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## Re-Imagining the Business Trust as a Sustainable Business Form

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### RE-IMAGINING THE BUSINESS TRUST AS A SUSTAINABLE BUSINESS FORM

LEE-FORD TRITT\* & RYAN SCOTT TESCHNER\*\*

#### ABSTRACT

*An important policy debate has emerged in the United States concerning how business should evolve to encapsulate more fully the burgeoning sustainability-conscious management paradigm. At issue in this debate is the proper role of business in society. The modern trend in business is to consider more than just shareholder profits. In the United States, companies are increasingly incorporating sustainability practices into their business models. However, by practice and by law, the traditional corporate management paradigm—the shareholder primacy model—holds that the singular social responsibility of business is to maximize shareholder interests, principally shareholder profits. This model conflicts with the sustainability management paradigm, which reflects the view that business should maximize value for society. Some states have realized the shortcomings of the traditional corporate management model and have enacted constituency statutes or created new corporate forms to account for the growth in sustainable corporate practices. However, these statutes and*

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*corporate forms have their own shortcomings. Historically, business trusts have been used to circumvent overly-restrictive corporate organizational and legal limitations. Entrepreneurs should once again look to this business form to pursue sustainable practices while maintaining profitability. Due to business trusts' structure and flexibility, they are an ideal vehicle for sustainable businesses. Accordingly, by drawing upon trust law and corporate law, this Article articulates an interdisciplinary, systematic application of business trusts as an alternative organizational form to corporations for the socially-conscious business management construct.*

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## INTRODUCTION

An important policy debate has emerged in the United States concerning how business ideology should evolve to encapsulate more fully the burgeoning sustainability-conscious management paradigm. At issue in this debate is the proper role of business in society. This has led to a heated discourse, in the business world, in academia, and in the popular press, about corporate sustainability in terms of organizational theory, law, and practice. The debate arises from a shift in the business world: companies have gone from focusing solely on the bottom line to making a positive impact on society. Both big and small businesses are considering their

environmental, societal, and economic effects on the community rather than focusing solely on shareholder wealth maximization. Corporations that many view as profit-generating powerhouses, such as Amazon<sup>1</sup> and Google,<sup>2</sup> are incorporating sustainable practices not geared purely towards profit.<sup>3</sup> However, by practice and by law, the traditional corporate management paradigm—the shareholder primacy model—holds that the singular social responsibility of business is to maximize shareholder interests, principally shareholder profits. This model conflicts with the sustainability management paradigm, which reflects the view that business should maximize value for society. Regrettably, corporate law and practice have remained static, making the corporate form ill-suited for the advancement of the sustainable management model. Business trusts and trust law, however, may provide a better organizational form and set of rules for sustainability-conscious entrepreneurs. Accordingly, by drawing from trust law and business law, this Article articulates and advocates an interdisciplinary, systematic application of business trusts as an alternative organizational form to corporations<sup>4</sup> for the socially-conscious business construct.

In the United States, the traditional corporate management paradigm has been the shareholder primacy model. The shareholder primacy model

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1. On Amazon's website, it lists one of its sustainability initiatives as expanding its downtown Seattle campus. *Amazon's Urban Campus*, AMAZON, <https://www.aboutamazon.com/working-at-amazon/amazons-urban-campus> [<https://perma.cc/3E2L-A9TP>]. It admits that "it would have been cheaper to move to the suburbs," but notes that its employees "love being in the heart of the city." *Id.*

2. Google lists two main sustainability focuses on its website: environment and responsible supply chain. *Sustainability*, GOOGLE, <https://sustainability.google> [<https://perma.cc/NE5B-TBX2>] [hereinafter *Google Sustainability*]. In fact, in 2016, Google spent more on renewable energy than any other company in the United States, Europe, and Mexico. Umair Irfan, *Energy Hog Google Just Bought Enough Renewables to Power Its Operations for the Year*, VOX (Dec. 6, 2017, 2:30 PM), <https://www.vox.com/energy-and-environment/2017/12/6/16734228/google-renewable-energy-wind-solar-2017> [<https://perma.cc/299Y-VLLE>].

3. See Lee-ford Tritt & Ryan Scott Teschner, *Amazon Delivers Diversity: Geographical & Social Influences on Corporate Embeddedness*, 16 BERKELEY BUS. L.J. 1 (2019) [hereinafter Tritt & Teschner, *Amazon Delivers Diversity*]. While on the surface sustainability practices may seem to hurt profits, sustainability practices are arguably more profitable in the long-term. *Id.* at 21.

4. This Article uses the corporate organizational form solely as a means in which to introduce the business trust into the sustainability discourse. Corporations are used for discussion purposes because the majority of the larger operating organizations select this form, the majority of publically traded companies are corporations, and the Massachusetts business trust originally emerged as an alternative to the corporation, specifically the restrictions on what was eligible for a corporate charter. Comparing business trusts to corporations and other business organizational forms for choice-of-entity purposes is a project for another time. It should be noted for future research, though, that a similar choice-of-entity dilemma exists in the not-for-profit arena, where charities can be created by trust or by incorporation.

requires the corporate board of directors to place shareholder interests above all else in corporate decision-making.<sup>5</sup> Shareholder primacy has been called the most fundamental concept in corporate governance and corporate law.<sup>6</sup> In this regard, the paradigm is widely embraced in the business, legal, and academic communities.

A derivative of shareholder primacy is the shareholder wealth maximization norm<sup>7</sup>—in that the board’s perceived duty “is to make decisions that maximize the financial interests of the shareholders, rather than those of any other ‘stakeholders’ or constituencies.”<sup>8</sup> This traditional shareholder-centric approach fosters the concept that corporations should focus solely on shareholder wealth maximization.<sup>9</sup> Undoubtedly, though,

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5. Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV., 1951, 1951 (2018). As used in this Article, shareholder primacy refers to the norm of prioritizing shareholder interests (especially financial interests) over the interests of other stakeholders (in essence, the question of whose interests prevail). The term is not used in the sense of corporate management modeling where the elements of corporate control lie with shareholders (in essence, the question of who is the ultimate decision-maker).

6. *Id.*

7. This focus of this Article is on the nexus between shareholder wealth maximization and corporate sustainability and social responsibility. It should be noted, though, that the terms “shareholder primacy” and “shareholder wealth maximization” are often conflated—but “one can have the latter without necessarily endorsing the former.” Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance 7* (UCLA Sch. of Law Research Paper No. 02-06, 2002), <http://papers.ssrn.com/abstract=300860>; see also Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 574 (2003).

8. WALTER A. EFFROSS, CORPORATE GOVERNANCE: PRINCIPLES AND PRACTICES 16 (2010) (footnote omitted); see also MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (40th Anniversary ed. 2002) [hereinafter FRIEDMAN, CAPITALISM AND FREEDOM]; Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 BUS. ETHICS Q. 235 (2002); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33 [hereinafter Friedman, *A Friedman Doctrine*].

9. For discussions concerning the shareholder wealth maximization norm, see Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993); A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135 (2012). For discussions concerning corporate considerations other than shareholder wealth-maximization, see LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Benjamin Means, *Nonmarket Values in Family Businesses*, 54 WM. & MARY L. REV. 1185 (2013); Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409 (1993); William W. Bratton, *Framing a Purpose for Corporate Law*, 39 J. CORP. L. 713, 720–21 (2014); Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637 (2006); David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013 (2013).

there is tension between shareholder profit maximization norms and sustainability paradigms when using a corporate organizational form for a socially conscious business construct.

So, what exactly is sustainability? Generally speaking, sustainability is a relatively new—and evolving—management archetype in which corporations prioritize meeting the “needs of the present without compromising the ability of future generations to meet their own needs.”<sup>10</sup> Sustainability envisions business strategies that focus on the ethical, social, environmental, cultural, and economic dimensions of doing business.<sup>11</sup> It requires corporations to pursue societal goals—for example, goals related to sustainable development, environmental protection, social justice, and equality—in addition to pursuing economic development.<sup>12</sup>

Sustainability encompasses three organizational ideologies: sustainable environmental development, corporate social responsibility (CSR), and economics. Sustainable environmental development is a “dialectical concept that balances the need for economic growth with environmental protection and social equity.”<sup>13</sup> CSR is a broad concept that deals with the role of business in society. This concept posits that corporations should be involved in social change.<sup>14</sup> Finally, economics embraces how companies balance profits and sustainability.<sup>15</sup>

Sustainability practices may sometimes detract from maximizing shareholder wealth, a result that contravenes one of the perceived major tenants of the shareholder primacy model.<sup>16</sup> Thus, in an attempt to

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10. U.N. WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE 43 (1987). This Article does not opine about whether corporations should embrace sustainability but whether the business trust offers an attractive alternative organizational form for socially-conscious entrepreneurs who desire to pursue sustainability as a business initiative.

11. See EFFROSS, *supra* note 8, at 401–02.

12. Mel Wilson, *Corporate Sustainability: What Is It and Where Does It Come from?*, IVEY BUS. J. (Mar./Apr. 2003), <https://iveybusinessjournal.com/publication/corporate-sustainability-what-is-it-and-where-does-it-come-from/> [<https://perma.cc/7YK4-9QRJ>].

13. *Id.*

14. EFFROSS, *supra* note 8, at 399.

15. Wilson, *supra* note 12.

16. While some scholars and economists advocate that certain sustainability practices and CSR initiatives may be wealth maximizing, other types of sustainable practices may not be. For an argument that sustainability may be wealth maximizing, see generally Vivek Ghosal & D. Daniel Sokol, *Compliance, Detection, and Mergers and Acquisitions*, 34 *MANAGERIAL & DECISION ECON.* 514 (2013); Marc Orlitzky et al., *Corporate Social and Financial Performance: A Meta-analysis*, 24 *ORG. STUD.* 403 (2003). For an argument that sustainability may not be wealth maximizing, see generally Michael L. Barnett & Robert M. Salomon, *Beyond Dichotomy: The Curvilinear Relationship Between Social Responsibility and Financial Performance*, 27 *STRATEGIC MGMT. J.* 1101 (2006); Michael L. Barnett & Robert M. Salomon, *Does It Pay to Be Really Good? Addressing the Shape of the Relationship*

accommodate the sustainability trend, states have begun to implement mechanisms to free corporations from the strict shareholder primacy model. Such mechanisms include constituency statutes and new corporate forms called benefit corporations and social-purpose corporations.<sup>17</sup> Though well-intentioned, these mechanisms may not be ideal: they implicate strict requirements characteristic of most corporate law and may not provide the flexibility that socially-conscious entrepreneurs need to fulfill their visions.

Business trusts, however, provide an alternative organizational form to efficiently effectuate the evolving paradigm of business sustainability.<sup>18</sup> The dual goals of seeking profits while being socially responsible can co-exist more organically within a trust structure than within a corporate structure that is constrained with burdensome common law doctrines and potential regulatory intrusion. Positively, business trusts are a flexible—and vetted—organizational form that can be used to implement sustainability practices without breaching shareholder primacy’s profit maximization restrictions. Normatively, business trusts provide a cohesive means to implement the goals of a sustainability management paradigm.

While business trusts have been mostly overlooked, in favor of corporations, by entrepreneurs who wish to start an operating business,<sup>19</sup>

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*Between Social and Financial Performance*, 33 STRATEGIC MGMT. J. 1304 (2012). For example, with the Trump Administration’s environmental protection rollbacks for the coal industry, coal companies that continue to implement the old, more environmentally-friendly practices will be less profitable than companies that follow the new, lower standards. See *Trump’s Environmental Rollback Rolls on*, BBC NEWS (Dec. 6, 2018), <https://www.bbc.com/news/world-us-canada-46471447> [<https://perma.cc/V3H8-ZRT4>]. Here, environmentally-sustainable practices may not be wealth maximizing, though still profitable. Unlike other industries, the power industry does not offer a wide range of consumer choice. For example, a consumer choosing between two types of coffee in the grocery store—one type from a company that adheres to free trade policies and another type from a company that does not—can easily pick the free trade coffee. Consumers do not have readily available options when it comes to their power. Because sustainability practices may not influence consumer choice in the coal industry, the less sustainable companies may maintain their customer bases with less environmental expenses. This Article focuses on this type of sustainability—the kind that does not always maximize profits, which contravenes the shareholder primacy model. It is important to note, however, that while this type of sustainability may not maximize shareholder profits, neither does it sacrifice profitability.

17. See generally Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 169 (2008) (discussing state constituency statutes); Tritt & Teschner, *Amazon Delivers Diversity*, *supra* note 3, at 13–17 (discussing social purpose corporations and state constituency statutes); Tina H. Ho, Note, *Social Purpose Corporations: The Next Targets for Greenwashing Practices and Crowdfunding Scams*, 13 SEATTLE J. FOR SOC. JUST. 935 (2015) (discussing the new entity, social purpose corporations).

18. Similar to corporations, the business trust structure is flexible enough to handle large scale business operations such as those listed on the SGX. See *Securities Prices*, SGX, <https://www2.sgx.com/securities/securities-prices> [<https://perma.cc/ZC9G-UWJ3>].

