Socially Conscious Corporations and Shareholder Profit

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Abstract

The normative debate as to whether corporations should operate with the singular objective of maximizing shareholder wealth or broader societal obligations may never be settled. Even so, the growth of socially conscious corporations—that seek to create shareholder profit while advancing social missions—highlights a contemporary legal issue facing corporate directors and shareholders. Can the directors of a for-profit corporation elect to pursue these dual objectives without running afoul of their fiduciary duty of loyalty? If so, to what extent may the directors of a for-profit corporation pursue social missions (or objectives other than those intended to directly increase shareholder profit)?

Because of uncertainty surrounding the ability of existing business entities to accommodate the dual objectives of socially conscious corporations, many states have created Benefit Corporations as a new type of business entity under state law. This Article explores the widespread enactment of Benefit Corporation statutes as a mechanism for facilitating the dual objectives of socially conscious corporations. Specifically, it considers the need and rationale for adding Benefit Corporations. Ultimately, this Article contends that the discussion about Benefit Corporations has been overly focused on the need for Benefit Corporations. As a result, the broader impact of Benefit Corporations on existing business entities and the viability of alternatives to adding a new business entity have been neglected. In the end, this Article concludes that the creation of an efficient legal environment requires a deeper understanding of the potentially negative impact of Benefit Corporation, and the resolution of a foundational question left unanswered by Benefit Corporation statutes—namely whether and to what extent for-profit corporations can pursue both shareholder profit and social missions.

Table of Contents

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INTRODUCTION

What is the proper role of the corporation in society? This age old question continues to inspire academic debate, divide the judiciary, and confound corporate executives. At the heart of this normative question is a diverging opinion as to the nature of the corporation.[1] Some view the corporation as a purely private enterprise organized for the benefit of its shareholders.[2] Others view the corporation as having a broader public or social function due to the wide-ranging impact of corporate action.[3] Today, small startups and large corporations alike appear increasingly interested in merging the pursuit of profit and the creation of a public benefit.[4] This practice raises contemporary questions about corporate purpose and the via-

1 *See infra* Parts I.A–B.

2 *See id.*

3 *See id.*

4 *See* Skoll World Forum, *GameChangers: The World's Top Purpose-Driven Organizations*, FORBES (Nov. 4, 2013, 10:03 PM), http://www.forbes.com/sites/skollworldforum/2013/11/04/gamechangers-the-worlds-top-purpose-driven-organizations/.

bility of the traditional corporate form to accommodate these dual objectives.[5]

In many ways, the diverging visions of the corporation originate from a well-known exchange between Professors Adolf Berle and E. Merrick Dodd in the 1930s.[6] The distinct views of Berle and Dodd formed the foundation of what would become decades of debate about the fundamental purpose of the corporation.[7] At the risk of oversimplification, two camps emerged from the debate. First, those that believe corporations are a purely private enterprise with directors beholden to the interests of shareholders alone.[8] Accordingly directors should manage the corporation with the singular objective of maximizing shareholder profit. Second, those that believe corporations are a private enterprise with broader obligations to society.[9] Under this theory, directors should consider the interests of non-shareholder stakeholders[10] such as employees, customers, creditors, the environment, and the community, and balance those interests with profit goals.

Despite decades of debate, the law has not evolved to definitively resolve the question of corporate purpose fully in favor of one camp. Instead, corporate law mandates shareholder primacy in the form of fiduciary duties while also providing deference to director decisions

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5 *See infra* Parts I–II.

6 *See* A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) [hereinafter Berle, *Corporate Powers*] (explaining that directors must exercise corporate powers solely for the benefit of shareholders); A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932) [hereinafter Berle, *Corporate Managers*] (arguing that directors manage the corporation as trustees of the shareholders); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147–48, 1159–61 (1932) (explaining that the law and public opinion may compel or approve of corporations recognizing responsibilities to persons other than their shareholders).

7 *See infra* Parts I.A–B.

8 *See id.*

9 *See id.*

10 The term "stakeholder" can take on a host of meanings. Broadly construed, the term could include any person that is affected by a corporation's actions (e.g., shareholders, employees, consumers, customers, creditors, and the community in which the corporation operates). *See* Mary R. English, *Who Are the Stakeholders in Environmental Risk Decisions? How Should They Be Involved?*, 11 RISK: HEALTH, SAFETY & ENV'T 243, 248 (2000). More narrowly, the term could include any person whose "financial well-being is tied to the corporation's success" or who has conferred a benefit on the corporation. Kathleen Hale, Note, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 825 (2003); *see also* Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime That Recognizes Non-Shareholder Interests*, 30 COLUM. J.L. & SOC. PROBS. 587, 589 (1997). In this Article, the term "stakeholder" is used to refer broadly to any person that is affected by a corporation's actions, and the term "non-shareholder stakeholder" is used to refer to all stakeholders other than shareholders of the corporation.

that may be motivated by objectives other than profit.[11] This resulting uncertainty highlights the ongoing importance of the issue of corporate purpose to corporate managers and shareholders who endure an indeterminate legal environment.[12] Corporate managers face the risk that their decisions will be challenged as failing to maximize shareholder profit.[13] Similarly, shareholders may lack clarity as to the scope of their rights in the face of perceived abuses of managerial authority and misuse of corporate assets.[14]

While the lack of definitive guidance has long plagued corporate decisionmaking, the growing interest in socially conscious corporations[15] adds newfound importance to the questions of whether and to what extent traditional for-profit corporations may pursue a broader public benefit.[16] The increased awareness and demand by consumers, employees, and investors for socially conscious corporations accentuates the legal uncertainty, as corporate managers may face pressure to take actions that seemingly contravene the dominant normative view that corporations exist solely to increase shareholder profits.[17] The difficulty of discerning the subjective intent of corporate managers further complicates matters. Some may be solely motivated by altruism or the desire to support a personal cause. However, others may seek to leverage corporate goodwill into long-term shareholder gains.[18] Within this construct, corporate managers may be subject to shareholder lawsuits alleging breach of fiduciary duties and misuse of corporate property.[19] Although corporate law, under the business

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11 *See infra* Part I.C.

12 *See infra* Part I.C.3.

13 *See id.*

14 *See id.*

15 A number of phrases, including "purpose-driven corporation," "mission-driven corporation," and "social enterprise" are commonly used when referring to the broader concept of corporations that eschew the single-minded pursuit of profit in favor of institutionalizing efforts to create some broader public benefit. While recognizing that corporations vary greatly in both the manner and degree to which they pursue the creation of a broader public benefit, this Article will use the overarching term "socially conscious corporation" for the sake of consistency.

16 *See* Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, INT'L J. MGMT. REVS. 85, 98–99 (2010) (noting that prospective employees prefer working for socially conscious corporations); *Benefits of Becoming a Sustainable Business*, ECO-OFFICIENCY.COM [hereinafter ECO-OFFICIENCY], http://www.eco-officiency.com/benefits_becoming_sustainable_business.html (last visited Jan. 14, 2016) (noting that consumers increasingly prefer socially conscious corporations); *SRI Basics*, US SIF, http://www.ussif.org/sribasics (last visited Jan. 14, 2016) (noting that investors are turning to socially responsible investing strategies).

17 *See infra* Part II.B.

18 *See infra* Part I.C.

19 *See id.*

judgment rule, reflects a policy of tremendous deference to the decisions of disinterested, independent corporate managers,[20] the potential for tension and conflict remains. Thus, some argue the existing legal framework does not adequately serve the needs of the modern socially conscious corporation.[21]

In response to the perception that corporate law does not adequately facilitate the needs of socially conscious corporations, thirty states and the District of Columbia have enacted Benefit Corporation statutes.[22] These statutes adopt the "Benefit Corporation" as a new class of corporation under state law.[23] Benefit Corporations must seek to provide or create a public benefit and directors of Benefit Corporations must balance the interests of a broader group of stakeholders with the interests of its shareholders.[24] As such, Benefit Corporations exist as hybrid business entities that unequivocally facilitate the pursuit of both profit and a public benefit.[25]

On the surface, Benefit Corporation statutes appear largely unobjectionable. Providing greater clarity regarding the scope of corporate decisionmaking powers would appear to appeal to both corporate managers and shareholders.[26] This Article, however, looks beyond the superficial appeal of Benefit Corporations to critically examine this new corporate form in the context of the unsettled legal question of corporate purpose that Benefit Corporation statutes seek to clarify and improve.[27] This Article does not seek to add to the immense literature championing a particular construct of the corporation and its

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20 "[T]he business judgment rule is a form of rational basis review that affords boards tremendous deference. Applying a rationality standard, a court will sustain a challenged board decision as long as there is any rational explanation for how it advances the interests of the corporation." Mohsen Manesh, Response, *Nearing 30, Is* Revlon *Showing Its Age?*, 71 WASH. & LEE L. REV. ONLINE 107, 114 (2014) (describing corporate law's tripartite framework with the deferential business judgment rule at one end of the spectrum, "entire fairness" as a form of strict scrutiny on the other end of the spectrum, and the enhanced judicial scrutiny of *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), and its companion decision, *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), in between).

21 *See infra* Part I.

22 *See State by State Status of Legislation*, BENEFIT CORP. [hereinafter *Status of Legislation*], http://benefitcorp.net/policymakers/state-by-state-status (last visited Jan. 14, 2016).

23 *See, e.g.*, MODEL BENEFIT CORP. LEGIS. §§ 102–103 (2013); *see also* DEL. CODE ANN. tit. 8, § 362(a) (2014).

24 *See* WILLIAM H. CLARK, JR. ET AL., 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 16 (2013), http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf.

25 *See id.* at 1.

26 *See infra* Part II.

27 *See infra* Part III.

proper role in society. Instead, it eschews this well-worn path in favor of: (1) analyzing the broader impact of Benefit Corporation statutes on corporate law; and (2) evaluating whether Benefit Corporation statutes succeed in providing more determinate outcomes for corporate managers.[28]

This Article suggests the discussion about Benefit Corporation statutes thus far has been overly focused on the benefits that accrue to businesses that organize as a Benefit Corporation under state law.[29] As a result, the broader implications of such statutes on existing business entities have been largely neglected.[30] Although existing law may result in uncertainty about the scope of discretion to pursue objectives other than profit, the addition of Benefit Corporations only promises to clarify decisionmaking for the limited number of businesses that organize as a Benefit Corporation.[31] For those that remain organized as a traditional for-profit corporation, the resulting legal environment is—at best—no better.[32]

At worst, the resulting legal framework contains an added layer of complexity, which may create increased uncertainty and inefficiency.[33] Such complexity may be unnecessary to the extent that the traditional for-profit corporation provides a sufficient flexible form to accomplish the dual objectives of shareholder profit and public benefit.[34] Furthermore, the addition of Benefit Corporations may have the unintended consequence of reinforcing what some believe is a misunderstanding about corporate law—that corporate managers must singularly focus on shareholder profit maximization.[35] As a result, Benefit Corporations may inhibit or complicate existing and ongoing efforts by those organized as a traditional for-profit corporation to create a public benefit.[36]

Upon consideration of the broader impact of creating a new class of corporation, this Article argues first that alternatives to the enactment of Benefit Corporation statutes should be given greater consideration.[37] For example, clarifying the scope of a traditional for-profit

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28 *See id.*

29 *See id.*

30 *See id.*

31 *See id.*

32 *See id.*

33 *See infra* Part III.B.

34 *See infra* Part III.A.

35 *See infra* Part III.C.

36 *See infra* Part III.D.

37 *See infra* Part II.B.2.

corporation's ability to pursue the creation of a public benefit may provide an alternative path for the evolution of corporate law.[38] In addition, this Article argues that the enactment of Benefit Corporation statutes alone fails to remedy the foundational issue—uncertainty regarding whether and to what extent traditional for-profit corporations can pursue dual objectives of profit and public benefit.[39] Because Benefit Corporation statutes provide added clarity only for the subset of corporations that organize as a Benefit Corporation, those seeking to address issues affecting socially conscious corporations more widely must recognize that Benefit Corporation statutes may need to be supplemented by additional legislation or caselaw to create greater certainty for traditional for-profit corporations.[40] In the absence of additional action, traditional for-profit corporations see little, if any, improvement from the addition of Benefit Corporations.[41]

This Article proceeds in three parts. Part I of this Article provides an overview of the academic debate about the normative question of corporate purpose and analyzes the extent to which corporate law provides definitive guidance. Part II of this Article discusses the increasing adoption of Benefit Corporation statutes as a way to address uncertainty over the ability of existing business entities to facilitate the pursuit of both profit and public benefit, and assesses common justifications for the necessity of a new business entity. Part III discusses the potentially broad impact of Benefit Corporation statutes on the laws affecting existing business entities, and identifies a number of potentially adverse consequences that may result from the adoption of Benefit Corporations. A brief conclusion follows.

I. The Shareholder vs. Stakeholder Debate

Should corporations singularly pursue shareholder profit?[42] At the risk of overgeneralization, variations on two positions tend to dominate. One view is that shareholders are the owners of the corporation, and as a result, directors of for-profit corporations effectively

38 *See id.*

39 *See infra* Part III.A.

40 *See infra* Part III.

41 *See id.*

42 This Article does not seek to argue in support of a particular position as to whether corporate executives must maximize profit, nor does it seek to establish the extent of discretion granted to corporate decisionmakers to pursue goals other than the bottom line. Instead, this Article examines the unsettled state of corporate law and the law's curious evolution in neglecting to definitively resolve the question, leaving the responsibilities of corporate managers up for debate.

act as agents with a duty to manage in a way that will maximize profit or shareholder value.[43] The opposing view is that directors retain managerial discretion.[44] Accordingly, directors can and should recognize the many nonfinancial considerations implicated by corporate action in determining what actions are in the best interest of the corporation.[45]

Although the shareholder versus stakeholder debate is a well-covered subject of legal scholarship that is familiar to many, this Part provides an overview in order to help refocus the topic within the contemporary context of socially conscious corporations and Benefit Corporations. Section A introduces the historical underpinnings of the debate. Section B considers the impact of shifting corporate norms over time. Finally, Section C analyzes sources of corporate law and concludes that a legal basis for both positions exists, creating considerable risk and uncertainty for corporate decisionmakers.

A. Historical Underpinnings

The foundation of the shareholder versus stakeholder debate can be traced to an exchange between Professor Adolph Berle of Columbia Law School and Professor E. Merrick Dodd of Harvard Law School.[46] Berle supported the shareholder primacy view of the corporation.[47] In contrast, Dodd viewed the corporation as having broader obligations to stakeholders—of which the shareholder was only one.[48]

To Professor Berle, corporations exist for one singular purpose—making profit for shareholders.[49] In support of this position, Professor Berle famously wrote that "all powers granted to a corporation or to the management of a corporation . . . are necessarily and at all times exercisable only for the ratable benefit of all the shareholders . . . ."[50] The acceptance of this premise leads to the conclusion that interpreting corporate law as permissive of any objective other than profit

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43 *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 91 (1991) (describing a corporation's managers as agents of the investors).

44 *See infra* Part I.C.

45 *See id.*

46 *See* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and* The Modern Corporation, 34 J. CORP. L. 99, 100–01 (2008); *see also supra* note 6 and accompanying text.

47 *See* Bratton & Wachter, *supra* note 46, at 101.

48 *See id*.

49 Berle, *Corporate Managers*, *supra* note 6, at 1365 (stating that "business corporations exist for the sole purpose of making profits for their stockholders").

50 Berle, *Corporate Powers*, *supra* note 6, at 1049.

would defeat the very purpose of the corporate form.[51] Under such a construct, discretion is ostensibly limited to selecting the means by which a corporation pursues profit.[52] A decision to pursue any other objective, even if in conjunction with seeking profit, would contravene obligations to the corporation's shareholders.

In contrast, Professor Dodd argued that it would be undesirable to further advance the view that corporations exist solely to make profit for shareholders.[53] Instead, Professor Dodd suggested that corporate law should reflect shifting public opinion—that corporations are more than purely private enterprises.[54] As a result, corporations should have social obligations to the community beyond the pursuit of shareholder profit.[55] Professor Dodd pointed to employees as an example of a non-shareholder group to whom a corporation may owe an affirmative obligation.[56] In addition, Professor Dodd aptly noted that such an approach could, in some cases, lead to increased profits.[57] Under this broader view of corporate purpose, corporate managers would either have the discretion to consider objectives other than shareholder profit, or even an affirmative obligation to do so.

