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Antony Page

Florida International University College of Law, apage@fiu.edu

Robert A. Katz

Indiana University Robert H. McKinney School of Law

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Is Social Enterprise the New Corporate Social Responsibility?

Antony Page[†]
Robert A. Katz[‡]

I. INTRODUCTION

Despite vigorous debate since the 1930s, the notion of corporate social responsibility (CSR) remains in flux.¹ Historically on one side of the debate was the claim, made perhaps most prominently by Milton Friedman, that “there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits.”² On the other side, prominent scholars such as Adolf Berle held a contrary view, arguing that corporations should “set forth a pro-

† Professor of Law, Indiana University School of Law–Indianapolis.

‡ Professor of Law, Indiana University School of Law–Indianapolis and Professor of Philanthropic Studies at the Indiana University Center on Philanthropy.

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1. Corporate social responsibility itself has no clear, readily accepted definition. See, e.g., Abigail McWilliams et al., *Corporate Social Responsibility: Strategic Implications*, 43 J. MGMT. STUD. 1, 8 (2006) (claiming that “there is . . . no strong consensus on a definition for CSR”). “[W]hilst some see it as a management trend, others view it as a framework of ‘soft regulation’ that places new demands on corporations, whilst others present it as a way for corporate actors to assist in social and economic development.” Andrew Crane et al., *The Corporate Social Responsibility Agenda*, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 3, 5 (Andrew Crane et al. eds., 2008). The debate itself, including the foundational question of whether firms have any social responsibilities, remains unresolved. See *id.* at 3.

2. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sep. 13, 1970, at 133. Earlier in the article, Friedman expresses a more nuanced view based on agency theory. Executives are agents of shareholders, with the responsibility to “conduct the business in accordance with their [shareholders’] desires.” *Id.* at 51. Thus, Friedman would allow directors to benefit nonshareholder stakeholders, if that is in fact what the shareholders themselves want.

gram comprising fair wages, security to employees, reasonable service to their public, and stabilization of business”³

The CSR debate seems to heat up every two decades but with little real progress.⁴ For every company that appears to promote social concerns there is somebody who accuses it of paying mere lip service to these concerns.⁵ Although there have been some legislative advances—for example, every state has expressly legalized corporate philanthropy—few believe there has been substantial meaningful change.

CSR’s perceived lack of progress created space for progressive corporate law, the most muscular and structural iteration of CSR. Progressive corporate law is a loose term for a collection of proposals aimed at remaking corporate law to encourage processes and outcomes more beneficial to the interests of nonshareholders with significant stakes in a corporation’s activities (i.e., stakeholders).⁶ Progressive corporate law’s main approaches are to grant nonshareholding stakeholders more say or representation in corporate decision-making⁷ and to grant controllers more discretion to pursue social objectives. To date, more than half of U.S. states have passed “other constituency” statutes that permit or require directors to consider the impact of at least some decisions on groups other than shareholders.⁸ Berle himself may have contemplated something akin to progressive corporate law when he put businesses on notice that, should they fail to voluntarily assume greater community responsibilities, the government would likely intervene.⁹

3. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 312 (Transaction Publishers 1991) (1932).

4. See, e.g., C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 78 (2002).

5. See, e.g., Steven D. Lydenberg, *Envisioning Socially Responsible Investing: A Model for 2006*, J. CORP. CITIZENSHIP, July 2002, at 57 (“Although an increasing number of corporations publish environmental and health and safety reports, many are simply token efforts—greenwashing” (citations omitted)).

6. See generally PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995). Bainbridge refers to this approach as “stakeholderism,” which posits that “corporations should be responsive to the interests of workers, consumers, and communities, not just to those of shareholders.” Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 877 (1997). Others simply refer to it as the stakeholder perspective. See, e.g., Francis Weyzig, *Political and Economic Arguments for Corporate Social Responsibility: Analysis and a Proposition Regarding the CSR Agenda*, 86 J. BUS. ETHICS 417, 418 (2009).

7. Bainbridge identifies “the corporate law rights of non-shareholder constituencies” as “the core of the progressive communitarian project” Bainbridge, *supra* note 6, at 877.

8. 1 JAMES D. COX & THOMAS LEE HAZEN, *TREATISE ON THE LAW OF CORPORATIONS* § 4:10 (3d ed. 2010).

9. ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 167 (1954).

If the CSR debate recurs like “sunspots,”¹⁰ the social enterprise movement is perhaps something new under the sun. Social enterprise, as we will show,¹¹ is connected to CSR in profound and interesting ways. “Social enterprise” is a loose term for businesses that aim to generate profits while advancing social goals.¹² Proponents of social enterprise believe that such businesses can combine the dynamism of for-profit firms with the mission-driven zeal more typical of nonprofit organizations. The movement also seeks legal change, demonstrated most notably by the creation of new legal forms including the low-profit limited liability company (L3C), the benefit corporation, and the United Kingdom’s community interest company.¹³ These forms were specifically designed for businesses committed both to generating a financial return for owner-investors and to advancing social goals.

The social enterprise movement and the CSR movement, including its progressive corporate law offshoot, appear to have much in common. They both seek a “better” world in a broadly left-liberal sense. Both want more businesses to take the interests of nonshareholder stakeholders seriously and to play a larger role in addressing pressing social and environmental problems. Yet there are some critical and underexplored differences in each movement’s approach to social change.

We argue that social enterprise offers an authentic alternative to CSR, even though its short-term social impact would likely be smaller. This alternative, moreover, is remarkably congenial to mainstream corporate law in ideology and methodology. In one respect, the social enterprise movement sidesteps the CSR debate by operating in a different setting—its vision is realized and embodied in new organizational forms rather than existing corporations. In another respect, the movement shows how mainstream corporate law can accommodate CSR’s and progressive corporate law’s concerns without fundamental change.

This Article proceeds in three parts. Part II provides a Berle-themed synthesis of the CSR debate, including its progressive corporate law iteration. Part III describes the social enterprise movement, its legal agenda,

10. Bainbridge, *supra* note 6, at 902–03 (citations omitted).

11. See, e.g., Wolfgang Bielefeld, *Social Entrepreneurship and Social Enterprise*, in 1 21ST CENTURY MANAGEMENT: A REFERENCE HANDBOOK 22 (Charles Wankel ed., 2008), available at http://www.sage-e-reference.com/management/Article_n3.html (discussing growing interest in topics of social entrepreneurship and social enterprise).

12. See Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 86–93 (2010) (discussing definitions of social enterprise).

13. See *infra* Part III. The private sector has also attempted to promote an organizational form suitable for social enterprise, the B Corporation. See <http://www.bcorporation.net> (last visited Mar. 29, 2011).

and discusses several new legal forms designed specifically for dual-goal businesses. Part IV highlights the overlaps and conflicts between each approach, and in light of the longstanding debate, explains the new and vital aspects of the social enterprise movement. Specifically, social enterprise advances the debate in unexpected ways—the movement appropriates some CSR notions and shares some CSR sensibilities, but combines them in a manner that should please corporate contractarians, alarm proponents of progressive corporate law, and discomfort some proponents of CSR. Part V offers a brief conclusion.

II. BERLE & CORPORATE SOCIAL RESPONSIBILITY

Berle is widely recognized as the first serious scholar of corporate governance, and he pioneered an analysis based on the separation of shareholder ownership and managerial control.¹⁴ He also played a pivotal role in framing the debate over CSR—fundamentally, what a corporation owes to society, above and beyond the benefits it confers as a matter of course by operating a profit-maximizing business.¹⁵ He was one of the first exponents of the view that corporations should be operated solely to maximize shareholder wealth—“shareholder primacy”—a position he staked out in his famous debate with E. Merrick Dodd in the pages of the 1931–1932 issues of *Harvard Law Review*.¹⁶ Less well-known, Berle revised his position in later works and argued in favor of broader social obligations for corporations.

A. Berle as Shareholder Wealth Maximizer

In Berle’s 1931 article—his opening shot—Berle asserted “that all powers granted to a corporation or to the management . . . are necessarily and at all times exercisable only for the ratable benefit of all the share-

14. Berle completed his seminal work in collaboration with Gardiner Means. See, e.g., BERLE & MEANS, *supra* note 3, at 4 (declaring in Book One, subtitled “Separation of the attributes of ownership under the corporate system,” that “the corporation is a means whereby the wealth of innumerable individuals has been concentrated into huge aggregates and whereby control over this wealth has been surrendered to a unified direction”).

15. “The basic questions at the heart of CSR are as old as business itself, such as what is a business for and what contribution does it make to society?” Crane et al., *supra* note 1, at 3–4; see also Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001) (arguing that “as a consequence of both logic and experience, there is convergence on a consensus that the best means to this end (that is, the pursuit of aggregate social welfare) is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests”).

16. See A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932).

holders as their interest appears.”¹⁷ In his 1932 rebuttal to Dodd’s response, he argued that

you can not abandon emphasis on “the view that business corporations exist for the sole purpose of making profits for their stockholders” until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else. . . . Otherwise the economic power now mobilized and massed under the corporate form . . . is simply handed over, weakly, to the present administrators with a pious wish that something nice will come out of it all.¹⁸

At that time, he apparently believed there was no available “clear and reasonably enforceable scheme” and that Dodd’s suggestions regarding “the business corporation as an economic institution which has a social service as well as a profit-making function” could not be implemented.¹⁹

In the same vein, Berle’s classic 1932 text, *The Modern Corporation and Private Property* (co-authored with Gardner Means), was in part a call for corporate management to act as trustees for shareholders.²⁰ Noting the separation of ownership and control, and thus the potential for corporate controllers to take advantage of shareholders,²¹ he argued in favor of a trustee model—directors should act as trustees of the corpora-

17. A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931).

18. Berle, *supra* note 16, at 1367–68 (1932).

19. E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932).

20. BERLE & MEANS, *supra* note 3, at 220. Book 2, Chapter 7 of *The Modern Corporation* is, in fact, largely a reprint of *Corporate Powers as Powers in Trust*. It repeats, for example, the claim that “all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears.” *Id.* *The Modern Corporation* is now remembered most for its elaboration of the separation of ownership and control. See, e.g., Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179, 180 (2005).

