FILLING A NONEXISTENT GAP: BENEFIT CORPORATIONS AND THE MYTH OF SHAREHOLDER WEALTH MAXIMIZATION

JESSICA CHU*

I. INTRODUCTION

The 2008 financial crisis left Americans in a state of economic frustration, anxiety, and doubt. After taxpayer money was used to bail out major financial institutions, the country watched in shock and outrage as those same financial institutions rewarded executives and traders with billions of dollars in bonuses.[1] As demonstrated by the Occupy Wall Street movement that spread throughout the United States in the last months of 2011, an overwhelming number of U.S. citizens felt "wronged by the corporate forces of the world."[2] These feelings of betrayal and distrust, stemming largely from the corporate disasters of the last fifteen years, brought forth an old argument in a new form. Today, more and more Americans are not only questioning the effectiveness of shareholder wealth maximization as a corporate strategy,[3] but they are also advocating for a different kind of corporate America—one where corporations do not aim myopically at perfecting short-term earnings reports, but instead consider

* J.D. Candidate 2013, University of Southern California Gould School of Law; M.B.T. Candidate 2013, University of Southern California Levanthal School of Accounting; B.A. Political Science and Economics 2009, University of California, Los Angeles. I would like to thank Professor McCaffery for his guidance and advice throughout the writing process; my family and friends for their continuous support and encouragement; and members of the *Southern California Interdisciplinary Law Journal* for all their hard work in editing this piece.

1. Edmund L. Andrews & Peter Baker, *A.I.G. Planning Huge Bonuses After $170 Billion Bailout*, N.Y. TIMES, Mar. 14, 2009, http://www.nytimes.com/2009/03/15/business/15AIG.html; Albert Bozzo, *Congress Wants Details on Bailout Firms' Bonus Plans*, CNBC (Oct. 30, 2008, 10:58 AM), http://www.cnbc.com/id/27423117/Congress_Wants_Details_On_Bailout_Firms_Bonus_Plans; Dan Gerstein, *The Bailout Bonus Smackdown*, FORBES (Feb. 5, 2009, 12:01 AM), http://www.forbes.com/2009/02/04/stimulus-obama-daschle-opinions-columnists_0205_dan_gerstein.html.

2. *Declaration of the Occupation of New York City*, N.Y.C. GEN. ASSEMBLY, http://www.nycga.net/resources/declaration/ (last visited Sept. 16, 2012) [hereinafter *Declaration*].

3. *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

their employees, communities, and, ultimately, aim for a larger social purpose.[4]

In the last two years, state legislators have responded to these criticisms by passing laws that establish "benefit corporations"—entities that specifically require businesses to consider their impact on society at large.[5] Benefit corporation legislation has been accepted with massive enthusiasm and support, and has been promoted as a way to reform the profit-driven motives that led to the failures of British Petroleum ("BP"), Enron, Lehman Brothers, and Blackwater.[6] Proponents view this new corporate form as the revolution needed to "change the face of American capitalism."[7]

Although benefit corporations pursue an admirable goal while providing some advantages and needed reform, this Note argues that if society wants to influence big companies and "corporate America," as defined as public companies in the Fortune 500, benefit corporations are not the way. In fact, they are unnecessary and ineffective. Instead of diminishing the profit-driven motives of big companies, benefit corporation statutes actually perpetuate and strengthen the concept of shareholder wealth maximization.

This Note proceeds by first introducing benefit corporations in Part II and explaining that their creation is largely premised on the assumption that corporations must maximize shareholder value. Part III analyzes three factors of U.S. corporate law—(1) corporate history, (2) corporations' articles of incorporation and state corporate codes and statutes, and (3) state case law—and concludes that the premise of shareholder wealth maximization is misguided. In fact, U.S. corporate law does not explicitly

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4. *See* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012) [hereinafter SHAREHOLDER VALUE MYTH]. *See also* Hansmann, *supra* note 3.

5. MODEL BENEFIT CORP. LEGISLATION §§ 102, 201 (version of July 30, 2012), *available at* http://benefitcorp.net/storage/documents/Model_Benefit_Corporation_Legislation.pdf (stating that benefit corporations are required to have a purpose of creating a "[g]eneral public benefit," which is defined as a "material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation").

6. Jamie Raskin, *The Rise of Benefit Corporations*, THE NATION (June 8, 2011), http://www.thenation.com/article/161261/rise-benefit-corporations.

7. Keith Wagstaff, *Can Benefit Corporations Change the Face of American Capitalism?*, THE UTOPIANIST (Mar. 18, 2011), http://utopianist.com/2011/03/can-benefit-corporations-change-the-face-of-american-capitalism/. *See also Capitalism's Waning Popularity: Market of Ideas*, THE ECONOMIST (Apr. 7, 2011), http://www.economist.com/node/18527446.

require corporations to focus "primarily on" or "solely on" share price.[8] Taking into consideration U.S. corporate law as defined in Part III, Part IV looks at the actual role of benefit corporations and argues that their creation has two divergent effects. On the one hand, benefit corporations provide socially conscious entrepreneurs with an explicit form to distinguish their businesses. On the other hand, they create an additional roadblock to corporate reform. Instead, the goals of the legislators who support benefit corporations could be better achieved through the passage of constituency statues in all fifty states.

II. WHAT IS A BENEFIT CORPORATION AND WHY WERE THEY CREATED?

A. THE PROBLEM WITH SHAREHOLDER VALUE MAXIMIZATION

As a result of the corporate disasters of the last fifteen years,[9] the reputation of corporations in America has plunged.[10] The failure of the market system has been attributed primarily to the greed and immorality of corporate leaders. Others, however, including legislators, academics, and members of the public, have traced the failure to a related, but more specific, cause.[11] They argue that it is the premise on which large corporations operate—that corporations can advance only the goal of profit maximization—that is largely to blame.[12]

The doctrine of shareholder value maximization, also known as shareholder primacy, has been almost uniformly accepted.[13] According to the doctrine, "public corporations 'belong' to their shareholders, and they exist . . . to maximize shareholders' wealth."[14] Whether a corporation has

8. *See infra* Appendix I.

9. Examples of such disasters include: the massive fraudulent accounting of Enron and Worldcom, which led to the elimination of both companies and various large public accounting firms; the 2008 financial crisis, which led to the fall of Lehman Brothers and the near failure of the large financial institutions Bank of America, Fannie Mae, Freddie Mac, AIG, Citigroup, JP Morgan Chase, Wells Fargo, Goldman Sachs, and Morgan Stanley; the BP oil spill; and the exposure of Bernie Madoff's ponzi scheme. *See also Bailout Recipients*, PROPUBLICA (Mar. 26, 2012), http://projects.propublica.org/bailout/list (tracking the money used to bailout the financial sector).

10. *See Occupy Wall Street: Public Opinion of Protestors Higher than Corporations, Washington*, HUFFINGTON POST (Nov. 16, 2011, 11:27 PM), http://www.huffingtonpost.com/2011/11/07/occupy-wall-street-poll_n_1079089.html.

11. *See* SHAREHOLDER VALUE MYTH, *supra* note 4, at 4–7.

12. *Id.*

13. *Id.* at v (stating that "[s]hareholder-value thinking was almost uniformly accepted by experts in law, finance, and management").

14. *Id.* at 2. *See also* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, *available at*

successfully maximized shareholders' wealth is usually determined by an analysis of share price.[15] Thus, shareholder value maximization places an alleged legal duty on corporations and the directors that control them to focus relentlessly on increasing share price.[16] This alleged legal duty leads directors to disregard other, equally important societal factors. As a result, in their quest to maximize shareholder wealth, directors often act in an extreme and seemingly ruthless manner: they fire loyal employees; cut back on research and development; delay replacing outdated and worn equipment; and, ultimately, squeeze profits.[17] Many who believe that corporations must maximize shareholder value argue that the legal framework essentially eliminates the possibility of for-profit entities that also champion social purposes, also known as "hybrid enterprises" or "for-profit social enterprises."[18]

The "forced" sale of Ben & Jerry's to British-Dutch multinational food giant, Unilever, is the paradigmatic case study of the consequences faced by corporations with social missions.[19] According to the standard recount of the takeover, Ben Cohen and Jerry Greenfield, Ben & Jerry's founders, had attempted to run their business as a hybrid enterprise. The duo pursued a "double bottom line" and "[sought] to advance progressive social goals, while still yielding an acceptable financial return for investors."[20] For example, they committed 7.5 percent of the company's pre-tax profits to charity and instituted a pay scale in which the highest-paid employee could not be paid more than five times the salary of the

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http://www.umich.edu/~thecore/doc/Friedman.pdf. Milton Friedman, a renowned economics professor at the University of Chicago and one of the earliest and most influential proponents of this viewpoint, defined shareholder primacy in an article in the *New York Times*. He argued that shareholders "own" the corporation and thus the only social responsibility of business is to increase its profits.

15. SHAREHOLDER VALUE MYTH, *supra* note 4, at 2–3.

16. *Id.* at 3, 24.

17. *Id.* at 3. Stout uses the Deepwater Horizon disaster as an example of how shareholder wealth maximization leads to detrimental results for the corporation, its shareholders, and society by pointing out that the disaster was caused in part by decisions of BP to cut costs, and that shareholders ultimately paid the price for these choices. *Id.* at 1–2.

18. Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 212 (2010).

19. *See The Scoop on Ben & Jerry's Sellout*, SLATE (Apr. 12, 2000, 3:05 PM), http://www.slate.com/articles/business/moneybox/2000/04/the_scoop_on_ben_jerrys_sellout.html; *Ben & Jerry's Sells Out*, WIRED (Apr. 12, 2000), http://www.wired.com/techbiz/media/news/2000/04/35616; Tamara Schweitzer, *B_Corp: Better Laws for Business*, DOWSER (Mar. 9, 2011, 12:00 PM), http://dowser.org/b-corp-better-laws-for-business/; Raskin, *supra* note 6; Wagstaff, *supra* note 7.

