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Note – Sustainable Capitalism Through the Benefit Corporation: Enforcing the Procedural Duty of Consideration to Protect Non-Shareholder Interests

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Notes

Sustainable Capitalism Through the Benefit Corporation: Enforcing the Procedural Duty of Consideration to Protect Non-Shareholder Interests

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Corporations are beholden to a deeply flawed system of corporate governance known as shareholder wealth maximization. This norm dictates that corporations optimize profits at all costs to compensate equity investors for their continued exposure to risk. Other stakeholders in the corporate enterprise, like employees and consumers, are owed nothing outside of the contractual relationships they might possess, while the public at large is owed nothing at all. Because courts continue to vigorously enforce this norm, corporations are largely excluded from providing public goods and services, while simultaneously incentivized to push harmful production costs onto communities and the environment. To cope with this outcome, disparate actors like non-profit organizations, the state, and consumers have intervened in the marketplace, with questionable effect. While it may be too late to do away with the shareholder wealth maximization system in traditional corporate entities, there is an alternative corporate structure that entrepreneurs and consumers can and should utilize to make capitalism work for the public good.

This Note analyzes how the structure of the benefit corporation reunites profit seeking and the promotion of the public good in a single, private business entity. The benefit corporation mandates a hybrid purpose: profit and "material positive impact on society and the environment." In short, benefit corporations aspire to the rallying cry of the "social entrepreneur"—to do well while doing good. Critics, however, question the substantive enforcement mechanism of the benefit corporation, a third-party auditing standard that they self-apply to evaluate whether they are effectively providing for the public good. This Note concurs, but proposes a statutory construction and litigation strategy that courts and plaintiffs can apply to ensure that benefit corporations do not shirk their duty to the public. Through the express private right of action known as the "benefit enforcement proceeding," this Note contends that shareholders and dissenting directors can and should seek injunctive relief for breaches of the procedural "duty of consideration of non-shareholder interests" by the corporation and its board of directors.

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INTRODUCTION—THE CAUTIONARY TALE OF APPLE AND FOXCONN

Apple Incorporated, the ubiquitous computer-electronics firm, became the subject of intense public scrutiny in January 2012 after investigative reports painted a disturbing picture of business practices at the manufacturing facilities of one of its primary Chinese suppliers, Foxconn Technology.[1] Labor conditions were so "morally repugnant"[2] that 150 workers had threatened to commit "mass suicide" unless Foxconn made changes.[3] A subsequent investigation by *The New York Times* revealed that Foxconn forced its employees to work "excessive overtime, in some cases seven days a week," their legs swelling until they could hardly walk.[4] Some of these laborers were college educated, while others were only children.[5] Packed into "cockroach-infested,"[6] "crowded dorms" during off-hours, workers returned to the factories to confront Orwellian signs on the wall that warned, "Work hard on the job today or work hard to find a job tomorrow."[7] Industrial explosions had ripped through multiple iPad factories, killing several and injuring dozens more.[8] Environmental protection protocols—voluntarily in place for the protection of local communities—were ignored or fraudulently bypassed by Foxconn, resulting in the disposal of "hazardous waste" in unregulated sites.[9] Although Apple was quick to respond to the resulting public relations crisis, sending its Chief Executive Officer Timothy D. Cook to China to personally visit Foxconn's iPhone manufacturing plant,[10] this was not the first time defects in Foxconn's labor practices were brought to Apple's attention.[11]

Despite Apple's promulgation of a socially responsible "code of conduct" that mandates fair treatment for workers and responsible environmental protocol in its supply chain, the company first encountered a series of problems with its Chinese manufacturers, similar to those described above, in 2005.[12] Executives at Apple were genuinely "shocked,"

1. *See* Charles Duhigg & David Barboza, *In China, Human Costs Are Built into an iPad*, N.Y. TIMES (Jan. 25, 2012), http://www.nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-for-workers-in-china.html?pagewanted=all&_r=0 (noting Foxconn is the largest exporter operating in China, manufacturing over 40% of the world's consumer electronics and employing over 1.2 million people).

2. *Id.*

3. Malcolm Moore, *'Mass Suicide' Protest at Apple Manufacturer Foxconn Factory*, TELEGRAPH (Jan. 11, 2012, 12:04 PM), http://www.telegraph.co.uk/news/worldnews/asia/china/9006988/Mass-suicide-protest-at-Apple-manufacturer-Foxconn-factory.html.

4. Duhigg & Barboza, *supra* note 1.

5. *Id.*

6. Susan Adams, *Apple's New Foxconn Embarrassment*, FORBES (Sept. 12, 2012, 2:38 PM), http://www.forbes.com/sites/susanadams/2012/09/12/apples-new-foxconn-embarrassment.

7. Duhigg & Barboza, *supra* note 1.

8. *Id.*

9. *Id.*

10. Kevin Drew, *Apple's Chief Visits iPhone Factory in China*, N.Y. TIMES (Mar. 29, 2012), http://www.nytimes.com/2012/03/30/technology/apples-chief-timothy-cook-visits-foxconn-factory.html.

11. Adams, *supra* note 6; *see The Stark Reality of iPod's Chinese Factories*, MAILONLINE (Aug. 18, 2006), http://www.dailymail.co.uk/news/article-401234/The-stark-reality-iPods-Chinese-factories.html (reporting abuses at the Foxconn factory in 2006).

12. Duhigg & Barboza, *supra* note 1; *see The Stark Reality*, *supra* note 11 (reporting abuses at the

and the company conducted an extensive, multi-year internal auditing process, which in 2007 resulted in an "annual audit report" that detailed numerous, continued violations to Apple's supply chain code of conduct, including findings of child labor.[13] A third-party consortium composed of consulting firms and the World Bank subsequently approached Foxconn, with Apple's knowledge, about putting in place programs to increase worker welfare at Foxconn's manufacturing facilities.[14] But negotiations over reforms broke down during consideration of various proposed safety nets.[15] Fourteen Foxconn employees subsequently committed suicide by leaping to their deaths,[16] which, in a cruel twist of irony, Foxconn responded to by installing physical safety nets.[17] After the most recent wave of negative publicity crashed over American consumers, however, Apple and Foxconn publicly "pledged to sharply curtail working hours and significantly increase wages inside Chinese plants making electronic products for Apple and others."[18] Unfortunately, their pledge was merely a portent of the pitfalls that lay ahead.

As part of Apple's promise to revamp labor practices in their global supply chain, Apple became the first computer-electronics firm to join the Fair Labor Association ("FLA").[19] The FLA is a consortium of universities, civil-society organizations, and other "socially responsible companies" that was founded in 1999 in order to protect workers' rights on an international scale by promoting a "multi-stakeholder approach" to corporate governance.[20] The FLA functions as an external auditor, setting labor standards through its own code of conduct,[21] monitoring and

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Foxconn factory in 2006).

13. Duhigg & Barboza, *supra* note 1.

14. *Id.*

15. *Id.*

16. James Pomfret et al., *Foxconn Worker Plunges to Death at China Plant: Report*, REUTERS (Nov. 5, 2010, 6:05 AM), http://www.reuters.com/article/2010/11/05/us-china-foxconn-death-idUSTRE6A41M920101105.

17. Moore, *supra* note 3.

18. Charles Duhigg & Steven Greenhouse, *Electronic Giant Vowing Reforms in China Plants*, N.Y. TIMES (Mar. 29, 2012), http://www.nytimes.com/2012/03/30/business/apple-supplier-in-china-pledges-changes-in-working-conditions.html?pagewanted=all.

19. *Apple Joins FLA*, FAIR LABOR ASS'N (Jan. 13, 2012), http://www.fairlabor.org/blog/entry/apple-joins-fla; *see* David Barboza & Charles Duhigg, *China Contractor Again Faces Labor Issue on iPhones*, N.Y. TIMES (Sept. 10, 2012), http://www.nytimes.com/2012/09/11/technology/foxconn-said-to-use-forced-student-labor-to-make-iphones.html?pagewanted=all.

20. *Protecting Workers' Rights Worldwide*, FAIR LABOR ASS'N, http://www.fairlabor.org/our-work (last visited Mar. 15, 2013). The "multi-stakeholder approach," a theory of corporate governance that demands organizations consider not only shareholders, but also employees, surrounding communities, and the environment in their decisionmaking, is detailed in Parts II and III of this Note.

21. *Labor Standards*, FAIR LABOR ASS'N, http://www.fairlabor.org/our-work/labor-standards (last visited Mar. 15, 2013). FLA's Code of Conduct is "based on International Labour Organization's standards and internationally accepted good labor practices." *Id.* The code outlines "Ten Principles of Fair Labor and Responsible Sourcing," which include: an employment relationship that safeguards minimum labor standards; nondiscrimination; a ban on harassment and abuse; a ban on forced labor; a

reporting on member companies, and supporting voluntary compliance efforts.[22] The consortium purports to distinguish itself from conventional auditors by identifying the systemic causes of sub-standard labor practices and recommending sustainable treatments, not emergency-room triage.[23] To diagnose Apple and Foxconn, the FLA conducted on-site audits of several of the Foxconn sites where Apple products are manufactured.[24] The FLA's President and Chief Executive Officer, Auret von Heerden, personally attended those initial inspections and declared, to a skeptical press, that Foxconn's "facilities are first-class" and "Foxconn is really not a sweatshop."[25] Several months later, the FLA released a two-and-a-half-page progress-verification report commending Foxconn's numerous successes at reducing employees' hours and improving working conditions.[26] The FLA made clear, however, that Foxconn still needed to hire "tens of thousands of extra workers" to ensure that these reforms were permanently institutionalized and not swept aside by impending market demands.[27]

Apple and Foxconn now faced a serious dilemma. Implementing the FLA's reforms had curtailed Foxconn's production capabilities, which were no longer sufficient to maintain Apple's production schedule for the highly anticipated and soon-to-be-released iPhone 5.[28] Consumers had pre-ordered the new devices in unparalleled numbers.[29] Investors carefully scrutinized the marketplace for signs that Apple would fail to meet earnings expectations.[30] With pressure mounting, Foxconn increased its

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ban on child labor; freedom of association; health, safety and environmental protections; restrictions on maximum hours; and minimum compensation. *Id.*

22. *Our Methodology*, FAIR LABOR ASS'N, http://www.fairlabor.org/our-work/our-methodology (last visited Mar. 15, 2013).

23. *Id.*

24. *Fair Labor Association Launches Independent Investigation of Foxconn*, FAIR LABOR ASS'N (Feb. 13, 2012), http://www.fairlabor.org/blog/entry/fair-labor-association-launches-independent-investigation-foxconn; *see* Barboza & Duhigg, *supra* note 19.

25. Steven Greenhouse, *Early Praise in Inspection at Foxconn Brings Doubt*, N.Y. TIMES (Feb. 16, 2012), http://www.nytimes.com/2012/02/17/business/early-praise-in-foxconn-inspection-brings-doubt.html.

26. *See Foxconn Verification Status Report*, FAIR LABOR ASS'N (Aug. 21, 2012), http://www.fairlabor.org/report/foxconn-remediation-verification; *Fair Labor Association Finds Progress at Apple Supplier Foxconn*, FAIR LABOR ASS'N (Aug. 21, 2012), http://www.fairlabor.org/press-release/foxconn_verification_report.

27. Barboza & Duhigg, *supra* note 19.

28. *See id*. (noting the existence of labor shortages following the implementation of the FLA reforms).

29. Josh Lowensohn, *Apple Says It's 'Blown Away' by iPhone 5 Preorders*, CNET (Sept. 14, 2012, 2:52 PM), http://news.cnet.com/8301-13579_3-57513424-37/apple-says-its-blown-away-by-iphone-5-preorders.

