
Having Your Cake and Eating It, Too: Making the Benefit Corporation Work in Massachusetts

“[I]n the great chess-board of human society, every single piece has a principle of motion of its own, altogether different from that which the legislature might chuse to impress upon it. If those two principles coincide and act in the same direction, the game of human society will go on easily and harmoniously, and is very likely to be happy and successful.”¹

I. INTRODUCTION

Recent sentiments toward businesses, particularly in response to the 2008 crash of the U.S. housing market, have dramatically changed consumer attitudes about primarily profit-driven business practices, and steered sales toward more socially minded companies.² Revolt against corporate greed coupled with the widening gap between the financially elite and the middle class further emphasizes the need for businesses to focus more on the evolving desires of their consumers.³ While some economists theorize that corporations are able to produce the most social benefit by adopting purely profit-maximizing business practices, businesses must still address consumer needs and desires in order to earn those profits, effectively forcing businesses to adopt (for philanthropic purposes or not) practices that more closely align with the

1. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 212 (Sálvio Marcelo Soares ed., MetaLibri 2005) (1790) available at http://www.ibiblio.org/ml/libri/s/SmithA_MoralSentiments_p.pdf.

2. See, e.g., WILLIAM H. CLARK, JR. & LARRY VRANKA, THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND ULTIMATELY, THE PUBLIC, BENEFIT 2-3 (2013), available at http://benefitcorp.net/storage/documents/Benefit_Corporation_White_Paper_1_18_2013.pdf (showing alignment of consumer values with purchases); Celia R. Taylor, *Carpe Crisis: Capitalizing on the Breakdown of Capitalism To Consider the Creation of Social Businesses*, 54 N.Y.L. SCH. L. REV. 743, 744 (2010) (chronicling events prompting shift in consumer attitude); Briana Cummings, Note, *Benefit Corporations: How To Enforce a Mandate To Promote the Public Interest*, 112 COLUM. L. REV. 578, 582-83 (2012) (noting consumers' consideration of corporation's contemplation of social responsibility when making purchases). According to a 2012 study conducted by marketing firm Cone Communications, roughly eighty percent of Americans feel that companies are not considering the environmental impacts of running their businesses. See *Trend Tracker: Consumers Still Purchasing, But May Not Be "Buying" Companies' Environmental Claims*, CONE COMM. 1 (Mar. 27, 2012), http://www.coneinc.com/stuff/contentmgr/files/0/1b7667e63cd5dd2858bd5a559a3a778a/files/2012_cone_green_gap_trend_tracker_release_and_fact_sheet.pdf. Furthermore, ninety percent believe that companies are responsible for considering the environmental impact of production. See *id.* at 4.

3. See Taylor, *supra* note 2, at 745 (underscoring how wealth disparities fortify arguments for corporate reform).

personal philosophies of their consumers.⁴

Regardless of their motivations, corporations began independently seeking mechanisms to achieve their socially beneficial goals.⁵ Social enterprise, entrepreneurship, and sustainable investment are all trends among the business savvy to support businesses that seek to improve the quality of life in some capacity, such as investment in low-income housing or manufacturing healthy, low-cost food for underprivileged communities.⁶ Most notably, B Lab developed a set of principles by which they can designate corporations that meet objective, socially focused goals, enabling investors to easily identify companies with missions they support; indeed, these voluntary business designations would be the antecedent for benefit corporation legislation, and were promulgated by the same company.⁷ Designation as a “B Corp” imposes on corporations the voluntary restriction of pursuing the general public benefit, even at the expense of maximizing profits, as well as the added requirement of preparing annual reports verifying that they are actively pursuing their socially minded goals.⁸

To meet the evolving needs of for-profit businesses with concerns beyond profit maximization, legislatures enacted a series of safeguards to protect directorial decisions that do not specifically underscore their shareholders’ profit-maximizing prerogatives.⁹ Constituency statutes, presently enacted in thirty-three states, empower directors to consider interests beyond simply earning profits.¹⁰ Further, directors’ reasonable business decisions are

4. See Milton Friedman, *The Social Responsibility of Business Is To Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 5, available at <http://www.umich.edu/~thecore/doc/Friedman.pdf> (advocating profit-maximizing business theory).

5. See Clark & Vranka, *supra* note 2, at 2-3 (suggesting inverse relationship between demand for socially responsible products and corporate trust); see also *infra* notes 34-46 and accompanying text (describing mechanisms corporations employ to achieve socially conscious goals).

6. See Clark & Vranka, *supra* note 2, at 4-5 (providing examples of socially conscious business endeavors); see also Taylor, *supra* note 2, at 768-70 (presenting case of Grameen Danone Foods Limited as example of social business).

7. See Clark & Vranka, *supra* note 2, at 5-6 (explaining development of B Corp certification and benefit corporation legislation); see also *infra* notes 35-41 and accompanying text (describing nonprofit B Lab and its B Corp requirements); *infra* notes 66-74 and accompanying text (explaining benefit corporation legislation).

8. See Clark & Vranka, *supra* note 2, at 5-6 (providing background information on B Corps); see also *infra* notes 37-40 and accompanying text (discussing B Corp requirements). “General public benefit” is defined as a “material, positive impact on society and the environment, taken as a whole, as measured by a third-party standard, from the business and operations of a benefit corporation.” MASS. GEN. LAWS ANN. ch. 156E, § 2 (West 2013). This language is representative of many, if not all, benefit corporation statutes, and is drawn from section 102 of the widely used Model Statute promulgated by Drinker, Biddle, & Reath attorney, William H. Clark, Jr., who drafted the model as a framework for states and to encourage the implementation of B Labs’ vision. See *Model Benefit Corporation Legislation*, BENEFIT CORP INFO CENTER, § 102 (Apr. 10, 2013), http://benefitcorp.net/storage/documents/Model_Benefit_Corporation_Legislation.pdf [hereinafter *Model Statute*]; *infra* note 68 (noting Model Statute’s influence in subsequent legislation).

9. See Clark & Vranka, *supra* note 2, at 8 (describing legislative safeguards for business directors concerned with social consciousness).

10. See Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for*

otherwise protected by the business judgment rule, even if not specifically profit driven.¹¹ Other states recognize low-profit limited liability companies (LLCs), flexible-purpose corporations, and benefit LLCs, which are amalgamations of nonprofit purposes and for-profit practices.¹² Internal devices, such as directives, by-laws, and strategic shareholder voting, also may effectively focus corporate action on social endeavors.¹³ In order to bolster the efficacy of these mechanisms, several states (one of the most recent of which is Massachusetts) enacted benefit corporation statutes to recognize a wholly separate legal entity that requires both the declaration of a social mission to pursue the general public benefit and objective third-party evaluations to enhance transparency, consequently implying a heightened fiduciary duty on directors.¹⁴

This first section of this Note chronicles the competing shareholder and stakeholder theories of corporate purpose, which establishes a philosophical foundation helping to explain the shift in corporate behavior. Based upon this foundation, the Note evaluates trends in both the business sector and legislative innovations, culminating with a discussion of the adoption of benefit corporation legislation in Massachusetts. The following section analyzes how that legislation diverges from other enacted benefit corporation statutes, as well as how it complements existing Massachusetts law. This Note will then postulate that while benefit corporation legislation may capture many aspects of existing law, it stands to serve a unique and legitimate purpose in the evolution of corporate philosophy. In closing, this Note anticipates the challenges benefit corporations will face based upon the statute's existing framework, and makes recommendations for its improvement.

Corporate Governance, 94 IOWA L. REV. 987, 997-98 (2009) (discussing context of constituency statutes); see also *infra* notes 48-51 and accompanying text (describing development and use of constituency statutes).

11. See *infra* note 88 and accompanying text (discussing Massachusetts's use of business judgment rule). The business judgment rule is the judicial deference to directorial decision-making based upon a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (modifying standard of review applied to judicial deference toward futility exception application), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

12. See Ann E. Conaway, *The Global Use of the Delaware Limited Liability Company for Socially-Driven Purposes*, 38 WM. MITCHELL L. REV. 772, 778 & n.22 (2012) (providing background information on low-profit LLCs); see also *infra* notes 57-60 and accompanying text (explaining L3Cs); *infra* notes 62-65 and accompanying text (outlining flexible-purpose corporations); *infra* note 61 and accompanying text (describing benefit LLCs).

13. See *infra* notes 30-34 and accompanying text (detailing self-imposed corporate restrictions).

14. See MASS. GEN. LAWS ANN. ch. 156E (West 2013) (outlining Massachusetts benefit corporation statute). See generally Clark & Vranka, *supra* note 2 (explaining how benefit corporations fill gaps in existing legal mechanisms).

II. HISTORY

A. *A Corporate Identity Crisis*

Traditional theorists, one of the earliest being A. A. Berle, Jr., contend that the sole purpose of a corporation is to maximize profits.¹⁵ Often known as shareholder theory and encapsulated in the concept of shareholder primacy (which places shareholder interest above nonshareholder interests), the concept is derived from the agency and contractual relationships that exist between shareholders and directors, and suggests that because directors are vested with the authority to use shareholders' capital, their authority must be used strictly for profit generation.¹⁶ Rebutting Berle's theory at the time, E. Merrick Dodd, Jr. instead contended that business directors should consider interests beyond profit maximization, which is often referred to as stakeholder theory.¹⁷ While later case law and significant legal scholarship ultimately undermined Berle's profit-maximization theory, shareholder primacy remained the norm in the United States through the 1950s and saw a later resurgence in the 1980s.¹⁸

15. See, e.g., A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1372 (1932) (advocating prioritization of profit-maximizing strategies in directorial decision-making); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423, 1428 (1993) (defending Berle's theory); Friedman, *supra* note 4, at 5 (advancing Berle's profit-maximization theory).

16. See Berle, *supra* note 15, at 1366-67 (describing relationship between shareholders and directors). The profit-maximization (or shareholder primacy) theory assumes that the very purpose of investing is to increase money. See *id.*; see also Bainbridge, *supra* note 15, at 1424 (explaining theory development and rationale). But see Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 777 (2005) (suggesting incorporation of economic efficiency in agency principles provides decisional flexibility).

17. See, e.g., Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 633 (2009) (suggesting compatibility of shareholder and stakeholder theories); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1154 (1932) (proposing corporate directors should consider interests of investors, laborers, and public interest); R. Edward Freeman, Kirsten Martin & Bidhan Parmar, *Stakeholder Capitalism*, 74 J. BUS. ETHICS 303, 312-13 (2007) (advocating for stakeholder consideration during business decision-making).