20. Page & Katz, *supra* note 18, at 211.

lowest-paid employee.[21] Although Ben & Jerry's was the quintessential social enterprise, Cohen and Greenfield also understood the importance of making money. They believed that "the best way to make Ben & Jerry's a force for progressive social change was to grow bigger . . . [in order to] . . . make more profits and give more money away."[22]

Despite the company's financial success after its initial NASDAQ stock offering in 1985,[23] the company's performance began to suffer in the mid-1990s. In 1993, Ben & Jerry's shares reached $33.75 per share, but financial loss in 1994 followed by slow sales growth resulted in stock prices of $17.00 per share in 1999.[24] Low stock prices eventually led to buyout offers, specifically from Dreyer's and Unilever.[25] Cohen and a group of social investors, through a group called Hot Fudge Partners, responded to these offers by attempting a leveraged buyout of the company.[26] They offered to purchase a controlling interest in the company for $38.00 per share.[27] This led Dreyer's to offer $38.00 per share and Unilever to offer $43.60 per share.[28] According to interviews with Greenfield, Cohen, and others involved in the deal, the board's decision to accept Unilever's offer came down to the issue of shareholder primacy and the fear of getting sued for failing to sell to the highest bidder.[29]

Ultimately, the story of Ben & Jerry's is a cautionary tale used to remind business owners of their alleged legal duty to act in the best interests of their shareholders:

> Among social entrepreneurs, Unilever's purchase of Ben & Jerry's still serves as a cautionary tale of how easily corporate fiat can undermine social responsibility. "The board was legally required to sell to the highest bidder," says Jonathan Storper, an attorney . . . . Neither Ben Cohen nor Jerry Greenfield wanted to sell the company, but because it was public, they had no choice. Both cofounders have since expressed concerns that the company has shifted away from its original mission of social responsibility.[30]

21. *Id.* at 211, 223.
22. BEN COHEN & JERRY GREENFIELD, BEN & JERRY'S DOUBLE DIP: LEAD WITH YOUR VALUES AND MAKE MONEY, TOO 94 (1997).
23. Page & Katz, *supra* note 18, at 219.
24. *Id.* at 224.
25. *Id.* at 225–26.
26. *Id.*
27. *Id.*
28. *Id.* at 226.
29. *Id*. at 229.
30. Jenna Lawrence, *Making the B List*, STAN. SOC. INNOVATION REV. (Summer 2009), *available at* http://www.ssireview.org/articles/entry/making_the_b_list.

Partly in order to avoid similar "Ben & Jerry's circumstances," companies like Dunkin' Donuts and Toys 'R' Us have "gone private" as a way to avoid the pressure of shareholder wealth maximization.[31] In fact, between 1997 and 2008 the number of publicly listed companies declined by almost 40 percent.[32] While this decrease can also be explained by other economic factors, such as the unavailability of financing and increased competition in the marketplace, this huge move out of the public sector by corporations is strong evidence that the American market structure requires reform. Similarly, many owners of start-up, mission-driven businesses decide not to sell shares to outside investors for fear that their interests will diverge over time.[33]

Even previous proponents of shareholder value maximization have turned their backs on the theory. During a 2009 interview with the *Financial Times*, Jack Welch, former CEO of General Electric ("GE"), blatantly proclaimed shareholder value as "the dumbest idea in the world" and emphasized that "shareholder value is a result, not a strategy."[34] Ironically, many attribute the popularization of shareholder primacy to a speech Welch gave in 1981 that credited the idea for GE's success.[35] Welch aggressively put this strategy into practice while running GE: in order to make the company more economically efficient, he shut down factories, cut payroll, and minimized all unnecessary costs.[36] However, despite his previous support for the idea, Welch has now joined the many who doubt the wisdom of having the shareholder primacy strategy govern the marketplace.

Ultimately, the idea that the legal framework prevents corporations from pursuing both profit and social good has frustrated consumers, investors, and entrepreneurs. This frustration has led a new movement emphasizing legal change.

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31. SHAREHOLDER VALUE MYTH, *supra* note 4, at 5, 54. *See also* Nanette Byrnes, *A Whole New Game for Toys 'R' Us*, BUS. WK. (Mar. 18, 2005), http://www.businessweek.com/bwdaily/dnflash/mar2005/nf20050318_5446_db016.htm.

32. DAVID WEILD & EDWARD KIM, STATEMENT TO THE JOINT-CFTC-SEC ADVISORY COMMITTEE ON EMERGING REGULATORY ISSUES, MARKET STRUCTURE IS CAUSING THE IPO CRISIS—AND MORE, (June 22, 2010), *available at* http://www.sec.gov/comments/265-26/265-26-19.pdf.

33. SHAREHOLDER VALUE MYTH, *supra* note 4, at 5, 54.

34. Francesco Guerrera, *Welch Condemns Share Price Focus*, FIN. TIMES (Mar. 12, 2009, 6:13 PM), http://www.ft.com/cms/s/0/294ff1f2-0f27-11de-ba10-0000779fd2ac.html#axzz1nNSxUECy.

35. *See id.*

36. Tim Smart, *Jack Welch's Encore: How GE's Chairman Is Remaking His Company—Again,* BUS. WK., Oct. 28, 1996, *available at* http://www.businessweek.com/1996/44/b34991.htm.

B. THE "SOLUTION" TO SHAREHOLDER WEALTH MAXIMIZATION

Legislators reacted to the demands of this new movement by creating "benefit corporations." As of November 2012, the benefit corporation form currently exists in twelve states—California, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, South Carolina, Vermont, and Virginia.[37] Four of these twelve states enacted benefit corporation legislation during 2012.[38] Legislation is currently pending in Washington, DC.[39]

Corporations that decide to form as a benefit corporation are required to formally commit to the purpose of creating a "general public benefit."[40] In addition, benefit corporations also have the option of committing to an "optional specific public benefit purpose" by including the purpose in the corporation's articles of incorporation.[41] Benefit corporations carve out a space within the current legal framework for for-profit entities whose purpose—providing social benefits—is central to their existence. Proponents of benefit corporations argue that these new entities not only give entrepreneurs the legal opportunity to act in socially responsible ways, but are also beginning to pave the way for substantive corporate reform.

Although legislation is state specific, benefit corporations are generally created with the same major characteristics as defined by the Model Benefit Corporation Legislation.[42] These include: (1) a specific corporate purpose that creates a "material positive impact on society and the environment" in its articles;[43] (2) an expansion of the fiduciary duties of

37. CAL. CORP. CODE §§ 14600–14604 (West 2012); HAW. REV. STAT. §§ 420D-1 to 420D-13 (West 2012); 805 ILL. COMP. STAT. ANN. 40/1–5.01 (West 2012); La. Rev. Stat. Ann. §§ 12:1801–1832 (2012) (West 2012); MD. CODE ANN., CORPS & ASS'NS §§ 5-6C-01 to 5-6C-08 (West 2012); 2011 MASS. H.B. 4352 (West 2012); N.J. STAT. ANN. §§ 14A:18-1 to 14A:18-11 (West 2012); N.Y. BUS. CORP. Law §§ 1701–1709 (McKinney 2012); VT. STAT. ANN. tit. 11A, §§ 21.01–21.14 (West 2012); 2012 Pa. Legis. Serv. 2012-152 (West 2012); S.C. Code Ann. §§ 33-38-110 to 33-38-600 (2012); VA. CODE ANN. §§ 13.1-782 to 13.1-791 (West 2012).

38. Of the twelve states, Illinois, Louisiana, Pennsylvania, and South Carolina passed benefit corporate legislation during 2012.

39. B19-0584 (Wash. D.C. 2011).

40. MODEL BENEFIT CORP. LEGISLATION §§ 103, 201 (2012).

41. *Id.* § 201.

42. WILLIAM H. CLARK, JR. & LARRY VRANKA, THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC 15 n.53 (2012), *available at* http://www.benefitcorp.net/storage/documents/The_Need_and_Rationale_for_Benefit_Corporations_April_2012.pdf (stating that "model benefit corporation legislation . . . collects the best features of the statutes enacted to date and represents the ideal legislation to create benefit corporations").

43. MODEL BENEFIT CORP. LEGISLATION §§ 102, 201.

directors to include the interests of both non-financial stakeholders and financial shareholders;[44] and (3) the required publication of annual reports that inform shareholders about the corporation's overall social and environmental performance.[45] In addition, the legislation also redefines the scope of director liability. Although the legislation explicitly states that directors and officers cannot be held personally liable for failing to meet the corporation's social commitments, it does give every shareholder a right to bring either a traditional action or a "benefit enforcement proceeding" on the basis that a director or officer failed to pursue or create the stated general or specific public benefit purposes, failed to consider the interests of the various stakeholders set forth in the statute, or failed to meet the transparency requirements in the statute.[46]

By creating a corporate space immune to the shareholder wealth maximization theory, benefit corporations seem to be the perfect solution for those advocating for a new corporate America. Benefit corporations implicitly validate the shareholder primacy theory by creating a new corporate form that explicitly expands the fiduciary duties of directors to include other constituents besides shareholders.[47] Benefit corporations also ensure accountability by providing shareholders with a means to obtain redress and by requiring directors to provide annual benefit reports.[48] Thus, a hybrid corporation that converts to a benefit corporation would be able to avoid the issues of liability and breach of fiduciary duty faced under non-benefit corporation laws.

For example, if Ben & Jerry's had had the option of converting to a benefit corporation, the board might not have felt pressured to maximize shareholder profit and could have sold the company to Hot Fudge Partners instead of Unilever. The board would not have had to fear the possibility of losing a shareholder derivative lawsuit for failing to maximize shareholder wealth. In fact, as a benefit corporation, the board's decision to sell to Hot Fudge Partners would have been completely justified. As a benefit corporation, Ben & Jerry's would have been required to advance a general public benefit, which means that the board would have been required to consider whether selling the corporation to Unilever would have had a

44. *Id.* § 301(a).
45. *Id.* § 401(a).
46. *Id.* § 305(a).
47. *Id.* § 301.
48. *Id.* § 401.

"material, positive impact on society and the environment."[49] This application of benefit corporation law is supported by the admission of Jeff Furman, director of Ben & Jerry's since the 1980s and the company's current chairman, to the *Wall Street Journal*. In a recent interview, he stated that if benefit corporations had existed during the time of the buyout offers, the board most likely would not have agreed to sell the company to Unilever.[50]

However, while benefit corporation legislation undeniably provides a clarifying structure that legitimizes the existence of for-profit, socially conscious corporations, legislators should reconsider whether implementation of benefit corporations is the best way to influence reform in corporate America.

III. U.S. CORPORATE LAW DOES NOT REQUIRE SHAREHOLDER WEALTH MAXIMIZATION

As discussed in Part II, advocates of benefit corporations contend that these new entities fill an important gap in the U.S. legal framework. They argue that, in the current system, corporations are required to maximize shareholder wealth while non-profit organizations are explicitly prohibited from pursuing private gain. However, this Part questions this belief by asking whether there is a gap in corporate law that needs filling in the first place.