21. BERLE & MEANS, *supra* note 3, at 7 (noting that “the interests of owner and of ultimate manager may, and often do, diverge”). The diverging interests of owners (as principals) and managers (as agents) are today referred to as agency costs. Fama and Jensen define agency costs as those associated with “structuring, monitoring, and bonding a set of contracts among agents with conflicting interests.” Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 304 (1983). “Shareholders’ agency costs are reduced, among other things, by product and employment markets, large shareholders monitoring performance, and the usually efficient capital markets that provide accurate pricing and the threat of a takeover.” Antony Page, *Has Corporate Law Failed? Addressing Proposals for Reform*, 107 MICH. L. REV. 979, 989 (2009). In a work generally critical of shareholder primacy, Professor Lynn Stout described the agency cost argument as arguably the best standard argument in favor of shareholder primacy. See Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CALIF. L. REV. 1189, 1199 (2002).

tion's property on behalf of shareholder-beneficiaries.²² In support of this model, Berle advanced the now standard argument that if managers owe fiduciary duties to multiple masters, they are effectively unconstrained.²³ Berle sought means to “establish a legal control which will more effectively prevent corporate managers from diverting profit into their own pockets from those of stockholders”²⁴ He recognized this as an imperfect solution, but concluded (or hoped) that shareholders’ “expectation of fair dealing” would serve to constrain management.²⁵

Berle’s position is often seen as the source of today’s widely held shareholder wealth maximization norm.²⁶ “[M]anagers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders” is one component of the mainstream approach to corporate law, referred to by Hansmann and Kraakman as the shareholder-oriented or standard model.²⁷

The shareholder-oriented model is generally supported by theorists who see the business organization as a “nexus-of-contracts” rather than a single entity.²⁸ The nexus is a complex “web of explicit and implicit contracts” between and among suppliers of various inputs—labor, debt capital, equity capital, and so on—acting in concert to produce goods or services.²⁹ For such contractarians, corporate law provides default rules subject to contractual opt-outs, and these rules serve as a kind of “standard form agreement” that approximates “what parties would rationally agree to in the absence of any pre-existing set of imposed terms.”³⁰ Shareholder wealth maximization is such a default rule.³¹ Corporate contractarians generally “believe that nonshareholder constituencies are adequately pro-

22. See William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 762–65 (2001).

23. Berle, *supra* note 16, at 1367 (“When the fiduciary obligation of the corporate management and ‘control’ to stockholders is weakened or eliminated, the management and ‘control’ become for all practical purposes absolute.”); see also William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation*, 34 J. CORP. L. 99, 129 (2008) (“The key insight that Berle attributed to these corporate lawyers is that a management-coordinated, multiple constituency system simply would not work.”); Page, *supra* note 21, at 994–95.

24. Dodd, *supra* note 19, at 1147 (describing Berle’s views).

25. BERLE & MEANS, *supra* note 3, at 243.

26. Hansmann & Kraakman, *supra* note 15, at 444 n.6.

27. *Id.* at 441; see *id.* at 440–43 (describing the shareholder-oriented model).

28. Bainbridge, *supra* note 6, at 859 (citing Thomas S. Ulen, *The Coasean Firm in Law and Economics*, 18 J. CORP. L. 301, 318–28 (1993)).

29. *Id.*

30. Bainbridge, *supra* note 6, at 865 n.31.

31. Although contractarianism does not require shareholder wealth maximization, proponents “have tended to advance the primacy of shareholder interests in corporate governance.” Hansmann & Kraakman, *supra* note 15, at 441 n.5.

tected through contract and/or general welfare law,” and that “corporate law should not be called upon to provide these constituencies with extra protections.”³²

B. Berle as Proponent of the Community

Notwithstanding Berle’s seminal role in outlining the case of shareholder primacy, his concerns went beyond a corporation’s internal arrangements. He pondered the problem of big business and the resulting concentration of power, focusing on the largest corporate actors—the “few hundred large corporations” that were “the crux of American industrial life.”³³ He observed that whatever a large corporation does—providing goods, services, employment, and a return to investors—it “exert[s] powerful influence on the framework of community life.”³⁴

Berle’s views on corporate arrangements and societal roles were nuanced and evolved substantially over time.³⁵ In 1954, Berle announced that “at least for the time being,” Dodd’s argument that corporate powers were held in trust for the community (rather than for shareholders) had prevailed.³⁶ This concession prompted a description of Berle as “a collateral antecedent of today’s CSR advocates, not a great-grandfather.”³⁷ *The Modern Corporation* itself is an equivocal work. Although the bulk of it advances a trustee model of corporate governance in favor of shareholders, it also contains language pointing to a broader social understanding of corporations.³⁸ To reflect Berle’s changing views, several commentators now refer to an “early” and “middle” or “late” Berle.³⁹

32. Bainbridge, *supra* note 6, at 877; *see also* Hansmann & Kraakman, *supra* note 15, at 442.

33. Berle, *supra* note 16, at 1365.

34. BERLE, *supra* note 9, at 169–70.

35. Bratton & Wachter explain that this contradiction resulted from when the different parts of the book were written. Bratton & Wachter, *supra* note 23, at 121–22. Berle’s move toward corporations’ greater social responsibility occurred after large parts of the book had been prepared. *Id.*

36. BERLE, *supra* note 9, at 169; *see also* Adolf A. Berle, Jr., “Control” in *Corporate Law*, 58 COLUM. L. REV. 1212, 1212 (1958) (“The late Professor E. Merrick Dodd of Harvard insisted, and history seems to have vindicated him, that [large corporations] are also stewards for the employed personnel, for customers and suppliers, and indeed for that section of the community affected by their operations. Any reasonable consideration of the responsibilities resting on the management of any large corporation, especially of the two or three hundred giants, will support this view.” (citations omitted)). In an interesting twist, Dodd had also changed his views, believing that the early Berle had been proven correct.

37. Bratton & Wachter, *supra* note 23, at 149.

38. *Id.* at 103 (“The conflict follows from contradictions in Berle’s texts, with parts of *The Modern Corporation* and the [1932 article] supporting a shareholder primacy reading, while other passages in *The Modern Corporation* presage CSR.”); *see also* Tsuk, *supra* note 20, at 181–82 (arguing that for *The Modern Corporation*’s authors, “the important message of the book was a political argument about the allocation of power in society, particularly the allocation of power between the state and a wide range of collective institutions”); Allan C. Hutchinson, *Hurly-Berle—Corporate*

In *The Modern Corporation's* introduction and final chapter, Berle adopted a more communitarian or stakeholder-oriented perspective. He further suggested that “the last chapter was what the book was all about—a few pages for the general reader ‘too lazy, busy or uninterested to read three hundred pages of academic argument.’”⁴⁰

He saw three alternatives for the governance of these companies. The first was his own trustee model described above—that a corporation’s controllers act as trustees “for the operation of the corporation for the sole benefit of the security owners.”⁴¹ This option was preferable (or rather, “the lesser of two evils”)⁴² to the second, which was to view controllers to have acquired the power to run the corporation in their own interests based on a “quasi-contractual” theory of shared understanding.⁴³

In the last chapter of *The Modern Corporation*, Berle expressed preference for a third model. Shareholders, because of their passivity and inattention, no longer deserved the benefit implied by strict ownership or property rights. Controllers, although helping to weaken the claims of shareholders by arrogating power to themselves, likewise had no legitimate reasons for why their interests should trump those of others. Instead, “[t]hey have placed the community in a position to demand that the modern corporation serve not alone the owners or the control but all society.”⁴⁴ The larger society’s legitimate demands on corporations en-

Governance, Commercial Profits, and Democratic Deficits, 34 SEATTLE U. L. REV. 1219, 1220 (2011) (“Although Berle and Means’s *The Modern Corporation* forms the bedrock of the prevailing paradigm in corporate law and governance, it also contains some very suggestive materials from which to construct an alternative and more democratic way of proceeding that actually subverts and transforms the established model.”).

39. Bratton & Wachter, *supra* note 23, at 104; cf. Marc T. Moore & Antoine Rebérioux, *Corporate Power in the Public Eye: Reassessing the Implications of Berle’s Public Consensus Theory*, 33 SEATTLE U. L. REV. 1109, 1111–12 (2010) (noting that “it is customary to view Berle as having ideologically changed course over his scholarly career, from his initial position as a conservative shareholder wealth maximization advocate to his later position as a reformist communitarian theorist,” but taking issue with this approach).

40. Bratton & Wachter, *supra* note 23, at 121 (quoting JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 63 (1987)). Berle revisited and elaborated upon the themes of this last chapter in his 1959 book, *Power Without Property*. ADOLF A. BERLE, JR., POWER WITHOUT PROPERTY (1959).

41. BERLE & MEANS, *supra* note 3, at 311 (emphasis in original).

42. *Id.* Berle elaborates, suggesting that the risk of a trust relation is the risk of a “diminution of enterprise.” *Id.* In contrast, the risk of unbridled controller discretion is the “probability of an era of corporate plundering.” *Id.*

43. *Id.*

44. *Id.* at 312.

tailed a correlative duty by corporations to place the community's interests first.⁴⁵

Berle predicted that the third option would prevail when the conditions were ripe: "When a convincing system of community obligations is worked out and is generally accepted, in that moment the passive property right of today must yield before the larger interests of society."⁴⁶ Controllers would "develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity."⁴⁷ Put more strongly, business practice may "increasingly assum[e] the aspect of economic statesmanship."⁴⁸ One possible outcome might be the reallocation of a corporation's surplus away from shareholders in favor of higher wages, increased job security, and greater community service, which if generally accepted by the community, would also have to be accepted by the courts.⁴⁹

Berle did not elaborate how the community's obligations should be determined or advanced, saying simply that these interests should "be put forward with clarity and force."⁵⁰ He nonetheless indirectly addressed the question when he asked what causes or interests corporations should advance if they were "to make gifts to support philanthropy," or were "trustees for the community."⁵¹ The answer, in Berle's view, is not to be found in the realm of law, but rather in the "realm of philosophy."⁵²

Nevertheless, Berle offered some suggestions based on what prominent companies were doing during the 1950s. For example, he referred to companies that set up national or international plans that maintained the viability and growth of the companies' industry. American oil companies, in his view, brought "about more or less orderly development of one of the world's great physical assets and have repeatedly avowed that their operations were the determining factor in national and international development."⁵³ Several corporations hired consultants to assist with their social contributions; one company established a working group to

45. *Id.* ("Neither the claims of ownership nor those of control can stand against the paramount interests of the community.")

46. *Id.*

47. *Id.* at 312–13.

48. *Id.* at 313.

49. *Id.* at 312.

50. *Id.*

51. BERLE, *supra* note 9, at 169. Similarly, Friedman asked, "How is [the corporate executive] to know how to spend it?" Friedman, *supra* note 2.

