NEW LEGAL STRUCTURES FOR SOCIAL ENTERPRISES: DESIGNED FOR ONE ROLE BUT PLAYING ANOTHER

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INTRODUCTION

In 2008, as the Great Recession was unfolding,[1] state legislatures began to recognize that business entities need not focus entirely on profit-seeking. The tiny state of Vermont led this change, recognizing the low-profit limited liability company (L3C).[2] Two years later, Maryland passed benefit corporation legislation.[3] Although quite different in ways that this Article will explore later, both business entities stress the importance of pursuing social goals along with profit-making ones.[4]

By 2018, thirty-seven states and the District of Columbia had passed some form of dual-purpose (i.e., social and profit-making) business legislation,[5] and approximately 7,000 businesses were organized as either L3Cs or benefit corporations[6]—the two most prominent of these new

1. Justin Lahart, *The Great Recession: A Downturn Sized Up*, WALL ST. J. (July 28, 2009), https://www.wsj.com/articles/SB124874235091485463.

2. *See* VT. STAT. ANN. tit. 11, § 4162 (2019) (recognizing requirements for a low-profit limited liability company).

3. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (West 2019).

4. *See infra* Part II.A (outlining the purposes of the low-profit limited liability corporation); *see infra* Part III.A (outlining the purposes of the benefit corporation).

5. *Status Tool*, SOC. ENTERPRISE L. TRACKER, http://socentlawtracker.org/#/map (last visited Apr. 27, 2019). In addition to L3Cs and benefit corporations, four states have a social purpose corporation (Washington, California, Florida, and Texas) and three recognize the benefit limited liability company. *Id.* For other sites that track social enterprise legislation, see *State by State Status of Legislation*, BENEFIT CORP., http://benefitcorp.net/policymakers/state-by-state-status (last visited Apr. 27, 2019) [hereinafter *Status*, BENEFIT CORP.]; *Laws*, AM. FOR COMMUNITY. DEV., http://americansforcommunitydevelopment.org/laws/ (last visited Apr. 27, 2019) [hereinafter *L3C Laws*].

6. *Find a Benefit Corp*, BENEFIT CORP., https://benefitcorp.net/businesses/find-a-benefit-corp (last visited Apr. 27, 2019) [hereinafter *Find a Benefit Corp*, BENEFIT CORP.] (providing a list of nearly 5,400 benefit corporations as of Apr. 27, 2019); *What is an L3C?*, INTERSECTOR PARTNERS, L^{3}C, https://www.intersectorl3c.com/l3c (last visited April. 27, 2019) (tallying a total of 1,651 L3C's organized in Vermont, Michigan, Wyoming, Utah, Oglala Sioux Tribe, Illinois, North Carolina, Louisiana, Maine, Rhode Island, and Navajo Tribe as of April 27, 2019).

business forms. Some of these businesses, such as Patagonia, Plum Organics, and King Arthur's Flour are quite prominent,[7] and proponents of these forms can justifiably tout these successes.[8]

And yet, 7,000 businesses formed as L3Cs and benefit corporations is a drop in the bucket compared to the thirty million businesses currently operating in the U.S.[9] If widespread adoption is the definition of success, these new business forms have not yet lived up to their billing. One possible reason that so few businesses have organized as L3Cs and benefit corporations is that the legislation that created these new forms was not designed to effectively solve the problems they were meant to address.[10] Over the years, scholars and other legal experts have suggested changes to these statutes, but no major substantive changes have been enacted into law.[11] As a result, we are left with statutes that are little more than statements of intent.

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7. *Find a Benefit Corp*, BENEFIT CORP., *supra* note 6.

8. *See, e.g.*, Kate Cooney et al., *Benefit Corporation and L3C Adoption: A Survey*, STAN. SOC. INNOVATION REV. (Dec. 5, 2014), https://ssir.org/articles/entry/benefit_corporation_and_l3c_adoption_a_survey# (explaining that "benefit corporation legislation is quickly spreading across the country," and "at least one study suggests a link" between benefit corporations and "the presence of a larger green economy"); Michael Vargas, *The Next Stage of Social Entrepreneurship: Benefit Corporations and the Companies Using This Innovative Corporate Form*, AM. B. ASS'N (Sept. 19, 2018), https://www.americanbar.org/groups/business_law/publications/blt/2016/07/01_vargas/ (highlighting the various impacts of benefit corporations).

9. *Quick Facts United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045217 (last visited Apr. 27, 2019) (calculating that in 2016, the U.S. had 7,757,807 businesses with employees and 24,813,048 without employees).

10. *See infra* Parts II–III (outlining why the L3C and public benefit corporations have failed to achieve their goals).

11. For examples of these suggestions, see DANA BRAKMAN-REISER & STEVEN A. DEAN, SOCIAL ENTERPRISE LAW: TRUST, PUBLIC BENEFIT, AND CAPITAL MARKETS 68–69 (2017) (suggesting that the current L3C statutes would benefit from adding a prioritization mandate); John Tyler et al., *Producing Better Mileage: Advancing the Design and Usefulness of Hybrid Vehicles for Social Business Ventures*, 33 QUINN. L. REV. 235, 290 (2015) [hereinafter Tyler, *Producing Better Mileage*] (proposing a new entity called the Social Primacy Company, which "expressly embeds fiduciary duties consistent with the pursuit of the specified social purpose(s) adopted by the entity that can be neither contracted around nor waived"); Ofer Eldar, *The Role of Social Enterprise and Hybrid Organizations*, 2017 COLO. BUS. L. REV. 92, 190 ("The core of the following reform proposal is to shift the focus of legal hybrid forms from organizations with mixed missions to firms that commit to transacting with disadvantaged groups . . . ."); Cassady Brewer, *Seven Ways to Strengthen and Improve the L3C*, 25 REGENT U. L. REV. 329, 331–32 (2013) (proposing "seven relatively simple but impactful changes to the L3C" that "are designed to strengthen and improve the L3C with respect to its use by tax-exempt organizations"); J. William Callison, *Putting New Sheets on a Procrustean Bed, How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 111–13 (2012) (arguing that hybrid entities could be improved by either allowing them to "organize as limited liability companies, which permit contractually tailored for-profit and nonprofit purposes" or "allow[ing] shareholders to specify the general or specific public benefits they want their corporation to seek").

This Article suggests that the weaknesses in these statutes reflect an astute political compromise. Measures that could help fix the design flaws in these new business forms, and that would encourage quicker adoption of these businesses, would require governmental oversight and at least some governmental expenditure.[12] Such costs are not yet politically acceptable, even to legislatures that would readily encourage businesses to pursue social goals.[13] And so these new business forms have served a different role from the one they were originally designed to hold. Instead of providing new sources of finance and protecting board members from liability, they have played a large part in an important conversation on the role of business in our country—namely, shifting the focus from shareholder maximization toward a more holistic and community-minded view of the role of business in society.[14]

Part I of this Article provides the historical and cultural context in which the L3C and the benefit corporation arose.[15] Parts II and III describe the L3C and the benefit corporation, respectively, along with the specific reasons these new business entities were developed and the ways in which they fell short of reaching their goals.[16] Part IV then considers the political and cultural changes that have occurred since 2008, places them in the larger context of American business history, and reflects on the roles that these new entities have played in both making and reacting to these changes.[17] This Article concludes that, if one considers the larger goal of shifting business culture in the U.S., these business entities have been far more successful than their small numbers suggest.

I. A HISTORY OF AMERICAN BUSINESS ENTITIES

In 2007, the American economic system was neatly divided into three categories—the government, business, and nonprofit sectors.[18] Most private

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12. *See infra* Part IV.B (overviewing the weaknesses of L3C statutes).

13. *See infra* notes 332–37, 348–55 and accompanying text (outlining the political limitations that have prevented legislators from amending hybrid business statutes).

14. *See infra* Part IV.C (providing examples of businesses that have devoted themesleves to social and environmental, as well as profit-making, goals).

15. *See infra* Part I (discussing the history of American business entities).

16. *See infra* Parts II–III (outlining the goals and purposes of the L3C and the benefit corporation).

17. *See infra* Part IV (discussing the role hybrid business statutes have had in shifting corporate decision making away from shareholder primacy).

18. Mark Kramer, *The Future of Philanthropy, Remarks for Panel*, *in* ELIZABETH SCHMIDT, NONPROFIT LAW: THE LIFE CYCLE OF A CHARITABLE ORGANIZATION 21 (2d ed. 2017). For a discussion of the way these sectors are blurring, see Donald Summers, *The For-Profit and Nonprofit Sectors are Converging: What Are the Implications for You?*, BOARDSOURCE BLOG (Mar. 14, 2018),

sector organizations were considered either profit-driven or charitable.[19] Profit-driven businesses—generally organized as C-corporations, S-corporations, or LLCs—had no obligation to consider anything other than enriching their owners.[20] Charitable organizations, on the other hand, agreed to pursue at least one of eight charitable purposes, and to refrain from distributing any net income to individuals, in return for significant tax breaks.[21] The idea of combining profit-seeking and charitable motives into a single business entity seemed radical.[22] Yet a history of American business entities shows that innovative business forms have often provided the impetus for new growth in the economy, popular opinion about business has ebbed and flowed over time, and businesses have not always focused solely on making profits. In many ways, the new business forms may simply be signaling a cultural return to some of the practices from the past.

A. Corporations[23] in the U.S. Before 1970

In the earliest years of the U.S., businesses were quite different than they are today. Business owners were personally responsible for all the

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http://blog.boardsource.org/blog/the-for-profit-and-nonprofit-sectors-are-converging-what-are-the-implications-for-you; Peter Frumkin, *On Being Nonprofit: The Bigger Picture*, *in* SCHMIDT, *supra*, at 4–5.

19. *See* Kramer, *supra* note 18 (distinguishing between for-profit businesses, whose goals are to "make money and [who] don't really care about social issues," with "the nonprofit sector and civil society, whose job it is to solve social problems").

20. *Id.*

21. I.R.C. § 501(c)(3) (2012); *Exempt Purposes - Internal Revenue Code Section 501(c)(3)*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/charitable-organizations/exempt-purposes-internal-revenue-code-section-501c3 (last visited Apr. 27, 2019).

22. Kramer, *supra* note 18 (positing that the division between the for-profit and nonprofit sector is "very hard for us to let go of").

23. The term *corporation* in this Article generally refers to a C-corporation. If the Article is referring to a nonprofit corporation or a benefit corporation, it states so explicitly. The Article does not refer to S-corporations, which are legal entities available to entrepreneurs that could also be vehicles for enhancing social purposes. *See* Bruce P. Ely, *State Taxation of Subchapter C, Subchapter S, and Subchapter K Entities and Their Owners—An Overview*, *in* KEATINGE AND CONAWAY ON CHOICE OF BUSINESS ENTITY: SELECTING FORM AND STRUCTUE FOR A CLOSELY HELD BUSINESS 447, 450 (2003) (explaining the specifics of a Subchapter S Corporation); Ellen Aprill & Sanford Holo, *Choice of Entity: Considerations and Consequences* 2 (Loyola Law Sch., Legal Studies Paper No. 2009-15, 2009), https://ssrn.com/abstract=1368301 (highlighting the tax and non-tax considerations that impact a corporation's choice of entity). While S-corporations have significant tax differences from C-corporations, they have the same "shareholder primacy" considerations as C-corporations; therefore, they need not be distinguished from C-corporations for the purposes of this Article. *See, e.g.*, Daniel M. Schneider, *Closing the Circle: Taxing Business Transformations*, 58 LA. L. REV. 749, 760, 765 (1998) (distinguishing between S- and C-corporations because "a C corporation is a taxpayer and is taxable on its profits" while "an S corporation is not taxed on its profits"); *see also infra* notes 71–84 and accompanying text (describing the concept of shareholder primacy).

debts of their businesses.[24] Tax considerations were irrelevant because no federal income tax was in place.[25] And governmental entities, charities, and businesses were all chartered by state legislatures as "corporations."[26] The legislature decided which organizations could do business in the state and only granted corporate charters to those that served a public purpose.[27] A minority of those corporations were commercial enterprises,[28] but all of these businesses, whether commercial or not, risked losing their charters if they failed to follow their approved public purpose.[29] As a result, investors did not always expect to make a high rate of return on their investments.[30]

The act of creating corporations was not without controversy in the post-Revolutionary era. The "anticharter" movement, as it was called, claimed that business corporations were aristocratic and anti-republican

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24. *See, e.g.*, Frederick G. Kempin, Jr., *Limited Liability in Historical Perspective*, 4 AM. BUS. L. ASS'N BULL. 11, 17–18 (1960) ("[P]rior to the late 1820's limited liability had not yet been held to be a necessary attribute of a corporation as a matter of law.").

25. *See* Ellen Terrell, *History of the US Income Tax*, BUS. REFERENCES SERVS., http://www.loc.gov/rr/business/hottopic/irs_history.html (last updated Feb. 27, 2018) (analyzing the history of federal income tax).

26. *See* Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation*, 49 U.C. DAVIS L. REV. 1719, 1731 (2016) (documenting how "[i]n the early days of the United States," "state legislatures commonly granted corporate charters to noncommercial associations, such as charities, churches, and universities"); Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 105 (1888) ("The most striking peculiarity . . . of the history of the law of business corporations is the fact that different kinds of corporations are treated without distinction, and, with few exceptions, as if the same rules were applicable to all alike.").

27. Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 55 (1993). The conditions of the corporate charter also included protections for the corporations' stakeholders. P.M. Vasudev, *Corporate Law and Its Efficiency: A Review of History*, 50 AM. J. LEGAL HIST. 237, 249 (2008–2010). Charters often protected both creditors and employees by imposing personal liability on shareholders for the corporate debt, including, specifically, wages owed to the employees. *Id.* at 249–51. Further, charters for turnpikes often required that farmers, worshippers, and the poor could use the turnpike without charge. *Id.* at 247.

28. In late 18th century Massachusetts, for example, almost two-thirds of corporate charters were for governmental entities, such as towns or local governmental units. Maier, *supra* note 27, at 53. Most of the other charters at that time would today be categorized as religious, educational, or charitable institutions. *Id.*

29. *Id.* at 55. The act incorporating the Beverly Cotton Mill in 1789, for example, provided that "'the promotion of useful manufactures, and particularly [s]uch as are carried on with materials of American produce within this Commonwealth,' would advance 'the happine[s]s and welfare thereof, by increa[s]ing the agriculture and extending the commerce of the country.'" *Id.* (quoting 1789 Mass. Acts 224).

30. For example, those who purchased stock in the private corporation that built the New York Turnpike at the beginning of the 19th century considered this investment more like a charitable contribution to a community improvement project than a highly profitable investment. DAVID E. SPENARD, CRASHING THE PARTY: A STATE REGULATOR'S OBSERVATIONS AND SUGGESTIONS REGARDING THE NEAR-TERM SUPERVISION OF THE SIMULTANEOUS PURSUIT OF MARGIN AND MISSION THROUGH SOCIAL ENTERPRISE, PHILANTHROCAPITALISM, AND MIXED-PURPOSE ENTITIES OR HYBRIDS 3 & n.4 (2013) [hereinafter SPENARD, CRASHING THE PARTY].

because they privileged the few at the cost of the average citizen.[31] Many anticharterists believed that corporations—with their perpetual existence—interfered with the ability of the average person to obtain property, much like primogeniture had done.[32] Additionally, their accumulation of wealth would prevent the most industrious and entrepreneurial individuals in future generations from obtaining the capital needed for their endeavors.[33]

One of the critics' largest concerns, however, was that corporations were sources of corruption.[34] Corporations and their owners could—and evidently did—bestow favors on legislators to obtain and renew charters, thereby gaining significant power over the government.[35] The critics successfully pushed for reform that would turn incorporation into a bureaucratic process open to everyone instead of a privilege bestowed by the government.[36] They standardized the conditions for incorporation and took the decision away from the legislature.[37] Ultimately,[38] that change also eliminated the idea that businesses were chartered for a public purpose.[39]

Another corporate innovation of the early to mid-1880s was limited liability for owners.[40] Prior to this, investors had been responsible for all the

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31. Maier, *supra* note 27, at 52, 61–62. These critics thought that chartering a corporation granted a sovereignty to individuals that should belong instead to the people and their elected government. *Id.* at 62. In fact, one of the earliest corporate law cases to reach the Supreme Court, *Trustees of Dartmouth College v. Woodward* (1819), reinforced this fear by holding that the state could not revoke a charter without the consent of the corporation. *Id.* at 65, 69, 79.

32. *Id.* at 61–63.

33. *Id.* at 70. Interestingly, some of these critics feared the perpetual existence of educational and charitable corporations more than they did business corporations:

> Their property remained "locked up from individual control, . . . subtracted from the mass of transmissible wealth, and . . . held in perpetuity, to be applied only to the purposes and objects, to which it was originally destined". . . . Business corporations might in fact be less dangerous, since the shares they issued were distributed among heirs or returned to the market on the death of their owners.

Id. at 70 (first and second alterations in original) (footnote omitted) (quoting GOVERNOR'S MESSAGE RELATIVE TO THE SALE MOZART ASSOCATION, H.R. NO. 151 (1825–1834)). Not all corporate charters were granted in perpetuity, however, and the requirement that the corporation renew its charter periodically helped encourage corporate responsibility. Ralph Gomory & Richard Sylla, *The American Corporation*, 142 DÆDALUS: J. AM. ACAD. ARTS & SCI. 102, 104 (2013).

34. Maier, *supra* note 27, at 71.

35. *See id.* at 72 (discussing speculation that Congress renewed the Second National Bank's charter in exchange for certain favors).

36. *Id.* at 76.

37. *Id.*

38. These laws first appeared in the 1840s, but it took until the end of the 19th century before every state had a widely accepted bureaucratic process, instead of a legislative one, for incorporating businesses. Vasudev, *supra* note 27, at 254. It took an additional half-century for the process of incorporating charitable entities to become purely bureaucratic. Norman Silber, A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE MODERN NONPROFIT SECTOR 5–6 (Westview Press 2001).

39. That change was not instantaneous, however, and it was not until 1900 that the remnants of a public purpose for corporations had disappeared. Maier, *supra* note 27, at 79–82.

40. Vasudev, *supra* note 27, at 249–50; *see also* Henry Hansmann et al., *The New Business Entities in Evolutionary Perspective*, 2005 U. ILL. L. REV. 5, 7 (chronicling how the "statutory business

corporation's debts, and a modest investment in a business that failed could lead to financial ruin if the business's debts were large enough.[41] With the new rules in place, and the financial risks abated, investors were far more willing to provide capital to corporations.[42]

The simplified procedures for chartering corporations and the possibility of limited liability for owners, along with some relaxation of other corporate rules, led to a major growth in business at the end of the 19th and beginning of the 20th century.[43] Charles O'Kelley described the evolving corporate model in early America:

> America had developed a uniquely efficient new business form—the modern corporation. Sitting astride these powerful economic entities were America's great entrepreneurs and financiers. Nothing could stem the modern corporation's swift rise to dominance, and, for a time, no reward seemed too great for the modern corporation's rulers—the Princes of Industry.[44]

By the end of the 1920s, most of the nation's wealth was in the hands of large corporations.[45] In fact, the 200 largest non-bank corporations controlled almost half the corporate wealth[46] and roughly 22% of the total wealth in the United States.[47] The profits of these companies rose almost exponentially, and the CEOs and shareholders reaped great rewards.[48] In 1929, the President of Bethlehem Steel earned $1.6 million[49] or

corporation," which provided limited liability for shareholders, emerged "[b]y the latter half of the nineteenth century").

41. *See* Kempin, *supra* note 24, at 23 (explaining the precarious position of investors prior to limited liability).

42. *Cf.* Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 262 (1967) (explaining that if investors were "made equally liable for all the debts of the business operation, as in a partnership . . . . Wealthy individuals would never make small investments in a corporation").

43. Charles O'Kelley, *The Evolution of The Modern Corporation: Corporate Governance Reform in Context*, 2013 U. ILL. L. REV. 1001, 1009. Industrialization, the railroad, a growing immigrant population, and World War I also helped build the economy. *Id.* at 1009, 1011.

44. *Id.* at 1009.

45. *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 18 (1932) (describing how the corporate system "draws wealth together into aggregations of constantly increasing size").

46. *Id.* at 30. The remaining half was held by more than 300,000 smaller corporations. *Id.*

47. *Id.* at 33.

48. O'Kelley, *supra* note 43, at 1021–22.

49. *Id.* at 1022.