Specifically, this Part examines: (1) the history of U.S. corporate law; (2) the articles of incorporation of individual corporations; (3) state corporate codes; and (4) state case law interpreting corporate law. Given the near-universal acceptance of shareholder value thinking, one would expect this analysis to produce an abundance of support furthering shareholder primacy theory. However, as the below analysis shows, shareholder value thinking is a myth without concrete justification in the law. At the very least, this Part shows that shareholder wealth maximization theory does not prevent corporations from acting in similarly socially conscious ways as benefit corporations.

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49. *Id.* § 102.

50. *See* Angus Loten, *With New Law, Profits Take a Back Seat*, WALL ST. J., Jan. 19, 2012, http://online.wsj.com/article/SB10001424052970203735304577168591470161630.html ("If benefit corporations had existed back in 2000, the board probably wouldn't have agreed to the Unilever deal.").

A. HISTORY

Although advocates of shareholder primacy commonly argue that the corporation's "proper purpose" has always been to maximize shareholder value, this concept is actually a recent development made popular in the late twentieth century by the rise of the "modern corporation." As this Note explains, the debate regarding the proper purpose of the modern corporation has not only vacillated between shareholder primacy and stakeholder consideration, but it also has been influenced by special interest groups and those that indirectly profit from shifts in corporate purpose. Thus, this Note argues that pro-shareholder primacy arguments based on alleged historical finality of the theory are unfounded.

The public corporation as we know it today—a business entity that issues stock to tens of thousands of investors—was developed in the early 1900s.[51] Prior to this period, corporations existed in a "private" or "closely held" form—a few shareholders "kept a tight rein on their private companies and were intimately involved in [the companies'] business affairs."[52] This structure was vastly different from the structure of the public corporation. Specifically, the goal of each individual investor of the public corporation was solely to profit from the corporation's activities,[53] and the individual investor had little interest in actually becoming engaged in the corporation's activities.[54] The ease of entry into the stock market coupled with increased demand for stock as investment property resulted in the creation of huge public corporations owned by uninvolved shareholders.[55] Unaware of the day-to-day operations of the public corporations they "owned," shareholders did not have any actual control.[56] Instead, real control was vested in the corporation's board of directors and then passed on to hired executives.[57]

The emergence of the new public corporation created new debates. The most enduring and fundamental argument has been over the proper

51. SHAREHOLDER VALUE MYTH, *supra* note 4, at 15.
52. *Id.*
53. *Id.*
54. *Id.* ("These many small individual investors, in turn, expected to benefit from the corporation's profit-making potential, but had little interest in becoming engaged in its activities.").
55. *Id.*
56. *Id.* at 15–16.
57. *Id.*

purpose of public corporations.[58] Shareholder primacy was uniformly accepted as the proper purpose of corporations prior to the early twentieth century.[59] This made sense because closely-held corporations prior to the early 1900s were owned by a small group of shareholders, who shared similar goals and enjoyed nearly absolute control to determine the firm's future.[60] However, a second viewpoint emerged when a large group of observers recognized that the new public corporations differed from their closely-held counterparts and questioned whether shareholder wealth maximization was the proper purpose of the new public corporations.[61] Specifically, they argued that public corporations had a "broader social purpose that went beyond making money for their shareholders."[62] They recognized that these corporations had a huge influence on the communities and societies they interacted with, and argued that they should be held accountable for the actions they took that impacted customers, employees, and society as a whole.[63] From these two viewpoints the "Great Debate" over the purpose of the public corporation was born.[64]

The Great Debate involves two conflicting answers to the following question: "Should the publicly held corporation serve only the interests of its atomized and ignorant shareholders, and should directors and executives focus only on maximizing those shareholders' wealth through dividends and higher share prices?"[65] The Great Debate first gained recognition after the publication of a debate between two leading experts in corporate law, Adolph Berle of Columbia and Merrick Dodd of Harvard. Berle took the side of shareholder primacy and argued that "all powers granted to a corporation or to the management of the corporation . . . [are] at all times exercisable only for the ratable benefit of the shareholders."[66] Dodd took the opposite position—the stakeholder viewpoint—and argued that the public company should consider other factors besides shareholder financial

58. *Id.* at 16. *See also* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and "The Modern Corporation"*, 34 J. CORP. L. 99, 100–03 (2008) (providing background information about the debate over the propor purpous of public corporations).

59. SHAREHOLDER VALUE MYTH, *supra* note 4, at 16.

60. *Id.* ("After all . . . the controlling shareholder or shareholder group enjoyed near-absolute power to determine the firm's future.").

61. *Id.*

62. *Id.*

63. *See id.*

64. *Id.* at 17 (citing William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067 (2002)).

65. *Id.* at 16.

66. *Id.* at 17 (quoting Adolf A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931)) (alteration in original).

gain.[67] He believed that a public company's purpose "included providing secure jobs for employees, quality products for consumers, and contributions to the broader society."[68]

Despite the overwhelming acceptance of Berle's argument today, Dodd's stakeholder viewpoint was declared the winning viewpoint in the 1950s. In fact, in 1954, Berle abandoned the concept of shareholder primacy. He published an article in which he declared that "[t]he argument has been settled . . . squarely in favor of Professor Dodd's contention."[69]

However, despite Berle's 1954 admission that corporations should focus on more than maximizing shareholder wealth, shareholder primacy began to resurface with the rise of the Chicago School's promotion of free market economics and the application of economics to corporate law. Michael Jensen and William Meckling solidified this argument in an influential paper published in the Journal of Financial Economics.[70] They established the now widely accepted principal-agency concept in corporate law—that shareholders in the corporation are principals that hire directors to act as their agents.[71] After establishing this principal-agent relationship, Jensen and Meckling emphasized the conflicts of interest between shareholders and directors and the agency costs resulting from these conflicts.[72] After making the basic assumption that shareholders cared only for financial gain, Jensen and Meckling concluded that by requiring shareholder primacy, the law could best reduce agency costs.[73] This meant that the directors, managers, and officers of a corporation only had one job—to maximize shareholder wealth "by every means possible short of violating the law."[74]

67. *Id.* (citing Merrick E. Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932) ("The business corporation [is] an economic institution which has a social service as well as a profit-making function . . . .").

68. SHAREHOLDER VALUE MYTH, *supra* note 4, at 17; Dodd, *supra* note 67, at 1148 ("[T]he business corporation [is] an economic institution which has a social service as well as a profit-making function . . . .").

69. SHAREHOLDER VALUE MYTH, *supra* note 4, at 18 (citing ADOLF A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 169 (1954)).

70. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

71. SHAREHOLDER VALUE MYTH, *supra* note 4, at 18 (citing Jensen & Meckling, *supra* note 70, at 309).

72. Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate* Governance, 50 HARV. INT'L L.J. 129, 135 (2009).

73. SHAREHOLDER VALUE MYTH, *supra* note 4, at 18–19, 34–35.

74. *Id.* at 18.

By emphasizing the way shareholder primacy could be used to control the acts of corporate directors, the Chicago School's approach turned a strategy that benefited investors into a strategy that benefited all.[75] The Chicago School's free market approach to understanding corporations started gaining dominance after several powerful groups realized its appeal.[76] Specifically, three groups stood to benefit from the new strategy: (1) managers of hostile takeover firms; (2) institutional investors; and (3) securities analysts.[77] By advocating for a shift in corporate strategy, these three groups stood to receive huge windfalls. As a result, they used their influence to shift the focus of corporations from the 1980s corporate myth of "portfolio management," also known as the "grow the company" strategy, to the myth of "shareholder value" in the early 1990s.[78]

The shift in corporate focus that led to the shareholder primacy theory is not unusual for economic thinking. Before this shift to shareholder primacy, there had been similar shifts in corporate strategy. For example, shifts occur when the business world believed that existing strategies no longer generated increasing growth, or when new management factions persuaded executives and shareholders that other strategies were more beneficial.[79] This shows that, although shareholder primacy is thought of as a firm rule, it is actually a relatively new idea that lacks a strong historical foundation. Also, like these past shifts, the acceptance of shareholder primacy came about because of outside influences.[80] In other words, shareholder primacy permeated the minds of the public not because it is founded in legal and historical wisdom, but rather as a result of lobbying from three strong groups with major financial interests in the strategy.[81]

75. Frank Dobbin & Dirk Zorn, *Corporate Malfeasance and the Myth of Shareholder Value*, 17 POL. POWER AND SOC. THEORY 179, 179 (2005).

76. *Id.* at 180.

77. *Id*. at 181.

78. *Id*.

79. *Id.* Firm competition and the need for efficiency required that companies continuously find strategies to increase company growth. Before shareholder maximization theory gained its current prominence, firms previously similarly swore by other strategies. Previous mainstream strategies include the production-expansion strategy, sales and marketing strategy, and diversification strategy.

80. "[T]hree groups with new clout in financial markets succeeded in imposing their will on corporations. They redefined corporate efficiency, and realigned the material interests of others." *Id*.

81. *Id.* (explaining that CEOs are paid with stock options that align their interests with those of profit maximization—the more the stock is worth, the wealthier the CEO becomes). However, this compensation scheme was one of the reasons for the corporate scandals of the 2000s. By incentivizing CEOs to increase stock prices, companies like Enron were motivated to adjust their accounting books to appear more profitable than they actually were. The same motivations fueled the housing crisis of 2008. Mortgage backed securities were highly traded and made to look profitable, resulting in the housing bubble burst. *See* SHAREHOLDER VALUE MYTH, *supra* note 4.

The history of the Great Debate regarding the purpose of publicly traded companies demonstrates a continuous shifting of ideas, and encourages the reevaluation of the shareholder primacy theory, which has proven its inability to achieve sufficient results. Although widely accepted, shareholder primacy is not unmovable historical bedrock. It was welcomed into mainstream ideology as a way to improve corporate law and can just as easily be turned away.

B. ARTICLES OF INCORPORATION AND STATE CORPORATIONS CODES

Just as it lacks historical support, the theory of shareholder primacy fails to find support in corporate law.

1. Articles of Incorporation

First, there are neither state laws that explicitly require corporations to maximize shareholder wealth nor state laws that explicitly prohibit corporations from considering other stakeholders. An examination of state corporate codes shows that state laws do not limit the corporate purpose of a corporation to shareholder wealth maximization.