30. Henry Blodget, *In Case You Had Any Doubts About Where Apple's Profit Comes from . . .*, BUSINESS INSIDER (Aug. 2, 2012, 11:02 AM), http://www.businessinsider.com/iphone-profit-2012-8 ("[T]he difference between a 'hit' and a 'dud' iPhone 5 would likely be hundreds of dollars per share."); *see* Deborah Netburn, *Latest Rumor Pegs Apple's Debut of iPhone 5 in September*, L.A. TIMES (July 24, 2012), http://articles.latimes.com/2012/jul/24/business/la-fi-tn-iphone-5-coming-this-september-20120724 (discussing rumored iPhone 5 release dates and their impact on Apple's share value).

labor force—but almost certainly not in the manner that the FLA had desired. Droves of unpaid "interns," who were students at nearby vocational schools, were put to work on Foxconn's iPhone assembly lines against their will.[31] Foxconn claimed that the students were free to leave, but interviews conducted by China Labor Watch, a Chinese labor advocacy organization, made it clear that the students "don't want to work there—they want to learn."[32] Their teachers, however, informed them that if they did not work, they would not graduate.[33] Foxconn had also hired large groups of migrant workers, who often traveled thousands of miles at their own expense only to arrive and discover that the terms of their employment had been drastically altered to their detriment.[34] Tensions were high, frustration was building, and further deterioration of labor relations was imminent.

On September 23, 2012, over one thousand workers at the Foxconn facility in Taiyuan, a large industrial city in central China where iPhone components are allegedly made, waged an uprising against Foxconn's "security guards."[35] What Foxconn initially described as a large brawl between employees turned out to be a full-scale riot, and over five-thousand police officers were dispatched to quell the disturbance.[36] An online video purportedly showed police using a megaphone to address migrant workers, suggesting that the uprising was connected to their particular complaints.[37] Foxconn repeatedly denied the extent of the disturbance and made sure to communicate that "no production facilities or equipment ha[d] been affected."[38] Two weeks later, between three and four thousand employees at the Foxconn facility in Zhengzhou went on strike, protesting increased quality-control standards put in place after consumer complaints about the iPhone 5.[39] The FLA's van Heerden met again with reporters for *The New York Times* and said that he was "concerned about these recent reports, and we're following up."[40] In response to inquiries by *Forbes*, an "Apple spokesman declined to

31. Barboza & Duhigg, *supra* note 19.

32. *Id.*

33. *Id.* By the time *The New York Times* had reported on the existence of these internships, the FLA had already confronted the issue in its Foxconn Verification Report. *Foxconn Verification Status Report*, *supra* note 26, at Appendix 1.

34. David Barboza & Keith Bradsher, *Foxconn Shuts Plant in Wake of Worker Riot: Foxconn Has Struggled with Reports of Labor Abuse and Work Safety*, INT'L HERALD TRIB., Sept. 25, 2012, at 17, *available at* PROQUEST, Document ID 1069245886.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Associated Press, *Foxconn Denies Report of Unrest at iPhone Factory*, N.Y. TIMES (Oct. 6, 2012), http://www.nytimes.com/2012/10/07/business/foxconn-denies-report-of-unrest-at-iphone-factory.html.

40. Adams, *supra* note 6.

comment on the reports . . . but said that Apple's code of conduct tells suppliers they must comply with local labor laws."[41]

Apple's failed attempts to cure the defects in its global supply chain demonstrate how traditional attempts to voluntarily institute "corporate social responsibility"[42] have failed workers, consumers, communities, and the environment. Neither internally promulgated "codes of conduct," nor various permutations of external auditing could resolve the structural forces driving the unacceptable labor practices at Foxconn. The question, then, is: Why does Apple continue to use Foxconn's manufacturing services? According to former Apple executives, "there is an unresolved tension within the company: executives want to improve conditions within factories, but that dedication falters when it conflicts with crucial supplier relationships or the fast delivery of new products."[43] To be sure, Apple is but one of many high-profile, transnational corporations that have frequently encountered bleak working conditions in their supply-chain systems.[44] Even in the face of widespread, negative press, hegemonic corporate norms demand compliance with short-term profit forecasts because they derive from deeply set deficiencies in the legal structure of corporations and the laws that govern them. These symptoms cannot be treated on an incident-by-incident or even on a supplier-by-supplier basis.[45] While the FLA's auditing methodology suggests that the organization is cognizant of the fact that the causes of sub-standard labor practices are systemic in origin, their prescriptions are not nearly the panacea the FLA seems to believe. In fact, before the FLA even released its initial report, rumors swirled that Apple would be relocating its iPhone and iPad manufacturing from China to new ten billion dollar facilities that Foxconn was building in Indonesia, where prevailing wages for workers are one-third of what Chinese workers are now paid.[46] Since that time, Apple has pledged to move some of its computer manufacturing back to the United States,[47] but it remains to be seen whether Apple will actually implement this shift in production and on what scale it might do so.

The cautionary tale of Apple and Foxconn, which will be utilized as a case study throughout this Note, strikes at the heart of a long-standing debate in corporate legal theory about the purpose of corporations in

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41. *Id.*

42. *See infra* Part I.C.

43. Duhigg & Barboza, *supra* note 1.

44. *Id.* (referencing Dell, Hewlett-Packard, I.B.M., Lenovo, Motorola, Nokia, Sony, and Toshiba as having similar problems as Apple).

45. *See infra* Part I.A–B.

46. Tim Worstall, *Now Apple's Manufacturing Is Leaving China*, FORBES (July 24, 2012, 12:33 PM), http://www.forbes.com/sites/timworstall/2012/07/24/now-apples-manufacturing-is-leaving-china.

47. Catherine Rampell & Nick Wingfield, *In Shift of Jobs, Apple Will Make Some Macs in U.S.*, N.Y. TIMES, Dec. 6, 2012, http://www.nytimes.com/2012/12/07/technology/apple-to-resume-us-manufacturing.html?pagewanted=all&_r=0.

"liberal capitalist"[48] societies like the United States. During the Great Depression, a famous exchange between Adolf Augustus Berle and Edwin Merrick Dodd on the pages of the *Harvard Law Review* phrased the question thusly: Are corporations solely responsible to private ownership interests, or do they also possess obligations to benefit the general public welfare?[49] Lines were drawn in the intellectual sand between Berle's "shareholder primacy" theory and Dodd's "stakeholder theory" of corporate governance—the former embracing corporations as private property, the latter as an integral component of any comprehensive system of social welfare.[50] The future of corporate law and the culture of American business were at stake.

As Part I details, shareholder primacy theory triumphed in the courts, and the "shareholder wealth maximization norm," which made the promotion of shareholder returns the exclusive mandate of corporate decisionmaking, was unshakably ingrained into the corporate ethos.[51] The effects of this normative choice were enormous. Corporations now had carte blanche to focus only upon short-term considerations of profit at the expense of workers, consumers, communities, and the environment.[52] Although a variety of forms of corporate social responsibility emerged within American businesses as they were gradually sterilized of stakeholder-consideration norms, many were whitewashing and only a few proved beneficial.[53] Non-profit organizations flourished as a legally cognizable mechanism for socially minded consumers, investors, and management to channel their desire to provide charitable goods and services.[54] Progressive politicians attempted to remedy the socially irresponsible conduct of corporations through regulation, while also funding public goods and services through infrastructure projects and entitlement spending.[55] Some consumers attempted to educate themselves about socially responsible businesses and boycotted producers whose practices they found unethical.

48. Liberal capitalism is the manifestation of neoclassical economic theory, which promotes a normative framework of freedom of consumer choice and a descriptive framework of rational consumer choice. *See infra* Part I.A.

49. A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367–69 (1932); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147–48 (1932).

50. *See* Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1354–58 (2011).

51. *See infra* Part I.A.

52. *See infra* Part I.A–B. Although one does not have to conduct a sweeping historical search for evidence that businesses were not ever benevolent entities, this Note will contend that efforts by executives like Henry Ford that could have shifted the tide away from short-term thinking were stifled by the courts through the shareholder wealth maximization norm.

53. *See infra* Part I.C.

54. *See infra* Part I.C.

55. *See infra* Part I.C.

While the efforts of these disparate actors have provided temporary salves and partial solutions, the bifurcation of profit seeking and the public good caused by the shareholder wealth maximization norm has given us a broken and highly inefficient permutation of liberal capitalism. The problem with placing the entire burden of the public good on non-corporate entities is that consumers are often overwhelmed by information and litigation costs, the inability of non-profits to distribute dividends inhibits financing, and the government, whether state or federal, is often either too large to effectively implement programs at the local level or is preempted by lobbying.[56] When profit seeking and the public good are united, however, society will no longer need to rely so heavily on external corrective mechanisms to solve the "market failures" of the shareholder wealth maximization system.[57] Instead, the primary organizing entities of liberal capitalism—private firms—will have to constrain their own deleterious behavior and shoulder more of the load of providing beneficial public goods and services.

Part II analyzes how the purpose and structure of the "benefit corporation," the bipartisan, legislative result of a fascinating public-private partnership, reunites profit seeking and the promotion of the public good in a unitary, private business entity. Unlike traditional corporate social responsibility codes or non-profit organizations, the benefit corporation affirmatively mandates a hybrid purpose: profit and "material positive impact on society and the environment."[58] In short, benefit corporations aspire to the rallying cry of the "social entrepreneur"—to do well while doing good.[59] Benefit corporations provide precisely the kind of new business association through which consumers, investors, and management can channel their increasing demand for responsible business practices.[60] Part II concludes, however, by reviewing a series of criticisms that have been leveled at the substantive enforcement mechanism of the benefit corporation, a third-party auditing standard that benefit corporations self-apply to evaluate whether they are effectively implementing their duty to provide for the public good.

Part III concurs with these criticisms and proposes a simple statutory construction and litigation strategy that courts and plaintiffs could respectively apply to ensure that benefit corporations do not shirk their duty to the public—at least until the corporate form and its case law mature further. Through the express private right of action statutorily

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56. *See infra* Part I.C.

57. *See infra* Part I.C.

58. CAL. CORP. CODE § 14601(c) (West 2012). *See generally id.* §§ 14600–20.

59. Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 409 (2002).

60. *See infra* Part II.A.

identified as a "benefit enforcement proceeding," this Note contends that shareholders and dissenting directors can and should seek injunctive relief for breaches of the procedural "duty of consideration of non-shareholder interests" by the board of directors and the corporation. These suits would parallel procedural actions filed against federal actors under the National Environmental Protection Act ("NEPA")[61] in that they would only seek to enforce procedural consideration of non-shareholder interests, not particular substantive outcomes, because those would be governed by the highly deferential "business judgment rule."[62] Anticipating criticism about the high costs this would impose on benefit corporations, this Note argues that the lack of standing for third-party beneficiaries, statutory requirements that the action considered be "material," the fact that—as shareholders and directors—those with standing have monetary interests aligned with the corporation, and civil pleading requirements will restrain vexatious litigation while ensuring the proper enforcement of the duty of public benefit.[63]

This Note concludes by providing a few final thoughts on the future of the benefit corporation and how it could solve problems plaguing entities like Apple and Foxconn.

I. Shareholder Wealth Maximization Has Unsustainably Exacerbated the Impact of Market Failures

To understand why the shareholder wealth maximization norm has become intrinsic to American business, it is necessary to detail how shareholder primacy theorists and stakeholder theorists once competed for the soul of corporate governance and to document the triumph of the former over the latter in decisional law and persuasive authority. Although the descriptive model of shareholder primacy has ultimately been cast aside by modern corporate legal theorists, the shareholder wealth maximization norm that accompanied it has remained. As a result, American liberal capitalism has been transformed into a system in which the disparate interventions of non-profit organizations, private firms, the state, and consumers must join forces to perform the Sisyphean task of externally correcting for the market failures caused by the organizing conduct of corporations, instead of mandating that firms constrain their own behavior through internal mechanisms that are enforced by corporate litigation.

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61. 42 U.S.C. §§ 4321–70 (2006).

62. *See generally In re* Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006) (analyzing various approaches to the business judgment rule); *see also* Robert W. Hamilton et al., Cases and Materials on Corporations Including Partnerships and Limited Liability Companies 638–738 (11th ed. 2010).

63. *See infra* Part III.C.

