Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance

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ABSTRACT: This Article relates the concept of sustainability—that society must meet its present needs without infringing on future generations' ability to do the same—to corporate governance and seeks to reconcile any conflicts between the two. The largest of these conflicts is the commonly held view that companies must strive to maximize shareholder wealth and thus affirmatively neglect all other constituencies and considerations. The Article debunks this myth, both as a matter of law and as a function of social norms, market influences, and corporate-law theory. The Article then presents a new paradigm for corporate governance wherein companies voluntarily commit themselves to sustainable business practices. One of these new sustainable business models is the "B Corporation" certification that has garnered recent attention in the national business press. A second model hails from Oregon, where a newly enacted corporate-law provision encourages businesses to pledge to act sustainably.

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> *The point is, ladies and gentlemen, that green, for lack of a better word, is good. Green is right. Green works. Green clarifies, cuts through, and captures the essence of the evolutionary spirit. Green in all of its forms—green for life, for money, for love, knowledge—has marked the upward surge of mankind. And green, you mark my words, will not only save Teldar Paper, but that other malfunctioning corporation called the U.S.A.*
>
> —As adapted from *Wall Street* [1]

INTRODUCTION

Gordon Gekko's virtuoso performance in the 1987 film *Wall Street* needs some updating. While greed still reigns supreme in many circles, green businesses and green business practices are becoming increasingly prevalent, promising, and profitable. Indeed, as both the current climate-change and energy crises deepen and demand immediate action,[2] green—in all its forms: green energy, green business practices, green products and services—may be just the thing to revitalize American business and save "that other malfunctioning corporation" Gekko mentioned.

The problem is that "green" or "sustainable" business practices can sometimes entail profit sacrifices, particularly in the short term.[3] A conflict thus arises with the commonly held view that corporate directors and officers must strive to maximize shareholder wealth and affirmatively neglect other corporate constituencies like labor, creditors, suppliers, customers, the public, and the environment. This perceived duty to maximize shareholder profits lies at the heart of the conventional law-and-economics-laced view of corporate governance, thus imposing a formidable obstacle to corporations wishing to become more sustainable.[4]

1. WALL STREET (20th Century Fox 1987) (as modified by the author, replacing "greed" with "green" throughout). In the film, Michael Douglas's character Gordon Gekko extols the virtues of greed, not green, modeled on Ivan Boesky's 1986 commencement address at the University of California, Berkeley. *See* Ivan F. Boesky, Commencement Address at the University of California, Berkeley School of Business Administration (May 18, 1986) ("Greed is alright, by the way. I think greed is healthy. You can be greedy and still feel good about yourself."). Gekko's speech to fellow Teldar Paper shareholders highlights the agency costs the firm endures by having a bloated management team whose interests do not align with its shareholders.

2. *See generally, e.g.*, AL GORE, AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCY OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT (2006) (documenting the fast-approaching effects of global warming); SHEILA NEWMAN ET AL., THE FINAL ENERGY CRISIS (Sheila Newman ed., 2d ed. 2008) (offering suggestions for solving the energy crisis).

3. *See infra* Part I (explaining how sustainability can seem contrary to wealth maximization).

4. *See infra* Part II.A (explaining that the law does not require maximizing shareholder wealth).

This Article seeks to overcome that obstacle and to reconcile sustainable business practices with corporate-governance law and theory. It proceeds in three Parts. Part I offers a brief overview of sustainability and the prevailing methods of putting sustainable business concepts into practice in business organizations. Part II dissects the shareholder-wealth-maximization view and its basis in law, as a consequence of the market, and as a product of prevailing social norms. For such an oft-repeated principle, its foundation is surprisingly thin. Part II also examines the theoretical arguments for shareholder-wealth maximization and finds them unpersuasive in the end. Part III then presents a new paradigm for sustainable businesses whereby firms voluntarily commit themselves to sustainability principles through pledges in their corporate charters. The increasing popularity of this trend may well foretell a new dawn of corporate-governance law, norms, and practice.

I. A SUSTAINABILITY PRIMER

Sustainability, according to its first and best-known definition, entails "meeting the needs of the present without compromising the ability of future generations to meet their own needs."[5] The term reflected a concern "that nations [must] find ways to grow their economies without destroying the environment or sacrificing the well-being of future generations."[6] In short, sustainability urges "economic growth, but in a new form."[7] To be sustainable,

> A . . . society needs to meet three conditions: its rates of use of renewable resources should not exceed their rates of regeneration; its rates of use of non-renewable resources should not exceed the rate at which sustainable renewable substitutes are developed; and its rates of pollution should not exceed the assimilative capacity of the environment.[8]

The concept of sustainability has since expanded beyond economic development into a more generally applicable principle that—as

5. U.N. WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE 43 (1987) (defining sustainability in the context of sustainable development). This document is commonly known as the "Brundtland Report" after Norwegian Prime Minister Gro Harlem Brundtland, who led the Commission.

6. ANDREW W. SAVITZ WITH KARL WEBER, THE TRIPLE BOTTOM LINE: HOW TODAY'S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL, AND ENVIRONMENTAL SUCCESS—AND HOW YOU CAN TOO, at x (2006).

7. JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS 55 (1998). The provocative title is a reference to Polish poet Stanislaw Lec, who asked, "Is it progress if a cannibal uses a fork?" *Id.* at ix. Elkington—the "dean of the sustainability movement"—believes it can be, that in a world of "sustainable cannibalism," "sustainable capitalism" "would certainly constitute real progress." *Id.*

8. *Id.* at 55–56 (paraphrasing economist Herman Daly of the World Bank).

governments, businesses, or individuals—our actions must not impinge on future generations' options.[9] Sustainable businesses aspire to this standard by treading as lightly as possible on the earth and its natural resources and by developing products, services, and technologies that contribute to larger societal efforts to live more sustainably. This sort of business model may include behaviors—such as being more than minimally compliant with environmental regulations, being more than minimally generous towards employees, or paying more for goods and services that are sustainably harvested or humanely produced—that sacrifice profits in the short run. Studies have shown, however, that these practices on the whole pay for themselves and sometimes even enhance profitability.[10] As many firms have shown and seem to believe, it is quite possible, and profitable, to "do well by doing good."[11]

Two complementary ways of operationalizing sustainability in business have emerged in the management literature: one that applies a "triple bottom line" approach to measuring corporate performance and success, and a second method that calls for businesses to "gear up" through increasingly pervasive levels of sustainability.

A. THE TRIPLE BOTTOM LINE

The triple-bottom-line approach to sustainable business views corporate performance and success in three separate dimensions: "economic prosperity, environmental quality, and social justice."[12] That is, in addition to "the traditional bottom line of financial performance (most often expressed in terms of profits, return on investment (ROI), or shareholder value)," sustainable firms must also mind "their impact on the broader

9. *See id.* at 70–71 (noting the broadening of "sustainability"); *see also* JOHN R. EHRENFELD, SUSTAINABILITY BY DESIGN: A SUBVERSIVE STRATEGY FOR TRANSFORMING OUR CONSUMER CULTURE 6 (2008) (defining sustainability as "the possibility that human and other life will flourish on the planet forever" (emphasis omitted)).

10. *See infra* notes 115, 117 (citing studies).

11. *See, e.g.*, *Who's Doing Well by Doing Good*, BUS. WK., Jan. 29, 2007, at 53, 53 (mentioning Volkswagen, Motorola, Dell, Quest Diagnostics, Sony, and Royal Dutch Shell as examples); *see also* Cornelia Dean, *Executive on a Mission: Saving the Planet*, N.Y. TIMES, May 22, 2007, at F1 (profiling Ray Anderson of Interface, Inc.); Steven Greenhouse, *How Costco Became the Anti-Wal-Mart*, N.Y. TIMES, July 17, 2005, at BU2 (describing Costco's generosity toward its employees); Adi Ignatius, *Meet the Google Guys*, TIME, Feb. 20, 2006, at 40 (noting Google's dedication to its end users); Associated Press, *Wal-Mart on Track to Cut Fuel Use by 25%*, MSNBC.COM, July 17, 2007, http://www.msnbc.msn.com/id/19810648 (discussing the retailer's fuel-efficiency efforts, which reduced its greenhouse-gas emissions and fuel consumption and saved the company between $35 and $50 million annually).

12. ELKINGTON, *supra* note 7, at ix; *see also* CYNTHIA A. MCEWEN & JOHN D. SCHMIDT, LEADERSHIP AND THE CORPORATE SUSTAINABILITY CHALLENGE: MINDSETS IN ACTION 10 (2007) (exploring the complexity of the term "sustainability"). Because of its tripartite focus, triple-bottom-line sustainability is often described using a three-legged-stool metaphor, where an imbalance among the three legs will cause the stool to topple. The triple bottom line is also often associated with the alliterative tagline "people, planet, profit."

economy, the environment, and on the society in which they operate."[13] By using this approach in its accounting, a firm can measure its financial success as well as the extent to which it is "reducing (or increasing) the options available to future generations" during a particular reporting period.[14]

Triple-bottom-line adherents argue that a sustainable mindset not only helps the environment and society, it can also help firms' financial bottom lines. For example, efforts to reduce waste and pollution often result in greater efficiency and the discovery of innovative techniques and materials, all of which in turn can benefit the firm, its workforce, and the environment in both the short and the long runs.[15] Such opportunities often lurk in the zones where business interests and stakeholder interests overlap, "where the pursuit of profit blends seamlessly with the pursuit of the common good."[16] Thus, an energy company's triple-bottom-line efforts might focus on renewable-energy sources, an automobile company's efforts might focus on fuel efficiency and hybrid and fuel-cell technologies, and a food company's efforts might focus on healthful options and reduced packaging.[17] In each of these examples, a company can better its financial bottom line while also bettering its social and environmental bottom lines.[18]

13. SAVITZ, *supra* note 6, at xii. Elkington notes that, by considering society and the environment, the triple bottom line internalizes costs that firms would otherwise externalize. *See* ELKINGTON, *supra* note 7, at 92–94, 307 (discussing the "full cost accounting" method of "assessing the total cost of making, using, and disposing of products").

14. ELKINGTON, *supra* note 7, at 92. Triple-bottom-line proponents acknowledge that, like meaningful financial performance, meaningful social and environmental performances are too complex to be reduced to a single number. *Id.* at 69–96; SAVITZ, *supra* note 6, at xiii (explaining the difficulties of quantifying sustainability).

15. *See* ELKINGTON, *supra* note 7, at 314 (discussing DuPont's successful 99% reduction in toxic emissions at a Texas plant—"achieved through the use of closed-loop recycling, off-site reclamation, selling former wastes as products, and substituting raw materials"—which saved "$2.5 million of capital and more than $3 million in annual operating costs"); *see also* SAVITZ, *supra* note 6, *passim* (containing numerous such anecdotes throughout); Associated Press, *supra* note 11 (noting Wal-Mart's fuel-efficiency efforts).

16. *See* SAVITZ, *supra* note 6, at 22–27 (terming this overlap "the sustainability sweet spot").

17. *See id.* (analyzing General Electric and Pepsi).

18. There is also a negative aspect to the triple bottom line: a company that ignores its social and environmental responsibilities does so at its own peril. It may lose out to more responsible competitors in the marketplace and be left behind by technological advances. *See id.* at ch. 14 (relating the benefits of sustainable business accounting and the dangers of ignoring it); *see also* ELKINGTON, *supra* note 7, at 2 ("To refuse the challenge implied by the triple bottom line is to risk extinction."); Clive Thompson, *A Green Coal Baron?*, N.Y. TIMES, June 22, 2008, § MM (Magazine), at 29 (quoting the old saw: "If you're not at the table, you're going to be on the menu").