$23,552,000 in 2019 dollars.[50] And the share of total national income going to the top 1% rose from 14.5% to almost 20% between 1920 and 1929.[51]

The Great Depression put an end to this prosperity and made citizens rethink the relationship of the corporation to society. Without regulations, even in the Depression, corporations could remain profitable by laying people off, reducing wages, and lowering production.[52] But the average person could not put food on the table, which led even the staunchest of conservatives to recognize that the system was broken.[53]

With the advent of the Roosevelt administration, the U.S. government began to shift its relationship with modern corporations. The U.S. experimented with Keynesian economics and passed laws that curtailed corporate power.[54] This was the era in which antitrust laws, labor laws, and social security taxes came into being.[55] Corporate power was curtailed, and business and government now held a mutual understanding that they would work together to help grow the economy.[56] After World War II, which helped to stimulate the economy, the U.S. emerged as the dominant world power.[57]

Once the U.S. gained this economic preeminence, the golden era of the modern corporation began.[58] The entrepreneurial spirt of the early 20th century was replaced by an economy driven by large, bureaucratic corporations that produced useful products, gave people jobs, and played a role in their local communities.[59] Corporate CEOs of that era were not

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50. *Inflation Calculator*, INFLATION CALCULATOR, https://www.usinflationcalculator.com/ (last visited Apr. 27, 2019).

51. O'Kelley, *supra* note 43, at 1021–22.

52. *Id.* at 1023.

53. *Id.* at 1024.

54. *Id.* at 1033.

55. *See id.* at 1035 (noting that Congress passed the National Labor Relations Act and the Social Security Act during this time).

56. *Id.* at 1033–35 (describing the metamorphosis of the corporation during the Roosevelt presidency).

57. *Id.* at 1035.

58. *Id.* at 1037. Corporations during this era were also referred to as the "managerial" corporation or the "Galbraithian corporation." *Id.* at 1008; Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169, 1171 (2013) [hereinafter Stout, *In the Closet*]; O'Kelley, *supra* note 43, at 1008; Ernie Englander & Allen Kaufman, *The End of Managerial Ideology: From Corporate Social Responsibility to Corporate Social Indifference*, 5 ENTERPRISE & SOC'Y 404, 405, 409 (referring to the "modern, large-scale corporation" from 1920 through 1970 as the "managerial corporation"). John Kenneth Galbraith was an important mid-20th century economist, who described this relationship between the government and the corporation. *See* JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE 392 (Houghton Mifflin Co. 1967) ("Given the deep dependence of the industrial system on the state and the nature of its motivational relationship to the state . . . the industrial system will not long be regarded as *something apart from government*." (emphasis added)).

59. O'Kelley, *supra* note 43, at 1033–37.

motivated solely, or even primarily, by compensation.[60] Instead, they "viewed themselves as stewards or trustees charged with guiding a vital social and economic institution in the interests of a wide range of beneficiaries."[61] Powerful labor unions ensured the interests of the wage earners were recognized.[62] Arguably, the interests of the nation were aligned with those of major corporations. This was the era when the president of General Motors, in his confirmation hearing to become Secretary of Defense, famously said, "for years I thought what was good for our country was good for General Motors, and vice versa . . . . Our contribution to the Nation is quite considerable."[63]

This corporate transformation had a large impact. Compared to the *great tycoons* just before World War I or the wealthy today, corporate CEOs of the bureaucratic era were relative paupers.[64] Life also improved for average Americans, who were healthier and more financially secure than they were during the Depression.[65] The Civil Rights movement increased the number of people who could participate in American economic life, and income inequality diminished substantially.[66]

B. Corporations from 1970 to 2008: The Rise of Shareholder Value

In 1970, the pendulum began to swing in the other direction when the Nobel Laureate winning economist Milton Friedman wrote an influential essay in the New York Times. He explained that "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[67] He argued that activities that we might characterize

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60. *Id.* at 1042.

61. Stout, *In the Closet*, *supra* note 58.

62. Gomory & Sylla, *supra* note 33, at 106.

63. Geoffrey Norman, *What's Good for General Motors?*, AM. SPECTATOR (Nov. 28, 2018), https://spectator.org/whats-good-for-general-motors/.

64. O'Kelley, *supra* note 43, at 1043.

65. *Id.* at 1045.

66. *See id.* ("The future looked bright and the path clear. Few would have predicted that almost overnight the motivational ethos and underpinnings of the Galbraithian modern corporation would go gentle into the night, to be only dimly remembered a long generation later." (footnotes omitted)); *see generally* Stout, *In the Closet*, *supra* note 58, at 1171–72 (discussing how the model of "managerial capitalism" served consumers, employees, and shareholders while providing corporate tax revenues for the government).

67. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 17 (quoting MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962)). His article was followed by another influential piece. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976) (arguing that the question of whether corporations have "'a social responsibility' is seriously misleading" because "*[t]he firm is not an individual*" but "a legal fiction which serves as a focus for a

as socially responsible—such as reducing pollution or hiring otherwise unemployable people at the expense of corporate profits—would constitute "spending someone else's money for a general social interest."[68] Friedman supported such actions if they furthered the long run interest of a corporation.[69] For example, a corporation that devoted resources to improving a community might be able to attract more desirable employees.[70] That decision would be furthering the interests of the owner, however, and therefore would not be considered one of social responsibility—a concept he believed could undermine the free market system.[71]

This doctrine of *shareholder primacy*[72] rapidly became predominant.[73] According to this doctrine, shareholders have top priority among all the

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complex process in which the conflicting objectives of individuals . . . are brought into equilibrium within a framework of contractual relations").

68. Friedman, *supra* note 67.

69. *Id.*

70. *Id.*

71. *Id.*

72. It has also garnered much academic discussion, both in defense and in opposition to the theory. *See, e.g.*, Jensen & Meckling, *supra* note 67, at 312–13 (exploring the inherent conflict between a manager-owner and outside shareholders); Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409, 1411 (1993) (explaining that some "Delaware [Supreme] [C]ourt decisions have . . . allow[ed] corporate directors to take into account the impact of their decisionmaking on other corporate 'stakeholder' groups" provided "that measures taken on behalf of other constituencies produce 'some rationally related benefit accruing to the shareholders'" (quoting Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986))); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1425 (1993) (defending the principle of shareholder wealth maximization); Grant Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071, 2078–79 (2010) (using political theory to analyze the corporate decision making process); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) [hereinafter Hansmann & Kraakman, *The End*] (arguing that "[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value"); Lynn Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189–90 (2002) [hereinafter Stout, *Bad Arguments*] (conceding that "the debate over the social role of the corporation remains unresolved," but nevertheless arguing that "some of the most frequently raised arguments for shareholders primacy are . . . bad arguments"); Lynn A. Stout, *The Shareholder Value Myth*, EUR. FIN. REV. (Apr. 30, 2013), http://www.europeanfinancialreview.com/?p=883 [hereinafter Stout, *Shareholder Value Myth*] (arguing that "[s]hareholder primacy theory is suffering a crisis of confidence" because "*shareholder value thinking doesn't seem to work, even for most shareholders*"). The debate has been around since at least 1931, when Adolf Berle and Merrick Dodd debated the issue. *Compare* A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (arguing that the corporation exists for the benefit of the shareholders), *with* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1153–54 (1932) (arguing that corporations should also have a social purpose).

73. Hansmann & Kraakman, *The End*, *supra* note 72, at 441 ("[T]here is today a broad normative consensus that shareholders alone are the parties to whom corporate managers should be accountable, resulting from widespread disenchantment with a privileged role for managers, employees, or the state in corporate affairs.").

people affected by the actions of a corporation.[74] As its owners, the shareholders officially control the corporation; but, unless there are very few owners, they generally delegate most of the governance and management functions to the board of directors and executive managers, respectively.[75] The shareholders elect the board of directors and vote on major changes within the organization.[76] The board of directors then governs the corporation, but its members have fiduciary duties of care and loyalty to the corporation and its owners.[77] They have a legal obligation to pay attention to the affairs of the corporation (duty of care) and to consider the corporation's interests ahead of their own (duty of loyalty).[78] In most instances, this means they have a duty to maximize the value of the shareholders' stock.[79]

Even though managers, customers, creditors, and sometimes even the general public (other *stakeholders*) are affected by the actions of the corporation, the idea that the shareholder has the top priority is widely shared for several practical reasons. First, it provides a way to negotiate inevitable conflicts among stakeholders, which provides stability to the market.[80] Second, the choice of the shareholder as this top priority protects the stakeholder with the least involvement in daily operations from being exploited by those with more involvement (i.e., the board and management).[81] Further, unlike other stakeholders—such as customers, employees, suppliers, and creditors—who can protect their interests through contractual negotiations, shareholders have less negotiating power with the managers of the corporation.[82] In fact, they do not see any money until all legal obligations to others—such as payroll, taxes, and payment of interest

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74. *Id.* at 440–41.

75. *Id.*; Grant M. Hayden & Matthew T. Bodie, *Shareholder Voting and the Symbolic Politics of Corporation As Contract*, 53 WAKE FOREST L. REV. 511, 516–17 (2018) [hereinafter Hayden & Bodie, *Shareholder Voting*].

76. Hayden & Bodie, *Shareholder Voting*, *supra* note 75, at 513, 516.

77. *Id.* at 516–17.

78. *Id.*

79. Hansmann & Kraakman, *The End*, *supra* note 72, at 441; Hayden & Bodie, *Shareholder Voting*, *supra* note 75, at 517.

80. *See* Ian B. Lee, *Efficiency & Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 537 (2006) ("[A] venture is worth more if managers are tasked with a clear mission, such as the maximization of the stock price, than with a more amorphous mission involving the balancing of competing interests.").

81. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 279 (1998) ("[T]he shareholder primacy norm was first used by courts to resolve disputes among majority and minority shareholders in closely held corporations.").

82. Stephen M. Bainbridge, *In Defense of the Shareholder Maximization Norm*, 50 WASH. & LEE L. REV. 1423, 1443 (1993) ("[N]onshareholders have a variety of other mechanisms available with which to influence management decisions that shareholders lack. One mechanism is contract negotiations." (footnote omitted)).

on loans, are fulfilled—and until the board decides, in its discretion, to use a company's profits to issue a dividend.[83] Finally, at least theoretically, all of society benefits from shareholder primacy because the company's success is measured by what the open market would pay for it.[84]

This idea has had unintended consequences. A concern that managers' interests should be aligned with shareholders led to the practice of tying top managers' compensation to the price of the stock.[85] As the stock market took off in the 1990s and beyond, even mediocre management saw large gains, and the wage earners' proportion of that wealth was dramatically reduced.[86] Increasingly, managers' incentives were geared toward short term gains, which could be detrimental to the environment and other longer term goals.[87] In addition, the income inequality gap that had narrowed in the middle of the 20th century began to widen considerably.[88] Further, even though the owners' pockets have been lined, some commentators believe the shareholder value theory may, in the long term, hurt the corporation itself, in part because the cost-cutting measures taken for short-term gain become very costly at a later date.[89]

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83. Gregory Hamel, *How Does a Shareholder Make Money?* AZCENTRAL, https://yourbusiness.azcentral.com/shareholder-make-money-2948.html (last visited Apr. 27, 2019).

84. Gomory & Sylla, *supra* note 33, at 108.

85. *Id.* at 108–09.

86. *Id.*

87. Stout, *In the Closet*, *supra* note 58, at 1178–80. In a frightening experiment conducted in the early 2000s, 34 active directors in Fortune 200 companies were presented with two case studies that asked them to choose between their personal morals and the shareholder primacy doctrine. Jacob M. Rose, *Corporate Directors and Social Responsibility: Ethics Versus Shareholder Value*, 73 J. BUS. ETHICS 319, 323–24 (2007). Almost all of them said they would cut down a mature forest or release a dangerous toxin into the environment if a loophole in the law allowed them to do so. *Id.* at 324–25. They all saw the ethical dilemma but believed that their duty to maximize the shareholder return should override their personal ethics. *Id.* at 325, 327. If asked to make the same decision as the owner in a partnership, they were far more likely to make the ethical decision. *Id.* at 325; *see also* Loizos Heracleous & Luh Luh Lan, *The Myth of Shareholder Capitalism*, HARV. BUS. REV., Apr. 2010, at 24 (describing the experiment).

88. SUSAN HOLMBERG & MICHAEL UMBRECHT, ROOSEVELT INSTIT., UNDERSTANDING THE CEO PAY DEBATE: A PRIMER ON AMERICA'S ONGOING C-SUITE CONVERSATION 6, 10, 14 (2014), http://rooseveltinstitute.org/wp-content/uploads/2015/10/244163008-Understanding-the-CEO-Pay-Debate-A-Primer-on-America-s-Ongoing-C-Suite-Conversation.pdf.

89. Stout, *In the Closet*, *supra* note 58, at 1178–80 (chronicling how shareholder primacy has hurt shareholders and corporations); Lynn A. Stout, Response, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003, 2020–22 (2013) [hereinafter Stout, *Side Effects*]; Leon Neyfakh, *Is 'Shareholder Value' Bad for Business?*, BOS. GLOBE (Aug. 3, 2014), https://www.bostonglobe.com/ideas/2014/08/02/shareholder-value-bad-for-business/3O4MYxjWgmJ2DOPwkeYxyN/story.html.

The shareholder primacy doctrine is a well-recognized social norm, but scholars disagree as to whether it is legally required.[90] The architects of the benefit corporation are convinced that it is legally required and that it prevents businesses from pursuing social goals.[91] They point to two cases, almost a century apart, that explicitly reinforce this doctrine.

In the first case, *Dodge v. Ford Motor Co.*, Henry Ford planned to end special dividends so that he could reinvest in the Ford Motor company, lower prices to consumers, and raise wages for employees.[92] The Dodge brothers, who owned 10% of the stock, sued, arguing that Ford was not considering their interests, and they won.[93] The court said:

> 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.
>
> . . .
>
> [I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely

90. *See* Stout, *In the Closet*, *supra* note 58, at 1171 (arguing that neither state nor federal law requires shareholder primacy). For a discussion of this debate, dating back to the 1930s, see J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, And Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 5–7 (2012) [hereinafter Murray, *Choose Your Own Master*] (discussing the historical academic debate as to whether directors should maximize shareholder wealth); William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and* The Modern Corporation, 34 J. CORP. L. 99, 100 (2008) ("A continuing and longstanding debate has been waged in corporate law scholarship among those who favor shareholder primacy . . . and those who believe that corporations have a social responsibility to other constituencies . . . ."); Fenner Stewart, Jr., *Berle's Conception of Shareholder Primacy: A Forgotten Perspective for Reconsideration During the Rise of Finance*, 34 SEATTLE U. L. REV. 1457, 1459 (2011) (arguing that shareholder primacy has shifted from "promoting shareholder primacy in order to protect minority constituents to promoting shareholder primacy in order to protect majority rights and the right of exit for any disgruntled minority").

91. *See* WILLIAM H. CLARK, JR. ET AL., THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC 6 (2013), http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf ("Whatever the letter of the law, . . . the risk of litigation if one fails to maximize shareholder value, ha[s] a chilling effect on corporate behavior as it relates to pursuit of a social mission.").

92. Dodge v. Ford Motor Co., 170 N.W. 668, 671 (Mich. 1919); Daniel P Hann, *Emerging Issues in U.S. Corporate Governance: Are the Recent Reforms Working*, 68 DEF. COUNS. J. 191, 193 (2001).

93. *Dodge*, 170 N.W. at 669, 685.

> incidental benefit of shareholders and for the primary purpose of benefiting others.[94]

The second case, *eBay Domestic Holdings, Inc. v. Newmark*, involved a dispute between the two individual founders and majority shareholders of craigslist and the minority shareholder, eBay.[95] Fearing that eBay would be able to control craigslist, the founders enacted several protective measures designed to keep the founders in control.[96] They maintained that their objective was to retain craigslist's "values, culture and business model" and to prevent a departure "from [craigslist's] public-service mission in favor of increased monetization."[97] The court rejected this reasoning:

> The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment . . . . Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that.[98]

Those who disagree that shareholder primacy is legally required maintain that these two cases are outliers, with very few other cases ever even citing them.[99] They point to the business judgment rule, which protects boards that make well-reasoned decisions about the day-to-day operations of the corporation.[100] Courts do not second-guess decisions that are made in

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94. *Id.* at 684.

95. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 6–7 (Del. Ch. 2010).

96. *Id.* at 6.

97. *Id.* at 32 (alteration in original).

98. *Id.* at 34.

99. *See, e.g.*, Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 164, 166–68 (2008) [hereinafter Stout, *Stop Teaching*] (calling into question the holding of *Dodge v. Ford*, due, in part, to its weak legal precedent); *see generally* Stout, *In the Closet*, *supra* note 58, at 1174 (disagreeing with the legal theory of shareholder primacy).

100. *See* Murray, *Choose Your Own Master*, *supra* note 90, at 11–12 (explaining the relationship between the business judgment rule and shareholder primacy). Even those who believe in the shareholder value doctrine admit that the business judgment rule allows great leeway, so long as there would be some way to tie a decision to the shareholder. Robert T. Miller, *Wrongful Omission by Corporate Directors:* Stone v. Ritter *and Adapting the Process Model of the Delaware Business Judgment Rule*, 10 U. PA. J. BUS. & EMP. L. 911, 923 (2008) (explaining that under the business judgment rule, the court's review is "limited to whether the decision serves any rational business purpose, i.e., is connected in any rational way with maximizing shareholder value—a test that is virtually always satisfied"). In both the *eBay* and *Dodge v. Ford* cases, it could have been argued that the board's actions would ultimately benefit the shareholders, but neither Mr. Ford nor craigslist's

good faith with the information at hand, even if they turn out to be mistakes.[101] This rule provides a strong presumption in favor of the board that is difficult to overcome, and many commentators argue that this rule allows boards the leeway to consider interests other than maximizing corporate profit when making decisions.[102]

Courts look more carefully at the board's decisions in situations in which there may be a conflict of interest on the board's part. This is particularly true when the majority shareholders could be taking advantage of minority shareholders.[103] This was the situation in *eBay*, but even there, the board had some discretion.[104] The only time the board must choose the highest possible price for the shareholder is in the situation of a takeover when a "sale" or "break-up" of the company is inevitable.[105] In that situation, according to *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*., the board's role changes from that of "defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."[106]

Most states also have "constituency statutes" that protect directors if they make decisions that benefit other corporate constituents, such as employees, customers, suppliers, creditors, or the larger community.[107] These statutes explicitly protect directors from lawsuits for such decisions, even if the decisions seem to contradict the shareholder primacy doctrine.[108] The statutes vary from state to state, but, in general, they are designed to provide the directors with protection when they make decisions that run counter to the shareholder's interests.[109]

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founders chose to make that argument. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010) (arguing instead that the corporation possessed a "palpable, distinctive, and advantageous culture that sufficiently promotes stockholder value").

101. *See eBay Domestic Holdings, Inc.*, 16 A.3d at 33 ("When director decisions are reviewed under the business judgment rule, this Court will not question rational judgments about how promoting non-stockholder interests . . . ultimately promote stockholder value.").

102. *See* Murray, *Choosing Your Own Master*, *supra* note 90, at 11–12 (highlighting the vast authority that the business judgment rule allocates to directors).

103. Hansmann & Kraakman, *The End*, *supra* note 72, at 442 ("[The shareholder-oriented model] asserts the interests of *all* shareholders, including minority shareholders. More particularly, it is a central tenet in the standard model that minority or noncontrolling shareholders should receive strong protection from exploitation at the hands of controlling shareholders.").

104. *See eBay Domestic Holdings, Inc.*, 16 A.3d at 33 (explaining that "[u]nder the *Unocal* standard, . . . the directors must act within the range of reasonableness").

105. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

106. *Id.*

107. CLARK, JR. ET AL., *supra* note 91, at 9. In 2013, 33 states had adopted such statutes. *Id.*

108. *See id.* ("The directors of companies incorporated in constituency statutes are expressly permitted by statute to consider persons other than shareholders . . . .").

109. For a discussion of constituency statutes, see generally Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 16, 16 (1992) (discussing the

Those who believe that the shareholder primacy theory prevents modern corporations from pursuing social purposes point out that there is enough precedent for corporations to know whether the statutes would truly protect the board in a takeover situation.[110] Ben & Jerry's ice cream was an early adopter of social causes.[111] Its dairy products are organic; it paid farmers more than market price; it considered the environment in its packaging; and it even provided benefits to same-sex partners long before other companies did.[112] Ben & Jerry's was, and continues to be, a supporter of the Greyston Bakery (motto: "We don't hire people to bake brownies, we bake brownies to hire people"), which supplies the brownies for the Ben & Jerry's brownie flavored ice cream.[113]

In 2000, Unilever bought Ben & Jerry's.[114] There were other bids—including one from Ben Cohen and Jerry Greenfield, which would probably have ensured that social interests remained paramount—but the board chose

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"debate over the proper interpretation of corporate constituency statutes"); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 585 (1992) (developing "a theoretical justification for the new constituency statutes" and "offer[ing] a two-part model for [their] enforcement"); Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 85 (providing an overview of case law interpreting constituency statutes and concluding that they "have realized neither the hopes they initially inspired nor the fears they initially instilled"); Antony Page, *Has Corporate Law Failed? Addressing Proposals for Reform*, 107 MICH. L. REV. 979, 980 (2009) (reviewing *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities*, an article that advocates "for a broader stakeholder approach"); Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 973 (1992) (describing nonshareholder constituency statutes as "potentially revolutionary"); *see also* Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 827–28 (2003) (arguing that "in addition to stakeholder statutes, states should adopt innovative stakeholder meeting statutes"); Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085 app. D at 1124–35 (2000) (summarizing various states' constituency statutes).