52. BERLE, *supra* note 9, at 173.

53. *Id.* at 171.

manage its philanthropy; some companies relied on their controllers' high-level contacts at universities and charities to guide their community contributions; and several business schools began offering executive level education regarding broader social understandings of business.⁵⁴

Berle was concerned about the statist implications of a more communitarian vision of corporations. He believed that most Americans thought "that private rather than governmental decisions are soundest for the community"⁵⁵ Although the parameters of community interest remained largely undefined, one decision was that the state should not be dominant.⁵⁶ Corporations were making, and should make, charitable donations, if only to avoid a more active and intrusive government. Berle nonetheless foreshadowed the development of progressive corporate law by putting businesses on notice that "[i]f private business and businessmen do not assume community responsibilities, government must step in and American life will become increasingly statist."⁵⁷ This followed from the lesson, "constant throughout history," that power does not remain unused, but is instead appropriated elsewhere.⁵⁸

The debate over CSR, which Berle helped start, is not a relic of the past; it is alive and well. But despite decades of commentary and scholarship, the legal debate has failed to advance CSR in any significant way. Moreover, passionate concern over CSR is cyclically fashionable. Several scholars have noted the cyclical nature of this debate. Stephen M. Bainbridge, for example, wrote:

Just as sunspots come in cycles, so too does the corporate social responsibility debate. In the 1930s, we had the Berle-Dodd debate. In the 1950s, Berle and others revisited the issue. In the 1970s, there was a major fracas over corporate social responsibility. Finally, today we have the nonshareholder constituency debate. . . . [E]ach iteration adopts a new terminology, focuses on a slightly different facet of the problem, and develops some new ideas.⁵⁹

In a similar vein, Harwell Wells observed that "[v]iewed in historical perspective, it is clear that each new round of debate on corporate social responsibility largely recapitulates the earlier debate in a slightly

54. *Id.* at 173–74.

55. *Id.* at 173.

56. *Id.* at 175 (providing the example of a donation to Princeton to avoid state domination of education and, thus, thinking). He noted that, at the time of writing, twenty-nine states had expressly authorized corporations to make charitable contributions. BERLE, *supra* note 9, at 168.

57. *Id.* at 167.

58. *Id.* at 172.

59. Bainbridge, *supra* note 6, at 902–03 (citations omitted).

altered form.”⁶⁰ Thus, although CSR may have good ideas about corporate behavior, it has generally failed to produce meaningful large-scale legal reform.⁶¹ The next Part examines the social enterprise movement, which shares some of CSR’s concerns, but attempts to advance them in a manner that moves beyond the parameters of the longstanding CSR debate. It seeks to open a new front in the campaign to make businesses more socially responsible.

III. SOCIAL ENTERPRISE MOVEMENT

Having examined the origins of the modern CSR debate and Berle’s role in setting its terms, we now turn to what might be CSR’s latest iteration—the social enterprise movement. The term “for-profit social enterprise” (or simply “social enterprise”) refers to businesses with shareholder-owners that seek to address social problems by combining the dynamism of capitalized for-profit enterprise with the intentionally pro-social orientation of nonprofit organizations.⁶² The idea of social enterprise has been embraced by a growing number of influential leaders and institutions.⁶³ Some leading proponents of social enterprise seek to promote and facilitate social enterprise formation through business organizations law,

60. Wells, *supra* note 4 (noting that the Berle–Dodd exchange was “the first clear debate over corporate social responsibility”); *cf.* Stout, *supra* note 21, at 1190 (suggesting that academics “have made at least some intellectual progress over the intervening decades on the question of the proper role of the corporation”).

61. That the CSR movement has generally failed to produce meaningful large-scale legal reform is not to say that there has been no progress. But unlike changes in corporate law, there have been advances in areas of law such as those affecting labor, the environment, and consumer protection. These laws serve to cabin the discretion of management. *See, e.g.*, Bratton & Wachter, *supra* note 23, at 150. Some proponents of a more active role for corporate law remain unsatisfied, claiming that corporate law may have a comparative advantage over other areas of law, or that the laws themselves remain inadequate. *See, e.g.*, KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW* 141 (2006); Faith Stevelman, *Globalization and Corporate Social Responsibility: Challenges for the Academy, Future Lawyers, and Corporate Law*, 53 N.Y.L. SCH. L. REV. 817, 833 (2008/2009) (“[C]ritics of CSR cannot, in good faith, counter that a corporation’s job is merely to conform to the existing regulations, because it is apparent that regulations and regulators cannot keep up with corporations determined to outrun them.”).

62. *See* Katz & Page, *supra* note 12. “Other terms for members of this genus include hybrid social ventures, for-profit social businesses, social purpose business ventures, blended value organizations, companies with a conscience, Fourth Sector organizations . . . for profit[s] with a nonprofit soul, and for-benefit organizations.” *Id.* at 61–62 (citations omitted) (internal quotation marks omitted). The term “social enterprise” can be defined more broadly as an organization or venture—either for-profit or nonprofit—“that achieves its primary social or environmental mission using business methods, typically by operating a revenue-generating business.” *Id.* at 59 (citations omitted) (internal quotation marks omitted).

63. *See id.* at 60–62.

most notably by supplying social entrepreneurs with new legal forms designed specifically for social enterprises.⁶⁴

The push for new forms reflects dissatisfaction with the seemingly binary nature of existing options—the for-profit corporation, which inclines controllers to increase shareholder wealth with little regard for the interests of nonshareholders and society at large, and the traditional charitable nonprofit organization, which primarily serves social purposes but has less access to capital and less leeway to compensate high-performing executives and employees. The first part of this section surveys various proposals for facilitating the creation and sustainability of social enterprise organizations. The second part identifies some of the advantages of such forms. This lays the groundwork for Part IV, which considers social enterprise within the context of the longstanding debate over CSR.

A. Developing Alternate Legal Forms

This section considers different organizational forms expressly intended for a social enterprise housed in a single organizational structure: low-profit limited liability companies, benefit corporations, community interest companies, and socially responsible corporations. The first three have been enacted in one or more jurisdictions. The last form to date has not been enacted.

1. L3Cs

The low-profit limited liability company or “L3C” was introduced in Vermont in April, 2008, and has since been adopted in seven other states.⁶⁵ A business organized as an L3C must pursue a charitable mission but can also distribute profits to its investors—although generating profit itself may not be a “significant” purpose.⁶⁶ Supporters of the L3C describe it as “the for-profit with a nonprofit soul,”⁶⁷ and claim that it

64. See, e.g., AMS. FOR CMTY. DEV., <http://www.americansforcommunitydevelopment.org> (last visited Mar. 29, 2011) (L3Cs); B CORP., <http://www.bcorporation.net> (last visited Mar. 29, 2011) (benefit corporations); discussion *infra* Part III.B; see also Katz & Page, *supra* note 12, at 62–63 (discussing this movement).

65. In addition to Vermont, Illinois, Louisiana, Maine, Michigan, North Carolina, Utah, and Wyoming passed L3C legislation. *Laws*, AMS. FOR CMTY. DEV., <http://www.americansforcommunitydevelopment.org/laws.php> (last visited Mar. 29, 2011). The Crow Indian Nation and the Oglala Sioux Tribe have also allowed the L3C. *Id.* Several other states are currently considering L3C bills. See, e.g., S. 1503, 50th Leg., 1st Reg. Sess. (Ariz. 2011); S. 501, 117th Gen. Assem., 1st Reg. Sess. (Ind. 2011).

66. VT. STAT. ANN. tit. 11, § 3001(27)(B) (2011). For convenience, we cite only to the Vermont statute, but to date, all state L3C statutes include the quoted language.

67. *Frequently Asked Questions*, AMS. FOR CMTY. DEV., <http://www.americansforcommunitydevelopment.org/faqs.php> (last visited Mar. 29, 2011).

“combines the best features of an LLC with the social conscience of a nonprofit.”⁶⁸

The L3C is an expressly dual-purpose LLC driven primarily by tax considerations. An L3C must meet three requirements: first, the company must “significantly further[] the accomplishment of one or more charitable or educational purposes,” and would not have been formed but for its relationship to the accomplishment of such purpose(s).⁶⁹ Second, “[n]o significant purpose of the company is the production of income or the appreciation of property”⁷⁰ Lastly, the company must not be organized “to accomplish [any] political or legislative purposes”⁷¹ Compliance with these three requirements qualifies the enterprise to accept “program-related investments” from charitable foundations, which under IRS regulations must be intended to further the foundation’s charitable or educational purpose, and must not be intended to produce income or have a prohibited purpose (like lobbying).⁷²

Proponents of the L3C form envision that its controllers can leverage these program-related investments with private capital to achieve its social aims, which would also serve the investing foundation’s purposes.⁷³ On this model, investments in L3Cs would be structured in tranches: program-related investments would ideally take the riskiest position in the capital structure and receive no or lower returns, thereby lowering

68. Caryn Capriccioso et al., *Who is the L3C Entrepreneur?*, AMS. FOR CMTY. DEV., 31 (May 2010), <http://www.americansforcommunitydevelopment.org/downloads/WhoistheL3CEntrepreneur.pdf>.

69. VT. STAT. ANN. tit. 11, § 3001(27)(A) (2011).

70. § 3001(27)(B).

71. § 3001(27)(C).

72. Treas. Reg. § 53.4944-3(a)(1) (2011). Program-related investments are desirable from a foundation’s perspective, as they are included for the purposes of calculating whether a foundation has disbursed 5% of its assets per year, as generally required by federal law. Currently, foundations do not make much use of program-related investments because of the problem of determining whether the investments comply with IRS regulations. The key stumbling block is I.R.C. § 4944(a)(1), which threatens to penalize the tax-exempt private foundation that “invests any amount in such a manner as to jeopardize the carrying out of any of its exempt purposes” The statute contains an exemption for “program-related investments,” defined as “investments, the primary purpose of which is to accomplish one or more [tax-exempt or charitable] purposes . . . and no significant purpose of which is the production of income or the appreciation of property.” § 4944(c). The question that foundations must ask themselves is this: “Is the income, or return, from the program-related investment not a significant purpose in making it?” Luther M. Ragin, *Program Related Investments in Practice*, 35 VT. L. REV 53, 55 n.5 (2010).

73. See, e.g., Marc J. Lane, *L3Cs Hold Key to Solving State’s Social Woes*, CRAIN’S CHI. BUS., Aug. 11, 2008, <http://www.chicagobusiness.com/article/20080809/ISSUE07/100030399/l3cs-hold-key-to-solving-states-social-woes>; *The Concept of the L3C*, AMS. FOR CMTY. DEV., <http://www.americansforcommunitydevelopment.org/concept.php> (last visited Mar. 29, 2011) [hereinafter *L3C Concept*].

risk and increasing returns for other equity investors.⁷⁴ The top tranche might be at the risk-adjusted market rate of return. There might also be a “mezzanine” tranche, designed for investors willing to accept a lower return because of their contribution to social welfare.