B. GEARING UP

A second strategy for incorporating sustainability principles into a business is the "gearing up" framework.[19] Like a manual transmission, the framework is designed to take a company from a level of bare compliance with applicable law to a place where sustainability is a systemic, integrated part of its strategy that transforms its business model and markets.[20] Viewed in this way, sustainability is not just a kinder, gentler way of conducting business; it is a "catalyst for growth and innovation" that can transform an entire industry, with committed, sustainable companies at the leading edge.[21]

The framework's first gear denotes compliance. In this first stage, a firm views the business case for sustainability with skepticism and, aside from generic corporate philanthropy, does little beyond comply with applicable labor and environmental regulations.[22] In second gear, firms voluntarily move beyond mere compliance, view sustainability as legitimate though mostly a public-relations matter, and focus their efforts on "eco-efficiency" and "measuring, managing, and reducing" the direct impact of their operations.[23] Companies that shift into third gear are more proactive in their efforts, often partnering with the government as well as "suppliers, customers, and others in their industry" to innovate sustainable solutions together.[24] By fourth gear, a firm has integrated sustainability principles into its strategy and business processes (starting with product or service development), putting the firm at a competitive advantage in its sector and at the same time creating value for all of its stakeholder groups.[25] In the fifth

19. *See* SUSTAINABILITY LTD., GEARING UP: FROM CORPORATE RESPONSIBILITY TO GOOD GOVERNANCE AND SCALABLE SOLUTIONS 34–37 (2004) [hereinafter GEARING UP], *available at* http://www.unglobalcompact.org/docs/news_events/8.1/gearing-up.pdf (laying out the "gearing up" framework); MCEWEN & SCHMIDT, *supra* note 12, at 9–19 (discussing the "gearing up" framework).

20. *See* GEARING UP, *supra* note 19, at 34 ("As companies or sectors shift through the gears of change, the levels of engagement and integration themselves change."); MCEWEN & SCHMIDT, *supra* note 12, at 9, 15 (discussing the first and last phases of "gearing up").

21. *See* NIKE, INC., INNOVATE FOR A BETTER WORLD: FY05-06 CORPORATE RESPONSIBILITY REPORT 4 (2006), *available at* http://www.socialfunds.com/csr/reports/Nike_FY05-06_Corporate_Responsibility_Report.pdf (letter from Nike CEO Mark Parker stressing the crucial importance of corporate responsibility).

22. *See* GEARING UP, *supra* note 19, at 35 ("No business case is perceived for going beyond compliance."); MCEWEN & SCHMIDT, *supra* note 12, at 14 (describing the first gear in the framework).

23. *See* GEARING UP, *supra* note 19, at 35 (describing companies that moved beyond compliance); MCEWEN & SCHMIDT, *supra* note 12, at 14 (summarizing the gear framework).

24. GEARING UP, *supra* note 19, at 36; *see* MCEWEN & SCHMIDT, *supra* note 12, at 14.

25. GEARING UP, *supra* note 19, at 36; *see* MCEWEN & SCHMIDT, *supra* note 12, at 15 ("'What you have to do is build responsibility into every aspect of the way you do business, so it's built in, not bolted on.'" (quoting a pharmaceutical manufacturer's vice president of corporate responsibility)).

and highest gear,[26] companies redesign or "reengineer" their business models, financial institutions, and markets to root out underlying causes of nonsustainability at "macro" (planetary ecological limits), "meso" (human-consumption demands), and "micro" (industry and company) levels.[27] To be sure, "for many people, most of the time, four gears is enough, [b]ut there are times when it is necessary to shift into fifth gear, or overdrive."[28]

Nike, the familiar sportswear and equipment company, explicitly follows the gearing-up framework.[29] According to a recent corporate-responsibility report, most of its current efforts lie in the fourth, or redesign, gear.[30] The company has deliberately rethought its entire design and production processes to reduce waste; to utilize improved, sustainable, and even reusable materials; and in some cases to eliminate the use of harmful materials altogether.[31] Specifically, the company has, among other efforts, instituted recycling programs that turn used athletic shoes into playing-field surfaces and replaced adhesives with stitching on some of its footwear lines.[32] Nike's efforts at "considered design" present an "enormous opportunity for innovation that can benefit [its] business and society," its supply chain and, one assumes, Nike's entire industry.[33]

26. There is also a reverse gear, in which companies simultaneously engage a forward gear and continue unsustainable business practices, either directly or by farming out such activities to others. *See* GEARING UP, *supra* note 19, at 36 (describing the reverse gear).

27. *See id.* at 33–36 (exploring companies' strategies at different levels); *see also* MCEWEN & SCHMIDT, *supra* note 12, at 15 (describing the fifth gear). As a firm shifts up through these gears, stakeholder engagement also increases. *See* GEARING UP, *supra* note 19, at 35–36 (noting that shifting up demands a focus shift and greater dedication); MCEWEN & SCHMIDT, *supra* note 12, at 14–15 (providing a summary outline of the gearing-up framework).

28. GEARING UP, *supra* note 19, at 36; *see also* MCEWEN & SCHMIDT, *supra* note 12, at 18 ("None of the companies [studied] have realized the [fourth integrate gear], and most do not recognize the [fifth redesign gear] as 'business-relevant.'").

29. In the spirit of full disclosure, Nike founder and chairman Phil Knight is a major benefactor of the author's university and law school. Although the company has had its issues regarding its overseas work conditions and practices, *see* ELKINGTON, *supra* note 7, at 132–33, the company's use of the gearing-up framework, extensive corporate-responsibility reporting, and familiarity recommend its use as an example.

30. *See* NIKE, INC., *supra* note 21, at 11–12, 51–73 (presenting Nike's recent plan).

31. *See id.* at 52 (discussing the new design). In its 2005–2006 corporate-responsibility report, Nike stated:

> We see three choices: (1) [c]ontinue with business as usual, ignoring the impact[;] (2) [a]ddress waste and impact of chemistry where we see them occur[; and] (3) [i]nfluence the beginning of the process. The first is not an option. The second will only produce incremental improvements. The final choice is where we see real potential for impact and system change.

Id. One tangible result of Nike's sustainability efforts is its new "considered" line of sustainable athletic footwear and apparel. *See* Nike, Nike Considered, http://www.nike.com/nikebiz/nike considered (last visited Feb. 15, 2009).

32. *See* NIKE, INC., *supra* note 21, at 52 (discussing changes in the design of Nike products).

33. *Id.* at 53.

These ways of operationalizing sustainability in business are designed to coincide with profitability and in practice they often do. To the extent that they do not increase profitability, however, and perhaps even sacrifice profits, sustainable business efforts go against the ingrained corporate principle of shareholder-wealth maximization. The next Part looks at this apparent conflict, analyzing the sources of the commonly held view that the purpose, and indeed duty, of corporations is to maximize shareholder wealth.

II. SHAREHOLDER-WEALTH MAXIMIZATION

There is at least a perception that both sustainability and the sustainable business practices discussed in the previous Part are diametrically opposed to the proper role of the corporation and the obligation of corporate fiduciaries to maximize shareholder wealth.[34] Of course, as many green businesses have shown, this is often not the case.[35] But from where did this understanding spring? To answer the question requires a look at the different factors that influence corporate decisionmakers: the law, to be sure, but also market pressures and social norms.[36] The following Sections discuss these influences and how each might impact corporate efforts to become sustainable businesses.

A. LAW

Corporate law, broadly defined, derives from three distinct sources: internal requirements set forth in the firm's charter and bylaws, state statutory requirements, and decisional law interpreting statutory provisions and addressing additional issues on which the statutes are silent.[37] As this Part demonstrates, none of these sources imposes a legal requirement that

34. For an example of this view of the corporation and its fiduciaries' duties, see STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS §§ 1.4(B), 9.2, 9.3 (2002).

35. *See, e.g.*, *supra* note 11 and accompanying text (noting businesses that have succeeded in making sustainability profitable); *infra* notes 115, 117 and accompanying text (discussing studies showing a positive relationship between socially responsible business practices and financial performance).

36. *See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 85–99 (1999) (identifying four categories of regulators in cyberspace and elsewhere: "the law, social norms, the market, and architecture"); *see also* Judd F. Sneirson, *Soft Paternalism for Close Corporations: Helping Shareholders Help Themselves*, 2008 WIS. L. REV. 899, 918–20 (applying Lessig's categories to the problem of minority-shareholder oppression in close corporations). Lessig's fourth category—architecture—includes physical or technical constraints that make individual behavior possible or impossible, easier or more difficult. It plays a smaller role in corporate decisionmaking and so I do not discuss it here.

37. *See* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 168 (2008) (identifying three sources of corporate law: "(1) 'internal' corporate law (that is, the requirements set out in individual corporations' charters and bylaws); (2) state corporate codes; and (3) corporate case law").

corporate fiduciaries maximize shareholder wealth and eschew sustainable and socially responsible business practices.

1. Charters and Bylaws

Corporate charters are foundational documents filed with Secretaries of State as part of the incorporation process. They set forth the "essential rules of the road" for the firm, "the basic terms under which it will operate."[38] State codes typically require that charters contain certain basic information, such as the new corporation's name and mailing address, the names and addresses of the firm's incorporators and registered agent, and the number of authorized shares.[39] State codes also typically permit incorporators to include optional provisions, such as provisions exculpating directors from personal liability for duty-of-care breaches,[40] provisions authorizing multiple classes of stock,[41] and statements setting forth or limiting the corporation's purpose.[42]

While a corporation's founders may certainly express in the charter that the firm is organized for the purpose of maximizing shareholder wealth, few actually do.[43] Indeed, those firms that do state a corporate purpose typically use generic, broad language to the effect that "the purpose of the corporation is to engage in any lawful act."[44] Thus, most now view charter recitations of corporate purposes as "mere formalities."[45]

Corporate bylaws are another potential source of an internal requirement to maximize shareholder wealth. Bylaws govern a corporation's

38. BAINBRIDGE, *supra* note 34, § 1.2, at 5; *see id.* § 2.3, at 41–42 (describing the requirements of articles of incorporation).

39. *See* DEL. CODE ANN. tit. 8, § 102(a) (2008) (specifying the information that a certificate of incorporation must include); MODEL BUS. CORP. ACT § 2.02(a) (2008) (same).

40. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (permitting firms to include in their charters provisions limiting or eliminating personal liability for duty-of-care breaches); MODEL BUS. CORP. ACT § 2.02(b)(4) (same).

41. DEL. CODE ANN. tit. 8, § 102(a)(4); MODEL BUS. CORP. ACT § 6.01(a).

42. *See* MODEL BUS. CORP. ACT § 2.02(b)(2)(i) (stating that the articles of incorporation "must set forth . . . the purpose for which the corporation is organized"). Delaware requires such a statement, although it is "sufficient to state . . . that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized." DEL. CODE ANN. tit. 8, § 102(a)(3).

43. *See* Stout, *supra* note 37, at 169 (suggesting that incorporators could "easily include . . . a recitation of the *Dodge v. Ford* view that the corporation in question 'is organized and carried on primarily for the profit of the stockholders'" but rarely do (quoting Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919))). Indeed, it is more common to see the opposite sort of provision, stating that the company will consider nonshareholder constituencies in determining what is in the corporation's best interests. *See infra* Part III.

44. *See* DEL. CODE ANN. tit. 8, § 102(a)(3) (explaining that this language is a sufficient statement of the corporation's purpose). This sort of expansive language helped lead to the demise of the ultra vires doctrine. *See generally* BAINBRIDGE, *supra* note 34, § 2.7 (explaining that such broad language helped erode the ultra vires doctrine).

45. BAINBRIDGE, *supra* note 34, § 2.3(A), at 41 n.1.

internal affairs.[46] They typically address "such matters as number and qualifications of directors, board vacancies, board committees, quorum and notice requirement[s] for shareholder and board meetings, procedures for calling special shareholder and board meetings, any special voting procedures, any limits on the transferability of shares, and titles and duties of the corporation's officers."[47] Despite all this detail, corporate bylaws rarely address decisionmaking criteria such as shareholder-wealth maximization.

In short, corporations do not typically bind themselves with internal requirements in their charters or bylaws to maximize shareholder wealth. Rather, these internal sources of corporate law generally leave such matters to the discretion of corporate boards and officers. Boards and officers may strive for shareholder-wealth maximization or not, so long as they act according to external sources of corporate law, namely, corporate statutes and decisional law.

2. Statutory Law

Statutory law, both in Delaware and under the Model Business Corporation Act, likewise does not require corporate boards and officers to maximize shareholder wealth. If anything, by expressly authorizing departures from shareholder-wealth maximization, state corporate codes affirmatively undercut the notion that corporate law requires profit maximization.[48]

Generally speaking, corporate codes enable corporate formation and activity more than they limit them.[49] One such enabling provision is an "other constituency" statute, which expressly authorizes corporate decisionmakers to consider more than just shareholders in determining what decisions are in the firm's best interests.[50] Most states adopted these provisions in response to the surge of corporate-takeover activity in the

46. *Id.* § 2.3(B), at 43.

