt, *For Federal Programs, A Taste of Market Discipline*, N.Y. TIMES, Feb. 9, 2011, at B1 (noting that Social Impact Bonds are sometimes referred to as "Pay for Success" Bonds).

241. Arthur Wood, *New Legal Structures to Address the Social Capital Famine*, 35 VT. L. REV. 45, 48 (2010) (referring to the Social Impact Bond model as a "contingent return model").

242. *Criminal Justice*, SOC. FIN., http://www.socialfinance.org.uk/work/sibs /criminaljustice (last visited Sept. 17, 2012) (stating that investors in One* SIB will receive a "share of the long term savings").

243. *Social Impact Bonds*, *supra* note 238; Wood, *supra* note 241, at 48.

244. *Criminal Justice*, *supra* note 242.

245. *Id.*

246. H.B. No. 625, 2011–12 Leg., Reg. Sess. (Vt. 2012) (unenacted).

247. *Who Succeeds Gets Paid: Barack Obama Imports a Big Idea From Britain*, ECONOMIST (Feb. 17, 2011), http://www.economist.com/node /18180436?story_id=18180436; *see* Leonhardt, *supra* note 240.

positive societal change.

5. *Labor Costs*

Finally, while not directly related to capital-raising, loan forgiveness programs and the intangible benefits that employees may receive from working at a social enterprise may allow these companies to pay lower salaries and thus have less demanding capital needs. Beginning with its 2009 class, the Yale School of Management expanded its loan forgiveness program to include graduates employed by Certified B Corporations.[248] In addition, New York University's Stern School of Business has a loan assistance program directed at graduates who pursue a career in social enterprise, and a few other schools are considering similar programs.[249] Currently, these benefits are provided by a very limited number of schools, but as programs such as these multiply, the benefits could have a significant impact on attracting talent to social enterprises. Further, even without loan repayment, prospective employees may be willing to accept a somewhat lower salary if they believe the company is socially and environmentally responsible.[250]

CONCLUSION

The beauty of social enterprise lies in the fact that managers and investors can choose which side of the well-worn shareholder wealth maximization argument they favor through their choice of entity or choice of corporate objective. They can choose their own master. They can choose their preferred paradigm. This Article recognizes that the traditional legal framework under corporate law already provides social entrepreneurs with most of the flexibility they seek, but posits that the social enterprise statutes might help combat the persistent shareholder wealth maximization norm. As an alternative to a new social enterprise statute, the Article suggests that states (that have not already done so) could consider amending their corporate code to expressly allow for a societal- or

248. *Loan Forgiveness*, YALE SCHOOL OF MANAGEMENT, http://mba.yale.edu/MBA/admissions/financial_aid/loan_forgiveness.shtml (last visited Nov. 30, 2012).

249. *NYU Stern Loan Assistance Program*, NYU STERN, http://www.stern.nyu.edu/portal-partners/financial-aid/loan-repayment/loan-assistance-program/index.htm (last visited Nov. 30, 2012) ("[Social enterprise] careers often have smaller compensation packages than traditional MBA tracks. The Loan Assistance Program supports the School's mission to develop leaders who create value for business and society.").

250. Harvard Business Review, *New MBAs Would Sacrifice Pay for Ethics*, THE DAILY STAT (May 17, 2011), http://web.hbr.org/email/archive/dailystat.php?date=051711 (Survey information shows that "88.3% of graduating MBA students say they'd take a pay cut to work for firms that have ethical business practices." The average amount the students stated that they would sacrifice was $8,087.).

environmental-focused objective in a corporation's charter. If a benefit corporation statute, or other social enterprise statute, is passed, the Article argues that the statute should require companies to choose a primary master.

The question remains, however, whether significant numbers of investors will invest in a corporation that chooses as its primary master something other than shareholder wealth maximization. Ultimately, the market will decide whether these social enterprise business forms will flourish or whether they will languish on the books with relatively little use.[251]

251. *See generally* RIBSTEIN, *supra* note 82.