A. Berle-Dodd and the Triumph of the Shareholder Wealth Maximization Norm

What is the purpose of corporate governance? Are corporations, as controlled by their directors and management, solely responsible to their shareholders who comprise the ownership of the entity? Or are corporations also responsible to their stakeholders—those whose lives are directly affected by the business's operations, such as employees, consumers, and local communities? Regardless of descriptive accuracy, which position has normative merit? The answer to these questions took shape in the debate between Berle and Dodd over eighty years ago.[64] To understand the facets of their arguments, it is critical to understand that the division between Berle's shareholder primacy theory and Dodd's stakeholder theory of corporate governance is the result of two competing descriptive and normative frameworks.[65]

Shareholder primacy theorists like Berle—who believe that traditional corporations are responsible solely to their owners—adhere to a "private property" conceptualization of the corporation.[66] The descriptive and normative components of this position are inextricably linked, at least as a matter of logical syllogism. Shareholders are, by definition, the only parties with an ownership stake in the corporate enterprise.[67] In exchange for their equity investment, shareholders should receive the entirety of the benefit from corporate pursuits, as profits are distributed by the board of directors through dividend payments.[68] Shareholder primacy theorists contend that this descriptive outcome is normatively justified because of the risk intrinsic to equity investments.[69] Given that shareholders could lose all of their money if the corporate venture becomes insolvent, they should be accorded the appropriate reward if and when the enterprise succeeds financially.[70] Moreover, because shareholder ownership is "passive," in the sense that shareholders rarely exercise any significant decisionmaking authority within a corporation,[71] directors and managers must function as the "mere stewards" of the shareholders' ownership interests.[72] In this way, the

64. Berle, *supra* note 49, at 1367–69; Dodd, *supra* note 49, at 1147–48.

65. *See, e.g.*, Berle, *supra* note 49, at 1367–69; Dodd, *supra* note 49, at 1147–48.

66. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 Cardozo L. Rev. 261, 264–65 (1992).

67. Hamilton, *supra* note 62, at 267–69.

68. Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 Wash. & Lee L. Rev. 1423, 1433–35 (1993).

69. *Id.*

70. *Id.*

71. Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 Wash. & Lee L. Rev. 1409, 1413 (1993).

72. Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 Iowa L. Rev. 1, 4–6 (2002). It is worth noting that Bainbridge is certainly not a shareholder primacy theorist in the sense

management's fiduciary duties of care[73] and loyalty[74] are analogous to those of a "trustee" and her "trust."[75] Therefore, directors and managers must have the sole duty of maximizing the profits delivered to the shareholders—within the constraints of the law—because that is in the "best interest" of the corporation.[76] Any other framework for governing director and management conduct would necessarily falter because the property management relationship at the heart of the corporation would be undermined.[77]

The descriptive private property model that undergirds shareholder primacy, however, has been extensively criticized and deconstructed by Stephen Bainbridge and other modern "contractarian" theorists.[78] Bainbridge conceptualizes the corporation not as private property, but as a "nexus of contracts" between the various constituencies of the corporation, with the board of directors sitting as the "nexus."[79] By doing so, Bainbridge and other contractarians have undermined the theoretical underpinnings of the shareholder wealth maximization norm. The private property model assumes that shareholders are the only constituency that matters in the eyes of the corporation; the corporation is their trust and the directorate is their trustee. The contractarian model, however, considers shareholders to be merely the parties to a corporation's equity contracts. Although the corporation may prioritize the shareholders over other constituent contracting parties by providing them with voting rights and a contingent interest in capital disbursements, shareholders are but one of many putative beneficiaries of the corporation's contractual obligations. In other words, corporations do not and should not function solely for their shareholders, but for all of their contractual constituents. Workers and consumers—through employment and purchase contracts—are also therefore stakeholders in the corporate enterprise. Granted, unlike their shareholders, corporations may not have indefinite contractual obligations with their employees or their consumers, but the fact remains that corporations still owe them certain obligations in conformity with their promises and the law. And although contemporary legal philosophy

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that he does not believe that shareholder primacy is an accurate descriptive model. For our purposes, however, Bainbridge is a defender of the shareholder wealth maximization norm, which is the normative extension of shareholder primacy.

73. *See* Model Bus. Corp. Act § 8.60 (2008) (stating that directors must not engage in self-dealing transactions and must serve the corporation's interests before their own).

74. *See id.* § 8.30(a) ("Each member of the board of directors, when discharging the duties of a director, shall act: (1) in good faith, and (2) in a manner the director reasonably believes to be in the best interests of the corporation.").

75. *See generally* Berle, *supra* note 49.

76. *See generally id.*; *see also* Principles of Corporate Governance: Analysis and Recommendations § 4.01(a) (1994).

77. *See generally* Berle, *supra* note 49.

78. *See, e.g.*, Bainbridge, *supra* note 72, at 3–8.

79. *Id.*

is far from recognizing communities and the environment as contractual constituents to corporate enterprise, corporations still possess negative legal duties toward both. Shareholder primacy theorists were thus too clever by half; the extremely passive nature of equity ownership exaggerates the diktat of the shareholder wealth maximization norm.

Despite that fact, Bainbridge maintains that shareholder wealth maximization is still an optimal norm of corporate governance.[80] He contends that if traditional corporate directors and managers are required to subsidize external constituencies—like employees and local communities—by ignoring the directive of shareholder wealth maximization, business will become highly inefficient and cost prohibitive.[81] Moreover, directors and management will take advantage of shareholders by reallocating corporate wealth to themselves by playing shareholder and non-shareholder interests off one another.[82] In sum, Bainbridge advances the commonplace notion that business simply cannot successfully operate without an exclusive and driving focus on short-term corporate profits. While maintaining efficiency is an entirely valid concern, Bainbridge and other proponents of shareholder wealth maximization set forth no empirical evidence to support the notion that alternative corporate-governance frameworks would necessarily falter. Shareholder wealth maximization was borne of a defunct descriptive framework, and Bainbridge's arguments amount to nothing more than post hoc justifications for maintenance of the status quo. But even if Bainbridge is correct that traditional corporations cannot function without the shareholder wealth maximization norm, this Note contends that is only proof we must embrace new corporate structures that permit consideration of non-shareholder interests.

To that effect, Dodd believed the corporation must be "tinged with a public purpose" because, at heart, the corporation is a "social institution."[83] The corporate form, he argued, is the byproduct of a bargain between the state and private actors to construct a vehicle for wealth creation that carries concurrent obligations to parties beyond its direct owners.[84] In exchange for limited liability and access to vast capital resources available on state-regulated stock exchanges,[85] corporations have

80. *See, e.g.*, Bainbridge, *supra* note 72, at 3–8.

81. Bainbridge, *supra* note 68, at 1433–35.

82. *Id.* at 1442 (describing the twin problems of "two masters" and "managerial sin," and stating that, as a result, the stakeholder model "is less likely to transfer wealth from shareholders to nonshareholder constituencies, as [Professor Ronald M. Green] apparently envisions, than it is to transfer wealth from both shareholders and nonshareholders to managers").

83. Allen, *supra* note 66, at 264–76; Dodd, *supra* note 49, at 1147–48.

84. Allen, *supra* note 66, at 264–76; Dodd, *supra* note 49, at 1147–48; *see* Larry E. Ribstein, The Rise of the Uncorporation (2010); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. Pa. L. Rev. 2063 (2001).

85. Robert A.G. Monks & Nell Minow, Corporate Governance 95 (1995).

not just a moral, but also a fiduciary, obligation to provide "the satisfaction of consumer wants, the provision of meaningful employment opportunities, and the making of a contribution to the public life of its communities."[86] Like their shareholder primacy counterparts, stakeholder theorists believe that their position is not only descriptively accurate, but also normatively justified.[87] Without consideration of non-shareholder interests, society and the environment will suffer the costs of production in the face of organizations that have the sole purpose of maximizing profit.[88] This problem will be further compounded as corporations leverage their vast resources to deregulate their business practices to increase profits, a logical byproduct of shareholder wealth maximization.[89] There can be little doubt that the result has been the construction of an unsustainable form of liberal capitalism.[90] One need not look far to understand how corporations have undermined the sustainability of our economic modality through political interference in the debates involving climate change,[91] increased criminalization and prison overcrowding,[92] and gun control,[93] to name but a few examples. Any increased profits enabled by shareholder wealth maximization are far outweighed by the costs traditional corporations have imposed on Americans and the world at large. It is, in fact, entirely consummate with capitalism's macroeconomic maxim of wealth creation to ensure sustainable market conditions through stakeholder considerations like effective resource management and ethical labor conditions.

Although the descriptive power of the shareholder primacy model collapsed over the course of the twentieth century,[94] the shareholder wealth maximization norm that accompanied shareholder primacy still

86. Allen, *supra* note 66, at 271; *see id.* at 264–76; Timothy L. Fort, *Corporate Constituency Statutes: A Dialectical Interpretation*, 15 J.L. & COM. 257, 263 (1995).

87. *See generally* Green, *supra* note 71.

88. *See generally id*.

89. *See* Frank René López, *Corporate Social Responsibility in a Global Economy After September 11: Profits, Freedom, and Human Rights*, 55 MERCER L. REV. 739, 753–54 (2004); *see also* Kelly v. Bell, 254 A.2d 62 (Del. Ch. 1969) (authorizing extensive payments by a corporation to a local government on the grounds that the entity had a long-term interest in the community and therefore the payments were justified by shareholder wealth maximization).

90. Dodd, *supra* note 49, at 1152; *see* Marshall M. Magaro, Note, *Two Birds, One Stone: Achieving Corporate Social Responsibility Through the Shareholder-Primacy Norm*, 85 IND. L.J. 1149, 1152 (2010).

91. Andrew C. Revkin, *Industry Ignored Its Scientists on Climate Change*, N.Y. TIMES, Apr. 23, 2009, http://www.nytimes.com/2009/04/24/science/earth/24deny.html?pagewanted=all&_r=0.

92. Adam Gopnik, *The Caging of America: Mass Incarceration and Criminal Justice in America*, NEW YORKER, Jan. 30, 2012, http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik.

93. Jordan Weissmann, *Whom Does the NRA Really Speak For?*, ATLANTIC, Dec. 18, 2012, http://www.theatlantic.com/business/archive/2012/12/whom-does-the-nra-really-speak-for/266373.

94. Bainbridge, *supra* note 72, at 3–8.

normatively won out the day.[95] To be sure, by the time that the Berle and Dodd debate took shape, the victory of shareholder wealth maximization had already been presaged by the seminal decision of *Dodge v. Ford Motor Company*.[96] Henry Ford, the prominent automobile industrialist, declared that as a matter of corporate policy, Ford Motor Company would invest all capital profits into hiring more workers, "to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes."[97] After shareholders filed a derivative suit, the Michigan Supreme Court ultimately held against Ford, stating:

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[98]

The language is striking: Directors work for shareholders exclusively. To that end, there can never be an action that results in the "reduction of profits." The only choice ever to be made is how to generate more capital. Without a doubt, the shareholder wealth maximization norm permits no other considerations but itself—it presents a bright-line for corporate governance.

The opinion in *Dodge* has stood the test of time, including the period of intense debate following the Berle-Dodd exchange: Most corporate legal theorists agree that the "theory of shareholder wealth maximization has been widely accepted by courts over an extended period."[99] Further decisional law has further ingrained the shareholder wealth maximization norm,[100] as seen most recently in the Delaware Chancery Court's holding in *eBay Domestic Holdings, Inc. v. Newmark*.[101] Although that case was decided in the context of a potential acquisition

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95. Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL'Y REV. 1, 8–9 (2008) ("[B]ecause of a mix of law, norms, and market dynamics, the touchstone of corporate success is the maximization of shareholder return. . . . On the whole, shareholder primacy is a fact of life in the United States in the early twenty-first century.").

96. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

97. *Id.* at 468.

98. *Id.*; *see* Ian B. Lee, *Corporate Law, Profit Maximization and the "Responsible" Shareholder*, 10 STAN. J.L. BUS. & FIN. 31, 34 (2005) ("The starting-point for any discussion of the case law is the 1919 decision of the Michigan Supreme Court in *Dodge v. Ford* . . . .").

99. STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 411–13 (2002); *see* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 825–28 (2012) (discussing how decisional law and persuasive authority have wholeheartedly adopted shareholder wealth maximization).

100. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985); *see* Rice v. Wheeling Dollar Sav. & Trust Co., 130 N.E.2d 442, 449 (Ohio 1954).

101. *See* 16 A.3d 1 (Del. Ch. 2010).

and various takeover defenses, the court was emphatic in its declaration that shareholder wealth maximization is the law of the Delaware courts.[102]

Some commentators, like Judd Sneirson and Julie A. Nelson, believe that the prominence of the norm is overstated.[103] Sneirson points to some opinions, like *Schlensky v. Wrigley*,[104] which have sought to temper the shareholder wealth maximization norm by permitting the consideration of non-shareholder interests in the short-term, such that long-term shareholder wealth is maximized.[105] The effect of these opinions, however, has been limited to operations that will ultimately benefit shareholders directly.[106] Nelson, an economist, denies the legal origins of the norm, contending that the only reason shareholder wealth maximization exists in practice is because "the idea was invented and has maintained its power to shape our thinking through mutually reinforcing historical, social, and political processes."[107] This is at best a question of the chicken and the egg. Nelson still admits that corporations continue to act as profit maximizers as a result of these metastructural forces.[108] But what we can take away from her criticism is "the belief that there is something intrinsic in the economic . . . structure of commerce that forces firms, inexorably, as if run on rails, to neglect values of care and concern in order to strive for every last dollar of profits" is fundamentally untrue.[109] Our system of corporate governance was a choice.[110]

B. How the Shareholder Wealth Maximization Norm Shifted the Burden of Market Failures from Private Firms to Non-Profits, the State, and the Public

The success of the shareholder wealth maximization norm engrained a fundamental understanding of the purpose of corporate governance in the United States. With corporations no longer able to consider non-shareholder interests and sterilized of any stakeholder-consideration norms, the American economic system of liberal capitalism was

102. *Id.*

103. Julie A. Nelson, *Does Profit-Seeking Rule Out Love? Evidence (or Not) from Economics and Law*, 35 Wash. U. J.L. & Pol'y 69, 71 (2011); Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 Iowa L. Rev. 987, 995–1017 (2009).

104. 237 N.E.2d 776, 776–81 (Ill. App. Ct. 1968).

105. Sneirson, *supra* note 103, at 71.

106. It is worth noting that the corporation at issue in the *Schlensky* litigation ultimately caved to shareholders' demands for profit maximization at the expense of concerns about the local community within fifteen years of the decision. Carrie Muskat, *Chicago Remembers 'Opening Night'*, Chi. Cubs MLB (Aug. 7, 2008, 10:00 AM), http://chicago.cubs.mlb.com/news/article.jsp?ymd=20080806&content_id=3267159&vkey=news_chc&fext=.jsp&c_id=chc (describing the interesting historical conclusion to the *Schlensky* saga).

107. Nelson, *supra* note 103, at 71–72.

108. *Id.*

109. *Id.*

110. *Id.*; *see* Roe, *supra* note 84, at 2065.

confronted with a serious dilemma: Who would shoulder the burden of its "market failures"? Before answering that question, it is necessary to detail the structure of liberal capitalism and the nature of market failures. Only then can the system of burden allocation that the shareholder wealth maximization norm created become apparent and available for criticism.

The normative tenet of liberal capitalism is that consumers and producers should be given the freedom to make their own economic choices in an open and deregulated marketplace.[111] Individual liberty and private property rights are thus the fundamental concerns of liberal capitalism; freedom of choice is the "why," and private property rights are the "how."[112] Wealth, the medium by which consumers acquire goods and services, is generated exclusively through the instrumentalization and exchange of land, labor, and capital by and between actors in the marketplace.[113] In order to operationalize these transactions, liberal capitalist societies, like the United States, rely on private, for-profit business associations, "firms," to organize the vast majority of their economic activity and allocate wealth, goods, and services to their populations.[114] As economist Ronald Coase famously explained, firms emerge "when it is efficient to substitute entrepreneurial fiat for the [existing] price mechanisms of the market," creating more effective mechanisms for distribution.[115] In other words, private commercial entities become economically viable when their method of production improves upon the status quo. According to the neo-classical economic model underpinning liberal capitalism, this system should result in total "allocative efficiency,"[116] whereby supply entirely meets demand.[117]

While there is no doubt that liberal capitalism has been a historical boon for the standard of living of many millions of its denizens,[118] its organizing entities have empirically failed to address certain shortcomings

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111. IAN ADAMS, POLITICAL IDEOLOGY TODAY 20 (1993).

112. *See id.*

113. WILLIAM CUNNINGHAM, THE GROWTH OF ENGLISH INDUSTRY AND COMMERCE 462–66 (5th ed. 1910).

114. Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 65–67 (2010); *see* R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 6 (1988) ("Most people in [liberal capitalist societies] are employed by firms, . . . most production takes place within firms, and . . . the efficiency of the whole economic system depends to a very considerable extent on what happens within these economic molecules.").

115. Bainbridge, *supra* note 72, at 17–18 (discussing R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 389 (1937) ("[T]he distinguishing mark of the firm is the suppression of the price mechanism.")).

116. ROBERT PITOFSKY ET AL., TRADE REGULATION: CASES AND MATERIALS 152–54 (5th ed. 2010).

117. Julie A. Nelson, *supra* note 103, at 72 ("The core model of mainstream economics, as it is taught in the United States and in many other countries, is the 'neo-classical' model in which autonomous, rational, self-interested, utility-maximizing individuals and profit-maximizing firms interact on 'perfectly competitive' markets. In such a hypothetical economy, all resources should end up being used in the most efficient way possible.").

118. *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

in this largely informal system of collective distribution.[119] The story of "market failures" is not new, but it bears repeating. Firms consistently undersupply, by any empirical measure, public or collective goods ("positive externalities") while simultaneously failing to internalize many costs that are imposed on outsiders as the result of production ("negative externalities").[120] The allocative efficiency of contemporary liberal capitalism is thus far from optimal.[121] It is important to detail what market failures look like in theory and practice to understand how the shareholder wealth maximization norm exacerbated an already flawed system of collective distribution. Such detail can also illustrate how we might help repair that system.

Positive externalities, like environmental repair, transportation infrastructure, or national defense, are not efficiently and satisfactorily produced as the natural byproduct of unregulated market economies.[122] A dearth of positive externalities occurs in part because firms are generally concerned that other firms, particularly competitors, will "free ride" on any contributions they make to the public good without contributing similarly.[123] For example, a firm may be unwilling to pay for a road through the town center near its manufacturing plant because, while beneficial for its own employees to get to work, it simultaneously benefits other nearby firms whose employees will similarly benefit from the construction and maintenance of the road. Even though the firm's incentive to increase worker productivity is aligned with the construction of a public good, it may still refuse to expend capital toward that end because its actions would subsidize competitors in the same way without any associated cost.[124] Moreover, in the process of acting in the name of the public good, a firm might believe that it is functionally redistributing its wealth to those without an ownership stake in the firm, arguably denying the risk bearers of the enterprise the fruits of their investment.[125] Similarly, firms may wish to invest their capital profits back into the firm in order to

119. 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, 170 (2012) ("The corporation today is often cast as villain instead of hero. At times it is framed as the exploiter of labor and destroyer of communities. At others, it is the insatiable consumer of natural resources. It may be seen as driven only by the need for growth and profit. Protected by limited liability and emboldened by vast capital resources, the corporation has legal personality, but presumably no interest in humanity.").

120. Katz & Page, *supra* note 114, at 60, 65–67 ("A market economy predictably under-produces certain urgent public or collective goods, such as a clean environment. It also perpetuates gross inequalities in resources among people and across regions.").

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *See* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970; *see also* Katz & Page, *supra* note 114, at 70.

expand their operational capacity or increase compensation for employees.[126] In a liberal capitalist economic system, firms have little structural incentive to contribute to the public good by producing positive externalities. The fact that firms are *prohibited* from creating positive externalities unless congruent with profit maximization is an outrageous decision to make.[127] That choice is disastrous because it theoretically apportions the entire burden of creating positive externalities onto non-corporate actors, while totally unburdening corporate actors—the primary organizing entities of the whole liberal-capitalist system.[128] To be sure, the state should maintain responsibility for the construction and maintenance of certain positive externalities like military defense. Privatization of these public goods and services would be highly problematic[129] because private firms should not be permitted to substitute their entrepreneurial fiat for the democratic political processes behind these projects. But that is no reason to prevent private firms from acting in the name of the public good as it pertains to conduct incidental to their business practices.

Firms also often externalize harmful production costs onto society without taking them into financial account, at least not as an initial matter. These are negative externalities.[130] For example, a firm that manufactures an industrial solvent may decide that rather than disposing of toxic chemical byproducts from its production process through appropriate channels, it could just dump the chemicals into a nearby public water supply without paying for disposal services. In this way, a firm avoids a necessary production cost from being calculated into its immediate financial bottom line, while pushing the cost onto third parties who will suffer from exposure to the toxic chemicals.[131] When common spaces are harmed as a result of negative externalities, the problem is known as "the tragedy of the commons"[132] because firms will not shoulder the burden of the positive externality of environmental cleanup in a framework of shareholder wealth maximization. Foxconn's dumping of hazardous waste in the local communities surrounding its manufacturing plant effectively illustrates what these kinds of negative externalities look like in practice.[133]

Negative externalities do not, however, have to be as invidious as the preceding example. In the interest of efficient operation, a firm could decide to replace large swaths of its workforce with cheaper automated machines. While this business decision may certainly increase the

126. HAMILTON, *supra* note 62, at 267–75.
127. *See supra* Part I.A.
128. *See infra* Part I.C.
129. Paul Krugman, *Prisons, Privatization, Patronage*, N.Y. TIMES, June 21, 2012, http://www.nytimes.com/2012/06/22/opinion/krugman-prisons-privatization-patronage.html?_r=0.
130. Katz & Page, *supra* note 114, at 60, 65–67.
131. *Id.*
132. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1248 (1968).
133. *See supra* Introduction.

profitability of the company, it might have the effect of decimating a local community that depends on that manufacturing base to supply its wealth. As a result, the community could fall into poverty—increasing crime and eroding the surrounding culture. The firm could not be said, however, to be culpable in the traditional criminal or tortious sense, at least under American law. As a matter of allocative efficiency, this outcome might not even be suboptimal. For instance, if greater wealth is generated such that more highly skilled, higher-paid positions are created, one could easily argue that this is a positive externality of innovation and not a negative externality at all. That being said, there are also hypothetical situations in which a manufacturing plant is moved from a community that is highly dependent on it for jobs, to another community that has a diverse source of employment, merely to take advantage of a lower corporate tax rate. But what is important is that firms operating under the guise of the shareholder wealth maximization norm cannot decide which outcome is ethically superior because the decreased tax rate, keeping all other variables constant, would be dispositive. The norm does not permit the intentional reduction of profits. And although the jobs created for Chinese workers may have increased their standard of living as compared to the largely agrarian jobs that they possessed before,[134] the jobs Apple created in China necessarily came at the cost of positions with higher labor standards elsewhere. For this reason, there may be nothing per se unethical about outsourcing. But, at some point, the deontological right to ethical labor conditions must trump utilitarian gains. Otherwise, the shareholder wealth maximization norm will continually drive labor standards lower and lower, as workers compete for less and less.

Further, negative externalities create a negative feedback mechanism in which the harms they inflict increase demand for their corresponding positive externalities, further increasing the market price of public goods.[135] For example, the more damage one does to local environments, the more scarce clean environments become, which drives up the cost of using clean space. And as corporations have grown increasingly multinational, a "race to the bottom" is well underway, as entities seek out locations with the lowest regulatory standards.[136] Foxconn's reported transfer of Apple production facilities from China to Indonesia is one such example. Why does this happen? Because countries with low regulatory standards are the cheapest options, and the shareholder wealth maximization norm dictates firms find loopholes and ways around compliance with the ethical decisions underlying more stringent regulations. Apple's need for the

134. Tim Worstall, A*pple and Foxconn Are the Best Thing That's Ever Happened to Chinese Labour*, FORBES, Nov. 30, 2012, http://www.forbes.com/sites/timworstall/2012/11/30/apple-and-foxconn-are-the-best-thing-thats-ever-happened-to-chinese-labour.