47. *Id.*; *see also* JEFFREY D. BAUMAN, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: STATUTES, RULES, AND FORMS 692–707, 713–28 (2008 ed.) (reprinting form bylaws).

48. *See* Stout, *supra* note 37, at 169 ("Do [state corporation codes] limit the corporate purpose to shareholder wealth maximization? To employ the common saying, the answer is not just 'no' but 'hell no.'").

49. *See* MODEL BUS. CORP. ACT § 3.01(a) (2008) (regarding corporate purposes); *cf.* DEL. CODE ANN. tit. 8, § 102(a)(3) (permitting corporate charters to state that the firm's purpose "is to engage in any lawful act or activity"). For this reason, corporate codes are generally considered enabling statutes. *See* BAINBRIDGE, *supra* note 34, § 2.1, at 40 (recounting the history of enabling laws).

50. *See, e.g.*, IND. CODE § 23-1-35-1(d) (1998) ("A director may, in considering the best interests of a corporation, consider the effects of any action on shareholders, employees, suppliers, and customers of the corporation, and communities in which offices or other facilities of the corporation are located, and any other factors the director considers pertinent.").

1980s, often prompted by an out-of-state hostile-takeover attempt of a local corporation.[51] These statutes provided cover for managers seeking to rebuff merger proposals that were generous to the firm's shareholders but entailed plant closures and layoffs that would harm the firm's employees and localities.

Thirty-three states currently have such provisions. True to their origins, about a third of these are couched in, and therefore limited to, the takeover context.[52] The rest contain no such limitation, however.[53] Whether or not they are so limited, such provisions expressly permit decisions that elevate other, nonshareholder considerations—such as labor and local communities—over the maximization of shareholder wealth.[54] Accordingly, these provisions, if anything, undermine the position that there is a legal duty to maximize shareholder wealth.

51. *See, e.g.*, Shani L. Fuller, Comment, *Shareholders, Directors, and Other Constituencies: Who's on First in Oregon's Corporate Takeover Law*, 30 WILLAMETTE L. REV. 347, 352 n.39 (1994) (noting the history of Oregon's constituency statute). These origins help explain why the jurisdictionless Model Business Corporation Act has no such provision.

52. *See* ARIZ. REV. STAT. ANN. § 10-2702 (2004); CONN. GEN. STAT. § 33-756(d) (2007); IDAHO CODE ANN. § 30-1-602 (2005); IOWA CODE § 490.1108A (2007); KY. REV. STAT. ANN. § 271B.12-210(4) (West 2006); LA. REV. STAT. ANN. § 12:92(G) (1994); MD. CODE ANN., CORPS. & ASS'NS § 2-104(b)(9) (West 2008); MO. REV. STAT. § 351.347(1) (2000); OR. REV. STAT. § 60.357 (2007); R.I. GEN. LAWS § 7-5.2-8 (1999); S.D. CODIFIED LAWS § 47-33-4 (2002); TENN. CODE ANN. § 48-103-204 (West 2008). Although Delaware has no such provision, it has, in its takeover jurisprudence, expressed the same general sentiment. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (providing business-judgment protection to reasonable responses to threats to the corporation and inviting directors to assess threats to the corporation by considering "the impact on . . . [its] creditors, customers, employees, and perhaps even the community generally"). This sentiment is conditioned with the possible caveat that some benefit, however remote, must accrue to the shareholders. *See* 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."). For further discussion of this caveat, see *infra* Part II.A.3.

53. *See* FLA. STAT. § 607.0830(3) (2008); GA. CODE ANN. § 14-2-202(b)(5) (2003); HAW. REV. STAT. § 414-221(b) (2004); 805 ILL. COMP. STAT. 5/8.85 (2006); IND. CODE § 23-1-35-1(d) (1998); ME. REV. STAT. ANN. tit. 13-C, § 832 (2005); MASS. GEN. LAWS ch. 156B, § 65 (2006); MINN. STAT. § 302A.251(5) (2008); MISS. CODE ANN. § 79-4-8.30 (2001); NEB. REV. STAT. § 21-2432(2)(2007); NEV. REV. STAT. ANN. § 78.138(4) (2007); N.J. STAT. ANN. § 14A:6-1(2) (West 2003); N.M. STAT. ANN. § 53-11-35(D) (West 2003); N.Y. BUS. CORP. LAW § 717(b) (McKinney 2003); N.D. CENT. CODE § 10-19.1-50(6) (2005); OHIO REV. CODE ANN. §§ 1701.13(F)(7), 1701.59(A), (D), (E) (LexisNexis 2004); 15 PA. CONS. STAT. § 515 (2001); VT. STAT. ANN. tit. 11A, § 8.30 (1997 & Supp. 2008); VA. CODE ANN. § 13.1-727.1 (2006); WIS. STAT. § 180.0827 (2005/2006); WYO. STAT. ANN. § 17-16-830(e) (2007).

54. In a recent essay, Jonathan Macey belittles these provisions as mere "factoids," to be used only as "tie-breakers" where taking these other constituencies' interests into account "does not harm shareholders in any demonstrable way." Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 179 (2008). While Macey's position may comport with language in the *Revlon* decision, it is at odds with the business-judgment rule. *See Revlon*, 506 A.2d at 182 (acknowledging a board's ability to consider other constituencies); *infra* Part II.A.3 (arguing that corporate law does not require directors and officers to maximize shareholder profits, except in limited circumstances).

A second enabling statutory provision that departs from shareholder-wealth maximization permits corporations to make charitable donations.[55] Although these provisions do not limit the value of permissible gifts, courts and commentators generally imply such a limitation.[56] Jurisdictions are split on whether donations must benefit the firm on some level: seven states allow donations regardless of a corporate benefit, nineteen states require a corporate benefit (however tenuous), and twenty-four states (including Delaware) do not specify any such requirement.[57]

While many corporate charitable contributions undoubtedly carry public-relations benefits,[58] they on the whole detract from, rather than maximize, shareholder wealth. As such, these provisions further support the conclusion that corporate codes do not require shareholder-wealth maximization and expressly permit profit-sacrificing departures from the shareholder-centric view.[59]

One additional statutory provision bears mentioning here. Corporate law primarily relies on shareholders to prosecute breaches of directors' and officers' fiduciary duties.[60] Some states, including Model Business Corporation Act jurisdictions, codify this arrangement in their statutes;[61] other jurisdictions (including Delaware) do so in civil-procedure rules.[62] While these provisions do empower shareholders, they do not obligate

55. *See, e.g.*, DEL. CODE ANN. tit. 8, § 122(9) (2001) (empowering corporations to "make donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof"); MODEL BUS. CORP. ACT § 3.02(13), (15) (2008) (empowering corporations "to make donations for the public welfare or for charitable, scientific, or educational purposes" and "to make . . . donations . . . that further[] the business and affairs of the corporation"); *see also* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 767–68 (2005) (advancing a law-and-economics argument for corporate philanthropy).

56. *See, e.g.*, A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 587–90 (N.J. 1953) (requiring charitable gifts to be modest in amount and untainted by conflicts of interest); Ray Garrett, *Corporate Donations*, 22 BUS. LAW. 297, 301 (1967) ("Donations should be reasonable in amount in light of the corporation's financial condition . . . ."); *see also* BAINBRIDGE, *supra* note 34, § 9.6, at 436 & n.3 (citing cases).

57. *See* JESSE H. CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS 39 (6th ed. 2004) (summarizing jurisdictions' approaches to corporate charitable donations). For examples of these variants, see N.Y. BUS. CORP. LAW § 202(12) (McKinney 2003) (authorizing charitable contributions regardless of corporate benefit), VA. CODE ANN. §§ 13.1-627(A)(12), (13) (2006) (requiring that contributions further corporate interests), and DEL. CODE ANN. tit. 8, § 122(9) (specifying no such requirement).

58. *See* BAINBRIDGE, *supra* note 34, § 9.6, at 437 (suggesting that "charitable giving is simply another form of advertising").

59. *See, e.g.*, *A.P. Smith*, 98 A.2d at 590 (rejecting a shareholder challenge to a $1500 corporate donation to Princeton University).

60. The company can also sue for breaches of fiduciary duties itself, and in a minority of jurisdictions directors can institute derivative actions. *See, e.g.*, N.Y. BUS. CORP. LAW § 720(b) (McKinney 2003) (allowing officers, directors, and corporations to bring suit).

61. REV. MODEL BUS. CORP. ACT §§ 7.40–7.46 (2008).

62. *See* DEL. CT. CH. R. 23.1; *see also* FED. R. CIV. P. 23.1.

directors and officers to act solely (or at all, for that matter) in shareholders' interests. As the next Section notes, fiduciary obligations generally run to the corporation,[63] hence the need for the equitable derivative-suit device. Shareholders merely prosecute the actions—and they do so on behalf of, and for the benefit of, the entire firm.

3. Decisional Law

The argument for a legal duty to maximize shareholder profits finds its strongest support in decisional law. Often, the starting point for a discussion of fiduciary obligations is the customary notation that corporate directors and officers must act loyally, in good faith, reasonably carefully, and generally in the best interests of the corporation.[64] Many decisions pose this last part differently, writing that fiduciaries must act in the best interests of the corporation *and its shareholders*.[65] Of course, at least in the long run, there may not even be a discernable difference between these two statements.[66] That is, what is in the long-term best interests of the entire firm will, in the long term, redound to the benefit of its shareholders.[67]

63. *See* BAINBRIDGE, *supra* note 34, § 8.1, at 362 ("Fiduciary duties of officers and directors are generally owed to the corporation as an entity, rather than to individual shareholders."). While the duties of care, good faith, and loyalty run to the firm, other fiduciary duties, like the duty to respect the shareholder franchise and the duty not to abdicate authority, run directly to shareholders and do not necessitate derivative actions. *See generally* Grimes v. Donald, 673 A.2d 1207 (Del. 1996) (involving a direct stockholder suit against the board for abdicating its authority); Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988) (involving a direct shareholders' alleging improper interference with the shareholder franchise).

64. *See* 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 n.8 (2008) ("'It is well settled that directors owe fiduciary duties to the corporation.'" (quoting N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007), among other cases)).

65. *See id.* ("'It is well established that the directors owe their fiduciary obligation to the corporation and its shareholders.'" (quoting *Gheewalla*, 930 A.2d at 99, among other cases)); *see also* 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 shareholders."). For a cogent explanation of this inconsistency, see Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 590–96 (1992) (positing that courts speak in terms of the corporation's best interests when resolving a "vertical conflict of interest" between the firm and its managers, and the shareholders' best interests when resolving a "horizontal conflict of interest" between shareholders and other stakeholder groups).

66. *See* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 285 (1998) ("'[T]he best interests of the corporation' are generally understood to coincide with the best long-term interests of the shareholders.").

67. *See* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1439 (1993) ("In most situations, shareholder and nonshareholder constituency interests coincide."); Veasey & Di Guglielmo, *supra* note 64, at 764–65 & n.9 (acknowledging that "operating a business in an environmentally

From subtle statements such as this, and from a very small number of cases addressing the issue directly,[68] many scholars posit that corporate decisional law imposes a duty on fiduciaries to maximize shareholder wealth, and as a corollary to that duty, eschew the interests of all nonshareholder constituencies.[69] The case for such a duty is far from strong, however, and even if such a duty exists, fiduciaries' business judgments are so well protected under the business-judgment rule that any such duty is essentially meaningless.

One of the few cases squarely addressing the issue of shareholder-wealth maximization is the casebook chestnut *Dodge v. Ford Motor Co.*[70] In *Dodge v. Ford*, John and Horace Dodge—then minority shareholders in the Ford Motor Company—challenged the decision of company founder and majority shareholder Henry Ford to suspend the company's practice of paying special dividends.[71] Ford instead sought to direct the firm's resources toward expanding its business, lowering the price of its cars, and paying the company's workers better wages.[72] While these decisions may seem

sustainable way" may make "good business sense and therefore increase[] long-term financial value").

68. *See* BAINBRIDGE, *supra* note 34, § 9.2, at 410 (candidly noting that "there are surprisingly few authoritative precedents on point").