19. See Robert H. Sitkoff, *Trust as “Uncorporation”: A Research Agenda*, 2005 U. ILL. L. REV. 31, 34. Not only have business trusts been overlooked by entrepreneurs, they have largely been ignored



this Article discusses why the U.S. business world should consider this form for sustainability purposes.<sup>20</sup> Specifically, two characteristics of the business trust make it an attractive organizational alternative for socially-conscious entrepreneurs. First, business trusts offer a superior structure for sustainability because trustees are not deemed to be the agents of the beneficial owners. This structure means that trusts need not adhere to the strict shareholder primacy model. Second, business trusts allow for increased flexibility through default rules that can be modified through drafting. For example, Delaware’s statutory trust act caveats most of its provisions with “[e]xcept to the extent otherwise provided in the governing instrument.”<sup>21</sup> This allows business trusts to “learn, adapt, and regularly

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in modern legal scholarship. *Id.* Accordingly, this Article seeks to contribute to the call for research in this area. *See id.* at 35 (Professor Sitkoff appealing for academic research regarding business trusts).

20. By contrast, these trusts have seen major success overseas. For example, in Singapore, business trusts, along with Real Estate Investment Trusts (REITs), make up the majority of IPOs on the Singapore Exchange. *See, e.g., Singapore’s 2017 IPO Market Dominated by Trusts’ Strong Performance*, DELOITTE (Nov. 30, 2017), <https://www2.deloitte.com/sg/en/pages/audit/articles/sg-2017-ipo-market-press-release.html> [<https://perma.cc/5L7K-AE26>] (“Proceeds from the overall Trusts market has improved from S\$0.3 billion raised in 2015 to S\$1.9 billion raised in 2016. To date, 20 Trusts have listed since the beginning of 2013, creating market vibrancy and raising a total of S\$13.9 billion.”); Angela Tan, *Reits, Business Trusts, F&B to Drive IPOs on SGX in 2018*, BUS. TIMES (Jan. 4, 2018, 5:50 AM), <https://www.businesstimes.com.sg/companies-markets/reits-business-trusts-fb-to-drive-ipo-on-sgx-in-2018> [<https://perma.cc/Q27L-QBPS>]; Angela Tan, *Reits, Business Trusts to Continue to Drive IPOs on SGX: PwC Report*, STRAITS TIMES (Jan. 3, 2018, 1:21 PM), <https://www.straitstimes.com/business/companies-markets/reits-business-trusts-to-continue-to-drive-ipo-on-sgx-pwc-report> [<https://perma.cc/YLY9-S2WC>] (“The year 2017 was a brilliant one for IPOs in Singapore. With the market upturn, we see that real estate investment trusts (Reits) and business trusts (BTs) continue to dominate the market making up 88 per cent [sic] of total funds raised . . . .” (quotations omitted)); *see also* Aradhana Aravindan & Anshuman Daga, *Singtel’s NetLink Makes Tepid Debut; More Singapore IPOs in the Pipeline*, REUTERS (July 19, 2017, 6:18 AM), <https://www.reuters.com/article/netlink-trust-listing/singtel-netlink-makes-tepid-debut-more-singapore-ipo-in-pipeline-idINKBN1A411D> [<https://perma.cc/JHV3-2QBT>] (“In recent years, SGX has become an attractive destination for companies to list their global assets by way of REITS or business trusts, as yields of as much as 6–7 percent draw in strong participation from retail and institutional investors amid relatively low interest rates.”). Entrepreneurs in Singapore have the choice between many different business entities, yet the Singapore business trust remains a popular business form. *See, e.g., Setting up in Singapore*, ACRA, <https://www.acra.gov.sg/components/wireframes/howToGuidesChaptersDetails.aspx?pageid=1755&contentid=1757> (last updated Nov. 10, 2016). Still, something prompts the selection of the business trust form over the corporate form. In order to maintain viability in growing socially-conscious markets—both domestically and internationally—the U.S. will need to stay current with innovative, emerging economies. In the face of change, uncertainty surrounding business trusts in the United States may “provide[] an excellent reason for imitation of observed success.” *See* Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211, 219 (1950). Therefore, a look at Singapore business trusts may guide American entrepreneurs in building a successful business trust in the United States. *See* Lee-ford Tritt & Ryan Scott Teschner, *The Rise of Business Trusts in Sustainable Neo-Innovative Economies*, 88 U. CIN. L. REV. (forthcoming 2019) [hereinafter Tritt & Teschner, *Rise of Business Trusts*] (comparing and contrasting U.S. business trusts and Singapore business trusts).

21. DEL. CODE ANN. tit. 12, § 3803 (2018).

transform themselves,” which is critical if companies are to prosper over time.<sup>22</sup>

This Article is organized as follows: Part I discusses corporate governance and sustainability to further explain why corporations are not the ideal organizational form for a sustainability management model of business.<sup>23</sup> Next, Part II provides an overview of the law and structure of corporations and business trusts. Finally, Part III of this Article explores the values that business trusts add to the growing sustainably-conscious business construct in the United States, focusing on their structure and flexibility.

### I. CORPORATE GOVERNANCE AND SUSTAINABILITY

In today’s business world, there are business ideologies at play that go beyond financial benefits. Today’s talent pool for both employees and customers has grown quite shallow. With low barriers to entry for new competitors, rapidly developing technology, and the kaleidoscope of change created by the viral world of the internet, firms need to differentiate themselves. Today, firms do this by establishing corporate mission statements, publicly taking sides on important issues, or selecting causes to support. Yet, in their efforts to involve themselves in social issues, corporations are often constrained by corporate law. With obligations to shareholders and profitability at the forefront of organizations, it can be difficult for an organization to shift directions, take a stance on cultural or societal issues, invest in new technology, or even fend off paradigm-shifting competition. Therefore, entrepreneurs may want to look for a new structure for their businesses.

“Corporate governance is the framework that defines the division of power in [a] corporation.”<sup>24</sup> This framework has long been dominated by the shareholder primacy management paradigm, which prioritizes

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22. Joseph L. Bower & Lynn S. Paine, *The Error at the Heart of Corporate Leadership*, HARV. BUS. REV., May–June 2017, at 50, 58.

23. Future research should compare business trusts to other organizational entities, such as LLCs. Like business trusts, LLCs have their own form of flexibility. Specifically, LLCs give contractual flexibility in structuring the entity and its business purpose. *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-1101(b) (“It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.”).

24. Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 680 (2004).

shareholder wealth.<sup>25</sup> However, CSR<sup>26</sup> and corporate sustainability<sup>27</sup> are gaining popularity as alternative management models in the U.S. business world.<sup>28</sup> States are now taking the initiative to help businesses that want to pursue sustainability without becoming non-profit entities. For example, states are enacting constituency statutes that allow corporations to consider stakeholder interests and creating new entities that take sustainability into account in their business models.<sup>29</sup> This section discusses shareholder primacy, sustainability, and these state initiatives.

### A. Shareholder Primacy

Shareholder primacy is the shareholder-centric management model of corporate governance, which focuses on maximizing the value of shareholder interests.<sup>30</sup> It is the traditional corporate management paradigm, and it has been called the most fundamental concept in corporate governance and corporate law.<sup>31</sup> The idea of shareholder primacy first

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25. FRIEDMAN, CAPITALISM AND FREEDOM, *supra* note 8; Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?*, 42 LOY. L.A. L. REV. 765, 770 (2009) (“According to the traditional corporate governance approach, directors have a duty to exercise corporate powers with the purpose of maximizing the corporation’s profits, thereby maximizing shareholder wealth.”); Jensen, *supra* note 8; Jensen & Meckling, *supra* note 8; Gary von Stange, Note, *Corporate Social Responsibility Through Constituency Statutes: Legend or Lie?*, 11 HOFSTRA LAB. L.J. 461, 462 (1994) (“Traditionally, it has been beyond the scope of corporate directors’ duties to conduct corporate activities in furtherance of nonshareholder interests. Corporate governance, however, has gradually evolved and currently embraces an expansion of fiduciary duties to include the accommodation and consideration of nonshareholder constituencies.”).

26. CSR is the method by which businesses consider stakeholders, such as employees, customers, and the surrounding community, not just shareholders. EFFROSS, *supra* note 8, at 397–98.

27. Corporate sustainability is an offshoot of CSR that focuses on “meet[ing] the needs of the present without compromising the ability of future generations to meet their own needs.” U.N. WORLD COMM’N ON ENV’T & DEV., *supra* note 10, at 43; *see also* David G. Mandelbaum, *Corporate Sustainability Strategies*, 26 TEMP. J. SCI. TECH. & ENVTL. L. 27, 27 (2007) (“Dow Jones defined ‘corporate sustainability’ as ‘a business approach that creates long-term shareholder value by embracing opportunities and managing risks deriving from economic, environmental and social developments.’” (quoting *Corporate Sustainability*, ROBECOSAM, <http://www.sustainability-indices.com/sustainability-assessment/corporate-sustainability.html> [<https://perma.cc/7YHR-ZRWD>])).

28. *See* Alicia E. Plerhoples, *Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 TRANSACTIONS: TENN. J. BUS. L. 221, 221–22 (2012) (“Despite being organized as a for-profit corporation, Ben & Jerry’s employs a triple bottom line—profits mixed with social and environmental missions.”); *GameChangers: The World’s Top Purpose-Driven Organizations*, FORBES (Nov. 4, 2013, 10:03 PM), <https://www.forbes.com/sites/kollworldforum/2013/11/04/gamechangers-the-worlds-top-purpose-driven-organizations/#f8152577b641> [<https://perma.cc/CD2D-722E>] (“For-profits: Whole Foods, IDEO, Google, and Zappos are great examples of major corporations that have used traditional for-profit structures to scale their growth while implementing many untraditional practices that aren’t profit motivated.”).

29. *See supra* note 17 and accompanying text.

30. *See supra* notes 8, 25 and accompanying text (discussing shareholder primacy).

31. Rhee, *supra* note 5, at 1951.

appeared in courts in the 1800s,<sup>32</sup> and it has since become the primary theory of corporate governance.<sup>33</sup> In this regard, it is widely embraced in the business, legal, and academic communities.

A derivative of the shareholder primacy model of corporate governance is the shareholder wealth maximization norm, “under which the board’s duty is to make decisions that maximize the financial interests of the shareholders, rather than those of any other ‘stakeholders’ or constituencies.”<sup>34</sup> This model comports with the concept of capitalism and the general assumption that companies are created to make money. Shareholder wealth maximization norms have been touted by famous economists, like Milton Friedman<sup>35</sup> and Stephen Bainbridge,<sup>36</sup> and discussed by numerous legal scholars.<sup>37</sup> In this model, shareholders lead the charge and society receives the product that maximizes profit.

From a theoretical perspective, the foundation of shareholder primacy is that shareholders “own” the corporation and have ultimate authority over its business.<sup>38</sup> Shareholders may thus demand that a corporation’s activities be conducted in accordance with their wishes.<sup>39</sup> In essence, this sets up an agency-based model of the corporation. For instance, Friedman argued in his New York Times article that “the manager is the agent of the individuals who own the corporation” and that the manager’s primary “responsibility is to conduct the business in accordance with [the owners’] desires.”<sup>40</sup>

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32. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 296 (1998).

33. David G. Yosifon, *Opting out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461, 462 (2017); see also Marshall M. Magaro, Note, *Two Birds, One Stone: Achieving Corporate Social Responsibility Through the Shareholder-Primacy Norm*, 85 IND. L.J. 1149, 1149 (2010) (emphasis added) (quoting Melvin Aron Eisenberg, *An Overview of the Principles of Corporate Governance*, 48 BUS. LAW. 1271, 1275 (1993)) (“[A] basic premise of corporation law is that a business corporation should have as its objective the conduct of such activities with a view to enhancing the corporation’s profit and the gains of the corporation’s owners, that is, the shareholders.”); *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes.”).

34. EFFROSS, *supra* note 8, at 16 (footnote omitted).

35. FRIEDMAN, *CAPITALISM AND FREEDOM*, *supra* note 8, at 133 (“[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.”).

36. EFFROSS, *supra* note 8, at 16–17.

37. See David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1015–16 (2013) (stating that “shareholder primacy” first appeared in law review articles in 1989 and has since “become a basic element of corporate law discourse”); see also *supra* note 9.

38. Bower & Paine, *supra* note 22, at 52.

39. *Id.*

40. Friedman, *A Friedman Doctrine*, *supra* note 8, at 33.

Friedman characterizes the corporate executive as “an agent serving the interests of his principal.”<sup>41</sup> This argument assumes that shareholders invest in the corporation solely to realize returns on those investments and that they select the directors to pursue that goal.