110. *See* Adams & Matheson, *supra* note 109, at 1086 (noting that "constituency statutes are relatively new and corporate law has historically been based on the shareholder primacy model"). Critics of constituency statutes also complain that they are permissive not mandatory. John Tyler, *Negating the Legal Problem of Having "Two Masters": A Framework for L3C Fiduciary Duties and Accountability*, 35 VT. L. REV. 117, 134 (2010) [hereinafter Tyler, *Negating Legal Problems*]. Except in Connecticut, these constituency statutes are permissive, not mandatory. *Id.* at 133–34. In other words, the board has the authority to consider other stakeholders' interests, but it is not required to do so. *Id.* at 134. Even in Connecticut, only shareholders can sue the board for failure to consider these interests. *Id.* at 135.

111. Brad Edmondson, *How Ben & Jerry's Brought Maverick Ideas to Mainstream Business*, GUARDIAN (Mar. 18, 2014), https://www.theguardian.com/sustainable-business/ben-jerrys-maverick-ideas-mainstream-business-values.

112. *Id.*; *Ben & Jerry's Homemade, Inc.*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/social-sciences-and-law/economics-business-and-labor/businesses-and-occupations/ben-jerrys-homemade-inc (last visited Apr. 27, 2019); Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and The Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 223 & n.90 (2010) [hereinafter Page & Katz, *Freezing Out*].

113. *Greyston Bakery: The People Behind Those Amazing Fudgy Brownies*, BEN & JERRY'S (Dec. 27, 2015), https://www.benjerry.com/whats-new/2015/brownie-partnership.

114. Constance L. Hayes, *Ben & Jerry's to Unilever, With Attitude*, N.Y. TIMES (Apr. 13, 2000), https://www.nytimes.com/2000/04/13/business/ben-jerry-s-to-unilever-with-attitude.html.

the highest bidder on advice from their attorneys.[115] Vermont had a strong constituency statute on its books at the time, which was nicknamed the "Ben and Jerry's amendment," because the state did not want to lose the company.[116] But the board did not want to test the statute in court.[117] Fortunately, the sales agreement required Unilever to maintain most of the company's social practices,[118] and Ben & Jerry's is now a certified B-corporation,[119] which means it meets sufficient social and environmental standards to gain B Lab's seal of approval.[120] Not everyone believes that Ben & Jerry's needed to sell to the highest bidder given Vermont's constituency statute.[121] At the very least, the perception of the shareholder primacy doctrine—even in a state with a strong constituency statute—was very real.[122]

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115. Page & Katz, *Freezing Out*, *supra* note 112, at 212–13, 228–29; John Dillon, *Ben & Jerry's Sought Help to Stay in Vermont*, TIMES ARGUS (Dec. 12, 1999), https://www.timesargus.com/news/ben-jerry-s-sought-help-to-stay-in-vermont/article_c71bea26-9b39-58b6-b5f4-2ccfe580a647.html.

116. Dillon, *supra* note 115.

117. Page & Katz, *Freezing Out*, *supra* note 112, at 236–37.

118. Edmondson, *supra* note 111. The agreement is available on the Security and Exchange Comissions's EDGAR database because Ben & Jerry's was a public company at the time of the sale. *EDGAR Search Results*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/cgi-bin/browse-edgar?company=Ben+%26+Jerry&owner=exclude&action=getcompany (last visited Apr. 27, 2019).

119. *See B Impact Report: Ben & Jerry's*, CERTIFIED BCORPORATION, https://bcorporation.net/directory/ben-and-jerrys (last visited Apr. 27, 2019) (identifying Ben & Jerry's as a certified B-Corporation since September 2012).

120. *See infra* Part III.A for a discussion of certified B-Corporations. As mentioned there, the B-Corporation is often confused with the benefit corporation. A B-Corporation has achieved a seal of approval by B Lab and is a branding mechanism. *Certification*, CERTIFIED BCORPORATION, https://bcorporation.net/certification (last visited Apr. 27, 2019). A benefit corporation, on the other hand, is legally incorporated as a benefit corporation. MODEL BENEFIT CORP. LEGISLATION § 102 (2017). It need not have achieved the B-Corporation seal of approval. This Article concentrates on the legal entity, the benefit corporation.

121. *See* Page & Katz, *Freezing Out*, *supra* note 112, at 231 (arguing that corporate law almost certainly did not require Ben & Jerry's board of directors to sell the company to Unilever); Antony Page & Robert A. Katz, *The Truth About Ben & Jerry's*, STAN. SOC. INNOVATION REV., Fall 2012, at 39, 41 (arguing that Ben & Jerry's had no obligation to sell to Unilever). Despite the criticism Ben & Jerry's received for selling out, the company appears to have influenced Unilever to become more socially responsible. *See* Edmondson, *supra* note 111 (explaining that because Unilever "needed Ben and Jerry's [so] badly," it agreed to let Ben & Jerry's "retain an independent board of directors" that "has the primary responsibility for 'preserving and enhancing the objectives of the historical social mission of the company'").

122. *See* Jay Coen Gilbert et al., *The Real Truth About Ben & Jerry's and the Benefit Corporation: Part 1*, CORP. SOC. RESP. WIRE (Oct. 1, 2012), http://www.csrwire.com/blog/posts/559-the-real-truth-about-ben-jerrys-and-the-benefit-corporation-part-1 ("While . . . directors of mission-driven corporations incorporated in constituency statute jurisdictions may take into consideration the interests of various constituencies when exercising their business judgment, the lack of case law . . . makes it difficult for directors to know exactly how, when and to what extent they can consider those interests . . . ." (third alteration in original) (quoting CLARK, JR. ET AL., *supra* note 91, at 10)).

C. The Limited Liability Company

The limited liability company was introduced in 1977,[123] just as the corporation was shifting from a bureaucratic entity to a shareholder primacy one.[124] Despite the many benefits of the corporate form, it has some disadvantages compared to general partnerships with regard to taxation and flexibility. Corporate earnings are taxed twice: First at the corporate level when the corporation pays taxes on its net income, and then again at the individual level when shareholders who have received dividends add that income to their personal income tax statements.[125] Partnerships, on the other hand, are only taxed at the individual level.[126] They are called "pass-through" entities because the organization pays no taxes.[127] Almost always, the partnership pays fewer total taxes compared to the corporation.[128]

The corporation's lack of flexibility gives stability to long-term investors, but it can be a double-edged sword if the owners disagree. In a small, closely held corporation, unhappy shareholders may be unable to find a buyer for their shares and may be unable to exit without convincing a majority of the shareholders to dissolve the corporation.[129] In such a situation, the flexibility of the partnership form could be helpful.[130] Partners

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123. Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1459, 1460 (1998) ("The Wyoming Limited Liability Company (LLC), created in 1977, represents the first domestic unincorporated business entity combining statutory limited liability protection with the ability to be taxed as a partnership for federal income tax purposes." (footnote omitted)); *see also* William J. Carney, *Limited Liability Companies: Origins and Antecedents*, 66 U. COLO. L. REV. 855, 858 (1995) (calling the Wyoming LLC Act, the "original LLC statute"); Robert L. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. L. 375, 381–84 (1992) [hereinafter Keatinge, *Study of the Emerging Entity*] (detailing the history of the LLC business entity).

124. Stout, *Side Effects*, *supra* note 89, at 2005–07.

125. Keatinge, *Study of the Emerging Entity*, *supra* note 123, at 407, 423, 424 & n.344.

126. *Id.* at 407.

127. *Id.* at 381.

128. For example, assume a corporation has net taxable earnings of $100,000 and that both the corporation and its owners are in the 20% tax bracket. If the corporation retains its earnings, it will pay $20,000 in taxes and have $80,000 to spend on building the business the next year. *Id.* at 424 n.344 ("The Internal Revenue Code generally taxes corporate income at both the entity and shareholder level."). If it also decides to pay out $20,000 in dividends to its ten owners, however, it will have $60,000 to work with the following year. Each of the owners will also pay a $500 tax on their dividends. *Id.* When all the taxes are paid, $25,000 will have been paid on $100,000 of earnings. If this business had been organized as a general partnership with ten owners, each owner would have paid $2,000 (20% of $10,000) for a total of $20,000 paid out in taxes. *Id.* ("Partnerships are not subject to an entity level tax; the partners take into account their respective shares of the partnership's income, gain, loss and deduction items."). The business would still have $80,000 to re-invest; $5,000 more than the corporation would have had.

129. Edward M. Ford, Jr., Comment, *Rights of the Minority Shareholders to Dissolve the Closely Held Corporation*, 43 CAL. L. REV. 514, 514–16 (1955).

130. STEPHEN BAINBRIDGE, LIMITED LIABILITY COMPANIES: A PRIMER ON VALUE CREATION THROUGH CHOICE OF FORM 7 (2001) [hereinafter BAINBRIDGE, A PRIMER], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=250164.

could contract for solutions to disagreements, and, if all else failed, the disgruntled partner could force the dissolution of the partnership.[131] Because of these problems, an opportunity arose for a new type of business—one with the limited liability of a corporation and the flexibility and tax treatment of the partnership.

In 1977, Wyoming passed the first limited liability company (LLC) statute, which was designed to meet this need.[132] The IRS had not yet blessed this tax treatment, however, and the LLC was slow to take off.[133] In addition, attorneys cautioned their clients that courts had not yet provided guidance on other issues.[134] As Larry Ribstein pointed out: "Clarification would come as more LLCs were formed, but who would form LLCs until important issues were clarified? For want of an egg the chicken was lost."[135]

By 1991 only eight states had passed LLC statutes.[136] That was about to change, however. The IRS had issued its first favorable tax statement in 1988,[137] and by 1996 every state had passed an LLC statute.[138] The IRS gave its final approval to the LLC in a 1997 regulation, which allowed LLCs to decide for themselves whether to be taxed as partnerships or corporations.[139]

LLCs are the most popular entity for new businesses in the U.S. today.[140] In fact, entrepreneurs are now twice as likely to set up new businesses as LLCs than they are to use a corporate form.[141] LLCs are simple to set up; they provide tax advantages and limited liability; and they allow their owners—called members—to define their duties through

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131. Ford, *supra* note 129, at 20.

132. Hamill, *supra* note 123.

133. Larry E. Ribstein, *LLCs: Is the Future Here?: A History and Prognosis*, BUS. L. TODAY, Nov./Dec. 2003, at 11.

134. *See id.* at 12 ("LLCs also posed uncertainties that tax rules could not solve.").

135. *Id.*

136. Wyoming, Florida, Alaska, Colorado, Kansas, Nevada, Texas, Utah, and Virginia were the early adopters. Carney, *supra* note 123, at 858 & n.15, 859 & n. 20; Ribstein, *supra* note 133; Hamill, *supra* note 123.

137. Rev. Rul. 88-76, 1988-2 C.B. 360, 360–61 ("An unincorporated organization operating under the Wyoming Limited Liability Company Act is classified as a partnership for federal tax purposes . . . .").

138. Ribstein, *supra* note 133 ("By 1996, every U.S. jurisdiction had an LLC statute."); Carney, *supra* note 123.

139. Ribstein, *supra* note 133; Treas. Reg. § 301.7701-1 to -3 (as amended in 2014).

140. Rodney D. Chrisman, *LLCs Are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LPs Formed in the United States Between 2004-2007 and How LLCs Were Taxed for Tax Years 2002-2006*, 15 FORDHAM J. CORP. & FIN. L. 459, 459–60 (2009); *see also* Daniel S. Kleinberger, *A Myth Deconstructed: The "Emperor's New Clothes" on the Low-Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879, 886 (2010) ("[T]he LLC has become the 'vehicle of choice' for new business formation.").

141. Chrisman, *supra* note 140, at 460.

membership agreements.[142] All the members' decisions and relationships are negotiated among themselves, and they only adopt the formal requirements that they think are necessary.[143]

D. Section 501(c)(3) Charitable Organizations

For socially minded entrepreneurs, the alternative to the for-profit corporation has traditionally been the § 501(c)(3) charitable organization.[144] In order to receive recognition as a § 501(c)(3), the organization must show that it is pursuing at least one of eight charitable purposes, the three most prominent of which are "religious," "charitable," and "educational."[145] Social entrepreneurs seeking to further one or more of these purposes may choose to organize the business as a § 501(c)(3) because these entities are exempt from federal income tax and eligible to receive tax-deductible donations.[146]

American charitable law is based on the British system,[147] which, as early as 1601, exempted from taxes organizations that helped the "aged, impotent and poor people, . . . sick and maimed soldiers and mariners,

142. BAINBRIDGE, A PRIMER, *supra* note 130, at 2–3, 7–8.

143. *See id.* at 7 ("The LLC thus provides substantial flexibility in structuring the firm's decisionmaking processes.").

144. *Exemption Requirements - 501(c)(3) Organizations*, IRS, https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-section-501c3-organizations (last updated Nov. 28, 2018) [hereinafter *Exemption Requirements*].

145. I.R.C. § 501(c)(3) (2017). Specifically, the statute exempts organizations with the following purposes: "religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals." *Id.*

146. *Id.* (providing tax-exempt status for corporations, trusts, and community chests organized and operated to further one of eight enumerated purposes); *id.* § 170(c)(2)(B) (allowing tax deductions for charitable contributions made to organizations with one or more of the purposes enumerated in § 501(c)(3)).

147. For articles discussing the history of philanthropy, see James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 618 (1985) (examining "the development of the law of 'charitable corporations'"); Henry Hansmann, *The Evolving Law of Nonprofit Organizations: Do Current Trends Make Good Policy?*, 39 CASE W. RES. L. REV. 807, 807 (1988) (describing the "considerabl[e]" changes that have occurred in nonprofit law over the last "several decades" and "evaluating the wisdom of continuing to follow the particular paths along which the law has been evolving"); Thomas Kelley, *Rediscovering Vulgar Charity: A Historical Analysis of America's Tangled Nonprofit Law*, 73 FORDHAM L. REV. 2437, 2451 (2005) ("[I]t was clear from the start that the colonists would carry their charitable traditions along with them from England to the New World . . . ."); MAMOUN ABUARQUB & ISABEL PHILLIPS, ISLAMIC RELIEF WORLDWIDE, A BRIEF HISTORY OF HUMANITARIANISM IN THE MUSLIM WORLD 3 (2009), http://waqfacademy.org/wp-content/uploads/2013/02/Mamoun-AbuarqubIsabel-Phillips-MA-IP.-07_2009.-A-Brief-History-of-Humanitarianism-in-the-Muslim-World.-Birmingham-UK.-Islamic-Relief-Worldwide.pdf (outlining the history and "centrality of humanitarian principles in Islam"); Roger Colinvaux, *Charity in the 21st Century: Trending Toward Decay*, 11 FLA. TAX REV. 3, 7 (2011) (arguing "for a reexamination of how charity is governed for federal tax purposes").

schools of learning, . . . churches, . . . orphans, . . . and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants."[148] But, as mentioned above, the concept of tax exemption was unnecessary in the first 130 years of the U.S. because no federal income tax existed.[149] Nor was it necessary to establish a special kind of corporation that was devoted to the common good because all corporations agreed to further a public purpose as a condition of doing business.[150]

And yet, the concept of tax-exempt charitable organizations, as set forth in the 1601 Charitable Uses proclamation, was so imbued in Anglo-American property and tax thinking that charitable organizations were exempted once the federal income tax was enacted in 1913.[151] The charitable deduction benefit was added for individuals in 1917 and for corporations in 1936.[152]

Since that time, charitable organizations' fortunes have risen and fallen, largely in conjunction with those of for-profit corporations. During the Gilded Age and the first few decades of the 20th century, when corporations and their owners grew increasingly rich, philanthropy blossomed.[153] The tycoons of this era created large grant-making foundations, many of which continue to this day.[154]

When the Depression hit a few years later, the government began working with charities to solve social problems, another practice that exists to this day.[155] And during the managerial, bureaucratic heyday of the

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148. *See* RESTATEMENT (FIRST) OF TRUSTS § 368 (AM. LAW INST. 1935) (quoting Statute of Charitable Uses 1601, 43 Eliz. I c. 4 (Eng.)).

149. *See supra* notes 24–25 and accompanying text (describing American corporations before federal income tax).

150. *See supra* notes 26–30 and accompanying text (explaining how corporations agreed to perform public purposes in exchange for corporate charters).

151. Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, STAT. INCOME BULL., Winter 2008, at 105, 106–07, https://www.irs.gov/pub/irs-soi/tehistory.pdf.

152. *Id.*

153. *See id.* at 105 (discussing how American industrialists used "their newly acquired wealth toward a broad range of altruistic endeavors").

154. *See, e.g.*, *Our History*, ROCKEFELLER FOUND., https://www.rockefellerfoundation.org/about-us/our-history/ (last visited Apr. 27, 2019) ("From our very first grant—to the American Red Cross—through to our present-day initiatives, The Rockefeller Foundation has legacy of trailblazing new fields, convening unlikely partners, and sparking new innovations that lead to transformative change."); *Our History*, CARNEGIE CORP. N.Y., http://www.carnegie.org/about/our-history/ (last visited Apr. 27, 2019) ("[E]stablished in 1911 'to promote the advancement and diffusion of knowledge and understanding,' [the Carnegie Foundation] is one of the oldest and most influential of American grantmaking foundations."); *History*, FORD FOUND., https://www.fordfoundation.org/regions/united-states/history/ (last visited Apr. 27, 2019) ("Since the foundation was established in 1936, we have been working to improve people's lives and address social justice issue across the United States.").

155. Alice M. Thomas, *Re-Envisioning the Charitable Deduction to Legislative Compassion and Civility: Reclaiming Our Collective and Individual Humanity Through Sustained Volunteerism*, 19 KAN. J.L. PUB. POL'Y 269, 295–96 (2010); *see also* SAUNJI D. FYFFE, URBAN INST., NONPROFIT-GOVERNMENT CONTRACTS AND GRANTS: THE STATE AGENCY PERSPECTIVE, at VI (2015) ("Nonprofit

American corporation, nonprofits fared well because they received the largesse of civic-minded corporations.[156]

In the shareholder primacy era of the last 30 years, the nonprofit sector has continued to grow exponentially.[157] But today's tycoons do not always use the nonprofit sector for their charitable endeavors.[158] Furthermore, government largesse has shrunk, and the gap between donations and operating expenses has grown for many organizations.[159] As a result, charitable organizations increasingly look to commercial endeavors to help bridge the gap.

Commercial activity is certainly compatible with § 501(c)(3) law, but nonprofits that engage in such activity must follow certain rules. First, the inurement provisions of § 501(c)(3) ensure that net profits will not be distributed to shareholders or even to managers, whose salaries must be set at fair market value.[160] Second, while a § 501(c)(3) can engage in unlimited commercial activity—as long as that activity furthers its charitable purpose[161]—it can only engage in a limited amount of activity that is

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and government organizations have a long history of working together to address social issues and deliver publicly funded programs and services.").

156. Arnsberger et al., *supra* note 151, at 105. Milton Friedman's attack on corporate social responsibility was in direct response to this largesse. *See supra* notes 67–71 and accompanying text (discussing Friedman's critique of corporate social responsibility).

157. The number of nationally recognized § 501(c)(3)s doubled between 1995 and 2015, even though the rules changed during that time, which eliminated at least 300,000 from the list. SCHMIDT, *supra* note 18, at 16.

158. Mark Zuckerberg, the founder of Facebook, and Pierre Omidyar, the founder of eBay, both use LLCs as their charitable vehicles. *See* Mark Zuckerberg, *A Letter to Our Daughter*, FACEBOOK (Dec. 1, 2015), https://www.facebook.com/notes/mark-zuckerberg/a-letter-to-our-daughter/10153375081581634 (introducing the Chan Zuckerberg Initiative which focuses on "personalized learning, curing disease, connecting people and building strong communities"); Seung Lee, *Zuckerberg Clarifies Why His $45 Billion Charity is an LLC*, NEWSWEEK (Dec. 3, 2015), https://www.newsweek.com/chan-zuckerberg-llc-charity-kind-not-really-charity-400964 (explaining that the Chan Zuckerberg initiative is "structured as an LLC rather than a traditional charity foundation"); *Financials*, OMIDYAR NETWORK, https://www.omidyar.com/financials (last visited Apr. 27, 2019) ("We invest in for-profit entities through our LLC. Inspired by the social impact of eBay, we believe that business can create extraordinary opportunity and value, and that market-based solutions can generate significant social returns.").