The L3C designation is intended to provide foundations with some assurances that a business will satisfy the tax law’s criteria for program-related investments.⁷⁵ To date, however, the IRS has not granted L3Cs any special privileges by virtue of the designation.⁷⁶ Foundations thus still seek private letter rulings, and should perform appropriate diligence in order to comply with the treasury regulations regarding program-related investments.⁷⁷

Because the legislation implementing L3Cs has been minimal, proponents recommend protecting the L3C’s social mission by contract in the operating agreement.⁷⁸ This protection could take several forms. For example, LLC Class A members, intended for foundation investors, might have no right to distributions, but might have a “put,” which is the right to have the company redeem their membership interests at a purchase price equivalent to the initial capital contribution.⁷⁹ Members might also have a right of first refusal. Any member who wished to sell her membership interests must give the other members a right to buy those membership interests at a price equal to the lower of the offer she

74. See *L3C Concept*, *supra* note 73.

75. *Low-Profit Limited Liability Company*, VT. SECRETARY ST., http://www.sec.state.vt.us/corps/dobiz/lc/lc_l3c.htm (last visited Apr. 1, 2011); *What is the L3C?*, AMS. FOR CMTY. DEV., at 2, <http://americansforcommunitydevelopment.org> (expand “Resources” menu; then follow “Whitepapers” hyperlink; then follow “1. What is the L3C?” hyperlink) (last visited Apr. 1, 2011) (“Probably more importantly than anything else, the L3C is a brand . . .”).

76. Americans for Community Development has drafted federal legislation, the Philanthropic Facilitation Act of 2010, that would amend § 4944(c) of the Internal Revenue Code and thereby make it easier for foundations to invest in L3Cs. This legislation has not been introduced in Congress. *Proposed Federal Legislation*, AMS. FOR CMTY. DEV., <http://www.americansforcommunitydevelopment.org/proposedfedlegislation.php> (last visited Apr. 1, 2011).

77. This has been one of the main criticisms of the L3C. Foundations will unwittingly make program-related investments in L3Cs that prove ineligible, thereby jeopardizing the foundation’s tax status. See, e.g., J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment In Entrepreneurial Ventures*, 35 VT. L. REV. 273, 291–92 (2010); Daniel S. Kleinberger, *A Myth Deconstructed: The “Emperor’s New Clothes” on the Low-Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879, 889 (2010).

78. See, e.g., *Introducing the new, socially responsible limited liability company*, AMS. FOR CMTY. DEV., at 2, http://www.americansforcommunitydevelopment.org/downloads/Introducing_the_L3C%20PowerPoint.pdf (last visited Apr. 15, 2011).

79. *L3C Operating Agreement*, INTERSECTOR L3C, § 6 (May 23, 2007) http://www.intersectorl3c.com/goopages/pages_downloadgallery/downloadget.php?filename=5923_3592218.pdf&orig_name=L3COperatingAgreement_Short.pdf.

has already received or the fair market value of the membership interests, as determined by an independent appraiser.⁸⁰ In addition, all members might have the right to veto the transfer through a unanimous consent provision. The manager could have more limited authority than in a conventional LLC, in that the members' consent could be required before the disposal of any of the LLC's assets beyond the ordinary course of business.⁸¹ Foundations, often sophisticated and well-advised, would protect an L3C's social mission by negotiating effective mission maintenance mechanisms.⁸²

2. Benefit Corporations

As of March 2011, Maryland, New Jersey, and Vermont have passed legislation creating a new type of entity called the "benefit corporation."⁸³ Colorado, Hawaii, New York, North Carolina, Pennsylvania, and Virginia are also considering similar legislation.⁸⁴ According to its proponents, benefit corporations provide an off-the-shelf organizational form for entrepreneurs to run a for-profit business without the worry of shareholder lawsuits based on a board's failure to maximize shareholder wealth.⁸⁵ This form can also promote transparency by requiring reports on the social mission.⁸⁶

Benefit corporations remain generally subject to the state's corporate law.⁸⁷ Typically, there is some form of compulsory "other constituency" statute, i.e., directors are required to consider other stakeholders.⁸⁸

80. *Id.* § 5.

81. *Id.* § 3.3.

82. See, e.g., Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 370 (2009) ("[T]he social benefit nonprofit actors can retain ultimate decision-making power and thereby ensure that the firm remains committed to its social and/or environmental purpose.").

83. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (West 2010); Act of Mar. 1, 2011, ch. 30, 2011 N.J. Laws 1 (to be codified at N.J. STAT. ANN. § 14A:18); Vermont Benefit Corporations Act, No. 113, 2010 Vt. Acts & Resolves 1 (to be codified at VT. STAT. ANN. tit. 11A, § 21) (effective July 1, 2011).

84. *Benefit Corporation Legislation*, B CORP., <http://www.bcorporation.net/publicpolicy> (last visited Apr. 1, 2011) (listing states and providing links to state bills). California also considered a similar legal form titled the "flexible purpose corporation." See S. 1463, 2009-2010 Leg., Reg. Sess. (Cal. 2010). It too would have a social purpose in addition to making a profit.

85. See, e.g., Katrina vanden Heuvel, *Making the Economy More Just*, WASH. POST, Jul. 21, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/20/AR2010072002754.html>.

86. See generally *Why B Corps Matter*, B CORP., <http://www.bcorporation.net/why> (last visited Apr. 1, 2011) [hereinafter *Why B Corps Matter*] (emphasizing "rigorous and independent standards" of transparency).

87. See, e.g., MD. CODE ANN., CORPS. & ASS'NS § 5-6C-02(a).

88. The directors must take into consideration: (1) the stockholders; (2) the employees, subsidiaries, and suppliers; (3) the interests of customers as beneficiaries of the general public benefit

The entity does not, however, have any formal or enforceable fiduciary duties to its intended beneficiaries or other nonshareholding stakeholders unless expressly provided for.⁸⁹

A benefit corporation must create a general public benefit, and may also identify in its charter one or more specific public benefits.⁹⁰ A general public benefit is “a material, positive impact on society and the environment, as measured by an [independent] third-party,” using transparent standards.⁹¹ A benefit corporation’s status must also appear prominently on any charter document or stock certificate of the corporation.⁹² Benefit corporations must deliver to each stockholder an annual benefit report that includes a description of the ways the corporation pursued the general or specific public benefit and the extent to which that benefit was created.⁹³ The report must also include any circumstances that hindered the creation of the benefit⁹⁴ and “[a]n assessment of the societal and environmental performance of the [company] prepared in accordance with a third-party standard applied consistently with the prior year’s [report],” or with an explanation of any inconsistency with the prior year’s report.⁹⁵

created by the corporation; (4) community and societal considerations, for all of the communities in which the corporation, subsidiaries, or suppliers have offices or facilities; and (5) the impact on the local and global environment. *Id.* § 5-6C-07(a)(1). If appropriate, the directors may also consider other pertinent factors or the interests of any other groups. *Id.* § 5-6C-07(a)(2).

89. *Id.* § 5-6C-07(b).

90. The phrase “specific public benefits” includes:

(1) [p]roviding . . . beneficial products or services; (2) [p]romoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) [p]reserving the environment; (4) [i]mproving human health; (5) [p]romoting the arts, sciences, or advancement of knowledge; (6) [i]ncreasing the flow of capital to entities with a public benefit purpose; or (7) [t]he accomplishment of any other particular benefit for society or the environment.

Id. § 5-6C-01(d).

91. *Id.* § 5-6C-01(c). The third-party standard must be “developed by a person or entity that is independent from the benefit corporation” and must publicly identify the factors considered, weight given each factor, and state that developed or changed the standard. *Id.* § 5-6C-01(e).

92. *Id.* § 5-6C-05.

93. *Id.* § 5-6C-08(a)(1)(i).

94. *Id.* § 5-6C-08(a)(1)(iii).

95. *Id.* § 5-6C-08(a)(2). The Vermont benefit report has additional requirements:

[1] a statement of the specific goals or outcomes identified by the benefit corporation for creating general public benefit and any specific public benefit for the period of the benefit report; [2] a description of the actions taken by the benefit corporation to attain the identified goals or outcomes and the extent to which the goals or outcomes were attained; [3] a description of any circumstances that hindered the attainment of the identified goals or outcomes and the creation of general public benefit or any specific public benefit; . . . [4] specific actions the benefit corporation can take to improve its social and environmental performance and attain the goals or outcomes identified for creating general public benefit and any specific public benefit; [5] an assessment of the social and environmental performance of the benefit corporation prepared in accordance with a third-

A corporation may terminate its status as a benefit corporation by deleting the statement from its charter with either a majority or super-majority vote, depending on the jurisdiction.⁹⁶

Vermont's law, like New Jersey's but unlike Maryland's,⁹⁷ includes a provision creating a position called "benefit director."⁹⁸ The benefit director must be independent⁹⁹ and elected or removed in the same way as the other directors,¹⁰⁰ but has some additional obligations.¹⁰¹ The benefit director coordinates the annual benefit report, including stating an opinion on whether the corporation and its directors and officers have acted in accordance with its benefit purposes.¹⁰² If there has been a failure to act, the benefit director must describe the failure.¹⁰³ A "benefit enforcement proceeding," which is a claim or action against a director or officer for failure to pursue the stated benefit(s) or violation of a duty or standard of conduct under the law, provides an enforcement mechanism.¹⁰⁴ People with standing to bring suit include shareholders, directors, 10% or greater shareholders of the benefit corporation's parent company, and anyone so identified in the corporation's articles of incorporation.¹⁰⁵

party standard that has been applied consistently with prior benefit reports or accompanied by an explanation of the reasons for any inconsistent application; [6] a statement of specific goals or outcomes identified by the benefit corporation and approved by the shareholders for creating general public benefit and any specific public benefit for the period of the next benefit report; [7] the name of each benefit director and the benefit officer, if any, and the address to which correspondence to each of them may be directed; [8] the compensation paid by the benefit corporation during the year to each director in that capacity; [9] the name of each person that owns beneficially or of record five percent or more of the shares of the benefit corporation; and [10] the statement of a benefit director

Vermont Benefit Corporations Act, No. 113, § 21.14(a), 2010 Vt. Acts & Resolves 1, 18–19 (to be codified at VT. STAT. ANN. tit. 11A, § 21.14(a)) (effective July 1, 2011).

96. Compare MD. CODE ANN., CORPS. & ASS'NS § 5-6C-04 (West 2010) (to terminate status, a benefit corporation must satisfy the same amendment requirements for all corporations), with Vermont Benefit Corporations Act § 21.07(2) (termination requires at least a two-thirds super-majority).