18. See Choudhury, *supra* note 17, at 635 (describing trends of judicial adherence to shareholder primacy model). Courts first observed shareholder primacy in the archetypal *Dodge v. Ford Motor Co.*, where Justice Ostrander held 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." 170 N.W. 668, 684 (Mich. 1919). The decision that forced defendant, Henry Ford, to distribute special dividends to stockholders, which he previously refrained from as a plan to decrease future prices of the cars he manufactured, stressing that the company "made too much money, has had too large profits, and that . . . sharing of them with the public . . . ought to be undertaken." *Id.* The corporate directors' profit maximizing role was in some ways echoed and in others modified amidst the smattering of hostile-takeover lawsuits in the 1980s, where courts likened directors to auctioneers when takeover was inevitable, imputing upon them the duty to fetch the highest price possible. See, e.g., *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989) (demanding directors solicit highest price at corporate sale); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (announcing duty of director to maximize corporation's value at sale); *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 958 (Del. 1985) (emphasizing directors' duty to protect corporate enterprise, including shareholders). For an overview of the mechanics of the heightened scrutiny required after *Revlon v. MacAndrews* and its interpretation in subsequent Delaware case law, see J. Haskell Murray, *Defending*

Many scholars have been unable to reconcile these competing views because they appear mutually exclusive: a director can either take the action that benefits the firm's shareholders vis-à-vis shareholder theory, or take the action that benefits those impacted by the firm (but not directly owning an interest in it) vis-à-vis stakeholder theory, but not both.¹⁹ Some scholars simply categorize corporate law insofar as it relates to the "what" and "why" of a corporation as "schizophrenic," while others question the utility of engaging in the debate at all.²⁰ Rather than disregarding the compartmentalization of these theories, some scholars urge that existing flexibility within corporate structure belies the assumptions that shareholder theory relies upon, such as the notion that shareholders invest only to further personal profit-generation goals.²¹ Others still urge that evaluation of stakeholder interests has a place in corporate decision-making, but only as an afterthought.²²

The movement away from shareholder primacy first gained traction in the 1970s in response to the domestic concerns of the 1960s and in part as a result of the Vietnam War, when Americans shared widespread sentiment that businesses owed something to their communities.²³ This movement would bear a laundry list of names throughout the past several decades and is most commonly referred to as corporate social responsibility (CSR).²⁴ CSR generally refers to the promotion or advancement of stakeholder—or those affected by but not necessarily owning a portion of the corporation—consideration in corporate decision-making, rather than acting only in the best

Patagonia: Mergers & Acquisitions with Benefit Corporations, 9 HASTINGS BUS. L.J. 485, 490-99 (2013).

19. See, e.g., Bainbridge, *supra* note 15, at 1427-28 (asserting directors cannot simultaneously profit maximize and socially benefit); Choudhury, *supra* note 17, at 633 (noting modern interpretation of competing views as contradictory); Steven Munch, Note, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J.L. & SOC. POL'Y 170, 177 (2012) (underscoring mutual exclusivity of theories and deeming stakeholder theory preeminent).

20. Compare William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 280-81 (1992) (explaining corporate philosophy as unavoidably erratic given its nature as reflection of society), with J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 10-13 (2012) (describing profit-maximization norm as deeply embedded in daily decision-making after *Dodge v. Ford*).

21. See Choudhury, *supra* note 17, at 648 ("[T]his presumption does not account for the increasing numbers of investors whose investments are guided by some concern for social responsibility."); see also *supra* note 16 (emphasizing assumption upon which shareholder theory relies).

22. See Taylor, *supra* note 2, at 747-78 (distinguishing consideration of stakeholder interests with promotion thereof).

23. See C. A. Harwell Wells, *The Cycles of Corporate Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 111-12 (2002) (acknowledging advocates seeking consideration of social welfare alongside profit maximization).

24. See, e.g., Lisa M. LeSage, *Sticky Thickets: Local Regulatory Challenges for Small and Emerging Sustainable Businesses*, 31 W. NEW ENG. L. REV. 673, 675 (2009) (describing CSR movement); Taylor, *supra* note 2, at 745-46 (explaining goals of CSR); Alissa Mickels, Note, *Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe*, 32 HASTINGS INT'L & COMP. L. REV. 271, 274-79 (2009) (chronicling development of CSR).

interest of the shareholders.²⁵

B. To Market, to Market

As corporate purpose became increasingly obscured, a movement began to take hold among businesses that would further obfuscate the neat labels legal scholars attempted to place on them: green, not greed, was “in,” and corporate decision-making no longer aligned entirely with either profit maximizing or philanthropic goals.²⁶ The housing market collapse and increased focus on climate change created new markets for businesses and entrepreneurs where other markets were shrinking.²⁷ Entrepreneurs had a myriad of reasons for entering these emerging markets: some were purely monetary, others to secure the favor of discretionary decision-making entities (e.g., zoning boards), while still others were in response to changing client demand or for truly benevolent purposes.²⁸ Regardless of the reason for the inclusion of nonshareholder interests when developing corporate goals, businesses felt increasingly constricted by the polarization of nonprofit and for-profit business models, neither of which seemed to adequately define or encourage their hybrid goals.²⁹

While the idea that corporations were considering factors beyond finances appealed to many investors and consumers in theory, in practice, it amounted to little more than a “do no harm” attitude without meaningful legal safeguards.³⁰

25. See Taylor, *supra* note 2, at 745, 747-48 (discussing CSR’s shift away from sole fiduciary duty of directors to maximize profits). Profit-maximization theory assumes that shareholders are only concerned with profit maximization and fails to consider that shareholders may have varied goals with their investments. See *id.*

26. See LeSage, *supra* note 24, at 675-79 (describing incentives and development of sustainable business).

27. See *id.* at 675-76 (noting most significant expansion of “green marketplace” occurred within past decade); see also Taylor, *supra* note 2, at 744-46 (describing financial crisis and housing market collapse as contributing factors to CSR movement). But see Wells, *supra* note 23, at 111-13 (chronicling series of similar events in 1960s and 1970s spurring revival and expansion of CSR).

28. See Matthew J. Parlow, *Greenwashed?: Developers, Environmental Consciousness, and the Case of Playa Vista*, 35 B.C. ENVTL. AFF. L. REV. 513, 521-23 (2008) (listing reasons for adapting corporate purpose). Professor Parlow notes that these varied rationales are particularly applicable to the case of sustainable contractors, who find that increased competition for land use coupled with heightened extraction and impact fees (which serve to offset the additional stress on resources as a result of new building projects) requires contractors to prove now more than ever that their plans best serve the interests of the surrounding community (i.e., stakeholders). See *id.* This often results in a constructive obligation for contractors to exceed minimum health and safety requirements in order to secure approvals by discretionary zoning boards. See *id.* at 516-19 (discussing positive impact on zoning approvals for stakeholder consideration in planning process). B Lab also lists the reasons for becoming a B Corp as: “1. Doing Good Business Better; 2. A Damn Useful Marketing Tool; 3. Bolstering the Bottom Line; 4. Raising Money; 5. Building Momentum.” 2012 Annual Report, B LAB, <http://www.bcorporation.net/news-and-media/2012-annual-report> (last visited Feb. 4, 2014).

29. See generally Taylor, *supra* note 2 (explaining limitations of corporate structure on businesses pursuing for-profit and nonprofit goals).

30. See *id.* at 751 (describing defects with current CSR model and instead urging “active advancement”); see also Aaron K. Chatterji & Barak D. Richman, *Understanding the “Corporate” in Corporate Social Responsibility*, 2 HARV. L. & POL’Y REV. 33, 39 (2008) (suggesting exclusively voluntary restrictions as

Corporations reaching this conclusion then attempted to impose a variety of restrictions in order to demonstrate their commitment to CSR.³¹ Many shareholders first began utilizing SEC Rule 14a-8, which allowed directors to include socially conscious proposals in proxy mailings if certain conditions were met.³² Other corporations sought to amend their corporate charters or by-laws—the documents that establish how their business is run both publicly and internally—to reflect their commitment to pursuing socially conscious goals.³³ Even absent these controls, the business judgment rule protects managerial decision-making so long as decisions were made in good faith and without self-interest, which would effectively enable a director to place stakeholder interest above shareholder interest without risking personal liability.³⁴

C. The B Corp Advantage

Many socially conscious corporate directors that found these devices anemic sought to place further restrictions on their directors by applying for certification as a B Corp.³⁵ Pioneered by B Lab, a nonprofit organization founded by Jay Coen Gilbert, B (short for benefit or beneficial) Corps are businesses that meet objective criteria demonstrating their social responsibility and that collectively seek to “redefine success” by including noneconomic goals.³⁶ B Lab equates B Corp certification to Leadership in Energy and Environmental Design (LEED) certification for contractors or Fair Trade certification for farmers, and has been considered a “Good Housekeeping seal of approval” for businesses guided by social consciousness.³⁷

essentially “window dressing”).

31. See Sneirson, *supra* note 10, at 995-97 (underscoring deficiencies of corporate charter amendment to mandate stakeholder consideration); see also Wells, *supra* note 23, at 113-14 (explaining shareholder utilization of SEC Rule 14a-8 to advance social goals).

32. See 17 C.F.R. § 240.14a-8 (2013) (outlining proxy mailing guidelines); see also Wells, *supra* note 23, at 113-14 (attributing first wave of Rule 14a-8 usage in 1960s to social activist Saul Alinsky).

33. See Sneirson, *supra* note 10, at 996-97 (describing role of charters and by-laws in establishing corporate philosophy).

34. See Mickels, *supra* note 24, at 283-84 (providing background information on mechanics of business judgment rule).

35. See Taylor, *supra* note 2, at 759-60 (explaining how B Corps expand ideals of corporate purpose beyond profit maximization); see also *The Non-Profit Behind B Corps*, B LAB, <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> (last visited Feb. 4, 2014) (explicating rationale for B Corp certification).

36. *What Are B Corps?*, B LAB, <http://www.bcorporation.net/what-are-b-corps> (last visited Feb. 4, 2014). Jay Coen Gilbert, a co-founder of B Lab, goes so far as to liken the “triple bottom line” of socially conscious companies (or the corporate consideration of profit, people, and planet) to Dr. Martin Luther King’s “three dimensions of a complete life,” analogizing a business’s “inward concern . . . for . . . personal welfare” to its profits; its “outward concern . . . for the welfare of others” to people; and its “upward concern . . . for the rest of God’s creation” to the planet. Jay Coen Gilbert, *Dr. King’s Triple Bottom Line*, FORBES, Jan. 22, 2013, <http://forbes.com/sites/csr/2013/01/22/dr-kings-triple-bottom-line>.