159. *See, e.g.*, FYFFE, *supra* note 155, at 2 ("[N]ational surveys uncovered widespread problems experienced by nonprofit organizations that have contracts or grants with governments throughout the country.").

160. I.R.C. § 501(c)(3) (2017) ("[N]o part of the net earnings [may] inure[] to the benefit of any private shareholder or individual"). Section 501(c)(3)s are also subject to § 4958, which establishes an excise tax for excess benefit transactions, which occur "if the value of the economic benefit provided [to an insider of the organization] exceeds the value of the consideration (including the performance of services) received for providing such benefit." *Id.* § 4958(c)(1)(A).

161. Treas. Reg. § 1.501(c)(3)-1(e) (as amended in 2014). This provision provides that:

> An organization may meet the requirements of section 501(c)(3) although it operates a trade or business as a substantial part of its activities, if the operation of such trade or business is in furtherance of the organization's exempt purpose or

unrelated to this purpose.[162] It must pay unrelated business income taxes on the net income generated from that unrelated activity,[163] and it must be careful not to engage in too much unrelated activity because it may lose its exemption.[164] Unfortunately, the line between related and unrelated activity is determined with a facts and circumstances test,[165] and the IRS has not provided guidance as to how much unrelated activity is too much.[166]

E. Melding of the Business Entity Forms in the 21st Century

By the early part of the 21st century, entrepreneurs were beginning to combine for-profit and nonprofit purposes with more regularity. In 1980, Bill Drayton had founded Ashoka, an organization that supported social entrepreneurs financially,[167] and Professor Gregory Dees published his classic definition of "social entrepreneurship" in 1998.[168]

Increasingly, those working at the intersection of the for-profit and nonprofit worlds expressed frustration with such rigid categorizations.[169]

> purposes and if the organization is not organized or operated for the primary purpose of carrying on an unrelated trade or business.

Id.

162. I.R.C. § 512(a)(1).

163. *Id.* § 511(b)(1).

164. *See* SCHMIDT, *supra* note 18, at 386 ("While the term 'exclusively' need not be interpreted literally, commercial activity can be substantial enough that the organization is not being operated for charitable purposes. In such instances, the organization will lose its §501(c)(3) tax-exempt status.").

165. Treas. Reg. § 1.501(c)(3)-1(e) ("In determining the existence or nonexistence of such primary purpose, all the circumstances must be considered, including the size and extent of the trade or business and the size and extent of the activities which are in furtherance of one or more exempt purposes.").

166. *See* Allen Bromberger, *Tandem Nonprofit & For-Profit Companies Must Walk Fine Line*, PERLMAN & PERLMAN (May 18, 2018), https://www.perlmanandperlman.com/private-benefit-tandem-structures/ ("In the world of nonprofit/for-profit tandem structures, this juggling of public interest and private interest can be a challenge. Every arrangement and transaction between the two entities has to satisfy competing and somewhat inconsistent requirements.").

167. *Ashoka's History*, ASHOKA, https://www.ashoka.org/en-US/ashoka%27s-history (last visited Apr. 27, 2019).

168. *See* J. Gregory Dees, *The Meaning of "Social Entrepreneurship*,*"* DUKE INNOVATION & ENTREPRENEURSHIP, https://entrepreneurship.duke.edu/news-item/the-meaning-of-social-entrepreneurship (last updated May 30, 2001) (providing a definition of "social entrepreneurship," which includes, among other things, "[a]dopting a mission to crease and sustain social value" and "[r]ecognizing and relentlessly pursuing new opportunities to serve that mission").

169. *See, e.g.*, THOMAS J. BILLITTERI, ASPEN INST., MIXING MISSION AND BUSINESS: DOES SOCIAL ENTERPRISE NEED A NEW LEGAL APPROACH? 2 (2007) (recognizing the emergence of a "'Fourth Sector' of social enterprise organizations that combine charitable missions, corporate methods, and social and environmental consciousness in ways that transcend traditional business and philanthropy"); ALLEN R. BROMBERGER, SOCIAL ENTERPRISE: A LAWYER'S PERSPECTIVE 2 (2007) (unpublished manuscript) [hereinafter BROMBERGER, SOCIAL ENTERPRISE], https://community-wealth.org/content/social-enterprise-lawyers-perspective ("Ironically, American law does not provide a legal form that is designed to accommodate the particular needs of social enterprise."); Nicole Wallace, *New Business-Charity Hybrid Sought*, CHRON. PHILANTHROPY (Mar. 12, 2008), https://www.philanthropy.com/article/New-Business-Charity-Hybrid/163197 ("As the lines between the

They noted that such business entity forms had limitations for those seeking to make a profit while serving a social purpose.[170] As mentioned above, § 501(c)(3)s cannot offer financial incentives to employees or investors because such incentives would constitute private inurement.[171] Nor can they engage in too much unrelated commercial activity, an amount that has never been defined.[172] Thus, using this entity form for a social venture, while possible, is laced with uncertainty.

Yet for-profit corporations and even LLCs are not necessarily the answer either because most investors and the general public will expect them to serve the owners' interests.[173] This expectation is higher for corporations than LLCs because LLC members can use the membership agreement to craft their relationships.[174] But, whatever the owners decide, the general public will expect profit-seeking behavior.[175] Further, even if the owners of an LLC or for-profit corporation decide among themselves to focus on more than profits, these forms do not provide a way to protect the social mission should future owners—or even the initial ones—change their minds.[176]

It is possible, of course, to combine a for-profit and nonprofit in a joint venture or in a parent-subsidiary relationship, but such structures are complex and expensive to set up.[177] Further, the board and management

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nonprofit and for-profit worlds blur, social-enterprise leaders continue to look for new legal structures that are better suited to such blended activities than current designations."); Robert A. Wexler, *Social Enterprise: A Legal Context*, 54 EXEMPT ORG. TAX REV. 233, 233 (2006) (expressing a desire for the legal community "to help change the law to accommodate new approaches to philanthropy").

170. *See, e.g.*, BILLITTERI, *supra* note 169, at 10 ("A number of participants at the Aspen meeting spoke of the difficulty under present laws [for nonprofits to] attract[] investment capital, whether from bank loans, venture capital, or some other form.").

171. *See* I.R.C. § 501(c)(3) (2017) ("[N]o part of the net earnings [may] inure[] to the benefit of any private shareholder or individual.").

172. Wexler, *supra* note 169, at 242; *see also supra* notes 160–66 and accompanying text (outlining the uncertainties and limitations of the unrelated commercial activity rule).

173. Hansmann & Kraakman, *The End*, *supra* note 72, at 441; *see also supra* Part I.B (describing the rise of the shareholder primacy doctrine).

174. Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 370 (2009) [hereinafter Kelley, *Law and Choice*].

175. *Id.* at 354; Hansmann & Kraakman, *The End*, *supra* note 72, at 447–48.

176. BROMBERGER, SOCIAL ENTERPRISE, *supra* note 169, at 3.

177. *See* DARREN B. MOORE & JOHN F. CRAWFORD, PUTTING THINGS TOGETHER: SUBSIDIARIES, COMPLEX ORGANIZATIONAL STRUCTURES, JOINT VENTURES, AND JOINT FUNDING VEHICLES 2 (2018) (explaining that "charities often find themselves looking to structure their operations through subsidiaries, affiliates, and other joint ventures vehicles" and deciding the appropriate vehicle "involves consideration of factors ranging from choice of form, tax status of the vehicle, and ultimately the impact on the exempt organization").

must remain vigilant to ensure that this arrangement does not jeopardize the § 501(c)(3) partner's exempt status.[178]

In 2006, a group of thought leaders attended an Aspen Institute meeting and began to question this traditional categorization and explore alternative ideas.[179] Present at that meeting were three men who presented early versions of their ideas about hybrid organizations.[180] They were Robert Lang and Marcus Owens, two of the architects of the L3C—and Jay Coen Gilbert, the founder of B Lab, and a proponent of the benefit corporation.[181]

II. THE LOW-PROFIT LIMITED LIABILITY COMPANY (L3C)

A. Description and Purpose

"On April 30, 2008, Vermont recognized a new business entity, the low-profit limited liability company, also known as the L3C. An L3C is a for-profit organization, designed to retain the flexibility of a limited liability company (LLC), but with a primary motivation to achieve a charitable goal."[182] Its measures were carefully crafted to attract investment from private foundations and other investors.[183] In the 11 years since Vermont adopted the L3C, eight other states, three tribal nations,[184] and one U.S.

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178. *See* Kelley, *Law and Choice*, *supra* note 174, at 341 ("But those complex structures, which involve corporations with multiple classes of stock and detailed shareholder agreements, or the creation of multiple interlocking entities, or the use of delicately drafted joint venture agreements, tend to be expensive to create, burdensome to maintain, and . . . legally insecure."); Allen Bromberger, *IRS Declares War on Commercial Charities*, PERLMAN & PERLMAN (Dec. 14, 2017), https://www.perlmanandperlman.com/irs-declares-war-on-commercial-charities/ (documenting cases in which the IRS revoked tax-exempt status because organizations were engaged in substantial "non-exempt (i.e., commercial)" activity).

179. BILLITTERI, *supra* note 169.

180. *Id.* at 10, 12–13.

181. *Id.*

182. Elizabeth Schmidt, *Vermont's Social Hybrid Pioneers: Early Observations and Questions to Ponder*, 35 VT. L. REV. 163, 163 (2010) [hereinafter Schmidt, *Hybrid Pioneers*] (footnote omitted). Much of the material in this section is derived from this article. *Id.*; *see also* VT. STAT. ANN. tit. 11, § 4162 (2019) (outlining Vermont's requirements for benefit corporations). Much has been written on the L3C. Americans for Community Development maintains the most comprehensive website about the L3C. *L3C Laws*, *supra* note 5; *see also* Schmidt, *Hybrid Pioneers*, *supra* (examining "the experiences of the early adopters of the L3C business form").

183. *See* Schmidt, *Hybrid Pioneers*, *supra* note 182 (explaining that L3Cs are "expected to facilitate social investing from private foundations").

184. The tribal nations are the Oglala Sioux Tribe, the Navajo Indian Nation, and the Crow Indian Nation of Montana. *L3C Laws*, *supra* note 5; A. Nicole Campbell, *The Possibilities of the L3C*, PROSKAUER (Nov. 10, 2009), https://nonprofitlaw.proskauer.com/2009/11/10/the-possibilities-of-the-l3c/.

Territory[185] have recognized this new social hybrid.[186] Approximately 1,600 organizations are now organized as L3Cs in the U.S.[187] The following description explains the problem L3Cs are designed to fix and the two parts to the solution that the architects mistakenly thought would solve that problem.

1. The Problem L3Cs are Designed to Fix—Difficulty Attracting Capital

The creators of the L3C were keenly aware of the difficulty social enterprises can have in attracting capital.[188] If organized as nonprofits, they are forbidden from seeking investors with promises of a financial return.[189] Loans can be difficult to obtain because lenders fear that nonprofits' lack of access to other forms of capital will decrease their ability to repay the loan.[190] Foundations and the government will fund nonprofits in the form of grants, but their time frame is slow,[191] their funds are dwarfed by the capital available in the private sector, and they rarely provide long-term funding.[192]

Social enterprises organized as either LLCs or corporations face similar obstacles in obtaining funding. Foundations and governments do not

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185. The U.S. Territory is Puerto Rico. 2015 P.R. Laws 233.

186. The states that have passed L3C legislation are Illinois, Louisiana, Maine, Michigan, Rhode Island, Utah, Vermont, and Wyoming. 805 ILL. COMP. STAT. 180/1–26 (2010); LA. STAT. ANN § 12:1302(C) (2010); ME. REV. STAT. ANN. tit. 31, § 1611 (2011); MICH. COMP. LAWS ANN. § 450.4102(2)(m) (West 2016); UTAH CODE ANN. § 48-3a-1302 (West 2014); WYO. STAT. ANN. § 17-29-101 (West 2017). North Carolina passed and then later rescinded an L3C statute, ostensibly because it was unnecessary. Anne Field, *North Carolina Officially Abolishes the L3C*, FORBES (Jan. 11, 2014), https://www.forbes.com/sites/annefield/2014/01/11/north-carolina-officially-abolishes-the-l3c/#4dbed67e3d7f.

187. *What Is An L3C?*, *supra* note 6.

188. BILLITTERI, *supra* note 169, at 10. Robert Lang, then the CEO of the Mary Elizabeth & Gordon B. Mannweiler Foundation, presented his idea about the L3C at the Aspen Institute meeting described above. Robert Lang & Elizabeth Carrott Minnigh, *The L3C, History, Basic Construct, and Legal Framework*, 35 VT. L. REV. 17, 29 (2010). After that meeting, Lang teamed up with three of the other participants—Marcus Owens, then Partner at Caplin & Drysdale and a former Director of the IRS Exempt Organizations Division; Arthur Wood, then Director of Social Financial Services at Ashoka; and John Tyler, the Secretary and General Counsel of the Ewing Marion Kauffman Foundation—to develop the idea further. *Id.*

189. *See* I.R.C. § 501(c)(3) (2017) (prohibiting private inurement); *see also* Frumkin, *supra* note 18, at 4–5 (explaining that the nondistribution constraint is a characteristic of a nonprofit organization).

190. *See* Frederick D. Hyman & Christine Walsh, *Considerations when Lending to a Not-For-Profit Entity*, N.Y. L.J. (Jun. 22, 2015), https://www.law.com/newyorklawjournal/almID/1202729819714/?slreturn=20190330163701 (explaining that lenders should be wary of lending to non-profit entities because "[i]n times of distress, not-for-profit entities, often layered with debt and other obligations, are more likely to seek bankruptcy in order to wind up and/or transition their operations").

191. FYFFE, *supra* note 155, at 2.

192. *See, e.g.*, Randy Hawthorne, *The Pros and Cons of Nonprofit Grants*, NONPROFIT HUB (Oct. 23, 2018), https://nonprofithub.org/grant-writing/pros-and-cons-of-relying-on-grants/ [https://webcache.googleusercontent.com/search?q=cache:https://nonprofithub.org/grant-writing/pros-and-cons-of-relying-on-grants/] ("Grants are almost always meant to be a supplemental funding source.").

generally provide grants to for-profit entities;[193] traditional investors look askance at organizations that do not seek to maximize profits;[194] and lenders are concerned about the viability of loans to such organizations.[195] Socially minded investors do exist, but it has been difficult for social enterprises to signal their purposes to these investors.[196]

The L3C creators saw an opportunity to solve this financing problem by creating a new business entity that could convince private foundations to invest in charitably minded for-profit businesses.[197] They also hoped this new form could entice other investors through a tranche funding mechanism.[198]

2. Solution 1: Unleashing Foundations' Program Related Investment Funds

Their strategy to convince foundations to fund L3Cs involved a little used tool in the private foundation toolbox, the program related investment (PRI).[199] A PRI is an investment that is made to further a foundation's exempt purpose.[200] Unlike grants, PRIs can provide foundations with a return on their investment.[201] The investment can take the form of a loan, an equity position, a loan guarantee, or any other transaction in which the foundation has an economic interest, so long as the PRI has the following

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193. *Where Can I Find Funding For My Business?*, GRANTSPACE, https://grantspace.org/resources/knowledge-base/business-funding/ (last visited Apr. 27, 2019). Foundations can exercise "[e]xpenditure responsibility" to determine whether an organization that is not a § 501(c)(3) could be eligible for tax-exempt grants. I.R.C. § 4945(a)(1), (d), (h); *Grants by Private Foundations: Expenditure Responsibility*, IRS, https://www.irs.gov/charities-non-profits/private-foundations/grants-by-private-foundations-expenditure-responsibility (last updated Apr. 16, 2019) (outlining how private foundations can practice expenditure responsibility).

194. *See* Hyman & Walsh, *supra* note 190 (explaining the various reasons that entities which do not have the goal of maximizing profit are viewed skeptically as candidates for private funding); *see also supra* Part I.B (describing the rise of the shareholder value doctrine).

195. *See, e.g.*, Shiva Mirzanian, *Washington's Social Purpose Corporation: Creating Accountability for Corporations or Simply Providing a Halo to Undeserving Corporations*, 5 SEATTLE J. ENVTL. L. 265, 269 (2015) ("Investors seeking market-rate returns do not typically invest in companies that might only incidentally provide them with such a return.").

196. *Id.* at 268–69; *see infra* Part II.A.2 (discussing how foundations can invest in L3Cs).

197. BILLITERI, *supra* note 169, at 2.

198. *See infra* notes 227–35 and accompanying text (discussing the concept of tranche investing).

199. BILLITTERI, *supra* note 169, at 10, 13 (describing Robert Lang's and Marcus Owen's discussions about PRI at the Aspen Institute meeting that led to the development of the L3C); Robert R. Keatinge, *LLCs and Nonprofit Organizations – For-Profits, Nonprofits and Hybrids*, 42 SUFFOLK U. L. REV. 553, 581–82 (2009) [hereinafter Keatinge, *LLCs and Nonprofit Organizations*].

200. Keatinge, *LLCs and Nonprofit Organizations*, *supra* note 199, at 581 ("A program related investment is one in which the primary purpose is to accomplish one or more of the private foundation's charitable purposes, 'and no significant purpose of which is the production of income or the appreciation of property.'" (quoting Treas. Reg. § 53.4944-3 (as amended in 2018))).

201. Lang & Minnigh, *supra* note 188, at 25.

characteristics: (1) its primary purpose is the accomplishment of a charitable purpose that is enumerated in § 170(c)(2)(B) of the Internal Revenue Code; (2) neither the production of income nor the appreciation of property is a significant purpose of the investment; and (3) it does not have any prohibited purpose such as lobbying or political campaigning.[202]

"Charitable" is defined as being organized and operated for one or more of the same eight enumerated purposes in § 501(c)(3) described above, the most important of which are "religious," "charitable," and "educational."[203] An organization will ordinarily satisfy this charitable purpose test with regard to PRIs if: (1) the organization significantly furthers the accomplishment of the private foundation's exempt activities and (2) the grant was only made because of the relationship between the investment and the foundation's exempt activities.[204] In other words, the foundation must determine that its exempt purposes match the activities of the organization in which it invests so that the investment qualifies as a PRI.[205]

The second requirement, the income-production test, requires that "[n]o significant purpose of the investment" may be the "production of income or the appreciation of property."[206] In other words, the foundation must be looking for investments that would not ordinarily attract market-rate investment because of their charitable purposes.[207] It is possible that, even though the investment would not attract most investors, it could eventually produce significant income or asset appreciation. That occurrence would not necessarily mean that the foundation has failed this second requirement.[208]

The third requirement posits that no purpose can be for the furtherance of lobbying or political campaign activity.[209] This requirement helps to

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202. I.R.C. § 4944(c) (2017); Treas. Reg. § 53.4944-3(a)(1)(i)–(iii). This exception to the jeopardizing investment rule has been in effect since 1969. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, 505.

203. I.R.C. § 170(c)(2)(B). This language tracks closely the purposes set forth in § 501(c)(3). *Id.* § 501(c)(3) (exempting organizations with "religious, charitable, scientific, testing for public safety, literary [and] educational purposes"). In this Article, the terms *charitable* and *educational* or *socially beneficial* mean the purposes listed in § 170(c)(2)(B). *Id.* § 170(c)(2)(B).

204. Treas. Reg. § 53.4944-3(a)(2)(i).

205. *Id.*

206. *Id.* § 53.4944-3(a)(1)(ii).

207. *Id.* § 53.4944-3(a)(2)(iii).

208. *Id.*; *see also id.* § 53.4944-3(b) (providing that a below-market rate loan to a small business owned by members of an economically disadvantaged minority group in a deteriorated urban area qualifies as a PRI "even though [a private foundation] may earn income from the investment in an amount comparable to or higher than earnings from conventional portfolio investments").

209. *Id.* § 53.4944-3(a)(1)(iii).

ensure that the charitable funds used in a PRI are used for charitable, rather than political, purposes.[210]

PRIs are exceptions to the jeopardizing-investment rule. That rule imposes a substantial excise tax on the organization and the managers who knowingly authorize those investments, as well as the possibility of the loss of exemption on foundations that make risky investments.[211] PRIs also count toward the 5% qualifying distribution requirement—the rule that requires private non-operating foundations to spend at least 5% of an average market value of their previous year's assets on charitable purposes.[212] Foundations traditionally meet this qualifying distribution requirement through grants, for which they receive no return on investment.[213] Because PRIs have the potential to make a return on their investment, they also have the potential to increase the amount of money foundations can eventually distribute for charitable purposes.[214]

PRIs have been permitted investment vehicles for foundations since 1969.[215] But when the Foundation Center tracked 173 grantmaking foundations that had made PRIs of $10,000 or more in 2006 and 2007, it found that those foundations' PRI investments totaled $742 million.[216] That amounted to less than 1% of the total qualifying distributions they made during these years.[217]

Several reasons existed for the relative dearth of PRIs. Foundations typically give grants instead of making loans or investments, and they may not have had the expertise or interest in managing PRIs.[218] Foundations also

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210. *Id.* § 53.4944-3(a)(1)(iii), (a)(2)(iv).

