BENEFIT CORPORATIONS: 
A CORPORATE STRUCTURE TO ALIGN CORPORATE PERSONHOOD WITH SOCIETAL RESPONSIBILITY

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I. INTRODUCTION

Any questions as to whether the Supreme Court’s decision in Citizens United v. Federal Election Commission would stand were emphatically answered in June of 2012 with the Court’s two-paragraph rejection of the Montana Supreme Court’s arguments in American Tradition Partnership, Inc. v. Bullock. In holding the free speech protections afforded to corporations in Citizens United inapplicable to Montana’s campaign finance laws, the Montana Supreme Court detailed Montana’s history of “corrupting influence of its unlimited corporate expenditures” and declared the Court’s 2010 opinion in Citizens United, which stated that corporations have the same constitutional rights as individual citizens, to be “utter nonsense.” The Supreme Court’s per curiam opinion summarily stated that “Montana’s arguments in support of the judgment below either were already rejected in Citizens United, or fail to meaningfully distinguish that case.”

Montana’s statute barring corporations from making expenditures “in connection with a candidate or a political committee that supports or opposes a candidate or a political party” was thus swiftly struck down as an unconstitutional restriction on corporate speech.

It is now clear at both the federal and state level that the government cannot bar corporations from making expenditures in elections. While there has been some support for the Supreme Court’s position on First Amendment rights for corporations amongst

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4 Bullock, 132 S. Ct. at 2491.
academics and politicians, there has been strong opposition to the Court’s position on this issue by the general public and across political parties. Some polls have shown that as high as eighty percent of respondents are opposed to the Supreme Court’s corporate personhood jurisprudence. Respondents to a 2009 Gallup Poll question, which asked whether limits on campaign contributions should take precedence over protecting rights to support campaigns through donations, indicated that fifty-two percent thought limitations should take priority over protecting the rights of individuals, corporations, or unions to freely support political campaigns. Seventy-six percent thought the government should particularly be able to place these limits on corporations.

The fact that groups of individuals associating together in the form of corporations are entitled to many of the same rights that the Constitution affords individuals is here to stay. While there are those who advocate for an end to corporate personhood, this would now require either a significant shift in the Court’s composition, coupled with a willingness to depart from established precedent, or a change to the U.S. Constitution, which is unlikely given the strenuous

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9 Id.

amendment process.\textsuperscript{11} This reality raises questions about the role of corporations in society—particularly if they are to be afforded not only free speech rights, but also the attendant potential for great influence through that speech with the considerable resources corporations have at their disposal.

Although corporations are established at the state level and generally operate under the laws of the state of incorporation, for-profit corporations in all states operate under the traditional shareholder primacy model, famously established in \textit{Dodge v. Ford Motor Co.}\textsuperscript{12} This model requires that the primary purpose of a board of directors is to serve the best interest of its shareholders, and only shareholders: “it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others . . . .”\textsuperscript{13}

Taking that one step further, the Delaware Supreme Court has found that not only is benefit to shareholders the primary purpose of a corporation, but all other interests must flow from it: “[a] board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.”\textsuperscript{14} Not only does this fail to encourage corporations to exhibit greater responsibility to those other than their shareholders—employees, customers, and communities, to name a few—it outright prohibits doing so. In light of this proposition, the law and activists alike have advanced various statutory constructs to create a greater balance.

Around the 1980s, during the height of the anti-takeover movement,\textsuperscript{15} a number of state legislatures passed constituency

\textsuperscript{11} U.S. CONST. art. V (providing for (a) proposal of amendments by bill, which passes a two-thirds majority vote of both houses, or upon application of two-thirds of the state legislatures, Congress shall call a convention for proposing amendments, and (b) ratification of such proposed amendments by three-fourths of the states).

\textsuperscript{12} Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919); Kent Greenfield, \textit{Reclaiming Corporate Law in a New Gilded Age}, 2 HARV. L. & POL’Y REV. 1, 8–9 (2008) (asserting that while there are those who disagree with the foundation of the shareholder primacy model, it is a practical reality in the United States).

\textsuperscript{13} Dodge, 170 N.W. at 684.


\textsuperscript{15} Following the invalidation of a state statute that “injected state authorities into the arena of hostile takeovers”, many statutes, initially enacted to impose costly and burdensome notice and approval requirements on hostile tender offers and control acquisitions, were invalidated. P. John Koziris, \textit{Some Observations on State Regulation of Multistate Takeovers—Controlling Choice of Law Through the Commerce Clause}, 14 DEL. J. CORP. L. 499, 500 (1989) (referencing Edgar v. MITE Corp., 457 U.S. 624 (1982)).
statutes, allowing corporate managers to consider employees, consumers, and the community in defending a takeover or taking a particular course of action—although the ever-influential Delaware has never passed such legislation. But the shareholder primacy model has led directors to seek profit maximization first and consider constituent interests second, despite pervasive claims that social and community interests are furthered by “job creation and philanthropy, rather than from the view of adhering to a stakeholder-based agenda that is potentially in lieu of greater profits.” At the end of the day, shareholder profit is still the controlling mantra above all else.

More recently, several state lawmakers have passed legislation advancing the “benefit corporation” as an alternative model. Taking the permissiveness of constituency statutes a step further, benefit corporations must consider how their decisions affect their employees, community, and the environment. They must also have the purpose of creating a material positive impact on society and must report on their beneficial performance. As of February 23, 2014, twenty states and the District of Columbia have passed benefit corporation legislation.

the aftermath, states began a new wave of antitakeover statutes. Id. at 501–03.


19 See e.g., N.J. STAT. ANN. § 14A:18-6.

20 Id.; see, e.g., Md. CODE ANN., CORPS. & ASS’NS §§ 5-6G-06(a)(1) (West 2010).

While still new, the structural model of benefit corporations has the potential to attain a greater balance between the rights afforded to and restrictions on associations of individuals within the context of corporate personhood. Rather than fighting against the Supreme Court’s consistent jurisprudence in this area, benefit corporations are mechanisms that work within the current framework to achieve the same goals—goals the government has the ability to incentivize.

Part II of this Comment briefly reviews the rights historically afforded to corporations, specifically within the context of free speech as it relates to campaign finance law. Part III examines the result of recent initiatives to create the new corporate structure known as a benefit corporation, focusing on the New Jersey and Delaware statutes. Part IV analyzes how regulations and statutory constructs can and should be used to balance the rights of corporations with their currently unmet responsibilities. Finally, Part V discusses a step-change approach as the most realistic path forward. Part VI concludes that while momentum is building on its own, there are multiple forces weighing against strong uptake of the benefit corporation as the corporate form of choice. To counterbalance this, and contribute to equalizing power and influence between natural persons and their associational incorporated form, the federal government should offer tax incentives to benefit corporations as a way to incentivize the model.

II. THE HISTORY OF CORPORATE CONSTITUTIONAL RIGHTS

A. Corporate Personhood Generally

The concept of corporations having similar rights to individuals, such as the right to contract, to sue and be sued, etc., is commonly known as “corporate personhood” and will be referred to as such for purposes of this Comment.22 Despite recent public attention and controversy, the American legal system has long recognized corporate personhood.23 In an 1886 case before the Supreme Court of the United States, Chief Justice Waite opened oral arguments with a response to defendants’ argument that corporations are not “persons”

22 MODEL BUS. CORP. ACT § 3.02 (2005).
23 See infra Part II.A.
within the meaning of the Fourteenth Amendment, stating:

The court does not wish to hear argument on the question [of] whether the provisions in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.21

This may be viewed as the origin of corporate personhood, as it was made without reason or precedent (or indeed argument of counsel).25 Yet, Santa Clara v. Southern Pacific Railroad26 was not considered an innovation but rather in line with Trustees of Dartmouth College v. Woodward, a case from 1819 that recognized the capacity of corporations to sue and be sued.27 Early underpinnings for corporate personhood are even present in the English common law dating back to 1791.28 Nearly forty years later, the Court expanded on Santa Clara, holding that corporations can hold property, and that the same protections afforded property owned by natural persons are also due to corporations.29

There are several theories that underlie the concept of a corporate person, and each has been present in the Supreme Court’s jurisprudence to support rights for corporations. The first, referred to herein as the “Charter Theory,” views corporations as fictional constructs that the law creates, and therefore legitimizes, to facilitate commerce.30 The Charter Theory emerged in the early nineteenth century when the Supreme Court recognized certain rights traditionally afforded natural persons for corporations—such as the

26 Santa Clara Cnty., 118 U.S. 394.
27 Horowitz, supra note 25, at 67 (although Horowitz argues that the “real entity” theory of corporate personhood was nonexistent in American legal thought and jurisprudence at the time the case was decided).
28 See 1 William Blackstone, Commentaries *467 (emphasis added) (“[I]t has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.”).
right to contract and to sue and be sued. As expressed in Dartmouth College, corporations exist only by virtue of their legal sanction by the government; this early Charter Theory of corporate personhood was present during the first half of the nineteenth century when corporations were created by individual approval of their charter by acts of state legislatures. Individual chartering was soon replaced by the state general incorporation statutes we have today, whereby a business incorporates members by merely the formality of filing a few documents with the state of incorporation.