In the United States, corporations are governed by the corporate codes of individual states. These codes establish rules that dictate the goals a corporation can pursue as well as the standard of conduct by which directors must abide. All state corporate codes require corporations to adopt articles of incorporation. The articles of incorporation, also known as the corporate charter, is a document established at the time of incorporation, which sets out the primary rules that will govern the business.[82] Generally, the articles of incorporation will include a provision that defines, as well as limits, "the purpose or purposes for which the corporation is organized."[83] Although state statutes establish default guidelines, corporations are ultimately free to define the limits of their purpose statements.[84] The established corporate purpose governs what the corporation can do and limits the corporation's express and implied powers.[85] Therefore, if a corporation commits an "ultra vires" act—an act that exceeds its powers or corporate purpose—the corporation's shareholders and the attorney general of the state of incorporation can prevent the corporation from engaging in that act.[86]

82. DONALD SCOTTEN, BUSINESS ORGANIZATIONS SUPPLEMENT 90 (2010).
83. *Id.*
84. MODEL BUS. CORP. ACT § 3.01 (2007).
85. *See* SCOTTEN, *supra* note 82, at 100.
86. *Id.*

The only limitation state codes place on corporations is the general requirement that the purpose of a corporation cannot be to commit any unlawful acts. For example, the Delaware General Corporation Code ("DGCC") states that "[a] corporation may be incorporated or organized . . . to conduct or promote any lawful business or purposes."[87] Under the Model Business Corporation Act ("MBCA"), unless a more limited purpose is stated in the articles of incorporation, every corporation has a default purpose of "engaging in any lawful business."[88]

With this understanding of the structure of corporate purpose, it is impossible to arrive at the conclusion that state statutes require corporations to maximize shareholder value. In fact, some who advance the shareholder wealth maximization theory even argue that the general purpose doctrine, which almost all publicly traded corporations adopt, is one way for corporations to circumvent the shareholder primacy requirement.[89] Therefore, while a business organized under the corporate form must undeniably seek a profit,[90] whether the corporation must maximize profits under state statutes is less certain. The American Law Institute's ("ALI") *Principles of Corporate Governance* provides the best summary of corporate law regarding corporate purpose: "a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."[91] By using the word "enhancing" as opposed to the word "maximizing" in describing a corporation's required pursuit of shareholder gain, the ALI supports the interpretation that firms have the option to pursue objectives beyond maximizing profit.[92]

Second, corporations themselves do not restrict their corporate purposes by requiring directors to maximize shareholder wealth. Even though corporate codes do not require a corporation to limit its purpose, it is important to ask whether corporations actually include limiting purpose statements requiring the corporation to maximize shareholder wealth. This

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87. DEL. CODE ANN. tit. 8, § 101 (West 2012).

88. MODEL BUS. CORP. ACT § 3.01 (2007).

89. Adam J. Sulkowski, *Ultra Vires Statutes: Alive, Kicking, and a Means of Circumventing the Scalia Standing Gauntlet in Environmental Litigation*, 24 J. ENVTL. L. & LITIG. 75, 100–01 (2009). *See also* Judd F. Sneirson, *The Sustainable Corporation and Shareholder Profits*, 46 WAKE FOREST L. REV. 541, 552 (2011).

90. BLACK'S LAW DICTIONARY 391 (9th ed. 2009) (defining a business corporation as a "corporation formed to engage in commercial activity for profit").

91. 1-2 PRINCIPLES OF CORPORATE LAW § 2.01 (2005) (citations omitted); Sneirson, *supra* note 89, at 552.

92. Sneirson, *supra* note 89, at 552.

is important because a corporation's founders have wide latitude to include unique corporate purposes, which allows them to form their company for whatever purpose they so desire. This makes the stated corporate purpose a strong indicator of what these founders hope their company will and will not do. For example, if a corporation includes a more narrow statement of purpose, this shows that the founders want their corporation to target only a few goals. If a corporation includes a general statement of purpose, this shows that founders want to keep the company as flexible and malleable as possible. Thus, if a corporation's founders believed they had to maximize profits or wanted to maximize profits, it reasonably follows that they would have included a statement in their corporate charter iterating this belief. If the popular belief held true and corporations were required to or wanted to consider shareholders first and foremost, one would expect to see a limited purpose statement clause stating that the "corporation is organized and carried on primarily for the profit of the stockholders."[93] However, in reality, "such provisions are as rare as unicorns."[94]

The overwhelming majority of articles of incorporation simply provide a general-purpose clause, which states that the corporation's purpose is to do anything "lawful." In fact, the articles of incorporation of eighteen of the top twenty companies in the Fortune 500 include general, nonspecific purpose statements.[95] As the chart in Appendix I indicates, Fannie Mae and Freddie Mac are the only two companies whose articles of incorporation do not contain general-purposes clauses.[96] Besides Fannie Mae and Freddie Mac, the purpose statements of the other top twenty Fortune 500 companies provide directors with much leeway. For example, even though Exxon Mobil's articles of incorporation provide a detailed purpose statement with specific goals,[97] the purpose statement concludes with the following provision:

93. Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 169 (2008) [hereinafter *Stop Teaching* Dodge v. Ford].

94. SHAREHOLDER VALUE MYTH, *supra* note 4, at 28.

95. *See infra* Appendix I.

96. The purposes of these two corporations can be explained by the unique relationship both corporations have with the government. Fannie Mae and Freddie Mac were chartered by Congress. Federal National Mortgage Association Charter Act, 12 U.S.C. § 1716 (2012) (charters Fannie Mae); Federal Home Loan Mortgage Corporation Act, 12 U.S.C. § 1451 note (2012) (Congressional Statement of Purpose) (charters Freddie Mac).

97. EXXONMOBIL, EXXON MOBIL CORPORATION CERTIFICATE OF INCORPORATION (2001), *available at* http://www.exxonmobil.com/Corporate/investor_governance_incorporation.aspx. The purpose statement of the Exxon Mobil Certificate of Incorporation is divided into four different sections and is over 500 words long. Some of the purposes include "[t]o do all kinds of mining, manufacturing and trading business," to "to build houses, structures, vessels, cars, wharves, docks and piers," and to

> To exercise as a purpose or purposes each power granted to corporations by the New Jersey Business Corporation Act or by any amendment or supplement thereto or by any statute enacted to take the place thereof, insofar as such powers authorize or may hereafter authorize corporations to engage in activities.[98]

Thus, despite the specificity with which Exxon Mobil describes the purpose of the corporation, it still reserves the right to act in any manner allowed by the state of New Jersey.

2. State Corporations Codes

Although corporate statutes and individual corporate purpose statements allow corporations to act in any legal way, many question the generality of the "anything legal" requirement and wonder if its interaction with state fiduciary statutes actually requires corporations to maximize shareholder wealth. An examination of the fiduciary duties of corporate directors and the existence of constituency statutes concludes that the answer to this question is no—after being permitted to act in any legal way, corporations are not then restricted by other areas of law to only maximize shareholder wealth.

Besides establishing the boundaries of corporate action by requiring purpose statements, state corporation codes also impose standards of conduct on directors through the establishment of fiduciary duties. Although these standards differ from state to state, directors that manage the business and affairs of a corporation, regardless of the corporation's state of incorporation, generally have two basic fiduciary duties: (1) a duty of loyalty and (2) a duty of care.[99] Under the duty of loyalty, directors must subordinate their personal interests to those of the corporation and the shareholders.[100] Under the duty of care, directors must exercise ordinary care and diligence when acting on behalf of the corporation.[101]

"to purchase or otherwise acquire, hold, sell, assign and transfer shares of capital stock and bonds or other evidences of indebtedness of corporations."

98. *Id.*

99. SCOTTEN, *supra* note 82, at 117–20. *See also* E. Norman Veasey & Christine T. Di Guglielmo, *How Many Masters Can a Director Serve? A Look at the Tensions Facing Constituency Directors*, 63 BUS. LAW. 761, 764 (2008) (citing N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007) ("It is well settled that directors owe fiduciary duties to the corporation.")); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) ("[O]ur analysis begins with the basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders.").

100. SCOTTEN, *supra* note 82, at 119.

101. *Id.* at 117.

While these fiduciary duties seem to support the theory of shareholder primacy, the corporate codes of a majority of states lessen directors' fiduciary duties to shareholders by containing "other-constituency statutes." Constituency statutes explicitly authorize directors to consider interests of "constituency groups."[102] Permissible constituency groups varies from state to state, but typically include employers, creditors, customers, suppliers, and the community.[103] There are currently twenty-eight states that have some form of constituency statute.[104] This means that, in the majority of states, directors are explicitly allowed to consider the interests of various constituencies when making decisions. Thus, in these twenty-eight states, state laws invalidate the shareholder primacy argument.

For the twenty-two states that have not adopted constituency statutes, state corporate laws neither expressly permit directors to consider the interests of stakeholders nor explicitly require directors to consider only corporations and shareholders.[105] Without clear authority, it is difficult to determine what directors can legally consider when making decisions. However, the fact that no law definitively permits directors to consider stakeholders in these states does not automatically imply that doing so would be impermissible. In fact, because the law's requirements are unclear, it is incorrect to assume that the current corporate statutes provide one way or the other. In other words, the existence of a fiduciary duty between the corporation and its shareholders does not equate to a claim that a director has a fiduciary duty to maximize shareholder wealth.

102. *Stop Teaching* Dodge v. Ford, *supra* note 93, at 169.

103. *Id.*

104. Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 587–88 (1992). *See* ARIZ. REV. STAT. ANN. § 10-2702 (2012); CONN. GEN. STAT. § 33-756 (2012); FLA. STAT. § 607.0830 (2012); GA. CODE ANN. § 14-2-202 (2012); HAW. REV. STAT. § 414-221 (2012); IDAHO CODE ANN. § 30-1602 (2012); 805 ILL. COMP STAT. 5/8.85 (2012); IND. CODE § 23-1-35-1(d) (2009); IOWA CODE § 490.1108 (2012); KY. REV. STAT. ANN. § 271B.12-210 (LexisNexis 2012); LA. REV. STAT. ANN. § 12:92 (2012); ME. REV. STAT. tit. 13-C, § 832 (2011); MD. CODE ANN., CORPS. & ASS'NS, § 2-104 (West 2012); MASS. GEN. LAWS ch. 156B, § 65 (2012); MINN. STAT. § 302A.251 (2011); MISS. CODE ANN. § 79-4-8.30 (2012); MO. REV. STAT. § 351.347 (2011); NEB. REV. STAT. § 21-2432 (2011); NEV. REV. STAT. § 78.138 (2011); N.J. STAT. ANN. § 14A:6-1 (West 2012); N.M. STAT. ANN. § 53-11-35 (West 2012); N.Y. BUS. CORP. LAW § 717 (McKinney 2012); N.D. CENT. CODE § 10-19.1-50 (2012); OHIO REV. CODE ANN. § 1701.59 (LexisNexis 2012); OR. REV. STAT. § 60.357 (2011); 15 PA. CONS. STAT. ANN. § 1715 (West 2012); R.I. GEN. LAWS § 7-5.2-8 (2011); S.D. CODIFIED LAWS § 47-33-4 (2012); TENN. CODE ANN. § 48-103-204 (West 2011); VT. STAT. ANN. tit. 11A, § 8.30 (2012); VA. CODE ANN. § 13.1-727.1 (2012); WIS. STAT. § 180.0827 (2011); WYO. STAT. ANN. §17-16-830 (West 2012).