The exchange between Professor Berle and Professor Dodd highlights the origins of two distinct positions on the proper purpose of the for-profit corporation, which paved the way for modern versions of the shareholder versus stakeholder debate.[58] Some twenty years after the debate commenced, Professor Berle acknowledged that the argument had been settled in favor of Professor Dodd's position—that corporations should be viewed as having some social obligations outside of pursuing profit for their shareholders.[59]

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51 *See id.* at 1074 (contending that any objective other than profit would "defeat the very object and nature of the corporation itself").

52 *See id.* at 1049.

53 Dodd, *supra* note 6, at 1147–48 (noting it would be "undesirable . . . to give increased emphasis at the present time to the view that business corporations exist for the sole purpose of making profits for their stockholders").

54 *See id.* at 1159–61.

55 *See id.* at 1153–54 (writing "there is in fact a growing feeling not only that business has responsibilities to the community but that our corporate managers who control business should voluntarily and without waiting for legal compulsion manage it in such a way as to fulfill those responsibilities").

56 *Id.* at 1151.

57 *Id.* at 1156–59 (noting that increased employee satisfaction could lead to greater productivity and profits, and that charitable giving could improve public opinion about the corporation and its products).

58 *See, e.g.*, Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 459–67 (2006) (tracing the development of corporate social responsibility theory).

59 ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 169 (1954) ("The

B. Continuing Debate

In the decades following the Berle-Dodd debate, the prevailing view shifted and the general consensus reverted once again to the notion that corporations must (or should) maximize profit or shareholder value subject only to the constraints of the law.[60] Legal scholars have advanced a number of justifications to support the rise of shareholder primacy in corporate law. Many view shareholders as the owners of the corporation with corporate managers acting as "mere stewards of the shareholders' interests."[61] Contractarian theory, however, treats corporate managers as contractual agents of shareholders who have contracted for favored status over other stakeholders in the form of fiduciary duties and voting rights.[62] It has also been argued that aligning corporate decisionmaking with the interests of shareholders (as opposed to other stakeholders) results in the most efficient use of corporate resources because shareholders have the greatest stake in the outcome.[63]

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argument has been settled (at least for the time being) squarely in favor of Professor Dodd's contention.").

60 *See* LYNN STOUT, THE SHAREHOLDER VALUE MYTH 21–23 (2012) (noting that "shareholder primacy had become dogma" and discussing how shareholder primacy has triumphed over other theories on corporate purpose); Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1529–30 (2007) ("[T]he maximization of shareholder value as the core test of managerial performance has seeped into managerial culture"); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 468 (2001) ("The triumph of the shareholder-oriented model of the corporation . . . is now assured"); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 708 (2002); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at SM17.

61 Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 5–6 (2002); *see also* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 248 (1999) (noting that most economists and legal scholars believe that shareholders own the corporation); Kent Greenfield, *There's a Forest in Those Trees: Teaching About the Role of Corporations in Society*, 34 GA. L. REV. 1011, 1023 (2000) (questioning why shareholders should be viewed as the sole owners of a corporation).

62 *See* Bainbridge, *supra* note 61, at 9–12; Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 548 (2003) ("Contractarian theory . . . continues to treat directors and officers as contractual agents of the shareholders, with fiduciary obligations to maximize shareholder wealth."); *see also* EASTERBROOK & FISCHEL, *supra* note 43, at 91 (describing a corporation's managers as agents of the investors).

63 *See, e.g.*, Lynne L. Dallas, *Two Models of Corporate Governance: Beyond Berle and Means*, 22 U. MICH. J.L. REFORM 19, 19 (1988); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 23–24, 26 (1991) ("[S]hareholders retain the ultimate authority to control the corporation because they have the greatest stake in the outcome of corporate decisionmaking."); Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266,

Despite the predominance of shareholder primacy today,[64] some corporate law scholarship continues to recognize the wide-ranging impact of corporate action to support the view that corporate managers ought to consider and balance the interests of all stakeholders instead of focusing on shareholders.[65] In doing so, legal scholars have critiqued shareholder primacy as missing the mark on both normative[66] and legal grounds.[67] Thus, the consensus has shifted since Professor Berle and Professor Dodd's famous exchange, but the debate endures.[68]

C. Corporate Law: What Does It Have to Say?

Thus far, this Article has shown that the longstanding academic debate surrounding corporate purpose generally results in two competing views of the corporation—either a shareholder primacy or broader stakeholder model of the corporation. At the core of the debate lies a divergence of opinion as to whether the corporation ought to be viewed as purely private or, alternatively, as a social institution.[69]

1273 (1999) ("Because shareholders are residual claimants, they receive the benefits—and incur the costs—associated with marginal, or discretionary, corporate decisions.").

64 *See* Bainbridge, *supra* note 61, at 5 ("[M]ost corporate law scholars today embrace some variant of shareholder primacy."); Williams, *supra* note 60, at 708 ("[C]onsensus suggests that corporations have no specific social responsibilities beyond profit maximizing for the benefit of shareholders.").

65 *See* Blair & Stout, *supra* note 61, at 287 (advancing a "team production" model of the corporation that views the corporation as "mediating hierarchy" with the board of directors as an arbiter, resolving disputes among all members who contribute to the corporation); Dallas, *supra* note 63, at 23 (discussing the influence of corporations on multiple constituencies in addition to shareholders). *See generally* Greenfield, *supra* note 61 (discussing the impact of corporate action on non-shareholder constituencies such as employees and noting that shareholder primacy is a social and political choice).

66 *See* Dallas, *supra* note 63, at 19 (questioning whether shareholder profit maximization is in the best interests of society and noting that other objectives could serve as well as profit).

67 *See* STOUT, *supra* note 60, at 18, 24–32 (explaining how shareholder primacy gets corporate law wrong and identifying other failings such as profit maximization's mistaken assumption that shareholder interests are purely financial); Dallas, *supra* note 63, at 105 (noting that profit maximization is a legal fiction that cloaks the discretion granted by corporate managers to make value choices in a veil of supposed objectivity). *See generally* David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001 (2000) (critiquing shareholder primacy).

68 *See* Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 902–03 (1997) (reviewing PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995)) (noting the recurrence of the corporate social responsibility debate in various permutations); Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1195 (1999) (noting that corporate social responsibility has been debated "ad nauseam").

69 *See* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 201–02.

Instead of seeking to weigh in on the normative merits of each competing view of the corporation, this Section briefly evaluates sources of corporate law to analyze whether and how academic debate and shifting views of corporate purpose have been reflected in the law. There is little doubt that positive corporate law currently focuses on governing the relationship between shareholders and corporate managers.[70] Nonetheless, this Article contends that corporate law currently evidences elements of both shareholder primacy and stakeholderism. Corporate law, however, stops far short of providing a definitive answer as to corporate purpose.[71] Therefore, modern corporate law provides the flexibility to fuel the ongoing debate about corporate purpose, with proponents of both views of the corporation able to find legal support for their positions.

1. Shareholder Primacy

Shareholder primacy permeates state corporate codes and case law in the form of fiduciary duties owed by corporate managers to the corporation. Corporate law generally recognizes a "triad" of duties that are owed to the corporation—the duty of care, duty of loyalty, and duty of good faith.[72]

It is the duty of loyalty, however, that is most relevant to the question of a corporate manager's obligation to maximize shareholder profit. Broadly construed, the duty of loyalty requires that corporate managers act in the best interests of the corporation.[73] The Delaware Supreme Court described the duty of loyalty as requiring directors and officers to: (1) affirmatively protect the interests of the corporation; and (2) refrain from acting to injure the corporation or to deprive it of profit or advantage.[74] As codified by the Model Business Corporation Act (and the jurisdictions that have adopted it), directors and officers have a duty to act in "good faith" and "in a manner the director [or officer] reasonably believes to be in the best interests of the corporation."[75] Though the duty of loyalty is frequently framed as a duty owed to the corporation, it is well established that this duty

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70 *See* Williams, *supra* note 60, at 708.

71 *See id.* at 719.

72 *See* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (stating that directors have a "triad" of duties to a corporation). *But see* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (noting the duty of good faith does not stand as an independent fiduciary duty because its breach does not result directly in liability).

73 *See* MODEL BUS. CORP. ACT § 8.30, §8.42.

74 *See* Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

75 MODEL BUS. CORP. ACT §§ 8.30, 8.42.

extends to acting in the best interests of the corporation's shareholders.[76]

Because corporate law separates control and ownership,[77] the duty of loyalty is a legal necessity to protect shareholders from corporate managers who might abuse their authority for private gain.[78] As a result, corporate law contains an affirmative mandate that directors and officers manage the corporation on behalf of the shareholders, and exercise their discretion to advance the best interests of the corporation and its shareholders.[79] Accordingly, the existence of the duty of loyalty can be viewed as corporate law not only supporting, but also explicitly compelling, the shareholder primacy model of the corporation. In addition, caselaw addressing shareholder objections to corporate decisionmaking show how the "best interests" standard can be further construed as concomitant with requiring shareholder profit maximization to the exclusion of other purposes.

For example, in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,[80] the Delaware Supreme Court considered a claim arising from defensive actions taken by the Revlon board to prevent a hostile tender offer by Pantry Pride.[81] In addition, the Revlon board decided to pursue a deal with another suitor, Forstmann, despite a higher per-share price offered by Pantry Pride.[82] Pantry Pride then filed a lawsuit arguing that the board breached its fiduciary duties by preventing the Revlon shareholders from accepting Pantry Pride's higher offer.[83] The Delaware Supreme Court ultimately determined that the duties of directors change when a corporation is put up for sale.[84] In those situations, directors have a duty to maximize "the company's value at a sale for the stockholders' benefit"[85] by seeking to get "the best price for stockholders."[86] In short, the duty of directors changes to maxi-

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76 *See Guth*, 5 A.2d at 510 (noting that directors and officers stand in a fiduciary relation to the corporation and its stockholders); *see also* MODEL BUS. CORP. ACT § 8.30, official cmt. (noting that the phrase "best interests of the corporation" encompasses the shareholder body).

77 *See* DEL. CODE ANN. tit. 8, § 141(a) (2011); Malone v. Brincat, 722 A.2d 5, 9 (Del. 1998); Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984); MODEL BUS. CORP. ACT § 8.01.

78 *See* Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 678 (2009).

79 *See* MODEL BUS. CORP. ACT § 8.30, official cmt.

80 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

81 *Id.* at 175.

82 *Id.* at 178.

83 *Id.* at 179.

84 *Id.* at 182.

85 *Id*.

86 *Id.*; *see also* Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1280 (Del. 1989) (citing *Revlon* and noting that in the context of the sale of corporate control, the responsibility of

mizing the short-term per-share price in the *Revlon* sale context. Moreover, courts will apply an enhanced standard of scrutiny in the sale context, requiring the board of directors to prove that their actions were reasonable instead of merely identifying a rational business purpose.[87] As evidenced by the *Revlon* opinion and its progeny, corporate law contains situational obligations to maximize shareholder profit.

Outside of the *Revlon* sale context, other corporate law opinions may be construed as containing more broadly applicable mandates to maximize shareholder profit. In *Dodge v. Ford Motor Co.*,[88] minority shareholders challenged the board of director's decision to withhold payment of a special dividend to shareholders and instead use corporate resources to build a new production plant, increase employee salaries, and reduce the price of its cars to make the cars more affordable to customers.[89] Such action was apparently taken to further the personal ambition of Henry Ford, the corporation's majority shareholder, to: (1) employ more people; (2) spread the benefits of the industrial system to the greatest number of people; and (3) help people build up their lives and their homes.[90] The Michigan Supreme Court ultimately sided with the minority shareholders and famously wrote that:

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes.[91]

Read alone, the foregoing excerpt of the court's decision in *Dodge* could seemingly support the position that corporate managers must always maximize shareholder profit and that the pursuit of any other corporate purpose violates corporate law.

In a more recent case, *eBay Domestic Holdings, Inc. v. Newmark*,[92] the Delaware Court of Chancery in included language with a

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directors is to get the highest value reasonably attainable for the stockholders); In re MONY Grp. Inc. S'holder Litig., 852 A.2d 9, 19 (Del. Ch. 2004).

87 *See* In re Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 192 (Del. Ch. 2007).

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

89 *Id.* at 671–72.

90 *Id.* at 671.

91 *Id*. at 684.

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

similar tenor. The dispute arose from diametrically opposed visions for the future of online classifieds site Craigslist.[93] In the dispute, eBay, a minority shareholder, wanted to monetize Craigslist, but the founders and majority shareholders of Craigslist wished to continue operating the online classifieds site as a free service to the community.[94] In the face of this threat to the founders' vision for Craigslist, the board of directors adopted three measures designed to protect the "corporate culture" of Craigslist.[95] However, the board actions also negatively impacted eBay by: (1) hampering eBay's ability to sell freely its shares; (2) making it impossible for eBay to elect unilaterally a director to the board; and (3) decreasing eBay's percentage ownership.[96] As a result, eBay challenged the board action, alleging breach of fiduciary duties.[97]

The court ultimately concluded that two of the three board actions were improper.[98] In doing so, the court opined that having chosen the for-profit corporate form, the directors of Craigslist were "bound by the fiduciary duties and standards that accompany that form" which "include acting to promote the value of the corporation for the benefit of its stockholders."[99] Moreover, in discussing the board's attempt to protect corporate culture, the court emphasized shareholder wealth maximization, writing that "[p]romoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders."[100] In addition, the court rejected one of Craigslist's board actions—the adoption of a rights plan—by concluding that "[d]irectors 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."[101]

As with *Dodge*, the language of the *eBay* opinion seemingly signifies the court's support for shareholder profit maximization and contempt for the pursuit of any other corporate purpose. Because of this, both cases have been cited by some as definitive evidence of corporate law's incorporation of shareholder primacy and profit maximization

93 *Id.* at 6.
94 *Id.*
95 *Id*.
96 *Id.*
97 *Id.* at 7.
98 *Id.*
99 *Id.* at 34.
100 *Id.* at 33.
101 *Id.* at 35.

ideals.[102] But reading the opinions in context may provide an alternative interpretation. Neither opinion imposes a definitive and all-encompassing duty on directors to maximize shareholder profit in all matters.[103] Instead, the opinions could be construed as standing for a far narrower proposition.[104] First, the duty of maximizing shareholder profit may only arise given the specific facts and circumstances of *Dodge* and *eBay*. Alternatively, it is possible that both cases merely stand as examples of majority shareholders violating fiduciary duties by virtue of oppressive actions against minority shareholders.[105]

In sum, corporate law undeniably reflects the concept of shareholder primacy in many respects. Structurally, corporate law statutes highlight the foundational nature of corporate managers directing the affairs of corporation on behalf of shareholders.[106] As a result, corporate law imposes fiduciary obligations on directors to act in the best interests of the corporation and its shareholders. However, corporate law stops short of definitively ruling out the consideration of non-shareholder interests in determining what is in the best interest of the corporation and its shareholders, or imposing a requirement that directors must always act to maximize shareholder profit.

2. Stakeholders

While shareholder primacy can be grounded in the existence of the duty of loyalty, corporate law also grants a great deal of discretion to corporate managers, which provides sufficient flexibility for deference to be given to decisions based on broader stakeholder interests. Though corporate law does not contain an express mandate for corporate managers to consider broader stakeholder interests, the flexibility to do so is implicit in the power to make reasonable charitable contributions, the permissiveness of constituency statutes, and the deference provided under the business judgment rule.

Both the Delaware General Corporate Law and the Model Business Corporation Act explicitly empower corporations to "[m]ake donations for the public welfare or for charitable, scientific or educational purposes . . . ."[107] The acceptance of corporate charitable giving could be viewed as flying in the face of shareholder primacy

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102 *See* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 165 (2008).

103 *See id.* at 167–68.

104 *Id.* at 167.

105 *See id.* (discussing *Dodge* as being justified on far narrower grounds).

106 *See, e.g.*, MODEL BUS. CORP. ACT §§ 8.30 (2002).