37. See Eric Gorski, *How New Belgium Brewing Is Positioning Itself To Remain Independent*, DENVER POST FIRST DRAFTS (Jan. 15, 2013, 4:37 PM), <http://blogs.denverpost.com/beer/2013/01/15/new-belgium->

To become a B Corp, a business must receive a passing score on B Lab's Impact Assessment Test to verify that it meets performance requirements, alter its legal structure to firmly plant sustainability in its corporate philosophy by either charter amendment or conversion to benefit corporation status, and sign the B Corp Declaration of Interdependence.³⁸ Annual fees are required, which vary depending upon the company's annual sales, and certification is limited to two-year terms (though companies may seek recertification).³⁹ Corporations must also agree to on-site reviews, which B Lab randomly conducts on ten percent of certified B Corps.⁴⁰ Since its launch in 2011, B Lab has certified at least 830 companies as B Corps, including prominent companies such as Ben & Jerry's Ice Cream, King Arthur Flour Company, and Patagonia.⁴¹ Massachusetts already boasts at least a dozen B Corps.⁴²

positio/7872; see also Murray, *supra* note 20, at 21 (describing B Corp analogous to LEED and Fair Trade certification); Taylor, *supra* note 2, at 759 (expounding purpose of B Corp certification); *The Non-Profit Behind B Corps*, *supra* note 35 (describing B Corp purpose). LEED certification is also a voluntary program sponsored by the U.S. Green Building Council that evaluates building projects for environmental friendliness based upon how well projects are designed and developed in the following categories: sustainable sites, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, and innovation in design. See *FAQ*, U.S. GREEN BUILDING COUNCIL, <http://new.usgbc.org/sites/default/files/Docs3330.pdf> (last visited Feb. 4, 2014) (explaining LEED requirements); see also *LEED*, U.S. GREEN BUILDING COUNCIL, <http://new.usgbc.org/leed> (last visited Feb. 4, 2014) (describing LEED certification process).

38. See Michael R. Deskins, Comment, *Benefit Corporation Legislation, Version 1.0—A Breakthrough in Stakeholder Rights?*, 15 LEWIS & CLARK L. REV. 1047, 1062-63 (2011) (describing B Corp certification requirements); see also *How To Become a B Corp*, B LAB, <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp> (last visited Feb. 4, 2014) (detailing B Corp certification process); *Protect Your Mission*, B LAB, <http://www.bcorporation.net/become-a-b-corp/why-become-a-b-corp/protect-your-mission> (last visited Feb. 4, 2014) (providing guidance for alteration of legal structure). If a corporation is able to either convert or incorporate as a benefit corporation then further amendment to its articles of organization is unnecessary, and the corporation will receive free listings on B Lab's website. See *Legal Roadmap*, B LAB, <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/legal-roadmap> (last visited Feb. 4, 2014). B Lab's Impact Assessment Test grades companies out of a total of 200 points to determine the company's impact on stakeholders, which is first conducted by administering between 50-150 questions that are later verified (companies need a score of at least 80 to pass). See *B Impact Assessment 101*, B LAB, <http://www.bcorporation.net/b-impact-assessment-101> (last visited Feb. 4, 2014); see also *Performance Requirements*, B LAB, <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/performance-requirements> (last visited Feb. 4, 2014). B Lab's Declaration of Interdependence further seeks to solidify the corporation's aspirational aims by requiring the following adoption: "we [must] act with the understanding that we are each dependent upon another and thus responsible for each other and future generations." *Term Sheet for B Corporations*, B LAB 3, http://www.bcorporation.net/sites/all/themes/adaptivetheme/bcorp/pdfs/term_sheet_constituency_states_llcs_llps_3.pdf (last visited Feb. 4, 2014).

39. See *Make It Official*, B LAB, <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/make-it-official> (last visited Feb. 4, 2014) (summarizing certification requirements).

40. See *How To Become a B Corp*, *supra* note 38 (explaining requirements for B Corp certification).

41. See *Find a B Corp*, B LAB, <http://www.bcorporation.net/community/directory> (search by typing in company name or browsing directory) (last visited Feb. 4, 2014) (listing all certified B Corps).

42. See *id.* (search by typing in "Boston" or "Massachusetts"). Notable companies include Dimagi, Inc., a software company that delivers high quality healthcare services to urban and rural communities, and Feronia Forests LLC, a forestry manager dedicated to sustainably managing natural hardwood forest properties in the United States. See *Dimagi, Inc.*, B LAB, <http://www.bcorporation.net/community/dimagi-inc> (last visited Feb. 4, 2014); *Feronia Forests LLC*, B LAB, <http://www.bcorporation.net/community/feronia-forests-llc> (last visited

If a corporation achieves B Corp certification, it may take advantage of B Lab's market visibility, appealing to more customers and investors, as well as expanding the business's network.⁴³ Significantly, B Corps are branded as socially conscious and thus are easily identifiable to consumers and investors.⁴⁴ As greater incentive to certify as a B Corp, the City of Philadelphia offers tax credits for sustainable businesses operating there.⁴⁵ The City of San Francisco similarly grants government-contractor preference to California B Corps.⁴⁶ Further, in a concerted effort to attract talent, prominent educational institutions such as the Yale School of Management and NYU Stern School of Business offer loan-forgiveness programs to graduates working at B Corps.⁴⁷

Feb. 4, 2014). In 2012, Dimagi, Inc. scored a 95 out of 200 possible points on the B Impact Report, and Feronia Forests LLC scored an 89. See *Dimagi, Inc.*, *supra*; *Feronia Forests LLC*, *supra*. When Massachusetts enacted benefit corporation legislation, Dimagic, Inc. reincorporated in Massachusetts from Delaware in order to become a B Corp. See Anthony Silva, *Mass. Allows Companies To File as Benefit Corporations*, CBS BOS. (Dec. 3, 2012, 7:27 PM) <http://boston.cbslocal.com/2012/12/03/mass-allows-companies-to-file-as-benefit-corporations>.

43. See Anurag Gupta, Note, *L3Cs and B Corps: New Corporate Forms Fertilizing the Field Between Traditional For-Profit and Nonprofit Corporations*, 8 N.Y.U. J.L. & BUS. 203, 222-23 (2011) (emphasizing business promotion and tool discounts as incentives to certify as B Corp); see also *Why Become a B Corp?*, B LAB, <http://www.bcorporation.net/become-a-b-corp/why-become-a-b-corp> (last visited Feb. 4, 2014) (listing reasons for seeking B Corp certification). Commentators also suggest that embedding the pursuit of socially conscious goals into a corporation's charter or by-laws (as prescribed by B Lab) alerts shareholders to the possibility that directors may not exclusively pursue profit maximization, which could help avoid a company being forced to sell to the highest bidder. See Sneirson, *supra* note 10, at 1018-19 (explaining B Corp more likely to survive new investors, management, and owners); Gupta, *supra*, at 223 (explaining how corporate missions clear to shareholders could prevent hostile takeovers). By adding CSR mission language into a corporate charter, corporations can attempt to bypass the ruling in *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.*, not because the directors' fiduciary duties are in any way abrogated, but because the risk of a shareholder derivative suit is diminished as profit-seeking shareholders are unlikely to invest in companies that aim to do more than maximize profits. See *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184-85 (Del. 1986) (describing directorial imposition of auctioneer role in hostile-takeover context); see also Sneirson, *supra* note 10, at 998; Gupta, *supra*, at 212, 223 (suggesting plausibility of takeover avoidance in recent example of Ben & Jerry's sale).

44. See Murray, *supra* note 20, at 44-46 (underscoring importance of clear branding to consumers and predicting corresponding B Corp marketing success).

45. See PHILA., PA., CODE § 19-2604(10) (2013) (granting tax credit to limited B Corps); see also Christen Clarke, Comment, *California's Flexible Purpose Corporation: A Step Forward, a Step Back, or No Step at All?*, 5 J. BUS. ENTREPRENEURSHIP & L. 301, 314 & n.128 (2012) (noting Philadelphia B Corp tax incentive undertaken by local initiative). Philadelphia awards a \$4000 tax credit for up to twenty-five businesses that are deemed to be "sustainable businesses." PHILA., PA., CODE § 19-2604(10)(b)(i)-(ii), (c)(i). B Corp certification is "prima facie evidence that the business is a Sustainable Business," making qualification for the tax credit easier. See *id.* § 19-2604(10)(b)(i).

46. See Murray, *supra* note 18, at 511 & n.148 (pointing to San Francisco's incentives for B Corps).

47. See, e.g., Anne Field, *New Financial Aid Program To Help MBAs Working for Social Enterprises*, FORBES, July 13, 2012, <http://www.forbes.com/sites/annefield/2012/07/13/new-financial-aid-program-to-help-mbas-working-for-social-enterprises>; Ryan Honeyman, *Five Huge Benefits To Becoming a B Corp*, SUSTAINABLE INDUSTRIES (Nov. 6, 2012, 12:53 PM), <http://sustainableindustries.com/articles/2012/11/five-huge-benefits-becoming-b-corp>; *Loan Forgiveness Program*, YALE SCH. OF MGMT., <http://som.yale.edu/our-programs/full-time-mba/admissions/financing-your-mba/loan-forgiveness-program> (last visited Feb. 4, 2014) (describing loan-forgiveness program for graduates working at B Corps and low-profit LLCs).

D. Constituency Statutes: A Start

Constituency statutes were one of the first legislative steps toward the protection of corporate decisions made without the purpose of producing the largest profits.⁴⁸ These statutes specifically authorize—albeit with permissive and not mandatory language—the consideration of interests beyond profit maximization in corporate decision-making.⁴⁹ This added protection bolsters the efficacy of the already deferential business judgment rule and potentially fortifies the breadth of the fiduciary duties owed by business directors to the corporation.⁵⁰ Thirty-three states, including Massachusetts, have some form of constituency statute, and while the statutory language varies, most permit the consideration of employees, consumers, creditors, suppliers, and the surrounding community in managerial decision-making.⁵¹

48. See Sneirson, *supra* note 10, at 997-98 (introducing and explaining purpose of constituency statutes).

49. See, e.g., CONN. GEN. STAT. ANN. § 33-756(d) (West 2013) (“[A] director . . . may consider . . . the interests of the corporation’s employees, customers, creditors and suppliers, and . . . community and societal considerations including those of any community in which any office or other facility of the corporation is located.”); MASS. GEN. LAWS ANN. ch. 156D, § 8.30(a)(3) (West 2013) (“[A] director may consider the interests of the corporation’s employees, suppliers, creditors and customers, the economy of the state, the region and the nation, community and societal considerations, and the long-term and short-term interests of the corporation and its shareholders.”); N.Y. BUS. CORP. LAW § 717(b) (McKinney 2013) (“[A] director shall be entitled to consider, without limitation . . . the effects that the corporation’s actions may have in the short-term or in the long-term upon . . . [current and past employees, customers, creditors, and its ability to provide employment in its surrounding community].”). Note that the Connecticut constituency statute was amended in 2010 to make the social considerations permissive and not mandatory. See CONN. GEN. STAT. ANN. § 33-756(d) (West 1997) (amended 2010); see also Choudhury, *supra* note 17, at 645 (highlighting mandatory language of Connecticut constituency statute prior to amendment); Munch, *supra* note 19, at 180-84 (attributing development of stronger constituency statutes to benefit corporation legislation).