105. *See* CLARK, JR. & VRANKA, *supra* note 42, at 11–13 (acknowledging that in some circumstances directors in non-constituency states may consider other interests than those of shareholders).

Furthermore, even if directors could consider only shareholder preferences when making decisions, corporate law does not define shareholder preferences as the pursuit of only financial gain.[106] Consequently, directors do not breach their fiduciary duties when they consider constituents' concerns. It is important to emphasize that the controversy regarding director fiduciary duties is not about whether the director owes shareholders a fiduciary duty, but rather what this duty requires. In order to justify a fiduciary duty to maximize shareholder wealth, advocates of shareholder primacy must make the basic assumption that shareholders care only about financial gain.[107] However, because of the number and diversity of shareholders publicly held corporations have, it is likely that the shareholders of any given corporation embody many different viewpoints and concerns. It is nearly impossible to solidly define the goals of shareholders. In order to act in a way representative of their shareholders, corporations actually need to be able to endorse multiple purposes, not just shareholder wealth maximization.

In addition, an analysis of corporate behavior indicates that corporations with general-purpose statements, regardless of the state of incorporation, are not restricted to only activities that maximize shareholder wealth. Appendix II compiles the purpose statement of each of the top ten most socially responsible American corporations as ranked by Boston College's Center for Corporate Citizenship.[108] Each of these corporations provides general-purpose statements in its articles of incorporation.[109] Of the ten corporations listed, only two corporations, Publix Super Markets, Inc., and Campbell Soup Company, are incorporated in states with constituency statutes.[110] The directors of the other eight corporations are not explicitly allowed to consider constituents. However, despite this lack of explicit permission, each of these businesses maintains high standards of social involvement. For example, Google, Inc., ranked as the second most socially responsible company in the United States, maintains that "[t]he nature of the business or purposes to be conducted or promoted by the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law

106. *See* SHAREHOLDER VALUE MYTH, *supra* note 4, at 94–97.

107. *Id.* at 95–97.

108. *See infra* Appendix II. For the complete ranking see BOS. COLL. CARROLL SCH. OF MGMT.: CTR. FOR CORPORATE CITIZENSHIP, THE 2011 CORPORATE SOCIAL RESPONSIBILITY INDEX (2011), *available at* http://www.bcccc.net/pdf/CSRIReport2011.pdf.

109. *See infra* Appendix II.

110. *See infra* Appendix II. Johnson & Johnson is incorporated in New Jersey.

of the State of Delaware."[111] Delaware does not have a constituency statute explicitly allowing directors to consider stakeholders, yet the Google website publicizes its commitment to the internet user above all else, even the company's bottom line.[112] Similarly, Kellogg Inc., which was ranked as the fourth most socially conscious company in the United States, is also organized in Delaware. Like Google, Kellogg also publicizes its commitment to corporate social responsibility despite its supposedly limited corporate form. Kellogg dedicates a prominent section of its website to corporate responsibility and officially declares that "[it] builds [its] brand by doing what's right—for [its] people, the environment, and society."[113] These examples show that state corporate laws have not prohibited corporations from taking into consideration the interests of those other than shareholders.

C. CASE LAW

The third source of corporate law, state court judicial opinions, similarly does not mandate shareholder primacy.

1. *Dodge v. Ford* Is Bad Law

The notion that corporations must have a profit-maximizing purpose and are required to promote the financial gain of shareholders was first articulated in 1919 by the Michigan Supreme Court in *Dodge v. Ford*.[114] This notion has since spread to the halls of almost every business organizations class, and to the minds of experts and the general public.[115] However, despite the collective acceptance of the case in corporate law, *Dodge* has been mistakenly interpreted as establishing a legal rule of shareholder wealth maximization. According to Lynn Stout, a professor of corporate and business law at Cornell Law School, this was not, and is not, the law.[116] Stout argues that the case is bad law for the proposition that a

111. GOOGLE, FOURTH AMENDED AND RESTATED CERTIFICATE OF INCORPORATION OF GOOGLE INC., Article III (2012), *available at* http://investor.google.com/pdf/google-fourth-amended-and-restated-certificate-of-incorporation.pdf.

112. *Ten Things We Know to Be True*, GOOGLE, http://www.google.com/about/company/philosophy/ (last visited Sept. 10, 2012) ("Since the beginning, we've focused on providing the best user experience possible. Whether we're designing a new Internet browser or a new tweak to the look of the homepage, we take great care to ensure that they will ultimately serve *you*, rather than our own internal goal or bottom line.").

113. *Corporate Responsibility*, http://www.kelloggcompany.com/en_US/corporate-responsibility.html (last visited Nov. 9, 2012).

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

115. *Stop Teaching* Dodge v. Ford, *supra* note 93, at 164.

116. *Id.* at 166.

corporation's purpose is to maximize shareholder wealth.[117] Stout's three arguments regarding *Dodge* can be summarized as follows: (1) the oft-cited statements purporting to require shareholder primacy are mere dicta; (2) the case is old and no longer accurately represents corporate law; and (3) the decision came from a court that has little influence on corporate law.[118]

The defendant in *Dodge*, Henry Ford, was the founder and controlling shareholder of the Ford Motor Company.[119] At the time of the suit, the company was extremely profitable and had amassed over $50 million in cash surplus. Despite the success of the company, Ford refused to issue dividends. John and Horace Dodge, minority investors in the firm, brought a lawsuit against Ford, claiming that he was inappropriately using his power as a controlling shareholder to restrict dividend payouts. Ford defended himself by stating that he preferred to use the company's money "to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes."[120] Ford added that by doing this, he was "putting the greatest share of [Ford Motor Company's] profits back in the business."[121] The Michigan Supreme Court sided with the Dodge brothers and ordered the Ford Motor Company to pay special dividends to its shareholders.[122] The court justified its holding on the narrow ground that Ford, a controlling shareholder in the company, had breached his fiduciary duty to his minority investors.[123] As a majority shareholder, Ford had a duty not to oppress minority shareholders.

Despite the narrow holding of the case, the court dismissed Ford's corporate charity argument with the following remark:

> A business corporation is organized and carried on primarily for the profits of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[124]

This offhand remark was unnecessary to reach the court's conclusion that Ford had breached his fiduciary duty to the Dodge brothers. These kinds of

117. *Id.*
118. *Id.* at 166–67.
119. *Dodge*, 170 N.W. at 668.
120. *Id.* at 683.
121. *Id.*
122. *Id.* at 685.
123. *Id.*
124. *Id.* at 684.

remarks are known as "obiter dictum," or simply "dictum."[125] Unlike the holding of a case, dictum does not establish legal precedent and can be disregarded by future courts. Thus, as dictum, the Michigan Supreme Court's musing is not evidence to support the argument that corporate law requires shareholder primacy.[126]

In addition to the fact that the Michigan Supreme Court's statements on the topic are dictum, the age of the *Dodge* decision renders the statements unreliable.[127] Decided in 1919, Stout emphasizes that the case is almost one-hundred-years old. Stout points out that "*Dodge v. Ford* is the oldest corporate law case selected as an object for study in most corporate law casebooks."[128] She explains that while the case has never been officially overruled, it no longer provides an accurate representation of modern corporate law—corporate law has evolved exponentially since the early 1900s.[129]

Finally, *Dodge v. Ford* was decided in Michigan, a state with little to no influence on corporate law.[130] The state of Delaware, home of more than half of the Fortune 500 companies, is widely recognized as the most influential court on corporate law.[131] However, *Dodge v. Ford* has been cited only once by a Delaware court.[132] Even then, the Delaware court cited to the opinion not on the question of corporate purpose, but rather on the question of a majority shareholder's fiduciary duty to minority shareholders.[133]

2. Other Cases

Since *Dodge v. Ford*, there have been five decisions that shareholder primacy advocates typically cite to support the shareholder primacy argument: *Granada Investments., Inc. v. DWG Corp.*,[134] *Revlon, Inc. v.*

125. BLACK'S LAW DICTIONARY 519 (9th ed. 2009) (defining "dictum" as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential").

126. *Stop Teaching* Dodge v. Ford, *supra* note 93, at 167–68.

127. *Id.* at 166.

128. *Id.*

129. *See id.*

130. *See id.*

131. SHAREHOLDER VALUE MYTH, *supra* note 4, at 27.

132. *Id.*

133. *Id.*

134. Granada Invs., Inc. v. DWG Corp., 823 F. Supp. 448, 459 (N.D. Ohio 1993) ("[T]he sole duty of a corporation's officers is to maximize shareholder wealth.").

MacAndrews & Forbes Holdings, Inc.,[135] *Katz v. Oak Industries, Inc.*,[136] *Long v. Norwood Hills Corp.*,[137] and *eBay Domestic Holdings, Inc. v. Newmark*.[138] Despite the statements made in each case in support of the shareholder primacy viewpoint, just like in *Dodge v. Ford*, those statements either appeared in dicta or came from cases significantly distinguishable from the typical shareholder primary argument.

Revlon is the most significant of these five cases and the second most cited case by shareholder primacy advocates, after *Dodge v. Ford*.[139] In *Revlon*, the CEO of a competing corporation, Pantry Pride, approached Revlon's board of directors to acquire the company.[140] Revlon's board of directors rejected Pantry Pride's offers, released various defense mechanisms, and later negotiated a leveraged buyout with another company as an alternative to the acquisition by Pantry Pride.[141] Revlon agreed to this alternative transaction with the new buyer, Forstman, which offered to acquire Revlon for $57.25 per share conditioned on a restrictive no-shop provision precluding Revlon from negotiating with Pantry Pride. Pantry Pride then raised its offer to $58 per share.[142] The no-shop provision in the deal with Forstman, however, prevented Revlon stockholders from accepting Pantry Pride's higher cash offer.[143] Pantry Pride thus filed a claim seeking injunctive relief to nullify the no-shop provision.