The whole justification for permitting the corporate executive to be selected by the stockholders is that the executive is an agent serving the interests of his principal. This justification disappears when the corporate executive imposes taxes and spends the proceeds for “social” purposes. He becomes in effect a public employe[e], a civil servant, even though he remains in name an employe[e] of a private enterprise.<sup>42</sup>

Regarding any social responsibilities of businesses, Friedman noted that “[o]nly people can have responsibilities. A corporation is an artificial person . . . ‘business’ as a whole cannot be said to have responsibilities.”<sup>43</sup> He discusses what it would mean for a corporate executive to have social responsibility, bringing up and condemning examples that sound very similar to initiatives businesses are actively taking today:<sup>44</sup>

For example, that [the corporate executive] is to refrain from increasing the price of the product in order to contribute to the social objective of preventing inflation, even though a price increase would be in the best interests of the corporation. Or that he is to make expenditures on reducing pollution beyond the amount that is in the best interests of the corporation or that is required by law in order to contribute to the social objective of improving the environment. Or that, at the expense of corporate profits, he is to hire “hardcore” unemployed instead of better-qualified available workmen to contribute to the social objective of reducing poverty.

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41. *Id.* at 122.

42. *Id.*

43. *Id.* at 33.

44. Businesses like Amazon and Google include environmental protection in their sustainability initiatives. *Sustainability*, AMAZON, <https://www.aboutamazon.com/sustainability> [<https://perma.cc/26GH-XZG7>]; *Google Sustainability*, *supra* note 2. However, Friedman specifically said a corporation should not reduce pollution if it is not in the best interests of the corporation or required by law. Friedman, *A Friedman Doctrine*, *supra* note 8, at 33. The Trump Administration has rolled back EPA protections, so law requires even less protections than it used to require. *See Trump’s Environmental Rollback Rolls on*, *supra* note 16. This means that companies with environmentally-friendly sustainable practices will be hard-pressed to justify the costs of those practices as legal compliance. Unless those practices are in the best interest of the company—with an emphasis on the company’s profitability—Friedman would not approve.

In each of these cases, the corporate executive would be spending someone else's money for a general social interest. Insofar as his actions in accord with his "social responsibility" reduce returns to stockholders, he is spending their money. Insofar as his actions raise the price to customers, he is spending the customers' money. Insofar as his actions lower the wages of some employees, he is spending their money.<sup>45</sup>

Michael Jensen and William Meckling further developed these ideas in *Theory of the Firm*, which posited that shareholders want businesses to be conducted in a way that maximizes their own economic returns.<sup>46</sup> To this end, they agree with Friedman that companies should not engage in acts of "social responsibility."<sup>47</sup> Bainbridge pointed out that the shareholder primacy model not only protects shareholders from directors spending the corporation's earnings on social causes, but also from the directors' own self-dealing.<sup>48</sup>

From a legal perspective, the foundation of shareholder primacy lies in *Dodge v. Ford Motor Co.*,<sup>49</sup> an early case that is often cited to support the shareholder primacy model.<sup>50</sup> The Ford company had a corporate policy to reduce the price of its cars every year.<sup>51</sup> At the same time, it wanted to expand production by building a new manufacturing plant.<sup>52</sup> Because of these two goals, the company decided to withhold special dividends from its shareholders.<sup>53</sup> Before compelling Ford to declare special dividends for its shareholders, the court stated, "[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."<sup>54</sup> In sum, the court did not allow Ford to justify withholding shareholder profit with social motives, namely making cars affordable for the general public.<sup>55</sup>

Shareholder primacy is also included in state statutes, enforced by modern courts, and endorsed by scholarly organizations. In Delaware, the state of incorporation for many large corporations, including Google and

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45. Friedman, *A Friedman Doctrine*, *supra* note 8, at 33.

46. Jensen & Meckling, *supra* note 8.

47. *Id.* at 311.

48. EFFROSS, *supra* note 8, at 16–17.

49. 170 N.W. 668 (Mich. 1919).

50. Rhee, *supra* note 5, at 1958.

51. *Dodge*, 170 N.W. at 683.

52. *Id.*

53. *Id.*

54. *Id.* at 684–85.

55. EFFROSS, *supra* note 8, at 17.

Amazon,<sup>56</sup> shareholder primacy is mandated by law.<sup>57</sup> In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,<sup>58</sup> the Supreme Court of Delaware held that the Revlon corporation's directors breached their duty of care when they "allowed considerations other than the maximization of shareholder profit to affect their judgment" during a takeover.<sup>59</sup> Additionally, the American Law Institute (ALI) states that a "corporation should have as its objective the conduct of business activity with a view to enhancing corporate profit and shareholder gain."<sup>60</sup>

Shareholder primacy, however, is not a limitless authorization for directors to maximize profits. Such limitations may include federal and state laws and regulations. Specifically, the ALI makes clear that corporations are still constrained by law.<sup>61</sup> In some instances, this means corporations must consider stakeholders, not just shareholders. For example, pursuant to statutes like the Air Pollution Control Act of 1955<sup>62</sup> and the Federal Water Pollution Control Act,<sup>63</sup> corporations must take certain steps to protect the environment.<sup>64</sup> These efforts can be very costly,<sup>65</sup> but corporations must still make them. Nevertheless, when not limited by laws or regulations, shareholder primacy generally requires the directors to maximize profits.

Additionally, shareholder primacy does not completely bar companies from philanthropic activities. For example, in *Revlon*, while the Supreme Court of Delaware ultimately held that the directors had breached their fiduciary duties, it also said, "[a] board may have regard for various constituencies in discharging its responsibilities, provided there are

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56. Alphabet Inc., Annual Report (Form 10-K) (Feb. 5, 2018) (listing Delaware as Google's state of incorporation); Amazon.com, Inc., Annual Report (Form 10-K) (Feb. 1, 2018) (listing Delaware as Amazon's state of incorporation).

57. Rhee, *supra* note 5, at 1984.

58. 506 A.2d 173 (Del. 1986).

59. *Id.* at 185; *see also* Rhee, *supra* note 5, at 1984 ("*Revlon* mandates an enforceable duty to maximize shareholder wealth . . .").

60. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 n.1 (AM. LAW INST. 1994).

61. *Id.* § 2.01(b)(1).

62. Pub. L. No. 84-159, 69 Stat. 322 (1955) (codified as amended in scattered sections of 42 U.S.C.).

63. Pub. L. No. 80-845, 62 Stat. 1155 (1948) (codified as amended in scattered sections of 33 U.S.C.).

64. *See generally id.* (creating requirements for companies to reduce water pollution); 69 Stat. 322 (creating requirements for companies to reduce air pollution).

65. *See, e.g.,* U.S. ENVTL. PROT. AGENCY OFFICE OF AIR & RADIATION, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020: SUMMARY REPORT 2 (2011), <https://www.epa.gov/sites/production/files/2015-07/documents/summaryreport.pdf> ("[T]he costs of public and private efforts to meet 1990 Clean Air Act Amendment requirements . . . are expected to reach an annual value of about \$65 billion by 2020." (emphasis omitted)).

rationally related benefits accruing to the stockholders.”<sup>66</sup> The court found that a board could not do this during the sale of the company, where the only objective is “to sell [the company] to the highest bidder.”<sup>67</sup> However, this finding does not foreclose the possibility of a corporation considering social purposes in other situations, so long as such consideration maximizes shareholder interests. Further, Delaware specifically authorizes 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.”<sup>68</sup> However, there are restrictions on this statutory authorization. Charitable gifts must be reasonable, and reasonableness is determined based on reference to the charitable deduction under the Internal Revenue Code.<sup>69</sup> This limitation shows that shareholder benefit is still at the heart of Delaware corporate law, even when making charitable donations. Considering the limitations under Delaware’s corporate charitable donation statute and recognizing that the language in *Revlon* suggesting constituencies may be considered is dicta, Delaware corporations should still seek to maximize profits.

### *B. Corporate Social Responsibility and Sustainability*

In contrast to the shareholder primacy model—which does not allow corporate directors to prioritize stakeholder interests in corporate decision-making—is the concept of corporate social responsibility. CSR specifically considers stakeholder interests, “encouraging positive labor-management relationships, environmental stewardship, corporate philanthropy, and community engagement.”<sup>70</sup> CSR attempts to combat “the potential negative social and environmental effects that may be created by economic entities in their pursuit of economic returns.”<sup>71</sup>

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

67. *Id.*

68. DEL. CODE ANN. tit. 8, § 122(9) (2018).

69. *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 405 (Del. Ch. 1969).

70. Michael J. Vargas, *In Defense of E. Merrick Dodd: Corporate Social Responsibility in Modern Corporate Law and Investment Strategy*, 73 BUS. LAW. 337, 348 (2018).

71. Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 721 (2002). While Williams calls this view of corporations “pessimistic,” *id.*, there are plenty of examples of corporations making harmful decisions in the name of shareholder profit. For example, the founder and president of a pharmaceutical company justified a 400% price increase of nitrofurantoin—an antibiotic essential for treating urinary tract infections—with profit maximization. Wayne Drash, *Report: Pharma Exec Says He Had ‘Moral Requirement’ to Raise Drug Price 400%*, CNN (Sept. 12, 2018, 9:25 PM), <https://www.cnn.com/2018/09/11/health/dru-g-price-hike-moral-requirement-bn/index.html> [<https://perma.cc/VS6Y-KTJD>].



Although companies attempted to incorporate social purposes even earlier,<sup>72</sup> CSR developed from the social issues that arose in the late 1960s.<sup>73</sup> Social organizations began arguing that companies could pursue social purposes while still producing profits.<sup>74</sup> Throughout the years, the idea that consideration of stakeholder interests and profitability were not mutually exclusive continued to gain support.<sup>75</sup> Bill Gates proposed hybrid companies that “would have a twin mission: making profits and also improving lives for those who don’t fully benefit from market forces.”<sup>76</sup> From Bill Gates’s concept came two other terms: the double bottom line and the triple bottom line.<sup>77</sup> The double bottom line refers to a company’s profit and social goals, and the triple bottom line adds “environmental concerns” to this list.<sup>78</sup> It is from these concepts that sustainability emerged.<sup>79</sup>

Sustainability has been described in various ways. The United Nations has said sustainability is about meeting “the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>80</sup> Others have said “a sustainable corporation is one that creates profit for its shareholders while protecting the environment and improving the lives of those with whom it interacts.”<sup>81</sup> In sum, sustainability marries CSR, Bill Gates’s hybrid companies, the double-bottom line, and the triple-bottom line. Sustainability recognizes that companies can create shareholder profit, consider immediate stakeholder interests, such as employee and customer interests, and consider their impact on the future of the world. In this model,

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72. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 671 (Mich. 1919) (“‘My ambition,’ declared Mr. Ford, ‘is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business.’”).

73. EFFROSS, *supra* note 8, at 399; see also Phillip I. Blumberg, *Corporate Responsibility and the Social Crisis*, 50 B.U. L. REV. 157, 157 (1970) (“As social problems have become more acute, all sectors of the community have been summoned by government and by public opinion to respond to the crisis. Business . . . has become part of the effort, and business participation in the social sphere—health, education, poverty, race relations, urban problems, and pollution abatement—is increasingly becoming a [sic] common-place.” (footnotes omitted)).

74. EFFROSS, *supra* note 8, at 399.

75. *Id.* at 399–401.

76. Bill Gates, *A New Approach to Capitalism*, in *CREATIVE CAPITALISM: A CONVERSATION WITH BILL GATES, WARREN BUFFETT, AND OTHER ECONOMIC LEADERS* 7, 10 (Michael Kinsley & Conor Clarke eds., 2008).

77. EFFROSS, *supra* note 8, at 401.

78. *Id.*

79. *Id.*

80. U.N. WORLD COMM’N ON ENV’T & DEV., *supra* note 10, at 43.

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

social good is built into the mission of the corporation and drives the product and eventual return to shareholders.

Sustainability envisions business strategies that focus on the ethical, social, environmental, cultural, and economic dimensions of doing business.<sup>82</sup> It requires corporations to pursue societal goals—such as those related to sustainable development, environmental protection, social justice and equality—in addition to pursuing economic development.<sup>83</sup>

Sustainability encompasses three organizational ideologies: sustainable environmental development, CSR, and economics. Sustainable environmental development is a “dialectical concept that balances the need for economic growth with environmental protection and social equity.”<sup>84</sup> For example, while working on economic growth, many companies are also working on reducing their carbon footprints. CSR is a broad concept that deals with the role of business in society. This concept posits that corporations have an ethical obligation to consider and address the needs of society and not act solely in the interests of the shareholders, and that corporations should be involved in effectuating social change.<sup>85</sup> Finally, economics embraces how companies balance profits and sustainability.<sup>86</sup>

While there is no question that shareholder primacy has been the dominant model of corporate governance for decades, there has been debate about whether corporations can nonetheless properly incorporate sustainability practices. One legal scholar argues that corporations need not adhere to shareholder primacy if they so choose.<sup>87</sup> Robert Rhee emphasizes this point by stating that “[s]hareholder primacy is a default norm only, and it can be subjugated to the interests of other constituents.”<sup>88</sup> Another legal scholar argues that *Dodge v. Ford Motor Co.*—one of the primary cases cited for the proposition that corporations must put shareholder wealth maximization first<sup>89</sup>—is bad law.<sup>90</sup> There are moments in *Dodge* that even

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82. See EFFROSS, *supra* note 8, at 401.