211. I.R.C. § 4944(a)–(c) (2017) (imposing an excise tax on private foundations that engage in high-risk investments that do not quality as PRIs).

212. *Id.* § 4942(a), (d)(1), (e)(1)(A); *see also* Marco Navarro & Peter Goodwin, *Program-Related Investments*, *in* 5 TO IMPROVE HEALTH AND HEALTH CARE 2 (Stephen L. Isaacs & James R. Knickman eds., 2002), https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/chapter-navarro-goodwin.pdf ("As long as a PRI meets these requirements, it can be counted, as grants are, toward meeting the 5 percent payout required by law.").

213. Steven Lawrence, *Doing Good with Foundation Assets: An Updated Look at Program Related Investments*, *in* THE PRI DIRECTORY: PROGRAM-RELATED INVESTMENTS AND LOANS BY FOUNDATIONS xiii, xiv (3d ed. 2010).

214. *Id.* at xiii.

215. Navarro & Goodwin, *supra* note 212.

216. Lawrence, *supra* note 213, at xiii.

217. *Id.* For a description of some of the PRIs that had been made before the advent of the L3C, see Georgia Levenson Keohane, *Foundation Philanthropy and the Power of PRIs*, CTR. FOR EFFECTIVE PHILANTHROPY (Feb. 3, 2010), https://cep.org/foundation-philanthropy-and-the-power-of-pris/ (detailing PRI investments made by "small- and middle-sized philanthropies," such as the Heron, MacArthur, and Ford Foundations); Luther M. Ragin, Jr., *Program-Related Investments in Practice*, 35 VT. L. REV. 53, 54 (2010) ("At the end of 2009, [the F.B. Heron Foundation] had just under $21 million in outstanding PRIs in 38 separate transactions").

218. Lawrence, *supra* note 213, at xiii.

typically seek reassurance that such investments actually qualify as PRIs, given the excise taxes and possible loss of exemption they face if they make an incorrect determination.[219] Thus, foundations tend to forego the process entirely, seek a private letter ruling from the IRS or an opinion letter from an attorney, or engage in an expensive and time-consuming internal due diligence process.[220]

The architects of the L3C reasoned that private foundations would be more likely to use the PRI tool if a legally recognized entity could signal to the foundations that PRI requirements were met.[221] Presumably, this designation would give private foundations the same confidence the § 501(c)(3) designation gives to grantmaking foundations.[222] As a result, lawmakers inserted these three requirements into the L3C legislation.

3. Solution 2: Build on the Inherent Flexibility of the LLC to Create Multi-tiered Financing Strategies

In reality, the L3C legislation is an amendment to the LLC statute in each state.[223] The drafters of this legislation assumed that basing the L3C on

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219. Carter G. Bishop, *The Low-Profit LLC (L3C): Program-Related Investment by Proxy or Perversion*?, 63 ARK. L. REV. 243, 244 (2010).

220. *Id.* at 258–59; *see also* Ragin, *supra* note 217, at 56–57 (arguing that foundations do not make PRIs because they "have a profound discomfort with the underwriting credit risk associated with PRIs"). For an argument that foundations are unnecessarily afraid of PRIs, see Nicole Motter, *Why Program-Related Investments are Not Risky Business*, FORBES (Feb. 21, 2013), https://www.forbes.com/sites/ashoka/2013/02/21/why-program-related-investments-are-not-risky-business/ (suggesting that "PRIs have been underutilized" partly because "they have been dubbed by many in the legal community as too risky for the average foundation, largely due to lack of IRS guidance").

221. *See* BILLITTERI, *supra* note 169, at 10–11 ("[T]he federal government could allow the development of specially designated 'social benefit organizations'—nonprofit or for-profit groups that are IRS-certified . . . . Such a designation . . . *would encourage more foundations to provide financial support* . . . ." (emphasis added)); Bishop, *supra* note 219, at 248 ("By design, the statutory L3C operating restrictions precisely mirror the PRI exception to the toxic federal excise tax imposed on investments that jeopardize charitable purpose." (footnote omitted)).

222. A determination letter from the IRS—in response to an application—recognizes that an organization is a § 501(c)(3) tax-exempt organization. It provides foundations and other donors advance assurance of deductibility of contributions. They can rely on this determination unless and until the IRS revokes the determination letter. *See* Rev. Proc. 82-39, 1982-1 I.R.B. 759 (discussing how once the IRS has recognized an organization as a § 501(c)(3), the IRS will not revoke its benefits until they notify the public of the change in status).

223. The Vermont L3C statute, for example, amended the existing limited liability statute by adding the definition of "L3C" or "low-profit limited liability company" to the definitions section of Vermont's limited liability statute. VT. STAT. ANN. tit. 11, § 4001(14) (2019). The L3C provision, § 4162, tracks the language in the Internal Revenue Code and the Treasury Regulations that relate to PRIs. *Id.* § 4162(1)–(3) (listing the three requirements of a Vermont L3C); *see also supra* notes 201–05 and accompanying text (outlining the requirements of PRIs under the IRS code and Treasury Regulations). The remaining LLC provisions in the Vermont statute then apply to L3Cs because they are simply a sub-set of the LLC. *See* VT. STAT. ANN. tit. 11, § 4001(13) (defining "[l]imited liability company" as "an organization formed under this chapter"). The Vermont L3C statute also provides that,

a familiar legal entity would provide three benefits, the third of which would encourage further investments.

The first benefit would be to provide members of L3Cs with the same limited liability protection, pass-through taxation, and flexibility to structure relationships through membership agreements as other LLCs.[224] The only difference was that L3Cs would also respect the three requirements that parallel PRI requirements.[225] The second benefit would be that the existing body of law governing LLCs would also govern L3Cs, which would provide some certainty to investors who may be wary of a new business entity.[226] Finally, L3C members could use the membership agreement to develop a multi-tiered financing strategy that could bring much needed capital to these new entities.[227]

This investment strategy, often called a "tranche" mechanism,[228] allows for several membership classes that expect different rates of financial return.[229] For example, a private foundation could make the initial investment in an L3C through a PRI.[230] That investment would have the highest risk and the lowest rate of return.[231] The investment would also provide the initial equity capital to the L3C, which would then give the L3C sufficient capital to attract investors who would otherwise have found the investment too prone to risk.[232] Such investors would then become a part of a separate membership class (or tranche) in the L3C: a class that could expect a higher rate of return than the foundation.[233] This class might become a middle tranche of investors—those who still accept a below-

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if any of these requirements are no longer met, the organization will cease being an L3C, but will remain an LLC as long as it meets the LLC requirements. *Id.* § 4163(a).

224. *See* BAINBRIDGE, A PRIMER, *supra* note 130, at 7–8.

225. *Compare* VT. STAT. ANN. tit. 11, § 4162(1)–(3) (enumerating Vermont's L3C requirements), *with* Treas. Reg. § 53.4944-3(a)(1)(i)–(iii) (as amended in 2018) (outlining the federal PRI requirements).

226. *See LLC, S Corporation, L3C, Benefit Corporation?*, IMPACT FOUND., https://impactfoundation.org/blog/llc-or-benefit-corporation (last visited Apr. 27, 2019) (explaining that "the L3C is treated as an LLC for all legal and tax purposes").

227. Lang & Minnigh, *supra* note 188, at 17–18.

228. David Spenard defines "tranche" as a "[f]ancy French word for slice." SPENARD, CRASHING THE PARTY, *supra* note 30, at 9 & n.9.

229. *See* Lang & Minnigh, *supra* note 188, at 17 ("[T]ranching refers to layering. Normally each tranche represents a class of members and each class has a different level of risk and receives different returns on their investment in addition to other rights and privileges of the class.").

230. *See, e.g.*, *id.* at 18 (illustrating an L3C financing structure in which "the foundation is the investor in the equity tranche").

231. *See id.* at 17 ("The terms equity tranche for the highest or first risk tranche, mezzanine for the middle tranche, and senior for the most secure tranche are often used.").

232. *Id.*

233. *See id.* at 18 (illustrating how an initial equity tranche investment by a foundation can "produce[] significant returns to commercial investors").

market rate of return in order to encourage a social return.[234] Ultimately, a class of investors who expect a market rate of return could emerge.[235] Thus, this tranche mechanism allows the PRI to provide much needed capital at the same time it leverages additional investment.

B. Why the L3C Falls Short of Accomplishing These Goals

1. Low PRI Support

Despite initial optimism,[236] L3Cs have not been able to garner significant PRI support.[237] A 2010 survey of the first adopters in Vermont found that no businesses had attracted PRI funding after two years.[238] Even Americans for Community Development, which promotes L3Cs, acknowledges that foundations have not responded positively to this new entity.[239]

This is not a surprising result. The creators of the L3C concept recognized that foundations were leery of making PRI investments and hoped that the L3C would encourage them to do so.[240] But, despite the language in the statute that parallels the PRI,[241] the L3C does not actually

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234. *See id.* ("It is our hope that in many L^{3}Cs investors willing to sacrifice a portion of the return in exchange for knowing that the L^{3}C is performing a socially-beneficial mission will populate a mezzanine tranche.").

235. *Id.*

236. *See, e.g.*, Cassady V. Brewer & Michael J. Rhim, *Using the 'L3C' for Program-Related Investments*, 21 TAX'N EXEMPTS 11, 18 (2009) ("The arrival of the L3C potentially is a watershed moment for individuals and organizations that are dedicated to achieving social change."); Kelley, *Law and Choice*, *supra* note 174, at 377 ("[T]he . . . L3C . . . appears to be the tool best adapted to give legal standing and structure to its hybrid social enterprises."); Sue Woodrow & Steve Davis, *The L3C: A New Business Model for Socially Responsible Investing*, FED. RES. BANK ST. LOUIS, https://www.stlouisfed.org/publications/bridges/winter-20092010/the-l3c-a-new-business-model-for-socially-responsible-investing (last visited Apr. 27, 2019) ("The trio of Lang, Owens, and Wood developed the L3C as a self-sustaining means to achieve a social mission at the lowest possible cost and with the greatest efficiency."); Marc J. Lane, *L3Cs Hold Key to Solving State's Social Woes*, CRAIN'S CHI. BUS. (Aug. 9, 2008), https://www.chicagobusiness.com/article/20080809/ISSUE07/100030399/l3cs-hold-key-to-solving-state-s-social-woes ("[An] L3C, is a new, hybrid business form that can leverage foundations' program-related investments to access trillions of dollars of market-driven capital for ventures with modest financial prospects but the possibility of major social impact.").

237. *See* Schmidt, *Hybrid Pioneers*, *supra* note 182, at 188 (discussing a survey of early adopters of the L3C form that found none had attracted PRI investments).

238. *Id.*

239. MICHAEL MARTIN, AMS. FOR COMMUNITY DEV., SHALL WE DANCE?: DONOR ADVISED FUNDS, PRIS AND THE L^{3}C, at 2 (2012), https://americansforcommunitydevelopment.org/wp-content/uploads/2016/03/Shall-We-Dance_-Donor-Advised-Funds-PRIs-and-The-L3.pdf.

240. ROBERT LANG, AMS. FOR COMMUNITY DEV., THE L^{3}C - BACKGROUND & LEGISLATIVE ISSUES: A NEW WAY TO ORGANIZE SOCIAL ENTERPRISES 1 (2013), https://www.americansforcommunitydevelopment.org/downloads/The%20L3C%20Law%20-%20Background%20&%20Legislative%20Issuesrev01-13.pdf.

241. *Id.* at 3–4.

make life easier for foundations. The foundation must still determine whether the organization meets the three criteria listed in the statute.[242] This is exactly the same due diligence required since 1969 whenever corporations, LLCs, nonprofits, and other business entities sought PRIs.[243] With their own § 501(c)(3) exemption at stake, foundations would be remiss if they blindly took the word of an organization that has checked a box on a state form claiming that the organization has a charitable purpose, which it prioritizes over profit-making, and refrains from lobbying and political activity.[244]

The L3C statutes do not include enforcement language[245]—such as a penalty for failure to follow the pledge that parallels the PRI requirements—which would help foundations feel more comfortable with such investments.[246] The L3C legislation simply provides that, if an L3C

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242. *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, 31 (2011) ("[F]oundations must conduct a fact-intensive analysis of whether to make a PRI and must exercise expenditure responsibility to monitor their investment.").

243. Bishop, *supra* note 219, at 258–59; David Edward Spenard, *Panacea or Problem: A State Regulator's Perspective on the L3C Model*, 65 EXEMPT ORG. TAX REV. 36, 40 (2010) ("Because private foundations that exercise reasonable diligence will continue to do so even within a fully implemented L3C model, there is good reason to be skeptical about whether the L3C model will result in a meaningful reduction in overall transactional costs for the diligent private foundation.").

244. *See, e.g.*, *Limited Liability Company Articles of Incorporation*, WYO. SECRETARY STATE, http://soswy.state.wy.us/Forms/Business/LLC/LLC-ArticlesOrganization.pdf (last visited Apr. 27, 2019) (providing Wyoming's L3C application, which only requires an organization to check a single box to certify its existence as a limited liability company). Some PRIs have been made to L3Cs, but they tended to be from smaller foundations. *See, e.g.*, Anne Field, *Another Reason to Become an L3C*, FORBES (Aug. 22, 2014), https://www.forbes.com/sites/annefield/2014/08/22/another-reason-to-become-an-l3c/#2e896963785a ("Foundations have dragged their feet in trying PRIs . . . . But over the last few years, more of them have been getting their feet wet."). Several scholars had predicted that L3Cs would be unable to garner foundation support. *See, e.g.*, J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT . L. REV. 273, 274 (2010) ("[T]he L3C experiment is flawed and should be abandoned unless and until the federal PRI rules change in a way that gives meaning to L3Cs."); Allison Evans et al., *L3C: Will New Business Entity Attract Foundation Investment?*, 63 EXEMPT ORG. TAX REV. 1, 2 (2009) ("A foundation weighing those costs against the benefits of the investment ultimately may conclude that a grant makes more sense than a potential PRI or that no PRI is worthwhile.").

245. *See* BRAKMAN-REISER & DEAN, *supra* note 11, at 62, 64 ("If an L3C 'at any time ceases to satisfy any one of the [statute's purpose] requirements, it shall immediately cease to be a low-profit limited liability company' . . . . Exactly how anyone will know when such a transformation has occurred remains a bit mysterious." (alteration in original) (foonote omitted) (quoting VT. STAT. ANN. tit. 11, § 3001 (repealed July 1, 2016)). *But see* Tyler, *Negating Legal Problems*, *supra* note 110, at 131 (maintaining that the priorities in the L3C statute create fiduciary duties that provide accountability).

246. Enforcement mechanisms, such as the Philanthropic Facilitation Act, would provide reassurance to foundations. Philanthropic Facilitation Act of 2015, S. 2313, 114th Cong. § 2 (2015). Had this legislation passed, it would have provided a streamlined application process by which the IRS would determine if an organization seeking a PRI investment from a foundation actually met the

stops fulfilling these criteria, it becomes an LLC.[247] The L3C statutes do not include a mechanism for determining when and how this change of form happens.[248] Therefore, the L3C members themselves will make the decision that the organization is no longer pursuing the three L3C criteria.[249] The members can bring suit to enforce these criteria.[250] However, foundations are unlikely to feel comfortable with the members being the only enforcers because the members could violate their fiduciary duties and pursue financial goals at the expense of the charitable ones.[251]

Nor is there any federal monitoring of the L3C.[252] The L3C proponents have attempted to pass such legislation, but they have not yet succeeded.[253] Thus, potential investors must either take the L3C's word that they meet these three requirements or undertake their own due diligence.

2. Tranche Investments

The original idea that multi-tiered financing could bring additional financing to L3Cs assumed that foundations would take on the highest risk investment and accept the lowest return in the form of PRIs.[254] Despite the

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requirements of a PRI. *Id.* Such a mechanism would provide a safe harbor for foundations investing in PRIs because they could rely on the IRS determination. *See generally Proposed Legislation*, AMS. FOR COMMUNITY DEV., http://americansforcommunitydevelopment.org/proposed-federal-legislation/ (last visited Apr. 27, 2019) [hereinafter *L3C Proposed Legislation*] (outlining the proposed 2016 legislation).

247. For a description of the specific termination provisions in all nine states, see CHRISTOPHER REINHART, OFFICE OF LEGISLATIVE RESEARCH, 2011-R-0344, LOW-PROFIT LIMITED LIABILITY COMPANIES OR L3CS (Conn. 2011).

248. *Id.*

249. *See* LANG, *supra* note 240, at 5 (outlining how L3C law "places a fiduciary responsibility on the owners and managers to operate in a manner consistent with the law").

250. *See* Tyler, *Producing Better Mileage*, *supra* note 11, at 267 ("Any given owner or manager should be able to hold others accountable for deviations based both on breach of contract and breach of fiduciary duty.").

251. Dana Brakman Reiser, *Regulating Social Enterprises*, 14 U.C. DAVIS BUS. L.J. 232, 234 (2014) (noting that L3C statutes do not empower any regulating body to play an enforcement role and wondering what would prevent investors from erring on the profit-seeking side and pocketing the gains); Tyler, *Negating Legal Problems*, *supra* note 110, at 131–34. *But see* Tyler, *Producing Better Mileage*, *supra* note 11, at 267 ("[T]he L3C standards seem to inject opportunity for legal actions to enforce duties by establishing priorities and weightings with regard to charitable purposes and investor profits.").

252. *See infra* notes 345–54 and accompanying text for a discussion of the failure to pass the Philanthropic Facilitation Act; *see also* John A. Pearce II & Jamie Patrick Hopkins, *Regulation of L3Cs for Social Entrepreneurship: A Prerequisite to Increase Utilization*, 92 NEB. L. REV. 259, 262 (2013) ("[N]either the IRS nor the federal government has provided formal notification that L^3Cs will receive preferential consideration . . . ."); Tanya M. Marcum & Eden S. Blair, *In Search of a Unique Identity: The L3C as a Socially Recognized Brand*, 14 TRANSACTIONS: TENN. J. BUS. L. 79, 93 (2012) ("At the federal level, time will reveal whether Congress supports the L3C . . . .").

253. *See L3C Proposed Legislation*, *supra* note 246 (highlighting proposed federal legislation).

254. LANG, *supra* note 240, at 4.

predicted increase in PRIs for L3Cs, there has been little increase,[255] and one can safely assume that this tranche investment idea has not brought in significant funding either.

In any case, critics of the L3C have argued that this idea should never gain traction because it could jeopardize the foundation's tax-exempt status.[256] If a foundation accepts a lower rate of return than other investors, the foundation could be allowing the other investors—who do not share its charitable purpose—to profit from its tax-exempt status.[257] Of course, the initial high risk, low return investment need not come from foundations.[258] If this return came from an individual or a for-profit entity, the inurement issue would disappear—as would the PRI rationale for the L3C.

Even assuming the inurement issue can be resolved, a second difficulty with both the PRI and the tranche investment strategy is that neither strategy is unique to the L3C.[259] LLCs and corporations can also receive PRIs and structure multi-tiered financial membership agreements.[260] Thus, neither *solution* is actually a solution to the financing issue because both were already available to traditional for-profit entities.[261] Unsurprisingly, the L3C has failed to attract substantial new funding because the L3C does not differ enough from the LLC to offer something new and compelling to investors.[262]

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255. *See supra* Part II.B.1 (explaining why it is "not a surprising result" that L3Cs have not been able to increase foundations' use of PRIs).

256. Evans et al., *supra* note 244.

257. Benjamin Leff, *Preventing Private Inurement in Tranched Social Enterprises*, 45 SETON HALL L. REV. 1, 22 (2015) ("A tranched investment strategy appears to potentially create a situation in which the charity is subsidizing the profits earned by the private investors, and that seems deeply troubling."); *see also* Kleinberger, *supra* note 140, at 893 ("Depending on how much an L3C is tilted toward the market-rate investors, the investing foundation risks being seen as benefitting . . . substantial number of individuals distinct from the foundation's purpose."); Bishop, *supra* note 219, at 263–65 (concluding that tranche investment may create a situation where foundations allow their "assets to be used to inure private benefit to the commercial or market tranche").