50. See Clark & Vranka, *supra* note 2, at 8 (explaining relationship between fiduciary duties and constituency statutes).

51. See ARIZ. REV. STAT. ANN. § 10-2702 (West 2013); CONN. GEN. STAT. ANN. § 33-756(d) (West 2013); FLA. STAT. ANN. § 607.0830(3) (West 2013); GA. CODE ANN. § 14-2-202(b)(5) (West 2013); HAW. REV. STAT. ANN. § 414-221 (LexisNexis 2013); IDAHO CODE ANN. § 30-1602 (West 2013); 805 ILL. COMP. STAT. ANN. 5/8.85 (West 2013); IND. CODE ANN. § 23-1-35-1 (West 2013); IOWA CODE ANN. § 490.1108A (West 2013); KY. REV. STAT. ANN. § 271B.12-210 (West 2013); LA. REV. STAT. ANN. § 12:92(G) (2013); ME. REV. STAT. ANN. tit. 13-C, § 832 (2013); MD. CODE ANN., CORPS. & ASS’NS § 2-104(b)(9) (LexisNexis 2013); MASS. GEN. LAWS ANN. ch. 156D, § 8.30(a) (West 2013); MINN. STAT. ANN. § 302A.251(5) (West 2013); MISS. CODE ANN. § 79-4-8.30(f) (2013); MO. ANN. STAT. § 351.347(1) (West 2013); NEV. REV. STAT. ANN. § 78.138(4) (LexisNexis 2013); N.J. STAT. ANN. § 14A:6-1(2) (West 2013); N.Y. BUS. CORP. LAW § 717(b) (McKinney 2013); N.D. CENT. CODE ANN. § 10-19.1-50(6) (West 2013); OHIO REV. CODE ANN. § 1701.59(F) (LexisNexis 2013); OR. REV. STAT. ANN. § 60.357 (West 2013); 15 PA. CONS. STAT. ANN. § 1715(a)(1) (West 2013); R.I. GEN. LAWS ANN. § 7-5.2-8 (West 2013); S.D. CODIFIED LAWS § 47-33-4 (2013); TENN. CODE ANN. § 48-103-204 (West 2013); VT. STAT. ANN. tit. 11A, § 8.30 (West 2013); VA. CODE ANN. § 13.1-727.1 (West 2013); WIS. STAT. ANN. § 180.0827 (West 2013); WYO. STAT. ANN. § 17-16-830(e) (West 2013). Because many constituency statutes were drafted in response to the hostile takeover suits of the 1980s, roughly one-third of the states implementing them limit the circumstances of stakeholder consideration to takeover context. See Sneirson, *supra* note 10, at 997, 998 & n.52 (listing states limiting constituency statute circumstances and linking limitation to takeover suits); see also Gupta, *supra* note 43, at 212 (emphasizing inadequacy of constituency statutes to promote social good). Conspicuously, a constituency statute is missing from the corporation mecca, Delaware; scholars, however, deny the necessity of a corresponding statute there given Delaware’s generous judicial deference to corporate decision-making. See Elhauge, *supra* note 16, at 742

E. Nonprofit and Hybrid Corporate Forms

Although corporate directors may shield themselves from liability by utilizing the protection of constituency statutes, traditional corporate structures still stymie the latitude afforded to directors, which prompted the development of alternative corporate forms.⁵² Traditional nonprofit corporations still provide viable business structures to socially conscious business owners, with some limitations.⁵³ Nonprofit organizations appear to be the logical alternative to the profit-seeking corporate model as they are, indeed, the corporation's antithesis: they operate specifically for charitable and not profit-generating purposes.⁵⁴ If able to demonstrate incorporation and operation for exclusively charitable purposes, nonprofit organizations will receive tax-exempt status under section 501(c)(3) of the Internal Revenue Code.⁵⁵ Should a nonprofit organization earn income from activities unrelated to its charitable operations, however, it must pay an unrelated business income tax, which effectively discourages profit-generating activity.⁵⁶

The low-profit limited liability company (L3C) is another adaptation of corporate structure that integrates the pursuit of profits with the goal of increasing public benefits.⁵⁷ L3Cs are created like partnerships and enjoy the

(rejecting contention of necessity of constituency statute in Delaware).

52. See Clark & Vranka, *supra* note 2, at 9-10, 14 (underscoring lack of clarity and predictability of constituency statutes and existing legal forms).

53. See Taylor, *supra* note 2, at 752-54 (explaining shortcomings of nonprofit models for CSR promotion).

54. See *id.* at 752-53 (discussing nonprofit corporate structure as viable alternative to for-profit form). Nonprofit organizations are divided into two broad categories: organizations that give money and services to charities and organizations that seek grants to distribute to them. See Michael D. Gottesman, Comment, *From Cobblestones to Pavement: The Legal Road Forward for the Creation of Hybrid Social Organizations*, 26 YALE L. & POL'Y REV. 345, 347 (2007) (dividing nonprofit organizations based on primary activity). Nonprofits face the inherent challenge of being prevented from engaging in political activity, which consequently prevents them from advocating for the very social purposes they support with money and services. See Gupta, *supra* note 43, at 215. They are also indissolubly linked to the economy: the weaker the economy is, the more their services are needed, and the less likely it is that donations are made to them. See *id.* at 206-07 (noting accelerated exhaustion of nonprofit funds during recession).

55. See I.R.C. § 501(c)(3) (2012); Treas. Reg. § 1.501(c)(3)-1 (as amended in 2008) (describing organizational and operational tests necessary for nonprofit qualification). An organization must fulfill both organizational and operational tests to qualify for tax-exempt status, which require that the organization both be formed and operate exclusively for one or more exempt purposes. See *id.*

56. See I.R.C. §§ 511, 513(a) (2012) (imposing tax on and defining unrelated business income for charitable organizations); see also Treas. Reg. § 1.513-1(a) (as amended in 1983) (defining unrelated trade or business as applied to additional taxes on otherwise tax-exempt organizations); Taylor, *supra* note 2, at 753-54 (discussing application of tax penalties on nonprofit organizations). To offset this tax, many nonprofit organizations are forming for-profit subsidiaries to earn necessary capital, which helps to diminish the challenges that nonprofits face in garnering start-up funds or working capital. See Taylor, *supra* note 2, at 756 (using nonprofit parent corporation with for-profit subsidiary as one solution to capital-access challenges).

57. See, e.g., Taylor, *supra* note 2, at 761 (depicting L3Cs as middle ground between for-profit and nonprofit companies); Munch, *supra* note 19, at 175 (noting investor preference for corporate over L3C form); Felicia R. Resor, Comment, *Benefit Corporation Legislation*, 12 WYO. L. REV. 91, 104-05 (2012) (explaining L3C's ability to accept program-related investments).

perks of flexible operations and decision-making (as opposed to the rigidity of corporate board election, for example), but are intended for the specific purpose of charitable or educational endeavors.⁵⁸ An important distinction of the L3C is that, due to its profit-generating structure, it is able to easily receive program-related investments (PRIs) for foundations (which demand specified returns) without onerous IRS private letter rulings.⁵⁹ L3Cs are currently recognized in seven states, the first of which was Vermont in 2008, as well as by two Native American tribes.⁶⁰ Maryland has implemented a variation of this hybrid organization known as the benefit LLC, which, instead of requiring the specific pursuit of charity or educational development, prescribes that the directors promote the general public benefit.⁶¹

58. See Taylor, *supra* note 2, at 761 (highlighting charitable goal as cornerstone of L3C organization); Gupta, *supra* note 43, at 216-20 (describing development of L3C); *The Concept of the L3C*, AMS. FOR COMMUNITY DEV., <http://www.americansforcommunitydevelopment.org/concept.html> (last visited Feb. 4, 2014) (providing background information on how L3Cs operate). Another benefit of the L3C structure is that, due to its pass-through taxation scheme, its profits are only taxed upon distribution to its partners; corporations, in contrast, are taxed on income earned, and their shareholders are additionally taxed when dividends are distributed. See Clarke, *supra* note 45, at 323 (considering L3C's pass-through taxation attribute as favorable factor for profit generation).

59. See Taylor, *supra* note 2, at 762 (explaining receipt of PRIs by L3Cs); *What Is the L3C?*, AMS. FOR COMMUNITY DEV., <http://www.americansforcommunitydevelopment.org/faqs/faqs-what-is.html> (last visited Feb. 4, 2014) (explaining link between nonprofit and for-profit structure). PRIs are loans made by nonprofit foundations to for-profit organizations that bear low interest rates and must be used by the for-profit organization to pursue the foundation's charitable goals. See Gupta, *supra* note 43, at 215-16 (providing background information on PRIs). While nonprofit organizations are usually prohibited from investing in for-profit companies, PRIs serve as an exception to this rule due to the limited circumstances in which they may be used. See *id.* at 215. Should the IRS deem the for-profit company to not sufficiently pursue the nonprofit's goals, however, the nonprofit will incur a tax. See Gottesman, *supra* note 54, at 349. The purpose of the L3C was to create an ideal vehicle for the receipt of PRIs by embedding the IRS's requirements into a corporate structure, thus reducing the risk of the unrelated business income tax. See Gupta, *supra* note 43, at 216-19 (describing L3C purpose to receive PRIs). See generally Carter G. Bishop, *The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243 (2010) (underscoring need to obtain private letter rulings regardless of L3C corporate form).

60. See 805 ILL. COMP. STAT. ANN. 180/1-26 (West 2013); LA. REV. STAT. ANN. § 12:1302 (2013); ME. REV. STAT. ANN. tit. 31, § 1611 (2013); MICH. COMP. LAWS ANN. § 450.4102(m) (West 2013); N.C. GEN. STAT. ANN. § 57C-2-01(d) (West 2013), *repealed by* 2013 N.C. Sess. Laws 157 (effective Jan. 1, 2014); R.I. GEN. LAWS ANN. § 7-16-76 (West 2013); UTAH CODE ANN. § 48-2c-412 (West 2013); VT. STAT. ANN. tit. 11, § 3001(27) (West 2013); WYO. STAT. ANN. § 17-29-102(a)(ix) (West 2013). L3Cs are also recognized by the Oglala Sioux Tribe and the Crow Indian Nation of Montana. See *Laws*, AMS. FOR COMMUNITY DEV., <http://www.americansforcommunitydevelopment.org/laws.html> (last visited Feb. 4, 2014) (listing states and tribes recognizing L3Cs).