107 DEL. CODE ANN. tit. 8, § 122(9) (2011); *see also* MODEL BUS. CORP. ACT § 3.02(13).

because corporate managers may in some instances make donations over objections from shareholders.[108] In initially considering corporate philanthropy, courts developed the common law rule that managers could only disburse corporate funds for philanthropic or public causes if the expenditure would benefit the corporation.[109] Some courts, however, applied the common law rule broadly to allow for donations that indirectly benefitted the corporation.[110] Others ultimately dispensed with the common law limitation that some benefit must accrue to the corporation. In *A.P. Smith Manufacturing Co. v. Barlow*,[111] the court wrote that "modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate."[112] As a result, the court reasoned that corporations have the power to contribute corporate funds within reasonable limits to support public causes even in the absence of an express statutory provision.[113]

In recognizing the power of corporations to make charitable contributions, corporate law appears to incorporate stakeholder ideals in two respects. First, corporate law is permissive such that corporate managers may decide to engage in charitable giving that is for a public benefit—even if there is no benefit to the corporation or its shareholders.[114] Second, corporate law evidences deference to the discretionary decisionmaking authority of corporate managers. As such, corporate managers appear to have some flexibility to consider the best interests of the corporation as a whole (not just the financial interests of shareholders) and perhaps even the advancement of a particular public benefit of social cause when making charitable donations over the objection of shareholders.

States that have adopted constituency statutes more explicitly integrate permissive stakeholder ideals into corporate law. In general, constituency statutes allow corporate managers to consider non-shareholder interests when determining the best interests of the corpora-

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108 *See, e.g.*, A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 589–90 (N.J. 1953) (upholding corporate donation to educational institution over objection from shareholders).

109 *See id.* at 584.

110 *Id.* at 584–85.

111 A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953).

112 *Id.* at 586.

113 *Id.*

114 *See supra* notes 107–09 and accompanying text.

tion and protect them from liability for doing so.[115] The scope of constituency statutes varies and may specify a range of non-shareholder interests from creditors[116] to those of the state and national economy.[117] For example, Pennsylvania's constituency statute allows directors to consider the effects of any corporate action upon employees, suppliers, customers, and communities in which the corporation is located along with "all other pertinent factors" when evaluating the best interests of the corporation.[118] In addition, the consideration of the foregoing factors does not constitute a violation of the duty of care owed by directors to the corporation.[119] While the motive for the creation of constituency statutes is debated,[120] the consensus is that states adopted these statutes in response to increased hostile takeover activity.[121] Even so, constituency statutes highlight how the discretion granted to corporate managers under corporate law may be utilized to permit the consideration of broader stakeholder interests. This discretion lends credence to the position that corporate managers are not strictly beholden to maximizing the shareholder profit.

Even in states that have not adopted a constituency statute, the deference provided by courts under the business judgment rule highlights the discretion that corporate managers may have to look beyond shareholder profit. In making business decisions, directors are presumed under the business judgment rule to have "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."[122] This rebuttable presumption means that shareholders who wish to challenge a corporate action have the burden of proving a breach of fiduciary duty.[123] The decisions of a board of directors "will not be disturbed if they can be attributed to any rational business purpose."[124] The deferential

115 *See, e.g.*, IND. CODE ANN. § 23-1-35-1(d) (West 2011); 15 PA. STAT. AND CONS. STAT. ANN. § 516(a) (West 2012).

116 *See* CONN. GEN. STAT. ANN. § 33-756(d) (West 2015).

117 *See* WYO. STAT. ANN. § 17-16-830(g) (2013).

118 15 PA. STAT. AND CONS. STAT. ANN. § 516(a).

119 *Id*.

120 *See* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 20 (1992).

121 *See id.* at 24–26 (discussing the anti-takeover motive behind constituency statutes and the likely chilling effect on adverse corporate takeovers); *see also* Anthony Bisconti, Note, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in* Revlon *Land?*, 42 LOY. L.A. L. REV. 765, 781 (2009).

122 Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); *see also* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

123 *See* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993).

124 Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971); *see also* Douglas M. Bran-

business judgment rule operates as the default standard of review when breach of fiduciary duty is alleged.[125]

The application of the business judgment rule also shows that a rational business purpose is not narrowly limited directly to the pursuit of shareholder profit in the short term. In *Shlensky v. Wrigley*,[126] a Delaware court upheld a professional baseball team board's decision not to install stadium lighting, which would have allowed for night baseball games and added revenue.[127] Despite foregoing the possibility of additional revenue, the board's decision was upheld because installing lights could have long-term deleterious effects on the relationship with the neighboring community, which was not in the best interest of the corporation.[128] This result highlights how, as a practical matter, the business judgment rule may shield directors from attack so long as the directors can point to any rational business purpose for the decision.

Assume, for example, that the directors lived in the neighborhood and were actually motivated by self-interest in not wanting the stadium lighting to shine into their homes at night, or that the directors were concerned solely about the environmental impact of erecting stadium lighting. Even if these considerations formed the basis for the decision, the directors need only identify a rational business purpose in order for their decision to be upheld, such as the possibility of long-term financial harm that may arise as a result of ill will or bad publicity. As a practical matter, the difficulty in ferreting out the subjective intent of the directors could result in the decision being granted deference just as if it were actually motivated by the long-term interests of the corporation.

As evidenced by the deference granted to corporate boards, the business judgment rule may operate to shield corporate decisions from attack so long as a rational business purpose, even one not directly tied to shareholder profit, is articulated by the board.[129] This shows that interests other than shareholder profit may, as a practical matter, form the basis of corporate action. Moreover, the business

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son, *The Rule That Isn't a Rule—the Business Judgment Rule*, 36 VAL. U. L. REV. 631, 632 (2002) ("[T]he rule provides a safe harbor that makes both directors and their actions unassailable if certain prerequisites have been met.").

125 *See* Golden Cycle, LLC v. Allan, No. Civ. A. 16301, 1998 WL 892631, at *11 (Del. Ch. Dec. 10, 1998).

126 Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968).

127 *Id.* at 777–81.

128 *Id.*

129 *See, e.g.*, *Sinclair Oil*, 280 A.2d at 720.

judgment rule leads to a curious legal framework—one where a board decision, if purely philanthropic, will be questioned. However, the same decision will be upheld if the board takes the same action under the pretense of a valid business purpose.[130] Regardless, the discretion granted under the business judgment rule effectively eviscerates the claim that corporation managers must be driven by the sole goal of shareholder profit maximization.

In conclusion, corporate law falls far short of imposing affirmative obligations to advance public or social interests. There is no legal basis to conclude that the corporate manager must always consider broader stakeholder interests. As such, corporate managers do not have unfettered discretion to eschew the financial interests of shareholders. The affirmative duty of corporate managers to act in the best interest of the corporation and its shareholders, however, is tempered significantly by the realities of the discretion given to corporate managers via the business judgment rule, which creates a framework that may allow for the consideration of stakeholder interests.

3. An Indeterminate Legal Environment?

As discussed above, corporate law reflects shareholder primacy in the form of an affirmative duty to act in the best interests of shareholders, while simultaneously providing corporate managers with discretion that could be used to accommodate stakeholder ideology.[131] Instead of definitively answering the question of corporate purpose by adopting profit maximization and ruling out the consideration of broader stakeholder interests or vice versa, the current legal framework allows elements of both to coexist.[132] In other words, shareholder primacy and stakeholderism are not necessarily mutually exclusive constructs within corporate law. The structure of the current legal framework recognizes the fundamental need to protect shareholders while also respecting the important role of managerial discretion.[133] As such, the reality is that although corporate managers have

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130 *See id.*

131 *See supra* Parts I.C.1–2.

132 While not binding law, the American Law Institute's *Principles of Corporate Governance* highlights how corporate law recognizes the role of both shareholder primacy and stakeholderism. 1 AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (1994). Specifically, § 2.01(a) provides that "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). Section 2.01(b), however, recognizes that corporations "[m]ay devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes." *Id.* § 2.01(b)(3).

133 *See supra* Part I.C.2.

a duty to exercise managerial power in the best interests of the corporation and its shareholders, the high level of deference granted to their decisions by courts can be used to shield actions that are motivated by other objectives.

Because corporate law does not adopt a single overriding consideration to direct corporate decisionmaking in all scenarios, the resulting legal environment is nuanced.[134] Moreover, the lack of clarity as to the interplay between the duty of loyalty and the scope of corporate discretion to pursue objectives other than shareholder profit creates uncertainty.[135] In short, shareholders and corporate managers alike have little definitive guidance on the extent to which a corporation may pursue objectives other than profit without running afoul of the duty of loyalty.[136] This means that any decision that is not directly tied to increasing profit may be questioned and challenged by shareholders as breaching the duty of loyalty and defended by corporate managers as being undertaken for some rational business purpose.[137]

II. The Rise of Benefit Corporations

To this point, this Article has overviewed the debate surrounding the normative question of corporate purpose and shown that corporate law does not appear to choose a side. Because of this, the resulting legal framework poses some challenges due to uncertainty over the exact scope of discretion corporate managers have to consider broader stakeholder interests.[138] This indeterminacy with respect to corporate purpose has newfound importance given the increased awareness about corporate citizenship and growing consumer interest in socially conscious corporations which possess an ethos that extends beyond mere profit to improving society in some way. As a result, corporate managers increasingly confront this uncertainty when evaluating action that may be viewed as pursuing a social mission instead of, or in tandem with, profit.[139]

Given this backdrop, the advent of the Benefit Corporation is commonly attributed to the failure of existing legal frameworks to accommodate for-profit businesses that also wish to pursue the creation of a public benefit, such as using business to solve social or environ-

134 *See* Clark, *supra* note 24, at 7–14.

135 *See id.*

136 *See id.*

137 *See id.*

138 *See supra* Part I.C.

139 *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010); Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

mental problems.[140] Thirty states have passed Benefit Corporation legislation,[141] which authorizes the organization of a new class of corporation—the Benefit Corporation—under state law.[142]

Benefit Corporations are distinct from traditional for-profit corporations because they must: (1) have a corporate purpose of creating a general public benefit;[143] (2) consider non-shareholder interests (such as impact on employees, community, and the environment) when making business decisions;[144] and (3) prepare and make public an annual report describing the Benefit Corporation's efforts to pursue a public benefit, including an assessment of the Benefit Corporation's overall social and environmental performance as judged against a third-party standard.[145]

While Benefit Corporation legislation has been well received, companies that wish to pursue both social and profit-driven ends have alternatives to incorporating as a Benefit Corporation under state law. For example, the nonprofit organization B Lab provides a "B Corp" certification to any business (domestic or foreign) that meets B Lab's specified standards of social and environmental performance, accountability, and transparency.[146] In addition, certain states have adopted legislation allowing for the organization of other types of business entities—for example, the L3Cs,[147] Social Purpose Corporations,[148] and Flexible Purpose Corporations[149]—that also seek to accommodate businesses that wish to pursue the dual objective of making profit while providing a public benefit.

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140 *See supra* Part I.C.1.

141 *See Status of Legislation*, *supra* note 22.

142 *See* MODEL BENEFIT CORP. LEGIS. §§ 101(c), 103 (2013) (noting that the election to organize as a benefit corporation results in incorporation under the state corporation code with the resulting Benefit Corporation subject to both the provisions of the corporate code applicable to traditional corporations as well as the new provisions of the statue relating solely to Benefit Corporations); *see also* CAL. CORP. CODE § 14601, 14603 (West 2014).

143 *See* MODEL BENEFIT CORP. LEGIS. § 201; *see also* CAL. CORP. CODE § 14610.

144 *See* MODEL BENEFIT CORP. LEGIS. § 301; *see also* CAL. CORP. CODE § 14620.

145 *See* MODEL BENEFIT CORP. LEGIS. § 401; *see also* CAL. CORP. CODE §§ 14621, 14630.

146 *See How to Become a B Corp*, B CORP., http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp (last visited Jan. 4, 2016).

147 *See* Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 593 (2011) (noting that as of 2011 at least nine states have enacted L3C legislation, which provides for limited liability corporations that consider charitable and education purposes).

148 *See, e.g.*, WASH. REV. CODE ANN. § 23B.25 (West 2013).

149 *See, e.g.*, CAL. CORP. CODE §§ 2500–3503 (West 2014).

The following Sections provide a brief overview of Benefit Corporations and analyze common justifications used to validate the need for creating a new class of corporation.

A. Benefit Corporation Statutes vs. Certified B Corp Status

Benefit Corporations incorporated under state law ("Benefit Corporations") are often confused with businesses that are B Corp certified by B Lab ("Certified B Corps"). While Benefit Corporations and Certified B Corps share some commonalities, they are also different in important respects. As a result, it is important to understand and recognize the distinct requirements imposed upon Benefit Corporations as opposed to Certified B Corps.

1. State Benefit Corporation Statutes

Benefit Corporations are businesses that have obtained a specific legal status that is authorized under state law and administered by the state.[150] Accordingly, a business can only become a Benefit Corporation by organizing in one of the states that has passed legislation allowing for the election of Benefit Corporation status when incorporating.[151] Businesses presently incorporated in (or planning to incorporate in) any other state must await the passage of Benefit Corporation legislation.

In states that have passed Benefit Corporation legislation, a new business may elect to organize as a Benefit Corporation by satisfying certain technical statutory requirements when incorporating. In general, this requires that a business state in its articles of incorporation that it is a Benefit Corporation.[152] Existing corporations may also elect to become a Benefit Corporation by amending the corporation's articles of incorporation to include a provision stating that corporation is a Benefit Corporation.[153] Such an amendment must be made via a duly approved corporate action that complies with any applicable statutory requirements and the corporation's internal governance documents.[154] Alternatively, an existing corporation can become a Benefit

150 *See Benefit Corp & Certified B Corp*, BENEFIT CORP., http://benefitcorp.net/what-makes-benefit-corp-different/benefit-corp-vs-certified-b-corp (last visited Jan. 14, 2016).

151 *How to Become a Benefit Corporation*, BENEFIT CORP., http://benefitcorp.net/businesses/how-become-benefit-corporation (last visited Jan. 4, 2016).

152 *See* MODEL BENEFIT CORP. LEGIS. §§ 102–03 (2013); *see also* CAL. CORP. CODE §§ 14601–02 (West 2014); DEL. CODE ANN. tit. 8, § 362(a) (2011).

153 *See* MODEL BENEFIT CORP. LEGIS. § 104(a); *see also* CAL. CORP. CODE § 14603; DEL. CODE ANN. tit. 8, § 363(a).

154 For example, under the Model Business Corporation Act, an amendment to a corpora-

Corporation in connection with a merger, consolidation, or conversion where the surviving, new, or resulting corporation will be a Benefit Corporation.[155] To do so, the corporation must again act via duly authorized corporate action to approve the plan of merger, consolidation, or conversion.[156] Because Benefit Corporation legislation is state-specific, additional requirements may be applicable depending on the jurisdiction.[157]

Although traditional for-profit corporations can be organized for the purpose of engaging in any lawful purpose,[158] Benefit Corporations must have a purpose of creating a "general public benefit."[159] A "general public benefit" is defined as having "[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard,[160] from the business and operations of a benefit corporation."[161] In addition to pursuing a statutorily mandated general public benefit, a Benefit Corporation may elect to set

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tion's articles of incorporation requires: (1) adoption of the proposed amendment by the board of directors, (2) submission of the amendment for shareholder approval, and (3) approval by the shareholders following a vote that satisfies the statutory default rules regarding quorum and minimum votes necessary for approval unless the articles of incorporation require a greater vote or greater number of shares present. *See* MODEL BUS. CORP. ACT § 10.03 (2002). State Benefit Corporation legislation, however, may impose more stringent requires. *See, e.g.*, DEL. CODE ANN. tit. 8, § 363(a) (noting that approval of ninety percent of the outstanding shares of each class of the stock of the corporation of which there are outstanding shares, whether voting or nonvoting, must approve the amendment).

155 *See* MODEL BENEFIT CORP. LEGIS. § 104(b); *see also* CAL. CORP. CODE § 14603; DEL. CODE ANN. tit. 8, § 362(b).

156 *See* MODEL BENEFIT CORP. LEGIS. § 104(b); *see also* CAL. CORP. CODE § 14603; DEL. CODE ANN. tit. 8, § 363(a).

157 For example, the state of Delaware requires that the name of each Benefit Corporation include the words "public benefit corporation," the abbreviation "P.B.C.," or the designation "PBC." *See* DEL. CODE ANN. tit. 8, § 362(c). In contrast, the state of Maryland requires the inclusion of the words "benefit corporation," "Benefit Corp," "benefit company," or "Benefit Co." in the name. *See* MD. CODE ANN., CORPS. & ASS'NS § 1-502(a)(2) (LexisNexis 2014).

158 State corporate codes generally permit a corporation to organize for any lawful purpose unless the corporation's articles of incorporation set forth a more limited purpose. *See* MODEL BUS. CORP. ACT § 3.01(a). Even so, corporations rarely elect to set a more limited corporate purpose in the charter or articles of incorporation.