Thus, a new theory of corporate personhood emerged, which this Comment refers to as the “Collective Personhood Theory.” This second theory views corporations as associations of people, and argues that the individual people who make up these associations should not be deprived of their individual constitutional rights when acting collectively. Under the Collective Personhood Theory, corporations owe their existence and validity not to the state, but rather to the individuals who formed the corporation.

Finally, a “Real Entity Theory” has also emerged as a way to understand and support the concept of corporate personhood. As the size of corporations grows and shareholder ownership becomes more dispersed and hands-off, an understanding of the corporate model that closely links it with its owners has become ill-fitted. Scholars in this area have more recently come to view corporate existence as independent from its members as well as from the state and legitimized by the entity itself.

B. A Modern Example: First Amendment Speech Rights in Campaign Finance Law

An example of the corporate personhood discussion being played out on a modern stage can be found in the arena of campaign finance law. As noted above, in 2010, the Supreme Court held that Congress may not ban political campaign expenditures by corporations, on the ground that they give rise to corruption or the appearance of corruption, because it violates corporations’ right to freedom of

32 Ripken, supra note 30, at 107.
33 Ripken, supra note 30 at 108-09.
34 Ripken, supra note 30 at 109-10.
35 Ripken, supra note 30 at 109.
36 Horowitz, supra note 25 at 67.
37 Horowitz, supra note 25 at 113.
speech.\textsuperscript{38} This discussion has continued in the public arena and in the courts with another consistent opinion by the Court on the issue in the summer of 2012.\textsuperscript{39}

But this seemingly modern discussion has old roots as well. As early as 1894, Elihu Root, a senator from New York and the Secretary of War under Presidents McKinley and Roosevelt, urged the Constitutional Convention of New York to adopt a bill prohibiting political contributions by corporations: “[t]he idea is to prevent the great . . . aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public . . . .”\textsuperscript{40} The case law in this area is extensive, but this Comment focuses exclusively on cases from the past half century.

Perhaps the first modern landmark case in the area of campaign finance law, \textit{Buckley v. Valeo}, reviewed the 1974 amendments to the Federal Election Campaign Act of 1971 (FECA), which regulated campaign contributions and spending.\textsuperscript{41} The 1974 amendments to FECA had, among other things, limited individual direct contributions to political campaigns and individual expenditures\textsuperscript{42} in support of campaigns.\textsuperscript{43} While recognizing the governmental interest in preserving the integrity of our system of democracy and upholding the portion of the Amendments limiting direct contributions, the Court found the limitation on expenditures to be unconstitutional.\textsuperscript{44} The Court did not believe that expenditures (i.e. costs expended in support of a particular political position or candidate, but not in coordination with a specific candidate) enhanced the potential for corruption in the same manner that individual contributions to candidates did, and therefore, the government interest was not sufficient to warrant

\textsuperscript{40} \textit{Supreme Podcast}, supers note 24, at 10:18.
\textsuperscript{41} 424 U.S. 1 (1976).
\textsuperscript{42} Direct contributions are where an individual or organization donate directly to a particular political candidate’s campaign for office, whereas an independent expenditure, as defined in the Federal Election Campaign Act, means an expenditure by a person that is “(A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” 2 U.S.C. § 431(17) (2002).
\textsuperscript{43} \textit{Buckley}, 424 U.S. at 1.
\textsuperscript{44} \textit{Id.} at 25.
courtment on free speech.\textsuperscript{45} In finding that these regulations placed a substantial restriction on a person’s right to engage in political speech, the Court recognized that the spending of money is the equivalent of speech because it is used to disseminate political thought.\textsuperscript{46}

If it was at all unclear whether the restrictions of \textit{Buckley} applied to corporations, the Court resolved this issue two years later in \textit{First National Bank of Boston v. Belotti}.\textsuperscript{47} Massachusetts had enacted a criminal statute prohibiting certain expenditures by banks and other corporations aiming to influence the vote on referendum proposals, unless such expenditures materially affected the business of the corporation.\textsuperscript{48} A bank interested in publicizing its views against a state constitutional amendment authorizing a graduated income tax brought the challenge.\textsuperscript{49} In a 5-4 decision, the Supreme Court held that the First Amendment prohibits restrictions on corporate expenditures for political speech to express corporate points of view. The Court stated that speech does not lose its protection “simply because its source is a corporation that cannot prove to the satisfaction of the court a material impact on its business.”\textsuperscript{50}

The case law that comports with the \textit{Citizens United} line of reasoning not only provides protections for traditional private profit-making corporations, but also addresses Political Action Committees (PACs)\textsuperscript{51} and political parties as well as non-profit interest groups.\textsuperscript{52} The Court has ruled that independent expenditure limits as applied to PACs in the context of a voluntary public financing system are

\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id. at 19.}
\textsuperscript{47} 435 U.S. 765 (1978).
\textsuperscript{48} \textit{Id. at 769.}
\textsuperscript{49} \textit{Id. at 765.}
\textsuperscript{50} \textit{Id. at 784.}
\textsuperscript{51} PACs are political committees that raise funds to campaign for or against candidates and/or certain initiatives; they can fall into two categories: (i) those that are “established and administered by corporations, labor unions, membership organizations or trade associations [and that] . . . solicit contributions from individuals associated with the” corporation or other sponsoring organization (separate segregated funds) or (ii) those that “are not sponsored or connected to any of the aforementioned entities and are free to solicit contributions from the general public.” Quick Answers to PAC Questions, FED. ELECTION COMM’N, http://www.fec.gov/ans/answers_pac.shtml.
unconstitutional.\textsuperscript{53} In a pair of cases emanating from Colorado, the Court held that political parties have free speech protections.\textsuperscript{54} And in 1996, independent expenditure limits applied to parties not coordinating with candidates were found unconstitutional.\textsuperscript{55}

Five years later, however, this protection was limited in \textit{Federal Election Commission v. Colorado Republican Federal Campaign Commission}, which upheld a provision of the FECA that restricts the amount of “hard money”\textsuperscript{56} political parties can spend on behalf of, and in coordination with, their congressional candidates.\textsuperscript{57} Justice Souter’s majority opinion found that coordinated expenditure limits on parties are subject to the same scrutiny as those limits on individuals, PACs, and corporations, and that such limits, while an infringement upon free speech rights, nonetheless withstand strict scrutiny because they further the government interest of reducing corruption.\textsuperscript{58}

In 2002, Congress passed the Bipartisan Campaign Reform Act, commonly referred to as the “McCain-Feingold Act” or “BCRA,” which further amended the FECA to regulate financing of public election campaigns.\textsuperscript{59} As stated in \textit{McConnell v. Federal Election Commission}, BCRA aimed to regulate (i) soft (or unrestricted, nonfederal) money in campaign financing and (ii) issue advocacy advertisements.\textsuperscript{60} In 2003, Senator Mitch McConnell—the then-Senate Majority Whip (i.e. Assistant Majority Leader of the United States Senate)—and groups including the National Rifle Association, Chamber of Commerce of the United States, and the California Democratic Party brought a challenge to BCRA.\textsuperscript{61} A 5-4 majority of the Court upheld most of BCRA, striking only titles III (restricting political parties from donating funds to tax exempt organizations to engage in partisan political activity) and IV (restricting candidates’ use of soft money).\textsuperscript{62}

\textsuperscript{55} \textit{Colo. Republican I}, 518 U.S. at 604.
\textsuperscript{56} The term “hard money” is used here to refer to funds donated or expended to advocate for the election of a particular candidate (and therefore it indicates the funds are regulated by the Federal Election Campaign Act). The term “soft money” refers to funds which do not explicitly endorse a particular candidate, but, for example, are used to advocate for a particular issue.
\textsuperscript{57} \textit{Colo. Republican II}, 535 U.S. at 431.
\textsuperscript{58} \textit{Id.} at 435.
\textsuperscript{61} \textit{Id.}
\textsuperscript{62} \textit{Id.}
This left intact restrictions preventing: (i) national party committees from soliciting, receiving, directing, or spending any soft money; (ii) state and local party committees from using soft money for activities that affect federal elections; and (iii) corporations and labor unions from funding electioneering communication within sixty days of an election. In 2009, however, Citizens United struck down the independent expenditure ban in BCRA.