69. *See, e.g.*, Smith, *supra* note 66, at 278 ("Corporate directors have a fiduciary duty to make decisions that are in the best interests of the shareholders."). Some progressive corporate-law commentators take this view as well, *see, e.g.*, JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 36 (2004) (stating that "directors have a legal duty to put shareholders' interests above all other and no legal authority to serve any other interests" and basing his book on this premise), although perhaps they do so just to set up a straw man and "excite their base." *Id.*; *see also* Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 89, 89, 91–95 (2005) (presenting the shareholder-primacy model but then arguing, among other things, that corporations should serve society as a whole); Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1023, 1051 (1996) (positing that corporate managers must act as shareholders' agents, but then arguing that shareholders do not uniformly desire wealth maximization); Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263, 1283–1301 (1992) (bemoaning "stockholder-centrism" and arguing for a new model of corporate governance).

70. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919); *see also* BAINBRIDGE, *supra* note 34, § 9.2, at 410–11 n.1 ("*Dodge* . . . establish[ed] a basic rule for board of directors; namely, that the board has a duty to maximize shareholder wealth."). *Dodge v. Ford Motor Co.* is often the only case cited as authority for a wealth-maximization duty. *See* Stout, *supra* note 37, at 165 & n.14 (noting this and citing BAKAN, *supra* note 69, at 36, and ROBERT CHARLES CLARK, CORPORATE LAW 679 (1986)).

71. *Dodge*, 170 N.W. at 671. The company had five other shareholders in addition to Ford and the Dodge brothers, and had regularly paid out generous special dividends. *Id.* at 670; *see* BAINBRIDGE, *supra* note 34, § 9.2, at 411 (stating that between 1911 and 1915 the company "regularly paid huge 'special dividends' totaling over $40 million").

72. *Dodge*, 170 N.W. at 671.

reasonable enough, Ford inadvisably testified that he believed the company made too much money and he preferred it to be less profitable.[73]

Seizing on this testimony, the Dodge brothers argued, and the Supreme Court of Michigan agreed, that Ford's actions perverted the corporation's purpose. The court famously wrote:

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among its stockholders in order to devote them to other purposes.[74]

Although the court ultimately deferred to much of Ford's business judgment, it ordered the company to declare a special dividend.[75]

While conventional wisdom attributes the Dodge brothers' victory to the court's shareholder-wealth-maximization imperative, recent commentators have argued that the case turned on entirely different grounds. These commentators suggest that Ford, as a controlling shareholder, breached his duty of good faith to the Dodge brothers as minority shareholders by withholding special dividends to perhaps freeze them out.[76] According to this interpretation, *Dodge*'s oft-quoted passage about shareholder profit is just famous dicta—and old Michigan dicta at that. While the 1919 decision remains a staple of law-school casebooks, courts outside of Michigan do not cite the case very often, and when they

73. *See id.* at 683–84 (stating that the company's profits should be shared with the public, by reducing the price of Ford cars); *see also* Macey, *supra* note 54, at 181–84 (suggesting that, had Ford been less forthright on the stand, he would have easily won the case).

74. *Dodge*, 170 N.W. at 684 ("[I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholder and for the primary purpose of benefiting others . . . .").

75. *Id.* at 685 (upholding the dividend fixed by the trial court). The court did not interfere with Ford's decision to expand the company's operations, however, in a straightforward application of the business-judgment rule. *See id.* at 684 (deferring to the company's judgment). Interestingly, the Dodge brothers used this money to finance their eponymous competitor, Dodge Brothers Company. *See* BAINBRIDGE, *supra* note 34, § 9.2, at 412 n.4 (suggesting that Ford's decision to cease special dividends "was a shrewd and ruthless attempt to stifle competition" and speculating that Ford did not testify as to this purpose because he "feared antitrust litigation" and "didn't want to look like a robber baron").

76. *See* Smith, *supra* note 66, at 318–19 (describing fiduciary duties of care within horizontal conflicts of interest); *see also* Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New* Lex Mercatoria, 83 DENV. U. L. REV. 101, 135–36 (2005) (noting that the Michigan Supreme Court wanted the "minority shareholders to be free from oppression"); Stout, *supra* note 37, at 167 (noting that Ford wanted to keep the Dodge brothers from amassing enough capital to start their own car company).

do, most courts cite it as authority on close-corporation oppression, not as authority for a fiduciary duty to maximize shareholder profits.[77]

The *Dodge* case, for what it is worth, represents a high-water mark for a shareholder-wealth-maximization duty. Subsequent cases are few and far between and relatively obscure. One of these is *Katz v. Oak Industries, Inc.*, a Delaware case in which bondholders sought to enjoin an exchange offer that they felt unfairly elevated shareholder interests above their own.[78] In rejecting the bondholders' challenge and agreeing with the board's priorities, the Chancery Court wrote, "It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders."[79] Helpful language, to be sure, but like *Dodge* before it, *Katz* lives on in the case law not as an authority for shareholder-wealth maximization but rather as authority for a different proposition entirely: that where bondholder and stockholder interests collide, boards may favor shareholder interests and owe no extra-contractual fiduciary duties to bondholders.[80]

Two more cases, one from Missouri and the other from Ohio, likewise speak in passing of a duty to maximize shareholder profits. In the Missouri case, a minority shareholder sought a court-ordered dissolution on the ground that the company—a closely held corporate country club—"made no conscientious effort to . . . produce a profit for the corporation . . . [or] to pay a reasonable dividend to the stockholders."[81] The court generally

77. *See* Stout, *supra* note 37, at 166 (suggesting that law professors use a more recent case to teach close-corporation oppression). Delaware courts have cited *Dodge* only three times: twice as authority on the close-corporations issue, *see* Hall v. John S. Isaacs & Sons Farms, Inc., 163 A.2d 288, 295 (Del. 1960) (referencing freeze outs); Blackwell v. Nixon, Civ. A No. 9041, 1991 WL 194725, at *4 (Del. Ch. Sept. 26, 1991) (referencing minority-shareholder oppression), and once, ironically, in dissent in support of business-judgment-rule deference, *see* E. I. Du Pont De Nemours & Co. v. Clark, 88 A.2d 436, 444 (Del. 1952) (Tunnell, J., dissenting).

78. Katz v. Oak Indus., Inc., 508 A.2d 873, 878 (Del. Ch. 1986).

79. *Id.* at 879. The court further stated:

> It seems likely that corporate restructurings designed to maximize shareholder values may in some instances have the effect of requiring bondholders to bear greater risk of loss and thus in effect transfer economic value from bondholders to stockholders. . . . But if courts are to provide protection against such enhanced risk, they will require either legislative direction to do so or the negotiation of indenture provisions designed to afford such protection.

Id.

80. *See id.* ("The terms of the contractual relationship agreed to and not broad concepts such as fairness define the corporation's obligation to its bondholders."). For cases citing *Katz*'s wealth-maximization headnote, see Pittelman v. Pearce, 8 Cal. Rptr. 2d 359, 361 (Cal. Ct. App. 1992) (citing *Katz* for the bondholder proposition); Gans v. MDR Liquidating Corp., No. 9630, 1998 WL 294006, at *3 n.8 (Del. Ch. May 22, 1998) (same); Cont'l Ill. Nat'l Bank & Trust Co. v. Hunt Int'l Res. Corp., Nos. 7888, 7844, 1987 WL 55826, at *4 (Del. Ch. Feb. 27, 1987) (same).

81. Long v. Norwood Hills Corp., 380 S.W.2d 451, 454 (Mo. Ct. App. 1964). Plaintiff also argued that the company abandoned its purpose, namely earning money for its stockholders. *Id.* at 476.

agreed with plaintiff that "the ultimate object of every ordinary trading corporation is the pecuniary gain of its stockholders" and admonished the firm to remain mindful of this purpose.[82] The court, however, ultimately deferred to management's application of company profits toward improving its facilities.[83] In the Ohio case, as part of an exegesis on fiduciary duties, the business-judgment rule, and the history of American corporate law, the court wrote: "[T]he sole duty of a corporation's officers is to maximize shareholder wealth."[84] Again, subsequent cases have made little of this dicta, only citing the case for Ohio authority on the business-judgment rule and for the applicable standard for approving derivative and class-action suit settlements.[85]

It is thus at best a stretch to say that *Dodge*'s "theory of shareholder wealth maximization has been widely accepted by courts over an extended period of time."[86] Perhaps the American Law Institute's restatement-like *Principles of Corporate Governance* better reflects the current state of modern corporate law.[87] According to the ALI, "a corporation *should* have as its objective the conduct of business activities with a view to *enhancing* corporate profit and shareholder gain."[88] Enhancing is not the same as maximizing,[89] and the drafters were careful to note that such enhancement is to be over the long term.[90] *The Principles of Corporate Governance* also permits firms to pursue limited objectives beyond profit and shareholder gain:

82. *Id.*

83. *Id.* at 478.

84. Granada Invs., Inc. v. DWG Corp., 823 F. Supp. 448, 459 (N.D. Ohio 1993) (citing Daniel H. Pink, *The Valdez Principles: Is What's Good for America Good for General Motors?*, 8 YALE L. & POL'Y REV. 180 (1990)); *see also id.* ("[Even as] calls arose for corporations to be more socially responsible . . . the principle that a corporate officer's overriding duty is to maximize shareholder wealth remained intact.").

85. *See, e.g.*, *In re* Broadwing, Inc. ERISA Litig., 252 F.R.D. 369, 372 (S.D. Ohio 2006) (stating that the court will rely on Ohio authority regarding the business-judgment rule and for the applicable standard for approving derivative and class-action suit settlements); ICSC Partners, L.P. v. Kenwood Plaza L.P., 688 N.E.2d 5, 9 (Ohio Ct. App. 1996) (citing *DWG Corp.* for the factors that a court will consider in deciding "whether a settlement is fair, reasonable, and adequate"); N. Coast Cable Co. v. Howley, No. 64785, 1994 WL 78085, at *2 (Ohio Ct. App. Mar. 10, 1994) (same).

86. *See* BAINBRIDGE, *supra* note 34, § 9.2, at 413 (discussing the difference between *Barlow* and *Dodge* and the acceptance of *Dodge*'s theory).

87. AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1994).

88. *Id.* § 2.01(a) (emphasis added).

89. *See* William W. Bratton, *Confronting the Ethical Case Against the Ethical Case for Constituency Rights*, 50 WASH. & LEE L. REV. 1449, 1456 (1993) (noting that the ALI eschews the term "maximization" for the more equivocal term "enhancement").

90. AM. LAW INST., *supra* note 87, § 2.01(a) cmt. f ("[E]nhancing corporate profit and shareholder gain . . . does not mean that the objective of the corporation must be to realize corporate profit and shareholder gain in the short run."); *see also id.* illus. 1 & 2 (providing examples to explain the analysis and recommendation).

> Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business . . . may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of businesses; and may devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.[91]

Moreover, even if one subscribes to the view that corporate decisional law requires fiduciaries to maximize shareholder wealth in the abstract, the business-judgment rule affords corporate decisionmakers so much latitude as to render such a duty unenforceable and meaningless.[92] Under the business-judgment rule, courts defer to fiduciaries' business judgments so long as there is no conflict of interest present and the decision is reached conscientiously, on the basis of reasonably full information, and with a good-faith belief that the decision is in the best interests of the firm.[93] So long as these predicates are met, company decisions, including decisions departing from a wealth-maximizing objective, will stand.

One vivid example of the rule in action is *Shlensky v. Wrigley*, the case involving the Chicago Cubs and Phillip Wrigley's famous refusal to install stadium lights and hold evening games at Wrigley Field.[94] When a

91. *Id.* § 2.01(b).

92. *See* Macey, *supra* note 54, at 180–81 (arguing that corporate law requires shareholder-wealth maximization but conceding that, like the speed limit on the Merritt Parkway, it is not enforced because enforcement would prove to be difficult or impossible); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2072 (2001) (noting that "corporate law's instructions to managers" to enhance shareholder gain do not "determine what they do"); Smith, *supra* note 66, at 286 ("[T]he business judgment rule makes the shareholder primacy norm virtually unenforceable against public corporations' managers."); *see also* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 651 (2006) ("Although *Dodge v. Ford* is frequently cited, no modern court has struck down an operational decision on the ground that it favors stakeholder interests over shareholder interests."); Thomas W. Joo, *Race, Corporate Law, and Shareholder Value*, 54 J. LEGAL EDUC. 351, 361 (2004) ("Directors' supposed duty to 'maximize' shareholder wealth is a toothless one. No courts actually require management to maximize shareholder wealth . . . . Indeed, such a showing would be all but impossible.").