159 *See* MODEL BENEFIT CORP. LEGIS. § 201(a)–(b); *see also* CAL. CORP. CODE § 14610(a); DEL. CODE ANN. tit. 8, § 362(a)–(b).

160 A "third-party standard" is any recognized standard for defining, reporting, and assessing corporation social and environmental performance that is: (1) comprehensive; (2) developed by an entity not controlled by the Benefit Corporation that has the necessary expertise to make a meaningful assessment and uses a balanced multi-stakeholder approach; and (3) transparent as a result of making information about the standard, including assessment criteria, available to the public. *See* MODEL BENEFIT CORP. LEGIS. § 102.

161 *Id.*

forth additional specific public benefits as part of its purpose.[162] As such, specific public benefits can be tailored to meet the mission or objectives of each individual Benefit Corporation. Examples of specific public benefits include: "providing low-income or underserved individuals or communities with beneficial products or services," "promoting economic opportunity," "protecting or restoring the environment," "improving human health," and "promoting the arts, sciences, or advancement of knowledge."[163]

While some states have elected to enact a Benefit Corporation statute substantially similar to the proposed Model Benefit Corporation Legislation, state-specific variations exist. For example, the Delaware Benefit Corporation statute creates a class of corporations termed Public Benefit Corporations.[164] Delaware Public Benefit Corporations must be organized with the intent of producing "a public benefit or public benefits and to operate in a responsible and sustainable manner."[165] Delaware Public Benefit Corporations must include a statement of purpose that identifies one or more specific public benefits that will be promoted by the corporation.[166] As such, the Delaware statute does not impose a mandatory general public benefit like the model legislation; instead, Delaware's statute mandates that public benefit corporations pursue "a positive effect (or reduction of negative effects) on [one] or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature."[167]

Despite the differences that may exist between state statutes, Benefit Corporation legislation shares the commonality of mandating that Benefit Corporations identify a public benefit purpose of some sort. In pursuit of providing a public benefit, the directors of Benefit Corporations are statutorily required to consider the interests of non-shareholder stakeholders when determining the best interest of the corporation.[168] Specifically, directors must consider the impact of corporate action (or inaction) on non-shareholder stakeholders such as:

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162 *See id.* § 201(b); *see also* CAL. CORP. CODE § 14610(b).

163 MODEL BENEFIT CORP. LEGIS. § 102.

164 DEL. CODE ANN. tit. 8, § 362(a).

165 *Id.*

166 *Id.* § 362(a)(1).

167 *Id*. § 362(b).

168 *See* MODEL BENEFIT CORP. LEGIS. § 301(a); *see also* CAL. CORP. CODE § 14620; DEL. CODE ANN. tit. 8, § 362(a).

(1) the Benefit Corporation's employees, suppliers, and customers; (2) the community in which the Benefit Corporation and its suppliers operate; and (3) the local and global environment.[169] Directors are also instructed to consider the Benefit Corporation's long- and short-term interests, the Benefit Corporation's ability to accomplish its stated public benefit, and any other factors that may be appropriate.[170] Given the number of stakeholders, Benefit Corporation statutes instruct directors to balance the interests of those impacted by the corporation's conduct instead of prioritizing the interests of any group.[171] In short, Benefit Corporation statutes make it explicitly clear that the financial interests of shareholders are but one of many considerations in the decisionmaking process. Even so, Benefit Corporation statutes do not create an enforceable duty owed by directors to all non-shareholder stakeholders.[172] A claim that the Benefit Corporation failed to pursue or create its stated public benefit or that the directors violated their obligations to balance stakeholder interests can only be brought directly by the Benefit Corporation or via a derivative suit.[173]

Benefit Corporations are also subject to statutorily mandated assessment and reporting requirements designed to increase transparency with respect to the Benefit Corporation's efforts toward achieving its stated public benefit.[174] Benefit Corporations must assess their performance in providing or creating a public benefit against a standard developed by an independent third-party.[175] Benefit Cor-

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169 *See* MODEL BENEFIT CORP. LEGIS. § 301(a)(1); *see also* DEL. CODE ANN. tit. 8, § 362(a); VT. STAT. ANN. tit. 11A, § 21.09(a)(1) (2010).

170 *See* MODEL BENEFIT CORP. LEGIS. §§ 301(a)(1)(vi)–(vii), 301(a)(2); *see also* DEL. CODE ANN. tit. 8, § 362; VT. STAT. ANN. tit. 11A, §§ 21.09(a)(1)–(2).

171 *See* MODEL BENEFIT CORP. LEGIS. § 301(a)(3); *see also* DEL. CODE ANN. tit. 8 § 365(a). While directors of Benefit Corporations are generally instructed to consider and balance various shareholder and non-shareholder interests in making decisions, the model legislation does allow for Benefit Corporations to alter this requirement to give priority to interests or factors related to accomplishing the Benefit Corporation's stated public benefit. As such, there may be statutory flexibility in some states to alter this requirement. *See* MODEL BENEFIT CORP. LEGIS. § 301(a)(3).

172 *See* MODEL BENEFIT CORP. LEGIS. § 301(d); *see also* CAL. CORP. CODE § 14610; DEL. CODE ANN. tit. 8, § 365(b).

173 *See* MODEL BENEFIT CORP. LEGIS. § 305; DEL. CODE ANN. tit. 8, § 367; N.J. STAT. ANN. § 14A:18-10 (West 2014) (action must be in the form of a benefit enforcement proceeding, which may only be taken by enumerated groups).

174 *See Benefit Corporation Reporting Requirements*, BENEFIT CORP., http://benefitcorp.net/business/become-a-benefit-corporation/what-are-the-requirements (last visited Jan. 14, 2016).

175 *See* CLARK, *supra* note 24, at 4; *see also* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (LexisNexis 2014). *But see* DEL. CODE ANN. tit. 8, § 366(c) (indicating that the use of a third-party standard for assessment may be required if so provided in the Benefit Corporation's articles of incorporation, but not mandating the use of a third-party standard).

porations have some discretion in selecting the third-party standard that will be used to assess compliance.[176] As such, assessment criteria may not be consistent across all Benefit Corporations. Instead, credibility is assured by requiring that the third-party operates outside the control of the Benefit Corporation and possess the necessary expertise to evaluate the Benefit Corporation's performance.[177] Additional information regarding the third-party standard, its criteria and objectives, and any changes must also be made publicly available.[178]

In connection with assessing performance, Benefit Corporations must prepare and distribute an annual report that includes information regarding the success of the Benefit Corporation in meeting its purpose of creating a public benefit.[179] State-specific nuances exist with respect to reporting.[180] However, the reporting provisions of the model legislation are illustrative of the type of requirements that are imposed with the aim of improving accountability and transparency. Reporting under the model legislation requires creation of an annual benefit report that assesses the Benefit Corporation's performance using the selected third-party standard.[181] An annual benefit report must include a narrative description of: (1) the ways in which the Benefit Corporation pursued a public benefit; (2) the extent to which a public benefit was in fact created; (3) any circumstances that hindered the creation of a public benefit; (4) the process and rationale used for selecting or changing the third-party standard used; and (5) an assessment of overall social and environmental performance.[182] The Benefit Corporation must also disclose any connection between the organiza-

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176 *See How Do I Pick a Third Party Standard?*, BENEFIT CORP., http://benefitcorp.net/third-party-standards/list-of-standards (last visited Jan. 15, 2016) (noting that benefit corporation legislation does not require the use of any particular third-party standard, and noting that it is up to the benefit corporation to determine whether a third party standard meets the statutory criteria).

177 *See* MODEL BENEFIT CORP. LEGIS. § 102; *see also* CAL. CORP. CODE § 14601(g).

178 *See* MODEL BENEFIT CORP. LEGIS. § 102; *see also* CAL. CORP. CODE § 14601.

179 *See* MODEL BENEFIT CORP. LEGIS. § 401 (requiring preparation and distribution of an annual benefit report); *see also* CAL. CORP. CODE § 14621; DEL. CODE ANN. tit. 8, § 366(b) (requiring preparation and distribution of a biennial statement to shareholders).

180 In contrast to the Model Benefit Corporation Legislation, Delaware's Public Benefit Corporation statute requires that a biennial statement be provided to shareholders as to the promotion of the public benefit(s) identified in public benefit corporation's certificate of incorporation and the best interests of those materially affected by the corporation's conduct. *See* DEL. CODE ANN. tit. 8, §§ 362(a), 366. The contents of the statement are dictated by statute, and must include: (1) the objectives of the board of directors, (2) the standards adopted by the board of directors to measure progress, and (3) an assessment of success in meeting its objectives and promoting its stated public benefit(s). *Id.* § 366(b).

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

182 *See id.*; *see also* CAL. CORP. CODE § 14621; N.J. STAT. ANN. § 14A:18-7(c) (West 2014)

tion establishing the third-party standard used by the Benefit Corporation and the directors, officers, and certain shareholders of the Benefit Corporation.[183] Additional information must also be included in the annual benefit report in order to comply with the statutory requirements.[184] The annual benefit report must be sent to each shareholder and made available to the public on the Benefit Corporation's website or upon request without charge.[185]

In sum, Benefit Corporation statutes establish the Benefit Corporation as a new legal entity that is authorized and administered under state law. Thus, the Benefit Corporation is effectively a new class of the traditional for-profit corporation. Accordingly, the Benefit Corporation is generally subject to all existing state corporate laws that are not inconsistent with the new statutory provisions governing Benefit Corporations.[186]

At the risk of overgeneralization, the statutory requirements that distinguish Benefit Corporations from traditional for-profit corporations can be summarized as follows: (1) Benefit Corporations must adopt a corporate purpose of promoting a general or specific public benefit; (2) the board of directors of a Benefit Corporation is required to consider and balance the interests of various groups that may be impacted by any corporate action (or inaction); and (3) Benefit Corporations must comply with statutorily imposed assessment and reporting requirements intended to increase accountability and transparency with respect to the Benefit Corporation's efforts to promote its stated public benefit(s).

2. B Lab Certified B Corps

Separate and distinct from organizing as a Benefit Corporation under state law, businesses may obtain B Corp certification from B Lab (a 501(c)(3) nonprofit).[187] Such a certification is described as analogous to LEED certification or Fair Trade certification.[188] Busi-

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(noting that if there has been underperformance, the report must include an explanation of the circumstances that led to the failure).

183 *See* MODEL BENEFIT CORP. LEGIS. § 401(a)(6); *see also* HAW. REV. STAT. § 420D-11(a)(7) (2014).

184 *See* MODEL BENEFIT CORP. LEGIS. § 401; *see also* CAL. CORP. CODE § 14621.

185 *See* MODEL BENEFIT CORP. LEGIS. § 402; *see also* HAW. REV. STAT. ANN. § 420D-11(c)–(d); MD. CODE ANN., CORPS. & ASS'NS § 5-6C-08(b)–(c) (LexisNexis 2014).

186 *See* MODEL BENEFIT CORP. LEGIS. § 101(c); *see also* CAL. CORP. CODE § 14600.

187 *See Benefit Corporations & Certified B Corps*, BENEFIT CORP., http://benefitcorp.net/what-makes-benefit-corp-different/benefit-corp-vs-certified-b-corp (last visited Jan. 15, 2016).

188 *See About B Lab*, B CORP., http://www.bcorporation.net/what-are-b-corps/the-non-

nesses that wish to become a Certified B Corp must comply with the certification process and related requirements developed and administered by B Lab.[189] In general, certification from B Lab involves: (1) meeting B Lab's performance requirement, which is designed to evaluate the company's environmental and social impact;[190] (2) ensuring that the company's governing documents and structure are consistent with B Lab's requirement that directors of Certified B Corps be required to consider non-shareholder interests and not be obligated to prioritize the interests of any group or groups when making decisions;[191] and (3) signing the B Lab term sheet and paying the applicable annual certification fees.[192]

The B Lab performance requirement essentially imposes B Lab's assessment and review process as the standard used to judge the business practices of those seeking certification. In doing so, B Lab seeks to validate stated claims of environmentally and socially beneficial business practices.[193] In order to meet the performance requirement process for certification, the business seeking certification must first complete the B Impact Assessment, a tailored questionnaire designed to evaluate environmental and social impact.[194] The results of the assessment must then be reviewed with a B Lab staff member.[195] Once the business seeking certification attains a minimum score of eighty out of two hundred, B Lab requests supporting documentation relating to randomly selected questions to confirm compliance.[196] Finally, the business seeking certification must complete and deliver a confidential disclosure statement, identifying any sensitive practices relating to the company's operations.[197] Certified B Corps are also subject

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profit-behind-b-corps (last visited Jan. 15, 2016); *What Are B Corps?*, B CORP., http://www.bcorporation.net/what-are-b-corps (last visited Jan. 6, 2016).

189 *See About B Lab*, *supra* note 188; *What Are B Corps?*, *supra* note 188.

190 *See Performance Requirements*, B CORP., http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/performance-requirements (last visited Jan. 15, 2016).

191 *See Protect Your Mission*, B CORP., http://www.bcorporation.net/become-a-b-corp/why-become-a-b-corp/protect-your-mission (last visited Jan. 15, 2016).

192 *See Make It Official*, B CORP., http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/make-it-official (last visited Jan. 15, 2016).

193 *See Performance Requirements*, B CORP., http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/performance-requirements (last visited Jan. 15, 2016).

194 *See id.*; *see also B Impact Assessment*, BIMPACTASSESSMENT.NET, http://bimpactassessment.net/how-it-works/assess-your-impact (last visited Jan. 15, 2016) (listing sample questions from the assessment such as "What portion of your management is evaluated in writing on their performance with regard to corporate social and environmental targets?").

195 *See Performance Requirements*, *supra* note 193.

196 *Id.*

197 *Id.*

to on-site reviews by B Lab; however, only ten percent of Certified B Corps are selected for review each year.[198] In addition, Certified B Corps must be recertified every two years.[199] Therefore, B Lab seeks to lend added legitimacy to its "seal of approval" such that Certified B Corps can be differentiated from businesses that simply promote environmentally or socially beneficial practices.

Certified B Corps must also ensure that their governance structure is consistent with the ideal of considering non-shareholder interests. To that end, B Lab generally requires that a company seeking certification either: (1) obtain the legal status of a Benefit Corporation under the laws of a state that has passed Benefit Corporation legislation; or (2) if not organized as a Benefit Corporation, amend its governing documents to mandate that the board of directors consider and balance the interests of the many groups (not just shareholders) that are impacted by corporate action.[200] Because organizing as a Benefit Corporation under applicable state law is not the only way to satisfy this requirement for certification, businesses organized in a form other than the corporation (e.g., LLC, LLP, LP) can also obtain certification by adopting an amendment to explicitly incorporate the consideration of non-shareholder interests into the governing documents (e.g., Articles of Incorporation, Membership Agreement, Partnership Agreement).[201] B Lab also provides sample language for inclusion in the applicable governing documents,[202] which generally tracks the statutory standard of conduct for balancing stakeholder interests under the Model Benefit Corporation Legislation.[203] Therefore, the B Lab certification requirements achieve a similar result by requiring, as a condition of certification, that the business voluntarily change its internal governance procedures to adopt the same standard of conduct imposed on directors of Benefit Corporations under state law.[204]

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198 *Id.*

199 *Id.*

200 *See Legal Roadmap*, B CORP., http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/legal-roadmap (last visited Jan. 15, 2016).

201 *See, e.g.*, *LLC Legal Roadmap*, B CORP., https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/legal-roadmap/llc-legal-roadmap (last visited Jan. 15, 2016).

202 *See Legal Roadmap*, *supra* note 200.

203 *See* MODEL BENEFIT CORP. LEGIS. § 301 (2013); *see also* CAL. CORP. CODE § 14620 (West 2014).