The independent expenditure ban portion of BCRA was not the only casualty of Citizens United. Although it had been questioned before, Citizens United also officially overturned a 1990 case that allowed Michigan campaign finance laws to prevent corporations from contributing to political campaigns or purchasing political advertising out of the corporation’s general fund. At oral arguments for Citizens United, Justice Ginsburg questioned whether there was any distinction between the First Amendment rights of an individual and a corporation: “[a] corporation, after all, is not endowed by its creator with inalienable rights, so is there any distinction that Congress could draw between corporations and natural human beings for purposes of campaign finance?” Theodore Olson, arguing on behalf of Citizens United and pointing to the Court’s First Amendment jurisprudence (specifically Sullivan and Grosjean), argued that it was well established that “corporations are persons, entitled to protection under the First Amendment.” Relying heavily on Bellotti (in which the Court held that the government could not limit a corporation’s speech on a particular ballot issue), a majority of the Court, consisting of Justices Kennedy, Roberts, Scalia, Alito, and Thomas, agreed with Mr. Olson and could find no basis for the proposition that, in the context of political speech, the government may impose restrictions on certain disfavored speakers (i.e. corporations):

By suppressing the speech of manifold corporations, both for-profit and nonprofit the Government prevents their voices and viewpoints from reaching the public and advising

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63 Id.
65 Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990); see Fed. Election Comm’n v. Wis. Right to Life, 551 U.S. 449, 481, 490 (2007) (holding that issue ads may not be banned in the months preceding a primary or general election; Justices Scalia, Kennedy and Thomas concurring and positing that Austin was wrongly decided).
66 SUPREME PODCAST, supra note 24, at 2:00:45.
voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of destroying the liberty of some factions is worse than the disease. Factions should be checked by permitting them all to speak and by entrusting the people to judge what is true and what is false.69

In a concurring opinion, Justice Scalia addressed head-on the dissent’s claim that the framers contemplated only the right of individual Americans to free speech:

That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears. But the individual person’s right to speak includes the right to speak in association with other individual persons.70

In 2012, the Court reaffirmed its commitment to the Citizens United ruling and overturned the Montana Corrupt Practices Act, a 1912 Montana campaign finance law restricting the amount of money that corporations and individuals could donate to campaigns.71

The status of corporations as persons with certain rights under the Constitution has thus been well established and endorsed throughout the past century by the Supreme Court.72 Particularly in the arena of political speech, the Court’s rulings have given corporations the potential for extensive power through expenditures.73

III. RISE IN BENEFIT CORPORATION LEGISLATION

Coincidentally, the year the contentious Citizens United ruling came down was the same year Maryland passed the first benefit corporation legislation.74 In April 2010, Maryland enacted the first

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69 Citizens United, 558 U.S. at 354–55 (internal quotations and citations omitted).
70 Id. at 391–92 (Scalia, J., concurring) (emphasis in original).
72 It is noteworthy, however, that corporate personhood continues to be a subject of litigation in areas outside of campaign finance. For example, this term, the Supreme Court granted certiorari to two cases that potentially call on the Court to answer whether corporate personhood embodies a for-profit corporation with religious rights under the Religious Freedom Restoration Act of 1993. Sebelius v. Hobby Lobby Stores, Inc., 723 F.3d 1114 (10th Cir.), cert. granted 134 S. Ct. 678 (2013); Conestoga Wood Spec. Corp. v. Sebelius, 724 F.3d 377 (3d Cir.), cert. granted 134 S. Ct. 678 (2013).
73 See discussion infra Part IV.
benefit corporation legislation. As of February 2014, several states and the District of Columbia had passed similar benefit corporation legislation, including Hawaii, Virginia, California, Vermont, New York, Washington, Louisiana, South Carolina, Illinois, New Jersey, Pennsylvania, Massachusetts, Oregon, Nevada, Arizona, Colorado, Arkansas, Rhode Island and Delaware. At the time of this writing, sixteen other states have also introduced benefit corporation legislation, making this a trend that will likely engulf over half of the States soon.

It is significant in the growth of this trend that Delaware, the most influential state in corporate law, passed its benefit corporation legislation toward the end of 2013. Over fifty percent of U.S. publicly traded corporations and sixty percent of Fortune 500 companies are incorporated in Delaware. In addition to charging no income tax on corporations not operating within the state and providing various incentives to those incorporated in the state, Delaware’s General Corporation Law, which governs corporate law in the state, is very business—and business-management—friendly. Because of the internal affairs doctrine, Delaware has expounded a well-developed body of case law, giving corporations the further incentives of substantial guidance and certainty if they incorporate in Delaware.

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75 *Id.;* MD, CODE ANN., CORPS & ASS’NS §§ 5-6G-01–08 (West 2010).
76 See supra note 21.
81 Ced & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (noting that under 8 DEL, CODE ANN., § 141(a), the plaintiff has the burden of proof of showing a director has breached one of the triads of their fiduciary duty; if the shareholder fails to meet this burden, the business judgment rule attaches to protect corporate officers and directors, and the court will not second-guess their business judgments).
82 The doctrine provides that the law of the state of incorporation shall govern disputes about corporate governance. McDermott Inc. v. Lewis, 531 A.2d 206, 215 (Del. 1987).
A. Benefit Corporations v. Traditional Corporations

In both traditional and benefit corporations, directors have a fiduciary relationship to the corporation, which results in the application of several legal standards to their conduct. Generally, directors’ decisions and actions are subject to broad discretion under the Business Judgment Rule, which dates back to 1742.85

However, directors are not given unbridled discretion. This is explicitly spelled out in the Model Business Corporation Act, which contains standards of conduct for directors: directors have a duty to “act (1) in good faith, and (2) in a manner the director reasonably believes to be in the best interests of the corporation.” The fiduciary duties of directors have also been thoroughly laid out in case law and are frequently described as a “triad”: due care, loyalty, and good faith.86

For traditional corporations, however, these standards are within the context of the shareholder primacy framework.87 That is, fiduciary duties generally operate with an underlying purpose of maximizing value for the shareholders of the corporation. This shareholder primacy model of maximizing wealth for shareholders was discussed in *Ford*.88 Ford Motor Company had built up a capital surplus of $60 million.89 Henry Ford, the company’s President, sought to limit special dividends for shareholders and instead use the surplus for investments in new plants that would enable increased production and additional hiring, while still allowing for a decrease in the cost of the product:

‘My ambition,’ declared Mr. Ford, ‘is 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. To do this, we are putting the greatest

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84 Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (reasoning that it is presumed that “the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company,” and that without a showing of bad faith, fraud, oppression, arbitrary action, or breach of trust, courts will not interfere with the business decisions of directors); Kamin v. American Express Co., 383 N.Y.S.2d 807 (Sup. Ct.) aff’d, 54 A.D.2d 654 (App. Div. 1976); Charitable Corp. v. Sutton, (1742) 26 Eng. Rep. 642 (Ch.) (proclaiming, in what is considered to be the first articulation of the business judgment rule, that directors are best suited to make business decisions for the corporation and that judges are ill-suited to second guess those decisions after the fact when negative consequences result from a director’s judgment).