61. See MD. CODE ANN., CORPS. & ASS'NS §§ 4A-1101 to -1108 (LexisNexis 2013), *amended by* 2013 Md. Laws. ch. 527 (S.B. 697) (codifying benefit LLCs). Maryland was the first state to enact benefit LLCs in addition to benefit corporations. See Murray, *supra* note 20, at 42. Like Maryland's version of the benefit corporation, the benefit LLC requires those charged with directing the business's actions to promote the general public benefit; additionally, directors may elect to promote a specific public benefit. See CORPS. & ASS'NS §§ 4A-1106, -1107 (describing purposes and outlining general and public benefit requirements). Consistent with LLC and L3C structure, Maryland imposes no requirement of a board of directors, nor is ownership represented by shares of stock. See *id.* § 4A-202 (requiring only execution of articles of organization to form LLC). Interestingly, B Lab urges that simply amending the articles of organization of an existing LLC to incorporate

While also statutorily authorizing benefit corporations, California enacted legislation to recognize flexible-purpose corporations in lieu of enacting a constituency statute.⁶² Like benefit corporations, flexible-purpose corporations can be formed for socially conscious purposes, though they only need to advance one specific public benefit rather than promoting the general public benefit.⁶³ Directors of flexible-purpose corporations are allowed, rather than required, to consider the interests of their employees, customers, suppliers, creditors, and the surrounding community when making decisions.⁶⁴ And in further contrast to benefit corporations, flexible-purpose corporations have no independent, third-party evaluation requirement, although they similarly deny a

CSR is inadequate to truly promote the general public benefit because institutional investors favor the more rigid structure of corporations, and notes that LLCs incorporating CSR do not differentiate themselves in the market. *See Legal FAQ's*, BENEFIT CORP INFO. CENTER, <http://benefitcorp.net/attorneys/legal-faqs> (last visited Feb. 4, 2014) (acknowledging diminished potential utility of LLCs to achieve public benefit goals). Maryland has also omitted benefit-enforcement proceedings from both its benefit LLC and benefit corporation statutes, instead relying on the respective statutes' transparency provisions to self-police corporate behavior. *Compare Model Statute*, *supra* note 8, §§ 102, 305 (defining and providing right of action for benefit-enforcement proceedings), with MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01 to -08 (LexisNexis 2013) (providing no enforcement proceedings for benefit corporations), and CORPS. & ASS'NS §§ 4A-1101 to -1108 (providing no enforcement proceedings for benefit LLCs). B Lab alleges that the existing corporate mechanisms, and even emerging variations of them, are still insufficient to achieve CSR goals. *See Legal FAQ's*, *supra* (urging benefit corporations as ideal business structure to promote public benefit). It further claims that the structural safeguards embedded into corporations—such as the establishment of a board of directors, annual meetings, and regulatory oversight—make them the preferred business model for investors. *See id.* (“However, because institutional investors prefer corporate structures over LLC’s, any company with plans to raise outside capital or go public is better off with a corporate rather than an LLC structure.”).

62. *See* CAL. CORP. CODE §§ 2500-17 (West 2013) (authorizing flexible-purpose corporations in California); *see also* Dana Brakman Reiser, *The Next Big Thing: Flexible Purpose Corporations*, 2 AM. U. BUS. L. REV. 55, 61-62 (2012) (describing failed constituency statute attempt in California); Resor, *supra* note 57, at 103 (describing development of flexible-purpose corporations). Despite being passed by both legislative houses, the constituency statute bill was ultimately vetoed by the governor in 2008 due to the belief that traditional corporate forms should prioritize profit maximization. *See* Reiser, *supra*, at 61-62. The veto prompted lawyers and proponents of the legislation to develop the flexible-purpose corporation so that directors have the authority to consider stakeholder interests alongside or even above shareholder interests. *See id.* at 63-65 (explaining fiduciary duties owed by directors of flexible-purpose corporations).

63. *See* Eric E. Bonnett, *Chapter 740: Creating a New Corporate Structure for Philanthropic-Minded Businesses*, 43 MCGEORGE L. REV. 601, 602-04 (2012) (highlighting novelties of California’s flexible-purpose corporate form); *see also* Resor, *supra* note 57, at 103 (comparing flexible-purpose corporations with benefit corporations). Greenpeace warns of the danger of “greenwashing,” or the “cynical use of environmental themes to whitewash corporate misbehavior,” by promoting minor advancements of environmentally conscious actions while missing the “big picture” concerns. *Introduction to StopGreenwash.org*, GREENPEACE, <http://www.stopgreenwash.org/introduction> (last visited Feb. 4, 2014). Thus, Greenpeace expresses concern that “greenwashing” misleads consumers and obscures the very goals of hybrid-purpose corporations. *See id.* No data has been provided, however, to verify these concerns. *See Legal FAQ's*, *supra* note 61 (stressing need for general public benefit inclusion in legislation).

64. *See* Bonnett, *supra* note 63, at 603-04 (emphasizing how flexible-purpose corporations filled gaps between California nonprofit and for-profit corporate regulations); *see also* Reiser, *supra* note 62, at 68-71 (describing fiduciary considerations of flexible-purpose corporations). While directors of flexible-purpose corporations are not required to consider stakeholder interest, they are required to provide the public with an annual report outlining the corporation’s progress towards its stated charitable purpose. *See* Bonnett, *supra* note 63, at 605.

private right of action for enforcement of their specific (or general) public benefit in a special proceeding.⁶⁵

F. Enter: Benefit Corporations

Just as the L3C embeds socially beneficial purposes into its business structure but maintains the basic partnership form, benefit corporations have socially beneficial purposes embedded within the traditional corporation structure.⁶⁶ Benefit corporations are primarily the codification, with stylistic variation, of B Corp certification, and likewise feature the requirements of the formal acknowledgement of their corporate purpose of creating general public benefit, as well as the filing of objective annual evaluations assessing their achievement of those ends.⁶⁷ B Lab in fact lobbied for the passage of benefit corporation statutes in the seventeen states that currently recognize them, and continues to pursue legislation in dozens of others.⁶⁸

Benefit corporations are now recognized in Arkansas, California, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, and Virginia, and legislation for their adoption has been introduced in over a dozen other states.⁶⁹ Benefit corporations now require, rather than permit, corporate directors to consider the interests of the general public when making corporate

65. See Resor, *supra* note 57, at 104 (highlighting similarities and differences between flexible-purpose corporations and benefit corporations); see also Reiser, *supra* note 62, at 71-73 (underscoring more expansive self-policing responsibilities required of flexible-purpose corporations as compared to benefit corporations).

66. See Reiser, *supra* note 62, at 60 (placing flexible-purpose corporations in middle of structural-rigidity spectrum between L3C and benefit corporation); see also Clark & Vranka, *supra* note 2, at 14-28 (providing general overview of key benefit corporation features).

67. See, e.g., Reiser, *supra* note 62, at 57-60 (outlining requirements imposed upon benefit corporations); Munch, *supra* note 19, at 184-86 (describing promulgation of benefit corporation legislation by B Lab); Resor, *supra* note 57, at 101-02 (comparing B Corp certification with benefit corporation legislation).

68. See Munch, *supra* note 19, at 183-84 (attributing B Lab's "organized, calculated support" as catalyst for enactment of benefit corporation statutes).

69. See ARK. CODE ANN. §§ 4-36-101 to -401 (2014); CAL. CORP. CODE §§ 14600-14631 (West 2014); DEL. CODE ANN. tit. 8, §§ 361-368 (West 2014); HAW. REV. STAT. §§ 420D-1 to -13 (West 2013); 805 ILL. COMP. STAT. ANN. 40/1-5.01 (West 2013); LA. REV. STAT. ANN. §§ 12:1801-1832 (2013); MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01 to -08 (LexisNexis 2013); MASS. GEN. LAWS ANN. ch. 156E, §§ 1-16 (West 2013); NEV. REV. STAT. ANN. §§ 78B.010-190 (West 2013); N.J. STAT. ANN. §§ 14A:18-1 to -11 (West 2013); N.Y. BUS. CORP. LAW §§ 1701-1709 (McKinney 2013); H.B. 2296, 77th Leg. Assemb. (Or. 2013); 15 PA. CONS. STAT. ANN. §§ 3301-3331 (West 2013); R.I. GEN. LAWS ANN. §§ 7-5.3-1 to -13 (West 2013); S.C. CODE ANN. §§ 33-38-110 to -600 (2013); VT. STAT. ANN. tit. 11A, §§ 21.01-14 (West 2013); VA. CODE ANN. §§ 13.1-782 to -791 (West 2013); see also Memorandum from the Mass. Sec'y of State on Massachusetts General Laws Chapter 156E, available at <http://www.sec.state.ma.us/cor/corpdf/Notice%20regarding%20Benefit%20Corporations.pdf> (last visited Feb. 4, 2014) [hereinafter Benefit Corporations Memo] (introducing Massachusetts benefit corporation). Legislation has also been introduced or passed (but not yet effective) in Alabama; Arizona; Connecticut; Florida; Georgia; Idaho; Indiana; Iowa; Kansas; Kentucky; Minnesota; Montana; Nebraska; New Hampshire; Ohio; Utah; Washington, D.C.; and West Virginia. See *State by State Legislative Status*, BENEFIT CORP INFO. CENTER, <http://benefitcorp.net/state-by-state-legislative-status> (last visited Feb. 21, 2014) (summarizing legislative attempts and successes of benefit corporations).

decisions, and afford corporations the opportunity to additionally declare a specific public benefit should they seek to pursue one.⁷⁰ Some states prescribe the appointment of a benefit director, and all require the preparation of annual reports evaluating the corporation's pursuit of the general public benefit (and specific public benefit if so selected) against objective third-party standards.⁷¹

Despite mandating directorial consideration of general public benefit in decision-making, these statutes specifically deny beneficiaries, including the general public, any right of action against the corporation should it fail.⁷² The William H. Clark, Jr.'s Model Benefit Corporation Legislation (Model Statute) suggests language that does allow the corporation—either individually or derivatively—to bring enforcement proceedings to evaluate its directors' compliance with promoting either general or specific public benefit, as well as whether it fulfilled its requirement to file annual benefit reports with both its shareholders and its state's secretary or treasurer.⁷³ Only the New Jersey benefit corporation statute currently empowers its Department of Treasury to terminate a benefit corporation's status if it fails to file its benefit report for two years.⁷⁴

70. See Clark & Vranka, *supra* note 2, at 14-28 (detailing benefit corporation requirements and illustrating with Model Statute); see also *Model Statute*, *supra* note 8, § 201. For a chart organizing enacted statutes by general provisions and formation, adoption, or termination of benefit corporation status, corporate purpose, officer duty, third-party standards, enforcement proceedings, and benefit-report requirements, see J. Haskell Murray, *Benefit Corporations—State Statute Comparison Chart* (July 17, 2013), <http://ssrn.com/abstract=1988556>.

71. See, e.g., MASS. GEN. LAWS ANN. ch. 156E, §§ 13, 15 (West 2013); N.J. STAT. ANN. §§ 14A:18-7, -11 (West 2013); *Model Statute*, *supra* note 8, §§ 302, 401-402 (describing role of benefit directors and guidelines for annual report preparation).