The *Revlon* court established the *Revlon* duties doctrine, which states that a corporation's board of directors may have "an obligation to maximize shareholders' immediate return, when the company's break-up is inevitable or its shareholders are getting cashed-out or selling control."[144] The *Revlon* court acknowledged that directors may be able to justify

135. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986) (stating that Revlon's board of directors had the duty to get the best share price for its shareholders).

136. Katz v. Oak Indus., Inc., 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders . . . .").

137. Long v. Norwood Hills Corp., 380 S.W.2d 451, 476 (Mo. Ct. App. 1964) ("[T]he ultimate object of every ordinary trading corporation is the pecuniary gain of its stockholders . . . .").

138. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010). Ebay was a minority shareholder of Craigslist and challenged a number of defensive measures, including a poison pill, adopted by the Craigslist board. The court stated that the Craigslist board had made "no serious attempt" to provide evidence that the stated purpose of the poison pill—to preserve Craigslist's "unique corporate culture"—would "lead at some point to value for stockholders."

139. SHAREHOLDER VALUE MYTH, *supra* note 4, at 30.

140. *Revlon, Inc.*, 506 A.2d at 176.

141. *Id.* at 176–77.

142. *Id.*at 178.

143. *Id.* at 179.

144. Page & Katz, *supra* note 18, at 233.

consideration of various corporate constituencies by demonstrating the existence of "rationally related benefits accruing to the stockholders."[145] However, the court clarified that if, after the transaction, shareholders no longer had an economic stake in the enterprise, the justification for considering other constituencies would no longer work because no rationally related benefit to the shareholder would exist.[146]

Despite *Revlon*'s bark, subsequent Delaware cases have essentially removed *Revlon*'s bite. Today, *Revlon* duties are only triggered when:

> A corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company. However, *Revlon* duties may also be triggered where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company.[147]

Thus, *Revlon* is the "exception that proves the rule."[148] As long as shareholders receive stock after the transaction, directors will be able to consider non-shareholder constituencies.[149] In other words, directors will only have a *Revlon* duty to maximize shareholder wealth when a public corporation will no longer be a public corporation after the deal.[150]

Like their application of *Revlon*, shareholder primacy advocates have also misapplied *Granada*, *Katz*, *Norwood*, and *eBay*. None of these cases hold that a corporation has no other choice but to maximize shareholder profit.[151] In fact, these cases have been cited to as standing for propositions of law other than shareholder primacy.[152]

3. The Business Judgment Rule

In addition, the business judgment rule, also commonly referred to as the "BJR," has prevented modern courts from striking down a director's decision on the ground that stakeholder interests are favored over shareholder interests.[153] Under the BJR, courts will defer to the business

145. *Id*.
146. *Id.*
147. *Id.* at 235 (quoting Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 47 (Del. 1994)).
148. SHAREHOLDER VALUE MYTH, *supra* note 4, at 30.
149. Page & Katz, *supra* note 18, at 235–36.
150. SHAREHOLDER VALUE MYTH, *supra* note 4, at 30–31.
151. Sneirson, *supra* note 89, at 550.
152. *Id.*
153. *Id.* at 29–31. *See also* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1985) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."); Jill E.

judgments of directors as long as there is no conflict of interest and the decision is made with an informed, good-faith belief that it is in the best interests of the company.[154] Thus, an un-conflicted director is legally free to pursue almost any goal, even if that goal may potentially harm shareholder value.

For example, in *Shlensky v. Wrigley*, the Wrigley Corporation, which owned the Chicago Cubs, refused to install lights that would allow the team to hold nighttime games at Wrigley Field.[155] Minority shareholders argued that offering night games would increase attendance at the games and ultimately make the Cubs more profitable.[156] However, the president of the corporation, Philip K. Wrigley, refused to install the lights because of his own personal beliefs.[157] Specifically, he believed baseball was a "daytime sport" and installing the lights would disturb the peace of the residents in the neighborhoods surrounding the field.[158] Wrigley also supposedly admitted that he did not care about the financial consequences of failing to hold nighttime games.[159] Despite these facts, when minority shareholders brought a lawsuit against Wrigley and the board of directors, the court upheld the directors' decision.[160] In doing so, the court looked past the fact that Wrigley, like Henry Ford in *Dodge v. Ford*, did not rationalize his decision by relating it to any sort of economic interests. The Illinois appellate court independently reasoned that a decline in the quality of life in the local neighborhoods could reasonably hurt the property values around Wrigley Field in the long run, which would in turn harm shareholders' economic interests.[161] This case is an example of how much deference the BJR affords a director when he or she makes decisions for the corporation.

The more recent Delaware case of *Air Products and Chemicals Inc. v. Airgas, Inc.* is another example of how the BJR works in conjunction with directors' *Revlon* duties.[162] In *Airgas*, the directors refused to sell the company to Air Products for $70 per share when the Airgas stock was

Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 651 (2006).

154. SHAREHOLDER VALUE MYTH, *supra* note 4, at 29.
155. Shlensky v. Wrigley, 237 N.E.2d 776, 777 (Ill. App. Ct. 1968).
156. *Id.*
157. *Id.*
158. *Id.* at 778.
159. *Id.*
160. *Id.* at 780.
161. *Id.*
162. Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011).

trading at between $40 and $50 per share.[163] In line with the current interpretation of *Revlon*, the court held that because Airgas was to remain a public company, the Airgas board of directors did not have "any per se duty to maximize shareholder value in the short term, even in the context of a takeover."[164] The court also held that the BJR gave directors the ability to decide what was in the corporation's long-term interests.[165] Therefore, because of the BJR, the directors had discretion to pursue goals other than shareholder value.[166]

These cases illustrate the leniency of judges when deciding whether or not to hold directors liable for failing to maximize shareholder value and the overall falsity of the shareholder wealth maximizing rule. The above argument is not to say that corporate law does not endorse or encourage shareholder primacy; rather, this Note acknowledges that corporate law statutes and cases are shareholder centered.[167] However, shareholder-centricity is not the same as shareholder wealth maximization, which advances that corporations must maximize the value of individual shares. Shareholder wealth maximization is not a legal mandate; it is a standard of conduct that has been accepted as the most efficient way to control the actions of directors.

D. REEVALUATING BEN & JERRY'S SALE TO UNILEVER

According to a proper interpretation of the law, the tale of Ben & Jerry's has actually misled social entrepreneurs. Despite the popular recitation that "corporate law made [Cohen and Greenfield] do it,"[168] an application of corporate law as clarified above demonstrates that Cohen and Greenfield did not have to sell their business to Unilever.

First, despite the high price Unilever offered to buy out the shares, the arrangement of the sale would not have triggered *Revlon* duties because there was no breakup of the company. Therefore, if they had sold to Hot Fudge Partners and then had been challenged by shareholders,[169] Cohen and Greenfield easily could have provided an adequate defense to protect

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163. *Id.* at 61, 89.

164. *Id.* at 98.

165. *Id.* at 124.

166. *Id.*

167. *See* Sneirson, *supra* note 89, at 551 (stating that under Delaware law, corporate decisions made to benefit stakeholders must also have some benefit for the firm's shareholders as well).

168. Page & Katz, *supra* note 18, at 230.

169. *Id.* at 229 (pointing out that there were three class action lawsuits ready to be filed before Ben & Jerry's announced that they were accepting Unilever's offer).

their decision. Second, at the time of the sale, even if the sale would have triggered *Revlon* duties, Vermont, Ben & Jerry's state of incorporation, had passed a constituency statute that allowed corporations to consider the interests of stakeholders.[170] This constituency statute would have rendered *Revlon* ineffective and would have effectively allowed the board to openly consider constituents such as the company's employees, customers, community, and other stakeholders.[171]

This analysis of Ben & Jerry's sale shows that the shareholder primacy have less wrath than Ben and Jerry gave them credit for. The board could have legally sold Ben & Jerry's to Hot Fudge Partners with zero consequence. However, the board's decision to accept Unilever's offer despite Vermont's constituency statute and the inapplicability of *Revlon* demonstrates the undeniable influence of the shareholder primacy myth.

IV. THE REAL ROLE AND EFFECT OF BENEFIT CORPORATIONS

The point of this Note is not to argue that the law uniformly allows directors to consider stakeholders, but rather to dispute the popularly held belief that the law requires directors to put shareholders before all else. The above arguments establish that the corporate duty of shareholder primacy is merely a myth; the theory lacks a definitive legal basis and is more properly defined as the latest shift in corporate purpose. Despite the persuasiveness of this argument, this Note cannot ignore the presence of the shareholder-centric view of corporate law. Thus, in analyzing the role of benefit corporations in today's society, it is important to make recommendations for improving corporate law not only based on the legal framework, but also on the actual practices of entrepreneurs, shareholders, and corporations.

A. SHAREHOLDER PRIMACY AS THE NORMATIVE POLICY

Even if shareholder wealth maximization is not required by law, as long as the public believes that shareholder primacy is the law, it will have the same effect as the law.[172] If the people who run corporations are under the impression that they have a legal obligation to focus on maximizing shareholder profits, then it is just as if they actually had such an

170. VT. STAT. ANN. tit. 11A, § 8.30 (2012) (requiring a corporate to director to discharge his duties "in a manner the director reasonably believes to be in the best interest of the corporation," but allowing the director to consider constituent interests when determining what the "best interest of the corporation" is).

171. Page & Katz, *supra* note 18, at 236.

172. Sneirson, *supra* note 89, at 554–55.

obligation.[173] Therefore, regardless of what legislators enact, social norms may require managers to maximize shareholder wealth because that is "what they learned in business school, because that is how they view their jobs, because that is what they perceive is expected of them, and because they believe—rightly or wrongly—that the law requires them to do so."[174] Similarly, many academics have concluded that the shareholder primacy norm grips mainstream American business culture to such an extent that it has "been fully internalized by American managers,"[175] and is "the appropriate goal in American business circles."[176]

Others dispute the argument that shareholder primacy has completely inundated the business world. They argue that this description "vastly overstates the prevalence of the shareholder primacy norm."[177] They observe that "corporate managers routinely make decisions that do not maximize shareholder value" and that studies demonstrate "'ambivalence' among directors toward shareholder wealth maximization."[178] In addition, analysis have speculated that the standards governing business decisionmaking may be "evolving to reflect a [more stakeholder-focused] business purpose . . . as environmental and social issues continue to enter the American mainstream."[179] Business schools have reflected this trend by "integrating [stakeholder] concepts in core and extracurricular courses," while MBA students have shown an increasing desire to "fuse social endeavors with profit-making ones."[180] Although these changes do not suggest a complete abandonment of the shareholder primacy theory, they do suggest a "'paradigm shift' toward a new norm of balancing the shareholder-profit objective with longer-term, sustainable, and socially responsible business practices."[181]

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173. According to philosopher Jean-Jacques Rousseau, "Every law the people ha[ve] not ratified in person is null and void—is, in fact, not a law." JEAN JACQUES ROUSSEAU, *Deputies or Representatives*, *in* THE SOCIAL CONTRACT 93, 94–95 (G.D.H. Cole trans., 1988).