88 *Id.*

89 *Id.* at 679.
share of our profits back into the business. The Dodge brothers, John and Horace, as ten percent minority shareholders, brought suit seeking to enjoin Ford from reducing prices and to force the company to pay out special dividends from the capital surplus in lieu of the proposed plant advancements.

The court found for the Dodge brothers, stating that “[a] business corporation is organized and carried on primarily for the profit of the stockholders” and not for the community or its employees. The discretion of the directors is to be exercised to meet 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” such as benefiting the public, making the profits of the stockholders incidental thereto.

Since the Ford case, the “shareholder primacy” model has come to represent the view that “managers’ fiduciary duties require them to maximize the shareholders’ wealth and preclude them from giving independent consideration to the interests of other constituencies.” While there is ongoing debate as to whether shareholders or directors are really the true controllers of corporations, and whether boards should be viewed as “mediating hierarch[s]” that allocate corporate profits, these arguments focus on the practice of businesses and do not necessarily dispute the legal framework established in Ford.

More recent case law from the Delaware Supreme Court found that not only is benefit to shareholders the primary purpose of a corporation, but that all other interests must flow from it. This requires that consideration of factors other than shareholder wealth maximization must be rationally related to benefits accruing to shareholders. As recently as 2010, the Delaware Court of Chancery reaffirmed the state’s position that directors are obligated pursuant to their fiduciary duties to maximize shareholder value. Despite the

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90 Id. at 683.
91 Id. at 673.
92 Id. at 684.
93 Ford, 170 N.W. at 684.
97 eBay Domestic Holdings, Inc. v. Newark, 16 A.3d 1, 28 (Del. Ch. 2010) (holding that “poison pill” shareholder rights provisions can deter value-maximizing bidders at the stockholders’ expense and that the decision to use such a plan will fall within the
existence of constituency statutes, in practice, directors seek profit maximization first and consider constituent interests second under the shareholder primacy model, claiming that social and community interests are furthered by “job creation and philanthropy, rather than from the view of adhering to a stakeholder-based agenda that is potentially in lieu of greater profits.”

As is clear from the Ford case, shareholders can bring suit to enforce the duties of directors. The suit may be direct (if the management’s breach deprived the shareholder of some other right) or derivative (if management’s breach reduced the residual value of the business); derivative proceedings are civil suits brought in the name of the corporation by a shareholder. Derivative actions allow shareholders to monitor and redress harm to the corporation caused by its directors and management.

In sharp contrast to this, benefit corporations are required to look toward public purposes and must account for public benefit considerations in pursuit of their mission. Thus, the concept of fiduciary duty in the context of a benefit corporation must include nonfinancial interests, such as general societal benefit, poverty, environmental impact, employee interests, etc. In the states that have enacted benefit corporation legislation, three provisions cut across all of the legislation:

[A] benefit corporation has: 1) a corporate purpose to create a material positive impact on society and the environment; 2) expanded fiduciary duties of directors which require consideration of nonfinancial interests; and 3) an obligation to report on its overall social and environmental performance as assessed against a comprehensive, credible,

[58] Patel, supra note 17, at 146-47.

[59] N.J. STAT. ANN. § 14A:12-7(10) (West 1988) (providing that “if the court determines that any party to an action brought under this section has acted arbitrarily, vexatiously, or otherwise not in good faith, it may in its discretion award reasonable expenses, including counsel fees incurred in connection with the action, to the injured party or parties.”); Model Bus. Corp. Act §7.40 (2005).


independent and transparent third-party standard.\textsuperscript{103}

\textbf{B. A Look at Benefit Corporation Statutes in New Jersey and Delaware}

Focusing on the New Jersey statute as a case study, this section will review the key provisions of benefit corporation legislation. Where applicable, it highlights distinctions in the corollary provisions of the Delaware statute, which became effective as of August 1, 2013. The distinctions between the New Jersey and Delaware statutes underscore the variation among the different versions of benefit corporation statutes that have been passed in the States.

New Jersey enacted its benefit corporation legislation in 2011.\textsuperscript{104} There is no express legislative intent provision regarding the purpose underlying either the New Jersey or Delaware statutes; however, the legislative history of the New Jersey statute provides that:

The purpose of a benefit corporation is to create a general public benefit, defined as a material positive impact on society and the environment, through activities that promote some combination of specific public benefits. This allows a benefit corporation, at the direction of its shareholders, to pursue a mission that goes beyond making a profit for owners and investors, while providing legal justification and protection for the actions of its officers and board members that consider social and environmental issues when making decisions on behalf of the corporation.\textsuperscript{105}

1. Common Characteristics

The New Jersey Act contains the three key benefit corporation provisions noted above: public benefit purpose, expanded fiduciary duties, and reporting.\textsuperscript{106} With respect to purpose, New Jersey’s statute requires that every benefit corporation have the purpose of creating a general public benefit.\textsuperscript{107} General public benefit is defined as a “material positive impact on society and the environment by the operations of a benefit corporation through activities that promote some combination of specific public benefits”\textsuperscript{108} and, if met, automatically constitutes the best interests of the benefit corporation.

\begin{footnotesize}
\begin{enumerate}
  \item CLARK VRANKA WHITE PAPER, supra note 101, at 15.
  \item See supra Part III.A.
  \item N.J. STAT. ANN. § 14A:18-5(a).
  \item § 14A:18-1.
\end{enumerate}
\end{footnotesize}
under the statute.\textsuperscript{100} In addition to this, the statute permits New Jersey benefit corporations to include additional specific purposes in their certificate of incorporation,\textsuperscript{108} and provides that any specific purposes do not limit the obligation of a benefit corporation to create general public benefit.\textsuperscript{111} Whether the benefit corporation has provided a public benefit is evaluated by the benefit director in the annual benefit report to shareholders.\textsuperscript{112} The Delaware statute does not expressly distinguish between general and public benefit, but rather merely requires that the entity be intended to produce one or more public benefits, which must be specifically identified (although Delaware also contains a general requirement that the entity operate in a “responsible and sustainable manner,” which could be viewed as equivalent to the New Jersey requirement for a general public benefit).\textsuperscript{113} Delaware also makes no provision for a benefit director.\textsuperscript{114}

With respect to expanded fiduciary duties, New Jersey’s benefit corporation statute requires that, in determining the best interests of the benefit corporation, the board of directors of the benefit corporation, along with any committee of the board and the individual directors themselves, consider nonfinancial interests in contemplating the best interests of the benefit corporation.\textsuperscript{115} These nonfinancial interests include the following: shareholders, employees, customers, community and societal considerations, the environment, and the short and long-term goals of the benefit corporation.\textsuperscript{116} In determining the best interests of the benefit corporation, such board, committees, and individual directors may also consider the effects on suppliers and

\textsuperscript{100} § 14A:18-6 (providing that the board of directors, committees of the board, and individual directors of a New Jersey benefit corporation must act in such corporation’s best interests; in considering the best interests of the benefit corporation, they must consider the effects of the benefit corporation on, shareholders, employees, customers, community and society, the local and global environment and the short and long term interests of the benefit corporation; this statutory provision deems the benefit corporation’s purpose of providing a general public benefit to be within the best interests of the corporation and prohibits it from being subverted by the board).

\textsuperscript{108} § 14A:185(a).

\textsuperscript{111} § 14A:185(b).

\textsuperscript{112} § 14A:187(c); see discussion infra Part III.B.b.

\textsuperscript{113} DEL. CODE ANN. tit. 8, § 362(a) (West 2013). Public benefit is defined in the Delaware statute as “a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacity as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.” § 362(b).

\textsuperscript{114} § 361.

\textsuperscript{115} N.J. STAT. ANN. § 14A:186 (West 2011).