93. *See* Joy v. North, 692 F.2d 880, 885–86 (2d Cir. 1982) (presenting rationales for the business-judgment rule); William T. Allen et al., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1297 (2001) (describing the business-judgment rule as "an expression of a policy of non-review of a board of directors' decision"); *see also* BAINBRIDGE, *supra* note 34, § 6.2 (viewing the business-judgment rule as an abstention doctrine). For a discussion of whether the business-judgment rule should apply to corporate officers or only to directors, see Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439 *passim* (2005). For an in-depth analysis of the "reasonably full information" predicate, see Judd F. Sneirson, *Doing Well by Doing Good: Leveraging Due Care for Better, More Socially Responsible Corporate Decisionmaking*, 3 CORP. GOVERNANCE L. REV. 438, 465–68 (2007) (arguing that the duty of care's reasonably full information component requires fiduciaries to assess and consider effects on the firm's nonshareholder constituencies).

94. Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968). The corporation ultimately installed lights, and the Chicago Cubs played their first evening game on August 8, 1988. Carrie

shareholder challenged the decision on the grounds that it sacrificed shareholder profits, Wrigley responded that baseball was a daytime sport and that nighttime games might adversely impact Wrigley Field's neighborhood.[95] Because Wrigley and the board believed in good faith that the decision was in the organization's best interests, and the rule's other predicates were met, the court deferred to Wrigley's business judgment and upheld his potentially profit-sacrificing decision.[96]

The only line of cases that appears to depart from these principles stems from *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[97] *Revlon* involved a bidding war for the cosmetics company that progressed to the point where it became evident that, following its sale, Revlon would no longer continue as a going concern.[98] The Delaware Supreme Court held that once the firm crossed that threshold, the board could no longer justify its actions according to its long-term strategy for the firm.[99] Therefore, the board's decision did not enjoy normal deference under the protective business-judgment rule.[100] Rather, on such facts, a board has an obligation to strive to obtain the best sale price it reasonably can obtain for the company and thus maximize shareholder returns.

In *Paramount Communications, Inc. v. QVC Networks, Inc.*, the Delaware Supreme Court expanded *Revlon* to cover an additional set of circumstances.[101] The bidding war in the *QVC* case did not reach the point where Paramount's break-up was imminent, and thus *Revlon* duties did not attach according to the rationale set forth in that decision. Yet, because a

Muskat, *Chicago Remembers 'Opening Night,'* MLB.COM, Aug. 7, 2008, http://chicago.cubs.mlb.com/news/article.jsp?ymd=20080806&content_id=3267159. For other notable cases invoking the business-judgment rule, see *Joy*, 692 F.2d at 880 (applying the business-judgment rule in the context of a shareholder's derivative suit); Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1052–53 (Del. Ch. 1996) (same); Kamin v. Am. Express Co., 383 N.Y.S.2d 807, 811–12 (N.Y. Sup. Ct. 1976) (same).

95. *Shlensky*, 237 N.E.2d at 778.

96. *Id.* at 780–81.

97. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1986) (holding that the business-judgment rule did not protect the defendant board of directors' actions).

98. *See id.* at 182 (noting that Revlon would have to break up following the transaction to finance its takeover). For a more detailed account of the *Revlon* case, see Judd F. Sneirson, *Merger Agreements, Termination Fees, and the Contract-Corporate Tension*, 2002 COLUM. BUS. L. REV. 573, 592–94.

99. *Revlon*, 506 A.2d at 182 (holding that, once it became clear that the Revlon board had abandoned its long-term strategy for the company and sought instead to break up the company, "[t]he duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit").

100. *Id.* at 185.

101. *See* Paramount Commc'ns, Inc. v. QVC Networks, Inc., 637 A.2d 34, 42 (Del. 1993) (stating that enhanced scrutiny applies to "(1) the approval of a transaction resulting in a sale of control, and (2) the adoption of defensive measures in response to a threat to corporate control").

single majority shareholder would substantially own and control Paramount following the contemplated transaction, Paramount shareholders would become minority shareholders in the resulting entity, lose whatever control and voting power they previously enjoyed, and forever lose the opportunity to share in a control or takeover premium.[102] In view of these consequences, the court required shareholder-wealth maximization as it did in *Revlon*, holding that Paramount's board, like Revlon's board before it, must strive to obtain the best price per share possible for the benefit of the company's shareholders.[103]

In *Revlon* situations, since there will be little left of the company following its sale, it is perfectly sensible and consistent with the principles described earlier in this Section to require boards to focus exclusively on shareholders.[104] And in relatively infrequent *QVC* situations, where the company will continue as a going concern but will no longer be widely held by the public,[105] it is only a minor exception from otherwise applicable corporate law to obligate boards to afford a similar economic benefit to shareholders.

In sum, corporate law contains no general requirement that directors and officers maximize shareholder profits and only departs from this view in rare instances that should not affect most green business decisions.[106] On the contrary, both corporate statutes and corporate case law affirmatively permit decisions that might sacrifice shareholder profits and further protect these decisions from substantive judicial review. Thus, to the extent there is a "duty" to maximize shareholder wealth and refrain from sustainable business practices, the duty is not a legal one.

B. MARKETS

Perhaps the duty to maximize shareholder profits derives from markets. The securities market conveys a rough measure of listed companies' value and performance.[107] Accordingly, managing a company well should translate to higher stock prices, and managing the company in the best way

102. *Id.* at 43; *see also* Sneirson, *supra* note 98, at 594–95 (discussing the *QVC* case in greater detail).

103. *QVC*, 637 A.2d at 43.

104. *See* Sneirson, *supra* note 93, at 439–40 n.2 (discussing whether corporate directors owe duties to the shareholders or to the corporation).

105. *See* Fisch, *supra* note 92, at 651 (noting that *Revlon* "applies to an extremely small set of cases"); Stout, *supra* note 37, at 172 (stating that *Revlon* "has become nearly a dead letter").

106. Paramount Commc'ns, Inc. v. Time, Inc, 571 A.2d 1140, 1150 (Del. 1989) ("[A] board of directors . . . is not under any *per se* duty to maximize shareholder value . . . .").

107. *See* Fisch, *supra* note 92, at 643–45 (citing sources); *see also* BAINBRIDGE, *supra* note 34, § 3.7(A), at 112–16 (setting forth the efficient-capital-market hypothesis, which is that, "in an efficient market, current prices always and fully reflect all relevant information about the commodities being traded"); Mitchell, *supra* note 69, at 1287 (noting that "stock prices and financial statements [have] become a surrogate for directorial performance").

possible should lead to shareholder-wealth maximization. Good management should also facilitate raising additional capital and assist a firm in a competitive marketplace.

The securities market impacts individual corporate decisionmakers as well. If corporate managers maximize firm stock price and shareholder wealth, they are more likely to keep their jobs, get raises and promotions, and also enjoy the satisfaction that comes with a job well done. On the other hand, the works of Berle and Means, and Jensen and Meckling teach that these individuals' interests often naturally diverge from their firms'.[108] Indeed, managers' self-interest will sometimes exert an opposite pressure from that of the market, encouraging managers to put their own interests or those of nonshareholder constituencies above shareholders'.[109] Consequently, there is at least a natural tendency for corporate decisionmakers to depart from the objective of shareholder-wealth maximization.

To close this agency-cost gap, firms employ incentives such as stocks and stock-option grants to align corporate fiduciary interests with the firm's shareholders. When so aligned, the securities market palpably encourages corporate fiduciaries to maximize the company's share price and thereby maximize their own compensation.[110] Increased monitoring offers a second solution to this agency-cost problem. Institutional investors, among others, can fulfill this role and exert market pressure on managers to better tend to the company's share price.[111]

To a lesser extent, the market for corporate control also influences corporate managers to hew to a strict profit orientation. For example,

108. *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 6–7 (1947) (recognizing the problem of agency costs); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (defining agency costs as the cost of the agent's divergence from the principal's best interests—i.e., the agent's disloyalty, negligence, or slacking—plus the expenditures the principal makes to safeguard against, monitor, and insure against such departures).

109. Examples of such conflicts include managers putting their own interests in job security and the perquisites of office over competing shareholder interests in efficiency and profit.

110. *See* Michael C. Jensen & Kevin J. Murphy, *Performance Pay and Top-Management Incentives*, 98 J. POL. ECON. 225, 225 (1990) (encouraging incentive-based compensation); Roe, *supra* note 92, at 2075 (noting that incentive compensation induces managers to maximize shareholder wealth). *But see* John Cassidy, *Greed Cycle: How the Financial System Encouraged Corporations to Go Crazy*, NEW YORKER, Sept. 23, 2002, at 64 (charging that stock-option grants in particular have encouraged corporate officers to overemphasize short-term stock gains and losses and have contributed to the recent rash of corporate scandals).

111. *See* BAINBRIDGE, *supra* note 34, § 10.7(B), at 514–55 & n.6 (discussing institutional investors and citing sources); Mitchell, *supra* note 69, at 1290–92 (relating how institutional investors pressure firms to maximize short-term stock prices); *see also* Robert C. Illig, *The Promise of Hedge Fund Governance: How Incentive Compensation Can Enhance Institutional Investor Monitoring*, 60 ALA. L. REV. 41 *passim* (2008) (lauding hedge funds as monitors and arguing for other institutional investors to adopt a similar compensation structure).

underperforming companies are ripe takeover targets as potential acquirers see the opportunity to take control, better manage the firm, and reap the economic rewards associated with doing so.[112] Takeover attempts are very costly and difficult; however, a target corporation's management can successfully implement anti-takeover measures and take other actions to fend off an unwanted suitor, even where the target shareholders support the contemplated transaction.[113] Consequently, the threat of a corporate takeover represents a real—though somewhat weaker than one might expect—influence on corporate managers to maximize shareholder value.[114]

It does not necessarily follow, however, that these market forces discourage sustainable business practices. Numerous studies have tested the assumption that sustainable or socially responsible business practices sacrifice shareholder profits. One recent meta-study found the relationship between socially responsible business practices and financial performance was positive in 27% of the 167 studies examined, not statistically significant in 58% of the studies, and negative in just 2% of the studies.[115] The authors noted that the individual studies ignore causation and that it is equally plausible that company profits cause social responsibility as opposed to the other way around.[116] Still, these results suggest that sustainable and socially responsible business practices generally pay for themselves and sometimes even turn a profit. To the extent that the results do not support the notion that sustainable business practices impinge on profits, the market forces

112. These incentives are at play in both hostile and friendly takeovers.

113. *See* Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians at the Gate*, 45 STAN. L. REV. 857, 858 (1993) ("The takeover wars are over. Management won."); Ian B. Lee, *Corporate Law, Profit Maximization, and the "Responsible" Shareholder*, STAN. J.L. BUS. & FIN., Spring 2005, at 31, 37 ("Takeovers are costly, and, in addition, management has some ability to blunt the disciplinary force of the market for corporate control though the adoption of takeover defenses or golden parachutes.").

114. *See* Roe, *supra* note 92, at 2074 ("Hostile takeovers . . . despite the rise of the poison pill still are[] an engine of shareholder wealth maximization.").

115. *See* Joshua D. Margolis et al., Does It Pay to be Good? A Meta-Analysis and Redirection of Research on the Relationship Between Corporate Social and Financial Performance 2, 21 (July 26, 2007) (unpublished manuscript, on file with the Iowa Law Review), *available at* http://stakeholder.bu.edu/2007/docs/Walsh,%20Jim%20Does%20It%20Pay%20to%20Be%20Good.pdf. The percentages do not total 100 because 13% of the studies did not report sample sizes. *Id.* at 21. An earlier meta-study reached similar results. *Id.*; *see also* Marc Orlitzky et al., *Corporate Social and Financial Performance: A Meta Analysis*, 24 ORG. STUD. 403, 427 (2003) ("[P]ortraying managers' choices with respect to [sustainability and profitability] as an either/or trade-off is not justified in light of 30 years of empirical data."). A recent individual study concluded that voluntary overcompliance beyond applicable environmental regulations does sacrifice shareholder profits, albeit only very slightly. *See* Karen Fisher-Vanden & Karin S. Thorburn, *Voluntary Corporate Environmental Initiatives and Shareholder Wealth* 2 (ECGI Fin. Working Paper No. 200/2008, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1141020 (available for a fee, or on file with the Iowa Law Review) (concluding that overcompliance depressed firms' stock prices by approximately 1%).