97. Compare Vermont Benefit Corporations Act § 21.03(a)(2), and Act of Mar. 1, 2011, ch. 30, § 14A:18-1, 2011 N.J. Laws ch. 30, with MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (West 2010).

98. Vermont Benefit Corporations Act § 21.10.

99. *Id.* § 21.10(b). The criteria for independence is essentially identical to that used for a traditional corporation. See generally Antony Page, *Unconscious Bias and the Limits of Director Independence*, 2009 U. ILL. L. REV. 237, 241–48 (examining definitions of independent directors).

100. Vermont Benefit Corporations Act § 21.10(b).

101. *Id.* § 21.10(a).

102. *Id.* § 21.10(c)(1), (3).

103. *Id.* § 21.10(c)(4).

104. *Id.* § 21.13(c)(1)–(2).

105. *Id.* § 21.13(b)(1)–(4).

The private sector has also created a hybrid corporate form for social enterprise promulgated under existing laws.¹⁰⁶ B Lab, a nonprofit organization, promotes the formation of “B Corporations,” a self-proclaimed “new type of corporation which uses the power of business to solve social and environmental problems.”¹⁰⁷ B Lab provides a template that signals the existence of a social enterprise and encourages its formation.¹⁰⁸

Like the state-sanctioned benefit corporation, B Corporations are intended to “[m]eet comprehensive and transparent social and environmental performance standards” and institutionalize stakeholder interests.¹⁰⁹ B Corporations must be certified through third-party validation to meet “transparent, comprehensive social and environmental performance metrics.”¹¹⁰ Even more than the state forms, B Lab markets the power of branding (“billions of dollars of collective market presence”) and networking.¹¹¹ If the B Corporation label catches on among consumers, this will help make the form sustainable. In fact, the founders optimistically predict that B Corporations, in a generation, will equal the size of today’s nonprofit sector.¹¹²

B Corporations were expressly designed to address the profit-maximization concerns regarding the corporation,¹¹³ but are also optimistically claimed to solve intertemporal or mission maintenance concerns,¹¹⁴ including profitability, succession, growth, and liquidity.¹¹⁵ The

106. See B CORP., <http://www.bcorporation.net> (last visited Apr. 1, 2011).

107. *About Certified B Corps*, B CORP., <http://www.bcorporation.net/about> (last visited Apr. 1, 2011) [hereinafter *About B Corps*]; *Who Certifies?*, B CORP., <http://www.bcorporation.net> (expand “About B Corp” menu; then select “Who Certifies?” hyperlink) (last visited Apr. 1, 2011).

108. See generally *Become a B Corp*, B CORP., <http://www.bcorporation.net/become> (last visited Apr. 1, 2011).

109. *About B Corps*, *supra* note 107.

110. *B Lab Legal Framework Objectives & Benefits*, B. CORP., http://www.bcorporation.net/resources/bcorp/documents/%2FBLab_LegalFramework_2009.pdf (last visited Apr. 1, 2011) [hereinafter *Objectives & Benefits*].

111. *Benefits of Becoming a B Corporation*, B. CORP., at 3, http://www.bcorporation.net/resources/bcorp/documents/Bcorp_Benefits%2520of%2520B_Package.pdf (last visited Apr. 1, 2011).

112. *B Lab’s Jay Coen Gilbert on What It Takes to Be a “B Corporation,”* SUSTAINABLE LIFE MEDIA, http://www.sustainablelifemedia.com/content/feature/strategy/do_you_have_what_it_takes_to_be_a_b_corporation (last visited Apr. 15, 2011).

113. See *Why B Corps Matter*, *supra* note 86. B Corporations also attempt to solve the signaling problem, i.e., which companies are really good and which just have good marketing. *Id.*

114. *Legal Roadmap*, B. CORP., <http://survey.bcorporation.net/legal.php> (last visited Apr. 1, 2011) (claiming to provide “a clear, step-by-step process to change the DNA of your business”). Intertemporal or mission-maintenance concerns are those regarding whether an organization will remain committed to a particular social mission over time and when confronted with challenges. Nonprofits, for example, have an asset lock.

key legal change for a B Corporation is to include an “other constituency” provision in its articles¹¹⁶ because B Corporations cannot be safely formed in states, such as Delaware, that lack an “other constituency” statute. The director’s goal remains the same: determining what is in “the best interests of the [corporation] and its shareholders”¹¹⁷ To do this, the director must “consider” all of the corporation’s stakeholders and the decision’s wider impact.¹¹⁸ The requirement is really just one of process; it requires consideration without requiring any particular result.¹¹⁹ It also gives enormous lawful discretion to the board of directors. As long as the directors “consider” the decision’s impact, it is effectively unreviewable.¹²⁰ The early Berle might have characterized this as handing over power, “with a pious wish that something nice will come out of it all.”¹²¹

For companies in some change-of-control situations, the provision would expressly remove the company from the so-called *Revlon* duty to maximize shareholder value.¹²² When *Revlon* applies, directors may only

115. *Introducing the B Corporation*, B CORP., http://www.bcorporation.net/resources/bcorp/documents/2009%20B%20Corp_Intro_Package.pdf (last visited Apr. 1, 2011). These goals are achieved all “while taking care of our employees, community and the environment.” *Id.*

116. B Lab suggests the following provision:

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, (collectively, with the shareholders, the “Stakeholders”), 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.

Legal Roadmap (Form Results), B. CORP., <http://survey.bcorporation.net/legal.php> (select “C Corporation” in “Corporate structure” field; then select “New Jersey” in “State of incorporation” field; then click “Next”) (last visited Apr. 1, 2011) [hereinafter *Legal Roadmap Form Results*]. “B Lab recognizes that this kind of provision may be less effective in states that do not have other constituency statutes.” *Id.* (select “C Corporation” in “Corporate structure” field; then select “Delaware” in “State of incorporation” field; then click “Next”).

117. *Legal Roadmap Form Results*, *supra* note 116.

118. *Id.*

119. Although B Lab asserts that this change would render directors accountable, it is hard to see how, in practice, any given decision could be challenged more successfully in a B Corporation than in a traditional corporation. What information would a director need to consider? Presumably the same standard as exists currently in Delaware: “all material information reasonably available to [the board].” *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985), *overruled on other grounds by Gantler v. Stephens*, 965 A.2d 695 (Del. 2009).

120. As has been observed many times before, a person with many masters effectively has none. *See, e.g.*, Page, *supra* note 21, at 994–95.

121. Berle, *supra* note 16, at 1368.

122. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (holding that when the breakup of a company is inevitable, the board’s duty is “the maximization of the company’s value at a sale for the stockholders’ benefit”).

consider those benefits to other stakeholders that are rationally related to shareholders' pecuniary interests.¹²³ Clearly, in a cash-out merger, shareholders have no pecuniary interest besides maximizing the consideration they receive.¹²⁴ The impact of the provision, however, is again, simply to give directors discretion regarding which takeover bid to accept. Whereas under *Revlon* a director *must* accept the highest reasonably comparable economic offer, a B Corporation director *must* only consider the takeover's impact on all stakeholders, and then *may* accept a lower offer. There is no requirement that the B Corporation directors *must* accept a lower offer that has a better social impact. The "B Corporation" label signals to prospective investors the entity's priorities and what they should expect.¹²⁵

3. Community Interest Companies

Community Interest Companies (CICs) were introduced in the United Kingdom in 2005 by Tony Blair's government, and were designed expressly to meet the needs of social enterprise.¹²⁶ CICs are companies intended to produce a community benefit by dedicating their assets and much of their profits to that purpose.¹²⁷

The two key legal features of CICs are a "community interest test" and "asset lock."¹²⁸ The community interest test is relatively broad. "A company satisfies the community interest test if a reasonable person might consider that its activities are being carried on for the benefit of the community."¹²⁹ Political campaigning, however, is excluded.¹³⁰ The

123. *Id.*

124. Arguably, this does not matter because it is generally fairly easy to avoid *Revlon* duties, or alternatively, many states' other constituency laws expressly disavow *Revlon* duties. See, e.g., IND. CODE § 23-1-35-1(f) (2011).

125. *Objectives & Benefits*, *supra* note 110. As B Lab notes, the corporation's social goals are in the articles and thus "explicitly disclosed in a capital raise, ensuring the mission-alignment of new investors." *Id.*

126. See William Davies, *How to Tame Capitalism*, NEW STATESMAN, Sept. 13, 2004, at 33.

127. See CMTY. INTEREST COS., <http://www.cicregulator.gov.uk/index.shtml> (last visited Apr. 2, 2011).

128. *Id.*

129. The Community Interest Company Regulations, 2005, S.I. 1788 (U.K.), <http://www.legislation.gov.uk/ukxi/2005/1788/contents/made>. The community interest test in the United Kingdom reflects, in part, differences between the English and American branches of Anglo-Saxon law. The United Kingdom's definition of a legally charitable purpose is narrower than the definition used in the United States. In both countries, a prospective charity might try to assimilate by analogy its organization's proposed purpose under one of the traditional charitable headings. In the United Kingdom, if the organization's purpose does not fit, it will not qualify as a charity. In the United States, the courts default to something like a "reasonable person" standard. The CIC structure is not solely about creating a special structure for social enterprise—it is also a way to break open the box

organization also must not limit access to its benefits to too small a group.¹³¹

“Asset lock” is the term used for all provisions that ensure the CIC’s assets and profits are used primarily for the benefit of the community and not for the excessive benefit of employees, contractors, or investors.¹³² Suppliers of goods and services may not be compensated beyond full market value. Thus, salaries “must not be disproportionately high in relation to [employees’] abilities and the services they perform.”¹³³ Investors may buy shares, but dividends are capped, both at a specific rate of return and as a percentage of profits that can be paid in aggregate dividends.¹³⁴ At liquidation, shareholders are limited to receiving back the amount of their investment in the company.¹³⁵ In essence, a CIC’s shareholders are much more like holders of preferred stock.

A CIC must also issue a “community interest company report” along with its annual financial filing. This report must address: “[1] how the company’s activities have benefited the community; [2] what steps were taken to consult stakeholders and what was the outcome; [3] what payments were made to directors; [4] what assets were transferred other than for full consideration; [5] what dividends were paid; and [6] what performance-related interest was paid on loans or debentures.”¹³⁶

Enforcement is provided by a state regulator. The regulator may intervene if a CIC no longer meets the community interest test, and responses could include replacing the directors or managers, transferring assets, or winding up the CIC’s operations.¹³⁷ In essence, the regulator’s role is analogous to states’ attorneys’ general supervision of charities.¹³⁸

that U.K. charity law has gotten itself into by defining the list of legally recognized charitable purposes so narrowly.