\textsuperscript{116} Id.
creditors, and any other pertinent factors or the interests of any other group they deem appropriate.\textsuperscript{177} Delaware’s statute is less explicit with respect to the proactive requirements of directors and merely states that the entity “be managed in a manner that balances the stockholders’ pecuniary interests, and best interests of those materially affected by the corporation’s conduct, and the public benefit or public benefits identified in its certificate of incorporation.”\textsuperscript{178} The Delaware statute, however, is very detailed in terms of the protections for, and limitation on liability of, directors in the event duties are not accomplished:

A director of a public benefit corporation shall not . . . have any duty to any person on account of any interest of such person in the public benefit or public benefits identified in the certificate of incorporation or on account of any interest materially affected by the corporation’s conduct and, with respect to a decision implicating the balance requirement in subsection (a) of this section, will be deemed to satisfy such director’s fiduciary duties to stockholders and the corporation if such director’s decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.

The certificate of incorporation of a public benefit corporation may include a provision that any disinterested failure to satisfy this sections [s]hall not . . . constitute an act or omission not in good faith, or a breach of the duty of loyalty.\textsuperscript{179}

With respect to reporting requirements, New Jersey’s benefit corporation statute requires benefit corporations to deliver an annual benefit report to shareholders and to post such report on its website.\textsuperscript{180} The annual benefit report must include a description of the ways the entity has pursued a general public benefit during the year and the extent to which such efforts were successful.\textsuperscript{181} The Delaware statute requires that the entity merely biennially provide a statement to stockholders as to the corporation’s promotion of public benefit.\textsuperscript{182} While this less frequent statement may seem more lax than the New Jersey requirement, Delaware has actually put some meat on the bones of this statement, requiring standards and objective factual

\textsuperscript{177} \S\ 14A:186(b).
\textsuperscript{178} \textsc{Del. Code Ann.} tit. 8, \S\ 362(a), \S\ 365(a).
\textsuperscript{179} \S\ 365(b)–(c).
\textsuperscript{180} \textsc{N.J. Stat. Ann.} \S\ 14A:1811.
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textsc{Del. Code Ann.} tit. 8, \S\ 366(b).
Moreover, the Delaware statute expressly notes that the entity may require the statement to be made more frequently, be made available to the public, and/or use an external standard or certification with respect to whether its public benefit goals are being met.\footnote{124}


There are several elements of the New Jersey and Delaware benefit corporation statutes that differ from the first benefit corporation legislation enacted in Maryland in 2010. The first of these is a new concept called a benefit director, present in the New Jersey statute.\footnote{125} New Jersey’s benefit director provision requires that the board of directors include one director elected as the “benefit director.”\footnote{126} The benefit director is responsible for preparing the portion of the annual benefit report that includes a statement as to whether “the benefit corporation acted in accordance with its general, and any specific, public benefit purpose in all material respects during the period covered by the report.”\footnote{127} If, in the opinion of the benefit director, these requirements have not been met at any time throughout the year, he or she must include in the statement a description of the ways the corporation failed to act.\footnote{128}

Another added feature in New Jersey’s benefit corporation statute is the requirement that, in addition to posting online and providing a copy to shareholders within 120 days, the benefit corporation must file the benefit report with the Department of Treasury.\footnote{129} If the benefit report is not filed with the Department of Treasury for two years, the Department has the option to determine that the corporation has forfeited its status as a benefit corporation, although this can be

\footnote{123} Id. (“The statement shall include: (1) The objectives the board of directors has established to promote such public benefit or public benefits and interests; (2) The standards the board of directors has adopted to measure the corporation’s progress in promoting such public benefit or public benefits and interests; (3) Objective factual information based on those standards regarding the corporation’s success in meeting the objectives for promoting such public benefit or public benefits and interests; and (4) An assessment of the corporation’s success in meeting the objectives and promoting such public benefit or public benefits and interests.”).

\footnote{124} § 366(c).

\footnote{125} N.J. STAT. ANN. § 14A:187.

\footnote{126} Id.

\footnote{127} § 14A:187(a).

\footnote{128} Id. It should be noted that the benefit director, as an officer of the benefit corporation, is also responsible for considering and representing this interest at all times in addition to reporting on it at the end of the year in the benefit report. § 14A:1846.

\footnote{129} § 14A:1811(d)(1) –(2).
reversed upon the filing of the benefit report.\textsuperscript{130} Forfeiture of benefit corporation status could be particularly devastating to business associations that have based their business model, marketing to customers, and/or relationships with investors that value a commitment to public benefit objectives in addition to financial returns on such benefit corporation status.\textsuperscript{131} The statute does not provide for the “default” status of an entity following the loss of benefit corporation status; as the legislation is still fairly new, there are currently no examples to consult for a determination of whether this results in the total loss of incorporation for the entity or whether it simply reverts to some other corporate form such as an LLC or traditional S or C corporation.\textsuperscript{132}

The Delaware statute has developed a provision to address amendments and mergers, and requires approval from ninety percent of outstanding shares for an existing corporation to become a public benefit corporation.\textsuperscript{133} Approval by only two-thirds of the outstanding shares of the corporation is required to remove an entity’s public benefit corporation status.\textsuperscript{134}

Finally, both the New Jersey and Delaware benefit corporation statutes include details with respect to benefit enforcement proceedings or derivative suits. Directors of both a New Jersey and Delaware benefit corporation can be challenged in the respective courts;\textsuperscript{135} indeed, New Jersey’s legislation would appear to limit challenges to the duties of directors and officers under the act to only “benefit enforcement proceedings.”\textsuperscript{136} Under the New Jersey statute, only the following may bring benefit enforcement proceedings to challenge the actions or decisions of directors or officers with respect to the general or any specific public benefit purpose: (i) the benefit corporation itself, or (ii) by way of a derivative action, brought by a

\textsuperscript{130} Id. It should be noted that the New Jersey benefit corporation statute lists no statute of limitations on the late filing of an annual benefit report for reinstatement of benefit corporation status. No cases have been brought on this issue to determine if the courts would indeed interpret this as an indefinite option.

\textsuperscript{131} Incidentally, these potential marketing and investment niche markets can also provide incentives to incorporate as a benefit corporation.

\textsuperscript{132} See, e.g., § 42:2B-1; § 14A:1-1.

\textsuperscript{133} \textsc{Del Code Ann. tit.} 8, § 363(a) (West 2013). Further, the Delaware statute allows a stockholder who did not vote in favor of merger with or transformation to a public benefit corporation to obtain an appraisal by the Court of Chancery of the fair value of his or her stock. § 363(b).

\textsuperscript{134} § 363(c).

\textsuperscript{135} \textsc{N.J. Stat. Ann.} § 14A:18-10; \textsc{Del Code Ann. tit.} 8, § 367.

permissible party on behalf of the corporation. A derivative action may be brought by:

(a) a shareholder; (b) a director; (c) a person or group of persons who owns beneficially or of record 10% or more of the equity interests in an entity of which the benefit corporation is a subsidiary; or (d) such other persons as may be specified in the certificate of incorporation or by-laws of the benefit corporation.

With respect to Delaware, derivative suits appear to be limited to stockholders of the public benefit corporation who own at least two percent of outstanding shares.

To date, the author has not been able to locate any litigation challenging the actions of directors or officers of benefit corporations under either the New Jersey or Delaware benefit corporation statutes. While this is unsurprising based on the relative youth of the benefit corporation legislation, such cases may also be unlikely to ever materialize given the restrictions within the statutes’ benefit proceedings and derivative action provisions. For example, in New Jersey, while corporate directors and officers are required to consider the impact upon other groups such as employees and the local community, such groups are only able to hold the benefit corporation directors and officers accountable if they are specifically named in the certificate of incorporation or by-laws of the benefit corporation. Absent dispute within the board or amongst shareholders, these individuals may be unlikely to challenge a move that increases their profitability at the expense of another constituency. On the other hand, at least the founders of the benefit corporation would presumably not have such temptation to prioritize profits, as they could easily have chosen to incorporate under a different corporate form and subscribe to the shareholder primacy model.

IV. HOW REGULATION AND CORPORATE STRUCTURE CAN BE USED TO BALANCE CORPORATIONS’ RIGHTS V. RESPONSIBILITIES

The general public is evidently aware of the purposes and financial aims of traditionally formed corporations and has recently expressed outcry at the mismatch between the rights (and therefore power) afforded corporations as articulated in Citizens United and its

137 Id.
138 Id.
predecessors and the role corporations have in society. As previously noted, polls have shown significant opposition to the Court’s position on this issue and support for government limitations on corporate spending in the area of campaigns. Admittedly, it is unclear how informed respondents to such polls, or the general public itself, are on the jurisprudential history of corporate personhood or the wider legal issues involved, but it is equally unclear whether greater understanding of Supreme Court precedent would change these opinions.