83. See *id.*

84. Wilson, *supra* note 12.

85. EFFROSS, *supra* note 8, at 399.

86. See *supra* note 15.

87. Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177, 179–80 (2008).

88. Robert J. Rhee, *Fiduciary Exemption for Public Necessity: Shareholder Profit, Public Good, and the Hobson's Choice During a National Crisis*, 17 GEO. MASON L. REV. 661, 720 (2010).

89. Rhee, *supra* note 5, at 1958.

90. Stout, *supra* note 17, at 166 (“*Dodge v. Ford* is indeed bad law, at least when cited for the proposition that the corporate purpose is, or should be, maximizing shareholder wealth.”).

suggest corporations can consider stakeholders.<sup>91</sup> Economist E. Merrick Dodd argued that corporations not only *could* consider stakeholder interests, but also *should*.<sup>92</sup> For years, economist Adolf Berle argued against Dodd's perspective and advocated for shareholder primacy.<sup>93</sup> However, Berle eventually conceded that Dodd was right.<sup>94</sup> Even major U.S. corporations have challenged the notion that they cannot take stakeholder interests into account. For example, Google has implemented sustainability practices<sup>95</sup> even though Delaware, its state of incorporation, embraces shareholder primacy.<sup>96</sup> However, corporations that elevate stakeholder interests to a degree that their sustainability policies hinder maximizing shareholder interests might expose themselves to liability from their shareholders.<sup>97</sup> And yet, as corporations strive to distinguish themselves—and as entrepreneurs become more socially conscious—working toward sustainability has become both more common and more important in the corporate world. What, then, can companies do to promote sustainability while protecting themselves from liability?

### C. Alternatives to Shareholder Primacy

With the rise of sustainability practices among for-profit companies, states have made efforts to allow companies to safely pursue sustainability. States have done this primarily by adopting constituency statutes and creating benefit or social purpose corporations.<sup>98</sup> This section discusses these two methods.

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91. For example, the court allowed Ford to expand its operations, even though Henry Ford said the motivation for doing so was to create more jobs in the local area. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 671, 684 (Mich. 1919). The court also said, “[t]he discretion of directors is to be exercised in the choice of means to attain [shareholder profit], and does not extend to a change in the end itself.” *Id.* at 684. This could be read to mean a corporation cannot operate primarily for social purposes, but it can employ social purposes if the company is still profitable.

92. Cheri A. Budzynski, Comment, *Can a Feminist Approach to Corporate Social Responsibility Break down the Barriers of the Shareholder Primacy Doctrine?*, 38 U. TOL. L. REV. 435, 440 (2006) (“Dodd argued that the trend of management-run corporations[] permitted corporations to take on responsibility to other constituencies. Dodd believed that public opinion would demand protection of these constituencies, especially for employees who lacked bargaining power.” (footnote omitted)).

93. EFFROSS, *supra* note 8, at 14.

94. *Id.* at 15.

95. See *GameChangers: The World's Top Purpose-Driven Organizations*, *supra* note 28.

96. See *supra* notes 56–59 and accompanying text.

97. Yosifon, *supra* note 33, at 463 (“Uncertainty regarding what is permissible and what is forbidden will impede broad experimentation, and, where experimentation is undertaken in the face of such uncertainty, costly and disruptive litigation will lurk, and strike.”).

98. See *supra* note 17 and accompanying text.

### 1. *Constituency Statutes*

Constituency statutes allow directors to consider non-shareholder constituents' interests in the corporate decision-making process.<sup>99</sup> These statutes seemingly do away with any concern about whether a corporation may consider stakeholder interests by expressly authorizing corporations to do so.<sup>100</sup> Constituency statutes are included under states' corporate codes,<sup>101</sup> so they seem to simply give the directors of standard corporations more discretion when making decisions. At first glance, these statutes may appear to be a solution to the sustainability problem.

However, there are several problems with constituency statutes. First, while the majority of states have enacted a constituency statute in some form,<sup>102</sup> Delaware has not,<sup>103</sup> which means that many corporations are still vulnerable to the risk of being sued for sustainability.<sup>104</sup> For corporations incorporated in states that have constituency statutes, there are application problems.<sup>105</sup> For example, when Vermont enacted its constituency statute, the Vermont Attorney General noted that an "absence of Vermont law on the subject ma[de] it difficult to determine what effect the amendment ha[d] on the obligations of corporate directors."<sup>106</sup> Scholars have argued that constituency statutes do not create fiduciary duties to stakeholders,<sup>107</sup> but

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99. Magaro, *supra* note 33, at 1150 ("Several states have implemented statutes allowing directors to consider these nonshareholder constituents' interests in the corporate decision-making process."); *see also* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 16 (1992) ("[T]he statutes purport to expand the traditional view that directors of corporations have a duty to make business decisions primarily, if not exclusively, to maximize shareholders' wealth by explicitly permitting consideration of non-shareholder interests.").

100. Orts, *supra* note 99, at 14, 16.

101. *See, e.g.*, CONN. GEN. STAT. § 33-756(g) (2018) (adding a constituency provision to the "[g]eneral standards of conduct for directors" statute under the state's corporate code); FLA. STAT. § 607.0830(3) (2018) (same); MASS. GEN. LAWS ch. 156B, § 65 (2018) (adding a constituency clause to Massachusetts's corporate director duty statute).

102. Emily Winston, *Benefit Corporations and the Separation of Benefit and Control*, 39 CARDOZO L. REV. 1783, 1793 (2018).

103. *See Facts and Myths*, DEL. CORP. L., <https://corplaw.delaware.gov/facts-and-myths/> [<https://perma.cc/M9ZA-Q489>] (comparing Delaware to states with more management protection, such as those with constituency statutes).

104. *Cf.* Tritt & Teschner, *Amazon Delivers Diversity*, *supra* note 3, at 17 ("It has been argued that Delaware law permits a deviation from shareholder primacy through private ordering, but this is not entirely clear." (footnote omitted)).

105. *See* Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 975 (1992).

106. Plerhoples, *supra* note 28, at 238 n.92 (quoting Informal Op., No. 2000-2, 2000 WL 34416663, at \*1 (Vt. A.G. Mar. 22, 2000)).

107. Bainbridge, *supra* note 105, at 987 ("[Constituency] statutes should not be interpreted as creating new director fiduciary duties running to nonshareholder constituencies and the latter should not have standing under these statutes to seek judicial review of a director's decision."). This conclusion is supported by the permissive language in all state constituency statutes. *See, e.g.*, VT. STAT. ANN. tit.

without clear guidelines, corporations in “constituency-statute states”<sup>108</sup> are no better off, in terms of risk, than corporations in states without constituency statutes. While corporations in states like Delaware may have to worry about whether their sustainability efforts will result in a shareholder suit, corporations in states with constituency statutes may have to worry about whether their profitability efforts will result in *stakeholder* suits.

Constituency statutes also enumerate which stakeholder interests corporations may consider,<sup>109</sup> and such enumeration does not allow corporations much flexibility in their sustainability efforts. While some constituency statutes have broad categories,<sup>110</sup> others are quite narrow. For example, New York’s constituency statute limits the consideration of stakeholder interests to the corporation’s employees, customers, creditors, and community.<sup>111</sup> While the “community” category may seem broad, it is limited to the community “in which [the corporation] does business.”<sup>112</sup> Conceivably, a New York corporation that does business exclusively in New York could not focus its sustainability efforts on fair trade for underprivileged countries.

Additionally, some statutes “specify that no single interest may dominate.”<sup>113</sup> Again, this limits corporations’ flexibility. For example, a corporation that wishes to focus its sustainability efforts on promoting the

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11A, § 8.30(a)(3) (West 2017) (“In determining what the director reasonably believes to be in the best interests of the corporation, a director of a corporation . . . may, in addition, consider the interests of the corporation’s employees, suppliers, creditors and customers, the economy of the State, region and nation, community and societal considerations, including those of any community in which any offices or facilities of the corporation are located . . . .” (emphasis added)). Connecticut used to have a mandatory constituency statute, *see* Michal Barzuza, *The State of State Antitakeover Law*, 95 VA. L. REV. 1973, 2007 (2009), but it has since amended its statute to make it permissive. *See* CONN. GEN. STAT. § 33-756(g) (2018).

108. This Article labels states that have enacted constituency statutes “constituency-statute states.”

109. *See* Brett H. McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1227, 1231 (2004).

110. *See, e.g.*, CONN. GEN. STAT. § 33-756(g) (“[A director] may consider, in determining what the director reasonably believes to be in the best interests of the corporation, (1) the long-term as well as the short-term interests of the corporation, (2) the interests of the shareholders, long-term as well as short-term, including the possibility that those interests may be best served by the continued independence of the corporation, (3) the interests of the corporation’s employees, customers, creditors and suppliers, and (4) community and societal considerations, including those of any community in which any office or other facility of the corporation is located. A director may also consider, in the discretion of such director, any other factors the director reasonably considers appropriate in determining what the director reasonably believes to be in the best interests of the corporation.”).

111. N.Y. BUS. CORP. LAW § 717(b) (McKinney 2017).

112. *Id.* § 717(b)(v).

113. McDonnell, *supra* note 109, at 1231.

LGBTQ community—like Amazon<sup>114</sup>—may be precluded from this focus in a constituency-statute state whose statute prohibits primacy of a single interest.

Finally, some states' constituency statutes are limited to takeovers and other control transactions.<sup>115</sup> This type of limitation could prevent a corporation from pursuing the vast majority of sustainability efforts it may wish to pursue. While a corporation could consider its employees' interests in negotiating an acquisition, guaranteeing their continued employment in exchange for a lower purchase price from the acquirer, it could not forgo shareholder profits to prevent layoffs without such a transaction taking place.

While constituency statutes have allowed a step toward sustainability, they have their downfalls. In particular, these statutes sometimes have significant limitations. If corporations wish to have flexibility in working toward sustainability, constituency statutes may not provide it. Additionally, corporations cannot take advantage of both the significant benefits of incorporating in Delaware and the benefits of constituency statutes, because Delaware is not a constituency-statute state. Further, while these statutes likely do not create fiduciary duties toward stakeholders, their application is still uncertain.

## 2. *Social-Purpose and Benefit Corporations*

Some states have addressed the rise in sustainability-consciousness by creating new entities. Some states, like Washington, created social purpose corporations.<sup>116</sup> Others, like Delaware, created benefit corporations.<sup>117</sup> Both of these entities are for-profit corporations that “consider[] both social and shareholders' interests.”<sup>118</sup> Additionally, both entities must designate a social purpose in their charters.<sup>119</sup>

To fully appreciate either social purpose corporations or benefit corporations, it is important to understand the differences between the two

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114. See generally Tritt & Teschner, *Amazon Delivers Diversity*, *supra* note 3, at 19–23 (discussing Amazon's LGBT initiatives in the context of Amazon's HQ2 decision).

115. Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 588 (1992); see, e.g., MO. REV. STAT. § 351.347 (2017); OR. REV. STAT. § 60.357(5) (2018).

116. See, e.g., WASH. REV. CODE § 23B.25.010 (2018).

117. See, e.g., DEL. CODE ANN. tit. 8, § 362 (2018).

118. Ho, *supra* note 17, at 935.

119. Mark J. Loewenstein, *Benefit Corporation Law*, 85 U. CIN. L. REV. 381, 383 (2017); Corp. Laws Comm., ABA Bus. Law Section, *Benefit Corporation White Paper*, 68 BUS. LAW. 1083, 1087–89 (2013).

entities. The most significant distinction is that a social purpose corporation *may* consider stakeholder interests when making decisions, while a benefit corporation *must* consider stakeholder interests when making decisions.<sup>120</sup> For example, under Washington’s social purpose corporation statute, “the director of a social purpose corporation *may* consider and give weight to one or more of the social purposes of the corporation as the director deems relevant.”<sup>121</sup> By contrast, under Delaware’s benefit corporation statute,

[t]he board of directors *shall* manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation’s conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.<sup>122</sup>

Another significant difference is that social purpose corporations may amend their social purpose, while benefit corporations cannot.<sup>123</sup>

Based on the differences between benefit corporations and social purpose corporations, one problem with benefit corporations is apparent: increased liability. Benefit corporation directors not only have fiduciary duties toward their shareholders, they also have fiduciary duties toward their stakeholders.<sup>124</sup> A corporation that wants to pursue sustainability while taking advantage of Delaware’s corporate law can do this by becoming a benefit corporation, but it must do so at its peril.

Another problem with both social purpose corporations and benefit corporations, though a more significant problem for benefit corporations, is a lack of flexibility. Benefit corporations and social purpose corporations are limited to the social purposes enumerated in their charters.<sup>125</sup> If one of these entities selects “environmental efforts” as its social purpose, it could face liability for considering the interests of its employees. Benefit corporations, once they have announced their social purpose, cannot change it.<sup>126</sup> Thus, someone who wishes to create a benefit corporation must think carefully before creating the corporation’s charter. Social purpose

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120. Corp. Laws Comm., ABA Bus. Law Section, *supra* note 119, at 1087–88.