258. *See What is the L3C?*, AMS. FOR COMMUNITY DEV., http://americansforcommunitydevelopment.org/ (last visited Apr. 27, 2019) (enumerating the mix of entities L3Cs "bring together" to achieve social objectives).

259. *See Tranche Investment: Everything You Need To Know*, UP COUNS., https://www.upcounsel.com/tranche-investment (last visited Apr. 27, 2019) (discussing tranche investments and their ability to give money to businesses over a period of time).

260. I.R.C. § 4844(c) (2017). In fact, I.R.S. Priv. Ltr. Rul. 200610020, at 2–3, 14 (Mar. 10, 2006), which proponents of the L3C used to show that L3Cs can accept PRIs with tranche investment strategies, actually dealt with an LLC.

261. *See* Rick Cohen, *Put Your Money Where Your Mission is: Mission-Related Investments and You*, NONPROFIT Q. (Feb. 14, 2013), https://nonprofitquarterly.org/2013/02/14/put-your-money-where-your-mission-is-mission-related-investments-and-you/ (noting the availability of PRIs for for-profit entities as well as nonprofit ones); *see also Tranche Investment*, *supra* note 259 ("Tranche investment lets *venture capital and other investors* split investments into parts." (emphasis added)).

262. *See* Kleinberger, *supra* note 140, at 897 ("In sum, from the perspective of state entity law, there is nothing an L3C can do that cannot already be done through an ordinary LLC.").

III. THE BENEFIT CORPORATION

A. Description and Purpose

As with the L3C, the benefit corporation pursues social as well as profit-making goals.[263] But this business entity is based on the corporation, not the LLC, and the benefit corporation's designers were mainly concerned with officer and director liability instead of financing difficulties.[264] As a result, this legislation is quite different from L3C legislation. Ironically, the benefit corporation is no better suited to reaching its goals than the L3C. The benefit corporation does not make a significant change to existing officer and director liability.[265] It fails to provide enough impetus to protect a social mission.[266] And the benefit corporation's structure does not appeal to the one type of business that truly needs this protection—the publicly traded business that could face a hostile takeover.[267]

The benefit corporation is the brainchild of the founders of B Lab, a nonprofit organization dedicated to helping businesses become a force for good.[268] B Lab's vision is that "one day all companies will compete to be not just best in the world but also best for the world."[269] Its first project created a certification system that requires businesses to meet high standards for social and environmental performance, public transparency,

263. *What is a Benefit Corporation?*, BENEFIT CORP., https://benefitcorp.net/what-is-a-benefit-corporation (last visited Apr. 27, 2019).

264. *See, e.g.*, CLARK, JR. ET AL., *supra* note 91, at 20 (detailing that courts give deference to directors' decisions even if they do not obviously promote shareholder interests). To be fair, most proponents of the benefit corporation mention the possibility of access to financing, but it is almost an afterthought. *See, e.g.*, *id.* at 28–29 (mentioning, after thoroughly discussing director liability, that "[b]enefit corporations are able to attract the same types of capital as regular corporations").

265. *See infra* notes 286–305 and accompanying text (noting the uncertainty surrounding directors' duties and obligations).

266. *See infra* Part III.B.1 (arguing that the benefit corporation legislation does not provide a board of directors with enough guidance as to how to choose social and environmental goals over profit-making ones).

267. *See supra* notes 103–06 and accompanying text (outlining the board of directors' duties during a forced sale or hostile takeover); *see also infra* Part III.B.1 (arguing that benefit corporations are unlikely to face a hostile takeover, especially because there is only one publicly traded benefit corporation).

268. Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1010 (2013) ("Benefit corporations are the brainchild of the nonprofit B Lab."); *see About B Lab*, CERTIFIED B CORP., https://www.bcorporation.net/what-are-b-corps/about-b-lab (last visited Apr. 27, 2019) (noting that B Lab advocates for benefit corporations).

269. *About B Lab*, *supra* note 268.

and legal accountability.[270] Once they meet this standard, these businesses are called "Certified B Corporations," which is somewhat of a misnomer because their underlying legal form can be any for-profit form.[271] As of early 2019, more than 2,600 businesses have earned the B Lab certification.[272]

In addition to running the B Lab certification system, B Lab has promoted the benefit corporation, which is currently recognized in 34 states and is under consideration in six others.[273] In general, businesses organized as benefit corporations agree to create a general public benefit, which is defined as "[a] material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation assessed taking into account the impacts of the benefit corporation as reported against a third-party standard."[274] They also have the option of adding one or more specific public benefits in their articles of incorporation, so long as the general public benefit remains.[275]

Benefit corporations also create a new fiduciary duty for officers and directors, requiring them to consider the interests of all stakeholders when they make a decision—not simply the interests of the shareholders.[276] And they further transparency by requiring an annual report that compares the company's overall social and environmental performance against a third-party standard.[277]

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270. *Certification*, CERTIFIED B CORP., https://bcorporation.net/certification (last visited Apr. 27, 2019); *Certification Requirements*, CERTIFIED B CORP., https://bcorporation.net/certification/meet-the-requirements (last visited Apr. 27, 2019).

271. *See Certification Requirements*, *supra* note 270 ("The legal requirement can be fulfilled through a variety of structures, from LLCs and traditional corporations to benefit corporations and cooperatives.").

272. *Certified B Corporation: A Global Community of Leaders*, B CORP., https://bcorporation.net/ (last visited Apr. 27, 2019). To avoid confusing *B-Corporations*—which are certified by B Lab—and *benefit corporations*—which are legal forms within which a business is organized—this Article uses the phrase "B Lab certified" when discussing the certification process.

273. *Status*, BENEFIT CORP., *supra* note 5. Each state statute is somewhat different, and some states, like Delaware, call their statute the "public benefit corporation." *See, e.g.*, DEL. CODE ANN. tit. 8, § 362(a) (2019) ("A 'public benefit corporation' is a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit . . . ."). It is similar enough to the benefit corporation that it is included in the list. *Status*, BENEFIT CORP., *supra* note 5.

274. MODEL BENEFIT CORP. LEGISLATION § 102 (2017).

275. *Id.* § 201(b).

276. *Id.* §§ 301(a), 303(a).

277. *Id.* § 401(a). Note that under Delaware law, certification by a third-party standard is optional. *See* DEL. CODE ANN. tit. 8, § 366(c) ("The certificate of incorporation or bylaws . . . may require that the corporation: . . . . (3) Use a third-party standard in connection with and/or attain a periodic third-party certification addressing the corporation's promotion of the public benefit . . . .").

The benefit corporation is a direct response to the shareholder primacy doctrine.[278] In 2013, the author of the benefit corporation legislation, William Clark, wrote a white paper with Larry Vranka explaining why such legislation was necessary.[279] They emphasized the dangers of committing to a mission-driven business in the current legal environment.[280] The authors of the white paper recognized the arguments that the shareholder primacy doctrine may not be as strong in every situation, given the business judgment rule and the constituency statutes in 33 states.[281] But they also emphasized that the legal uncertainty and the need for clarity were making it difficult for mission-driven businesses, even those in states with constituency statutes.[282]

B. Why the Benefit Corporation Cannot Accomplish its Goals

The issues with the benefit statute are somewhat paradoxical. On the one hand, there is not enough guidance to protect directors,[283] and on the other, there is so much protection of the directors that the mission is not protected.[284] To add to the complexity, the only situation in which the directors truly need this protection would be during a forced sale of a publicly owned company.[285] But as of January 2019, there was only one publicly-traded benefit corporation based in the U.S.[286] Certainly, it was not necessary to pass legislation in 34 states to protect a single corporation.

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278. *See, e.g.*, B LAB, SHAREHOLDER PRIMACY: MYTHS AND TRUTHS 1 (n.d.), https://bcorporation.net/sites/default/files/documents/missionalignment/Myths%20and%20Truths.pdf ("B Lab has promoted the adoption of 'benefit corporation' law, which provides an option that allows corporations to reject shareholder primacy . . . .").

279. CLARK, JR. ET AL., *supra* note 91, at 1.

280. *Id.*

281. *Id.* at 9, 12.

282. *Id.* at 14.

283. *See infra* notes 288–94 and accompanying text (noting the uncertainty surrounding director's duties and liabilities).

284. *See, e.g.*, MODEL BENEFIT CORP. LEGISLATION § 301(c) (2017) (providing that, unless otherwise specified, directors are "not personally liable for monetary damages").

285. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (describing how in the face of a forced sale of a corporation, directors are required to drive shareholder value); *see also* Stout, *Shareholder Value Myth*, *supra* note 72 ("The only context in which courts require directors to maximize shareholder value is when the directors of a public company determine to sell the company to a private owner . . . . In other words, as long as a public company wants to stay public, directors have no legal obligation to maximize either profits or share value.").

286. *See FAQ*, BENEFIT CORP., http://benefitcorp.net/faq (last visited Apr. 27, 2019) ("[I]n October 2015 Laureate Education, the largest degree-granting higher education institution in the world, announced that it was filing an S-1, and that it would do so as a benefit corporation.").

1. The Benefit Corporation Does Not Provide Enough Guidance to Remove Uncertainty

The authors of the benefit corporation legislation claim that the uncertainty surrounding existing law requires a new statute that will provide more certainty.[287] At one level, the purpose statement does provide directors with some certainty because the articles of incorporation, which provide the authority to do business in the state, requires the enterprise to have a "material positive impact on society."[288] That provides the state's imprimatur on the stakeholder value doctrine, which is a major shift.

But it is largely a symbolic shift because the statute does not provide any other guidance to the board members.[289] We do not know what a "material positive impact" is or how to measure it.[290] The board is told to consider the seven enumerated groups of stakeholders listed in the statute when it makes decisions,[291] but there is no guidance as to how to prioritize these stakeholders, if at all.[292] And it is unclear what it means to "consider" the stakeholders.[293] Is it enough to consider worker safety long enough to decide that safety measures will be too expensive and then to choose profits over safety? How different is that decision—except perhaps for a statement in the minutes—from a traditional shareholder primacy decision? And what role does the benefit director play?

Some of the answers to these questions will be ironed out over time. A difficulty inherent in any new business entity is that issues will arise that courts have not yet answered.[294] Unfortunately, that situation creates the

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287. CLARK, JR. ET AL., *supra* note 91.

288. *See* MODEL BENEFIT CORP. LEGISLATION § 201(a) ("A benefit corporation shall have a purpose of creating general public benefit."); *see also id.* § 102 (defining "[g]eneral public benefit" as "[a] material positive impact on society and the environment").

289. Other commentators have noted this uncertainty with regard to directors' duties. *See, e.g.*, Murray, *Choose Your Own Master*, *supra* note 90, at 27 ("One of the primary problems with the current benefit corporation statutes is the lack of guidance the statutes provide for boards of directors."); *see also* Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. L. 1007, 1027–31 (2013) (outlining the potential conflicting duties directors of benefit corporations face).

290. MODEL BENEFIT CORP. LEGISLATION § 102.

291. *See id.* § 301(a)(1)(i)–(vii) (requiring the board to consider shareholders, employees, "the interests of customers," "community and societal factors," "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 public benefit purpose").

292. *See id.* § 301(a)(3) (providing that the board "need not give priority to a particular interest or factor . . . unless the benefit corporation has stated in its articles of incorporation its intention to give priority to certain interests").

293. *Id.* § 301(a)(1) (requiring the board to "consider the effects of any action or inaction upon" seven enumerated stakeholders).

294. *See supra* notes 132–39 and accompanying text (discussing the uncertainty surrounding the LLC statute when it was first introduced).

uncertainty that the white paper sought to eliminate.[295] Ironically, the benefit corporation's designers believed a new entity could solve uncertainty by creating something new,[296] which, by default, also leaves many questions unanswered. The benefit corporation designers based this statute on corporate law,[297] and so some issues already have answers. But the questions surrounding the tensions between shareholder and stakeholder remain undecided. If Ben & Jerry's decided not to fight a shareholder lawsuit because Vermont's constituency statute had not been tested,[298] why would Ben & Jerry's feel more confident with Vermont's untested benefit corporation statute?

One of the ways to answer these questions is to let the stakeholders make their own decisions. Most benefit corporation statutes require that benefit corporations prepare annual benefit reports that they make public.[299] The statutes also require that benefit corporations use a third-party standard to measure their success.[300] That third party could be B Lab, but other standards, such as Fair Trade, would also be suitable.[301] The third party does not certify the business.[302] Instead, the business simply needs to use someone else's objective standard to report to the public how that business is handling the tensions between profits and other issues.[303]

In an ideal world, if a benefit corporation chose to forego worker safety measures to increase profits, that corporation would report that decision in

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295. *See* CLARK, JR. ET AL., *supra* note 91, at 1 (arguing that the public benefit corporation "addresses the needs of social entrepreneurs" in ways that the "current legal framework[]" does not).

296. *See id.* at 14 (arguing that the benefit corporation is the best business entity to address "legal uncertainties" and "the unique needs of for-profit mission-driven businesses").

297. *Id.* at 15 ("The Model Legislation has been drafted so that the existing corporation code applies to benefit corporations in every respect except those explicitly stipulated in the Model Legislation.").

298. *See infra* Part IV.C.3 (outlining how Ben & Jerry's was an early supporter of social causes).

299. *See, e.g.*, MODEL BENEFIT CORP. LEGISLATION § 401(a) (2017) ("A benefit corporation shall prepare an annual benefit report . . . .").

300. *Id.* § 401(a)(2). These provisions cover the preparation and dissemination of the annual benefit report. *Id.* § 401.

301. *See How Do I Pick a Third Party Standard?*, BENEFIT CORP., https://benefitcorp.net/how-do-i-pick-third-party-standard (last visited Apr. 27, 2019) (providing a list of "acceptable third party standards"); *see, e.g.*, *Our Global Model*, FAIR TRADE CERTIFIED, https://www.fairtradecertified.org/why-fair-trade/our-global-model (last visited Apr. 27, 2019) (explaining that Fair Trade "certif[ies] transactions between companies and their suppliers to ensure that the people making Fair Trade Certified goods work in safe conditions, protect the environment, build sustainable livelihoods, and earn additional money").

302. *How Do I Pick a Third Party Standard?*, *supra* note 301.

303. *Id.*

its benefit report.[304] Then, the corporation's stakeholders could decide whether they agreed with that decision. If they did, they would continue to support the business, but if they did not, they could withhold their support by selling their stock or moving their business elsewhere. In other words, the market would enforce the statutory provisions. But that market is not available because, as discussed below, without an enforcement mechanism, too few benefit corporations are releasing benefit reports to make it possible for consumers and investors to make these decisions.[305]

2. The Statute Provides Too Much Protection to the Board and Leaves the Mission and the Stakeholders Unprotected

Unfortunately, despite leaving board members confused as to the meaning of their duties, the law provides so much procedural protection to them that no practical enforcement mechanism exists.[306] If the board fails to consider all the stakeholders or neglects to provide a benefit report, a board member or shareholder with at least 2% of the outstanding shares can bring a suit to force them to do so.[307] But the plaintiff cannot win any monetary awards because the statute explicitly protects the board from financial liability.[308] Although board members will appreciate protection from monetary liability, the upshot is that no one will spend the time or money to force these issues.

Unsurprisingly, a recent study found that only 8% of benefit corporations produced benefit reports.[309] The businesses that do not produce these reports not only deprive the public of essential information but also undercut the entire purpose of the report as described above—to

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304. Such a decision is defensible within the language of the statute, which requires only that the board of directors "consider the effects of any action or inaction upon" various stakeholders. MODEL BENEFIT CORP. LEGISLATION § 301(a). It does not say that the stakeholders' interests are paramount. *See id.* § 301(a)(3) (emphasizing that directors "need not give priority to a particular interest or factor").

305. *See infra* Part III.B.2 (explaining how public benefit corporations provide too much protection to directors).

306. *See, e.g.*, Tyler, *Producing Better Mileage*, *supra* note 11, at 264 (reasoning that "[t]he 'duty of care' is diluted to the point of not being legally actionable" because "[t]here is no obligation to prioritize or give more or less weight to any one or more purposes over others").

307. MODEL BENEFIT CORP. LEGISLATION § 305(a), (c)(2)(i).

308. *Id.* § 301(c). The model statute states that "[e]xcept as provided in the [*articles of incorporation*] [*bylaws*], a director is not personally liable for monetary damages" either for performing her traditional corporate duties or for "failure of the benefit corporation to pursue or create general public benefit or specific public benefit." *Id.* (second and third alterations in original). Delaware's Public Benefit Corporation statute provides that directors will not be liable if a "decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve." DEL. CODE ANN. tit. 8, § 365(b) (2019).

309. J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25, 34 (2015).

slowly devise an answer to the substantive questions about the board's fiduciary duties.

3. The One Situation the Benefit Corporation Could Help the Most is the One That is Least Likely to Have Benefit Corporations Involved

Finally, a careful reading of the law regarding the shareholder primacy theory makes clear that, before the benefit corporation was created, the only time the board of directors actually needed to prioritize shareholder's interests over others was during a sale or hostile takeover of a publicly traded for-profit company.[310] But almost all benefit corporations are very small, and those that are larger, such as Patagonia, are almost invariably privately owned.[311]

To date, only one publicly traded company is a benefit corporation: Laureate Education.[312] At one point, it looked as if Etsy might join Laureate as a publicly traded benefit corporation.[313] Etsy became B Lab certified in 2012, and it went public in 2015.[314] B Lab requires B Lab certified companies to become a benefit corporation within four years if they are located in a state that recognizes the benefit corporation.[315] In late 2017, Etsy decided to give up its B Lab certification rather than change from a C-

310. *See supra* notes 105–06 and accompanying text (discussing *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, which set forth the duty to maximize shareholder value in the sale of a publicly traded company).

311. For example, Patagonia sole shareholders are Yvon Chouinard and his wife. Amanda Little, *An Interview with Patagonia Founder Yvon Chouinard*, GRIST (Oct. 23, 2004), https://grist.org/article/little-chouinard/. And Kickstarter's two co-founders still hold a majority of the shares in that company. Adele Peters, *Why Kickstarter is Now a Public Benefit Corporation (and What That Means)*, FAST COMPANY (Sept. 22, 2015), https://www.fastcompany.com/3051362/why-kickstarter-is-now-a-public-benefit-corporation-and-what-that-means.

312. Kyle Westaway, *The First Public Benefit Corporation Is . . . a For Profit College?*, FAST COMPANY (Feb. 10, 2017), https://www.fastcompany.com/3068059/the-first-public-benefit-corporation-is-a-for-profit-college; Beckie Smith, *Laureate Education IPO to Raise $490m*, PIE NEWS (Feb. 1, 2017), https://thepienews.com/news/laureate-education-ipo-to-raise-490m/.

313. Ina Steiner, *Etsy Gives Up B Corp Status to Maintain Corporate Structure*, ECOMMERCE BYTES (Nov. 30, 2017), https://www.ecommercebytes.com/2017/11/30/etsy-gives-b-corp-status-maintain-corporate-structure/.

314. David Gelles, *Inside the Revolution at Etsy*, N.Y. TIMES (Nov. 25, 2017), https://www.nytimes.com/2017/11/25/business/etsy-josh-silverman.html [hereinafter Gelles, *Inside the Revolution*]; Steiner, *supra* note 313.

315. Steiner, *supra* note 313; *see also* Maria Stracqualursi, *The Rise of the Public Benefit Corporation: Considerations for Start-Ups*, B.C. LEGAL SERVS. LAB, http://bclawlab.org/eicblog/2017/3/21/the-rise-of-the-public-benefit-corporation-considerations-for-start-ups (last visited Apr. 27, 2019) ("According to B-Lab rules, businesses that are incorporated in states that have public benefit corporation laws are required, within four years from the date such legislation was passed or two years after B-Corp certification, to elect [public benefit corporation] status in their state of incorporation in order to retain B-Corp certification."). To determine the legal requirements in a particular state, see *Legal Requirements*, CERTIFIED B CORP., https://bcorporation.net/certification/legal-requirements (last visited Apr. 27, 2019).

corporation to a benefit corporation.[316] Etsy's stated reason was that "*converting [to a benefit corporation] is a complicated, and untested process for existing public companies*."[317] In other words, the same type of uncertainty that the benefit corporation was designed to eliminate actually prevented Etsy from becoming a benefit corporation.

Equally compelling was the reality that both C-corporation and benefit corporation statutes require supermajorities to authorize a decision to convert.[318] Etsy, as a publicly traded Delaware corporation, would initially have been required to convince 90% of its shareholders to convert to a benefit corporation.[319] But, before Etsy converted its business structure, Delaware changed its public benefit corporation statute to require only a 2/3 supermajority.[320] For Etsy, however, the reformed Delaware statute was not enough to compel it to convert to a benefit corporation.