In a world of corporate personhood, society is demanding more than the shareholder-primacy paradigm can deliver; the current reality wherein alternative entity formations are merely an option, and one that can still be subverted by the requirements of shareholder primacy, does not seem to be sufficient to counterbalance the existing and overriding corporate structure. The rights afforded corporations, through the Court’s corporate personhood jurisprudence, are not properly counterbalanced by the responsibilities of such entities in society and that the lack of such checks creates a distortion in our political system. Alternative entity formations should no longer be viewed as mere alternatives for outlier organizations—benefit corporations can present a more balanced corporate model for all corporations acting within society. While federal legislation, preempting all state corporation law and requiring that all existing corporate forms incorporate the components of benefit corporations, would be uniform and create consistency through its application to all the states, presumably through the United States Congress’s Commerce Clause powers, for reasons discussed below, it is unlikely. Moreover, the novelty of the benefit corporation concept and evolving ideas even from the Maryland statute to the New Jersey

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142 See supra notes 8–9 and accompanying text.
143 See supra notes 8–9 and accompanying text.
144 The survey did not include questions as to the respondent’s knowledge of the legal issues implicated. See Saad, supra note 8.
145 Melissa Block, What is the Basis for Corporate Personhood?, NPR (Oct. 24, 2011), http://www.npr.org/2011/10/24/141663195/what-is-the-basis-for-corporate-personhood (noting that among the demands of Occupy Wall Street protestors is an end to corporate personhood); Kevin Robillard, Poll: No unlimited political spending, POLITICO (July 18, 2012), http://www.politico.com/news/stories/0712/78647.html; Steven Rosenfeld, How Right-Wingers on the Supreme Court Sold Our Democracy Down the River—Again, ALTERNET (June 25, 2012), http://www.alternet.org/story/156029/how_right-wingers_on_the_supreme_court_sold_our_democracy_down_the_river__again (arguing that the voices of ordinary Americans are lost in the Court’s current campaign finance jurisprudence).
146 U.S. CONST. art. I, § 8, cl. 3.
147 See infra Part IV.
and Delaware statutes indicate that the states can still act as valuable laboratories for experimenting with this corporate form.⁴⁸ Thus, rather than a drastic change with all-encompassing federal legislation, both federal and state governments should promote the introduction of benefit corporation legislation and the take up of the corporate form by individuals and entities through tax incentives. Naturally, corporations prefer to have lower rates to afford them more income and working capital.⁴⁹ Right now, corporate tax rates vary from fifteen to thirty-five percent.⁵⁰ This is one area where federal policy has the potential for significant impact: if benefit corporation tax rates were lowered, by a certain percentage below what the applicable traditional corporate tax rate would be for example, this could serve as a strong incentive to existing shareholders to switch their current corporate form to a benefit corporation.⁵¹

For example, as previously discussed, the Bill of Rights affords multiple protections to natural persons and corporations alike: both have the ability to contract, to sue and be sued, and are entitled to freedom of speech protection, particularly in the area of funding political campaigns.⁵² Under the shareholder primary model, however, where fiduciary duties are owed to the corporation alone and the actions of directors and management must focus on maximizing shareholder wealth, corporations not only are permitted, but have a legal obligation, to maximize profit without regard to the community in which they operate.⁵³ They are encouraged by the legal and regulatory environment to act primarily, if not entirely, as selfish entities.⁵⁴

This is inconsistent with the obligations and motivations of

⁴⁸ Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting) (“One of federalism’s chief virtues, of course, is that it promotes innovation by allowing for the possibility that ‘a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.’”) (quoting New State Ice Co. v. Liebhmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

⁴⁹ Michael Schuyler, Tax Found., Growth Divided from a Lower Corporate Tax Rate 3 (2013), available at http://taxfoundation.org/sites/taxfoundation.org/files/docs/sr208_0.pdf (“[T]he smaller after-tax reward for corporate investment (due to the higher tax rate) depresses capital formation; the diminished capital stock lowers work productivity, thereby decreasing real wages and discouraging people from supplying as much labor as before; and the smaller quantities of capital and labor result in fewer goods and services being produced and less income being generated.”).


⁵¹ Schuyler, supra note 149, at 3.

⁵² See generally supra Part II.

⁵³ See supra Part III.A.

⁵⁴ Id.
individuals when they are not acting in association in the form of a
corporation: a natural person is unlikely to be able to disregard
broader society in this fashion and still participate in it.155 It would
likely go against social norms to send one’s children to reside in an
impoverished environment because the cost of food and housing is far
lower or to turn one’s home into a miniature oil refinery to increase
regular contributions to one’s 401K. Of course this is partially because
this individual would be subject to zoning regulations and the
jurisdiction of child protective service, for which there are corporate
equivalents (zoning and land use laws apply equally to corporate-
owned property and corporations are subject to child labor and
general employment law).156 And one might argue that the primary
responsibility of both individuals and corporations to broader society
is in the form of taxes, from which corporations are not exempt.157
Regulations, of course, are not the only motivation for individual
action or inaction, but these analogies show the influence pertinent
regulations, including benefit corporation statutes, can have as a
primary way of effecting change.

But while there are clear counterparts to some elements of
individual life that translate into the “life” of a corporation, there are
further restrictions on natural persons to which corporations are not
subject. In addition to, and perhaps more important than, those
formal regulations that impinge upon an individual’s free will, there
are interpersonal relationships that prevent individuals from
becoming totally selfish actors (for example by shipping off one’s
children or overdeveloping one’s land). The primary motivating
factor to keep individuals from undertaking such actions is not the
threat of litigation, but rather the respect individuals have for fellow
“natural persons” and the knowledge that they would shun and find
unacceptable such actions.158 And, at a subconscious biological level,

155 See Hackman, J.R., Group Influences on Individuals in Organizations, in 3
HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY 234-45 (M.D. Dunnette
& L.M. Hough eds. 1992) (describing the Return Potential Model as a method for
plotting and visualizing social norms, including a variable that accounts for a range of
tolerable behavior).

156 See, e.g., N.J. STAT. ANN. § 40:55D-1 (West 1976) (authorizing municipal land use

157 INTERNATIONAL TAX REVIEW, TAX MANAGEMENT IN COMPANIES 7 (2d ed. 2008),
available at https://www.pwc.com/en_GX/gx/taxmanagementstrategy/pdf/pwc_tax_
management_ent_in_companies.pdf (“They should view tax not merely as a cost to
the business but as a contribution to society and its infrastructure – in essence, a fee
paid to society for the right to operate within it.”).

158 Duke University, Government Subsidies Change Behavior, but Social Shame Works
Even Better, SCIENCE CODEX (Sept. 30, 2009), http://www.sciencemag.org/cgi/
it has been argued that human genes favoring survival of individuals are always in conflict with those favoring altruism and cohesion, evidencing that the genetic make-up of natural persons is a mix that balances maximizing benefits for oneself and for greater society.\footnote{Edward O. Wilson, The Social Conquest of Earth 142-43, 158-63, 166 (2012).}