72. See, e.g., MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07(b) (LexisNexis 2013) (“A director of a benefit corporation, in the performance of duties in that capacity, does not have any duty to a person that is a beneficiary of the public benefit purposes of the benefit corporation.”); MASS. GEN. LAWS ANN. ch. 156E, § 10(e) (West 2013) (“A director shall not have a fiduciary duty to a person that is a beneficiary of the general or specific public benefit purposes of a benefit corporation arising from the status of the person as a beneficiary.”); *Model Statute*, *supra* note 8, § 301(d) (“A director does not have a duty to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation arising from the status of the person as a beneficiary.”).

73. See *Model Statute*, *supra* note 8, §§ 102, 305 (defining and providing right of action to commence benefit-enforcement proceedings).

74. See N.J. STAT. ANN. § 14A:18-11(d)(2) (West 2013).

If a benefit corporation has not delivered a benefit report to the department for a period of two years, the department may prepare and file a statement that the corporation has forfeited its status as a benefit corporation and is no longer subject to this act. If the corporation subsequently delivers a benefit report to the department for filing, the status of the corporation as a benefit corporation shall be automatically reinstated upon the filing of the benefit report by the department and the corporation shall again be subject to this act.

Id.

G. Survey Says?

Thus far, only one empirical study—focusing solely on Maryland’s benefit corporations and benefit LLCs—has been conducted that evaluates the efficacy of hybrid-purpose organizations.⁷⁵ By performing interviews, administering surveys, and conducting local and national analyses, MBA consultants at the University of Maryland Robert H. Smith School of Business developed meaningful insight into the impact of the statutes on Maryland’s sixteen benefit corporations and twenty-three benefit LLCs.⁷⁶ The group discovered that “[m]any corporate goals can be achieved via third-party certification rather than legislation;” that the lack of information about how benefit corporations and benefit LLCs operate impeded their full utility; and found a distinct lack of corporate accountability.⁷⁷ Seventy percent of respondents felt that there was no internal system to measure compliance with the statute because few companies post their benefit reports online.⁷⁸

H. Introduction of Benefit Corporations in Massachusetts

Benefit corporations were passed into law in Massachusetts via House Bill 4352 on July 30, 2012, and went into effect on December 1 of that year.⁷⁹

75. See MEGAN BURKHART, ANA CASTRO & ADRIAN SANCHEZ, UNIV. OF MD. ROBERT H. SMITH SCH. OF BUS., MARYLAND BENEFIT CORPORATION ACT: THE STATE OF SOCIAL ENTERPRISE IN MARYLAND I (Jan. 2013), available at <http://www.slideshare.net/changematters/maryland-benefit-corporations-analysis-full-report> (analyzing benefit corporation and LLC statute effects and providing recommendations for improvement). A summary is also available via the social enterprise consultancy, ChangeMatters. See CHANGE MATTERS, http://changematters.com/wp-content/uploads/2010/10/Maryland-Benefit-Corporations-Analysis_Summary.pdf (last visited Feb. 4, 2014); see also Anne Field, *First-Ever Study of Maryland Benefit Corps Released*, FORBES, Jan. 25, 2013, <http://www.forbes.com/sites/annefield/2013/01/25/first-ever-study-of-maryland-benefit-corps-released> (highlighting study’s notable conclusions).

76. See BURKHART, CASTRO & SANCHEZ, *supra* note 75, at 10 (detailing composition of Maryland’s benefit business sector and industries represented).

77. See *id.* at 12 (summarizing survey results); see also Gus Sentementes, *Loophole? Maryland Not Tracking Formation of “Benefit Corporations”*, BALTIMORE SUN, Mar. 23, 2011, http://weblogs.baltimoresun.com/news/technology/2011/03/loophole_maryland_cant_track_f.html (underscoring Maryland’s failure to establish benefit corporation registry when law passed). The lack of accountability could open Maryland constituents up to the potential abuse of greenwashing (the holding out by corporations of socially responsible policies to hide otherwise unfavorable business decisions). See Sentementes, *supra* (highlighting inability to track effectiveness of benefit corporations and benefit LLCs); *supra* note 63 (describing greenwashing and its implications for flexible purpose corporations).

78. See BURKHART, CASTRO & SANCHEZ, *supra* note 75, at 19 (reporting low rate of compliance with report requirements). One respondent summarizes the statutes’ impact by asking: “How do we measure or quantify success if there are no tangible benefits?” *Id.*

79. See H.B. 4352, 187th Gen. Court, Reg. Sess. (Mass. 2012); Benefit Corporations Memo, *supra* note 69, at 1 (announcing enactment of benefit corporation legislation); see also MASS. GEN. LAWS ANN. ch. 156E (West 2013) (containing benefit corporation provisions). The Massachusetts statutes covering corporations and other business forms are found within chapters 155 through 156D of the Massachusetts General Laws, with the new benefit corporation law codified in chapter 156E. See MASS. GEN. LAWS ANN. chs. 155-156E (West 2013); see also Benefit Corporations Memo, *supra* note 69, at 1 (explaining codification of benefit corporation statute). Benefit corporation legislation was initially included in Senate Bill 2350 on July 17, 2012, which

These entities joined the existing cornucopia of corporate structures, including nonprofit and for-profit corporations, professional companies, LLCs, and partnerships, as well as the judicial and legislative support system in place to protect directorial decision-making.⁸⁰ Chapter 156E of the Massachusetts General Laws draws heavily from the Model Statute, and likewise features the requirement of a benefit director, as well as the option of appointing a benefit officer to aid in the preparation of benefit reports.⁸¹ Benefit corporations must also file annual reports with the Secretary of the Commonwealth narratively describing the efforts undertaken, and any achievements earned, toward the creation of general public benefit (and specific public benefit, if any), as measured against a third-party standard.⁸² And like the Model Statute, chapter 156E denies would-be beneficiaries of the corporation a right of action against the corporation should it fail to meet its goals, again limiting those endowed with enforcement rights to the corporation, either individually or derivatively.⁸³ Chapter 156E diverges from the Model Statute in two important ways, however: it affords appraisal rights to shareholders who do not wish to amend their articles of organization to reflect benefit corporation status, and it expressly forbids other corporations from holding themselves out as benefit

Senator Thomas P. Kennedy sought to strike through amendment, though it was ultimately rejected. *Compare* H.B. 4119, 187th Gen. Court, Reg. Sess. (Mass. 2012) (containing no benefit corporation provisions), *with* S.B. 2350, 187th Gen. Court, Reg. Sess. (Mass. 2011-2012) (including Benefit Corporations Act and bill history showing Kennedy's amendment to strike legislation). The legislation was approved in its introduced form by the House on July 30, 2012, and then signed by Governor Deval Patrick on August 7, 2012. *See* H.B. 4352, 187th Gen. Court, Reg. Sess. (Ma. 2012) (containing updated bill text); *see also* *Bill H.4352*, 188TH GEN. CT. OF THE COMMONWEALTH MASS., <http://www.malegislature.gov/Bills/187/House/H4352/History> (last visited Feb. 4, 2014) (chronicling history and passage of bill).

80. *See* MASS. GEN. LAWS ANN. chs. 155-156D (West 2013) (authorizing corporate forms in Massachusetts).

81. *Compare Model Statute*, *supra* note 8, § 304 (describing benefit officer duties), *with* ch. 156E, § 13 (adopting Model Statute language almost in its entirety). Language regarding the preparation of annual benefit reports is similarly adopted, and specifically underscores that auditing by third parties is not required even though benefit corporations must compare their pursuit of the general public benefit against third-party standards. *Compare Model Statute*, *supra* note 8, § 401, *with* ch. 156E, § 15 (requiring preparation of annual report but no third-party audit).

82. *See* ch. 156E, § 15 (explaining contents of annual report and filing requirements). These reports must be included with the reports otherwise required under chapter 156A, section 18 for professional corporations and chapter 156D, section 16.22 for business corporations. *See* ch. 156E § 16(d) (cross-referencing professional company and corporation annual filing requirements).

83. *See* ch. 156E, § 14(b).

A benefit enforcement proceeding shall be commenced or maintained only: (1) directly by the benefit corporation; or (2) derivatively by: (i) a shareholder; (ii) a director; (iii) a person or group of persons that owns beneficially or of record 5 per cent or more of the equity interests in an association of which the benefit corporation is a subsidiary; or (iv) other persons as specified in the articles of organization, bylaws or shareholder agreement of the benefit corporation.

Id.

corporations unless organized under the statute.⁸⁴

Despite not experimenting with other business forms, such as California's flexible purpose corporation or Vermont's low-profit LLC, Massachusetts law otherwise provides some latitude for socially minded business owners to incorporate their CSR goals.⁸⁵ For example, codified in its general laws is directorial permission to consider nonshareholder interests when making decisions via the Massachusetts constituency statute.⁸⁶ Massachusetts also empowers corporations to adopt by-laws that regulate corporate behavior, and permits corporate contributions to communities and charitable organizations.⁸⁷ And while statutes and case law set forth a manager's fiduciary duties to the

84. See ch. 156E, § 5 (“[T]he shareholders of the corporation shall be entitled to appraisal rights under sections 13.01 to 13.31, inclusive, of [Massachusetts General Laws] chapter 156D.”); see also ch. 156E, § 7 (“A business corporation organized under the laws of the commonwealth shall not hold itself out as, advertise itself as, or indicate in any way that it is a benefit corporation unless it was organized under and in full compliance with this chapter.”). Appraisal rights are more fully explained in chapter 156D, sections 13.01 through 13.31, as cross referenced in chapter 156E, and entitle shareholders to receive a fair value of their share of stock should various events take place, such as a merger. See MASS. GEN. LAWS ANN. ch. 156D, §§ 13.01 to .31 (West 2013). California and South Carolina have similar provisions in their benefit corporation statutes that may require the corporation to purchase the dissenting shareholder's stock at a fair value should he or she not vote to become a benefit corporation by amendment to the corporation's articles of incorporation. See CAL. CORP. CODE § 14603(a) (West 2013); S.C. CODE ANN. § 33-38-600 (2013); see also Haskell Murray, *Massachusetts Benefit Corporation Statute*, SOCENTLAW (Dec. 1, 2012), <http://socentlaw.com/2012/12/massachusetts-benefit-corporation-statute> (underscoring similarities between Massachusetts and California benefit corporation statutes).