121. WASH. REV. CODE § 23B.25.050(2) (emphasis added).

122. DEL. CODE ANN. tit. 8, § 365(a) (emphasis added).

123. See Alicia E. Plerhoples, *Social Enterprise as Commitment: A Roadmap*, 48 WASH. U. J.L. & POL’Y 89, 108 (2015).

124. DEL. CODE ANN. tit. 8, § 365. Directors’ fiduciary duties toward stakeholders may be triggered in social purpose corporations when such corporations “act like” benefit corporations by considering stakeholder interests when making decisions.

125. See, e.g., *id.* § 365(a); WASH. REV. CODE § 23B.25.050(2).

126. Plerhoples, *supra* note 123, at 108.

corporations can amend their social purpose, but an amendment of this kind requires at least a two-thirds shareholder vote.<sup>127</sup> If a supermajority of the shareholders do not agree on a new social purpose, the social purpose corporation is stuck.

States with these new entities are trying to promote sustainability. However, these entities' inflexibility and increased liability issues may make them less desirable mechanisms for pursuing sustainability. Because of these problems, many potential business owners may hesitate to incorporate as either a social purpose corporation or a benefit corporation.

Instead of states creating novel and untested organizational forms to accommodate the evolving sustainability movement, we advocate a return to business trusts. Trust law initially impacted the evolution of corporate law.<sup>128</sup> In essence, business trusts gave way to modern corporations,<sup>129</sup> which were misused, leading to strict rules on corporate governance. Shareholder primacy became the primary model of corporate governance. Now, sustainability is gaining popularity and entrepreneurs are seeking ways to incorporate this practice into their businesses without breaching shareholder primacy. This brings them full circle back to business trusts, which can be used to safely implement sustainability into a profitable business. Business trusts, as an organizational form, offer a simpler, vetted solution for sustainability-conscious business entrepreneurs. Therefore, a discussion of corporations and trusts as organizational forms is in order.

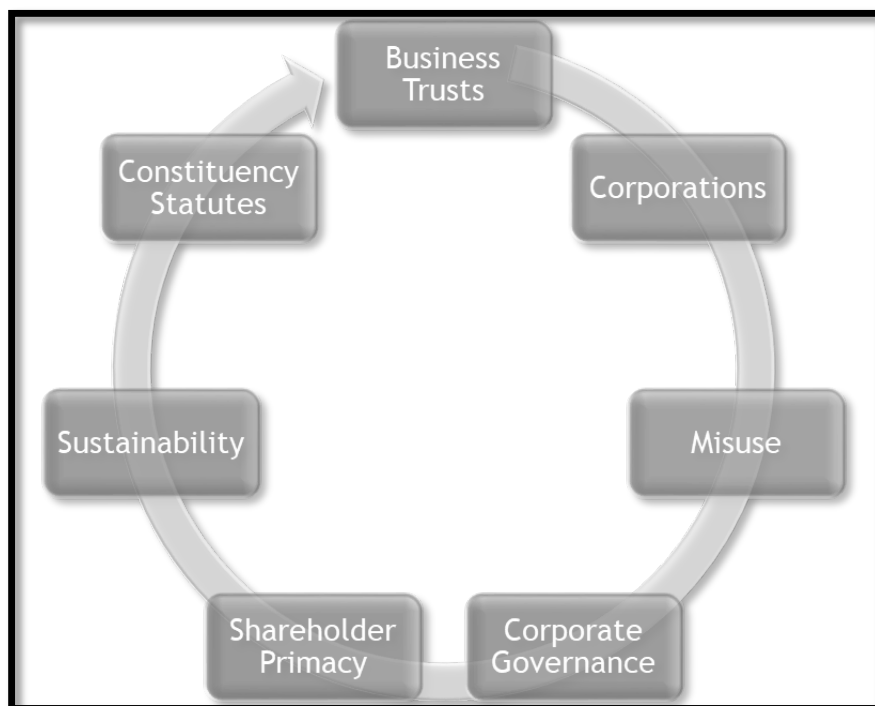
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127. *Id.*

128. See John Morley, Essay, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2145–47 (2016). The author discusses how, as a matter of judicial doctrine, the trust form offered several key features of the corporate form, such as entity shielding, limited liability, and capital lock-in. *Id.* at 2146. Thus, many businesses in the mid-nineteenth century preferred the trust form over general incorporation statutes because it was more cost-efficient than the corporation. *Id.* at 2146–47. The author also points out how the historical use of trusts leads to an understanding of the development of business law, *id.* at 2147, and how business trusts remained popular until the 1920s, as demonstrated by the monopoly trusts that resulted in the anti-trust movement of the 1880s, *id.* at 2164; see also Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2292–93 (2013) (discussing how large firms in the late 1800s, such as Standard Oil, adopted the trust structure to escape the limitations imposed by state corporation laws, which led to the creation of antitrust legislation—laws designed to foster a competitive market by eliminating monopoly power). This is why United States anti-predatory business laws are referred to as “anti-trust” laws, while other countries refer to these types of laws as competition laws. Morley, *supra* note 128, at 2164.

129. See Morley, *supra* note 128, at 2166.





**Figure 1**<sup>130</sup>

## II. ORGANIZATIONS

Introducing business trusts into sustainability discourse requires an elementary review of both corporations and business trusts as organizational forms. A rudimentary understanding of these organizational forms is necessary in order to appreciate the opportunities business trusts afford socially-conscious entrepreneurs.

### *A. An Elementary Overview of Corporations*

Concepts and theories regarding corporate structure and organizations are well-developed. Before analyzing the benefits and disadvantages of business trusts and corporations from the perspective of socially-conscious

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130. This figure illustrates the evolution of the use and the future potential use of business trusts in the United States.

entrepreneurs, it is important to briefly discuss and identify the legal attributes of corporations, as well as the principal of agency relationships within corporations. There are several different types of business organization forms, such as limited liability companies (LLCs) and limited partnerships (LPs). However, corporations still constitute a large number of total entities. Therefore, the comparison of business trusts to corporations is used solely for the purpose of introducing business trusts to the ongoing sustainability dialogue. The continued use of corporations, despite the creation of other business entities, is attributable to several features of the corporate structure. These important features include limited liability, indefinite duration, separation of ownership and control, fully transferrable shares, and the delegation of management to a board of directors.<sup>131</sup>

### *1. Corporate Structure and Organization*

As a general overview, corporations are legal entities that are “separate and distinct” from their owners and shareholders.<sup>132</sup> Thus, corporations are legal persons that can execute contracts, own and sell property, be sued, and conduct many other business transactions. Since corporations are separate and distinct entities, they provide limited liability protection to their shareholders, known as the “corporate veil.”<sup>133</sup> As equity-holders, shareholders “own” the corporation,<sup>134</sup> but actually have “virtually no decisionmaking powers—just the right to elect the firm’s directors and to vote on an exceedingly limited—albeit not unimportant—number of

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131. See STEPHEN M. BAINBRIDGE, *CORPORATE LAW* 1 (3d ed. 2015); John Armour et al., *What is Corporate Law?*, in *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 1, 1–2 (Reinier Kraakman et al. eds., 2d ed. 2009) (discussing the five most important features of corporations).

132. *Sonora Diamond Corp. v. Superior Court*, 99 Cal. Rptr. 2d 824, 836 (Cal. Ct. App. 2000); Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 *VAND. L. REV.* 1, 4 (2002) (“A defining characteristic of public corporations is the so-called separation of ownership and control.”); Sidney Turner, *What You Should Know About Limiting Personal Liability: The Reality of Piercing the Corporate Veil and Reverse Piercing of the Corporate Veil*, 31 *WESTCHESTER B.J.* 33, 33 (2004); Antoinette Sedillo Lopez, Comment, *The Alter Ego Doctrine: Alternative Challenges to the Corporate Form*, 30 *UCLA L. REV.* 129, 129 (1982).

133. *Sonora Diamond Corp.*, 99 Cal. Rptr. 2d at 836 (“A corporate identity may be disregarded—the ‘corporate veil’ pierced—where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation.”); see also Turner, *supra* note 132 (noting how a corporation’s existence as a separate and distinct legal entity provides immunity to its shareholders by protecting their personal assets from creditors of the corporation, known as the “corporate veil”).

134. Bainbridge, *supra* note 132, at 4 (noting how shareholders are “said to ‘own’ the firm”).

corporate actions.”<sup>135</sup> Rather, state statutes delegate management to the board of directors, who then delegate the day-to-day responsibilities to the officers and other employees within the corporation.<sup>136</sup> This outlines the separation of ownership and control within corporations.

One of the primary benefits of recognizing corporations as distinct from their owners is that shareholders enjoy “limited liability.”<sup>137</sup> Limited liability means that in the event corporate assets are insufficient to pay corporate obligations, individual shareholders are not responsible for covering corporate debts.<sup>138</sup> The maximum loss each shareholder can suffer is limited to the money she invested to acquire the corporate stock. If a creditor sues a corporation, the corporate entity generally shields shareholders from involvement with such litigation. Additionally, if a corporation exhausts its cash reserves and financing options, it can file for bankruptcy or cease to exist. Shareholders are under no obligation to continue funding corporate operations. Thus, from a limited liability perspective, shareholders benefit from the treatment of corporations as separate legal entities.

In addition to limited liability, corporate stock ownership offers transferability benefits. Investors readily buy and sell publicly-traded shares using established stock exchanges.<sup>139</sup> Moreover, shareholders generally do not disrupt corporate operations when stock is transferred. Management continues to function independently from its shareholders.

Finally, from a financial reporting perspective, corporations offer the advantage of administrative convenience. Typically, annual reporting is performed at the corporate level and considers the corporation as a whole. Corporations do not treat shareholders differently. Rather, stock ownership is used to equitably allocate corporate interests. Although corporations may offer different classes of stock, similarly-situated shareholders receive corporate distributions pro-rata.<sup>140</sup>

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135. BAINBRIDGE, *supra* note 131, at 3.

136. *Id.*

137. MODEL BUS. CORP. ACT § 6.22 (AM. BAR ASS'N 2016).

138. Armour et al., *supra* note 131, at 9.

139. There are generally more restrictions on transfers of private company stock. A detailed discussion of stock transfers is beyond the scope of this article. See Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 414 (2006) (“Shareholders also can benefit economically by selling their shares at a profit. One of the key characteristics of corporations is the free transferability of shares: shareholders can sell shares at will.”).

140. MODEL BUS. CORP. ACT § 6.23(a).

In terms of governance, the laws governing corporations are derived primarily from state law.<sup>141</sup> Public corporations are created by filing a charter document, known as the “articles of incorporation,” with a state.<sup>142</sup> As a result, the state statute governing a corporation provides for mandatory and default rules.<sup>143</sup> The existence of default rules allows for a great deal of private ordering by enabling corporations to contract around them in their bylaws. Therefore, a corporation’s bylaws act as a governing statute, specifying the duties and responsibilities of the corporation’s directors, officers, and shareholders, as well as other procedural rules. Since corporations are “creature[s] of statute” to a certain extent, they must act through their officers, directors, and agents.<sup>144</sup> Therefore, agency cost theories have been applied to corporations and the agency-principal relationships within them.<sup>145</sup> However, it is important to note that the increased growth and sophistication of state corporate laws has diminished the need for agency law to be used as a gap-filler.<sup>146</sup>

Before discussing the law of agency as applied to corporations, it is important to briefly discuss the managerial structure of corporations. As mentioned above, shareholders are owners, but the “locus of management” for a corporation is its board of directors.<sup>147</sup> Shareholders do not have the power to initiate corporate action and may only partake in a number of board actions.<sup>148</sup> Rather, the board of directors has the authority to appoint officers

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141. See Armour et al., *supra* note 131, at 5 (“In virtually all economically important jurisdictions, there is a basic statute that provides for the formation of firms . . .”).

142. BAINBRIDGE, *supra* note 131, at 8.

143. Armour et al., *supra* note 131, at 20.

144. See *State v. J.P. Lamb Land Co.*, 401 N.W.2d 713, 717 (N.D. 1987) (“A corporation is a creature of statute which cannot exist without the consent of the sovereign, and the power to create a corporation is an attribute of sovereignty.”).

145. Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 623 (2004) (“Agency cost theories of the firm dominate the modern literature of corporate law and economics.”).

146. See Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1192 (2003) (noting how state corporate laws have reduced the need for reliance on agency laws, but agency laws are still used as gap-fillers in areas where corporate law has not been fully developed).

147. Thomas Earl Geu, *A Selective Overview of Agency, Good Faith and Delaware Entity Law*, 10 DEL. L. REV. 17, 30 (2008); see also MODEL BUS. CORP. ACT § 8.01(b) (AM. BAR ASS’N 2016) (“Except as may be provided in an agreement authorized under section 7.32, and subject to any limitation in the articles of incorporation permitted by section 2.02(b), all corporate powers shall be exercised by or under the authority of the *board of directors*, and the business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of the board of directors.” (emphasis added)).