The closest equivalent to this in the corporate world is lost profits from consumer disapproval and “shopping with their feet” by procuring a particular product from a competitor corporation. The sometimes vast corporate treasuries available to fund public relations campaigns,\footnote{Lobbying Database, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/ (last visited Apr. 23, 2013) (showing that companies, labor unions and other organizations spent $3.21 billion on lobbying in 2012).} generally fast-paced and uninformed nature of the average consumer,\footnote{See generally Steve Chapman, Mixing Ignorance and Democracy: Can Our System Work With Uninformed Voters?, CHICAGO TRIB. (Apr. 19, 2012), http://articles.chicagotribune.com/2012-04-19/news/ct-oped0419-chapman-20120419_1_politicalignorance-league-of-women-voters-democracy (“There is a consistently large gap between what people need to know and what they actually do know.”).} and faceless nature of the corporate structure\footnote{See Brett H. McDonnell, Professor Bainbridge and the Arrowian Moment: A Review of the New Corporate Governance in Theory and Practice, 34 DEL. J. CORP. L. 139 (2009) (discussing who actually controls the decisions and actions of a corporation-shareholders or directors).} seem to cut even further against the idea that consumer ethically-motivated shopping would act as an equivalent check on corporate behavior to the level that interpersonal societal relationships between individuals constrains them. Moreover, given the potential for influence available to corporations through their pooled wealth\footnote{OPENSECRETS.ORG, supra note 160.} and unrestricted ability to spend through political expenditures,\footnote{See supra Part II.O.} in combination with the existing shareholder primacy model,\footnote{See supra Part II.O.} it is inevitable that corporate financial interests, be they in the form of lower corporate taxes\footnote{Dylan Matthews, Everyone Wants to Lower Corporate Tax Rates. Here’s How You Do It, WASH. POST (Sept. 26, 2012), http://www.washingtonpost.com/blogs/wonkblog/wp/2012/09/26/everyonewantstolowercorporatetaxrateshereshowyoudoit/.} or a bail-out following the next market crash,\footnote{Editorial, On the Brink of Bankruptcy, U.S. Auto-Parts Companies Seek Bailout, iSTOCKANALYST (Jan. 26, 2009) http://www.iStockanalyst.com/article/viewarticle/articleId/2083496.}
will dominate not only our corporate sector, but also our politicians’ agendas. Finally, while the individual decision-makers of a corporation (i.e., directors) may have the same personal and societal relationships as you and I, their fiduciary duty to maximize shareholder value prohibits a director from letting such societal pressures play any meaningful role in their decisions, as everything must be subordinated to shareholder profits.\(^{168}\)

As much as this Comment gives human nature the benefit of the doubt with respect to having and acting on good intentions, it is only natural for even the best-intentioned politicians to be tempted by the motivation that accompanies the ever-present election cycle—the need for campaign funds. Without fundraising, or being independently wealthy, politicians are unlikely to be reelected and thus unable to act upon even their best intentions.\(^{169}\) In trying to balance their political motivations with the practical realities, there is at the very least a significant danger of misplacement of priorities. The case law discussed in Part II makes clear that attempts to regulate campaign finance have been stunted at best.\(^{170}\) A paradigm shift that focuses on those influencers with deep pockets, as opposed to the politicians, is an alternative means of accomplishing this realignment.

Admittedly, there are areas where political agendas and corporate interests do not perfectly align. For example, the current President wants to raise the corporate tax rate to forty percent, and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) has many parts that will require major compliance costs for corporations.\(^{171}\) But this does not negate the fact that corporate interests may be put above those of individual voters in practice (if not explicitly in party platform) where the potential for power through speech combined with extreme wealth exists. Increasingly, there is occasion for this issue to arise as growth in corporate profits continues to expand well above wage increases.\(^{172}\)


\(^{170}\) See supra Part 0.


\(^{172}\) See Joe Weisenthal, UPDATE: The Infamous Chart of Corporate Profits Vs. Total Wages, BUX INSIDER (Nov. 29, 2012), http://www.businessinsider.com/corporate-profits-hit-new-record-high-2012-11 (showing that wages as a share of GDP have fallen
This is not to say that the positions advocated, or speech purchased, by corporate funds are inherently less valuable than that of a particular individual, nor is it a judgment on the value of the speech or the issues affecting those with greater means. The issue is rather one of distortion: the model is no longer one of “one person, one vote” and one voice with which to influence others. The voice of an individual director or shareholder, acting on behalf of the corporation in spending corporate funds, is amplified disproportionately by those funds available to the corporation. Of course corporations, unlike natural persons, do not actually possess the right to vote, but in many ways the ability to influence is weightier than the ability to cast a single vote. With the power to influence individuals through spending, a corporation can essentially create its own indirect right to vote—and potentially a multiplied right, depending on the amount spent and its reach. Of course an individual also has the “power” to influence and thus “multiply” his or her vote, but it is scaled down for individuals, as their influence is likely through one-on-one conversation with a colleague or friend or through independent (as opposed to corporate media organizations) journalistic efforts. Corporations, on the other hand, have the ability to increase their influence by a larger factor because they have significant funds, as compared to an individual, to support their efforts to reach voters with their message. This may well be the structure within which the American system will operate, but we should be honest about the fact that the kind of system that will develop is not one of majority rule with minority rights; rather, it is the corporate minority that has the “rule” by virtue of their financial ability to create and multiply a vote via campaign expenditures.

That being said, the First Amendment has been read by the Supreme Court to prohibit regulations that seek to balance this inequality in ability to advocate through speech/spending—i.e. by prohibiting the amount corporations can spend on campaign speech. There is no such thing as “too much speech.”

175 One potential solution to a new low while corporate profits as a share of GDP (a proxy for profit margins) are at a new high).


174 See generally U.S. CONST.

is to refocus the structure of corporations to provide a more direct link to the populous. A benefit corporation, for example, would have the same power of a corporation to make larger expenditures on speech than would an individual, but it would have a duty to work toward the creation of a public benefit. Its right to freedom of speech, and the resulting distortion it can create, are checked or counterbalanced by its link to the people.

This concept of balancing rights with responsibilities fits with an alternative view of the most recently developed theory of corporations, the aforementioned Real Entity Theory. As summarized by Susanna Ripken,

If the corporation is a real person in society, it should have the same sorts of moral and social responsibilities that individuals have. As a citizen of a larger community, it enjoys certain rights and privileges, but it should also bear the corresponding duties of a citizen ‘to be sensitive to the impact of its activities on others, including not just its investors, but also employees, creditors, consumers, and the larger society in which it operates.’

Completely doing away with corporate personhood is not the answer to equalizing rights and responsibilities. Despite ever-present chatter regarding overturning controversial precedent, even if certain judges were to resign during a particular president’s term and be replaced by someone either slightly to the left or to the right, case law is firmly established in this area and the Court is unlikely to overturn precedent anytime soon. A Constitutional amendment is also extremely

dissenting).

177 See supra Part II.0.
178 Ripken, supra note 30, at 117.
180 Dahlia Lithwick, Supreme Court Year in Review Entry 6: The Court’s Conservatives Don’t Care How Much You Hate Citizens United, SLATE, (June 25, 2012, 6:30 PM) http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/supreme_court_year_in_review/supreme_court_year_in_review_the_court_s_conservatives_refused_tohear_montana_s_challenge_of_their_decision_in_citizens_united_.html (observing that in Bullock, the “sense of lingering public outrage over Citizens United... influenced the court not one little bit on this issue”).
unlikely, and even the most staunch anti-corporate rights advocate would likely agree that corporations still need to be able to maintain certain protected rights (such as to contract and to be sued). And while corporate social responsibility programs, constituency statutes, and alternate corporate forms exist as possibilities for corporations to opt into, at the end of the day, the shareholder primacy model remains the firmly entrenched reality.

Benefit corporations have been gaining momentum, with legislation being introduced regularly in new states. Indeed, B Lab, a nonprofit that certifies benefit corporations as “B Corps”—an independent third-party standard—currently supports these efforts. Until more states adopt the benefit corporate legislation, however, the corporate form will not become a truly pervasive option. Moreover, pure competition between models will likely make the traditional corporate structure more attractive to most investors, as a higher profit margin is to be expected. While some individual investors who are particularly interested in socially responsible organizations and values may target their investments towards benefit corporations, presumably the more attractive option to the majority of investors will be the corporation that provides the greatest return on the investment. Thus, if left purely to market forces, it seems unlikely that a more socially-conscious and responsible corporate structure will, even gradually over time, become the norm. If comprehensive structural change is to be addressed, it would need to be across the board and applicable to all corporate and business forms. The

181 Karen H. Good, *I, Panel One: Citizens United: Reconciling Free Speech and Campaign Finance Regulation*, 3 CHARLOTTE L. REV. 327, 340–41 (2012) (responding to the question of how likely it is that Congress would enact a constitutional amendment overturning Citizens United, and stating that “[i]f you look at how many amendments have been proposed over the last two centuries and how many have actually succeeded, it is a miniscule percentage.”).
182 U.S. CONST. art. V; supra Part I.D.
183 Greenfield, supra note 12, at 8–9 (asserting that while there are those who disagree with the foundation of the shareholder primacy model, it is a practical reality in the United States).
184 BENEFIT CORP INFORMATION CENTER, supra note 77.
186 Investors seeing a return on their investment will naturally be more attracted to the corporate model that employs the shareholder primacy model, as it will likely result in greater profits.
188 See generally supra text accompanying note 186.
solution is to change the basic corporate structure and create a model for corporations that forces accountability by transplanting onto the corporate structure the interpersonal relationship checks, present in the interactions of natural persons in society. The core principle of the benefit corporation legislation, mandating consideration of factors other than shareholder wealth maximization and the promotion of at least a general public purpose at the election of the corporation, would achieve this balance.