116. *See* Margolis et al., *supra* note 115, at 24–25. Other caveats include varying definitions and measures of social responsibility. *Id.* at 9–13.

discussed above should not discourage these practices.[117] Instead, if the studies are believable, market forces should encourage them.

Corporate America certainly appears to believe these studies. A great many businesses—from start-ups investing in green energy and technology to old-economy companies looking to remake their image and jump on the environmental bandwagon—have expended considerable effort and capital on various sustainable business initiatives.[118] The recent activities of venture capital firms bear these studies out as well, as these firms have invested billions of dollars in green business ventures with the object of reaping substantial returns.[119] This new conventional wisdom about sustainable business practices supports the view that markets—to the extent that they encourage shareholder-wealth maximization—do not discourage sustainable business efforts.

117. The studies provide several possible explanations for these results. In consumer-oriented sectors, the correlation between corporate social responsibility and profitability can be attributed to consumers' willingness to pay more for "green" goods and services. *See, e.g.*, Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 664–65 (2007) (citing studies measuring "a strong positive relationship between [corporate socially responsible] behaviors and consumers' reactions to a company's products and services"); Raymond J. Fisman et al., Corporate Social Responsibility: Doing Well by Doing Good? *passim* (Sept. 2005) (unpublished manuscript), *available at* http://www.olin.wustl.edu/jfi/pdf/corporate.social.responsibility.pdf (noting that corporate social responsibility is more positively related to profitability in advertising-intensive, consumer-oriented industries). This may be the case in business-to-business transactions as well. *See* ELKINGTON, *supra* note 7, at 110, 119 (relating anecdotes). Being ahead of the curve on environmental regulation and consumer trends can also often serve companies' bottom lines. *See* Jayne W. Barnard, *Corporate Boards and the New Environmentalism*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 291, 291 (2007) (noting that "sophisticated corporate managers" are "tak[ing] into account the possibility of increased governmental regulation; the increasing risk of a costly response to changing environmental conditions . . . ; and growing consumer preference for products sold by companies that are good corporate citizens"); *see also* David Kiley, *Toyota: How the Hybrid Went to the Swift*, BUS. WK., Jan. 27, 2007, at 58 (reporting that Toyota "makes more profit than any other automaker"). This comports with Michael Jensen's "enlightened stakeholder theory," which posits that managers can maximize the long-term value of the firm by tending to all of the firm's constituencies. *See* Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 14 J. APPLIED CORP. FIN. 8, 16–17 (2001) (setting forth the theory).

118. *See* Robert C. Illig, *Al Gore, Oprah, and Silicon Valley: Bringing Main Street and Corporate America into the Environmental Movement*, 23 J. ENVTL. L. & LITIG. 223, 229 (2008) ("Everyone these days has become 'green.' General Electric is green. Ford and GM are green. The oil companies are green. Even Wal-Mart is green.").

119. *See id.* at 231–34 (citing Marc Gunther & Adam Lashinsky, *Cleanup Crew*, FORTUNE, Nov. 26, 2007, at 82, 84 (noting venture capital firm Kleiner Perkins's plans to invest in emission reducing technologies), and David Worrell, *Keen on Green, Venture Capitalists See Potential in Green Business*, ENTREPRENEUR, Sept. 2006, at 67); Jon Gertner, *Capitalism to the Rescue*, N.Y. TIMES, Oct. 5, 2008, § MM (Magazine), at 54 (profiling Kleiner Perkins's green business investments).

C. NORMS

Perhaps more than the law or the market, norms instill in corporate fiduciaries a drive to maximize shareholder profit.[120] Social norms are "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both."[121] Thus, whether or not the law or the market actually requires managers to maximize shareholder wealth, social norms might induce them to do so, because that is how they view their jobs, how they perceive what is expected of them, and because they believe—rightly or wrongly—that is what the law requires.

The legal literature contains considerable anecdotal support for a profit-maximization norm. For example, "Norms in American business circles, starting with business school education, emphasize the value, appropriateness, and indeed the justice of maximizing shareholder wealth (which will trickle down, or raise the tide that will raise all boats, etc.)."[122] Indeed, many conclude that these norms have "been fully internalized by American managers,"[123] such that modern business practices could be said to follow Milton Friedman's famous credo that "the social responsibility of business is to increase its profits."[124] An in-depth look at corporate norms paints a different picture of modern business practices, however. In his seminal work on the subject, Gordon Smith notes that "managers often make decisions that do not maximize value for shareholders,"[125] citing studies showing "ambivalence" among directors toward shareholder-wealth

120. *See* Bainbridge, *supra* note 67, at 1440–41 (speaking of wealth maximization in terms of norms); Roe, *supra* note 92, at 2066 (same); Smith, *supra* note 66, at 290–91 (addressing the "shareholder primacy norm").

121. Richard H. MacAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997); *see also* LESSIG, *supra* note 36, at 235 (defining norms as "those normative constraints imposed not through the organized or centralized actions of a state, but through the many slight and sometimes forceful sanctions that members of a community impose on each other"); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996) (defining norms as "social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done"). *See generally* Symposium, *Norms and Corporate Law*, 149 U. PA. L. REV. 1607 (2001) (discussing the role that social norms play in corporate settings).

122. Roe, *supra* note 92, at 2073; *see also id.* at 2065 ("Shareholder wealth maximization is usually accepted as the appropriate goal in American business circles."); Fisch, *supra* note 92, at 654–55 (noting a study finding "that the norm of shareholder wealth maximization was implicit in most business school courses").

123. Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657, 717 (1996); Mitchell, *supra* note 69, at 1288 ("Directors seem to believe that their legal duty is to the stockholders.").

124. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § MM (Magazine), at 33.

125. Smith, *supra* note 66, at 290 (citing AM. LAW INST., *supra* note 87, § 2.01 cmt. h (conceding that decisions that do not enhance shareholder profit are "not infrequently made")).

maximization.[126] Subsequent studies have yielded similar results.[127] From these, Smith concludes that "the view . . . held by modern legal scholars—that [the wealth-maximization norm] is a major factor . . . in making ordinary business decisions—may not accurately reflect reality."[128] In other words, while the shareholder-wealth-maximization norm may not be "impotent," its prominence in the legal literature is vastly overstated.[129]

What is more, social norms evolve over time, as "norm entrepreneurs" defy existing norms and others follow their lead.[130] "High-profile CEOs and corporate leaders" can serve as corporate norm entrepreneurs,[131] and, indeed, many such individuals arguably have already advanced corporate norms to incorporate sustainable and socially responsible business methods as new best practices.[132] Corporate rhetoric and sustainable business-school curricula confirm this trend.[133] While these changes may not indicate a wholesale abandonment of the wealth-maximization norm, they perhaps indicate a "paradigm shift" toward a new norm of balancing shareholder profit with long-term sustainable and socially responsible business practices.[134]

126. *See id.* at 290–91 (citing JAY W. LORSCH & ELIZABETH MACIVER, PAWNS OR POTENTATES: THE REALITY OF AMERICA'S CORPORATE BOARDS 38–39 (1989) and JAMES C. COLLINS & JERRY I. PORRAS, BUILT TO LAST: SUCCESSFUL HABITS OF VISIONARY COMPANIES 67 (1994)) (describing studies about the "shareholder primacy norm").

127. *See* Fisch, *supra* note 92, at 655 (citing Petra Joerg et al., *Shareholder Value: Principles, Declarations, and Actions* 23–24 (European Corp. Governance Inst. Fin., Working Paper No. 95/2005, 2008), *available at* http://ssrn.com/abstract=690044).

128. Smith, *supra* note 66, at 290–91.

129. *Id.* at 291; *see also* Fisch, *supra* note 92, at 655 (arguing that this norm may not dominate business practice).

130. *See* Sandeep Gopalan, *Changing Social Norms and CEO Pay: The Role of Norms Entrepreneurs*, 39 RUTGERS L.J. 1, 30–34 (2007) (defining "norm entrepreneurs"); MacAdams, *supra* note 121, at 369–70 (referring to successful norm entrepreneurs as "heroes"); Sunstein, *supra* note 121, at 909 (coining the term "norm entrepreneur").

131. *See* Gopalan, *supra* note 130, at 30–31 (defining "norm entrepreneurs").

132. *See* Barnard, *supra* note 117, at 291, 301, 303–05 (suggesting that "an awakening on the part of . . . corporate management to the desirability of moving toward environmental best practices" represents "a true paradigm shift," offering an explanation for this development, and noting several "environmentally-sensitive high-profile CEOs"); Timothy Egan, *The Oil Man Cometh*, N.Y. TIMES, July 24, 2008, at A25 (profiling Texas oilman—and corporate raider in the *Unocal* case—T. Boone Pickens and publicizing his push for renewable energy); Thompson, *supra* note 18, at 26 (profiling Duke Energy CEO and "green coal baron" Jim Rogers).

133. *See* Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 683–87 (2006) (rebutting the shareholder-primacy norm).

134. *See* Barnard, *supra* note 117, at 291. A rash of new book titles supports this trend, *see generally* JONATHAN ESTES, SMART GREEN: HOW TO IMPLEMENT SUSTAINABLE BUSINESS PRACTICES IN ANY INDUSTRY—AND MAKE MONEY (2009); DANIEL C. ESTY & ANDREW S. WINSTON, GREEN TO GOLD: HOW SMART COMPANIES USE ENVIRONMENTAL STRATEGY TO INNOVATE, CREATE VALUE, AND BUILD COMPETITIVE ADVANTAGE (2006); DAVID GOTTFRIED, GREED TO GREEN (2004); PAUL HAWKEN ET AL., NATURAL CAPITALISM: CREATING THE NEXT INDUSTRIAL REVOLUTION (1999); DAVID E. HAWKENS, CORPORATE SOCIAL RESPONSIBILITY: BALANCING TOMORROW'S

D. THEORY

As a descriptive matter then, shareholder-wealth maximization finds little basis in corporate law and fares only slightly better when one considers the market incentives and social norms that likewise influence corporate decisionmaking. Shareholder-wealth-maximization proponents advance normative arguments for their position as well, based on efficiency and on the assumption that wealth maximization is an essential term on which shareholders invest money in organizations. This Section presents and addresses these arguments in turn.

The efficiency argument for shareholder-wealth maximization takes several forms. One form is the "many masters" argument, which states that when managers are permitted to serve more than one corporate constituency, all can get short-changed as the managers either enrich themselves or do just about anything and justify it as benefiting some stakeholder group or another.[135] The better approach is to give managers a clear directive—namely to maximize shareholder wealth, afford them no discretion to depart from that goal, and hold them accountable for their performance as determined by this measure.[136]

SUSTAINABILITY AND TODAY'S PROFITABILITY (2006); CHAD HOLLIDAY ET AL., WALKING THE TALK: THE BUSINESS CASE FOR SUSTAINABLE DEVELOPMENT (2002); VAN JONES, THE GREEN COLLAR ECONOMY: HOW ONE SOLUTION CAN FIX OUR TWO BIGGEST PROBLEMS (2008); K.B. KEILBACH, GLOBAL WARMING IS GOOD FOR BUSINESS: HOW SAVVY ENTREPRENEURS, LARGE CORPORATIONS, AND OTHERS ARE MAKING MONEY WHILE SAVING THE PLANET (2008); CHRIS LAZLO, SUSTAINABLE VALUE: HOW THE WORLD'S LEADING COMPANIES ARE DOING WELL BY DOING GOOD (2008); AMORY LOVINS ET AL., HARVARD BUSINESS REVIEW ON PROFITING FROM GREEN BUSINESS (2000); JOEL MAKOWER & CARA PIKE, STRATEGIES FOR THE GREEN ECONOMY: OPPORTUNITIES AND CHALLENGES IN THE NEW WORLD OF BUSINESS (2008); BRUCE PIASECKI, THE GREEN ADVANTAGE: HOW TODAY'S BEST BUSINESSES PROFIT BY GOING GREEN AND SOLVING GLOBAL PROBLEMS (2009); DANIEL RAINY, SUSTAINABLE BUSINESS DEVELOPMENT: INVESTING THE FUTURE THROUGH STRATEGY, INNOVATION, AND LEADERSHIP (2006); HORST RECHELBACHER, MINDING YOUR BUSINESS: PROFITS THAT RESTORE THE PLANET (2008); TOBIN SMITH, BILLION DOLLAR GREEN: PROFIT FROM THE ECO-REVOLUTION (2008); BILL STREEVER, GREEN SEDUCTION: MONEY, BUSINESS, AND THE ENVIRONMENT (2007).

135. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 38 (1991) ("[A] manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither."); Bainbridge, *supra* note 67, at 1427 n.13, 1436 ("'No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other.'" (quoting *Matthew* 6:24)).

136. *See* ELAINE STERNBERG, CTR. FOR BUS. & PROF'L ETHICS, UNIV. OF LEEDS, THE STAKEHOLDER CONCEPT: A MISTAKEN DOCTRINE 21 (1999), *available at* http://papers.ssrn.com/paper=263144 ("Accountability to multiple masters can indeed only function if everyone involved accepts a common purpose that can be used for ordering priorities."); Jensen, *supra* note 117, at 11 ("[T]elling a manager to maximize current profits, market share, future growth in profits, and anything else one pleases will leave that manager with no way to make a reasoned decision. In effect, it leaves the manager with *no* objective.").

However, "[h]umans are quite accustomed to having a range of obligations."[137] Individuals routinely juggle both professional and personal demands—answering to one "master" at work and another "master" at home—and do just fine. Even within a single job, responsibilities can proliferate. To borrow Kent Greenfield's example, law professors typically divide their efforts among scholarship, teaching, and service; though time spent on one endeavor necessarily detracts from the other two, professors somehow manage to balance these three competing demands.[138] The same is also true for corporate fiduciaries: "Corporate directors and managers, in actual practice, routinely balance a number of obligations, some arising from corporate law, some from other areas of law, and some from the market itself."[139]

In fact, recent financial scholarship posits that the firm is not best served by a focus on shareholder wealth to the exclusion of all other considerations. Rather, to maximize the long-term value of the firm, corporate managers must gauge and on some level tend to all of the firm's constituencies.[140] Noted financial economist Michael Jensen writes, "[W]e cannot maximize the long-term market value of an organization if we ignore or mistreat any important constituency. We cannot create value without good relations with customers, employees, financial backers, suppliers, regulators, and communities."[141] In other words, shareholder-wealth maximization does not maximize the long-term value of the firm and indeed may not even maximize shareholder wealth.

A second efficiency argument is that companies should focus on their strong suit—making shareholders money—and leave "distributive justice" efforts to the experts in the government.[142] Proponents add that shareholder-wealth maximization, in its own way, makes everyone better off, producing "an ethically attractive combination of happiness, of rights (to liberty and property), and of sharing with the less fortunate members of

137. Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 88, 105 (2005).

138. *See id.* (explaining the author's responsibilities as a professor).

139. *Id.* (noting that fiduciaries must also manage conflicting obligations to shareholders of different classes of stock).

140. *See* Jensen, *supra* note 117, at 9 ("[A]ny decision criterion . . . must specify how to make tradeoffs between multiple constituencies with conflicting interests."); *cf.* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 281 (1999) (calling for boards of directors to act as "mediating hierarchs" charged with determining the best use of corporate assets and resolving disputes that arise between shareholders, managers, and other corporate constituencies); Sneirson, *supra* note 93, at 468–82 (arguing that the information component of the fiduciary duty of care requires corporate managers to make such an assessment).

141. Jensen, *supra* note 117, at 16. Thus, to maximize long-term firm value, Google must tend to its end users, Costco its employees, and Whole Foods its natural and environmental image.

142. *See* BAINBRIDGE, *supra* note 34, § 1.4, at 22 (recounting this argument).

society."[143] Of course, this presumes that the government can and will fulfill its role, and runs contrary to the sobering public-choice view that "legislative decisions are not driven by distributive justice but by interest group pressures."[144] It also runs contrary to the belief, held by many, that environmental and social problems are so pervasive, in every sense of that word, that "corporations are the only organizations with the resources, the technology, the global reach, and, ultimately, the motivation" to solve them.[145]

Yet a third efficiency argument for shareholder-wealth maximization laments that corporate managers enjoy too much discretion in their business judgments. If managers were duty-bound to maximize shareholder profits and were afforded little latitude, monitoring would be easier, slacking and self-dealing would be harder, and agency costs would be smaller. But a certain degree of managerial discretion is necessary to maintain the "highly efficient" centralized decisionmaking system in place in large corporations.[146] For this delegation of authority to be meaningful, managers must be able to exercise this authority fully, freely, and, in most instances, without constant shareholder interference.[147] In other words, granting managers true authority requires sacrificing a certain amount of accountability.

143. Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 487 (1980); *see also* BAINBRIDGE, *supra* note 34, § 1.4, at 22 (quoting the adage, "a rising tide lifts all boats"); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001); Friedman, *supra* note 124 (colorfully making this argument). Hansmann and Kraakman noted that:

> All thoughtful people believe that corporate enterprise should be organized and operated to serve the interests of society as a whole, and that the interests of shareholders deserve no greater weight in this social calculus than do the interests of any other members of society. The point is simply that now, as a consequence of logic and experience, there is a convergence on a consensus that the best means to this end . . . is to make corporate managers strongly accountable to shareholder interests . . . .

Hansmann & Kraakman, *supra*, at 441.

144. BAINBRIDGE, *supra* note 34, § 1.4, at 23; *see also* ELKINGTON, *supra* note 7, at 20 (noting "industry's often effective lobbying over the years for less regulations and, in some cases, active deregulation").

145. ELKINGTON, *supra* note 7, at 71.

146. *See* BAINBRIDGE, *supra* note 34, § 6.3, at 252–53 (citing KENNETH J. ARROW, THE LIMITS OF ORGANIZATION (1974)).

147. *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) ("The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors."); BAINBRIDGE, *supra* note 34, § 6.3, at 253 (paraphrasing ARROW, *supra* note 146, at 78, stating that "the power to hold to account is ultimately the power to decide"); *see also id.* ("[T]his is not an argument for unfettered board authority. In some cases, accountability concerns become so pronounced as to trump the general need for deference in the board's authority.").

A fourth argument for shareholder-wealth maximization rests on the nexus-of-contracts conception of the corporation. The nexus-of-contracts view "model[s] the firm not as an entity, but as an aggregate of various inputs acting together to produce goods or services."[148] To wit:

> Employees provide labor. Creditors provide debt capital. Shareholders initially provide equity capital and subsequently bear the risk of losses and monitor the performance of management. Management monitors the performance of employees and coordinates the activities of all the firm's inputs. The firm is a legal fiction representing the complex set of contractual relationships between these inputs. In other words, the firm is not a thing but rather a nexus or web of explicit and implicit contracts establishing rights and obligations among the various inputs making up the firm.[149]

Contractarians assert that one of these implicit rights is the right of the firm's shareholders to profit maximization,[150] basing their assertion on the prediction that, in a hypothetical negotiation, "directors and shareholders would strike a bargain in which directors pursue shareholder wealth maximization."[151]

There is no reason to make this assumption, however; the nexus-of-contracts theory does not require it.[152] Hypothetically, shareholders could bargain for managers to pursue the long-term best interests of the entire enterprise on the assumption that what is in the firm's long-term best interests is in the shareholders' long-term best interests. Shareholders and managers could likewise bargain to afford managers considerable decisionmaking latitude, provided that the managers act in good faith, reasonably carefully, and without conflicts of interest. This assumes that this arrangement is an efficient way to balance authority and accountability in a large, public corporation. Further, to the extent that these bargains mirror applicable corporate-law tenets,[153] they make good default rules. Dissenting

148. BAINBRIDGE, *supra* note 34, § 1.5, at 27.

149. *Id.* The nexus-of-contracts model "is today the dominant theory of the firm in the legal academy" and has also been embraced by the courts. *Id.* § 1.5, at 33.

150. *See id.* at 29 (describing shareholder-wealth maximization as "a mere bargained-for contract term").

151. *See id.* § 9.3, at 420 (assuming that "[s]hareholders will insist on that norm when entering into their contract with the corporation"); EASTERBROOK & FISCHEL, *supra* note 135, at 36 (discussing contracting to maximize long-run profits, thus maximizing shareholders' stock value).

152. *See* Lee, *supra* note 113, at 48 ("Shareholder profit maximization is not an essential feature of a contractual relationship. It is not even an essential feature of a contract of investment: no one would argue that management promises to maximize bondholders' profits, for example."); *see also* Blair & Stout, *supra* note 140, at 254–55 n.17 (discussing the nexus-of-contracts theory and shareholder-wealth maximization).

153. *See supra* Part II.A (noting the broad corporate-law tenets).

parties are free to bargain around these rules, for example, by placing a profit-maximizing directive in the company's charter.[154]

In short, the normative arguments for shareholder-wealth maximization fare no better than the descriptive arguments that the law imposes such a duty. Thus, corporate laws and theories permit firms to pursue sustainability, whether or not efforts to do so create shareholder profits.

III. A NEW PARADIGM

The shareholder-wealth-maximization principle thus does not limit and should not discourage corporations from undertaking sustainability efforts, even when those efforts appear to detract in the short term from what would otherwise become shareholder profits. A number of businesses have elected to take this permission to the next level by incorporating an affirmative commitment to sustainable business practices into their corporate identities. In the process, these firms have forged a new paradigm for sustainability and corporate governance: a corporation that is green to its very core.

These efforts follow a common pattern. In their corporate charters, these firms include a statement to the effect that the business will be managed in a sustainable and socially responsible manner.[155] As noted above, such a charter provision becomes the firm's "internal law" or "rules of the road" and binds it, unless and until it is amended.[156] And consistent with the nexus-of-contracts conception of the firm set forth in the previous Part, shareholders investing in the firm do so on this basis and thereby accede to this explicit commitment as part of their hypothetical bargain.[157] The following Sections discuss three variations of this theme.

A. B CORPORATIONS

The most prominent example of this new paradigm is the "B Corporation."[158] A B Corporation is a private certification and associated mark signifying that a business meets certain high standards of social and environmental performance.[159] To become a B Corporation and use its

154. *See* Lee, *supra* note 113, at 51 & n.181 (countering the contractarian comment that shareholders who do not want the shareholder-wealth-maximization principle to apply should simply bargain around it).

155. Such charter provisions would also assist socially responsible investment vehicles to identify firms that fit their investment criteria.

156. *See supra* Part II.A.1 (discussing firm charters and bylaws).

157. *See supra* Part II.D (analyzing the nexus-of-contracts argument for shareholder-wealth maximization).

158. The "B" stands for "beneficial," not a subchapter of the Internal Revenue Code. Certified B Corp., http://www.bcorporation.net (last visited Feb. 15, 2009). To date there are 163 B Corporations spanning 31 industries. *Id.*

159. *See* Certified B Corp., About B Corp., http://www.bcorporation.net/about (last visited Feb. 15, 2009) (explaining what B corporations are). Other examples of private certification arrangements are the Orthodox Union certification for kosher products, the Leadership in

mark, a firm must first score high enough on a survey meant to distinguish sincere social and environmental commitments from mere window dressing.[160] Second, an applicant must include in its articles of incorporation the following provision respecting the interests of employees, the community, and the environment:

> In discharging his or her duties, and in determining what is in the best interests of the Company and its shareholders, a Director shall consider such factors as the Director deems relevant, including but not limited to, the long-term prospects and interests of the Company and its shareholders, and the social, economic, legal, or other effects of any action on the current and retired employees, the suppliers and customers of the Company or its subsidiaries, and the communities in which the Company or its subsidiaries operate . . . , together with the short-term, as well as long-term, interests of its shareholders and the effect of the Company's operations (and its subsidiaries' operations) on the economy of the state, the region and the nation.
>
> Nothing in this Article, express or implied, is intended to create or shall create or grant any right in or for any person or any cause of action by or for any person.[161]

The provision is meant to offer additional protection to corporate fiduciaries who consider the interests of groups other than shareholders in making company decisions and to empower shareholders (but not other groups) to hold fiduciaries accountable for not doing so.[162] By enshrining

Energy and Environmental Design ("LEED") system for certifying "green" buildings, and the Quality Assurance International organic food certification. Oukosher.org, http://oukosher.org (last visited Feb. 15, 2009); U.S. Green Bldg. Council, http://www.usgbc.org/leed (last visited Feb. 15, 2009); Quality Assurance Inspections, http://www.qai-inc.com (last visited Feb. 15, 2009).