148. BAINBRIDGE, *supra* note 131, at 3; Bainbridge, *supra* note 132, at 4.

to perform various tasks, thus invoking the law of agency to “fill gaps in the law governing corporate relationships.”<sup>149</sup> “[T]he board’s role is to formulate broad policy and oversee the subordinates who actually conduct the business day-to-day.”<sup>150</sup> Most importantly, the board is responsible for overseeing and disciplining “top management.”<sup>151</sup>

The Restatement (Third) of Agency defines agency as “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”<sup>152</sup> Therefore, it has been argued that there are several agent-principal relationships within a corporation: officers as agents and the corporation as principal, which is managed by the board of directors,<sup>153</sup> and shareholders as principals and directors as agents.<sup>154</sup> For example, Henry Hansmann and Reinier Kraakman categorize the decision-makers of a corporation as the board of directors (the managers) and the beneficial “owners” (or beneficiaries) as the shareholders.<sup>155</sup> Hansmann and

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149. Geu, *supra* note 147, at 30–32; *see also* Bainbridge, *supra* note 132, at 5 (“[P]ublic corporations traditionally have been characterized not by participatory democracy, but rather by hierarchies in which decisions are made on a more-or-less authoritarian basis.”).

150. Bainbridge, *supra* note 132, at 5.

151. *Id.* at 8.

152. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006).

153. *See* Deborah A. DeMott, *Corporate Officers as Agents*, 74 WASH. & LEE L. REV. 847, 852 (2017) (“Directors act as or on behalf of the principal in a relationship with officers as the corporation’s agents.”); Geu, *supra* note 147, at 31. However, it is important to note that an agency relationship will only arise if the elements of agency are satisfied. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c.

More specifically, an agency relationship arises when there is a manifestation of consent by the principal that the agent act on the principal’s behalf and subject to the principal’s control, and the agent consents to so act. The requisite manifestation of consent can be implied from the circumstances, which makes it possible for the parties to have formed a legally effective agency relationship without realizing they had done so. Corporate employees, especially officers, are generally regarded as agents of the corporation.

BAINBRIDGE, *supra* note 131, at 90.

154. *See* Deborah A. DeMott, *Shareholders as Principals*, in *KEY DEVELOPMENTS IN CORPORATE LAW AND EQUITY: ESSAYS IN HONOUR OF PROFESSOR HAROLD FORD* 105, 105–06 (Ian M. Ramsay ed., 2002). In this article, Deborah A. DeMott discusses the natural tendency to view shareholders as principals and directors as their agents because the shareholders have the ability to choose directors by electing them to office. *Id.* Once elected, the directors “hold discretionary management power over the corporation and thus make decisions that affect the economic well-being of shareholders. In exercising their managerial power, directors are subject to fiduciary duties, as are agents when acting within the scope of the agency relationship.” *Id.* at 105. However, “[c]ontemporary corporate law does not treat directors as shareholders’ agents other than in a loose or metaphorical sense. If fully applicable to directors’ relationships to shareholders, the common law of agency would destabilize the legal consequences that contemporary corporate law facilitates.” *Id.* at 106.

155. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 392 (2000).

Kraakman state that the managers “may . . . be distinct from the persons for whose benefit the managers are charged to act” which, in this case, are a corporation’s shareholders.<sup>156</sup>

## 2. Taxation

As explained above, a corporation is owned by its shareholders. There is no minimum or maximum number of shareholders required to form a corporation. Even a single-member LLC may incorporate and own all the outstanding shares of a corporation.<sup>157</sup> Most publicly-traded companies, however, have significantly more than one shareholder. Despite being owners, shareholders do not report corporate income on their personal income tax returns as the income is earned. Instead, corporations report income and pay taxes at the corporate level.<sup>158</sup> Compared with other businesses, there is greater distinction between the corporate entity and its owners, a distinguishing feature with both potential benefits and disadvantages.

To begin with, corporate income is subject to a flat corporate tax rate. Unlike individuals, who are subject to various tax rates depending on the character of their income, corporations pay the corporate income tax rate on all sources of income.<sup>159</sup> For 2018, the federal corporate tax rate is 21%.<sup>160</sup>

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156. *Id.*

157. Treas. Reg. § 301.7701-3 (2018).

158. This section is limited to a review of corporations as defined in Subchapter C of the Internal Revenue Code. A small business corporation that satisfies the requirements of Section 1361(a) of the Internal Revenue Code and elects to be classified as an S-corporation using IRS Form 2553 will be treated as a partnership for tax purposes. A detailed review of S-corporations is beyond the scope of this Article.

159. Individuals pay ordinary income tax rates and capital income tax rates. Corporations pay the 21% corporate income tax rate on capital gains. Corporations track capital gains and losses, but are only permitted to use capital losses to offset capital gains. Unused capital gains are carried forward until they may be used against capital gains.

160. I.R.C. § 11 (Supp. V 2018). The Tax Cuts and Jobs Act of 2017 (TCJA) significantly changed the federal corporate tax rate in the United States. *See generally* STAFF OF JOINT COMM. ON TAXATION, 115TH CONG., GENERAL EXPLANATION OF PUBLIC LAW 115-97 (Comm. Print 2018) (explaining these changes). Effective January 1, 2018, the TCJA reduced the federal corporate tax rate from 35% to 21%. *Id.* at 101. Prior to 2018, the United States had one of the highest corporate tax rates in the world. *See* Kyle Pomerleau, *The United States' Corporate Income Tax Rate is Now More in Line with Those Levied by Other Major Nations*, TAX FOUND. (Feb. 12, 2018), <https://taxfoundation.org/us-corporate-income-tax-more-competitive/> [<https://perma.cc/TT7B-745W>]. Many saw the high corporate tax rate as an incentive to move business operations to non-U.S. jurisdictions. Aparna Mathur, *How to Help Close the Tax Gap*, AEI (May 27, 2016), <http://www.aei.org/publication/how-to-help-close-the-tax-gap/> [<https://perma.cc/RQ4C-SDL4>]. The recent reduction in the federal corporate tax rate has been heralded as a

Compared to other business entities, corporate recordkeeping is relatively straightforward and efficient.<sup>161</sup>

The biggest disadvantage of treating corporations as separate legal entities is the effect of “double taxation.” Essentially, double taxation occurs because corporate income is taxed at the corporate level when earned and again at the shareholder level when distributed.<sup>162</sup> Historically, corporations have distributed earnings to shareholders through cash dividends. The amount paid to each shareholder depends on the number of shares owned by each shareholder as of a specific date.<sup>163</sup> Significantly, corporations are not allowed to reduce net income by cash set aside for dividend distributions. Dividends are deemed to be paid out of accumulated earnings and profits, which were taxed in previous years.<sup>164</sup> Thus, corporations pay income taxes on the earnings distributed as dividends. The same earnings are taxed again when shareholders receive dividend distributions.<sup>165</sup> Shareholders must report dividends as income in the year received.<sup>166</sup> To help address the effect of double taxation, dividends are taxed at capital gains rates, which are less than ordinary individual income tax rates.<sup>167</sup> Only

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major victory in making the United States competitive with other industrialized countries. A detailed discussion of the TCJA is beyond the scope of this article.

161. Alternatively, partnerships (including limited liability companies and S-corporations treated as partnerships for tax purposes) must track income and equity at both the entity level and the individual level. Treas. Reg. § 1.704-1 (2018). The Internal Revenue Code requires partnerships to use capital accounts to track each partner’s basis in the entity. As such, a partnership must first calculate the total amount of income, gains, losses, deductions, credits, and contributions received during the year at the partnership level and then allocate each item among the various capital accounts in accordance with specific ratios contained in its partnership agreement (or default rules provided in Treas. Reg. § 1.704-1). As part of the partnership’s tax return (Form 1065), individual Schedule K-1s are prepared for each partner, listing their relative shares of income, gains, losses, deductions and credits from the partnership. Each partner receives a copy of her Schedule K-1 and incorporates the information into her personal income tax return. While the partnership owes no tax at the partnership level, the character of each item flows through to individual partners. For example, capital gains received by the partnership are also capital gains in the hands of the partners.

162. I.R.C. §§ 11, 61 (2018).

163. State statutes govern when corporate shareholders are deemed to own stock for purposes of receiving dividends.

164. State statutes often disallow corporate dividend distributions unless there are sufficient accumulated earnings and profits available. See, e.g., *Topic Number 404—Dividends*, IRS, <https://www.irs.gov/taxtopics/tc404> [<https://perma.cc/RKK2-9ULB>] (discussing how dividends are paid out of accumulated earnings and profits of the corporation).

165. I.R.C. § 61.

166. *Id.*

167. For 2018, individuals subject to an ordinary income tax of 0%, 10%, or 12% pay a capital gains tax at a rate of 0%; individuals subject to an ordinary income tax of 22%, 24%, 32%, or 35% pay a capital gains tax at a rate of 15%; and individuals subject to ordinary income tax of 37% pay capital gains tax at a rate of 20%. I.R.C. § 1. Additionally, taxpayers with income above a certain threshold must also pay net investment income tax at a rate of 3.8%. I.R.C. § 1411.

shareholders' initial stock investment will be returned tax-free (upon dissolution of the company). All other distributed earnings, whether during the life of the corporation or at dissolution, are subject to tax.<sup>168</sup>

In addition to federal income taxes, corporations are also subject to state income taxes. Generally, corporate law is state law. States have broad discretion in regulating and taxing business entities within their boundaries. All corporations, regardless of where they are incorporated, are subject to the federal income tax imposed by the Internal Revenue Code. A detailed analysis of state-specific statutes is beyond the scope of this Article.

### *B. An Elementary Overview of U.S. Business Trusts*<sup>169</sup>

A cogent analysis of business trusts as an organizational form for socially-conscious entrepreneurs must contain (1) a discussion of some basic tenets of trust law; (2) an exploration of trusts as organizations; (3) an elementary overview of the basic principles of business trusts; (4) a look at Delaware business trust law; and (5) an overview of business trust taxation.

#### *1. Common Law Principles of Private Donative Trusts*

When people generally think about trusts, they most likely think about private donative trusts. In essence, private donative trusts provide a means for individuals to make gifts. Although most gifts involve a donor simply giving a gift outright to the donee, a gift through a trust conceptually splits the gift between a trustee and beneficiary. Essentially, trusts create two distinct elements of asset ownership: (1) legal title; and (2) beneficial ownership.<sup>170</sup> In a gift to a trust, the trustee acquires legal title to the trust property, while the equitable title of trust property rests with the beneficiaries.

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168. I.R.C. § 1411. Note distributions of earnings are distinguished from salaries and wages. If a shareholder is also an employee, the corporation is allowed a deduction for salaries and wages paid while the employee pays ordinary income taxes on salaries and wages received. Thus, salaries and wages are not subject to double-taxation.

169. The primary focus of this Article is on business trusts. Although private trusts carry noteworthy donative importance, and charitable trusts play their own significant role in American society, this Article's discussion of sustainability applies solely to business trusts.

170. See RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. d (AM. LAW INST. 2003).



In creating a trust, the settlor<sup>171</sup> gives property to a trustee to hold for the benefit of a beneficiary upon the terms and conditions that the settlor imposes.<sup>172</sup> Trust law has historically aimed to effectuate the settlor's intent.<sup>173</sup> "In this regard, the settlor faces few restraints when formulating the details of the trust instrument."<sup>174</sup> Therefore, trust law consists overwhelmingly of default rules that the settlor can alter or reject—providing great flexibility for the settlor to tailor the trust to her wishes.<sup>175</sup> This regime reinforces one of the primary policy goals of private donative trusts: donative freedom.

A fiduciary relation arises because the trustee (the legal owner) shepherds the trust property for the benefit of the beneficiary in accordance with the purpose of the trust. In administering the trust, the trustee is held to a robust concept of fiduciary duties. In fact, the concept of fiduciary duties may be one of the defining aspects of the common law of trusts, and a rich and well-developed concept of fiduciary responsibilities and duties has developed under common law.<sup>176</sup>

Particularly noteworthy, trusts are entities in themselves—separate and distinct from the parties surrounding their creation (i.e., the settlor, trustee and beneficiary). Because trusts are perceived as separate entities, they have unique partitioning and protection features.<sup>177</sup> Trust law splits the trustee into distinct legal persons—an individual acting on her own behalf and a

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171. The settlor is the original property owner who transfers the property to establish the trusts. There may be one settlor or multiple settlors. The settlor may also be referred to as the "grantor" or "trustor."

172. As Scott's treatise contemplates, "[t]he duties of the trustee are such as the [settlor] . . . may choose to impose; the interests of the beneficiaries are such as he may choose to confer upon them." 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 1 (4th ed. 1987).