Benefit Corporation legislation would impose by regulation what corporate society has not and cannot impose on itself—sensitivity to one’s impact upon society. Even while operating under a Real Entity Theory of corporate existence, corporations will never feel shame or take a moment’s pause to wonder if its peers would approve of whatever course of action it is about to undertake. But, a requirement for a general public purpose in a corporation’s by-laws could replicate the reciprocal relationship that individuals have with one another in society and that corporations, endowed with certain rights under the constitution, should have in society. Likewise, an option for specific additional purposes could replicate a reminder of what its founder would have wanted in future decisions and directions taken by the corporation. Even if not every corporation adopts this structure, the policy goals espoused by this corporate form are laudable and worth incentivizing as a means of repositioning the role corporations play in society and balancing corporate and individual power and interests.

Of course, one can argue that the interpersonal relationships that hold natural persons accountable for their actions are often ignored in reality and that there are countless everyday examples of natural persons acting solely out of self-interest. Part of this may come down to one’s view of the world—is the glass half full or half empty of good deeds and community (or only a quarter full)? That aside, and even conceding that there is breakdown of interpersonal relationships, when such relationships disappear to a degree where a person feels no connection to the community or humankind in general, the resulting behaviors by such individuals are at worst criminal and at best frowned upon by society.

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189 See Thomas Hobbes, Leviathan 188, 394 (C.B. MacPherson ed., 1968) (1651) (positing that humans are intrinsically self-interested and that the state develops out of necessity, not due to some instinctive human desire for community).

190 Living as a recluse is not valued by any society and complete divorce of an individual from others around him or her can lead to anti-social and criminal behavior. Three Theories of Criminal Behavior HubPages (July 21, 2011), http://seiken2.hubpages.com/hub/Three-Theories-of-Criminal-Behavior. See also, Wilson supra note 159.
responsible and accountability to one’s community are not always present in every human action. But such societal checks have not completely disintegrated, and where they have, it is generally not regarded as a positive development. See generally supra text accompanying note 190.


It is not unreasonable for society, through government, to regulate corporations in such a way. See generally U.S. CONST, art. I, § 8, cl. 3 (providing that Congress has the right to regulate interstate commerce); Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (holding that the requirements of due process and equal protection of the laws do not forbid the states to levy and collect a tax on foreign insurance companies as a condition of receiving a certificate of authority to do business in the state).

While corporations are “persons” for legal purposes, the Fourteenth Amendment is not a bar to many state laws that effectively limit a corporation’s right to contract business as it pleases. See generally supra text accompanying note 193.

For example, the Clayton Antitrust Act of 1914 regulates corporations by preventing anticompetitive practices through, among other restrictions, limiting price discrimination between different purchasers if it would create a monopoly, and limiting mergers and acquisitions where the effect could substantially lessen competition.

There are several issues with implementing this type of culture change in the United States with respect to corporations. Given the state-by-state method of incorporation, change of each individual state’s incorporation law on a state-by-state basis would be a slow process, requiring buy-in from all states. Although a small and step-change approach to reconfiguring the position of corporations in
society, it is still a step in the right direction. Most encouraging is 
Delaware’s recent passage of benefit corporation legislation.197

V. CONCLUSION

Complete overhaul of the current corporate structure by the 
addition of a public benefit requirement to every incorporated entity, 
and the associated duty to ensure it is met to every incorporated entity, 
is perhaps too ambitious and premature, given the newness of benefit 
corporations as a corporate structure. Moreover, it is impractical given 
the implementation issues noted above with respect to either a state-
by-state approach or sweeping federal regulations.

Yet the concern remains that corporations, while constitutionally 
afforded the same rights as natural persons in most instances, do not 
share in the checks on behavior and responsibilities to wider society 
that natural persons experience. Moreover, while a corporation’s free 
speech rights seemingly mirror those of an individual natural person 
at first glance, they are in fact amplified by the collective profit-making 
power of the entity and by the funds available to it from its general 
treasury.

As with most largescale movements, the likely path forward 
involves a step change. It is encouraging that at least portions of the 
American public appear to have an appetite for movement in this 
direction, and public discontent with the notion of corporate personhood remains,198 leading one to look for solutions within the 
framework of existing and well-established law.199 Additionally, the 
younger, working generation seems to value the ethical nature of 
companies when considering potential job placements, which could 
also help provide a general public swell of support for broader 
implementation of the benefit corporation form.200

197 S. 47, 147th Gen. Assembly (Del. 2013); Chase, supra note 16.
198 The Occupy Wall Street movement celebrated its 1-year anniversary with still 
   further protests on September 17, 2012, indicating a continuing dissatisfaction on the 
   part of at least portions of the public with respect to the current political and corporate 
   systems. Luke Johnson, Sarah Silverman, Lizz Winstead Take on 'Corporations Are People',  
   HUFFINGTON POST (Oct. 18, 2012, 2:40 PM), http://www.huffingtonpost.com/ 
   2012/10/18/sarahsilvermanlizzwinstead_n_1981051.html; Colin Moynihan, 185 
   Arrested on Occupy Wall St. Anniversary, N.Y. TIMES (Sept. 17, 2012), http:// 
   cityroom.blogs.nytimes.com/2012/09/17/protests-near-stock-exchange-on-occupy- 
   walls-anniversary/.
199 Good, supra note 181, at 340–41 (noting the difficulty with overruling Citizens 
   United via constitutional amendment).
200 Bill Snyder, Challenging Work and Corporate Responsibility Will Lure MBA Grads,  
   stanford.edu/news/research/montgomery_mba.html (noting that a survey of
The availability of a corporate form, where the attainment of public benefit can be mandated, is an important first step to foster discussion and comfort with the concept, even if only as an option. Although hardly a dramatic change, this would be a step in the right direction. In this sense, in the past four years, benefit corporations have made decent progress in obtaining recognition as a corporate form in nearly half of states, including those in different geographic regions. But more states need to introduce benefit corporate legislation so that the corporate form is at least a truly pervasive option and becomes more well-known, tested and refined throughout the country. B Lab, a nonprofit that certifies benefit corporations as B Corps, is currently engaged in an outreach campaign to further this goal, and, despite the limitations on derivative suits, the recent enactment of benefit corporation legislation in Delaware could signify a turning point. Now that some benefit corporation legislation has been enacted as an optional corporate structure, a means of incentivizing existing corporations or entrepreneurs who wish to form new corporations or convert their existing traditional corporations to benefit corporations, would help to promote further development of the benefit corporation concept and public awareness of the option. One means of doing this might be for the federal and/or state government to offer tax incentives to benefit corporations that are not available to traditionally incorporated entities who do not provide a general public benefit, albeit not at the full tax-exempt status available to nonprofit organizations.

As use of the benefit corporation form continues and the legislation is refined, mandatory transitions to incorporation of a public benefit purpose, while unlikely to ever be the option of all corporations, may become more palatable. Due to potential constitutional and/or political considerations, it may still be difficult to preempt state law with sweeping federal legislation or constitutional amendment, even after a significant uptake in the benefit

graduating MBAs at eleven top schools found that they rank corporate social responsibility high on their list of values and are willing to sacrifice a significant part of their salaries for this).
corporation form. Absent this, a supportive administration could offer funding incentives to the states in order to facilitate a more uniform uptake of mandatory benefit corporation form. Until a more accountable and responsible corporate form becomes normal, if not mandatory, across the States, we will continue to see an imbalance in power and influence between natural persons and their faceless associational incorporated form.