135. Katz & Page, *supra* note 114, at 65–67.

136. López, *supra* note 89, at 753–54.

cheapest and most scalable production facilities virtually required it to attain Foxconn's supply chain services under that paradigm of business.[137]

Without proper intervention, it is clear that the shortage of public goods and services and the abundance of harms caused by market failures threaten to undermine sustainable development on a global scale.[138] From deleterious changes to communities, to the degradation of ecosystems necessary to sustain life as we know it, there may be a point of no return looming on the horizon.[139] The shareholder wealth maximization norm has exacerbated this risk by handicapping the primary economic actors from manifesting ethical changes in the market. Our liberal capitalism is a broken distributive system.

C. Public and Private Interventions into the Marketplace Have Been Inadequate

In recognition of the structural gap left by liberal capitalism and later widened by the shareholder wealth maximization norm, public and private non-corporate entities have made interventions into the marketplace to provide positive externalities and help administer remedies for negative externalities.[140] In many ways, this was a logical byproduct of the bifurcation of profit seeking and providing for the public good in firms. The assistance that these disparate public and private actors have provided is best considered as an external corrective mechanism; their actions are meant to correct for the acts and omissions of third parties in the context of market failures. Corporate entities, for their part, have adopted voluntary codes of corporate social responsibility for a variety of reasons and in a variety of forms.[141] Corporate social responsibility is an example of an internal corrective mechanism because it is enacted by corporations as a measure of preventative care for non-shareholder interests. While corporate social responsibility, especially when exercised in conjunction with "constituency statutes," might appear to be sufficient to remedy market failures without the assistance of corporate entities, in practice this has not held true.[142] After briefly reviewing the various external and internal corrective responses to market failures in our system—principally addressing non-profit organizations and consumers, the government, and private firms operating under the guise of corporate social responsibility—this Note contends that there is a better alternative, as explained in Part II.

137. Duhigg & Barboza, *supra* note 1.

138. Katz & Page, *supra* note 114, at 60, 65–67. *See generally* Green, *supra* note 71.

139. Judd F. Sneirson, *The Sustainable Corporation and Shareholder Profits*, 46 Wake Forest L. Rev. 541, 542–44 (2011).

140. Katz & Page, *supra* note 114, at 60, 65–67.

141. *See, e.g.*, López, *supra* note 89, at 753–54.

142. Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 Ann. Surv. Am. L. 85, 85 (1999).

Non-profit organizations are one manner in which private actors can avoid the constraints of the shareholder wealth maximization norm while seeking to provide positive externalities in a formalized legal construct.[143] These organizations function as a line of defense for marginalized segments of society and attempt to provide undersupplied public, as well as "mixed," goods and services.[144] Non-profit organizations can function in several different capacities: They may serve to reduce information asymmetries for consumers by providing information about suppliers, they may merely provide public goods and services in a donative capacity, or they may sell commercial goods to raise money for other donative efforts.[145] In order to understand how non-profit organizations are structurally enabled to accomplish those goals—but ultimately fall short of being a comprehensive corrective mechanism—it is important to discuss their structural characteristics.

Non-profit organizations have no traditional "ownership" characteristics, passive or otherwise.[146] In this way, non-profit organizations do not suffer from the risk of inculcating notions of private property that control the traditional corporation. Non-profit organizations are also united by their "other-regarding orientation,"[147] making them theoretically antithetical to for-profit enterprise. In exchange for tax-exempt status,[148] however, non-profit organizations must not pay out any dividends to shareholders.[149] This is known as the "non-distribution constraint."[150] Economics and law professor Henry Hansmann considers the non-distribution constraint to be the "critical and defining characteristic"[151] of the non-profit organization.[152] Non-profits generating an operating profit also have an affirmative duty to distribute that capital to advance the organization's charitable interest.[153] While non-profit organizations help to provide a significant safety net, especially in the context of purely public, non-commercial goods, there are several deficiencies in their legal structure that do not render them a totally effective external corrective mechanism for market failures. Most problematically, the non-distribution constraint makes non-profit organizations an unattractive proposition for

143. Katz & Page, *supra* note 114, at 69.
144. *Id.* (explaining that "mixed" goods and services are commercial goods or services that are used to finance other donative measures implemented by the non-profit organization).
145. *Id.* at 71–77.
146. *Id.* at 67.
147. Dana Brakman Reiser, *Charity Law's Essentials*, 86 NOTRE DAME L. REV. 1, 7–8 (2011).
148. I.R.C. § 501(c)(3) (2006); *see* Reiser, *supra* note 147, at 7–13.
149. Reiser, *supra* note 147, at 7–13.
150. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980).
151. Katz & Page, *supra* note 114, at 67.
152. Hansmann, *supra* note 150, at 838.
153. Reiser, *supra* note 147, at 8–9.

investment.[154] Without proper financing, non-profit organizations are left to sell commercial goods in an attempt to remain operationally sustainable.[155] This makes the provision of purely public goods costly and reliant on donations for support.[156] More importantly, as an external corrective mechanism, non-profit entities do not provide anything more than a hopefully enduring band-aid for the problem of market failures.

"Corporate social responsibility" is an attempt by traditional corporations to have the best of both the private and non-profit worlds: shareholder wealth maximization and simultaneous adherence to moral obligation.[157] Through voluntarily instated codes of conduct, corporations like Apple have attempted to end the Berle-Dodd debate permanently by limiting negative externalities and providing for the public good, while still operating under the guise of shareholder wealth maximization.[158] From the outset, it is worth noting that there is no consensus for a general definition of corporate social responsibility.[159] "[W]hilst some see it as a management trend, others view it as a framework of 'soft regulation' that places new demands on corporations, whilst others present it as a way for corporate actors to assist in the social and economic development."[160] In truth, corporate social responsibility takes all of these forms in the spectrum of its implementation. Some corporate actors probably have sincere commitments to sustainable business practices and are successful in doing so. Others who share this same commitment are less successful, ultimately turning a blind eye to violations of their codes.[161] One problem, as illustrated by the story of Apple and Foxconn, is that voluntary attempts at corporate social responsibility become obfuscated by the shareholder wealth maximization norm.[162] If the ethical principles underlying the code of conduct begin to conflict with meeting investor expectations, the corporation will often turn its back on the code.

Another traditional response to the deficiencies of bifurcating profit seeking and the public good has been governmental intervention into the marketplace.[163] One could even say that escaping the deleterious effects of liberal capitalism and the shareholder wealth maximization norm has been

154. Katz & Page, *supra* note 114, at 71–77.

155. *Id.*

156. *Id.*

157. Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 348–49 (2009).

158. *Id.*

159. *See, e.g.*, Abagail McWilliams et al., *Corporate Social Responsibility: Strategic Implications*, 43 J. MGMT. STUD. 1, 8 (2006).

160. Andrew Crane et al., *The Corporate Social Responsibility Agenda*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 3, 5 (Andrew Crane et al. eds., 2008).

161. *See supra* Introduction.

162. *See supra* Part I.A–B.

163. *See* Bainbridge, *supra* note 68, at 1431–32.

the sole preoccupation of the social-welfare state since the mid-twentieth century. When the state intervenes on behalf of its undersupplied or harmed populations, it either legally regulates the conduct of private business entities to deter or encourage certain behavior, or provides goods, services, or wealth directly to individuals as compensation for their socioeconomic standing.[164] Entitlement programs and other forms of social welfare are questionably effective as anything other than a pure stop-gap for harm to the most undersupplied and marginalized populations. While this is undoubtedly an important function, welfare in and of itself will not correct the deficiencies of the market; it is merely another band-aid. Through legislation, the government can create substantive laws, such as tort liability and employment codes, to reign in the conduct of corporate entities. But while laws may check the extent of the abuse in the construction of blatant negative externalities,[165] more subtle examples, such as those outlined in Part I.B, are left unaddressed. Moreover, consumer litigation is expensive, information costs are high, and consumers are often ill-equipped to redeem their rights.[166] These information and resource asymmetries are further compounded by corporations that attempt to deregulate their fields in order to continue to expand upon shareholder wealth.[167]

Like Bainbridge, some corporate legal theorists believe that external remedies via the political process and the judicial system effectively remedy market failures stemming from the shareholder wealth maximization norm.[168] While state oversight is undoubtedly important to ensure compliance with legal remedies, the preventative care embodied in the notion of internal corrective mechanisms seems logically preferable to primary reliance on state action. For one thing, enforcement through litigation requires the violation of a right.[169] Where a recognized right exists, the best case outcome involves the courts adjudicating a remedy for the injury through an award of compensatory or equitable remedies.[170] Where no recognized right exists, the injured party is left to appeal to the political process in order to establish a right for future, putatively injured parties. While Bainbridge believes that external corrections are more than sufficient to secure an equitable social outcome,[171] the fact of the matter is that in both scenarios, harm occurs. The clear theoretical alternative is a system of corporate law that embraces preventative care through internal

164. *See* Katz & Page, *supra* note 114, at 71–77.
165. *See* Bainbridge, *supra* note 68, at 1431–32.
166. *See* Green, *supra* note 71, at 1420–21.
167. *See* López, *supra* note 89, at 753–54.
168. Bainbridge, *supra* note 68, at 1431–32.
169. *See, e.g.*, Marbury v. Madison, 5 U.S. 137 (1803).
170. *See id.*
171. Bainbridge, *supra* note 68, at 1431–32.

corrective mechanisms that seek to prevent harm from happening in the first place by instituting a structural change within the entity.

In fact, the idea of permitting and incentivizing preventative care within the structure of corporations is not a new one. Constituency statutes, which permit traditional corporations to consider non-shareholder interests, were the most heralded governmental intervention into the marketplace of recent years for this reason. These statutes were introduced primarily in response to the once-accelerating threat of hostile takeovers that came to prominence in the late twentieth century.[172] In the event that hostile investors made a tender offer to the shareholders in order to seize control of the company and then, for instance, to slash employment to pay off their leveraged debt, existing management could justify actions to quash the takeover with constituency statutes.[173] Many hoped that constituency statutes would expand from these humble beginnings to affirmatively alter the structure of corporate governance from the Berle model toward the Dodd model, the construction of a larger internal corrective mechanism. In the end, however, constituency statutes failed to achieve much change because they were confined in use to the context of takeover defenses. Even in that context, constituency statutes often were used as a mechanism to enable the entrenchment of existing management, rather than to defend other stakeholder interests.[174] As Jonathan Springer, the preeminent scholar on constituency statutes, noted, "if there is any fundamental change in corporate law that will address constituency interests, it will be only as the result of a direct engagement of the legal and economic underpinnings of corporate law."[175] To implement a multi-stakeholder approach to corporate governance, corporate reformers must challenge the shareholder wealth maximization norm outright.

That being said, we must still consider the role of consumers as the ultimate external corrective mechanism for market failures. Because consumer demand largely drives the conduct of firms within the liberal capitalist system, consumer action presents a unique engine for change.[176] One inference that could be drawn from Apple's cautionary tale is that consumer demand has finally reached an inflection point at which the malfeasance and nonfeasance of corporate pasts, whether foreign or domestic in nature, shall no longer be tolerated.[177] Despite the fact that the purported abuses were extraterritorial in nature, it was American

172. HAMILTON, *supra* note 62, at 267–75.

173. *Id.*

174. Springer, *supra* note 142, at 85.

175. *Id.* at 124.

176. *See supra* Part I.A.