160. *See* Certified B Corp., Become a B Corporation, http://www.bcorporation.net/become (last visited Feb. 15, 2009) (explaining the process for becoming a B Corporation, the first step of which is taking the survey to measure a firm's current social and environmental performance).

161. Certified B Corp., Legal Roadmap, http://survey.bcorporation.net/become/legal.php (select "C Corporation" and "OR") (last visited Feb. 15,2009). Note the similarity to the "other constituency statutes" discussed *supra* in Part II.A.2. Jurisdictions permit the inclusion of such a provision. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(b) (2001) (setting forth a range of permissible charter provisions); MODEL BUS. CORP. ACT § 2.02(b) (2008) (same). B Corporations must also pay a modest licensing fee and may take advantage of resources like guides and tools on corporate governance, employee relations, and best sustainable business practices. Certified B Corp., B Resources, http://www.bcorporation.net/B-Services/B-Resources (last visited Feb. 15, 2009) (listing available resources).

162. Certified B Corp., Understand Legal, http://www.bcorporation.net/become/legal (last visited Feb. 15, 2009) (explaining the legal framework of B corporations).

these values in the firm's charter, they are "more likely . . . [to] survive new investors, new management, and even, someday, new owners."[163]

B. AN OREGON EXPERIMENT

The Oregon legislature amended its corporations code in 2007 to effect a similar option.[164] Oregon law now expressly permits its corporations to include in their articles of incorporation "[a] provision authorizing or directing the corporation to conduct the business of the corporation in a manner that is environmentally and socially responsible."[165] Thus, firms may either "authorize" their decisionmakers to act in an environmentally and socially responsible manner, "direct" them to do so, or remain silent on the issue.[166]

Even though the "authorizing" version effectively reaffirms the business-judgment rule, the provision's proponents consider such charter language useful.[167] Firstly, Oregon law on the business-judgment rule is somewhat sparse and uneven;[168] a charter provision would hopefully alleviate this uncertainty and afford corporate managers additional comfort to make disinterested, informed, good-faith decisions without subjecting themselves to shareholder-derivative suits. Secondly, the provision helps dispel the common misconception that corporate boards have a legal obligation to maximize shareholder profits and may not take into account, and sacrifice profits to benefit, other stakeholder groups. As the previous Part demonstrates, this is simply not the case, and the newly enacted law will

163. Certified B Corp., About B Corp., http://www.bcorporation.net/about (last visited Feb. 15, 2009).

164. *See* H.B. 2826, 74th Leg. Assem., Reg. Sess. (Or. 2007) (codified at OR. REV. STAT. § 60.047(2)(e) (Supp. 2008)). The bill went into effect on January 1, 2008.

165. OR. REV. STAT. § 60.047(2)(e). The statute's reference to environmental and social responsibility deliberately reflects the triple-bottom-line conception of sustainability. *See supra* Part I.A (discussing the triple bottom line).

166. Remaining silent on the issue should not draw an inference that corporate decisionmakers should aim to maximize shareholder profits. There are many reasons why a company would omit this newly available provision, including uncertainty over how courts might treat it. Further, the legislature enacted the provision against a legal background that permits profit-sacrificing decisions, *see supra* Part II.A, and the statute was meant to reaffirm those principles. *See Hearing on H.B. 2826 Before the S. Judiciary Comm.*, 74th Leg. Assem. 2 (Or. 2007) (written testimony of James Kennedy, Esq.).

167. *See id.* at 1–2 (arguing that the statute provides explicit guidance for corporate boards facing a dearth of Oregon jurisprudence on this issue).

168. Naito v. Naito, 35 P.3d 1068, 1083 (Or. Ct. App. 2001) ("Courts are generally reluctant to interfere with the exercise of business discretion by the officers and directors of a corporation."); Colvin v. Colvin, No. 05-409-AA, 2007 WL 2248160, at *11–15 (D. Or. Aug. 1, 2007) (reciting the business-judgment rule but then substituting the court's judgment for a close corporation's manager's judgment).

hopefully enlighten corporate decisionmakers (and their attorneys) on this point and embolden them to take a broader view of their roles.[169]

The "directing" language literally mandates that the firm be run in an environmentally and socially responsible manner, like the B Corporation form charter provision quoted above.[170] Also like the B Corporation provision, the optional Oregon provision is not meant to confer any legal rights or standing on nonshareholder groups, and it leaves any enforcement primarily to the company's shareholders—just as it stands under current corporate law.[171]

C. VOLUNTARY CHARTER PROVISIONS

A third variation on this theme is a voluntary charter provision along the lines described above but without the attendant marketing or statutory endorsement. Jurisdictions permit such provisions,[172] and indeed companies have long included them.[173] To take one prominent example, The Washington Post Company's certificate of incorporation states that its corporate purpose is "to publish . . . an independent newspaper dedicated to the welfare of the community and the nation, in keeping with the principles of a free press."[174] In its 1971 offering prospectus, The Post noted: "Publishing *The Post* in keeping with those principles has involved and will continue to involve substantial expenses (not necessarily compensated for by increased revenues) incurred in endeavoring to achieve and to maintain editorial excellence and independence as well as to provide outstanding news collection and reporting."[175] Similarly, a Portland, Oregon sportswear

169. As noted in Part II.A.2, Oregon's "other constituency" statute is limited to the takeover context. *See supra* note 52 and accompanying text (providing statutes that protect managers who want to reject merger proposals that are good for shareholders, but bad for employees). Were it generally applicable, both the statute and charter language "authorizing" the firm to consider environmental and social factors would serve to reaffirm business-judgment-rule deference.

170. *See supra* text accompanying note 161 (quoting the relevant provision).

171. Anecdotal evidence suggests that since Oregon House Bill 2826 became effective, few Oregon corporations have included either charter provision, but Oregon's Secretary of State does not compile these sorts of statistics. *See* Interview with Peter Threlkel, Dir., and Twila Coakley, Serv. Delivery Manager, Or. Sec'y of State Corp. Div., in Salem, Or. (July 10, 2008) (stating that none of the clerks has seen a 2826 provision in an articles of incorporation since its effective date).

172. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(b) (2001) (setting forth a range of permissible charter provisions); MODEL BUS. CORP. ACT § 2.02(b) (2008) (same). The B Corporation concept is predicated on such provisions' inclusion.

173. *See* Robert Daines & Michael Klausner, *Do IPO Charters Maximize Firm Value? Antitakeover Protection in IPOs*, 17 J.L. ECON. & ORG. 83, 97 (2001) (noting that the fourteen firms studied "adopted nonshareholder constituency provisions as terms in their charters").

174. Washington Post Co., Certificate of Incorporation, art. 3. § 1, at 2 (as amended through May 12, 1988), *available at* http://www.secinfo.com/dsvRq.986.d.htm.

175. *See* Donald E. Graham, *The Gray Lady's Virtue*, WALL ST. J., Apr. 23, 2007, at A17 (arguing that a news business should not prioritize profits over journalistic excellence and integrity).

company included a sustainability pledge in its charter, stating that the duty of directors shall be to make money for shareholders but not at the expense of the environment, human rights, public health and safety, dignity of employees, and the welfare of the community in which the company operates.[176] This mandate can be amended, to be sure, but only by a supermajority shareholder vote.[177]

D. IMPLICATIONS

These variations raise interesting corporate-governance questions, including who is to prosecute when fiduciaries fail to live up to these internal obligations and how are such prosecutions to be decided. The B Corporation language and the Oregon law's legislative history both indicate that only shareholders can bring derivative actions to enforce these provisions, and both purport not to confer standing and additional rights on nonshareholder constituencies.[178] As for the second question, I suspect that a charter mandate to act sustainably would be governed by the business-judgment rule. That is, disinterested, informed, good-faith decisions—about how sustainable and socially responsible the firm should be, how shareholder profits (and other stakeholder interests) should balance such considerations, and how to achieve a desired level of sustainability and social responsibility—would likewise enjoy business-judgment-rule protection from shareholder derivative suits. While this deference admittedly saps some of these provisions' force, it also should keep activist-shareholder derivative suits to their current levels.

Two additional issues concern charter amendments: whether activist shareholders will be able to force a sustainable charter amendment on a company[179] and whether shareholders or new management will be able to remove an existing charter provision mandating sustainable and socially responsible business practices. If activist-shareholder proposals are any

176. *See* Polly LaBarre, *Leap of Faith*, FAST COMPANY, June 2007, at 97 (profiling Nau, Inc.). Nau ran into trouble and out of funding after one year in business for reasons unrelated to its sustainability ethos. *See* Laura Gunderson, *Clothier with a Conscience Nau in Business Again*, OREGONIAN (Portland), June 25, 2008, at B1 (reporting that Nau's troubles flowed from an overly ambitious rollout of stores and a business model that relied on consumers to change their shopping habits). Another sportswear company recently purchased Nau's assets, *see id.*, and now Nau will try again while keeping its sustainability platform intact. *Id.*

177. *See Hearing on H.B. 2826 Before the S. Judiciary Comm.*, 74th Leg. Assem. 2 (Or. 2007) [hereinafter *Hearing*] (written testimony of Jeffrey C. Wolfstone, Esq., Lane Powell P.C. Partner and Nau, Inc. General Counsel). Nau, Inc. is a Delaware Corporation that, consistent with title 8, section 242(b) of the Delaware Code, requires a seventy-five-percent shareholder vote to amend its corporate charter.

178. *See supra* text accompanying notes 161 and 171 (quoting the relevant B Corporation language and discussing enforcement under the Oregon statute).

179. *See* Andy Giegerich, *Some Biz Lawyers Worry over Sustainability Effort*, PORTLAND BUS. J. (Or.), Apr. 18, 2008, http://portland.bizjournals.com/portland/stories/2008/04/21/focus7.html (noting this concern).

indication, the former prospect should be unlikely,[180] particularly where a company charter requires more than a simple majority for an amendment.[181] If a company's founders wish to lessen the latter possibility, they can likewise require a supermajority vote to amend their firm's charter to remove a sustainability provision,[182] and they can also retain control over the firm through a two-tiered stock structure.[183]

Time will tell whether this new paradigm for corporate governance takes hold and proves successful. Until it does, spectators can watch and learn from these firms' experiences—emulating their successes, avoiding their mistakes, and in the process contributing to larger societal efforts to achieve sustainability.

CONCLUSION

If we are to achieve sustainability as a society, corporations must be part of the solution. The drive for shareholder profits—though not required as a matter of corporate law—has stood in the way of this goal, insofar as misperceptions, market forces, and social norms have discouraged corporate decisionmakers from pursuing sustainability. But market forces have seemingly evolved to a point where sustainable and socially responsible business practices either break even or prove profitable, and social norms have likewise seemingly come around. As a consequence, corporations should no longer see corporate law, norms, and market pressures as obstacles to sustainable business. What is more, these developments may affirmatively encourage firms to join in and even lead the sustainability movement, thus revitalizing American business, our economy, and—with a little luck—the world.

180. *See* MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES AND MATERIALS 238 (concise 9th ed. 2005) (noting that social-policy shareholder proposals routinely fail and that "any vote over 15 percent is considered high").

181. *See* DEL. CODE ANN. tit. 8, § 242(b) (2001) (permitting provisions that require a supermajority to amend a corporate charter); *see also Hearing*, *supra* note 177 (noting Nau, Inc.'s supermajority requirement and describing the company's sustainability pledge as "'baked in' to Nau's corporate DNA").

182. *See supra* notes 163 and 181 and accompanying text (discussing the power to amend the company charter).

183. *See* Graham, *supra* note 175, at A17 (noting that *The New York Times*, *The Wall Street Journal*, and *The Washington Post* companies each use such a two-tier stock structure).