174. Sneirson, *supra* note 89, at 555.

175. Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657, 717 (1996).

176. Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065, 2072 (2001) (noting that "corporate law's instructions to managers" to enhance shareholder gain do not "determine what they do").

177. Sneirson, *supra* note 89, at 555.

178. *Id.*

179. *Id.*

180. Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 677 (2006).

181. Sneirson, *supra* note 89, at 556.

Regardless of whether shareholder primacy is a view that has been solidified in the minds of business people or can be slowly reformed, it is nonetheless a concept founded in the ideas of society and not the law. As such, changing the law by adding benefit corporations cannot successfully counter this societal norm. Instead, adding benefit corporations as an available corporate form will further influence the public perception that shareholder primacy is the law.

B. THE REAL INFLUENCE OF BENEFIT CORPORATIONS

1. The Benefits of Benefit Corporations

Undoubtedly, benefit corporations provide real solutions to entrepreneurs seeking to run hybrid corporations by explicitly addressing the ambiguities in the law. First, benefit corporations provide absolute legal protection to directors and officers who publicly declare that their businesses are dedicated to other issues. Second, they provide shareholders with a way to keep directors accountable and with greater access to capital. Third, benefit corporations offer socially conscious businesses a way to clearly differentiate themselves in the market.

First, benefit corporations completely shield directors from shareholder-derivative lawsuits alleging failure to maximize shareholder financial wealth.[182] Conversely, shareholders can bring suits or enforcement proceedings against directors who focus only on shareholder wealth and fail to consider a public purpose.[183] In states that have enacted benefit corporation legislation, the legislation removes the legal uncertainty that directors face by simply making mission-driven companies legal.[184]

Besides creating legal certainty, benefit corporation legislation provides shareholders with greater ability to keep directors accountable to the company's social purpose. Benefit corporation legislation establishes this accountability by requiring the benefit corporation to deliver an annual report to the shareholders and to make the report readily available to the public.[185] The report must be filed with the appropriate state department, include a narrative description of the ways in which the benefit corporation

182. CLARK, JR. & VRANKA, *supra* note 42, at 20; MODEL BENEFIT CORP. LEGISLATION §§ 102, 305 (2012) (version of July 30, 2012), *available at* http://benefitcorp.net/storage/documents/Model_Benefit_Corporation_Legislation.pdf.

183. CLARK, JR. & VRANKA, *supra* note 42, at 20; MODEL BENEFIT CORP. LEGISLATION §§ 102, 305.

184. CLARK, JR. & VRANKA, *supra* note 42, at 20–21.

185. *Id.* at 17; MODEL BENEFIT CORP. LEGISLATION § 401(a).

pursued a general public benefit or any specific benefit, any circumstances that may have hindered creation of general public benefit or specific public benefit, and the process and any rationale if the corporation is changing the third-party standard used to prepare the benefit report.[186] Essentially, like the way a traditional corporation's financials are analyzed and recorded, benefit corporations are required to submit an annual accounting of their efforts to promote the "public good." This formalizes otherwise informal social accounting techniques, such as Ben & Jerry's "double bottom line" considerations.[187]

Benefit corporations also provide shareholders with greater access to capital. Specifically, benefit corporations allow for greater and more regulated communication between social entrepreneurs and social investors which, in turn, allows benefit corporations to attract a greater array of investors. "The socially responsible investing ("SRI") movement has grown over the past thirty years to represent nearly 10 percent of U.S. assets under management . . . ."[188] SRI investors have many strategies to determine in which corporations they want to invest. Many SRI investors use screens to identify and avoid "sin" stocks, such as tobacco, alcohol, and gaming, and weapons stocks.[189] Other SRI investors seek to create social impact "through targeted direct equity and debt investments in businesses such as community banks, microfinance institutions, or clean-tech."[190] Benefit corporations that enter into the SRI investment market are automatically able to identify themselves. Additionally, the accountability measures required by statute provide investors with a set of comprehensive tools to better understand the complete picture of a company's performance. Some may argue that benefit corporations actually alienate investors who emphasize shareholder primacy, and thus decrease access to capital. While this may have some truth, ultimately, hybrid corporations that form as benefit corporations are better able to attract the type of investor they desire.

Most importantly, benefit corporations provide business owners with a way to legitimize their social activities. Currently there are over 65,000 businesses with over $40 billion in revenues that belong to membership

186. CLARK, JR. & VRANKA, *supra* note 42, at 17; MODEL BENEFIT CORP. LEGISLATION § 401.

187. *See* Page & Katz, *supra* note 18, at 211 (explaining Ben & Jerry's "double bottom line" considerations).

188. CLARK, JR. & VRANKA, *supra* note 42, at 3.

189. *Id.*

190. *Id.*

associations generally identified with the sustainable business movement.[191] There are also numerous companies that do not self-identify as "socially responsible" but nevertheless behave that way. States that do not recognize the benefit corporation lack the accountability and third-party grading standard used to evaluate a corporation's social achievement. Without these measures, entrepreneurs who are genuinely socially conscious are unable to separate themselves from companies that only make claims of "sustainability," "greenness," and "social responsibility." Corporations that are truly dedicated to social good have no way to gain deserved recognition. By becoming a benefit corporation, businesses can signal to investors and consumers that they actually do what they preach.

2. Letting Corporate CEOs Have Their Cake and Eat It Too

Although benefit corporations do provide solutions for socially conscious corporations, such as added legitimacy, their creation also creates long-term effects that may negatively impact overall corporate goals and purposes. One of the main focuses of this Note has been to argue that there is no legal rule that prevents a corporation from accomplishing the same results as a benefit corporation. It follows that because there is no legal basis requiring shareholder wealth maximization, it is possible for a corporation to create a mission-based purpose statement under the current legal framework. The possible lawfulness of hybrid corporations has even been acknowledged by proponents of benefit corporations.[192] However, the main impediment to constituent consideration in the current legal framework is the acceptance of shareholder wealth maximization as a corporate norm. Corporations act the way they do because of a misconception; society, not the law, deems shareholder primacy as a corporation's proper purpose.

States, by creating benefit corporations, do not pave the way for a new era of responsible corporate purpose, but are instead unnecessarily reinforcing current beliefs by establishing a dichotomy in which there are only two entities: (1) regular corporations, which cannot take into consideration social factors and must maximize shareholder wealth; and (2) benefit corporations, which can take into consideration social factors

191. *Id.* at 5.

192. *Id.* at 13 (acknowledging that "[t]here is a credible view . . . that because there is no specific provision in the Delaware statute preventing consideration of other stakeholder interests, if a company were to actually include the requirement of such consideration . . . in the purpose clause of its certificate of incorporation or in defining the directors' fiduciary standards, such a requirement might withstand the court's scrutiny in a defensive or change of control situation and be given effect").

and do not have to maximize shareholder wealth. By establishing this dichotomy, states inadvertently create a jointly exhaustive pair in which the very existence of benefit corporations requires that their counterpart, a shareholder wealth maximizing corporation, exist. In other words, benefit corporations further reinforce the assumption that corporations exist only to make money for their shareholders.

Proponents of benefit corporations argue that as legislation spreads, a change in normative thinking will eventually follow. The basic argument states that by "[c]reating a different kind of corporate culture, especially one that is legally binding, [benefit corporations take] the first step in making sure big companies don't just view community concerns as barriers to higher profits."[193] Despite this argument, it is unrealistic to believe that corporations listed on the Fortune 500—the corporations that influence public opinion and created the disasters that influenced benefit corporation legislation—will ever change their corporate form from "incorporated" to "b-incorporated."

Despite their potential good, benefit corporations create too much potential liability and unneeded regulation to attract large and established companies. First, benefit corporation statutes give shareholders unprecedented power. Even though corporate directors cannot be held personally liable, shareholders have the power to bring enforcement proceedings against the corporation.[194] Shareholders can bring enforcement proceedings "on the basis that a director or officer failed to pursue or create . . . the public benefit purpose . . . [or] failed to consider the interests of the various stakeholders."[195] Already victims of self-serving and wasteful litigation, large corporations are often wary of giving shareholders additional power. Second, benefit corporations are required to publish and publicize annual reports.[196] This creates increased and repetitive costs, especially because many corporations already actively publish and market the impact they have on the community. Third, because corporations can already act in socially conscious ways, there is little incentive for current corporations to switch corporate forms. Lastly, benefit corporations are required to limit their purpose statements by requiring consideration of

193. Wagstaff, *supra* note 7.

194. CLARK, JR. & VRANKA, *supra* note 42, at 20; MODEL BENEFIT CORP. LEGISLATION §§ 102, 305 (2012) (version of July 30, 2012), *available at* http://benefitcorp.net/storage/documents/Model_Benefit_Corporation_Legislation.pdf.

195. CLARK, JR. & VRANKA, *supra* note 42, at 20.

196. MODEL BENEFIT CORP. LEGISLATION § 401.

public benefits.[197] By adding this into their articles of incorporation, corporations would be limiting the activity they would legally be able to pursue. As exemplified by the collection of purpose statements in the Appendix I, corporations uniformly include general purpose statements in order to maintain almost complete freedom.[198]

Despite the enthusiasm and applause behind the legislation, benefit corporations, by establishing themselves as different entities, alienate large corporations by labeling them as "the other." Their creation establishes a legal dichotomy that only strengthens the shareholder primacy norm and furthers the unwarranted belief that "regular" corporations are unable to do social good. Thus, benefit corporations are not the appropriate way to influence corporate America.

3. An Alternative Solution

As explained above, while the creation of benefit corporations is a noble idea, it unnecessarily adds to the growing number of corporate forms already available to business owners and entrepreneurs. Instead of making business activity easier, benefit corporations not only confuse and complicate the law, but also restrict what traditional corporations can and cannot do.