177. Duhigg & Barboza, *supra* note 1; *see* Clark & Babson, *supra* note 96, at 822 (discussing the rise of socially responsible investment funds).

consumers who mobilized to protest the actions of Apple and Foxconn.[178] To that effect, recent polls have shown that sixty-eight million American consumers have stated that they make purchasing decisions "based upon their sense of social and environmental responsibility,"[179] and forty-nine percent have said that they will punish a company for socially irresponsible behavior by boycotting their goods and/or services.[180] Moreover, mechanisms for alerting consumers of corporate misdoing are more efficient and transnational than ever, with crowd-sourced, non-profit petition organizations like change.org galvanizing a host of highly effective protests and boycotts against previously unchallenged governmental and private conduct.[181] This synergy between consumers and non-profits significantly reduces information asymmetries, increasing the effectiveness of both. Consumers have further harnessed their burgeoning social philosophy by transforming their purchasing power into business investments. Socially conscious investors now control over $2.3 trillion, which equates to approximately ten percent of all managed assets in the United States.[182]

Certainly, these alterations to consumer demand and investment philosophy are positive developments for external corrective mechanisms. The fact remains, however, that consumers alone will not be able to remedy the structural shortcomings of for-profit business associations. Unless and until the state provides new corporate forms for private firms to channel the demand for more socially responsible and sustainable business conduct, companies like Apple will continue to effectuate deleterious externalities outside the scope of American labor and environmental law. Voluntary codes of conduct, the only recourse to the public good available to traditional corporations, will continue to fail. And despite the significant deterrence regime that consumers, non-profit organizations, and the state have constructed, external corrective mechanisms can only go so far to protect and supply the public good. If harm occurs as a result of corporate decisionmaking, there is a significant lag time between the deleterious conduct and the public's ability to constrain that behavior, assuming that the harmful conduct is ever noticed at all. Only a complete restructuring of the corporate legal entity that alters both the pattern of corrective action and the manner in which companies do business will construct a more sustainable form of liberal capitalism that fairly apportions the burden of market failures.

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178. *See supra* Introduction.

179. Clark & Babson, *supra* note 99, at 819–20.

180. Sheila M.J. Bonini et al., *The Trust Gap Between Consumers and Corporations*, 2 McKinsey Q. 7, 10 (2007).

181. *See* change.org, http://www.change.org (last visited Mar. 15, 2013).

182. Soc. Inv. Forum Found., 2010 Report on Socially Responsible Investing Trends in the United States (2010).

II. Change from Within: Social Entrepreneurship and the Benefit Corporation

The future of private business firms in liberal capitalist societies stands at a crossroads. Despite the many valiant efforts of non-profits, corporate social responsibility programs, government intervention, and consumer action, there exists a much more efficient and far less costly solution to the problem of market failures. Recent developments have reflected a growing consensus that, regardless of whether traditional corporate forms are permitted or obligated to pursue moral courses of action that are beneficial to the public good, business entrepreneurs should be provided an outlet in which it is unquestioned that they are allowed and, in fact, commanded to do so. As noted above, this desire has been undergirded by a chorus of consumer and investor voices that believe the current state of corporate law has doomed non-corporate entities to shoulder the entire burden of market failures.[183] The only way to ensure sustainable development on a global scale is to build the consideration of non-shareholder interests into the very legal structure of the corporation.[184] Even Berle himself ultimately agreed that, when "a convincing system of community obligations is worked out . . . the passive property rights of today must yield before the larger interests of society."[185] Leaving enforcement to external corrective mechanisms like consumer boycotts, non-shareholder litigation, and non-profit organizations is an inefficient system that fails to construct adequate deterrence and incentive measures for corporate entities. It is time to reunite the bifurcated pursuit of profit and the public good. We can do so by enabling consumer demand to flow into the benefit corporation.

A. Social Entrepreneurship Challenges Shareholder Wealth Maximization

In recognition of the market and legal deficiencies noted in Part I, leading academics and businesspeople have issued a clarion call to envision a structural change to our methods of production. When former Chairman of Microsoft Bill Gates called for the construction of "a more creative capitalism" in a highly visible speech at the commencement of Harvard University,[186] Nobel Laureate Mohammed Yusef responded with his articulation of dual-purpose business associations.[187] Yusef's theoretical

183. *See supra* Part I.C.

184. Springer, *supra* note 142, at 124.

185. Adolf A. Berle, Jr. & Gardiner C. Means, The Modern Corporation and Private Property 356 (1932).

186. *See* Barbara Kiviat & Bill Gates, *Making Capitalism More Creative*, Time Mag. (July 31, 2008), http://www.time.com/time/magazine/article/0,9171,1828417,00.html.

187. *See* Vikas Bajaj, *Out to Maximize Social Gains, Not Profit*, N.Y. Times (Dec. 9, 2006), http://www.nytimes.com/2006/12/09/business/worldbusiness/09yunus.html?pagewanted=all&_r=0.

model seeks to serve both profitability and public benefit— what has been deemed a "blended enterprise."[188] Blended enterprises have received much attention recently because they provide a break from the pitfalls of the shareholder wealth maximization norm.[189] And as evidenced by the rise of "social entrepreneurship," there is sufficient management interest to implement modifications to traditional corporate practice.[190]

Social entrepreneurs primarily seek to avoid the pitfalls of the shareholder maximization norm by allowing management to form dual-purpose business entities: corporate forms that pursue both profit and the public good.[191] As a corollary to their desire to provide both profitability and positive externalities, social entrepreneurs have also embraced attempts to engage in a more accurate accounting of the holistic effects of their businesses.[192] Where traditional business associations merely measure their assets against their liabilities in determining profitability, social entrepreneurs have attempted to price the value of their social and environmental externalities into their financial reporting.[193] In this way, the true impact of business associations on market failures is directly known to the board of directors, shareholders, and society at large, who can then structure their consumer and investment decisions based upon a more robust theory of corporate accounting.[194]

A new generation of "hybrid corporations" has been passed into law in a number of states, and the most recent addition to this class of business associations is the benefit corporation. This Note will now analyze the rise of the benefit corporation,[195] a hybridized corporate entity that mandates both the pursuit of profit and material contribution to the public good, as a possible solution to the quagmire of shareholder wealth maximization and sustainable development.[196] While the benefit corporation is not the only attempt at constructing a legal form for blended enterprise, this Note will not attempt to discuss the various benefits and deficiencies of other new hybrid entities like the low-profit limited liability company[197] and the flexible purpose corporation.[198] Instead, this Note will focus on

188. Dana Brakman Reiser, *Governing and Financing Blended Enterprise*, 85 CHI.-KENT L. REV. 619, 619 (2010).

189. *Id.* at 644–45.

190. *See* Page & Katz, *supra* note 50, at 1351; Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 591 (2011).

191. *See* Page & Katz, *supra* note 50, at 1353.

192. Katz & Page, *supra* note 114, at 86–87.

193. *Id.*

194. *Id*.

195. *See, e.g.*, CAL. CORP. CODE §§ 14600–31 (West 2012) (California's benefit corporation statute).

196. *See id*.

197. *See, e.g.*, J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1 (2011).

198. CAL. CORP. CODE §§ 2600–05.

how to ensure that benefit corporations can fulfill their stated dual-purpose aspirations.

B. The Benefit Corporation: Allowing Private Firms to Take Back Responsibility

Although it came from humble beginnings as a project of the non-profit organization B Lab,[199] the benefit corporation has surged to the forefront of cutting-edge corporate legal theory. Within the last two years, benefit corporation legislation has been signed into law in California,[200] Hawaii,[201] Maryland,[202] New Jersey,[203] New York,[204] Vermont,[205] and Virginia.[206] Benefit corporation legislation has been introduced in five additional states,[207] and several more legislative proposals are expected to be introduced this year.[208] It is worth noting that benefit corporations have been approved by state legislatures in unanimous and bipartisan votes[209] and have received a great deal of positive media attention.[210] Businesses have also been highly receptive to the benefit corporation model, and not just small, traditionally non-profit entities. Patagonia, the well-known clothing manufacturer, which had over $270 million in revenues in 2011, was one of the first twelve businesses to incorporate under the benefit corporation statute in California.[211]

Benefit corporations are dual purpose, blended entities, adhering to the mold of Dodd's social enterprise theory and the social entrepreneurship movement, with a legal structure that embraces both the

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199. *The Non-Profit Behind B Corps*, B Corporation, http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps (last visited Mar. 15, 2013). The model legislation was drafted by William H. Clark, Jr., a partner at the law firm of Drinker, Biddle, & Wreath LLP. *See 2010 B Corp MVP: Bill Clark*, B Corporation, http://bcorp.nonprofitsoapbox.com/component/content/article/12-blog/249-2010-b-corp-mvp-bill-clark (last visited Mar. 15, 2013).

200. Cal. Corp. Code §§ 14600–31 (West 2012).

201. S. 1462, 26th Leg., Reg. Sess. (Haw. 2011).

202. Md. Code Ann., Corps. & Ass'ns § 5-6C-01 (West 2011).

203. N.J. Stat. Ann. § 14A:18 (West 2011).

204. N.Y. Bus. Corp. Law §§ 1701–09 (McKinney 2012).

205. Vt. Stat. Ann. tit. 11A, § 21.02 (2011).

206. Va. Code Ann. § 13.1-782 (2011).

207. 805 Ill. Comp. Stat. 180 § 1-26 (2010); S.B. 11-005, 68th Gen. Assemb., Reg. Sess. (Colo. 2011); S. 360, 96th Leg., Reg. Sess. (Mich. 2011); S. 26, 2011 Gen. Assemb., 2011 Sess. (N.C. 2011); H.R. 1616, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); H.R. 1578, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); S. 433 195th Gen. Assemb., Reg. Sess. (Pa. 2011).

208. Clark & Babson, *supra* note 99, at 818.

209. *See, e.g.*, *New York Votes*, S. 79A 235th Leg., Reg. Sess. (N.Y. 2012) (unanimous approval in the Senate, 62–0, and the Assembly, 139–0); *New Jersey Votes*, S. 2170 214th Leg., Reg. Sess. (N.J. 2011) (unanimous approval in the House of Representatives and the Senate).

210. *See* Tina Rosenberg, *Ethical Businesses with a Better Bottom Line*, N.Y. Times (Apr. 14, 2011, 9:00 PM), http://opinionator.blogs.nytimes.com/2011/04/14/ethical-businesses-with-a-better-bottom-line.

211. *Firms with Benefits*, Economist (Jan. 7, 2012), http://www.economist.com/node/21542432.

pursuit of profit and the material enhancement of the public good.[212] This general legal structure provides a benefit corporation with two distinct advantages over non-profits and traditional corporate entities. First, unlike non-profits, the board of directors may issue dividend payments to shareholders.[213] Escaping the non-distribution constraint is essential to accessing sufficient financing to compete with traditional corporate entities, while also attracting management talent who desire wealth.[214] Second, the benefit corporation also possesses an affirmative statutory mandate to pursue the general public benefit, in addition to any specific public benefits included within the articles of incorporation.[215] This enables benefit corporations to transcend the efforts of corporate social responsibility because they are manifestly enabled to construct positive externalities.

The express statutory purpose of the benefit corporation is to distance itself from the shareholder wealth maximization norm that has dominated traditional corporations, to increase transparency in corporate decisionmaking, and to increase accountability for promised social outcomes.[216] To accomplish these three distinct goals, the statutory language mandates several critical changes to the corporate legal structure. First, the corporate entity has the express purpose of creating a "material positive impact on society and the environment."[217] Second, a benefit corporation is required to publish an "annual benefit report" that details the corporation's "overall social and environmental performance" using an independent, third-party standard of valumetrics.[218] Third, the board of directors is assigned an expanded fiduciary duty that requires consideration of interests in addition to the financial interests of its shareholders[219] during the process of corporate decisionmaking. Each of these alterations shall be considered using the California version of the legislation as a template.[220]

1. *Public and Private Purposes of the Benefit Corporation*

The statutory language that creates benefit corporations provides that the purpose of the benefit corporation is to create "general public benefit,"[221] in addition to any "specific public benefit"[222] that the articles of

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212. Clark & Babson, *supra* note 99, at 839–42.
213. *Id*.
214. *Id*.
215. *Id*.
216. *Id*. at 818–19, 838.
217. Cal. Corp. Code § 14601(c) (West 2012).
218. *Id*. §§ 14601(g), 14621, 14622.
219. *Id*. § 14620(b).
220. The California statute is identical to the other versions of the statute enacted in other jurisdictions.
221. Cal. Corp. Code §§ 14601(c), 14610; Clark & Babson, *supra* note 99, at 839.

incorporation are drafted[223] or amended[224] to include. The legislation provides a non-exhaustive list of potential specific public benefits including: providing low-income or underserved individuals or communities with beneficial products or services, promoting economic opportunity for individuals or communities beyond the creation of jobs in the ordinary course of business, preserving the environment, improving human health, promoting the arts, sciences, or advancement of knowledge, increasing the flow of capital to entities with a public benefit purpose, and accomplishing any other particular benefit for society or the environment.[225] In other words, the benefit corporation permits the construction of some of the most undersupplied positive externalities in our system of liberal capitalism.