130. The Community Interest Company Regulations, 2005, S.I. 1788, art. 2, ¶ 3 (U.K.).

131. *Id.* art. 2, ¶ 4.

132. *Frequently Asked Question[s]*, CMTY. INTEREST COS., 5 (Oct. 2009), <http://www.cicregulator.gov.uk/index.shtml> (follow “Leaflets” hyperlink; then follow “Frequently asked questions” hyperlink) (last visited Apr. 2, 2011).

133. *Id.*

134. A CIC is limited to paying out 35% of its profit and carrying forward any unused dividend capacity to five years.

135. The Community Interest Company Regulations, 2005, S.I. 1788, art. 6, ¶ 23 (U.K.).

136. *Frequently Asked Question[s] for Funding Organisations*, CMTY. INTEREST COS., 5 (Oct. 2009), www.cicregulator.gov.uk/guidance/Chapter%206%20-%20Feb%202010.pdf (last visited Apr. 2, 2011).

137. *See, e.g.*, The Community Interest Company Regulations, 2005 S.I. 1788 art. 6, ¶ 23(6) (U.K.), available at <http://www.legislation.gov.uk/ukxi/2005/1788/contents/made> (last visited Apr. 2, 2011) (presenting Regulator’s control over distribution of assets on dissolution).

138. The United States has responded to inadequate Attorney General supervision by using the IRS to act as regulator of charities and tax exempt nonprofits.

Importantly, the CIC is intended to provide a brand identity for social enterprise, which could help lower its transaction costs.¹³⁹ The government explained: “As the concept of social enterprise becomes more widely understood by the finance community, social entrepreneurs should find it easier to explain what they are doing and to get a competitive price for finance. Clear recognition of the CIC form will help this process.”¹⁴⁰

4. Socially Responsible Corporations

Some progressives have proposed an organizational form that adopts some of the features of progressive corporate law, notably stakeholder representation. In particular, state legislators in Minnesota proposed legislation that would give businesses the option of incorporating as a “socially responsible” for-profit business corporation.¹⁴¹ Businesses choosing this designation would be required to allot 20% of their board for worker-elected representatives, and another 20% for board-selected directors to “represent and advocate for the public interest.”¹⁴² This proposal carries both the hallmarks of social enterprise, in that this is an optional form, and progressive corporate law, in that certain stakeholders are expressly privileged in a relatively uniform way across entities organized under this form.

B. Increasing the Number of Social Enterprises and Achieving Visions and Missions

Efforts to combine for-profit and nonprofit features and tendencies in a single structure can, to say the least, be problematic.¹⁴³ States may, however, be able to promote social welfare by creating organizational forms that supply ready-made or off-the-rack means to solve or at least

139. *Community Interest Companies (CICs)*, DEP'T TRADE & INDUSTRY, <http://www.dti.gov.uk/cics/faqs.htm> (last visited Apr. 2, 2011).

140. *Id.*

141. S. 510, 86th Leg., Reg. Sess. (Minn. 2009).

142. “The directors of a corporation . . . must include directors whose role as directors includes representation of, and advocacy for, the interests of the corporation’s employees and of the public interest.” *Id.* § 304A.06(a). “At least 20 percent of the corporation’s directors must represent and advocate for the corporation’s employees. These directors must be nominated and elected by the employees, through a process specified in the bylaws.” *Id.* § 304A.06(b). “At least 20 percent of the corporation’s directors must represent and advocate for the public interest. These directors must be elected by the other board members, after seeking input from persons or groups representing the public interest.” *Id.* § 304A.06(c).

143. See Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 230–31 (2010) (describing perceived problems of corporate law for socially oriented companies).

mitigate such problems. Most notably, they can reduce transaction costs for aspiring social entrepreneurs, provide them with conspicuous and inexpensive signals to potential supporters who share their social aims, shape preferences by enabling and encouraging prospective entrepreneurs to pursue broader social aims, and nudge controller and employee behavior in more other-regarding directions.

Transaction costs can be thought of as friction interfering with the free exchange of rights and obligations.¹⁴⁴ Transaction costs may include those costs incurred by searching for information about the transaction (e.g., which stock or house to buy), bargaining (e.g., the process of sorting offers and counteroffers in setting the price of a house), and policing and enforcing the agreement (e.g., suing the home buyer to complete the transaction in a falling real estate market).

New legal forms designed specifically for social enterprises could make it less costly for social entrepreneurs to launch such enterprises by manipulating the forms supplied by current organizational law. There would be fewer wheels for social entrepreneurs and their legal advisors to reinvent. As the forms become more common, there would be less need for the social entrepreneur to explain and bargain over standard provisions. Gradually, a market norm could emerge and become accepted. This virtuous spiral, at least with respect to transaction costs, might mirror the behavior of venture capitalists and angel investors in Silicon Valley. There, various standard market norms and organizational structures have become common, facilitating the efficient funding and development of start-ups, even if, when starting on a blank slate, other organizational structures might be more effective.¹⁴⁵

These new forms may cultivate and solidify more socially responsible norms within the firms that adopt them. Social norms are “customa-

144. *Black's Law Dictionary* defines a transaction cost as “a cost connected with a process transaction, such as a broker's commission, the time and effort expended to arrange a deal, or the cost involved in litigating a dispute.” BLACK'S LAW DICTIONARY 398 (9th ed. 2009). Ronald Coase famously explored the problem with his discussion of the “costs of using the price mechanism” in his landmark article, *The Nature of the Firm*. R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 390 (1937). Oliver E. Williamson can be credited with popularizing the term. See Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 *J. LAW & ECON.* 233 (1979).

145. See, e.g., John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 *CALIF. L. REV.* 1301, 1339 (2001) (observing that “[i]n the VC financing stage, for example, Silicon Valley lawyers use ‘cookie cutter’ forms into which they ‘cram’ deals that do not completely fit”).

ry rules of behavior that coordinate our interactions with others.”¹⁴⁶ A common criticism of corporations is that through their norm of profit maximization, they encourage executives to make antisocial decisions and that, absent the corporation, the decision-maker would make more “ethical” decisions.¹⁴⁷ In a nonprofit organization, the controllers and employees should feel less pressure to make decisions that maximize the entity’s net earnings at society’s expense. New organizational forms promise to promote social action more consistently than the conventional corporate form. For example, by altering decision-making procedures—say, by requiring controllers to consider how significant decisions would affect their mission and not simply profits—new forms could subtly alter controllers’ agendas in more pro-social directions.

A third potential advantage of new forms is to increase the demand for the forms themselves and, with it, the supply of socially motivated entrepreneurial activity. The founder of a prospective business, when presented with an expanded array of organizational forms on the secretary of state’s website or at her office, may find that the new form serves her social aspirations better than any of the longstanding options. Enacting the new form and making it readily available could serve to market the form itself.

A new organizational form could also serve a signaling or branding function toward potential customers. Some customers prefer, all things being equal, to trade with an organization that has a social mission rather than with a more conventional profit-maximizing corporation. Consumers who buy fair trade coffee, or Product (RED) may only be the tip of this particular iceberg.

There is admittedly some risk that social enterprises will divert resources from the nonprofit sector instead of attracting resources that would otherwise go to conventional for-profit corporations.¹⁴⁸ There is also a risk that some social enterprises will prove to be wolves in sheep’s clothing. In other words, they will derive benefits from signaling their

146. H. Peyton Young, *Social Norms*, NEW PALGRAVE DICTIONARY OF ECONOMICS ONLINE, http://www.dictionarofeconomics.com/article?id=pde2008_S000466&edition=current (last visited Apr. 12, 2011).

147. See, e.g., Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 199, n.254 (2003) (“[D]irectors and executives who work within firms face strong cultural norms to maximize profits and are given extensive training in business schools or by the firms themselves. The American business culture promotes the idea that ‘business is business’ and considerations other than profit are irrelevant to decisions.”).

148. See, e.g., Laura Otten, *A Tough Hybrid to Swallow—the L3C*, NONPROFIT UNIV. BLOG (Nov. 19, 2009, 1:12 PM), <http://www.nonprofituniversityblog.org/2009/11/a-tough-hybrid-to-swallow-the-l3c3>.

social orientation but, absent an effective enforcement mechanism, will not actually be any better than conventional corporations. These risks may be worth taking. The social enterprise movement's optimistic hope is that not only will more socially responsible organizations be formed, but that these entities will also be more effective in achieving their social missions than the traditional nonprofits.

Lastly, as a practical matter, the enactment and provision of new forms designed for social enterprises seems less likely to arouse opposition than, say, legislation to advance progressive corporate law's agenda.¹⁴⁹ A business's decision to adopt these forms is wholly voluntary as well as conspicuous to the business's potential investors, who can make decisions and adjust their expectations accordingly. The social enterprise movement's incremental approach to change through organizational law may therefore be politically more viable.

IV. FROM CORPORATE SOCIAL RESPONSIBILITY TO PROGRESSIVE CORPORATE LAW TO SOCIAL ENTERPRISE?

Part II examined the CSR debate that Berle helped frame. That debate's main trope is whether corporate directors should aim to maximize shareholder value rather than serve the interests of nonshareholders and society at large.¹⁵⁰ We also saw how support for a larger government role in shaping corporate governance coalesced under the label of progressive corporate law—in many ways the most muscular and structural iteration of CSR.¹⁵¹ Part III examined the social enterprise movement and its legal

149. New Jersey's benefit corporation legislation, for example, passed unanimously in both houses. *Bill Allowing For-Profits To Organize As Issue-Driven Companies Now Law*, N.J. TODAY, Mar. 7, 2011, <http://njtoday.net/2011/03/07/bill-allowing-for-profits-to-organize-as-issue-driven-companies-now-law/#ixzz1Hv5tfe6C>.

150. See, e.g., Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 89, 91 (2005) (observing that the corporation is "an instrument to serve the collective good, broadly defined").

151. See, e.g., *id.* at 95 (arguing that the "crucial" question is "how we construct a legal framework for corporations that maximizes the probability that businesses serve the interests of society as a whole"); Marleen A. O'Connor, *Promoting Economic Justice in Plant Closings: Exploring the Fiduciary/Contract Law Distinction to Enforce Implicit Employment Agreements*, in PROGRESSIVE CORPORATE LAW, *supra* note 6, at 219 (arguing that corporate law should recognize that corporate managers have certain legal (and legally enforceable?) responsibilities to the corporation's workers and their families); see also Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 639 (2001) ("In the late 1990s, a new corporate social responsibility movement [i.e., that goes by the name of 'progressive corporate law'] has gained considerable momentum."). In Branson's view, PCL's tone is "more muted" and "less shrill" than CSR's iteration in the 1970s, which he says called for such things as "federal chartering, federal minimum standards, mandatory public interest directors, and 'power to the people.'" *Id.* at 647.

agenda, which promotes new organizational forms designed specifically for for-profit businesses that integrate a social mission or, one might say, are constitutionally committed to being socially responsible. This Part compares and distinguishes CSR, progressive corporate law, and social enterprise along key axes, and contrasts them with mainstream corporate law. In particular, this Part shows how social enterprise both advances and partly sidesteps the hoary CSR debate started by Dodd and Berle.