204 B Lab labels this certification requirement a "Legal Requirement." *See How to Become a B Corp*, *supra* note 146. It should be noted, however, that the requirement to either organize as a Benefit Corporation or amend governing documents in a manner acceptable to B Lab is actually a certification requirement. That is to say, B Lab and its certification process are separate and distinct from obtaining the legal status of a Benefit Corporation under state law. The

After satisfying the B Lab performance requirement and complying with B Lab's requirements regarding internal governance procedures, the certification process is finalized upon execution of the "B Corp Declaration of Interdependence" and a "Term Sheet."[205] A Certified B Corp must also pay B Lab an annual certification fee that is tiered based on annual sales.[206] The amount of the annual fee can range from $500 (for those businesses with annual sales under $1,000,000) to over $50,000 (for those with annual sales exceeding $100,000,000,000).[207]

In sum, the B Lab certification process conveys an independent "seal of approval" on those that become Certified B Corps. Certified B Corps may also be organized as a Benefit Corporation under state law, but need not have that legal status in order to be certified by B Lab.[208] As noted above, organizing as a Benefit Corporation is one of the B Lab-approved mechanisms for ensuring the business has incorporated the consideration of stakeholder interests into their operations.[209] Therefore, a business seeking certification could elect to organize as a Benefit Corporation in a state that has adopted such legislation. Alternatively, a business that is already organized as a Benefit Corporation could elect to obtain B Lab certification.[210] Certification by a third-party is not required under all Benefit Corporation statutes.[211] However, a Benefit Corporation might elect to become a Certified B Corp and use B Lab in connection with satisfying its statutory third-party assessment requirements.

While a particular entity may be both a Benefit Corporation and a Certified B Corp, it is important to note that there are some key distinctions between the two. Although Benefit Corporations have a statutory mandate to consider non-shareholder interests and to pursue a public benefit,[212] Certified B Corps (if not organized as a Benefit Corporation) may only be required by their internal governing docu-

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requirement does, however, have a legal implication either in the legal status of the business or in its internal governing documents and procedure adopted by the business.

205 *See Make It Official*, *supra* note 192.

206 *Id.*

207 *Id.*

208 *See Legal Roadmap*, *supra* note 200.

209 *See id.*

210 *See id.*

211 *See, e.g.*, DEL. CODE ANN. tit. 8, § 366(c) (2011) (noting that a Delaware Public Benefit Corporation may elect to require certification by a third-party, but is not required to do so unless such a requirement is adopted in the corporation's governing documents).

212 *See* Model Benefit Corp. Legis. § 301(a).

ments to do so.[213] In addition, Benefit Corporations must comply with statutory assessment and reporting requirements whereas a Certified B Corp (if not organized as a Benefit Corporation) need only satisfy B Lab's certification and recertification requirements.[214] Finally, Benefit Corporations obtain a legal status administered by the state, whereas Certified B Corps obtain an independent means of differentiating themselves from other businesses that claim to be pursuing environmental and social missions.[215]

Benefit Corporations and Certified B Corps can both leverage their respective statuses to obtain business advantages. Certification as a B Corp can be viewed as distinct from organizing as a Benefit Corporation, however, because it contains an additional marketing or branding component.[216] B Lab touts a host of reasons for becoming certified, which primarily revolve around the idea that certification from an independent entity such as B Lab provides proof of responsible business practices.[217]

Certified B Corps can use the B Lab "seal of approval" to differentiate themselves in the eyes of consumers, investors, and potential employees who wish to support businesses that have some larger public mission.[218] Benefit Corporations that are not Certified B Corps can use their legal status and compliance with an alternative independent third-party standard in a similar fashion. Certified B Corps, however, can also access services and support from B Lab, including assistance with marketing, sales, generating press, and attracting investors.[219] For example, B Lab operates GIIRS, a ratings agency and analytic platform that provides impact information to investors.[220] Certified B Corps receive free GIIRS ratings that can help them become more visible and attractive to investors.[221] Certified B Corps can also par-

213 *See supra* note 200 and accompanying text.

214 *See supra* Part II.A.

215 *See id.*

216 *See* Reiser, *supra* note 147, at 622–24 (finding that the Benefit Corporation form is unlikely to function effectively as a brand and noting that B Lab is promoting awareness of the Certified B Corp form as a brand).

217 *See Why Become a B Corp?*, B CORP., http://www.bcorporation.net/become-a-b-corp/why-become-a-b-corp (last visited Jan. 15, 2016); *see also GIIRS Ratings*, B ANALYTICS, http://b-analytics.net/giirs-ratings (last visited Jan. 15, 2016) (explaining that GIIRS ratings demonstrate a business's social and environmental impact).

218 *See Why Become a B Corp?*, *supra* note 217.

219 *See id.*

220 *See About B Lab*, *supra* note 188.

221 *See Attract Investors*, B CORP., https://www.bcorporation.net/become-a-b-corp/why-become-a-b-corp/attract-investors (last visited Jan. 15, 2016).

ticipate in B Lab's advertising campaign, which increases awareness about Certified B Corps and encourages the public to support Certified B Corps.[222] In addition, Certified B Corps can obtain discounted or free services via a number of partnerships maintained by B Lab with over eighty service companies.[223] Finally, Certified Benefit Corps become part of a growing community of certified businesses. As a result, Certified Benefit Corps can learn from or do business with a growing number of other like-minded B Corp-certified businesses.

Given the possibility of using certification as a marketing tool to differentiate in a crowded marketplace, certification with B Lab has become increasingly popular. At present, 1550 businesses have become Certified Benefit Corporations (up from just 125 in 2008).[224] Certified Benefit Corporations can be found in 42 countries and across 130 different industries.[225]

B. Exploring the Need and Rationale for Benefit Corporations

This Section focuses on evaluating the need and rationale for the adoption of Benefit Corporation statutes and the creation of a new class of corporation under state law. As discussed in the preceding Section, third-party certification can exist separately and apart from enactment of Benefit Corporation statutes.[226] The primary purpose of this Article is to analyze and evaluate the potential impact of adding a new class of corporation to the corporate law framework, not the role of third-party certification as a tool for differentiation.

The need for Benefit Corporation statutes generally revolves around two primary justifications. First, it is argued that the current legal framework fails to accommodate for-profit corporations that also wish to pursue social missions for the public good.[227] Second, it is argued that the growth of socially conscious businesses in the marketplace creates the need for a reliable method of evaluating claims of public benefit.[228] Therefore, the need for Benefit Corporation statutes

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222 *See Participate in Ad Campaign*, B CORP., http://www.bcorporation.net/become-a-b-corp/why-become-a-b-corp/participate-in-ad-campaign (last visited Jan. 15, 2016).

223 *See Save Money and Access Services*, B. CORP., https://www.bcorporation.net/become-a-b-corp/why-become-a-b-corp/save-money-and-access-services (last visited Jan. 15, 2016).

224 *See Welcome*, B CORP., http://www.bcorporation.net/ (last visited Jan. 15, 2016) (stating current number of enrolled members); *see also* B CORP., B CORPORATION 2012 ANNUAL REPORT (2012), https://www.bcorporation.net/sites/all/themes/adaptivetheme/bcorp/pdfs/BcorpAP2012_Web-Version.pdf (stating 2008 enrollment figures).

225 *See Welcome*, *supra* note 224.

226 *See supra* Part II.A.2.

227 *See* CLARK, *supra* note 24, at 7.

228 *See id.* at 2.

can be reduced to: (1) a legal justification based on a perceived gap in existing corporate law; and (2) a market justification based on the ability of Benefit Corporation status to serve a signaling function and help to differentiate "mere puff" from actual performance. Each of these justifications is addressed in turn below.

1. *Evaluating the Legal Justification for Benefit Corporation Statutes*

The most commonly stated reason for supporting Benefit Corporation statutes is that the traditional for-profit corporation and nonprofit corporation models available under existing law do not effectively allow for the pursuit of both profit and other nonfinancial objectives.[229] Some critics view corporate law as being burdened by a perceived obligation to maximize shareholder value.[230] As discussed above, although corporate law mandates that corporate managers act in the best interests of the corporation and its shareholders, this does not necessarily mean that other considerations are wholly excluded.[231] Even so, corporate caselaw has raised some concern that corporate managers might be subjected to a shareholder lawsuit if they opt to pursue objectives other than those that are clearly tied to maximizing shareholder profit.[232]

Two cases, *Dodge* and *eBay*, both discussed above,[233] are commonly held out as examples of the risk facing the board of directors as a result of legal uncertainty over their discretion to pursue objectives other than, or in addition to, shareholder profit.[234] In both cases, minority shareholders prevailed on lawsuits challenging corporate actions taken by the board of directors.[235] Further, in both judicial opinions, the court used language that may suggest an endorsement of some legal obligation on the part of a board of directors to maximize shareholder profit.[236]

When viewed in isolation, these cases could be construed as corporate law prohibiting a board of directors from taking into account non-shareholder stakeholder interests in all circumstances.[237] Such an

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229 *See id.* at 7.
230 *See supra* Part I.C.
231 *See id.*
232 *See* CLARK, *supra* note 24, at 12–13.
233 *See supra* Part I.C.1.
234 *See id.*
235 *See supra* Part I.C.
236 *Id.*
237 *Id.*

interpretation, however, would constitute a misunderstanding of the state of corporate law. As discussed above in Part I, corporate law does not mandate the pursuit of shareholder profit.[238] Instead it permits the consideration of broader stakeholder interests by allowing many decisions to be justified by any rational business purpose, authorizing reasonable charitable giving, and in some states, allowing for the consideration of non-shareholder interests via constituency statutes.[239] Therefore, Benefit Corporation legislation is not justified on the basis that for-profit corporations are categorically prohibited from pursuing objectives other than, or in addition to, shareholder profit.

Instead, the legal justification for Benefit Corporation legislation is perhaps more aptly framed as necessary to mitigate what some view as an unacceptable level of uncertainty or indeterminacy as to the interplay between the duty of loyalty and managerial discretion.[240] Because corporate law reflects both deference to decisions that may consider broader stakeholder interests and obligations to pursue shareholder profit maximization in certain circumstances, there may be some question as to the amount of latitude that corporate managers possess.[241] Supporters of Benefit Corporation statutes, therefore, argue that the creation of a new class of corporation that not only authorizes but also mandates the balancing of various stakeholder interests is necessary to eliminate the risk of legal uncertainty.[242]

Without Benefit Corporation statutes, it is said that for-profit corporations could be subjected to shareholder lawsuits if corporate actions were viewed as failing to prioritize or maximize shareholder value.[243] Therefore, the existing for-profit corporation model arguably frustrates the efforts of socially conscious corporations because it is unclear whether and to what degree an environmental or social purpose can coexist with the perceived obligation to pursue shareholder profit as the only acceptable means of discharging the duty of loyalty.[244] In short, the for-profit corporation appears to accommodate the broader objectives of a socially conscious corporation, but may not provide a sufficient degree of certainty with respect to the appropri-

238 *Id.*
239 *Id.*
240 *See* CLARK, *supra* note 24, at 6–7.
241 *See id.*
242 *See id.*
243 *See id.*
244 *See id.* at 10–12

ateness of the corporate form for nonfinancial objectives such as creating a positive impact on society.[245]

Some also believe the nonprofit model fails to adequately accommodate dual objectives of pursuing profit and creating a public benefit.[246] A nonprofit corporation may be organized to pursue a purpose that more clearly allows for the creation of a public benefit.[247] However, obtaining and maintaining nonprofit status, including the associated tax benefits, requires compliance with restrictions under the Internal Revenue Code,[248] which may make the nonprofit corporation incompatible for those seeking investors.[249]

Nonprofits must be organized and operated for one or more of the listed purposes in section 501(c) of the Internal Revenue Code. For example, section 501(c)(3) extends tax exempt status for corporations organized and operated exclusively for the following purposes: (1) religious; (2) charitable; (3) scientific; (4) testing for public safety (5) literary; (6) educational; (7) fostering national or international amateur sports competition; and (8) for the prevention of cruelty to children or animals.[250] As such, the nonprofit form clearly allows for the consideration and pursuit of objectives other than increasing shareholder value. However, the narrow categories of permissible nonprofit purposes may result in the objectives of some socially conscious corporations falling outside the scope of the statute.[251]

Even if the objectives constitute a permissible purpose under the nonprofit model, other restrictions may prevent the viability of organizing as a nonprofit corporation. For example, federal law places restrictions on the ability of nonprofits to use and dispose of earnings.[252] Specifically, nonprofits are generally prohibited from distributing any net earnings for the benefit of any private shareholder or individual.[253] Nonprofits may also be required to use their net earnings exclusively for charitable, educational, or recreational purposes.[254] As a practical matter, these restrictions preclude nonprofits

245 *See id.*

246 *See id.* at app. C.

247 *Id.*

248 26 U.S.C. § 501(c)(3) (2012); *see also* Treas. Reg. § 1.501(c)(3)(2015).

249 *See* CLARK, *supra* note 24, at app. C.

250 26 U.S.C. § 501(c)(3).

251 *See* CLARK, *supra* note 24, at app. C.

252 Arthur Rieman et al., *California's New Hybrid Corporation Statute*, 35 L.A. LAW. 19, 21 (2012) (discussing limits on a nonprofit's use and disposition of charitable funds and assets in order to protect against inappropriate uses for private benefit).

253 *See* 26 U.S.C. § 501(c)(3); Rieman et al., *supra* note 252, at 23.

254 *See* 26 U.S.C. § 501(c)(4)(A)–(B).

from turning to equity capital as a method of securing funding for their operations.[255] As a result, nonprofits are often limited to competing with other nonprofits for a limited pool of funding from individual donations, government grants, and private foundation grants.[256] Federal law also places limitations on the compensation that can be paid by nonprofits to key employees, such as top-level executives and officers,[257] which may further frustrate an organization's business objectives by making it more difficult to attract and retain key employees.[258]

In sum, the nonprofit model is perhaps better suited to accommodate an organization's desire to: (1) consider non-shareholder stakeholder interests; and (2) use business to advance a social cause or provide a public benefit. The nonprofit model comes up short, however, with respect to supporting the needs of a socially conscious corporation because the nonprofit form does not allow for the unencumbered use and disposition of funds for business purposes such as shareholder distributions and employee compensation. Therefore, the nonprofit form may be unsuitable for organizations that wish to pursue a public benefit while also growing a business.

At the heart of the legal justification for Benefit Corporation statutes is the view that the existing categories of for-profit corporations and nonprofit corporations are too limited to accommodate the dual objectives of profit and public benefit. Due to legal uncertainty, for-profit corporations must to some degree prioritize shareholder value to the exclusion of nonfinancial objectives in order to mitigate the risk of shareholder lawsuits.[259] On the other hand, nonprofits can be organized for charitable purposes, but the nonprofit model is limited by a relatively narrow set of permissible purposes and strict restrictions on distributions and use of earnings that may make it

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255 *See* CLARK, *supra* note 24, at app. C.

256 *See* Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 353 (2009) (noting that decreased government funding to the nonprofit sector made the model even less sustainable); Gail A. Lasprogata & Marya N. Cotten, *Contemplating "Enterprise": The Business and Legal Challenges of Social Entrepreneurship*, 41 AM. BUS. L.J. 67, 68 (2003) (noting that "[s]ocial service nonprofit organizations have historically sustained themselves through a portfolio of financial resources such as government and private foundation grants, individual donations and fees for services," which resulted in nonprofits often being forced to compete with one another for limited resources).

257 *See* Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 60 (2010) (noting that nonprofits are limited to "reasonable compensation").

258 *See* CLARK, *supra* note 24, at app. C.

259 *See id.* at 6.

difficult to fully realize business objectives.[260] Accordingly, supporters of Benefit Corporation statutes believe that Benefit Corporations ably fill the gap in existing law by creating a new class of corporation via a hybrid model that explicitly accommodates both profit and public benefit.[261] Stated another way, the Benefit Corporation is available when a for-profit corporation is too much of a "business" for the non-profit form and too "socially conscious" for the for-profit corporate model.

By creating a new class of corporation, Benefit Corporation statutes may eliminate some of the uncertainty and associated risk from potential shareholder lawsuits that exist under the traditional for-profit model.[262] So long as the business organizes as or elects to become a Benefit Corporation, the board of directors will enjoy the protection of the statutory mandate to consider non-shareholder stakeholder interests and the statutory exoneration from liability as a result of doing so.[263] Accordingly, the creation of Benefit Corporations as a separate and distinct legal status under state law effectively acts as a safe harbor for those that organize as Benefit Corporations.[264] However, the uncertainty remains for those corporations that do not elect Benefit Corporation status. Benefit Corporation statutes specify that enactment shall not impact or change the law affecting business corporations that are not organized as Benefit Corporations.[265] The Benefit Corporation-specific provisions simply control over any contrary requirements in the state's corporate code.[266] Therefore, those that organize as a Benefit Corporation receive the benefit of reduced uncertainty and risk. However, those that organize as a traditional for-profit corporation continue to operate with the same uncertainty that supporters of Benefit Corporation statute point to as justifying the need for Benefit Corporations.