The breadth of the scope of the specific public benefits would allow most large, publicly held entities to function as benefit corporations, such as Apple (advancement of the sciences), Google (advancement of knowledge), or Paramount Studios (advancement of the arts). The articulation of a specific public benefit, however, cannot replace the requirement of the general public benefit.[226] This is to prevent a hypothetical company from advancing science, but doing so, for instance, through the exploitation of child labor.[227] General public benefit is defined as a "material positive impact on society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation."[228] What constitutes a "material positive impact" is left undefined, but it is rather clearly a function of the third-party standard.[229]

The third-party standard is a "standard for defining, reporting, and assessing overall corporate social and environmental performance," with strict qualification standards that define which external entities can develop a valumetric standard for the benefit corporation.[230] Specifically, the third-party standard must be constructed by a wholly independent entity that has "no material financial relationship with the benefit corporation" and is not "materially financed" by other companies operating within the specific industry of the benefit corporation. Substantively, the third-party standard must be a "comprehensive

222. CAL. CORP. CODE § 14601(e).
223. *Id.* § 14602.
224. *Id.* § 14610(d) (providing that the articles of incorporation of a benefit corporation may be amended to include specific public benefit purposes).
225. *Id.* § 14601(e)(1)–(7).
226. Clark & Babson, *supra* note 99, at 842.
227. *Id.*
228. CAL. CORP. CODE § 14601(c). *But see* N.J. STAT. ANN. §§ 14A:18 (West 2011) (no third-party standard).
229. *See* Clark & Babson, *supra* note 99, at 839.
230. CAL. CORP. CODE § 14601(g).

assessment" of the considerations mandated by the expanded fiduciary duties of the board of directors[231] and must apply a "balanced multistakeholder approach."[232] As Clark and Babson note, unlike "in the financial area, where standardized conventions for reporting financial performance have developed, there does not yet exist a standard way to report on social and environmental performance."[233] That being said, there are purportedly a wide variety of third-party standard-setting organizations that meet the substantive and conflict of interest qualifications set forth in the statute.[234] Moreover, there is a "public comment period," in which members of the general public may provide suggestions for how to develop the standard.[235] The ultimate third-party standard adopted must remain "publicly available" and include the "criteria considered," the "relative weightings assigned to the criteria," the identities of the directors, officers and third-party standardmaker, the process by which revisions are made, and an "accounting of the sources of financial support for the entity."[236]

2. *Auditing and Reporting Requirements*

The second critical innovation of the benefit corporation is the requirement of publication of an "annual benefit report."[237] The annual benefit report, prepared by the board of directors and in the board's opinion, must state whether the benefit corporation "failed to pursue its general, and any specific, public benefit purpose in all material respects" in light of its third-party standard.[238] If so, the board must specify how it failed.[239] Furthermore, the annual benefit report must include the "process and rationale for selecting the third-party standard," "the ways in which the benefit corporation pursued any specific public benefit," and "any circumstances that have hindered the creation" of any general or specific public benefit in a "narrative" format.[240] What is most critical about the provisions of the annual benefit report, however, is that the ultimate assessment of the social and environmental impact of the benefit corporation, via the third-party standard, is not an externally applied

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231. *Id.* § 14601(g)(1) (referencing CAL. CORP. CODE § 14620(b)(2)–(5), which sets out a non-exclusive list of non-shareholder interests that must be considered by the board of directors).

232. *Id.* § 14601(g)(3).

233. Clark & Babson, *supra* note 99, at 842.

234. *Id.* at 845–47 (discussing the apparent efficacy of third-party standard-setting organizations such as The Global Reporting Initiative, GreenSeal, Underwriters Laboratories, ISO2600, Green America, and B Lab, among others).

235. CAL. CORP. CODE § 14601(g)(3)(B).

236. *Id.* § 14601(g)(4)(A)–(E).

237. *Id.* §§ 14621, 14630.

238. *Id.* § 14621(a).

239. *Id.* § 14621(b).

240. *Id.* § 14630.

auditing mechanism.[241] Instead, the benefit corporation, through the board of directors, must apply the standard to itself.[242] Whether the self-application of third-party valumetrics will be successful in curtailing the traditional excesses of profit maximization is a separate question, discussed below.[243]

3. *The Directorate's Procedural Duty of Consideration of Non-Shareholder Interests*

The third innovation of the benefit corporation is the expansion of directors' and managers' fiduciary duties to affirmatively mandate the consideration of non-shareholder interests during the process of corporate decisionmaking.[244] The statutory text provides an exhaustive list of parties and issues to be considered, including: the shareholders, the employees and workforce of the benefit corporation and its subsidiaries and supplies, customers, communities and societal considerations, the local and global environment, the short-term and long-term interests of the benefit corporation, and the ability of the benefit corporation to accomplish its general, and any, specific public benefit purpose.[245] The duty of consideration in section 14620(b), however, is expressly limited by section 14622(a) to persons with discretion to act and only in situations in which it "reasonably appears to the officer that the matter may have a material effect" on the creation of a general or specific public benefit or any of the constituents noted in 14620(b).[246]

4. *Benefit Enforcement Proceedings*

Finally, benefit corporations provide an express private right of action called a "benefit enforcement proceeding" that permits shareholders and (minority) directors to sue (majority) directors and the corporation for a host of breaches of the obligations set forth above.[247] Specifically, the benefit enforcement proceeding permits suit upon: a failure to pursue the general, or any specific, public benefit purpose of the benefit corporation, a violation of a duty or standard of conduct imposed on a director, and a failure to deliver or post the annual benefit report.[248] As stated above, in the context of the board of directors' duty to consider non-shareholder interests, suit cannot be brought upon actions with an immaterial effect, significantly cabining liability for directors in the exercise of their

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241. *Id.* § 14630(a)(2) ("The assessment does not need to be audited or certified by a third party.").
242. *Id.*
243. *See supra* Part II.B.
244. CAL. CORP. CODE § 14620(b).
245. *Id.* § 14620(b)(1)–(7).
246. *Id.* §§ 14620(b), 14622.
247. *Id.* § 14601(b).
248. *Id.* § 14601(b)(1)–(3).

discretion of the day-to-day operations of the firm.[249] Moreover, there are a host of director immunity provisions built into the statute that prevent the imposition of monetary damages for breaches of their fiduciary duties, as well as a denial of standing to "third-party beneficiaries,"—that is, non-corporate actors—in benefit enforcement proceedings.[250] The benefit enforcement proceeding, however, is essential to maintaining the dual purpose of the benefit corporation, for reasons that are further detailed below.

C. Criticisms of the Benefit Corporation's Efficacy

To be sure, the benefit corporation regime cannot be expected to single-handedly correct for the problems of firm externalities and ensure immediate sustainable development, primarily because of the voluntary nature of benefit incorporation[251] and the lack of strong tax incentives that have driven other innovative corporate models in the past.[252] However, the framework of the benefit corporation provides the beginnings of a future regime of corporate social responsibility in which internal and preventative enforcement mechanisms—unlike consumer boycotts, non-shareholder litigation, and non-profit organizations—are relied upon to prevent negative externalities and provide positive externalities. Moreover, as more benefit corporations enter the marketplace, there is significant potential for "market-driven positive feedback loops [that reward] companies that adopt this higher standard of corporate governance and demonstrate higher levels of overall social and environmental performance."[253]

Beyond the problem of disseminating the benefit corporation as a widespread corporate form, the primary concern revolves around enforcing the substantive purpose of benefit corporations.[254] Existing legal scholarship on the benefit corporation has focused on the first two prongs of its structural innovations, particularly the application and enforcement of the third-party standard in the annual benefit report and this rule's potentially drastic shortcomings.[255] Because the third-party standard is applied by the benefit corporation to its own actions (and not by the third party that developed the standard), commentators contend that the board of directors will ultimately fall victim to profit maximization and shirking.[256] In conjunction with the business judgment rule, upon judicial

249. *Id.* § 14622.
250. *Id.* § 14622(c), (d).
251. *Id.* §14601(a).
252. *See* Munch, *supra* note 119, at 188.
253. Clark & Babson, *supra* note 99, at 845.
254. *E.g.*, Reiser, *supra* note 190, at 591; Munch, *supra* note 119, at 170.
255. Reiser, *supra* note 190, at 613; Munch, *supra* note 119, at 189–94.
256. Reiser, *supra* note 190, at 611–14.

review, boards of directors are unlikely to be controlled effectively by the substantive components of the statute, at least standing alone.[257] The substantive goal of the benefit corporation, to effect a "material positive impact on society and the environment,"[258] is certainly admirable, but is subject to the same "creative accounting" and lax oversight that plague traditional corporate entities—especially in a future, competitive marketplace of benefit corporations. Non-shareholders may be left with the same kind of "greenwashing" that has plagued traditional notions of corporate social responsibility.[259]

This enforcement problem is compounded by the fact that benefit corporation statutes do not provide any hierarchy of purpose between profit seeking and provision of the public good.[260] The board of directors is thus left with tremendous discretion as to what particular outcomes to follow, and a host of immunity provisions that prevent monetary liability for a failure to succeed in the dual purpose of the entity.[261] Moreover, as stated above, third-party beneficiaries of the benefit corporation have no standing to sue the board of directors for the failure to provide or continue to provide positive externalities.[262] The question is rightly posed: How does the benefit corporation intend to succeed in light of these potentially fatal structural deficiencies? This Note concurs with criticisms that the benefit corporation will fail to maintain its dual purpose, but only if enforcement actions remain purely substantive in nature. The true strength of the benefit corporation, however, lies in enforcing the as-yet undeveloped notion of the procedural duty of consideration of non-shareholder interests imposed on the board of directors by the statutes.[263]

III. Enforcing the Procedural Duty of Consideration to Protect Non-Shareholder Interests

With the observations and criticisms set forth in Part II in mind, this Note will now propose the possibility of enforcing the fiduciary duty of consideration held by the board of directors and its officers during corporate decisionmaking from a procedural perspective.

257. *Id.* at 613–14.
258. Cal. Corp. Code § 14601 (West 2012).
259. Reiser, *supra* note 190, at 611.
260. *Id.* at 612–13.
261. Cal. Corp. Code § 14622(c), (d).
262. Reiser, *supra* note 190, at 611–14.
263. Another proposal for preventing a collapse of substantive enforcement comes from the drafter of the legislation himself. Clark suggests that because the shareholders remain free to remove problematic directors, they can simply oust directors who do not properly subscribe to the dual purpose of the benefit corporation. Clark & Babson, *supra* note 99, at 850. While that is true, it is highly problematic because the shareholders could just as easily elect a board of directors who are unsympathetic to the benefit corporation's dual purpose.

A. Enforcing the Board of Directors' Procedural Duty of Consideration in a Benefit Enforcement Proceeding

Current analysis of the duty of consideration has been confined to judicial review of substantive decisions made by the board of directors.[264] For instance, if the directorate makes a particular business decision that ultimately harms the provision of public benefit, shareholders and (minority) directors could file suit under the express private right of action set forth by the benefit enforcement proceeding.[265] The problem is that such an outcome is governed by the business judgment rule, which creates a strong presumption that the board of directors acted in the best interests of the corporation[266] and would probably result in dismissal under current summary judgment standards, if not at the pleading stage.[267] This is especially true in light of both the aforementioned lack of a hierarchy between profit-seeking and public benefit-creating actions, which affords the board of directors a great deal of discretion, and the substantial director immunity provisions that undermine a strong deterrence regime.[268] Current analysis has also focused on the procedural duty of filing an annual benefit report, in which the board of directors self-applies a third-party standard to determine the overall success of the benefit corporation at fulfilling its hybrid purpose.[269] Short of failing to file the annual benefit report and abiding by its specific content directives, there is little room for the board of directors to be subject to injunctive remedy.[270] This Note contends, however, that there is an additional procedural duty lurking beneath the surface of the benefit corporation statute.