85. See MASS. GEN. LAWS ANN. ch. 156D, § 8.30(a) (West 2013) (allowing, but not requiring, directors to consider nonshareholder interests when making decisions); *infra* note 86 (providing text of statute). Massachusetts further recognizes nonprofit organizations, and empowers directors to make contributions to or fundraise for the “betterment of social and economic conditions in any community in which such corporation is doing business.” MASS. GEN. LAWS ANN. ch. 155, § 12A (West 2013); see MASS. GEN. LAWS ANN. ch. 180, §§ 1-29 (West 2013) (prescribing governance for charitable corporations); MASS. GEN. LAWS ANN. ch. 156B, §§ 11-13 (West 2013) (outlining corporate formation guidelines for nonprofit organizations); see also *Nonprofit Corporation Information*, SECRETARY OF THE COMMONWEALTH OF MASS., <http://www.sec.state.ma.us/cor/corpweb/cormp/npinf.htm> (last visited Feb. 4, 2014) (describing nonprofit formation and operation process). See generally Recent Statutes, *Corporations-Charities-Statute Making Contributions to Charity by Corporations Intra Vires*, 52 HARV. L. REV. 538 (1939) (discussing background of introduction of charitable-contribution-by-corporations statute).

86. See ch. 156D, § 8.30(a).

A director shall discharge his duties as a director, including in his duties as a member of a committee . . . in a manner the director reasonably believes to be in the best interests of the corporation. In determining what the director reasonably believes to be in the best interests of the corporation, a director may consider the interests of the corporation's employees, suppliers, creditors and customers, the economy of the state, the region and the nation, community and societal considerations, and the long-term and short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.

Id.

87. See MASS. GEN. LAWS ANN. ch. 156, § 13 (West 2013) (establishing corporation's power to adopt by-laws restricting corporate behavior); MASS. GEN. LAWS ANN. ch. 155, §§ 12A, 12C (West 2013) (authorizing gifts to communities and charitable organizations).

corporation, Massachusetts adheres to the business judgment rule, effectively sanctioning a directorial decision that prioritizes stakeholders (provided there are no indicia of self-dealing).⁸⁸

III. ANALYSIS

A. *Corporate Thought Reformed?*

Benefit corporations underscore a tectonic philosophical shift in the world of corporate law because their corporate aims are divided and vary dramatically from traditional notions of corporate purpose.⁸⁹ However, traditional notions of corporate purpose have become hotly debated and further clouded by the gradual evolution of corporate response to consumers, which eventually created the opportunity necessary for the development of hybrid organizations (including benefit corporations).⁹⁰ Simply acknowledging the amorphous and evolving nature of corporate law as a reflection of the amorphous and evolving society from which it is comprised yields a startling thought: why can't a corporation do both?⁹¹ An analysis of the adaptations of existing corporate structures, as well as the introduction of hybrid organizations, demonstrates that businesses can do both, even if legal scholars and legislators are unable to adequately define or accept them.⁹²

Adherents to the profit-maximization camp cannot deny a trend toward the absorption of stakeholder consideration in corporate decision-making.⁹³

88. See ch. 156, § 21 (laying out required composition of corporation's management). *But see* Prod. Mach. Co. v. Howe, 99 N.E.2d 32, 36 (Mass. 1951) (holding bad faith, dishonesty, and corruption unnecessary to show breach of fiduciary duty). The fiduciary duties owed by a corporation's directors to the corporation are contained within section 8.30 (the Massachusetts constituency statute), with the duties owed to the corporations by officers contained within section 8.42, both of which require that corporate officers employ the same level of care and good faith that a reasonable person under the circumstances would. See ch. 156D, § 8.30(a) ("A director shall discharge his duties as a director . . . (1) in good faith; (2) with the care that a person in a like position would reasonably believe appropriate under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation."); ch. 156D, § 8.42(a) ("An officer shall discharge his duties: (1) in good faith; (2) with the care that a person in a like position would reasonably exercise under similar circumstances; and (3) in a manner the officer reasonably believes to be in the best interests of the corporation."). These duties are the codification of the business judgment rule, which "affords protection to the business decisions of directors, including the decision to institute litigation, because directors are presumed to act in the best interests of the corporation." *Harhen v. Brown*, 730 N.E.2d 859, 865 (Mass. 2000); see *Gut v. MacDonough*, No. Civ.A.2007-1083-C, 2007 WL 2410131, *11 (Mass. Super. Ct. Aug. 14, 2007).

89. See *Deskins*, *supra* note 38, at 1056-60 (describing evolution of corporate philosophy).

90. See *Munch*, *supra* note 19, at 182-83 (discussing how progressively stronger constituency statutes paved way for benefit corporation legislation).

91. See *Choudhury*, *supra* note 17, at 647 (acknowledging possibility of consequential duty fulfillment rather than simultaneous).

92. See *Chatterji & Richman*, *supra* note 30, at 47 (using De Beers's development of Kimberley Process to demonstrate simultaneous CSR and profit-maximizing commitment).

93. See *Sneirson*, *supra* note 10, at 1000-07 (providing overview of case law eroding profit-maximization theory).

Beyond limited (and arguably outdated) case law, managers are not explicitly required to consider profits in daily decision-making; not only do many states permit the consideration of interests beyond profit maximization by directors through constituency statutes, but some states had previously prescribed it.⁹⁴ Alleged to be one of the most important devices to protect socially responsible decision-making, the business judgment rule further protects corporate decisions so long as directors exhibit no hint of self-interest; the rule makes no reference to the inclusion of profit maximizing strategies in the decision that triggers the rule's protection.⁹⁵ And while profit-maximization norms saw resurgence in the 1980s, the context in which directors needed to maximize shareholder profits was limited to a few narrow circumstances, such as forced sale under the threat of a hostile takeover.⁹⁶

Even benefit corporation statutes and corresponding press releases provide unclear guidance in the changing territory of stakeholder consideration by directors.⁹⁷ Hawaii's benefit corporation statute, for example, requires that directors consider the business's shareholders and the promotion of the general public benefit; however, in stark contrast to the remaining benefit corporation statutes, it permits—but does not require—consideration of employees, customers, and the surrounding community (among others).⁹⁸ External guidelines of business decision-making in Massachusetts (generally in the form of legislation or case law) remains similarly clouded: while the Commonwealth has its own constituency statute, press releases introducing the benefit corporation under the newly enacted chapter 156E emphasize that traditional for-profit organizations must focus on profit maximizing business strategies.⁹⁹ The official statements released in connection with the statute further obscure the statute's intent because they stress that “directors and officers . . . are expressly *permitted* to consider and prioritize the social and environmental impacts of their corporate decision[.]making,” although the statute itself requires directors to consider the interests of the general public.¹⁰⁰

94. See *id.*; see also *supra* note 49 and accompanying text (noting amendment of Connecticut constituency statute).

95. See Choudhury, *supra* note 17, at 655-57 (noting no profit maximizing requirement for application of business judgment rule); Mickels, *supra* note 24, at 283 (describing requirements of business judgment rule).

96. See *supra* note 18 and accompanying text (chronicling director duties during hostile takeover suits of 1980s).

97. See Murray, *supra* note 18, at 506-08 (describing lack of clear guidance for benefit corporation directors).

98. See HAW. REV. STAT. ANN. § 420D-6 (LexisNexis 2013) (“[T]he board of directors . . . [s]hall consider . . . [t]he shareholders . . . and . . . [t]he . . . general and specific public benefits set forth in the sustainable business corporation's purposes; and . . . [m]ay consider [employees, customers, surrounding community, environment, short- and long-term corporate interests, and other pertinent factors].” (emphasis added)).

99. See Benefit Corporations Memo, *supra* note 69, at 1 (“[D]irectors and officers must focus primarily on maximizing financial returns to investors . . .”).

100. *Id.* (emphasis added). Compare *id.* (permitting the consideration of limited socially beneficial

And though recent Massachusetts cases have failed to definitively adopt the profit-maximization requirement for directors, they have similarly failed to deny its absence from decision-making.¹⁰¹

B. What Benefit Corporation Statutes Do—And Do Not Do

While benefit corporations symbolically make strides toward requiring more socially conscious decision-making by corporate directors, existing statutes offer ambiguous incentives to incorporate or convert.¹⁰² Corporations already impose a number of duties of varying rigidity upon directors in order to maintain the solid corporate structure to receive the safeguard of limited liability, as well as to appeal to investors.¹⁰³ In addition to these structural obligations, benefit corporations must also file annual reports and must place stakeholder considerations alongside shareholder considerations even in situations of economic duress while having the same advantages as—but no more than—the average corporation.¹⁰⁴ Nonprofit organizations, in contrast, receive tax-exempt status in exchange for pursuing charitable goals, though it

interests), with MASS. GEN. LAWS ANN. ch. 156E, § 10(a) (West 2013).

[T]he board of directors . . . shall consider the effects of any action upon [the shareholders, employees and workforce, interest of its customers and suppliers and their respective communities, the environment, the corporation's long- and short-term interests, and its ability to accomplish its purpose]; . . . and may consider: [the state's economy or other relevant factors].

ch. 156E, § 10(a) (emphasis added).

101. See *Gut v. MacDonough*, No. Civ.A.2007-1083-C, 2007 WL 2410131, *11 (Mass. Super. Ct. Aug. 14, 2007) (explaining plaintiff's argument in favor of profit-maximization consideration by directors in "lock-up" agreement). In *Gut v. MacDonough*, the court was afforded the opportunity to adopt the holding in *Revlon v. MacAndrews* by requiring Westboro Financial Services, Inc. to solicit bids for its outstanding shares when faced with a merger. See *id.* at *1-3, 5; see also *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (holding director's duty to maximize selling price to buyer in event of sale); *supra* note 18 (reviewing case law in support of profit-maximization theory). The plaintiffs in the case argued that the directors' failure to solicit a greater number of bids and fetch a higher stock price was a breach of the fiduciary duty they owed to the corporation, which, during a merger, should be maximizing the per-share value. See *Gut*, 2007 WL 2410131, at *11-12 (underscoring similarities with *Revlon v. MacAndrews* minority shareholders). The defendants instead argued that they were entitled to the benefit of the business judgment rule when deciding not to pursue other offers, and further that no fiduciary duty was violated under chapter 156D, section 8.30 of the Massachusetts General Laws (the Massachusetts constituency statute). See *id.* The court held that in cases of mergers requiring a cash-out of minority shareholders as part of a "freeze-out" merger (where public ownership is eliminated), a higher standard of scrutiny is required by the courts. See *id.* at *12-16 (holding defendant's actions reasonable even under heightened scrutiny).

102. Compare *supra* Part II.C (describing advantages of B Corp certification), with *supra* Part II.D (describing benefit corporation legislative requirements).

103. See, e.g., MASS. GEN. LAWS ANN. ch. 156D, § 1.20 (West 2013) (listing filing requirements necessary for corporate status); ch. 156D, § 7.01 (requiring holding of annual meetings by corporations); ch. 156D, § 8.24 (imposing majority and quorum requirements for meetings); see also *Legal FAQ's*, *supra* note 61 (stressing investor preference for solid corporate structure).