In fact, the difficulty for publicly traded businesses to change business forms is so great that publicly traded benefit corporations will ordinarily have organized themselves as benefit corporations at the time of the initial public offering (IPO).[321] Even this scenario is difficult, however. IPOs are expensive and possibly dangerous to the social mission.[322] The U.S. Department of the Treasury has estimated that an average business spends $2.5 million to go public and an additional $1.5 million per year to remain public.[323] Once a business is publicly traded, the only common language that investors are likely to speak is financial, which could put great pressure on the business to emphasize finances at the expense of the social mission.[324] Etsy, for example, has lost much of its values-based culture.[325] It

316. *See* Steiner, *supra* note 313 ("Etsy will not seek conversion to a benefit corporation by the December 2017 deadline . . . .").

317. *Id.*

318. Haskell Murray, *Amendments to Delaware's PBC Law ("The Etsy Amendments")*, BUS. L. PROF. BLOG (July 3, 2015), https://lawprofessors.typepad.com/business_law/2015/07/amendments-to-delaware-pbc-law-the-etsy-amendments.html.

319. *Id.*

320. *Id.*

321. Westaway, *supra* note 312. Laureate Education was "the first public benefit corporation to ever be publicly traded," and it was a public benefit corporation prior to the IPO. *Id.*

322. *See* Barry McCarthy, *IPOs are Too Expensive and Cumbersome*, FIN. TIMES (Aug. 7, 2018), https://www.ft.com/content/60cd1bb8-9970-11e8-88de-49c908b1f264 (noting that IPOs are too expensive and that the American system is "broken").

323. IPO TASK FORCE, REBUILDING THE IPO ON-RAMP: PUTTING EMERGING COMPANIES AND THE JOB MARKET BACK ON THE ROAD TO GROWTH 9 (2011), https://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf; *see also* Chad Brooks, *Cost of Going Public Often Underestimated*, BUS. NEWS DAILY (Sept. 11, 2011), https://www.businessnewsdaily.com/3112-going-public-cost-underestimated.html ("While the allure of going public may be appealing to a business, new research shows many don't fully understand the costs, time and complexity that come with it.").

324. For a discussion of these difficulties, see Lois Yurow, *Benefit Corporations and the Public Markets—Will We Ever See a Public Benefit Corporation?*, GOVERNANCE & ACCOUNTABILITY INST.: SUSTAINABILITY UPDATE (Nov. 24, 2014), http://ga-institute.com/Sustainability-Update/benefit-

has laid off employees and eliminated its Values Based Alignment team.[326] Etsy's current CEO has said that its social purpose is to increase sales for its sellers, adding "[b]eing good doesn't cut the mustard."[327]

IV. WHY AND WHAT NEXT?

A. Why Did Legislators Pass Bills That Could Not Accomplish Their Purpose?

Why would sophisticated lawyers and business leaders draft and promote legislation that could not, in its initial form, meet its goals? The drafters designed the L3C to free up foundation funds, but it did not change the status quo enough to make this result happen.[328] The drafters designed the benefit corporation to protect officers and directors from liability if they chose to pursue social and environmental missions in addition to profit-making ones.[329] But this legislation suffers from the same defects as the statutes it was designed to replace.[330] This paradox seems inexplicable, unless these business entities are actually serving a different purpose.

Although I have not had the opportunity to speak directly to the architects of these new business entities, I would posit that it was a wise political decision. In 2008 and 2010, state legislatures first passed L3C and benefit corporations statutes.[331] The political climate then was such that legislators, reflecting the will of the public, wanted to support the idea of socially responsible business without expending any resources to enforce those provisions.[332] The nation was in the midst of the Great Recession, and irresponsible, greedy businesses were in part to blame for the nation's

corporations-and-the-public-markets-will-we-ever-see-a-public-benefit-corporation/ (arguing that public benefit corporations "are unlikely to generate enough new capital in the public market to justify the expense of being there" and that "offering stock to the general public . . . can jeopardize a benefit corporation's mission").

325. Gelles, *Inside the Revolution*, *supra* note 314.

326. *Id.*

327. *Id.*

328. *See supra* Part II.B.1–2 (highlighting how L3C statutes failed to achieve their primary goals of increasing PRI funding through tranche investing).

329. *See supra* Part III.A (outlining the goals of public benefit corporation statutes).

330. *See supra* Part III.B.1 (discussing why the benefit corporation fails to provide directors with enough guidance on how to consider various stakeholders).

331. *See* Cooney et al., *supra* note 8 (noting that Vermont and Maryland passed L3C statutes in 2008 and 2010, respectively).

332. James Epstein-Reeves, *Consumers Overwhelmingly Want CSR*, FORBES: CSR BLOG (Dec. 15, 2010, 9:58 AM), https://www.forbes.com/sites/csr/2010/12/15/new-study-consumers-demand-companies-implement-csr-programs/#1512b7c365c7 (highlighting survey results, which indicated that "[m]ore than 88% of consumers think companies should try to achieve their business goals while improving society and the environment").

financial state.[333] Although society still widely accepted the idea that business could be better,[334] voters were also unhappy that the government had intervened to prop up the *too big to fail* businesses.[335] The appetite for government spending, particularly on business, was waning.[336] Thus, the drafters of this legislation could not have successfully passed more stringent legislation—at least not without significant delays. Their strategy appears to have been to get as many laws on the books as possible and amend them later, if necessary.

There are hints of this strategy with both measures. As early as 2006, when the future authors of both types of legislation met at the Aspen Institute, Marcus Owens suggested that one way to encourage PRI spending would be to add new regulatory standards to existing law on program-related investments rather than try to create a new entity.[337] And the founders of the L3C have always claimed that the Philanthropic Facilitation Act is an important part of their strategy, which they planned to accomplish once the state legislation was in place.[338]

The L3C proponents introduced the state legislation before they had any buy-in from the IRS or Congress—a move that bothered some of the L3C critics.[339] Yet in this respect, their strategy mirrored that of the LLC,

333. Steve Suranovic, *Greed, Capitalism, and the Financial Crisis* 1 (Inst. for Int'l Econ. Policy, Working Paper No. 2010-22). Steve Suranovic summarizes some of the statements—from, among others, the Dalai Lama and Ralph Nader—claiming that the Financial Crisis was caused by greed. *Id.*

334. John Quelch, *How Corporate Responsibility Can Survive the Recession*, HARV. BUS. REV. (Sept. 22, 2009), https://hbr.org/2009/09/how-corporate-responsibility-c.

335. *See, e.g.*, *Poll: U.S. Concerned But Split On Bailout*, CBS NEWS (Oct. 1, 2008), https://www.cbsnews.com/news/poll-us-concerned-but-split-on-bailout/ ("Just 39 percent . . . say the bailout would help everyone, while more than half of those surveyed think it would help only Wall Street."); Brian Montopoli, *Poll Finds Americans Pessimistic*, *Dissatisfied With Washington*, CBS NEWS (May 25, 2010), https://www.cbsnews.com/news/poll-finds-americans-pessimistic-dissatisfied-with-washington/ ("Fifty-nine percent say Wall Street has undue influence in Washington, and a majority says the stock market unfairly benefits the rich; most oppose the government bailouts for banks and automakers, though they back support for struggling homeowners. Eight in ten say the economy is in bad shape.").

336. Montopoli, *supra* note 335.

337. BILLITTERI, *supra* note 169, at 10.

338. *See* Lang & Minnigh, *supra* note 188, at 23.

339. *See, e.g.*, Carol Liao, *Early Lessons in Social Enterprise Law*, *in* THE CAMBRIDGE HANDBOOK FOR SOCIAL ENTERPRISE LAW 109–11 (B. Means & J. Yockey eds., 2018) ("Critics of the L3C model argued that the L3C had little to no value without accompanying federal legislation or an IRS ruling."). For criticism of the L3C more generally, see Kleinberger, *supra* note 140, at 896 ("L3Cs have no special ability to promote PRIs, and the L3C construct is unnecessary, unwise, and inherently misleading."); Bishop, *supra* note 219, at 250 ("At this point, there is no federal tax authority indicating that PRI determination will be satisfied merely by the L3C operating restrictions."); Callison & Vestal, *supra* note 244, at 293 ("Until these problems and issues have been resolved, it is appropriate that the lawyers (regulatory genes) have called out the L3C as an illusion and put an end to the mischief."); Spenard, *supra* note 243, at 36 (cautioning that the L3C model "raises issues regarding . . . state supervision").

which Wyoming introduced in 1977 and which made almost no headway until it received tax blessing in 1988.[340] Even then, although the number of states adopting LLC statutes increased after 1988,[341] the largest growth in organizations choosing this business form took place when the IRS introduced the "check the box" provision in 1997.[342] The LLC is now the most widely used business form in the U.S.[343] Taking a play from the LLC playbook should be an acceptable strategy for a new business form. As one article on the history of the LLC has noted:

> LLCs' growth and spread demonstrates both the folly of trying to predict the future and the need to preserve flexibility. Changing business conditions might cause the LLC to be replaced by some new or hybrid form, just as the LLC seems to be taking over from the close corporation and limited partnership forms.[344]

Had they waited to get federal blessing, there would be no L3C today. However compelling the public policy is behind the Philanthropic Facilitation Act, the political environment has not been amenable to such a solution. L3C proponents have introduced such legislation four times to no avail.[345] The L3C creators conceived the L3C in 2006, which was before the Financial Crisis of 2008–2009; at that time, it seemed plausible that a nonpartisan approach to help social enterprises get additional funding could succeed.[346]

Events in the past ten years have made such passage almost impossible. The Financial Crisis dramatically reduced foundations' ability to pursue their missions, and it undoubtedly reduced their ability to support the Philanthropic Facilitation Act. Meanwhile, the federal government became increasingly polarized. Congress was unable to pass a budget, much less a bill that would affect a small portion of society.[347] Further, the appetite for

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340. Ribstein, *supra* note 133, at 12.

341. *Id.* (explaining that once the IRS held "that a Wyoming LLC could be taxed as a partnership" the number of states with LLC statutes increased).

342. Treas. Reg. § 301.7701-1 to -3 (as amended in 2014); *see also* Ribstein, *supra* note 133, at 13 ("Under Treasury Regulation 301.7701-1-3, effective Jan. 1, 1997, firms could decide for themselves — that is, 'check the box'— whether they wanted to be taxed as partnerships and corporations. The check-the-box rule took the lid off of the growth of LLCs.").

343. Kleinberger, *supra* note 140.

344. Ribstein, *supra* note 133, at 13.

345. *L3C Proposed Legislation*, *supra* note 246.

346. *See* BILLITTERI, *supra* note 169, at 10–12 (reporting on the ongoing developments and funding opportunities for social enterprises, and in particular PRIs).

347. *See* Pete V. Domenici & Alice M. Rivlin, Opinion, *Congressional Budget Process is Broken, Drastic Makeover Needed*, BROOKINGS INSTITUTION (July 27, 2015), https://www.brookings.edu/ opinions/congressional-budget-process-is-broken-drastic-makeover-needed/ ("In nearly half of the past two decades, a staggering nine years, Congress failed to pass a budget

governmental solutions, even ones that would support private answers to social questions, continued to dampen.[348]

Additionally, the Philanthropic Facilitation Act depends on the IRS to make determinations about the validity of PRIs and to devise and monitor the reporting of these investments.[349] From 2012 to 2013, however, the IRS faced a huge backlog in its ability to recognize tax-exempt organizations.[350] Organizations were waiting years to learn whether they had received tax exemption.[351] The time did not seem ripe to add to the IRS's burdens.

Then, in 2013, the IRS was accused of political bias in favor of the Democrats, and months of paralysis and congressional hearings ensued.[352]

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agreement . . . . The disarray of the budget process, of course, is a symptom of the gridlock-producing polarization of our politics . . . ."); *see also Political Polarization in the American Public*, PEW RES. CTR.: U.S. POL. & POL'Y (June 12, 2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/ (observing that "[p]artisan animosity has increased substantially" since 1994).

348. *Political Polarization in the American Public*, *supra* note 347; Paul Steinhauser, *CNN Poll: Trust in the Government at an All Time Low*, CNN (Aug. 8, 2014), http://politicalticker.blogs.cnn.com/2014/08/08/cnn-poll-trust-in-government-at-all-time-low-2/.

349. *See* Philanthropic Facilitation Act of 2015, S. 2313, 114th Cong. § 2 (2015) (requiring the Secretary of Treasury to establish procedures by which private foundations may qualify for program-related investments).

350. *See* TAXPAYER ADVOCATE SERV., 2013 ANNUAL REPORT TO CONGRESS: VOL. ONE 166 (2013) ("Since 2004, the National Taxpayer Advocate has reported on the increased number of applications for exempt status and the decrease in the number of . . . employees who handle them.").

351. *Id.* at 165–66; *see also* Wyden, *Floor Statement on Finance Committee Investigation of IRS Handling of Applications for Tax-Exempt Status*, U.S. SENATE COMMITTEE ON FIN. (Aug. 5, 2015), https://www.finance.senate.gov/wyden-floor-statement-on-finance-committee-investigation-of-irs-handling-of-applications-for-tax-exempt-status ("By my count, there were seven different efforts, over more than two years, to figure out how to handle these applications, and the first six all failed. By December 2011, a total of 290 applications for 501c4 status had been set aside for further review. Two of these applications had been successfully resolved. Not two hundred. Two.").

352. *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP'T OF TREASURY, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW, REFERENCE NO. 2013-10-053, at 5, 11–12 (2013) ("The [IRS] developed and began using criteria to identify potential political cases for review that inappropriately identified specific groups applying for tax-exempt status based on their names or policy positions instead of developing criteria based on tax-exempt laws and Treasury Regulations."); NAT'L TAXPAYER ADVOCATE, INTERNAL REVENUE SERV., SPECIAL REPORT TO CONGRESS: POLITICAL ACTIVITY AND THE RIGHTS OF APPLICANTS FOR TAX EXEMPT STATUS 36 (2013) ("Since the release of the [Inspector General] report . . ., [the Taxpayer Advocate Service] has examined the problems identified. [The Taxpayer Advocate Service] found that inadequate guidance, inadequate training, inadequate systems, inadequate metrics, insufficient transparency, and management failures all contributed to the problems . . . ."); COMM. ON OVERSIGHT & GOV'T REFORM, RESOLUTION RECOMMENDING THAT THE HOUE OF REPRESENTATIVES FIND LOIS G. LERNER, FORMER DIRECTOR, EXEMPT ORGANIZATIONS, INTERNAL REVENUE SERVICE, IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH A SUBPEONA DULY ISSUED BY THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, H.R. REP. NO. 113–415, at 3 (2014) ("Documents and testimony reveal that the IRS targeted conservate-aligned applications for tax-exempt status by scrutinizing them in a manner distinct—and more intrusive—than other applicants."); COMM. ON FIN., U.S. SENATE, BIPARTISAN INVESTIGATIVE REPORT AS SUBMITTED BY CHAIRMAN HATCH AND RANKING MEMBER WYDEN, S. REP. NO. 114–119, at 5 (2015) ("Our investigation found that from 2010

The Republican-led Congress distrusted the IRS so intensely that it cut the IRS budget by roughly $526 million.[353] Congress also forbade the IRS from developing rules that would help the IRS determine whether a tax-exempt organization was engaging in political activity.[354] Although it has been six years since that scandal, the wounds remain. Any attempt to ask Congress to accord more power to the IRS—much less provide it with the resources to handle the new duties outlined in the Philanthropic Facilitation Act—would be fruitless in today's political environment.

The benefit corporation does not have the IRS drama to influence its story, but it also exists in the same political environment. Proposals that ask states or the federal government to provide enforcement mechanisms or tax benefits are equally likely to fall on deaf ears.

A second possibility is that these business entities were, in many ways, always more aspirational than they were actual answers to specific problems.[355] The proponents of the benefit corporation have been frank in their goal to create a new kind of capitalism.[356] The benefit corporation is

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to 2013, IRS management was delinquent in its responsibility to provide effective control, guidance, and direction over the processing of applications for tax-exempt status filed by Tea Party and other political advocacy organizations."); *see also* Joe Davidson, *IRS Chief Departs, Blasting Congress for Budget Cuts Threatening Tax Agency*, WASH. POST (Nov. 7, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/11/07/irs-chief-departs-blasting-congress-for-budget-cuts-threatening-tax-agency/?utm_term=.1020f759c76e ("The Republican impeachment frenzy grew from the belief that the IRS was targeting right-leaning groups for additional scrutiny. But an agency inspector general report issued last month indicated that left-leaning groups were targeted, too.").

353. Howard Gleckman, *IRS Gets Hammered in the 2014 Budget Agreement*, FORBES (Jan. 14, 2014), https://www.forbes.com/sites/beltway/2014/01/14/irs-gets-hammered-in-the-2014-budget-agreement/#19cf6e9357bf.

354. *Id.*

355. A third possibility is that they were actually trying to encourage the formation of these businesses. If so, they have failed because so few businesses have been formed. *What is an L3C?*, INTERSECTOR PARTNERS, L3C, *supra* note 6; *Find a Benefit Corp*, BENEFIT CORP., *supra* note 6; James Woulfe, *How Many Benefit Corporations Are There in the U.S.?*, SOCENTPOLICY (June 19, 2018), http://www.socentpolicy.com/how-many-benefit-corporations-are-there-in-the-u-s. I would speculate, however, that there would be even fewer than 7,000 businesses formed as L3Cs and benefit corporations if stronger enforcement measures, which would include additional regulation and red tape, had been enacted. The founders of the first L3Cs in Vermont made clear that if the L3C had not been an option, they would have used a for-profit legal entity, rather than a § 501(c)(3), because the for-profit forms had less regulation. Schmidt, *Hybrid Pioneers*, *supra* note 182, at 183–84.

356. *See, e.g.*, *Why Pass Benefit Corporation Legislation*, BENEFIT CORP., https://benefitcorp.net/policymakers/why-pass-benefit-corporation-legislation (last visited Apr. 27, 2019) ("Passing benefit corporation legislation helps facilitate a new market so that current shareholders, consumers and potential investors can make informed decisions based on companies' missions and performance."); Jon Mertz & J. Coen Gilbert, *Revitalizing Capitalism: B Corps and Accountability*, ACTIVEWORLD (Oct. 4, 2018), https://activateworld.com/revitalizing-capitalism-b-corps-accountability/ (featuring podcast discussing the benefit corporation); *see also* Jay Coen Gilbert, *Sen. Elizabeth Warren, Republicans, CEOs, and Blackrock's Fink Unite Around 'Accountable Capitalism*,' FORBES (Aug. 15, 2018), https://www.forbes.com/sites/jaycoengilbert/2018/08/15/sen-

simply one of the tools in their tool box. The fact that the benefit corporation was not necessary does not actually matter because the publicity surrounding it, and the experiments that innovative businesses will do with it, will help move toward this new kind of capitalism.

The proponents of the L3C have not talked about revamping the entire economic system, but they did want to see foundations spend more money on PRIs.[357] Curiously, they chose to create an entirely new legal form when the way to convince foundations to make PRIs would be to educate them about PRIs or to make it easier for them to do their due diligence. But perhaps their larger goal was to facilitate more investments by foundations in social enterprises, whatever their form.

B. Then What Was the Reason?

Some would see this scenario as a failure of the L3C and the benefit corporation. The legislation authorizing these business forms does not match their intended goals, and suggested amendments to fix these weaknesses are not politically feasible.[358] After ten years, only 7,000 businesses are organized as L3Cs and benefit corporations.[359] If we judge these new entities by whether they have accomplished their stated goals, we cannot call them successful.

Yet they have performed another, possibly more important, role in the past ten years because they have played a major part in the conversation that is taking place about the role of business in society.[360] If nothing else, these statutes signal a legislative intent that new business values should be encouraged. Perhaps their lack of prescriptive provisions recognizes that the social enterprise field is so new that they need to work out many details. Both types of legislation entrust the definition of concepts and the enforcement of provisions to the individuals who own and work with these

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elizabeth-warren-republicans-ceos-blackrocks-fink-unite-around-accountable-capitalism/#3227ccbb51d9 (discussing "legislation called the Accountable Capitalism Act," which would create "a new model of corporate governance based on the benefit corporation").

357. *See, e.g.*, LANG, *supra* note 240, at 3 ("The legislation establishing the L^{3}C was specifically written to dovetail with IRS regulations relevant to Program Related Investments (PRIs) by foundations to promote increased use of these investment forms.").

358. *See supra* notes 347–54 and accompanying text (describing the political climate that made it impossible for benefit corporation and L3C legislation to include more accountability measures); *see also infra* Part IV.C.4 (describing why Senator Warren's legislative proposal is "unlikely to pass in today's climate").