We begin by asking if social enterprise is “the new CSR,” and answer the question in the negative. The proposed connection is not necessarily flattering, as many commentators believe that the CSR debate is jejune.¹⁵² So the question—“Is social enterprise the new CSR?”—is another way of asking whether the social enterprise movement is yet one more iteration of CSR, albeit with (as was said of progressive corporate law) some “new terminology,” a focus “on a slightly different facet of the problem,” and a few new ideas?¹⁵³ In our view, the social enterprise movement is significantly more substantive and interesting than that characterization. As we show, it appropriates some CSR notions and shares some CSR sensibilities, but combines them in a way that should please corporate contractarians while alarming progressive corporate law proponents and discomfiting some CSR proponents. This leads to a counterintuitive conclusion: while corporate contractarians can wholeheartedly embrace the creation of new legal forms for social enterprises, some progressive corporate law proponents might find grounds to object to that project.

CSR and the social enterprise movement seem like fruits of the same tree. Their proponents seek answers to the same core questions: How can more businesses be induced to do more to address pressing social and environmental problems? What changes—including changes to the law of business organizations—would lead more businesses to take the interests of nonshareholders and society more seriously?

While these schools ask the same or similar questions, they use different approaches to supply answers. Mainstream corporate law—the baseline from which we assess movement and perhaps progress—seeks to reduce the agency costs that shareholder–principals incur with respect to manager–agents by using shareholder exit rights, under-enforced fidu-

152. Bainbridge, *supra* note 6, at 902–03; Wells, *supra* note 4; see, e.g., Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1195 (1999) (“[L]egal, political, social, and economic commentators have debated corporate social responsibility ad nauseam.”).

153. Bainbridge, *supra* note 6, at 903.

ciary duties, the market for corporate control, more potent norms and market forces, and other mechanisms intended to constrain controller action and align incentives more closely with shareholder interests.¹⁵⁴ It attempts to encourage (or require) controllers to make decisions that benefit shareholders.¹⁵⁵

CSR, however, tries to encourage current controllers of large corporations to make decisions more beneficial to society. It uses extralegal strategies such as self-regulation, external monitoring, and consumer activism.¹⁵⁶ It also looks to government to encourage pro-social behavior by authorizing corporate controllers to engage in corporate philanthropy¹⁵⁷ and to consider nonshareholder interests when making decisions.¹⁵⁸ It is not, however, revolutionary, or even particularly challenging to the status quo.¹⁵⁹

Progressive corporate law focuses on changing decision-making by restructuring corporate law and its governance requirements in ways thought to better serve the interests of nonshareholder stakeholders.¹⁶⁰ The way to improve decision-making is to alter the decision-makers. This might be done by expanding the composition of corporate boards to include representation of other stakeholders. Other formal ways for stakeholders to advance their interests might include expanding their standing to sue.

Where CSR and progressive corporate law would induce controllers of existing businesses to make better decisions, the social enterprise

154. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991); JONATHAN R. MACEY, *CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN* 5–17 (2008); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives From History*, 41 *STAN. L. REV.* 1471, 1478 (1989) (“[F]irm contracts take forms determined by the now well known imperative of agency cost reduction.”).

155. See, e.g., MACEY, *supra* note 154, at 9; Hansmann & Kraakman, *supra* note 15, at 441.

156. See, e.g., Crane et al., *supra* note 1, at 5 (describing one view of CSR “as a framework of ‘soft regulation’ that places new demands on corporations”); Joe Nocera, *The Paradoxes of Businesses as Do-Gooders*, *N.Y. TIMES*, Nov. 11, 2006, at C1 (“[W]hat initially spurred the modern corporate social responsibility movement was the rise of nonprofit activist groups, which pushed and prodded—and boycotted—companies to force them toward, say, treating workers better in developing countries.”).

157. See, e.g., DEL. CODE ANN. tit. 8, § 122(9) (2010) (allowing corporations to “[m]ake donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof”).

158. See, e.g., N.Y. BUS. CORP. LAW § 717(b) (McKinney 2009). New York’s other constituency statute is typical: it permits, without requiring, a board in its decision-making to consider interests such as those of employees or the communities in which it does business. *Id.*

159. See, e.g., Nocera, *supra* note 156 (quoting the cofounder of Paul Hawken as saying “corporate social responsibility is a very safe place By safe, I mean it doesn’t challenge the business model.”).

160. Page, *supra* note 21, at 993–97.

movement seeks structures that would enable social entrepreneurs to create businesses that pursue double or triple bottom lines and not subordinate mission to profits. Part III examined several legal forms for such structures. The L3C model is premised on contracts and tax law. In the ideal case, an L3C-type social enterprise would obtain program-related investments from tax-exempt charitable foundations. These investments would be contingent on the enterprise's continued pursuit of its social mission, which the foundation has incentive to monitor, and perhaps influence, so as to avoid endangering its tax-exempt status.¹⁶¹ The foundation's monitoring and control rights would be determined by contract, which sophisticated foundations would be able to negotiate and enforce on their own.¹⁶² In the certification or accreditation model, exemplified by benefit corporations and B Corporations, a business seeks confirmation of its social enterprise bona fides from an independent third party such as B-Lab. Other approaches would put independent directors on an enterprise's board of directors to act as reporters and mission monitors. Another approach, reminiscent of the nonprofit form, would cap investors' financial returns, as demonstrated by the community interest company, and as suggested by the L3C's requirement that profit-making not be a "significant purpose."¹⁶³

Which approach yields more socially responsible business activity? In the markets for sales and corporate control, corporations that act in more socially responsible ways may put themselves at a competitive disadvantage compared to corporations that are less conscientious. Such corporations, for example, may be more vulnerable to takeover by profit-seeking controllers eager to recapture wealth transferred to nonshareholder stakeholders. Progressive corporate law proponents would be expected to advocate for statutory minimums to counteract these races to the bottom.

Like conventional corporations that practice CSR, businesses set up as social enterprises may be more vulnerable to firms that focus on a single bottom line. Yet these businesses might also have more success in attracting investors, employees, and consumers who sympathize with

161. See, e.g., John Tyler, *Negating the Legal Problem of Having "Two Masters": A Framework for L3C Fiduciary Duties and Accountability*, 35 VT. L. REV. 117, 155 (2010) (noting that an L3C provides a distinct advantage for "foundations and other charities that are going to be more likely to remain vigilant and expect loyalty to charitable purposes [than for-profit partners]").

162. Luther Ragin, Vice President, Investments, The F.B. Heron Foundation, *PRIs in Practice*, Feb 19, 2010.

163. VT. STAT. ANN. tit. 11, § 3001(27)(B) (2011) ("No significant purpose of the company is the production of income or the appreciation of property . . ."). Foundations investing in L3Cs might also negotiate contractual limits on other investors' returns.

their missions. Thus, L3Cs would aggressively seek investments from charitable foundations, which might be more willing to accept low or no returns and subsidize investors seeking market returns, in order to increase the capital available to socially minded businesses. Similarly, some employees might be more willing to accept lower salaries from social enterprises than from profit-maximizing businesses, in the same way that some employees for charities accept lower salaries in exchange for warm glow or psychic income.¹⁶⁴

Some differences among the schools reflect differences in emphasis rather than substance. CSR and social enterprise, for example, are directed toward businesses at different stages in the corporate lifecycle. Proponents of CSR and progressive corporate law generally focus on large and established businesses.¹⁶⁵ (Berle, too, was expressly concerned with the largest companies and their increasing dominance of the U.S. economy.)¹⁶⁶ The scale of such businesses permit Kent Greenfield, a leading progressive corporate law scholar, to assert that improving their governance “would have positive impacts on . . . stagnant wages for blue-collar workers and stark income inequality.”¹⁶⁷ Social enterprise proponents, by contrast, go for depth over breadth: they focus on budding social entrepreneurs, who may be more amenable to adopting a pervasively pro-social structure for their businesses. Even so, many proponents believe that social enterprise will ultimately be transformative and lead to large-scale change.¹⁶⁸

Other differences go deeper. CSR and especially progressive corporate law lean toward the left-liberal side of the political spectrum, while the social enterprise movement is more libertarian in orientation. This is reflected in how each deals with the “S” word—socialism. Critics, nota-

164. See, e.g., Brian Galle, *Keep Charity Charitable*, 88 TEX. L. REV. 1213, 1223 (2010); Note, *Federal Income Taxation of Employee Fringe Benefits*, 89 HARV. L. REV. 1141, 1147 (1976) (defining psychic income as “the cash valuation of satisfaction obtained from the performance of one’s job”).

165. See, e.g., Wells, *supra* note 4, at 80 (stating that “[f]irst, corporate social responsibility is about big business”); Greenfield, *supra* note 150, at 96 (noting that among the various business forms, the publicly traded corporation is the most broadly successful “in providing the framework for large business enterprises” (emphasis added)).

166. See *supra* note 36 and accompanying text.

167. See GREENFIELD, *supra* note 61, at 3.

168. See, e.g., J. Gregory Dees, *The Meaning of “Social Entrepreneurship.”* CTR. FOR ADVANCEMENT SOC. ENTREPRENEURSHIP, 4 (May 30, 2001), http://www.caseatduke.org/documents/dees_sedef.pdf (stating that the founders of social enterprise “seek to create systemic changes” with the “potential to stimulate global improvements”); *What is a Social Entrepreneur?*, ASHOKA FOUND., http://www.ashoka.org/social_entrepreneur (claiming that “social entrepreneurs act as the change agents for society . . . come[] up with new solutions to social problems and then implement[] them on a large scale”).

bly Friedman, have not hesitated to label the CSR and progressive corporate law initiatives as socialist.¹⁶⁹ Marjorie Kelly, a leader in pro-social corporate redesign, tackles the issue head on. “Some may wonder if these alternative designs are intended to promote or lead to socialism but in fact the concept of private ownership is deeply intrinsic to them. Instead of doing away with private ownership, these firms redesign it.”¹⁷⁰ Progressive corporate law proponents tread more lightly. For example, in *The Failure of Corporate Law*, Greenfield does not broach the subject of socialism until the book’s postscript, where he asserts that his progressive approach to corporate law “is hardly inconsistent with capitalism.”¹⁷¹

In execution, the various approaches will tend to benefit different sets of nonshareholder interests. CSR generally allows for the soft elaboration of norms and diffuse dispersal of benefits to corporate “stakeholders” broadly understood, which can extend to the community at large or even global society and the planet. Berle, for example, wrote of corporations making decisions in line with the clearly expressed sentiments of the community, albeit without the hard regulation of laws.¹⁷² In practice, however, CSR would likely result in benefits only to the most sympathetic of stakeholders. Progressive corporate law, on the other hand, would have the state identify the groups to be benefited through legislative fiat, with the leading beneficiaries being a company’s employees, followed by the “communities in which the company employs a significant percentage of the workforce”¹⁷³

Proponents of social enterprise also believe businesses should affirmatively seek to benefit nonshareholders.¹⁷⁴ The critical difference is

169. See Friedman, *supra* note 2. Bainbridge also identifies links between “stakeholderism” and socialism. Bainbridge, *supra* note 6, at 890 n.171. Indeed, he writes, “Stakeholderism is in some respects even more invidious than traditional socialism. Instead of economic power being exercised directly by the central government, state control would be dispersed throughout the economy.” *Id.* at 890.