104. See ch. 156E, §§ 10(a), 15 (requiring stakeholder consideration and preparation of annual benefit reports).

comes at the alternate expense of foregoing profit-generating activity.¹⁰⁵ Other hybrid forms, such as L3Cs and benefit LLCs, are more flexible than corporations but also maintain the right to advertise as a socially conscious organization.¹⁰⁶

The B Corp certification process, as well as the study analyzing the impact of benefit corporations in Maryland, further emphasizes the disparities between what B Lab offers and what legislative authorization offers to socially minded businesses.¹⁰⁷ Corporations seeking B Corp certification agree to assume the same additional duties as benefit corporations, but unlike certified B Corps, these duties are not statutorily binding.¹⁰⁸ B Corps also receive the added benefit of marketing on B Lab's website, which enhances brand visibility for both consumers and sustainable investors.¹⁰⁹ The lack of visibility or marketing benefit was particularly emphasized in the Maryland study, suggesting that B Corp certification is more advantageous for businesses despite having to pay annual fees.¹¹⁰

Minimal enforcement provisions in benefit corporation statutes coupled with significant transparency requirements also create uncertainty about these statutes' ability to achieve CSR goals.¹¹¹ While Massachusetts benefit directors must adhere to stringent objectivity requirements when selecting the third-party standard used to evaluate the corporation's efforts of achieving its goals, the statute does not require actual report auditing, effectively requiring the corporation to police itself.¹¹² Failure to fulfill these requirements could result in a benefit enforcement proceeding, but chapter 156E provides no guidance on

105. See Taylor, *supra* note 2, at 752-55 (explaining advantages and disadvantages of nonprofit models for pursuing CSR goals).

106. See *supra* notes 57-60 and accompanying text (outlining L3C and flexible purpose corporation requirements).

107. See *Why Become a B Corp?*, *supra* note 43 (highlighting benefits of becoming certified B Corp); see also BURKHART, CASTRO & SANCHEZ, *supra* note 75, at 4 (concluding enhanced visibility necessary to bolster benefit corporation success).

108. See *Term Sheet for B Corporations*, *supra* note 38, at 1-2 (outlining legal requirements for conversion); see also *Make It Official*, *supra* note 39 (describing B Corp certification process). Part of the B Corp certification process requires amendment of the organization's articles of incorporation, which serve as the guiding principles for business decision-making and impose fiduciary—but not statutory—duties on those vested with the power to make corporate decisions. See *Term Sheet for B Corporations*, *supra* note 38, at 2 (distinguishing structural amendment requirements for different corporate forms); see also ch. 156D, § 10.01 (authorizing corporation to amend its articles of organization). A corporation's articles of incorporation can be amended just as easily to remove the provisions. See ch. 156D, § 10.01.

109. See *Why Become a B Corp?*, *supra* note 43 (noting market differentiation and investor attraction as reasons for B Corp certification).

110. See BURKHART, CASTRO & SANCHEZ, *supra* note 75, at 15-16 (presenting survey results demonstrating few advantages of Maryland benefit corporation legislation).

111. See Munch, *supra* note 19, at 189-91 (anticipating enforceability problems with new benefit corporation provisions).

112. See MASS. GEN. LAWS ANN. ch. 156E, § 11(b) (West 2013) (requiring benefit director to be independent from corporation); ch. 156E, § 15(a) (mandating corporate action analysis against third-party standard); ch. 156E, § 15(b) (excluding audit requirement from annual benefit report preparation).

how these proceedings are to be conducted, nor any indication about potential consequences.¹¹³ B Lab, in contrast, can and will revoke certification if a corporation fails to file its annual benefit report or does not pass its Impact Assessment Test, conducts audits on ten percent of its certified B Corps, and provides certification for only two-year periods.¹¹⁴

C. *Is Massachusetts Resigned to Maryland's Fate?*

While the impact the Maryland benefit corporation has had on its business sector, or lack thereof, is disheartening, chapter 156E of the Massachusetts General Laws, though also adopted from the Model Statute, deviates from sections 5-6C-01 to -08 of the Maryland Corporations & Associations Code in several significant ways, which suggests the possibility of different results.¹¹⁵ Unlike chapter 156E of the Massachusetts General Laws, sections 5-6C-01 to -08 of the Maryland Corporations & Associations Code conspicuously omit all provisions related to enforcement proceedings.¹¹⁶ As the empirical study points out, Maryland's lack of accountability has been a significant impediment to its statute's success.¹¹⁷ And although neither chapter 156E nor sections 5-6C-01 to -08 grants its respective state secretary with the right to terminate benefit corporation status for failure to file annual benefit reports, chapter 156E

113. See ch. 156E, § 14. Benefit enforcement proceedings may be brought either by the corporation, a director, or a shareholder to enforce the additional duties imposed by its benefit corporation status, but specifically denies the corporation's beneficiaries the same right of action. See ch. 156E, § 10(e) (asserting benefit director owes no fiduciary duty to status of person as beneficiary under statute). The statute does allow benefit corporations to identify parties in its articles of organization as beneficiaries and grant them a right of action for enforcement against the corporation should it choose to do so. See ch. 156E, § 14(b)(2)(iv).

114. See *supra* notes 38-40 and accompanying text (outlining B Corp certification requirements).

115. See *infra* notes 116-18 and accompanying text (comparing Maryland and Massachusetts benefit corporation statutes).

116. Compare MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 to -08 (LexisNexis 2013) (excluding enforcement-proceeding provisions), with *Model Statute*, *supra* note 8, §§ 102, 305 (defining and prescribing process for benefit-enforcement proceeding), and MASS. GEN. LAWS ANN. ch. 156E, §§ 2, 14 (West 2013) (adopting respective Model Statute language). Chapter 156E, section 2 of the Massachusetts General Laws slightly expands upon the language of the Model Statute's section 305 by specifying that actions may be brought against a director in a benefit enforcement proceeding. Compare ch. 156E, § 2 ("[A] claim or action brought directly by a benefit corporation, or derivatively as authorized by this chapter on behalf of a benefit corporation, *against a director or officer.*" (emphasis added)), with *Model Statute*, *supra* note 8, § 102 ("[A]ny claim or action or proceeding for: (1) the *failure of a benefit corporation* to pursue or create general public benefit." (emphasis added)). Chapter 156E also allows any shareholder to bring a claim in a benefit enforcement proceeding, whereas the Model Statute allows only "a person or group of persons that owned beneficially or of record at least 2% of the total number of shares of a class or series outstanding at the time of the act or omission complained of," effectively eliminating a right of action by minority shareholders. *Model Statute*, *supra* note 8, § 305(b)(2)(i); see ch. 156E, § 14 (endowing any shareholder with standing to sue in benefit enforcement proceeding). The comments to the Model Statute explain that the purpose of the two shareholder interest requirement was to prevent nuisance suits. See *Model Statute*, *supra* note 8, at 20-21.

117. See BURKHART, CASTRO & SANCHEZ, *supra* note 75, at 19 (reporting low compliance levels with Maryland requirement of annual benefit report); see also Munch, *supra* note 19, at 189-91 (predicting general enforceability problems with benefit corporation legislation).

prohibits other corporations from holding themselves out as benefit corporations unless adequately formed pursuant to the chapter, indicating more concern for consumer protection and consequential policing.¹¹⁸ Lastly, chapter 156E provides more protection for its existing shareholders by recognizing appraisal rights and giving any shareholder, regardless of the size of his or her share, the right to institute benefit-enforcement proceedings.¹¹⁹

The deficiencies of sections 5-6C-01 to -08 of the Maryland Corporations & Associations Code coupled with the success of B Corps and innovation of section 14A:18 of the New Jersey Statutes also provide ample guidance for strengthening chapter 156E of the Massachusetts General Laws.¹²⁰ The Maryland benefit corporation and benefit LLC study suggests that Maryland corporations could find greater advantages of third-party certification, such as by certifying as a B Corp, than with statutory recognition alone, for both enforcement and visibility reasons.¹²¹ Like the New Jersey statute, which terminates benefit corporation status for failure to file annual reports, B Lab certifies corporations for two-year terms contingent upon the fulfillment of reporting requirements and successful pursuit of goals; B Lab will likewise decline certification if a company fails its Impact Assessment Test.¹²² B Lab also provides the added incentive of visibility to certified B Corps with media campaigns and the use of its website for advertising.¹²³ By bestowing a state administrative agency greater power to enforce the benefit proceeding provisions of chapter 156E of the Massachusetts General Laws, the legislature would likely make the compliance with its CSR tenets more probable (as would the implementation of a central registry to easily locate Massachusetts benefit corporations).¹²⁴

IV. CONCLUSION

Benefit corporation legislation serves as indicia of a movement to harness the power of the corporate form for the purpose of social good. Although new corporate forms coupled with the visibility of B Corps are making strides

118. See *supra* note 74 and accompanying text (describing New Jersey benefit corporation termination rights); see also ch. 156E, § 7 (prohibiting the holding out of non-benefit corporation as benefit corporation).

119. See ch. 156E, §§ 5, 14(b)(2)(i) (granting shareholders right to bring benefit-enforcement proceeding).

120. See *supra* note 116 and accompanying text (comparing Maryland and Massachusetts benefit corporation statutes); Part II.C (describing advantages to B Corp certification); *supra* note 74 and accompanying text (highlighting additional powers granted by New Jersey benefit corporation statute).

121. See BURKHART, CASTRO & SANCHEZ, *supra* note 75, at 19, 24, 27-28 (recommending greater benefit corporation visibility, accountability, and consideration by Maryland legislature).

122. See N.J. STAT. ANN. § 14A:18-11(d)(2) (West 2013); *supra* text accompanying note 74 (providing New Jersey Secretary of State termination rights for companies failing to file annual reports); see also notes 38-41 and accompanying text (discussing requirements for B Corp certification).

123. See *2012 Annual Report*, *supra* note 28 (including marketing tool as reason to certify as B Corp); see also *supra* Part II.C (highlighting advantages of certifying as B Corp).

124. See Murray, *supra* note 20, at 27-33 (suggesting statutory amendment to enhance decisional clarity).

toward changing how and why corporations conduct business, benefit corporation legislation may still be strengthened by greater accountability and governmental oversight. Chapter 156E of the Massachusetts General Laws has created a framework for the enforcement of benefit corporation proceedings and stands alone in protecting consumers from potential abuses. Still, it would benefit from the inclusion of additional provisions designed to bolster its legitimacy by granting enhanced enforceability rights, such as requiring the filing of annual benefit reports with the Secretary of the Commonwealth. Most importantly, Massachusetts should incentivize the conversion and incorporation of benefit corporations by increasing their local visibility and encouraging Massachusetts residents to become part of the movement to transform corporate goals. With legislative support and an increased business focus, Massachusetts stands to prove that businesses can promote the public benefit while maintaining profitability.

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