359. *What is an L3C?*, INTERSECTOR PARTNERS, L3C, *supra* note 6; *Find a Benefit Corp*, BENEFIT CORP, *supra* note 6.

360. *See infra* Part IV.C (detailing the role L3Cs and benefit corporations have played in changing the conversation about the role of business in society).

new business entities.[361] Although this flexibility leaves room for abuse, it also encourages innovation and experimentation while the entrepreneurs in the trenches work out the details. When those details emerge, the legislature can amend the statutes.

C. How Are These Business Entities Playing a Part in the Conversation About the Role of Business in Society?

In the meantime, significant social and economic changes are taking place. Many businesses appear to be moving away from a system that focuses only on the shareholder and toward one that recognizes the interests of the stakeholders. This social and economic change may be a sign that the more aspirational goals of the proponents of these two forms are actually succeeding.

1. Changes in Business Behavior

Those advocating for the L3C always had a more narrow vision—to encourage foundations to increase their investments in social enterprises.[362] Ten years after the first L3C statute, there appears to be a greater interest in PRIs. Foundations are beginning to see that they have a larger capacity for investing in social enterprises than they initially understood.[363] Not only are they investing the non-programmatic parts of their endowment more often in mission-related investments,[364] they are using PRIs more often.[365] The IRS provided additional guidance on PRIs in 2016[366]—a move that made

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361. *See supra* Part III.B.1 (explaining that the benefit corporation legislation lacks enforcement mechanisms and gives boards wide discretion to define key terms).

362. *See* LANG, *supra* note 240, at 3 (explaining that one goal of the L3C was to increase foundations' use of PRIs).

363. *See infra* notes 365–71 and accompanying text (detailing certain initiatives to encourage foundations to use PRIs); *see, e.g.*, Nicole Wallace, *Mission Critical: Nonprofits and Foundations Making Impact Investments Believe Their Dollars are Vital to Solving Tough Problems*, CHRON. PHILANTHROPY, May 31, 2017, at 2 [hereinafter Wallace, *Mission Critical*] ("Pioneering nonprofits and foundations have experimented with harnessing markets and investments to catalyze social change for more than a decade, and the Ford Foundation's embrace of impact investing . . . pushes the idea further into the mainstream.").

364. *See* Wallace, *Mission Critical*, *supra* note 363, at 2–3 (noting that "impact investing," which generally refers to investments with social and environmental purposes, "appear[s] to be gaining momentum"); Mark Gunther, *Doing Good and Doing Well*, CHRON. PHILANTHROPY, Jan. 2019, at 8–9 (pointing out that the total amount of mission-based investments is still very small).

365. LILLY FAMILY SCH. OF PHILANTHROPY, LEVERAGING THE POWER OF FOUNDATIONS: AN ANALYSIS OF PROGRAM RELATED INVESTING 2 (2013) ("There generally has been an increase in the total PRI dollar amount, the total number of PRIs granted, and the total number of PRI providers since the late 1990s. The average PRI dollar amount has increased steadily since 2005.").

366. T.D. 9762, 2016-19 I.R.B. 718.

foundations more comfortable with the idea. Important funders, such as the Bill & Melinda Gates Foundation and the MacArthur Foundation, have announced their intention to use PRIs as part of their investment strategy.[367] Several large foundations have started training other foundations to use PRIs.[368] Intermediaries are also being created to further the use of PRIs.[369] Although this change cannot definitively be attributed to the L3C, it likely played a part, if only because the publicity about the PRI generated in the L3C discussions reached the ears of nonprofit and foundation leaders.[370]

The proponents of the benefit corporation, however, had a larger vision—to change the way business is conducted in the U.S.[371] It may be even more difficult to determine how and if the benefit corporation has had this effect. But there is no denying that business behavior has changed in the last ten years, and some of the rhetoric from the large companies echoes that of the benefit corporation.[372]

Perhaps the biggest change has been in the behavior of traditional large C-corporations—those that are publicly traded and would probably never convert to benefit corporations. In 2017, 85% of the S&P 500 Index companies published sustainability reports.[373] This was up from slightly less than 20% in 2011.[374] This issue resonates with many large companies.

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367. *See, e.g.*, *What We Do*, BILL & MELINDA GATES FOUND., https://sif.gatesfoundation.org/what-we-do/ (last visited Apr. 27, 2019) (describing the the role PRIs play in changing investment strategies); *Impact Investments*, MACARTHUR FOUND., https://www.macfound.org/programs/program-related-investments/strategy/ (last visited Apr. 27, 2019) (explaining the beneficial impact of various investment strategies).

368. *See Foundations Launch Program Related Investments Resource*, PHILANTHROPY NEWS DIG. (Feb. 13, 2015), http://philanthropynewsdigest.org/news/foundations-launch-program-related-investments-resource?_ga=2.61239082.760486217.1527083551-557770194.1527083551 (noting that four of the nation's most prominent foundations—including the Bill & Melinda Gates Foundation—have launched an online program to help other foundations utilize PRIs).

369. *See, e.g.*, *The Venn Model*, VENN FOUND., https://www.vennfoundation.org/ (last visited Apr. 27, 2019) ("Using specialized donor-advised funds called [Venn Accounts], any individual or entity can recommend that Venn make PRIs with their charitable donations.").

370. *See* Schmidt, *Hybrid Pioneers*, *supra* note 182, at 192 ("[T]he publicity alone can help raise foundations' consciousness about and comfort level with the PRI tool, which could in turn lead to a greater use of PRIs. Such a result would thus accomplish a major goal of the L3C legislation, even if the L3C never gains widespread acceptance.").

371. *See supra* Part III.A (discussing the purposes of benefit corporations).

372. *See infra* notes 373–81 and accompanying text (noting how business behavior has changed over the last decade); *see also* Wallace, *Mission Critical*, *supra* note 363 ("[P]owerful players in the finance industry are also getting behind investments that aim to tackle social and environmental challenges *and* generate a monetary return.").

373. *Flash Report: 85% of S&P 500 Index Companies Publish Sustainability Reports in 2017*, GOVERNANCE & ACCOUNTABILITY INST. (Mar. 20, 2018), https://www.ga-institute.com/press-releases/article/flash-report-85-of-sp-500-indexR-companies-publish-sustainability-reports-in-2017.html.

374. *Id.*

Shortly after the U.S. pulled out of the Paris Climate Accord in 2017, over 100 corporations joined local government officials and college presidents to pledge their commitment to help the U.S. reach its goals under the climate accords.[375] And in other cases, where the corporations have not instituted these changes themselves, the investors have played a role in leading corporations to change. Both Exxon Mobil[376] and Occidental Petroleum[377] faced shareholder resolutions forcing them to report climate change risks in 2017.

Among the large companies, Walmart has had one of the most striking changes in language and goals. In 2016, the company pledged to achieve zero waste to landfills in four countries, to power 50% of the company's energy from renewable sources, to double the sales of locally grown produce in the U.S., to expand sustainable sourcing to cover 20 key commodities, and to use 100% recyclable packaging for all private-label brands by 2025.[378] It also pledged to improve training and workplace conditions for its employees.[379] In announcing these goals, Dan Bartlett—Walmart's Executive Vice President for Corporate Affairs—stressed that "we'll be seeing more efforts by Walmart to give its stakeholders a clearer view of the company's intentions, and how those intentions align with the company's objectives for both stockholders and stakeholders."[380]

2. Changes in Investor Behavior

Investors are also making a difference in moving social issues forward. Perhaps the most notable recent development was a letter Laurence Fink wrote in January 2018 to corporate CEOs. Fink is the founder, chairman, and CEO of BlackRock, an investment firm with $1.7 trillion in assets

375. Hiroko Tabuchi & Henry Fountain, *Bucking Trump, These Cities, States and Companies Commit to Paris Accord*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html. The number of business leaders has undoubtedly increased. The *We Are Still In* website now has over 3,665 signatures on the letter that was initially signed on June 5, 2017. *About*, WE ARE STILL IN, http://www.wearestillin.com (last visited Apr. 27, 2019).

376. Exxon's shareholders passed their resolution by 62%, which was up from 38% in 2016. Marianne Lavelle, *Exxon Shareholders Approve Climate Resolution: 62% Vote for Disclosure,* INSIDE CLIMATE NEWS (May 31, 2017), https://insideclimatenews.org/news/31052017/exxon-shareholder-climate-change-disclosure-resolution-approved.

377. Emily Chason, *Occidental Shareholders Override Board in Approving Climate Proposal*, WORLDOIL (May 12, 2017), https://www.worldoil.com/news/2017/5/12/occidental-shareholders-override-board-in-approving-climate-proposal.

378. *Walmart Offers New Vision for the Company's Role in Society*, WALMART (Nov. 4, 2016), https://news.walmart.com/2016/11/04/walmart-offers-new-vision-for-the-companys-role-in-society.

379. John Makower, *Inside Walmart's 2025 Sustainability Goals*, GREENBIZ (Nov. 4, 2016), https://www.greenbiz.com/article/inside-walmarts-2025-sustainability-goals.

380. *Id.*

invested.[381] The letter's language sounded as if it had been crafted by B Lab. Among its statements are:

> Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate.
>
> Without a sense of purpose, no company, either public or private, can achieve its full potential. It will ultimately lose the license to operate from key stakeholders.
>
> . . .
>
> Companies must ask themselves: What role do we play in the community? How are we managing our impact on the environment? Are we working to create a diverse workforce? Are we adapting to technological change? Are we providing the retraining and opportunities that our employees and our business will need to adjust to an increasingly automated world? Are we using behavioral finance and other tools to prepare workers for retirement, so that they invest in a way that will help them achieve their goals?[382]

Other examples abound, especially in the *green* sector.[383] Large American banks JP Morgan Chase, Bank of America, and Citigroup have agreed to facilitate at least $425 billion in green finance through 2025.[384]

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381. *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter (last visited Apr. 27, 2019).

382. *Id.* For more information on the context of this letter and other investor-led actions toward social causes, see Andrew Ross Sorkin, *Blackrock's Message: Contribute to Society or Risk Losing Our Support*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html.

383. For example, Climate Action 100+ is an investor-led initiative to encourage the world's largest corporate greenhouse gas emitters to improve governance on climate change, curb emissions, and strengthen climate-related financial disclosures. *Global Investors Driving Business Transition*, CLIMATE ACTION 100+, http://www.climateaction100.org (last visited Apr. 27, 2019). After the Parkland High School shootings in 2018, several companies cut their ties to the NRA. Jacey Fortin, *A List of the Companies Cutting Ties With the NRA*, N.Y. TIMES (Feb. 24, 2018), http://www.nytimes.com/2018/02/24/business/nra-companies-boycott.html.

384. John Makower, *GreenFin Funds the Sustainability Transition*, GREENBIZ (Feb. 5, 2018), https://www.greenbiz.com/article/greenfin-funds-sustainability-transition.

And some investors outside the U.S. have begun shifting their entire portfolios to environmental, social, and governance indices.[385] The investors see a market opportunity in furthering environmental and sustainable goals—a belief borne out by a report from the Business and Sustainable Development Commission, which envisions $12 trillion worth of new market opportunities in the green economy.[386]

3. Evidence That Socially Conscious Business Behavior Pays Off Financially

Increasingly, businesses are more likely to make money if they take social considerations into account. Unilever—the company that bought Ben & Jerry's and was initially skeptical of Ben & Jerry's social purposes[387]—has found that its "brands with purpose" are growing at twice the rate of its traditional brands.[388] Unilever's former CEO Paul Polman has recognized this change: "This calls for a transformational approach across the whole value chain if we are to continue to grow. Consumers are . . . increasingly demanding responsible business and responsible brands."[389] But growth is not Unilever's entire purpose: Polman has also said that "[t]he role of business has to be firmly understood by the CEO down, that it is there to serve the broader society, the common good and only by doing that very well you will be rewarded, but it has to start there and end there."[390]

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385. *See, e.g.*, Susanna Rust, *SwissRe's $130bn Benchmark Change 'Most Meaningful' Step in ESG Shift*, INV. & PENSIONS EUR. (July 7, 2017), https://www.ipe.com/news/esg/swissres-130bn-benchmark-change-most-meaningful-step-in-esg-shift/10019808.fullarticle ("SwissRe is implementing environmental, social, and governance (ESG) benchmarks across its entire $130bn investment portfolio . . . .").

386. *See* Homi Kharas, *U.S. Global Leadership Through an SDG Lens*, BROOKINGS INSTITUTION (July 31, 2018), https://www.brookings.edu/research/us-global-leadership-through-an-sdg-lens/ ("The Business and Sustainable Development Commission (2017) identified $12 trillion in new market opportunities in just four economic systems—food and agricultural, cities, energy and materials, and health and well-being.").

387. *See* Edmondson, *supra* note 111 (reporting that "Unilever tried to avoid its commitments" to Ben & Jerry's social causes after they acquired the company); David Gelles, *How the Social Mission of Ben & Jerry's Survived Being Gobbled Up*, N.Y. TIMES (Aug. 21, 2015), https://www.nytimes.com/2015/08/23/business/how-ben-jerrys-social-mission-survived-being-gobbled-up.html (detailing some of the early clashes between the disparate corporate cultures of Unilever and Ben & Jerry's).

388. Leonie Roderick, *Unilever's Sustainable Brands Grow 50% Faster than the Rest of the Business*, MARKETING WK. (May 18, 2017), https://www.marketingweek.com/2017/05/18/unilever-sustainable-brands-growth/.

389. Sara Spary, *Unilever Says 'Brands with Purpose' are Growing at Twice the Speed of Others in Portfolio*, CAMPAIGN (May 5, 2015), https://www.campaignlive.co.uk/article/unilever-says-brands-purpose-growing-twice-speed-others-portfolio/1345772.

390. Jo Confino, *Interview: Unilever's Paul Polman on Diversity, Purpose and Profits*, GUARDIAN (Oct. 2, 2013), https://www.theguardian.com/sustainable-business/unilver-ceo-paul-polman-purpose-profits.

Unilever now sources 55% of its agricultural raw materials sustainably and has drastically reduced waste from its factories to landfills.[391] It has "trained 800,000 smallholder farmers since 2010 and provided 238,000 women with access to training, support and skills."[392] Unilever also credits its sustainability focus with helping it hire and maintain talent.[393]

Unilever is one of at least nine companies with "products or services that have sustainability or social good at their core" that generate at least $1 billion dollars in annual revenue.[394] These businesses also include "Tesla, Chipotle, Ikea, Unilever, Nike, Toyota, Brazilian beauty company Natura, Whole Foods and GE's Ecomagination."[395] Target was expected to join the list in 2016.[396]

Even smaller companies find social responsibility profitable. According to the Centre for Sustainability and Excellence (CSE), two-thirds of the companies with the highest scores on their sustainability reports had better financial performance than those with lower scores.[397] And a March 2017 report found that B Lab certified companies in the U.K. were growing 28 times faster than the national economic growth.[398] In addition, 35% of British B-corps reported attracting new audiences after gaining certification; 48% percent found that prospective employees were attracted to the business because of their B-Corp status; and almost half reported that they have begun benefiting from developing partnerships with like-minded businesses that they met through the B Lab process.[399]

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391. *Unilever Sees Sustainability Supporting Growth*, UNILEVER (May 5, 2015), https://www.unilever.com/news/press-releases/2015/Unilever-sees-sustainability-supporting-growth.html.

392. *Id.*

393. Jessica Lyons Hardcastle, *How Unilever, GE, Ikea Turn a Profit from Sustainability*, ENVTL. LEADER (Jan. 7, 2016), https://www.environmentalleader.com/2016/01/how-unilever-ge-ikea-turn-a-profit-from-sustainability/.

394. Freya Williams, *Meet the Nine Billion-Dollar Companies Turning a Profit from Sustainability*, GUARDIAN (Jan. 2, 2016), https://www.theguardian.com/sustainable-business/2016/jan/02/billion-dollar-companies-sustainability-green-giants-tesla-chipotle-ikea-nike-toyota-whole-foods.

395. *Id.*

396. *Id.*

397. Terry Waghorn, *Sustainable Reporting: Lessons from the Fortune 500*, FORBES (Dec. 4, 2017), https://www.forbes.com/sites/terrywaghorn/2017/12/04/sustainable-reporting-lessons-from-the-fortune-500/#7fbd12c86564.

398. Megan Tatum, *B Corps Businesses 'Grow 28 Times Faster than UK GDP*,*'* GROCER (Feb. 21, 2018), https://www.thegrocer.co.uk/people/diversity-and-inclusion/b-corps-businesses-grow-28-times-faster-than-uk-gdp/563584.article.

399. *B Corp Analysis Reveals Purpose-Led Businesses Grow 28 Times Faster Than National Average*, SUSTAINABLE BRANDS (Mar. 1, 2018), https://sustainablebrands.com/read/business-case-1/b-corp-analysis-reveals-purpose-led-businesses-grow-28-times-faster-than-national-average.

4. New Legislative Proposal

Finally, Senator Elizabeth Warren has introduced the Accountable Capitalism Act,[400] which is based, in part, on the benefit corporation model.[401] If passed, this bill would require companies with annual revenue above $1 billion to obtain a federal corporate charter that requires the corporation to consider all stakeholders, not simply the shareholders.[402] The Accountable Capitalism Act would also allow the employees to elect 40% of the directors, restrict officers and directors' ability to sell their shares in the stock to encourage a more long-term view for the corporation, and require shareholder and board approval for political expenditures.[403] The office of the U.S. Corporations could revoke the federal charter if the corporation engaged in egregious or illegal behavior.[404] While still unlikely to pass in today's climate, Senator Warren's ability to introduce, and to obtain a national platform for, such a bill shows how much the national conversation has changed over the past decade and how influential the benefit corporation has been.

CONCLUSION

We will never know exactly how much new hybrid business forms have contributed to the societal changes that have occurred over the last ten years, but we can see the changes, and we know these forms have been part of the mix. Social scientists posit that when 10% of the population holds a belief, that belief will become widespread.[405] It is possible the U.S. is on the road to another era in which businesses recognize their obligations to society.[406] At that point, the political climate should be such that legislators will either revise these statutes or reinforce the community obligations of traditional businesses.

In many ways, the proponents of the L3C and the benefit corporation have gambled that no large scandals will occur before the time is right to

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400. Accountable Capitalism Act of 2018, S. 3348, 115th Cong. § 1 (2018).

401. Lenore Palladino, *It's Time for Accountable Capitalism*, AM. PROSPECT (Oct. 4, 2018), https://prospect.org/article/its-time-accountable-capitalism.

402. S. 3348 §§ 2, 4–5.

403. *Id.* §§ 6–8.

404. *Id.* § 9. For an explanation of this Act, see Press Release, Elizabeth Warren, U.S. Senator, Warren Introduces Accountable Capitalism Act (Aug. 15, 2018).

405. *See* J. Xie et al., *Social Consensus Through the Influence of Committed Minorities*, PHYS. REV. E, 2011, at 5–6 (exploring how the women's suffrage and civil rights movements both saw a tipping point once 10% of the population believed these rights were warranted).

406. *See supra* Part IV.C.1–3 (describing some of the recent examples of businesses promoting social and environmental goals).

make such changes. Certainly, the B Lab and sustainability reports mentioned in the last few paragraphs point to the importance of a mechanism that allows investors, customers, and employees to learn whether the claims of social benefit are accurate or are merely "greenwashing."[407] To date, however, their gamble has paid off.

As we saw in Part I, much of the history of American business is the history of innovation. Early organizations were not classified into for-profit, nonprofit, and government sectors.[408] They all served a public purpose and could lose their charter to do business if they did not do so.[409] There was no federal income tax and no limited liability.[410] Through much innovation and change, we have built a significantly larger economy than was possible in those early years. But in the last 30 or so years, that growth may have been at the expense of the common good. The L3C and the benefit corporation remind us that business can be a force for good.[411] They provide a legal framework, which legislators can modify when the political climate changes, that gives voice to the important value changes that are taking place in society today.

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407. *See* Alicia E. Plerhoples, *Nonprofit Displacement and the Pursuit of Charity Through Public Benefit Corporations*, 21 LEWIS & CLARK L. REV. 525, 558 (2017) ("[F]raud is often called 'greenwashing,' i.e., deceiving unwitting stockholders, customers, or other stakeholders to invest or spend their time and money in an enterprise that negligently or fraudulently claims to pursue social, environmental, or charitable benefits."). *See generally supra* notes 268–72, 373–74, 397–99, 406 and accompanying text (discussing corporate sustainability reports and B-Corp certification).

408. *See supra* Part I (explaining the history of American business organizations).

409. Maier, *supra* note 27.

410. *See supra* notes 25, 40–42 (explaining the lack of a federal income tax at the dawn of the American corporation and the invention of the limited liability concept in the mid-1880s).

411. *See supra* Part IV.C.3 (providing evidence that corporations can have beneficial social and environmental impacts).