The advantages offered by Benefit Corporation statutes for those wishing to pursue objectives not clearly related to shareholder profit may be better understood through illustration. Take TOMS Shoes ("TOMS") as an example. TOMS famously touts that its goal is to

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260 *See supra* notes 250–58 and accompanying text.

261 *See* CLARK, *supra* note 24, at 14–15.

262 *See id.*

263 *See* MODEL BENEFIT CORP. LEGIS § 301 (2013).

264 *See* MODEL BENEFIT CORP. LEGIS. § 101(b) (providing that Benefit Corporation legislation "shall not affect a statute or rule of law that is applicable to a business corporation that is not a benefit corporation").

265 *See id.*

266 *See id.* § 101(c).

help improve lives.[267] Specifically, TOMS has a "one for one" practice of distributing one pair of shoes to a child in need for each shoe purchased by a customer of TOMS.[268] Yet even though TOMS is driven by philanthropic objectives, the nonprofit model may be impracticable because TOMS ultimately operates as a for-profit entity.

Without Benefit Corporations statutes, TOMS could opt to organize as a traditional for-profit corporation. Under the for-profit corporation model, the board of directors of TOMS could exercise their statutory authority and discretion to manage the company in order to implement the "one for one" practice.[269] The board could identify a number of rational business purposes for this decision such as attempting to increase sales by appealing to socially conscious consumers.[270] Despite the deference granted to board decisions and the flexibility in corporate law, the existence of cases such as *Dodge* gives a shareholder who is unsupportive of the practice an opportunity to challenge the action as breaching the duty of loyalty.[271] TOMS, therefore, could either move forward with its "one for one" practice while bearing the risk, or elect not to take any action that might be construed as failing to maximize shareholder profit.

With the adoption of Benefit Corporation statutes, TOMS could now decide to seek Benefit Corporation status. As a Benefit Corporation, the board of directors would enjoy statutory protections such as an explicit mandate to balance stakeholder interests instead of prioritizing any one, and exoneration from personal liability.[272] If TOMS was unable or unwilling to become a Benefit Corporation, however, it would still be subject to any ongoing uncertainty that stems from the traditional for-profit corporation model. Therefore, Benefit Corporation statutes only operate to reduce the risk for those that ultimately organize as Benefit Corporations. The uncertainty that currently exists in the traditional for-profit and nonprofit models remains for all others that do not become Benefit Corporations because Benefit Corporation statutes do not address the core question of whether and to what degree the law allows the board of directors of a for-profit cor-

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267 *See Improving Lives*, TOMS, http://www.toms.com/improving-lives#stepbystep (last visited Jan. 15, 2016).

268 *About Toms®*, TOMS, http://www.toms.com/about-toms#companyInfo (last visited Jan. 15, 2016).

269 *See supra* note 99 and accompanying text.

270 *See supra* note 87 and accompanying text.

271 *See supra* Part I.C.1.

272 *See supra* Part II.A.2.

poration to consider objectives other than or in addition to shareholder value.

2. *Evaluating the Market Justification for Benefit Corporation Legislation*

Supporters of Benefit Corporation statutes also assert that increased demand by consumers, investors, and entrepreneurs for socially conscious corporations justifies the adoption of Benefit Corporation statutes and the creation of Benefit Corporations as a new class of corporation under state law.[273] It is said that Benefit Corporation statutes meet the needs of these socially-minded consumers, investors, and entrepreneurs by providing a legitimate means of differentiating socially conscious corporations from those that might overstate or make unsubstantiated claims as to the impact of their efforts.[274] As such, incorporating as a Benefit Corporation can signal a corporation's commitment to pursuing the creation of a public benefit. By incurring statutory obligations to balance stakeholder interests and comply with assessment and reporting requirements, Benefit Corporation status can serve a signaling function that gives interested parties a meaningful method off differentiation.

The general public has become increasingly aware of the social initiatives undertaken by corporations.[275] While the efforts of socially conscious corporations can take many forms, public perception about a corporation's good citizenship (e.g., support for good causes and protection of the environment) and responsible business practices (e.g., ethical behavior, transparency in business dealings, and treatment of employees) is increasingly important to consumers.[276] Studies have shown that consumers are much more likely to recommend or otherwise communicate something positive about a company that they view as being a good corporate citizen.[277]

Corporate social responsibility also plays into consumer purchasing decisions. The Natural Marketing Institute's consumer research has shown that knowing a company is mindful of its impact on the environment and on society makes consumers fifty-eight percent more likely to buy the company's products.[278] Consumer surveys also indi-

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273 *See* CLARK, *supra* note 24, at 2–5.

274 *See id.* at 8.

275 *See id.* at 2.

276 *See* ECO-OFFICIENCY, *supra* note 16.

277 *See* REPUTATION INST., 2014 GLOBAL CSR REPTRAK 100 (2014), https://www.reputationinstitute.com/Resources/Registered/PDF-Resources/2014-CSR-RepTrak-100-Study.aspx.

278 *See* ECO-OFFICIENCY, *supra* note 16.

cate that consumers prefer to purchase products and services from socially conscious businesses when all other factors are equal.[279] In fact, many consumers are willing to pay a premium to purchase socially and environmentally responsible products and services.[280] In addition to supporting socially conscious products, services, and companies, consumers may be willing to boycott socially irresponsible businesses and their products or services.[281] In sum, it appears that consumer demand for socially responsible products and support for companies that engage in socially responsible practices is increasing.

The increased awareness about corporate social responsibility is not limited solely to consumer purchasing decisions. Employees also exhibit a preference for working at companies that are committed to good citizenship and engaged in ethical business practices. For example, potential employees increasingly weigh the social and environmental track record of a corporation when deciding where to work.[282] In fact, surveys have indicated that potential employees would be willing to accept less compensation to work for a company that they view as socially responsible instead of receiving more pay to work for a company that they view as lacking ethical business practices.[283]

Like consumers and employees, investors (particularly mutual funds) have increasingly turned to socially responsible investment strategies. Socially Responsible Investing ("SRI") generally seeks to achieve strong financial returns while also using investments to advance social, environmental, and governance practices.[284] SRI strategies can take many forms, but traditionally, investors that employ SRI strategies incorporate consideration of environmental, social, and corporate governance criteria in their investment analysis and portfolio construction decisions.[285] For example, the Eventide Gilead Fund pursues an investment philosophy that invests in companies that "fulfill their high calling to serve the common good by creating real value for all of their stakeholders: customers and employees especially, as

279 *See* CLARK, *supra* note 24, at 2; CONE COMMC'NS, 2007 CONE CAUSE EVOLUTION & ENVIRONMENTAL SURVEY 8 (2007), http://www.conecomm.com/2007-cause-evolution-and-environmental-survey; ECO-OFFICIENCY, *supra* note 16.

280 *See* ECO-OFFICIENCY, *supra* note 16.

281 *See generally* LAWRENCE B. GLICKMAN, BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA (2009); Lawrence Glickman, *Whole Foods Boycott: The Long View*, WASH. POST: SHORT STACK (Sept. 2, 2009, 5:30 A.M.), http://voices.washingtonpost.com/shortstack/2009/09/whole_foods_boycott_the_long_v.html?hpid=news-col-blog.

282 *See* CLARK, *supra* note 24, at 3.

283 *See id.*

284 *See SRI Basics*, US SIF, http://www.ussif.org/sribasics (last visited Jan. 7, 2015).

285 *See id.*

well as suppliers, communities, the environment, and society broadly."[286] Another fund, the New Alternatives Fund, invests in companies that produce products or services that benefit the environment.[287] Funds pursuing SRI strategies have experienced significant growth in recent years both in absolute terms and in comparison to overall assets under management in the United States.[288] At present, "more than one out of every nine dollars under professional management in the United States is invested according to SRI strategies."[289]

The increased awareness of consumers, employees, and investors about the broader impact of corporate actions highlights a growing demand by a segment of the population. Given this mounting preference for supporting socially conscious corporations that pursue profit while also working to benefit society, advocates for the adoption of Benefit Corporation statutes tout it as a needed mechanism to provide accountability.[290] By explicitly requiring directors to balance stakeholder interests and pursue the creation of a public benefit, Benefit Corporation statutes provide a means for differentiating corporations that truly have a socially conscious objective from those that do not.[291] In addition, the reporting requirements increase transparency, which allows for more effective conveyance of information about the corporation's efforts to benefit the public.[292] Benefit Corporation statutes therefore address a legitimate concern—that consumers, employees, and investors could be flooded with assertions of corporate sus-

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286 *About Us*, EVENTIDE FUNDS, http://eventidefunds.com/about-us/#!philosophy (last visited Jan. 15, 2016).

287 *Company Overview*, NEW ALTS. FUND, http://www.newalternativesfund.com/about/about_overview.html (last visited Jan. 15, 2016).

288 As one report from the Forum for Sustainable and Responsible Investment states:

> From 1995 to 2012, sustainable and responsible investing has grown at a compound annual rate of 11 percent, or 1.24 percentage points faster than all professionally managed investment assets in the United States. In cumulative terms, the SRI universe has increased 486 percent from 1995 to 2012, while the broader universe of assets under professional management in the United States, according to estimates from Thomson Reuters Nelson, has grown 376 percent, from $7 trillion in 1995 to $33.3 trillion in 2012. US SRI assets at year-end 2011 were 22 percent higher than at year-end 2009, and 38 percent higher than at year-end 2006. In comparison, overall US assets under management at year-end 2011 were 32 percent higher than at year-end 2009, and 33 percent higher than at year-end 2006.

2012 Trends Report, US SIF, http://www.ussif.org/files/Publications/Trends2012Final2.pdf (last visited Jan. 15, 2016).

289 *Id.*

290 *See* CLARK, *supra* note 24, at 17.

291 *See id.*

292 *See id.* at app. C.

tainability and social impact without any reliable mechanism for evaluating the veracity of such claims.

Despite this legitimate concern, it should be noted that the creation of a new class of corporation is not the only way to address it. The need to differentiate and provide accountability could be addressed via any or some combination of: (1) third-party criteria and certification; (2) government standard and certification; (3) disclosure requirements for investors; (4) regulation of labeling and advertising for consumers; and (5) public reporting requirements.[293] Such efforts could be taken wholly independent from the creation of the Benefit Corporation as a new type of legal entity.

In lieu of adopting a Benefit Corporation statute, regulatory efforts could be focused on standard setting—i.e., establishing a set of criteria by which a corporation's sustainable practices and pursuit of a public benefit would be evaluated. In a way, this would be akin to the regulation of eco/fairness labels (such as Fair Trade, EPA ENERGY STAR, USDA Organic, or LEED Certified) which proliferated[294] in response to growing demand for sustainable food products.[295] These originated from a number of different sources. Some labels were promulgated by privately-owned entities labeling their own products (e.g., the Home Depot "Eco Options" label).[296] Other labels were established and certified by a third-party labeler (e.g., Fair Trade Certified or LEED Certified) or the government (e.g., USDA Organic or EPA ENERGY STAR).[297] Critics have questioned the effectiveness and reliability of a wholly private mechanism of labeling to convey information about the production process and the labeler's results in

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293 *See id.* at 15–18, 23.

294 *See Will Glut of Food Eco-Labels Imperil Consumer Confidence?*, SUSTAINABLE FOOD NEWS (Jan. 11, 2013) [hereinafter SUSTAINABLE FOOD NEWS], https://www.sustainablefoodnews.com/printstory.php?news_id=18242 (noting the introduction of over 200 food eco-labels as of January 2013).

295 *See* Teshager W. Dagne, *Place-Based Intellectual Property Strategies for Traditional and Local Agricultural Products: Acting Locally to Participate Globally in a Rights-Based Approach*, 17 DRAKE J. AGRIC. L. 565, 593 (2013); Jill J. McCluskey & Maria L. Loureiro, *Consumer Preferences and Willingness to Pay for Food Labeling: A Discussion of Empirical Studies*, 34 J. FOOD DISTRIB. RES. 95, 95 (2003).

296 *See* Jeffrey Belson, *Ecolabels: Ownership, Use, and the Public Interest*, 102 TRADEMARK REP. 1254, 1264 (2012).

297 *See generally* NICHOLAS INSTITUTE FOR ENVIRONMENTAL POLICY SOLUTIONS, AN OVERVIEW OF ECOLABELS AND SUSTAINABILITY CERTIFICATIONS IN THE GLOBAL MARKETPLACE (Jay S. Golden ed., 2010), https://center.sustainability.duke.edu/sites/default/files/documents/ecolabelsreport.pdf.

achieving goals of fairness and sustainability.[298] In addition, the rapid proliferation of labels has resulted in consumer confusion about what a particular label actually means.[299] This is particularly true where multiple standards cover the same product category,[300] or nontransparent criteria are used in determining when a particular label can be used.[301] As a result, the credibility of such labels may suffer and consumer confidence in the meaning of such labels may diminish.[302] Despite these challenges, increased transparency in the development and evaluation process, greater uniformity in standard setting, and the establishment of a prevailing or more universally accepted standard could remedy many of the concerns resulting from the proliferation of labels.

The eco/fairness label example highlights how similar concerns about accountability and differentiation in the "labeling" of socially conscious corporations could be addressed without the creation of a new class of corporation. Like the labeling of products, corporations themselves are seizing on labels such as "social responsibility," "socially conscious," "social entrepreneurship," "purpose-driven," "mission-driven," and "social enterprise" as consumer demand increases.[303] As discussed above, the use of a purely private system of labeling a corporation's actions as sustainable or otherwise benefiting society may lead to legitimate concerns that the market will have no credible way to evaluate such claims.[304] That is to say, when a corporation categorizes itself as utilizing "sustainable" or "ethical" business practices or claims that it is a "social enterprise" or "mission-driven business," it may be unclear what (if anything) the corporation is affirmatively doing to deserve such a label.[305]

A third-party or government standard and certification process may be a viable alternative for remedying market concerns about ac-

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298 *See, e.g.*, Martijn W. Scheltema, *Assessing Effectiveness of International Private Regulation in the CSR Arena*, 13 RICH. J. GLOBAL L. & BUS. 263, 264 (2014).

299 *See, e.g.*, WORLD RES. INST., GLOBAL ECOLABEL MONITOR: TOWARDS TRANSPARENCY 3 (2010), http://www.wri.org/sites/default/files/pdf/2010_global_ecolabel_monitor.pdf; *see also* Helen Nilsson et al., *The Use of Eco-Labeling Like Initiatives on Food Products to Promote Quality Assurance—Is There Enough Credibility?*, 12 J. CLEANER PROD. 517, 517–26 (2004).

300 *See* WORLD RES. INST., *supra* note 299, at 3.

301 *See* Belson, *supra* note 296, at 1258; WORLD RES. INST., *supra* note 299, at 3.

302 *See generally* Nilsson et al., *supra* note 299; SUSTAINABLE FOOD NEWS, *supra* note 294.

303 *See* Michelle Nunn, *Millennials to Business: Social Responsibility Isn't Optional*, WASH. POST, (Dec. 20, 2011), http://www.washingtonpost.com/national/on-innovations/millennials-to-business-social-responsibility-isnt-optional/2011/12/16/gIQA178D7O_story.html.

304 *See supra* note 298 and accompanying text.

305 *See id.*

countability, if it involves the proper development of consistent standards and transparency as to how the standard is applied to evaluate and award certification. If so, a third-party or government standard could: (1) lend credibility to the evaluation process to ensure accountability by those seeking certification, and (2) provide useful information to consumers, investors, and employees to facilitate differentiation. Finally, additional investor specific disclosure requirements and public reporting requirements could be added to facilitate increased understanding and transparency.

As evidenced by the foregoing, it is possible to address consumer demand and market-related concerns without statutorily creating a new business entity. In fact, B Labs (the nonprofit backing Benefit Corporation statutes) explicitly acknowledges this possibility by providing a third-party standard and certification process for corporations and other business entities even in the absence of a Benefit Corporation statute in the jurisdiction of the organization.[306] Therefore, the market justification of increased demand and the need for differentiation raises a legitimate issue. It does not fully support or justify the adoption of Benefit Corporation statutes, however, because alternatives exist to the creation of a new class of corporation. Simply stated, the enactment of Benefit Corporation statutes is one approach for addressing market concerns, but these market concerns do not in and of themselves necessitate that states recognize the Benefit Corporation as a new business entity.