Section 14620(b), which details the requirements of the duty of consideration, is actionable from the perspective of substantive outcomes or the procedural filing of an annual benefit report. As a matter of litigation strategy, section 14620(b) also functionally mandates a board of directors—subject to suit in a benefit enforcement proceeding—to procedurally demonstrate their consideration of non-shareholder interests in a material corporate decision. In this way, each material action by the board of directors is capable of both substantive and procedural review. Substantive, in that a lawsuit may challenge a particular business decision

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264. Reiser, *supra* note 190, at 611–14.

265. Cal. Corp. Code § 14601(b).

266. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 52–53 (Del. 2006); *see* Hamilton, *supra* note 62, at 638–738.

267. *See* Fed. R. Civ. P. 12(b)(6), 56; Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

268. Cal. Corp. Code § 14622(c); Reiser, *supra* note 190, at 612–13.

269. Munch, *supra* note 119, at 186.

270. Clark & Babson, *supra* note 99, at 842–46.

under the business judgment rule, and procedural, in the sense that the board of directors must make some affirmative, evidentiary showing of non-shareholder consideration for all material decisions when challenged in a benefit enforcement proceeding. This is the heart of the enforcement power in the benefit corporation statute because it completely escapes the deference of the business judgment rule. Instead, there is strict procedural liability, subject to injunctive remedy, to present evidence of consideration by the board of directors regarding a material decision. Without that evidence, the plaintiffs in a benefit enforcement proceeding should be able to restrain further corporate action until a sufficient procedural showing of consideration is made by the board of directors. Some might argue that this procedural enforcement mechanism is a hollow hope because in no way is it action forcing, apart from requiring the board of directors to make a showing of procedural consideration upon suit. An existing procedural enforcement mechanism in an entirely different context, however, demonstrates how powerful a procedural showing can be.

B. Using the National Environmental Protection Act as a Template for Enforcing the Procedural Duty of Consideration in Benefit Corporations

The National Environmental Protection Act ("NEPA") provides an excellent template from which to understand the value of a procedural enforcement mechanism. NEPA was enacted by Congress in 1970 and is widely considered a landmark environmental law.[271] While NEPA proclaims the broad purpose of requiring the federal government to "use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony,"[272] its "most important provision"[273] regards "environmental impact statements" ("EIS"). Pursuant to section 102(2)(C) of NEPA, all agencies of the federal government must "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement."[274] This detailed statement must contain assessments of "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects . . . , (iii) alternatives to the proposed action, (iv) . . . [consequences for] long-term productivity, and (v) any irreversible and irretrievable commitments of resources."[275]

271. Daniel A. Farber et al., Cases and Materials on Environmental Law 456 (8th ed. 2010).
272. 42 U.S.C. § 4331 (2012).
273. Farber, *supra* note 271, at 456.
274. 42 U.S.C. § 4332.
275. *Id.*

Unlike other federal environmental statutes like the Endangered Species Act[276] or the Clean Air Act,[277] NEPA is unique in that it has "no action-forcing mechanisms beyond the simple EIS filing requirement."[278] In other words, no substantive outcome is required of federal actors by NEPA as a result of considering their proposed action's environmental impact; it merely requires the procedural consideration of its environmental impact, as evidenced by an EIS filing. Although this "merely procedural"[279] duty may sound like a weak enforcement mechanism for mitigating environmental harms, "NEPA has had a significant impact:"[280]

> First, the need to comply with the EIS requirement required agencies to reconsider their missions in light of the environmental impacts those missions caused. Second, . . . the possibility of challenging a project because the agency failed to do an EIS, or because it produced an insufficient one, provides environmental groups some leverage to insist on mitigation as the price for settling NEPA lawsuits. . . . Finally, NEPA litigation serves as an information-disclosure and political-rallying mechanism, which can help to generate political opposition to projects with negative environmental impacts.[281]

In sum, the EIS, as a procedural enforcement mechanism of NEPA, has the effect of: (1) increasing actor knowledge, (2) providing litigation leverage for affected parties, and (3) increasing public knowledge and organized responses to proposed action. To that extent, NEPA's procedural duty is in fact "action-forcing" of substantive outcomes, as least passively. This procedural result has been described as "the democratizing effect" because it increases plaintiff participation in the decisionmaking processes of federal actors.[282]

This Note contends that we can extract a similar effect from the statutory language of the benefit corporation to ensure a greater degree of substantive enforcement from the procedural prong of the duty of consideration held by the board of directors. Through strategic use of benefit enforcement proceedings, shareholders and (minority) directors should require the board of directors to procedurally evidence its consideration of non-shareholder interests. In doing so, shareholders and (minority) directors can attain the same effects on benefit corporations that NEPA has on federal actors. Although it is certainly true that the benefit corporation statute makes no reference to the construction of a "corporate impact statement" analogous to an EIS, the plain meaning of

276. 16 U.S.C. §§ 1531–44 (2012).
277. 42 U.S.C. §§ 7401–671.
278. FARBER, *supra* note 271, at 456.
279. *Id.* at 461.
280. *Id.*
281. *Id.* (citation omitted).
282. *Id*. (internal quotation marks omitted).

the statutory language would require a similar, albeit more informal, showing upon suit. In this way, the burden of the procedural showing is deferred to the benefit enforcement proceeding, unlike federal actors under NEPA, who must prepare an EIS in advance of any "major Federal action."[283] That said, if upon suit the board of directors cannot evidence its consideration of non-shareholder interests, it will be subject to temporary injunction. In this way, benefit enforcement proceedings would closely track NEPA procedural litigation.[284]

This Note argues that if plaintiffs and courts use this proposal as a litigation strategy and matter of statutory construction, they can construct a highly effective, albeit informal, deterrence regime against the board of directors and also give full weight to the legislative intent behind the statute in effectuating a dual-purpose enterprise. The deterrence regime created by this procedural enforcement mechanism is essential because of the host of director immunity provisions listed in section 14620 that effectively destroy any other source of deterrence to the board of directors, the nexus of power within any corporate entity.[285] In tracking NEPA procedural litigation, this proposal would have three additional implications: (1) boards of directors would be necessarily exposed to the truth of what their actions will affect; (2) by increasing their knowledge exposure, like NEPA does for federal actors, boards would ultimately alter their decisionmaking processes to effect substantive changes in benefit to the public; and (3) shareholder-plaintiffs would have significant settlement leverage against a misbehaving benefit corporation.[286] In this way, benefit enforcement proceedings could obtain the same "democratizing effect" from benefit corporation statutes as citizen-suits do under NEPA.[287] This Note's litigation strategy could save the benefit corporation from itself.

C. Responses to Anticipated Criticisms of the Proposed Procedural Litigation Strategy

There are two primary criticisms that could be leveled at this Note's proposal. First, rigorous use of benefit enforcement proceedings would destroy benefit corporations through excessive litigation. Second, benefit corporation shareholders have little incentive to undermine their own equity investment by litigating against the benefit corporation, and therefore no one will initiate such enforcement suits in practice. Each criticism shall be addressed in turn.

283. 42 U.S.C. § 4332 (2012).
284. *Id.*
285. *See* Cal. Corp. Code § 14620 (West 2012); Bainbridge, *supra* note 72, at 4–6.
286. Farber, *supra* note 271, at 456–61.
287. *Id.* at 461.

Critics could contend that the costs of business would skyrocket for benefit corporations as a result of constant litigation demanding a procedural showing of consideration of non-shareholder interests by the board of directors. Thus, this Note's proposal would place the benefit corporation at a competitive disadvantage to traditional corporations, which do not have a similar procedural liability. I believe that there are at least four checks against this concern that, in the aggregate, more than effectively hedge against serious disadvantage. First, the lack of third-party beneficiary standing for plaintiffs in a benefit enforcement proceeding severely cabins the number of potential adversaries.[288] Second, the director immunity provisions of the benefit corporation statutes limit all actions, substantive or procedural, to review of "material" corporate decisions.[289] This limitation on the kinds of directorate action that are subject to suit would filter out trivial or vexatious litigation regarding day-to-day operations by the board of directors at the pleading stage. Third, traditional civil pleading requirements would require the plaintiffs to make some affirmative, factual showing of non-consideration of non-shareholder interests in the complaint.[290] For instance, these procedural actions would not be able to proceed past the pleading stage unless they set forth an affidavit in the complaint that stated more than neutral facts with regard to non-consideration by the board of directors. Fourth, the fact that shareholders and (minority) directors are the only parties with standing means that the plaintiffs and defendants in a benefit enforcement proceeding would have aligned interests—the continued success of the benefit corporation as an equity investment. Therefore, plaintiffs in a benefit enforcement proceeding would rarely have the intended goal of destroying the benefit corporation through injunctive remedies or costly settlement negotiations.

Critics could also argue that while the proposed litigation strategy is good in theory, in practice it will never happen, precisely because shareholder interests are monetarily aligned with the board of directors. The directors are dependent on the board for their salaries, and they might have stock incentives that further align their interests with those of the shareholders. This argument is also a direct offshoot of the aforementioned criticism of the lack of standing in benefit enforcement proceedings for third-party beneficiaries. I would respond that, as long as benefit incorporation remains voluntary, benefit corporations will attract investors who believe in the concept of "shareholder responsibility."[291] Indeed, all that the proposed litigation strategy requires is a single

288. CAL. CORP. CODE § 14622(d).
289. *Id.* § 14622(a).
290. *See* FED. R. CIV. P. 12(b)(6); Ashcroft v. Iqbal, 556 U.S. 662, 679–80 (2009).
291. *See* Lee, *supra* note 98, at 31 (discussing the importance of ethical investing).

activist shareholder to file suit. In that world, it remains highly likely that at least one shareholder would be willing to engage in a benefit enforcement proceeding against the board of directors out of concern for both her long-term investment and the provision of positive externalities.

Conclusion

Liberal-capitalist societies like the United States have reached an inflection point. The traditional system of correcting for market failures by applying external corrective mechanisms has failed to solve the most challenging social and environmental externalities presented by the conduct of corporate firms. Non-profit organizations, corporate social responsibility initiatives, the government, and consumers can only do so much to shoulder the burden of positive externalities given their respective limitations. Once advocates for social change acknowledge that external remedies for market failures are less efficient and effective than internal, structural reforms, the benefit corporation will stand out as the best solution to the market's ills.

As commentators have noted, the benefit corporation's substantive enforcement mechanism, the self-application of a third-party standard and its procedural enforcement mechanism—publishing the results in an annual benefit report—are alone insufficient to guarantee fulfillment of the aspirational, dual purpose of the entity. But, if shareholder-plaintiffs apply the litigation strategy set forth in this Note's proposal—to require a procedural showing of consideration of non-shareholder interest under penalty of injunction—they will create a self-sustaining deterrence regime against shirking the duty to provide public benefit. While this may raise efficiency and cost concerns, for the reasons set forth above there is little reason to believe that the increased litigation costs would ever become damning to the benefit corporation as a competitive enterprise. Let us briefly return to the cautionary tale of Apple and Foxconn. According to a former Apple executive, noncompliance with corporate social responsibility "is tolerated, as long as the suppliers promise to try harder next time. If we meant business, core violations would disappear."[292] As this Note has demonstrated, this understanding of the problems plaguing traditional corporations probably exists in good faith, but it misses the mark. Without a structural reformation of the descriptive and normative foundations of the corporate entity, engagement with internal codes of conduct and external auditors will ultimately fall short. If Apple truly wants to avoid the negative externalities that it has encountered in its global supply chain, it should reincorporate as a benefit corporation. In this way, major American corporations can create a system of sustainable capitalism that means business.

292. Duhigg & Barboza, *supra* note 1.

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