173. Effectuating the settlor's intent has been characterized as the foundational substantive principle of the laws of trusts. John H. Langbein, *Mandatory Rules in the Law of Trusts*, Essay, 98 NW. U. L. REV. 1105, 1109 (2004); see also Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 288–90 (2010) (discussing the importance of intent effectuating default rules in trusts and estates law); Lee-ford Tritt, *Dispatches from the Trenches of America's Great Gun Trust Wars*, 108 NW. U. L. REV. 743, 752–53 (2014) [hereinafter Tritt, *Trust Wars*] (providing a brief overview of donative trust law and explaining settlor's intent).

174. Tritt, *Trust Wars*, *supra* note 173, at 752–53.

175. Generally, the settlor's intent will be ignored only in those rare cases where it violates public policy by encouraging illegal activities, immoral behavior, or capricious purposes, to name a few. Tritt, *Trust Wars*, *supra* note 173, at 753 n.47.

176. See Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67 (2005) (discussing the importance of the social norms underlying fiduciary duties).

177. Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 438 (1998) (noting that the property law aspects of shielding a trustee's assets from creditors is one of the most important contributions of trust law).

trustee acting on behalf of the trust<sup>178</sup>—thereby insulating the trustee from creditors of the trust and protecting trust assets from creditors of the trustee. In addition, the settlor’s creditors generally cannot reach the trust assets. Accordingly, asset partitioning and creditor protection aspects of trusts are very important in their use.

## 2. *Trusts as Organizations*

The essence of trusts and how they operate makes them uniquely applicable for socially-conscious entrepreneurs.<sup>179</sup> In order to fully comprehend how business trusts provide a superior alternative organizational form for sustainability purposes, a rudimentary analysis of the function of trusts is required. Despite its historical legacy, trust law appears to have neither a complete descriptive theory nor a complete normative theory, and a debate concerning the nature of trusts has developed. Scholars in this area have questioned whether trusts lie within property law, contract law, organizational law, or a combination of all three.<sup>180</sup> Though this debate has raged on for over one hundred years,

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178. See Hansmann & Kraakman, *supra* note 155, at 416.

179. Although trusts have been used for centuries and have a well-developed and established common law, the very nature, function, and form of trust law remains subject to increasingly heated debate. See generally Hansmann & Kraakman, *supra* note 155, at 416 (stating that trust law is grounded in organizational law); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995) (arguing that the law of trusts is rooted in contract law); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 844 (2001) (briefly discussing the ongoing debate as to whether trust law is a form of property law or contract law); Sitkoff, *supra* note 145 (noting that trust law can be applied to an agency cost theory framework).

180. Professor Sitkoff summarized the debate in this area:

Early participants in this debate, which has been ongoing for over 100 years, include Frederic Maitland (who took a contractarian perspective), Austin Scott (who took a proprietary perspective), and Harlan Fiske Stone (who took a contractarian perspective).

... On the “dialogue” between Maitland and Scott, see [John H.] Langbein, [*The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625,] 644–46 [(1995)] (collecting and describing their publications); see also Harlan F. Stone, *The Nature of the Rights of the Cestui Que Trust*, 17 COLUM. L. REV. 467 (1917).

... For modern American manifestations, see Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1196–97 & n.13 (1985); Ronald Chester & Sarah Reid Ziomek, *Removal of Corporate Trustees Under the Uniform Trust Code and Other Current Law: Does a Contractual Lense Help Clarify the Rights of Beneficiaries?*, 67 MO. L. REV. 241, 244–46 (2002); Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don't Have to Think of England Anymore*, 62 ALB. L. REV. 543, 546 n.22 (1998); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1178 & n.73 (1999); [Thomas W.] Merrill & [Henry E.] Smith, [*The Property/Contract Interface*, 101 COLUM. L. REV. 773,] 844 n.248 [(2001)]; see also ELIAS CLARK ET AL., *GRATUITOUS TRANSFERS: WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS, FUTURE INTERESTS, AND ESTATE AND GIFT TAXATION* 454–56 (4th ed. 1999); JOEL C. DOBRIS ET AL., *ESTATES AND TRUSTS* 476–77 (2d ed. 2003); RICHARD POWELL, *POWELL ON REAL*

Professors John Langbein, Henry Hansmann, Ugo Mattei, Reinier Kraakman, and Robert Sitkoff have recently infused this debate with a new level of economic sophistication which merits a more detailed exploration.<sup>181</sup>

Many scholars predominantly view trust law as a branch of property law.<sup>182</sup> For example, a trust has been defined as “a fiduciary relationship with respect to property.”<sup>183</sup> At its core, a trust cannot be created unless there is a transfer of property.<sup>184</sup>

While this property-based theory of trusts is the majority position,<sup>185</sup> many scholars have also argued trusts are based in contract, as it is evident that trust law also involves contractual relationships.<sup>186</sup> For example, Professor Langbein opines that the typical three-party trust (settlor, trustee, and beneficiary) is a contractarian institution and that the laws of fiduciary administration are “overwhelmingly contractarian.”<sup>187</sup> Rather than focusing on the transfer of property into a trust, Professor Langbein argues that the most distinguishing feature of a trust is the “trust deal that defines the powers and responsibilities of the trustee in managing the property.”<sup>188</sup> He

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PROPERTY ¶ 513[3], at 41-141-50 (Michael Allan Wolf ed., rev. 2003); Gregory S. Alexander, *The Transformation of Trusts as a Legal Category, 1800-1914*, 5 L[A]W & HIST. REV. 303, 336-50 (1987).

Sitkoff, *supra* note 145, at 627 & nn.19-20. Professors Hansmann and Mattei have also contributed to this debate. See Hansmann & Mattei, *supra* note 177, at 437 (“A clear understanding of the functions served by the law of trusts offers insight . . . into the functions of organizational law in general. The private trust is among the simplest of the forms of enterprise organization provided for in the law . . .”). The most recent contribution to this debate is Lee-ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579 (2011).

181. See Hansmann & Mattei, *supra* note 177, at 437; sources cited *supra* note 179.

182. Langbein, *supra* note 179, at 627. For detailed descriptions of the view of trust law as property law, see Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 768 & n.7 (2000); Joshua Getzler, *Legislative Incursions into Modern Trusts Doctrine in England: The Trustee Act 2000 and the Contracts (Rights of Third Parties) Act 1999*, 2 GLOBAL JURIST i, 6-14 (2002); see also ROBERT A. PEARCE & JOHN STEVENS, *THE LAW OF TRUSTS AND EQUITABLE OBLIGATIONS* 87-108 (3d ed. 2002) (discussing trust law as property law).

183. RESTATEMENT (SECOND) OF TRUSTS § 2 (AM. LAW INST. 1959).

184. See *id.* §§ 2, 74.

185. Tritt, *supra* note 180, at 2595 (noting how Professor Sitkoff has conceded that the clear majority position is that trust law is a form of property law).

186. Henry Hansmann & Ugo Mattei, *Trust Law in the United States. A Basic Study of Its Special Contribution*, 46 AM. J. COMP. L. 133, 135 (1998). For the contractarian view of trust law, see generally Langbein, *supra* note 179; Patrick Parkinson, *Reconceptualising the Express Trust*, 61 CAMBRIDGE L.J. 657 (2002) (dealing with the Australian model).

187. Langbein, *supra* note 179, at 628.

188. *Id.* at 627. Professor Langbein also acknowledges that “[o]ur black letter law has resisted the insight that trusts are contracts,” by pointing to the Restatement of 1959, which declared that a trust is a conveyance of a beneficial interest in property rather than a contract. *Id.* at 628.

asserts that trusts are contracts and that the relationship between the settlor and trustee is equivalent to a modern third-party-beneficiary contract.<sup>189</sup>

While trusts were originally used as a device to transfer and gift property, the use of the modern-day trust has shifted. Today, many trusts are instead used as a “management regime for a portfolio of financial assets.”<sup>190</sup> This shift has affected the rights and responsibilities of trustees when managing trust property. Under the contractarian view, it is asserted that most of the trustee’s powers and duties are equivalent to standard default terms in a contract, which can be altered or modified.<sup>191</sup>

Following Professor Langbein’s work, Professor Sitkoff promotes an agency-cost model of trusts that focuses on the reduction of transaction costs between the settlor, trustee, and beneficiary.<sup>192</sup> This view shares similarities with Friedman’s view of corporations, where the corporate directors are agents of the shareholders,<sup>193</sup> although Professor Sitkoff focuses on donative trusts, where the settlor’s intent takes precedence over the beneficiaries’ desires.<sup>194</sup> Professor Sitkoff’s theory, applied to business trusts, would likely be even closer to the corporate agency-cost theory.

Professors Hansmann, Kraakman, and Mattei, however, make compelling arguments that trust law is grounded in organizational law, which, at its core, operates as a form of property law.<sup>195</sup> Organizational law is comprised of the “bodies of law that govern standard legal entities.”<sup>196</sup> Examples of entities include general partnerships, corporations, private trusts, charitable trusts, municipal corporations, and marriages, just to name a few.<sup>197</sup>

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189. *Id.* at 627.

190. *Id.* at 629.

191. Hansmann & Mattei, *supra* note 177, at 469.

192. Tritt, *supra* note 180, at 2595; *see also* Sitkoff, *supra* note 145. To determine whether trust law is closer to contract or property law, Professor Sitkoff argues that agency cost principles derived from corporate law and economics can be applied to private trusts. *Id.* Professor Sitkoff focuses on two important aspects of trusts: separation of ownership and the relationship between the trustee, beneficiary, and settlor. *Id.* Ultimately, Professor Sitkoff asserts that principal-agent economics can offer helpful insights into the nature and function of trust law. *Id.* For a detailed discussion and analysis of why agency costs theory is incompatible to trust law, see Tritt, *supra* note 180.

193. *See supra* notes 40–45 and accompanying text; *see also* Sitkoff, *supra* note 145, at 623 (“[M]any of the analytical tools supplied by the agency cost theories of the firm, which are routinely applied in the economic analysis of corporate law, should be similarly applicable to the underdeveloped economic analysis of trust law.”).

194. *See* Sitkoff, *supra* note 145, at 624.

195. *See* Peter B. Oh, *Business Trusts*, in RESEARCH HANDBOOK ON PARTNERSHIPS, LLCs AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 268, 279 (Robert W. Hillman & Mark J. Loewenstein eds., 2015) (“[T]he trust is grounded in property law.”).

196. Henry Hansmann & Reinier Kraakman, *Organizational Law as Asset Partitioning*, 44 EUR. ECON. REV. 807, 807 (2000).

197. Hansmann & Kraakman, *supra* note 155, at 390.

To begin, Professors Hansmann and Kraakman argue that “the essential role of all forms of organizational law is to provide for the creation of a pattern of creditors’ rights—a form of ‘asset partitioning’—that could not practicably be established otherwise.”<sup>198</sup> An entity’s ability to shield assets from creditors is a derivative of property law rather than contract law.<sup>199</sup> “Without organizational law the firm could not be established as a juridical person that could hold title to assets in its own right.”<sup>200</sup> Therefore, Professors Hansmann and Kraakman ultimately proffer that a trust’s ability to insulate assets from personal creditors makes it a legal entity and thus trust law is a form of organizational law.<sup>201</sup>

To reach this conclusion, Professors Hansmann and Mattei focus on the economic functions served by a “separate law of trusts.”<sup>202</sup> They seek to discover what the law of trusts can accomplish without relying on principles of contract and agency law.<sup>203</sup> As mentioned above, trust law automatically imposes standard default rules, which govern the relationships between the settlor, trustee, and beneficiary and impose fiduciary duties on the trustee.<sup>204</sup> Professors Hansmann and Mattei concede that these rules can be modified or rearranged and thus the effect of the rules might also be achieved by contract in the absence of trust law.<sup>205</sup> Furthermore, in the absence of trust law, agency law principles would apply and impose fiduciary duties on the trustee.<sup>206</sup>

Given that basic principles of contract and agency law can cover the relationships between the trustee, settlor, and beneficiary, Professors Hansmann and Mattei argue that the “more vital function of trust law lies in arranging the expectations of the personal creditors of the Settlor, Trustee, and Beneficiary,” and that these relationships cannot be covered by contract or agency law.<sup>207</sup> This vital function of trust law protects all three parties. For example, generally, under trust law, the settlor’s creditors cannot reach

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198. *Id.*

199. *Id.*

200. Hansmann & Kraakman, *supra* note 196, at 812–13 (“Organizational law eliminates the need for such contracting, and the transaction costs and moral hazard associated with it. By permitting the firm itself to be an ‘owner’ of assets, the law permits business assets to be insulated easily from claims of the individual creditors of the firm’s owners or managers. In this respect—and this is the crucial point—organizational law operates as a form of property law, permitting changes in rights that bind third parties.”).

201. Hansmann & Kraakman, *supra* note 155, at 416.

202. Hansmann & Mattei, *supra* note 186, at 133.

203. *Id.*

204. *Id.* at 136 (noting that these default terms govern the duties and powers of the trustee, such as the duty to preserve the trust property).

205. *Id.*

206. *Id.* at 136–37.