III. The Consequences of Enacting Benefit Corporation Legislation

The widespread enactment of Benefit Corporation statutes[307] is a testament to the appeal of the legislation. Because of uncertainty as to the scope of managerial discretion to consider non-shareholder stakeholder interests when making decisions and setting corporate policy, Benefit Corporation statutes provide a seemingly easy fix. The statutes facilitate corporate efforts to provide a public benefit instead of pursuing profit at all costs,[308] which is a position that enjoys growing consumer support.[309] In addition, Benefit Corporation statutes prom-

306 *See Legal Roadmap*, *supra* note 200.

307 Thirty-one states have passed Benefit Corporation legislation and five more states have introduced legislation. *See Status of Legislation*, *supra* note 22.

308 *See* Model Benefit Corp. Legis. §§ 201, 301 (2013).

309 *See* Jacquelyn Smith, *The Companies with the Best CSR Reputations*, Forbes, (Oct. 2, 2013, 11:59 PM), http://www.forbes.com/sites/jacquelynsmith/2013/10/02/the-companies-with-the-best-csr-reputations-2/; *see also* Reputation Inst., *supra* note 277.

ise minimal impact on existing corporate law.[310] Instead of seeking an overhaul of corporate law, Benefit Corporation statutes take a limited approach in adding a handful of requirements that are only applicable to those entities that decide to organize as a Benefit Corporation.[311] Because of these reasons, the enactment of Benefit Corporation statutes is admittedly an attractive option.

Looking beyond the surface-level appeal of Benefit Corporations, however, raises legitimate questions about the potentially adverse impact of adding a new legal entity to an already indeterminate corporate law framework. This Article does not seek to take a position on the normative question of whether corporations should seek to provide a societal benefit or focus solely on shareholder profit. Moreover, this Article does not attempt to argue that the creation of a hybrid business entity such as the Benefit Corporation has no place. Instead, this Article suggests that too little attention has been focused upon the potentially adverse impacts (as opposed to the benefits) of simply adding a new class of business entity to an already complicated and somewhat uncertain corporate law environment. That is to say, an analysis of the justifications and benefits of added certainty for those businesses that elect to organize as a Benefit Corporation neglects other important factors, which are necessary to the making of informed decisions as to the adoption of Benefit Corporation statutes and whether additional steps may need to be taken.

In short, this Article suggests that the addition of Benefit Corporation statutes may result in four distinct but related consequences that should be weighed carefully by legislators when shaping the evolution of modern corporate law. First, the addition of the Benefit Corporation legal entity may needlessly complicate existing law while providing minimal gains in corporate law certainty. Second, adding a new class of corporation may make entity selection and corporate decisionmaking more inefficient. Third, Benefit Corporations may reinforce the profit maximization norm and advance a misunderstanding about director duties under corporate law. Fourth, Benefit Corporation statutes may have the unintended consequence of stifling efforts by for-profit business entities (other than those organized as Benefit Corporations) to adopt sustainable business practices and provide societal benefits.

Legislators and policymakers should weigh these potential consequences when deciding whether to adopt Benefit Corporation legisla-

310 *See, e.g.*, MODEL BENEFIT CORP. LEGIS. § 101(b).

311 *See id.* § 101(a).

tion. Even if the trend of Benefit Corporation enactment continues, these potential consequences highlight the limited reach of Benefit Corporation statutes. Because Benefit Corporation statutes do not address the uncertainty that has and will continue to impact traditional for-profit corporations, the addition of Benefit Corporations further accentuates aspects of corporate law that may warrant additional attention and reform if legislators wish to improve the foundational issue of the extent to which traditional for-profit corporations can pursue dual objectives of profit and public benefit.

A. Added Clarity or Needless Complexity?

Because the traditional for-profit corporation arguably provides a form that is flexible enough to accommodate the pursuit of a public benefit, the addition of the Benefit Corporation may needlessly complicate the existing legal framework. As discussed in Part I, corporate law is in many ways flexible enough to accommodate the consideration of broader stakeholder interests.[312] As a result, the addition of Benefit Corporations creates an overlap with traditional for-profit corporations where both are capable of pursuing dual objectives of profit and public benefit. If corporate law mandated the pursuit of shareholder profit to the exclusion of other objectives, then Benefit Corporation statutes would fill a gap between for-profits and nonprofits.

Because traditional for-profit corporations are not beholden to pursue shareholder profit exclusively and corporate managers enjoy significant discretion,[313] the addition of Benefit Corporations may create uncertainty as to the difference in scope of permissible activities (if any) between traditional for-profit corporations and Benefit Corporations. Though corporate managers are required to act in the best interests of the corporation and its shareholders, the degree of deference afforded to managerial decisions leaves ample room for the consideration of broader stakeholder interests and the pursuit of goals other than or in addition to profit.[314] Corporations may organize for the pursuit of any lawful purpose,[315] and managers are granted the authority to direct the business and affairs of the corporations.[316] As such, corporate managers enjoy the flexibility to pursue dual objec-

312 *See generally supra* Part I.

313 *See supra* Part I.C.

314 *See id.*

315 *See* MODEL BUS. CORP. ACT § 3.01(a) (2002).

316 *See id.* § 8.01; *see also* DEL. CODE ANN. tit. 8, § 141(a) (2014).

tives of profit and public benefit if they so choose.[317] Such decisions will generally enjoy deference from the courts under the business judgment rule so long as a rational business purpose is identified.[318] Therefore, even in the absence of constituency statutes, the flexibility of corporate law permits traditional for-profit corporations to accomplish the primary purpose of Benefit Corporations—the pursuit of both profit and public benefit.

Moreover, corporate law already provides traditional for-profits with the means to demonstrate an even greater commitment to the pursuit of a public benefit. A traditional for-profit corporation could organize for the express purpose of pursuing a specified purpose such as the pursuit or creation of a public benefit.[319] Moreover, the governing documents of a traditional for-profit corporation could be voluntarily amended to expressly condone or mandate the consideration of non-shareholder interests and the pursuit of a public benefit.[320] Because corporate law allows for the flexibility to adopt voluntarily charter provisions,[321] the traditional corporate form permits the use of business to advance a public benefit. While corporate activities that do not narrowly focus on increasing shareholder profit may draw the ire of some shareholders, the existing legal framework clearly allows for traditional for-profit corporations to engage in such activities, especially if such practices enjoy broad shareholder support.[322] Therefore, the traditional for-profit corporation, like the new Benefit Corporation form, can be used to facilitate the provision of a public benefit in addition to the pursuit of profit.

Given the rhetoric surrounding corporations acting with a profit-at-all-costs mentality, the flexibility of corporate law to permit pursuits other than those that are clearly and directly related to generating profit may be surprising.[323] However, examples of traditional for-profits taking advantage of the permissiveness of corporate law

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317 *See supra* Part I.C.

318 *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

319 *See* Steven Pearlstein, *How the Cult of Shareholder Value Wrecked American Business*, WASH. POST: WONKBLOG (Sept. 9, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/09/09/how-the-cult-of-shareholder-value-wrecked-american-business/.

320 *See* Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 1020 (2009).

321 *See id.*

322 *See id.*

323 *See* Greg Emerson, *The 10 Most Charitable Companies in America*, YAHOO FINANCE (Dec. 2, 2011, 12:29 PM), http://finance.yahoo.com/news/the-10-most-charitable-companies-in-america.html.

abound.[324] Corporate charitable giving has become commonplace.[325] In 2010, Kroger, Macy's, Safeway, Dow Chemical, and Morgan Stanley each gave over five percent of their 2009 profits to charity.[326] The dollar figures of such corporate giving can also be significant. In 2010, Wal-Mart's charitable giving topped $319 million dollars.[327] Corporations often organize responses to assist in the wake of natural disasters.[328] In addition to donating money, corporations also volunteer time and donate products and services.[329] For example, following Typhoon Haiyan, AT&T customers were allowed to make calls to the Philippines at no cost.[330] Tide sends mobile laundromats to areas affected by natural disasters and Tide employees do laundry for free.[331] After Hurricane Sandy, Verizon gave more than six million dollars for rebuilding efforts.[332] Corporations have also increasingly adopted sustainable business practices with many committing to good global citizenship in the areas of human rights, labor standards, and environmental protection.[333]

Some corporations have even opted to tackle larger societal problems.[334] TOMS's ethos of giving was founded on the desire to improve the lives of children.[335] TOMS has advanced this mission by donating one pair of TOMS shoes for each purchase of a pair of TOMS shoes.[336] To date, TOMS has given away more than forty-five million pairs of shoes[337] and expanded their social mission to treating vision issues, improving access to water, and providing safer birth conditions.[338] Warby Parker has a similar "Buy a Pair, Give a Pair" practice of donating a pair of eyeglasses for every pair of eyeglasses that is

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324 *See id.*

325 *See id.*

326 *See id.*

327 *See id.*

328 *See* Alexis Caffrey, *5 Examples of Corporate Disaster Relief*, TRIPLE PUNDIT (Dec. 18, 2013), http://www.triplepundit.com/2013/12/5-companies-giving-disaster/.

329 *See id.*

330 *See id.*

331 *See id.*

332 *See id.*

333 *See id.*

334 *See* Knowledge@Wharton, *Why Companies Can No Longer Afford to Ignore Their Social Responsibilities*, TIME (May 28, 2012), http://business.time.com/2012/05/28/why-companies-can-no-longer-afford-to-ignore-their-social-responsibilities/.

335 *See supra* note 267and accompanying text.

336 *See supra* note 268 and accompanying text.

337 *See What We Give*, TOMS, http://www.toms.com/what-we-give-shoes (last visited Jan. 15, 2016).

338 *See supra* note 267.

purchased.[339] The Coca-Cola Company has a program to empower young women entrepreneurs.[340] Visa has partnered with local governments and nonprofits to focus on financial inclusion.[341] Fashion designer Kenneth Cole has used his company to raise public awareness for issues such as AIDS, homelessness, gun safety, and women's rights.[342]

Each of these actions could be viewed as failing to maximize shareholder profit. Despite the actual subjective motivation of the corporate managers, however, if their decisions were challenged, each decision could presumably be justified by a rational business purpose—the long-term benefit accruing to the corporation and its shareholders as a result of goodwill and positive publicity.[343] It follows then that corporate law has not prevented traditional for-profit corporations from choosing to embrace the advancement of social causes as a core value instead of simply focusing on the bottom-line. Therefore, the flexibility of the traditional for-profit form can be utilized to accomplish more than just the growth of shareholder profit.

Because the traditional for-profit form can be used by corporations wishing to provide or create a public benefit, the addition of Benefit Corporations may add complexity while adding little value. If the directors of traditional for-profit corporations were subject to an unwavering duty to maximize shareholder profit,[344] Benefit Corporations would allow for the pursuit of a corporate purpose that simply could not be attained by using the nonprofit form or traditional for-profit form. Thus, the Benefit Corporation would add complexity to corporate law by creating a new legal entity while filling a legitimate void. If so, the gains of creating Benefit Corporations might justify the addition of a new legal entity.

The potential positive impact of adding Benefit Corporations, however, must be tempered by the added complexity that stems from the fact that the traditional for-profit corporation can also be used to pursue both profit and the creation of a public benefit.[345] Although Benefit Corporation statutes provide added certainty and reduced risk

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339 *See Buy a Pair, Give a Pair*, WARBY PARKER, https://www.warbyparker.com/buy-a-pair-give-a-pair (last visited Jan. 15, 2016).

340 *See* Knowledge@Wharton, *supra* note 334.

341 *See id.*

342 *See* Knowledge@WhartonStaff, *Kenneth Cole: How the King of Sole Got Soul*, INC. (Jan. 1, 2004), http://www.inc.com/articles/2004/01/causerelatedmktg.html.

343 *See supra* Part I.C.

344 *See id.*

345 *See id.*

for the small subset of corporations that elect to organize as a Benefit Corporation, the larger group of traditional for-profit corporations may suffer. At best, the traditional for-profit corporations will realize no benefit and must continue to operate within the same uncertain legal framework.

However, layering Benefit Corporation statutes onto existing law is likely to introduce new questions and issues. For example, does the creation of the Benefit Corporation in any way impact the discretion afforded to the directors of for-profit corporations and the exercise of that discretion to pursue a public benefit so long as a rational business purpose is articulated?[346] In addition, confusion may arise as to whether and why differing standards apply to the managerial decisions of traditional for-profit corporations as compared to Benefit Corporations when they may serve substantially the same function. Until these questions and others like them are resolved, the enactment of Benefit Corporation statutes may actually create greater uncertainty.

In sum, the addition of Benefit Corporations will add complexity to corporate law by creating yet another new business entity. The benefits of enacting Benefit Corporation statutes, however, do not justify the added complexity where traditional for-profits may serve some or all of the needs of socially conscious corporations.[347] At a minimum, the broader impact of Benefit Corporations on existing corporate law and the management of other business entities raise legitimate questions about whether further action should be taken in conjunction with the enactment of Benefit Corporation statutes to clarify how Benefit Corporations integrate into the existing legal framework. Absent such action to clarify the interplay between Benefit Corporations and existing corporate law—especially the scope of the ability of a traditional for-profit company to consider non-shareholder stakeholder interests and pursue a public benefit following the addition of Benefit Corporations—the enactment of Benefit Corporation statutes may simply create greater uncertainty as to corporate purpose.

B. Increased Inefficiency?

The addition of Benefit Corporations may also result in more inefficiency for those incorporating businesses, corporate managers, and shareholders. As discussed above, Benefit Corporations add a layer of complexity and raise questions about the scope of permissible

346 *See id.*

347 *See id.*; *see also supra* Part II.B.

action for traditional for-profits as compared to Benefit Corporations. Therefore, the resulting legal framework with Benefit Corporations will create increased uncertainty until the impact of Benefit Corporation statutes is ultimately settled.

During this period of time, new businesses seeking to incorporate will be forced to evaluate a new class of corporation when making a decision on entity selection. Incorporators must attempt to discern the substantive differences between the various business entities and may have imperfect information about the repercussions of selecting the new Benefit Corporation form as compared to other available business entities. Moreover, the legal treatment of Benefit Corporations may be unknown for some time. As a result, the process of entity selection may be more time consuming, costly, and inefficient following enactment of Benefit Corporation statutes.

Like incorporators, the managers and shareholders of traditional for-profit corporations will be faced with the need to evaluate and analyze the likely impact of Benefit Corporations on existing corporate law. For example, corporate managers and shareholders may need to determine whether the existence of the Benefit Corporation form affects charitable giving, adoption of sustainable business practices, and the pursuit of a public benefit for those organized as a traditional for-profit corporation. In addition, existing for-profit corporations may need to evaluate and consider whether converting into a Benefit Corporation is necessary to accomplish certain objectives that are not purely profit driven. Ultimately, the absence of definitive guidance on these issues will lead to increased decisionmaking costs and a more convoluted legal environment for traditional for-profits.

In sum, the addition of the Benefit Corporation will likely cause some level of disruption. Despite best efforts to expressly limit the impact of Benefit Corporation statutes, the legal treatment of the Benefit Corporation by the judiciary will need to be developed over time. As a result, the question of how the existence of Benefit Corporations will be interpreted to affect traditional for-profits will be unsettled, resulting in uncertainty. Such uncertainty will create a more inefficient legal system for incorporators and corporate decisionmaking.

C. Reinforcement of the Profit Maximization Norm?

The enactment of Benefit Corporation statutes may unintentionally reinforce the profit maximization norm. While the dominant view

of corporations may currently favor shareholder primacy and profit maximization,[348] the consensus as to this normative position has shifted and may continue to evolve over time.[349] As discussed above, corporate law does not reflect an unequivocal duty on the part of corporate managers to maximize shareholder wealth.[350] Instead, corporate law reflects the coexistence of both shareholder primacy and the discretion to consider the broader interests of non-shareholder stakeholders.[351]

By enacting Benefit Corporation statutes, states are creating a new type of business entity that facilitates the dual objectives of shareholder profit and pursuing a broader public benefit.[352] The primary justification for Benefit Corporations is that existing business entities do not adequately support such an enterprise.[353] Because of this, the existence of Benefit Corporations may reinforce the profit maximization norm. Even though corporate law is flexible enough to accommodate the pursuit of both profit and public benefit, the public,[354] corporate managers, shareholders, and the judiciary may construe Benefit Corporations as the only proper (or at least lowest risk) legal entity for pursuing a hybrid corporate purpose. Stated another way, the rhetoric surrounding Benefit Corporations may be overly simplified such that Benefit Corporations are viewed as necessary because traditional for-profits prohibit the consideration of broader stakeholder interests and the pursuit of a public benefit.[355] Accordingly, traditional for-profit corporations may be mistakenly relegated to the pursuit of shareholder profit alone.