Instead of complicating the law, legislators who seek to reform business practices should emphasize corporate clarification and simplification. One way legislators can do this is through the promotion of constituency statutes. If every state adopted a constituency statute, the law would be clear: corporate directors would be explicitly allowed to consider stakeholders when making decisions and would be freely able to act in socially conscious ways without fear of retaliation from profit-hungry shareholders. Constituency statutes would also displace the previous case law that perpetuated the shareholder primacy myth.[199] This solution is immensely more efficient because it utilizes already existing tools to clarify corporate law. In contrast, benefit corporations add another layer of complication onto an already complicated system.

V. CONCLUSION

The tales of *Dodge v. Ford* and Ben & Jerry's have enjoyed an enduring legacy. However, like the fables loved by children, these stories

197. *Id.* § 201.
198. *See infra* Appendix I.
199. *See supra* Part III.C.

must come to an end. Both have been regularly misconstrued. They have been frequently cited as standing for the inaccurate proposition that corporate directors must maximize shareholder wealth. As a result, legislators, businesspeople, and even academics have not only incorrectly blamed the legal framework for today's corporate blunders, but have also incorrectly argued that hybrid enterprises or for-profit social enterprises have no place in the current corporate framework. With this misunderstanding of corporate law in mind, legislators created benefit corporations as a way to both counteract the detrimental effects caused by shareholder wealth maximization and make room for social enterprise. However, as explained by this Note, this interpretation of corporate law is incorrect. The introduction of benefit corporations has only complicated corporate law by an additional corporate form and reinforcing the belief that traditional corporations are required to prioritize shareholder wealth. While the goals of benefit corporations are admirable, this Note proposes that the same result could be achieved through a uniform adoption of constituent statues.

APPENDIX I

WHAT LAW GOVERNS THE TOP TWENTY FORTUNE 500 COMPANIES?[200]

Rank	Company	General Purpose Statement	Identifies Specific Purposes	State of Incorporation	Constituency Statute[201]	Benefit Corporation[202]
1	Wal-Mart Stores[203]	Y	N	Delaware	N	N
2	Exxon Mobil[204]	Y	Y	New Jersey	Y	Y
3	Chevron[205]	Y	N	Delaware	N	N
4	ConocoPhillips[206]	Y	N	Delaware	N	N
5	Fannie Mae[207]	N	Y	Federally Chartered	---	---
6	General Electric[208]	Y	Y	New York	Y	Y
7	Berkshire Hathaway[209]	Y	N	Delaware	N	N
8	General Motors[210]	Y	N	Delaware	N	N
9	Bank of America[211]	Y	N	Delaware	N	N
10	Ford Motor[212]	Y	Y	Delaware	N	N

200. *Fortune 500*, CNNMONEY.COM (May 23, 2011), http://money.cnn.com/magazines/fortune/fortune500/2011/full_list/index.html.

201. This column identifies whether the state in which the corresponding company is incorporated in has a constituency statute.

202. This column identifies whether the state in which the corresponding company is incorporated in permits the formation of benefit corporations.

203. Wal-Mart Stores Inc., Quarterly Report (Form 10-Q) (June 30, 2011), Ex. 3. (II), *available at* http://www.secinfo.com/d14D5a.q4qRk.d.htm#1stPage.

204. EXXONMOBIL, *supra* note 97.

205. CHEVRON CORP., RESTATED CERTIFICATE OF INCORPORATION OF CHEVRON CORPORATION (2008), *available at* http://www.chevron.com/documents/pdf/certificateofincorporation.pdf.

206. Conocophillips, Current Report (Form 8-K) (Aug. 30, 2002), Ex. 3.1, *available at* http://sec.gov/Archives/edgar/data/1163165/000089882202001082/ex3-1.txt.

207. Federal National Mortgage Association Charter Act, 12 U.S.C. § 1716 (2012).

208. GEN. ELEC., CERTIFICATE OF INCORPORATION OF GENERAL ELECTRIC COMPANY (2011), *available at* http://www.ge.com/pdf/company/governance/certification/ge_certificate_of_incorporation.pdf.

209. Berkshire Hathaway Fin. Corp., Sec. Registration Form (Form S-4) (Dec. 30, 2003), Ex. 3.1, *available at* http://sec.gov/Archives/edgar/data/1163165/000089882202001082/ex3-1.txt.

210. GEN. MOTORS, RESTATED CERTIFICATE OF INCORPORATION OF GENERAL MOTORS COMPANY (2010), *available at* http://www.gm.com/content/dam/gmcom/COMPANY/Investors/Corporate_Governance/PDFs/Restated_Cert_of_Inc._12_10_10.pdf.

211. BANK OF AM. CORP., AMENDED AND RESTATED CERTIFICATE OF INCORPORATION OF BANKAMERICA CORPORATION (2010), *available at* http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-govhighlights#fbid=8a50EeKmamT.

11	Hewlett-Packard[213]	Y	N	Delaware	N	N
12	AT&T[214]	Y	N	Delaware	N	N
13	J.P. Morgan Chase[215]	Y	Y	Delaware	N	Y
14	Citigroup[216]	Y	N	Delaware	N	N
15	McKesson[217]	Y	N	Delaware	N	N
16	Verizon Communications[218]	Y	N	Delaware	N	N
17	American International Group[219]	Y	N	Delaware	N	N
18	International Business Machines[220]	Y	N	New York	Y	Y
19	Cardinal Health[221]	Y	N	Ohio	Y	N
20	Freddie Mac[222]	N	Y	Federally Chartered	---	---

212. Ford Motor Co., Annual Report (Form 10-K) (Mar. 22, 2001), Ex. 3-A, *available at* http://www.sec.gov/Archives/edgar/data/37996/000003799601000014/0000037996-01-000014-0002.txt.

213. HEWLETT-PACKARD CO., RESTATED CERTIFICATE OF INCORPORATION OF HEWLETT-PACKARD COMPANY (1998), *available at* http://media.corporate-ir.net/media_files/irol/71/71087/corpgov/cert_of_incorportion_021198.pdf.

214. AT&T Inc., Quarterly Report (Form 10-Q) (Aug. 5, 2009), Restated Certificate of Incorporation, *available at* http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=6732667-169264-200742&SessionID=bqOeWWLzxzXYg97.

215. JPMorgan Chase Bank, Nat'l Ass'n, Securities Registration Form (Form S-3) (Feb. 10, 2006), Ex. 3.1, *available at* http://www.secinfo.com/d14D5a.vQcp.d.htm.

216. CITIGROUP INC., RESTATED CERTIFICATE OF INCORPORATION OF CITIGROUP INC. (2011), *available at* http://www.citigroup.com/citi/corporategovernance/data/citigroup_rci.pdf.

217. MCKESSON CORP., AMENDED AND RESTATED CERTIFICATE OF INCORPORATION OF MCKESSON CORPORATION (2011), *available at* http://www.mckesson.com/en_us/McKesson.com/Investors/Corporate%2BGovernance/Certificate%2Bof%2BIncorporation.html.

218. VERIZON COMMC'NS INC., RESTATED CERTIFICATE OF INCORPORATION OF VERIZON COMMUNICATIONS INC. (2006), *available at* http://www22.verizon.com/investor/certificateofincorporation.htm.

219. AM. INT'L GRP., INC., RESTATED CERTIFICATE OF INCORPORATION OF AMERICAN INTERNATIONAL GROUP, INC. (2011), *available at* http://www.aigcorporate.com/corpgovernance/CertificateofIncorporation.pdf.

220. INT'L BUS. MACHS. CORP., CERTIFICATE OF INCORPORATION OF INTERNATIONAL BUSINESS MACHINES CORPORATION (2007), *available at* http://www.ibm.com/investor/pdf/certificateofincorporation.pdf.

221. Cardinal Health, Inc., Current Report (Form 8-K) (Aug. 10, 2012), *available at* http://www.secinfo.com/dmZEk.p13.htm#1stPage.

222. Federal Home Loan Mortgage Corporation Act, 12 U.S.C. § 1451 (2012) (Congressional Statement of Purpose).

APPENDIX II

WHAT LAW GOVERNS THE TOP TEN MOST SOCIALLY CONSCIOUS COMPANIES?[223]

Rank	Company	General Purpose Statement	Identifies Specific Purposes	State of Incorporation	Constituency Statute	Benefit Corporations
1	Publix Super Markets Inc.[224]	Y	N	Florida	Y	N
2	Google[225]	Y	N	Delaware	N	N
3	UPS[226]	Y	N	Delaware	N	N
4	Kellogg[227]	---	---	Delaware	N	N
5	Amazon.com[228]	Y	N	Delaware	N	N
6	Berkshire Hathaway[229]	Y	N	Delaware	N	N
7	FedEx[230]	Y	N	Delaware	N	N
8	Campbell Soup Company[231]	Y	Y	New Jersey	Y	Y
9	Baxter International[232]	Y	N	Delaware	N	N
10	3M[233]	Y	N	Delaware	N	N

223. As ranked by the Boston College Carroll School of Management's Center for Corporate Citizenship. THE 2011 CORPORATE SOCIAL RESPONSIBILITY INDEX, *supra* note 108.

224. Publix Super Markets Inc., Quarterly Report (Form 10-Q) (May 11, 2006), Ex. 3, *available at* http://www.secinfo.com/d2F5a.v2r.d.htm#1stPage.

225. GOOGLE, *supra* note 111.

226. UNITED PARCEL SERVICE INC., RESTATED CERTIFICATE OF INCORPORATION OF UNITED PARCEL SERVICE, INC. (2010), *available at http://www.investors.ups.com/phoenix.zhtml?c=62900&p=irol-govhighlights.*

227. Information for Kellogg was not available at the time of print.

228. AMAZON.COM, INC., RESTATED CERTIFICATE OF INCORPORATION OF AMAZON.COM, INC. (2012), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=97664&p=irol-govIncorporation.

229. Berkshire Hathaway Fin. Corp., *supra* note 209.

230. FEDEX INC., THIRD AMENDED AND RESTATED CERTIFICATE OF INCORPORATION OF FEDEX CORPORATION (2011), *available at* http://investors.fedex.com/phoenix.zhtml?c=73289&p=irol-govcharter.

231. CAMPBELL SOUP COMPANY, CERTIFICATE OF INCORPORATION OF CAMPBELL SOUP COMPANY (1970).

232. BAXTER INT'L INC., AMENDED AND RESTATED CERTIFICATE OF INCORPORATION OF BAXTER INTERNATIONAL INC. (2006), *available at* http://www.baxter.com/downloads/about_baxter/corporate_governance/certificate_of_incorporation.pdf.

233. 3M COMPANY, CERTIFICATE OF INCORPORATION OF 3M COMPANY (2007), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=80574&p=irol-govhighlights.