170. Marjorie Kelly, *Not Just for Profit: Emerging Alternatives to the Shareholder-Centric Model*, in 2009 SUMMIT ON THE FUTURE OF THE CORPORATION: PAPER SERIES ON RESTORING THE PRIMACY OF THE REAL ECONOMY 34, 40 (Allen White ed., 2009), <http://www.corporation2020.org/corporation2020/documents/Papers/2nd-Summit-Paper-Series.pdf> (last visited Mar. 31, 2011).

171. GREENFIELD, *supra* note 61, at 241 (“Nowhere have I suggested state ownership of the means of production. A nation need not flirt with socialist economic organization to regulate corporations to make them more accountable to the public. . . . Seeing [both shareholders and workers] as stakeholders to which the management owes duties is hardly inconsistent with capitalism.”).

172. See *supra* note 45 and accompanying text.

173. See, e.g., Greenfield, *supra* note 150, at 118.

174. See, e.g., *About Us*, SOC. ENTERPRISE ALLIANCE, <http://netforum.avectra.com/eweb/DynamicPage.aspx?Site=SEA&WebCode=CustomPage> (last visited Apr. 2, 2011); *Our Vision*,

that they would give the founders of social enterprises far more leeway to define their specific missions and select which nonshareholders—including non-stakeholders—to privilege. It is each social entrepreneur's choice, and the choice of those backing her, rather than the sense of the CSR community or the mandate of the state.¹⁷⁵ The founder of a social enterprise might thus seek to benefit one set of stakeholders to the detriment of others with perhaps stronger claims on the enterprise's surplus.¹⁷⁶ Alternatively, the founder might seek to benefit the world as a whole. Yet some CSR proponents might think the selection of some beneficiaries unfair, "in the sense that a case could be made that a corporation should limit its selection process [for social projects] to considering those in need *among its stakeholders*," e.g., its employees, customers, suppliers, and local community.¹⁷⁷

Life can be unfair, and the various approaches address somewhat different sources of unfairness. Fairness depends in large part on people's reasonable expectations.¹⁷⁸ Investors who made their investments under a regime of shareholder wealth maximization might reasonably expect such a regime to continue. Where investors are advised *ex ante* that a specific firm or class of firms might sometimes advance social benefits at the shareholders' expense, they cannot justly complain about unfair treatment. Such complaints might be more valid regarding CSR, to the extent it significantly changes corporate decision-making away from the preexisting or reasonably expected norm. Investors' cries of unfairness seem even more justified regarding progressive corporate law: to the degree that it significantly changes the baseline rules for allocating a corporation's surplus, it would effectively transfer some of the current shareholders' wealth to nonshareholding stakeholders. With social enterprise, by contrast, firms that adopt a more pro-social form explicitly and

Mission and Strategic Objectives, SOC. ENTERPRISE COALITION, <http://www.socialenterprise.org.uk/pages/our-vision-mission-and-strategic-objectives.html> (last visited Apr. 2, 2011).

175. L3Cs are marginally more limited in their purpose. As they were conceived in large part to facilitate the use of foundations' program-related investments, their purposes must be state-recognized charitable purposes. In the United States, however, this is a very broad category.

176. The company Guayakí, for example, pays indigenous farmers two to three times the market rate for its mate. "Kue Tuvy"—*The Ache Guayakí Preserve*, GUAYAKÍ YERBA MATE, <http://www.guayaki.com> (scroll to the bottom of the page; follow "Reforestation" hyperlink; then follow "Kue Tuvy"—*The Ache Guayakí Preserve* hyperlink) (last visited Apr. 1, 2011). On the other hand, 80% of its U.S. employees earn an income below the poverty rate.

177. Thomas W. Dunfee, *The Unfulfilled Promise of Corporate Philanthropy*, in GIVING WELL: THE ETHICS OF PHILANTHROPY 243, 257 (Patricia Illingworth et al. eds., 2011) (emphasis added).

178. See, e.g., MACEY, *supra* note 154, at 3 (arguing that boards of directors need only satisfy shareholders "legitimate investment-backed expectations").

conspicuously inform investors up front that the firm will sometimes pursue its social mission, even where it does not maximize shareholder wealth. Here the fairness concerns result from abrupt changes in the quantum of contribution. An investor reasonably expecting, say, 20% of potential profits to be diverted toward a social mission, might consider themselves treated unfairly if that portion increased to 60%.

Because of its libertarian approach to social change, the social enterprise movement is compatible with a contractarian understanding of corporate law. In this respect, the social enterprise movement continues the CSR debate *from a different point of view*—that is, it offers a rejoinder to CSR from a contractarian perspective. Under mainstream corporate law, shareholder wealth maximization is the default norm in publicly traded corporations.¹⁷⁹ Critically, these defaults are non-mandatory and so subject to contrary agreement.¹⁸⁰ This leaves open the possibility that a corporation's shareholders can "mak[e] side bargains with other constituencies" and stakeholders.¹⁸¹ Corporations may pursue the opt-out route by memorializing their social commitments through statements in their charters or bylaws. For example, in its certificate of incorporation, the Washington Post Company declares its purpose "to publish . . . an independent newspaper dedicated to the welfare of the community and the nation, in keeping with the principles of a free press."¹⁸² In large publicly traded corporations, however, the opt-out route is often not viable because of high transaction costs, and midstream changes in corporate policy away from shareholder maximization, even when endorsed by a majority of shareholders, raise the expropriation concern mentioned above.¹⁸³ Yet in the context of a close corporation, as Bainbridge ob-

179. See, e.g., ROBERT CHARLES CLARK, *CORPORATE LAW* 678 (1986) ("[F]rom the traditional legal viewpoint, a corporation's directors and officers have a fiduciary duty to maximize shareholder wealth, subject to numerous duties to meet specific obligations to other groups affected by the corporation."); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2073 (2001) ("Norms in American business circles, starting with business school education, emphasize the value, appropriateness, and indeed the justice of maximizing shareholder wealth . . .").

180. See, e.g., MACEY, *supra* note 154, at 6 ("Shareholder wealth maximization is and should be both a norm and a default rule, but *only* a norm and a default rule.").

181. EASTERBROOK & FISCHER, *supra* note 154, at 35–36 (arguing that one should not care what the purpose of a corporation is as long as there is full *ex ante* disclosure); Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. LAW & BUS. REV. 177, 189 (2008).

182. Washington Post Co., *Certificate of Incorporation*, SECINFO.COM, art. 3, § 1, <http://www.secinfo.com/dsvRq.986.d.htm#1stPage> (last visited Apr. 3, 2011).

183. While it is true that investors know a company's charter can be changed, usually with the requirement of an affirmative shareholder vote, it does not follow that a radical change in a company's profit orientation is within investors' reasonable expectations. It is also possible that the lan-

served, the transaction costs of bargaining around default rules are far lower. “The contractarian model thus seems especially apt for the close corporation context.”¹⁸⁴ Similar conditions can be found in start-up social enterprises, making it easier for parties to actually bargain for something to maximize besides shareholder wealth.

CSR and progressive corporate law proponents could find much to dislike about the social enterprise movement. At present, the social enterprise movement has generated more publicity than change. Yet even if the social enterprise movement succeeds on its own terms—if, say, every state, territory, and Indian nation enacts new hybrid organizational forms and a growing share of newly formed businesses adopt these forms—it will be quite some time before we see large-scale change. CSR proponents may thus realistically fear that the social enterprise movement will “steal their thunder” and divert resources from advancing CSR’s agenda, which can effect more change faster through incremental improvements at large long-standing businesses.

V. CONCLUSION

The CSR debate continues unresolved, despite nearly eighty years of commentary. On one side are those who, like early Berle, contend that the board of directors’ paramount duty is to maximize value for shareholders. On the other are those who, following later Berle, contend that corporations have broader and wider responsibilities that extend to non-shareholding stakeholders, including employees, suppliers, creditors, and society at large. Two major strategies evolved to induce corporations to act upon these duties. The mainstream CSR movement promoted extra-legal strategies, including self-regulation, external monitoring, and socially responsible investing. The “progressive” corporate law movement advocated structural changes in corporate law itself designed to serve the interests of nonshareholders with a stake in a corporation’s activities, such as “other constituency” statutes that expand directors’ discretion. Most would agree, however, that neither movement produced much real change.

Recently, a new approach to business organizations law has emerged that promotes the creation of new organizational forms for businesses. Loosely termed “social enterprises,” these for-profit businesses expressly aim to both generate profits for owners and pursue a

guage restricting a corporation to “any lawful business or purposes” may serve to constrain a company’s pro-social intentions. *See* DEL. CODE ANN. tit. 8, §101(b).

184. Bainbridge, *supra* note 6, at 876.

social mission. The social enterprise movement has had striking legislative successes in the last three years, introducing in ten states (as of March 2011) new organizational forms that are designed specifically for businesses with a “double bottom line.”

Although social enterprise and CSR seem like fruits of the same tree, each draws some support from different and somewhat antagonistic sources and inclines in somewhat different—if not opposing—directions. Social enterprise’s emphasis on the individual social entrepreneur’s vision indicates a more libertarian orientation, unlike more robust iterations of CSR that strike some as socialistic. Social enterprise embraces a broader array of social missions and intended beneficiaries than those encouraged by CSR. Indeed, a social enterprise could be adverse and even unfair to certain interests favored by CSR, mostly notably to a business’s more immediate stakeholders. The differences between social enterprise and CSR may be more striking than the similarities and, for some CSR proponents, even lamentable.