Benefit Corporation statutes appear to recognize the potential for such a construction.[356] Benefit Corporation statutes typically provide that the existence of a provision is not intended to "create an implication that a contrary or different rule of law is applicable to a business corporation that is not a benefit corporation."[357] That is to say, the fact that Benefit Corporations are statutorily required to pursue a public benefit and balance all stakeholder interests should not

348 *See* Williams, *supra* note 60, at 707–08.

349 *See supra* Part I.B.

350 *See supra* Part I.C.

351 *See id*.

352 *See* CLARK, *supra* note 24, at 16–17.

353 *See supra* Part II.

354 *See supra* Part I.C.

355 *See supra* Part II.

356 *See, e.g.*, MODEL BENEFIT CORP. LEGIS. § 101, cmt.(2013).

357 *Id.* § 101(b).

be interpreted to mean that traditional for-profit corporations are not permitted to do so. The foregoing notwithstanding, the practical result of adding Benefit Corporations may nonetheless result in an affirmation of the profit maximization norm.

In sum, the existence of Benefit Corporation statutes may have the unintended consequence of being construed as a legislative mandate that, under corporate law, considering broader stakeholder interest and creating a public benefit is wholly prohibited unless a business has opted to organize or reincorporate as a Benefit Corporation. Such a fundamental misunderstanding of the law could operate to strengthen the profit maximization norm and further inculcate shareholder profit maximization into corporate law to the exclusion of stakeholder concepts. Such a result seems undesirable to the extent that it may create a generalized perception of corporate law instead of advancing a complete understanding of its nuanced approach to corporate purpose and the interplay between the duty of loyalty and managerial discretion.[358]

D. Stifling Socially Conscious Corporations?

Finally, the added complexity and reinforcement of the profit maximization norm may collectively lead to an overall reduction in the advancement of social missions by corporations. Benefit Corporation statutes enhance the ability of Benefit Corporations to pursue social missions by clarifying the scope of permissible activity[359] and mandating demonstrated progress toward the creation of a public benefit.[360] The increased public benefit generated by Benefit Corporations, however, may be more than offset by a corresponding decline in the efforts of traditional for-profit corporations if the Benefit Corporation form is not widely adopted and the managers of for-profit corporations elect to curtail the pursuit of social missions.

Managers of a traditional for-profit corporation might decide to reduce or eliminate broader social endeavors to mitigate the risk of an increasingly unpredictable legal environment.[361] As discussed above, many for-profit corporations have pursued the creation of a public benefit despite historical uncertainty over the compatibility of such an objective with the fiduciary duties owed to the corporation and its

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358 *See supra* Part I.C.

359 *See supra* notes 295–98 and accompanying text.

360 *See supra* notes 188–225 and accompanying text.

361 *See* CLARK, *supra* note 24, at 6.

shareholders.[362] However, widespread enactment of Benefit Corporation statutes adds to an already uncertain legal environment by raising new questions about how Benefit Corporation statutes impact traditional for-profit corporations and whether the existence of Benefit Corporations necessitate profit maximization as the only acceptable objective for the traditional for-profit corporation.

Until these questions are definitively settled, the added risk may prove too much for some corporate managers. As a result, they may limit or suspend activities that are not clearly and directly tied to increasing shareholder profit. Even if corporate managers become comfortable with the added risk, the enactment of Benefit Corporation statutes could still result in traditional for-profit corporations reducing initiatives designed to create societal benefits. The existence of Benefit Corporation statutes alone could be construed as mandating shareholder profit maximization for corporations not organized as Benefit Corporations, which may lead corporate managers to abide by that principle in practice. As such, traditional for-profit corporations may again reduce or eliminate their pursuit of social missions in favor of the wholesale pursuit of shareholder profit.

Consider, for example, the case of global coffee giant Starbucks. The Starbucks corporate website proudly proclaims the company's longstanding commitment to "strik[ing] a balance between profitability and a social conscience."[363] Starbucks, as a corporation, believes it "can—and should—have a positive impact on the communities [it] serve[s] . . . so that Starbucks and everyone [it] touch[es] can endure and thrive."[364] To that end, Starbucks supports and advances a variety of socially responsible initiatives to help local communities, minimize its environmental footprint, provide ethically sourced products, embrace diversity, and improve community health and wellness.[365] A recent initiative involves a partnership between Starbucks and Conversation International to develop a pilot approach to helping

362 *See supra* Part III.A; *see also CSRwire Members*, CSRWIRE, http://www.csrwire.com/members (last visited Jan. 15, 2016) (listing members of the Corporate Social Responsibility Newswire, which includes a high volume of corporations interested in communicating their corporate citizenship initiatives).

363 *Starbucks Company Profile*, STARBUCKS.COM (Jan. 2015), http://globalassets.starbucks.com/assets/4286be0614af48b6bf2e17ffcede5ab7.pdf.

364 *The Starbucks Mission Statement and Corporate Social Responsibility*, STARBUCKS.COM, http://www.starbucks.com/responsibility (last visited Jan. 15, 2016).

365 *See id.*

farmers respond to the effects of climate change without sacrificing the principles of high quality, climate-friendly coffee production.[366]

Whether out of a desire to obtain financial benefits or pure altruism, traditional for-profit corporations, such as Starbucks, have opted to become more socially conscious and engage in creating broader societal benefits.[367] Before the enactment of Benefit Corporation statutes, socially conscious corporations faced some risk that their initiatives would be challenged.[368] They ultimately enjoyed relative comfort through the protection afforded by the business judgment rule, however, so long as the decision could be justified by a rational business purpose.[369] Even so, dissatisfied shareholders with sufficient support from other shareholders retained the ability to remove ultimately or decline to re-elect incumbent management.[370] As such, the existing legal framework without Benefit Corporations provided an imperfect but workable system that allowed corporate managers to exercise their expertise in determining the best interests of the corporation and protected shareholders from abuses of managerial discretion.[371]

Despite the existence of some uncertainty, this legal system—without Benefit Corporations—allows the market to rule. Corporate managers retain discretion while being incentivized to act in accordance with the interests and desires of shareholders.[372] Where shareholders are satisfied as to managerial performance and return on investment, corporate managers have little to fear. On the other hand, where managerial directives result in unsatisfactory results, shareholders retain the ability to voice their displeasure.[373] Though corporate managers were forced to deal with some risk as a result of inconsistent legal precedent and confusion over the interplay between fiduciary duties and managerial discretion, the existing framework facilitated balanced deference to managerial decisions with shareholder protection.[374]

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366 *See* Ann B., *Helping Sumatran Farmers Respond to Climate Change*, STARBUCKS.COM (July 23, 2012) http://www.starbucks.com/blog/helping-sumatran-farmers-respond-to-climate-change/1213.

367 *See supra* Part III.A.

368 *See supra* Part I.C.

369 *See id.*

370 *See id.*

371 *See id.*

372 *See id.*

373 *See id.*

374 *See id.*

The addition of Benefit Corporations to corporate law, however, creates newfound uncertainty that may cause traditional for-profit corporations to stop pursuing socially focused initiatives. Returning to the example of socially conscious corporations such as Starbucks, corporate efforts to balance profit with social responsibility may fall by the wayside due to the unknown impact of Benefit Corporations on existing law as it applies to traditional for-profits.[375] The availability of the Benefit Corporation form might lead corporations like Starbucks to determine that social initiatives can only be pursued if the business is organized as a Benefit Corporation.[376] Because sufficient shareholder support may not exist for reorganization, socially conscious corporations may not feel comfortable with continuing to advance social initiatives without becoming a Benefit Corporation.[377]

Even if corporations do not interpret the existence of Benefit Corporations as such a mandate, they may nonetheless reduce or eliminate social initiatives to mitigate the risk of a shareholder lawsuit for breach of fiduciary duty. Until the law surrounding Benefit Corporations develops to provide guidance as to the scope of permissible activity for traditional for-profits, there is a greater risk of an adverse judicial ruling on the issue. To mitigate the risk, traditional for-profit corporations may opt to scale back or eliminate the pursuit of a public benefit pending definitive authorization of such action. For these reasons, the creation of broader societal benefits by traditional for-profit corporations could suffer following the enactment of Benefit Corporations statutes.

In addition to the possibility of stifling future corporate social responsibility from traditional for-profit corporations who have already exhibited a commitment to give back to the community, the existence of Benefit Corporations statutes could also be used to justify the lack of social initiatives by traditional for-profit corporations. For each business that is lauded for its community involvement, there is another that is criticized for being slow to adopt corporate social responsibility.[378] For-profit corporations facing pressure for their lack of social initiatives could point to Benefit Corporation statutes as a justification for their laser focus on profit maximization within the con-

375 *See supra* Part III.A–B.

376 *See supra* Part III.C.

377 *See id.*

378 *See* James Epstein-Reeves, *Consumers Overwhelmingly Want CSR*, FORBES (Dec. 15, 2010, 9:58 AM), http://www.forbes.com/sites/csr/2010/12/15/new-study-consumers-demand-companies-implement-csr-programs/.

fines of the law and their disregard for other interests. The existence of Benefit Corporation legislation, therefore, could act as a shield from public scrutiny and calls for greater social impact. In this way, Benefit Corporations could further reduce the amount of public benefit created by traditional for-profit corporations, and impede what appears to be a shift in business practices from a tradition of focus on profit maximization toward increasing acceptance of a corporation's ability to positively impact the society in which it operates.

This Article does not point out the potential of traditional for-profit corporations to reduce efforts designed to create a broader public benefit for the purpose of arguing for or against a particular normative position on corporate purpose. In fact, supporters of the traditional view of the corporation—which focuses on shareholder primacy and profit maximization[379]—may very well welcome an interpretation of Benefit Corporation statutes as definitively requiring profit maximization by for-profit corporations and limiting broader social initiatives to Benefit Corporations. On the other hand, stakeholderists[380] that subscribe to the view that for-profit corporations have always catered to multiple constituencies and interests other than shareholders might oppose such an interpretation as an inappropriate way of advancing the profit maximization norm.

Instead, this Article highlights potential consequences for the purpose of facilitating informed legislation and accentuating the fact that enacting Benefit Corporation statutes alone fails to address the foundational question whether and to what degree for-profit corporations may pursue objectives other than or in addition to profit. As a result, the evolution of corporate law may benefit from further action to clarify the issue.

CONCLUSION

In many ways, modern corporate law reflects discretion for managers to consider objectives other than shareholder profit.[381] State corporate codes allow corporations to be organized for any lawful purpose (not just the maximization of shareholder wealth),[382] and provide for management by the directors (not the shareholders).[383] In addition, state corporate codes may reflect statutory authority to

379 *See supra* Part I.C.1.

380 *See supra* Part I.C.2.

381 *See supra* Part I.C.

382 *See, e.g.*, MODEL BUS. CORP. ACT § 3.01(a) (2002).

383 *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2014); MODEL BUS. CORP. ACT § 8.01.

make charitable donations[384] and to consider the broader interest of non-shareholder stakeholders.[385] Combined with the deference granted to directors for decisions under the business judgment rule,[386] directors of a for-profit corporation enjoy a level of support for the proposition that they may decide to pursue the creation of a public benefit, especially if there is an identified business purpose accruing to the corporation.[387] Corporate law only dictates that directors shift their focus to the maximization of shareholder wealth in limited circumstances.[388] Therefore, shareholders have limited recourse. Shareholders may allege a breach of fiduciary duty, attempt to elect new directors, or simply sell their shares.

The foregoing notwithstanding, a level of uncertainty admittedly exists. Corporate law does not definitively answer the question of corporate purpose.[389] Instead, it generally allows shareholder profit and the consideration of broader constituencies to coexist.[390] However, the exact boundaries of deference to director discretion as compared to the obligation to prioritize the pursuit of shareholder wealth may be somewhat unclear.[391] As a result, directors may be subject to shareholder lawsuits alleging breach of fiduciary duty for actions that shareholders view as not intended to maximize profit.[392]

In light of the existing legal environment, the layering of Benefit Corporations over the existing corporate law framework may lead to undesirable results.[393] If corporate law mandated the pursuit of shareholder profit in all circumstances, the addition of Benefit Corporations would surely fill a gap between nonprofits and for-profits by creating a hybrid entity capable of pursuing dual objectives of profit and public benefit. Corporate law, however, does not impose such a mandate. Because corporate law appears to allow corporate directors to consider broader stakeholder interests and to work towards the cre-

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384 *See, e.g.*, DEL. CODE ANN. tit. 8, § 122(9); MODEL BUS. CORP. ACT § 3.02(13).

385 *See, e.g.*, IND. CODE ANN. § 23-1-35-1(d) (West 2011); 15 PA. CONS. STAT. § 516(a) (2014).

386 *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985); *see also* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

387 *See supra* Part I.C.2.

388 *See supra* Part I.C.1.

389 *See supra* Part I.C.3.

390 *See id*.

391 *See supra* Part I.B.

392 *See id*.

393 *See supra* Part III.

ation of a public benefit,[394] for-profit corporations as they exist today already accomplish much of what Benefit Corporations purport to do.

Although the addition of Benefit Corporations results in minimal gains with respect to certainty for those businesses that elect to organize as a Benefit Corporation, the broader impacts on corporate law need to be weighed more carefully by legislators.[395] Adding Benefit Corporations may add uncertainty to an already complex and indeterminate legal framework.[396] Although directors and shareholders of Benefit Corporations have more clarity regarding their corporate duties, the directors and shareholders of traditional for-profits do not see any improvement. In fact, the resulting framework with Benefit Corporations may create additional uncertainty for traditional for-profits.[397] Moreover, the addition of Benefit Corporations increases the transaction costs in connection with entity selection and corporate decisionmaking.[398] Corporate managers will need to expend resources gathering information and considering the impact of Benefit Corporation statutes on the existing legal environment.[399] Because corporate managers may be risk averse, the addition of Benefit Corporations may also reinforce the profit maximization norm.[400]

As discussed above, corporate law does not demand profit maximization in all circumstances.[401] Accordingly, while profit maximization is a valid normative position on proper corporate purpose, it reflects an overly simplified understanding of the nuances of corporate law, which reflects the interplay of fiduciary duties and managerial discretion.[402] The addition of Benefit Corporations may lead corporate managers to reduce or eliminate consideration of broader stakeholder interests and the pursuit of a public benefit.[403] As a result, Benefit Corporations may ultimately reinforce the profit maximization norm while impeding current efforts by for-profit corporations to be more socially conscious.[404]

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394 *See id.*

395 *See id.*

396 *See supra* Part III.A.

397 *See id.*

398 *See supra* Part III.B.

399 *See id.*

400 *See supra* Part III.C.

401 *See supra* Part I.C.

402 *See id.*

403 *See supra* Part III.D.

404 *See id.*

Given these potential consequences, the aims of Benefit Corporation statutes—to clarify the law—may fall short.[405] This Article suggests that the broader impact of Benefit Corporations have not been given sufficient weight. Instead, too much focus has been given to the market justifications for Benefit Corporations—specifically, that increased demand for social enterprise and market differentiation justifies the creation of a new class of corporation. The consideration of the broader impact of Benefit Corporations on existing corporate law results in more informed decisionmaking when evaluating the need for Benefit Corporation statutes.

The rise in states enacting Benefit Corporation statutes along with increased interest in social enterprise makes a comprehensive analysis and understanding of the potential ramifications even more important. Legislators ought to weigh the benefits of Benefit Corporation statutes against the potentially adverse results. In doing so, it is possible that state legislators could pursue a number of options. First, legislators could decide that Benefit Corporations are unnecessary because existing corporate law allows for the pursuit of profit and public benefit. Second, legislators could determine that existing corporate law could be modified to more clearly specify the scope of authority that directors have to pursue both profit and public benefit. Third, legislators could determine that Benefit Corporation statutes should be enacted. Even so, the enactment of Benefit Corporation statutes without further action to clarify the impact on traditional for-profit corporations may do little more than add complexity to an already complex framework for corporate decisionmaking. Accordingly, further action should be considered to clarify, following enactment of a Benefit Corporation statute, the extent to which for-profit corporations may pursue the creation of a public benefit.

Ultimately, this Article suggests that a more comprehensive understanding of the broader impacts of Benefit Corporation statutes, including potentially adverse consequences, would serve as an invaluable tool for legislators and the judiciary in shaping the evolution of corporate law. Such a tool would assist in the development of corporate law in the face of increased interest and demand for social enterprise.

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405 *See supra* Part III.