207. *Id.* at 137.

the trust property if the settlor is not a beneficiary of the trust.<sup>208</sup> The same holds true for the trustee: if the trustee becomes insolvent, the trustee's personal creditors cannot go after the trust property that is administered by the trustee.<sup>209</sup> Beneficiaries are also protected in the event that the trustee breaches her fiduciary duty by selling trust property to a third party who has notice of the trust and is not a bona fide purchaser.<sup>210</sup> Professors Hansmann and Mattei therefore argue that in the absence of trust law, the relationships between the trustee, settlor, and beneficiary and third parties cannot be easily rearranged by contractual means due to the high transactional costs that would follow.<sup>211</sup>

Professors Hansmann and Mattei conclude that the ordering of relationships between the trustee, settlor, beneficiary, and third parties who deal with the trust—relationships that cannot be rearranged easily by contract law—is the principal benefit of trust law.<sup>212</sup> With this in mind, Professors Hansmann and Mattei look to whether “trust law provides benefits that are not provided by the law of corporations.”<sup>213</sup> In doing so, they focus on how a trust has the ability to separate and partition assets from creditors—the essential function of organizational law.<sup>214</sup> More specifically, “trust law provides for the creation of an entity—the trust—that is separate from the three principal parties.”<sup>215</sup> As a result, trusts are organizations that are similar to corporations because they separate assets from creditors and offer limited liability to the trust's beneficiaries.<sup>216</sup> Therefore, the next question becomes: What can trusts do that corporations cannot?

The principal difference between trusts and corporations is flexibility.<sup>217</sup> Trusts do not have to face many of the restrictions that corporations face, including restrictions by “even the more liberal business corporation

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208. *Id.* at 139.

209. *Id.* at 140.

210. *Id.* at 146.

211. *Id.* at 147; *see also id.* at 144 (noting how the creation of a trust-like relationship between the settlor and trustee, where the settlor is free of personal liability, would be impractical for the trustee because if the trustee were an agent of the settlor, any contracts entered into by the trustee would bind the settlor as principal).

212. Hansmann & Mattei, *supra* note 177, at 434.

213. *Id.*

214. *Id.*

215. *Id.* at 470. Professors Hansmann and Mattei also briefly discuss the agency theory of trusts. *Id.* at 472. They argue that this theory focuses on the shared intent of the three principal parties in a trust, which is in line with a contractarian view, but Professors Hansmann and Mattei take it a step further and focus on the arrangement of creditors' rights. *Id.* It is this function of trust law, the reorganization of rights between third parties and creditors, which is the property-like aspect of a trust. *See id.*

216. *Id.* at 438, 472.

217. *Id.* at 472.

statutes.”<sup>218</sup> Professors Hansmann and Mattei list several restrictions specific to corporations, such as the requirements for a board of directors, annual shareholder meetings, and residual claims.<sup>219</sup> Trust law allows for the “creation of an entity managed by persons who are not subject to direct control by the residual claimholders.”<sup>220</sup>

These benefits have led to the rise of business trusts, which allow investors of capital to become beneficiaries of the trust.<sup>221</sup> Professors Hansmann and Mattei note that there is still a need for statutes that provide for different types of business corporations, such as LLCs, because they provide more structure than business trusts.<sup>222</sup> However, even with the additional rise of more liberal business corporation statutes, the business trust has remained popular in certain industries.<sup>223</sup> All of the same functions provided by state corporate statutes can be achieved privately through the use of a business trust.<sup>224</sup>

These intrinsic and unique aspects of trusts make them an organizational form that is more suited to sustainability purposes. The primary function of organizational law is to partition assets within an organization and “define the property rights over which participants in a firm can contract.”<sup>225</sup> Therefore, at its core, organizational law encompasses property law and allows organizations to shield assets and ensure limited liability<sup>226</sup>—a function that can be achieved through the use of private trusts and business trusts. It is evident that certain functions of trust law can be achieved using the basic tools of contract and agency law, but the more important function of a trust—its ability to insulate assets and offer limited liability—comes from organizational law. While similar to corporations in this way, trusts offer flexibility that corporations do not. Thus, trusts as an organizational form may be ideal for socially-conscious entrepreneurs, and business trusts are particularly suitable.

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218. *Id.*

219. *Id.* at 472–73.

220. *Id.* at 473.

221. *Id.*

222. *Id.* at 476.

223. *Id.* at 474.

224. *Id.* at 476.

225. *See* Hansmann & Kraakman, *supra* note 155, at 440.

226. *See id.*

### 3. *Business Trusts in the United States*<sup>227</sup>

Business Trusts have been around for more than one hundred years in the United States.<sup>228</sup> Historically, business trusts offered profit-seeking associations of individuals limited liability, entity shielding, capital lock-in, tradable shares, and legal personhood.<sup>229</sup> Business trusts enjoyed their heyday back when state laws made incorporation cumbersome and placed severe restrictions on corporations. Today, business trusts remain in common usage for the structuring of mutual funds and in asset securitization.<sup>230</sup>

What is a business trust? Business trusts are unincorporated associations carried on for profit,<sup>231</sup> created at common law by a trust agreement.<sup>232</sup> The United States Supreme Court has defined a business trust as:

[A]n arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided. These certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle

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227. Although there are two types of trusts that fall within the commercial trust realm—the traditional commercial trust and the business trust—this Article focuses on the business trust. A traditional commercial trust, though, operates more like a gratuitous trust in that the traditional commercial trust’s main focus “is to collect, to preserve, and to distribute” the trust assets. See Thomas E. Plank, *The Bankruptcy Trust as a Legal Person*, 35 WAKE FOREST L. REV. 251, 256 (2000); see also RESTATEMENT (SECOND) OF TRUSTS §§ 169, 172–82, 227 (AM. LAW INST. 1959) (discussing laws relating to commercial trusts); Jared W. Speier, Comment, *Clarifying the Business Trust in Bankruptcy: A Proposed Restatement Test*, 43 PEPP. L. REV. 1065, 1074 n.85 (2016) (discussing other characteristics of the traditional commercial trust, including “the appointment of a trustee by the beneficiaries of the trust; the power of the trustee to act on behalf of the beneficiaries, which includes suing and defending suits; and that the trustee does not have the broad power to conduct business activities”).

228. See Sheldon A. Jones et al., *The Massachusetts Business Trust and Registered Investment Companies*, 13 DEL. J. CORP. L. 421, 424–28 (1988) (elucidating the origins and history of the Massachusetts business trust).

229. John Morley, Essay, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2146 (2016).

230. John H. Langbein, Essay, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 171–72 (1997).

231. Speier, *supra* note 227, at 1074.

232. Wheeler A. Rosenbalm, Comment, *The Massachusetts Trust*, 31 TENN. L. REV. 471, 471 (1964).



the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.<sup>233</sup>

Generally, a business trust is created:

[W]herever several persons transfer the legal title in property to trustees, with complete power of management in such trustees free from the control of the creators of the trust, and the trustees in their discretion pay over the profits of the enterprise to the creators of the trust or their successors in interest.<sup>234</sup>

The business trust may be illustrated as follows: A, B and C desire to form a company in which to invest their money. They consider the plan of organization. They may form a partnership, or a corporation; but decide that they will pay certain amounts to [a Trustee] under a transfer whereby [the Trustee] will hold the funds in trust for A, B and C for purposes specified in the transfer, it being also provided that the interests of A, B and C are transferable upon the books of the [Trustee].<sup>235</sup>

Business trusts evolved from private donative trusts and, accordingly, were historically governed under traditional common law principles of trusts. In many ways, business trusts are analogous to their ancestor, the private donative trust. First and foremost, business trusts may be viewed as the epitome of the settlor's freedom.<sup>236</sup> Business trusts allow entrepreneurs to design their organization any way they desire (subject to the pressures and judgments of the markets).<sup>237</sup> Second, legal title of the trust property is transferred to the trustee in order to manage the property for the trust's beneficiaries (usually through transferable certificates of beneficial interest). Third, the business trust agreement,<sup>238</sup> which creates the trust, sets forth the specific details of the trust—such as its terms, the duties and powers of the trustee, and the precise interests of the beneficiaries.<sup>239</sup> Finally, the business trust is considered a distinct legal entity separate and

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233. *Hecht v. Malley*, 265 U.S. 144, 146–47 (1924).

234. *Goldwater v. Oltman*, 292 P. 624, 627 (Cal. 1930).

235. ALFRED W. BAYS, *LAW OF CORPORATIONS WITH A CHAPTER ON BUSINESS TRUSTS* 182–83 (1921).

236. Tamar Frankel, Essay, *The Delaware Business Trust Act Failure as the New Corporate Law*, 23 *CARDOZO L. REV.* 325, 325 (2001).

237. *Id.* at 325–26.

238. Private donative trusts, however, may be oral as well as created by a written trust agreement.

239. *See, e.g., Hecht*, 265 U.S. at 147.

apart from the parties of the trust (i.e., the trustor, trustee, and beneficiary).<sup>240</sup>

There are, however, distinct and legally significant differences between private donative trusts and business trusts.<sup>241</sup> First, the settlor of a private donative trust receives no compensation for her conveyance of property into a trust, whereas the settlor of a business trust always receives payment for the assets conveyed to the trust.<sup>242</sup> Second, the goals of business trusts are not to collect, preserve, and distribute trust property, but rather to use the property to conduct business and make a profit.<sup>243</sup> Third, in a business trust, investors in effect pool their resources in a mutual, consensual, contract-like relationship, as between themselves and a trustee, while private trusts arise from the settlor's gift with no contractual elements in its creation.<sup>244</sup> Fourth, the business trust agreement "not only prescribes the assets of the trust, the duties and responsibilities of the trustee, and the rights of the beneficiaries; it also prescribes the permissible business activities of the trust."<sup>245</sup> Fifth, in contrast to most private donative trusts, the settlors of business trusts are usually the beneficiaries and are not third parties. The beneficiaries of business trusts require a measure of control over the trustee and voice in changing the trust instruments. Finally, business trusts are taxed as business entities, not as trusts.<sup>246</sup>

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240. See Plank, *supra* note 227, at 260; see also, e.g., CONN. GEN. STAT. § 34-501(2) (2018) (providing that a statutory trust, which includes a business trust, shall be "a separate legal entity"); DEL. CODE ANN. tit. 12, § 3801(g) (2018) (providing that a trust shall be a "separate legal entity").

241. In fact, the differences between the two types of trusts are so significant that one court stated that the "only resemblance [a business trust] bears to an ordinary trust is the fact that the word 'trust' happens to have been chosen as the generic term to describe" the commercial enterprise. *Jim Walter Inv'rs v. Empire-Madison, Inc.*, 401 F. Supp. 425, 428 (N.D. Ga. 1975) (quoting Supplemental Brief in Support of Defendant's Motion to Dismiss at 6, *Jim Walter Inv'rs*, 401 F. Supp. 425 (No. C75-804A)).

242. Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 BUS. LAW. 559, 562 (2003).

243. Speier, *supra* note 227, at 1074 & n.87 (citing GEORGE BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES: A TREATISE COVERING THE LAW RELATING TO TRUSTS AND ALLIED SUBJECTS AFFECTING TRUST CREATION AND ADMINISTRATION WITH FORMS* §§ 2-7 (1984)) ("describing the means employed by a trustee in using the trust property to operate a business"); see also, e.g., *Jim Walter Inv'rs*, 401 F. Supp. at 428 ("Plaintiff's associational characteristics include: centralized control; beneficial shares; distinct legal existence provided by its declaration of trust; limitation upon liability; profit motivation; ability of the shareholders to remove the trustees with or without cause, to merger or terminate the trust, and to freely amend the terms of the trust instrument."); Schwarcz, *supra* note 242, at 559-60 (discussing the profitable markets in which business trusts thrive).

244. Herbert B. Chermiside, Jr., Annotation, *Modern Status of the Massachusetts or Business Trust*, 88 A.L.R.3d 704 § 2 (1978 & Supp. 2001) (discussing the differences between private trusts and business trusts).

245. See Plank, *supra* note 227, at 258.

246. See *infra* Section II.B.5 (discussing the taxation of U.S. business trusts).

Because business trusts were associated with common law trust principles, business trusts posed a number of potential uncertainties.<sup>247</sup> To avoid these uncertainties, many states in the United States passed statutes regulating business trusts. Like trust law, business trusts are creatures of state common and statutory laws. The rights and liabilities of any business trust are determined under the laws of the trust's situs. Laws governing business trusts vary greatly depending on the state. The foremost statute regarding business trusts is the Delaware Statutory Trust Act of 1988.<sup>248</sup>

#### 4. Delaware

The Delaware Statutory Trust Act of 1988<sup>249</sup> facilitated the use of the business trust as a form of business organization by eliminating several disadvantages associated with common law trust principles. The "principle purpose of the Act is to recognize expressly the statutory trust as an alternative form of business association."<sup>250</sup> This Act requires that a business trust hold, manage, invest, or perform business or professional activities for profit.<sup>251</sup> "[T]here are four general requirements in order to consider a trust a business trust: (1) there must be a trustee; (2) the trustee controls identifiable property; (3) the trust must engage in business; and (4) the trust must issue transferable shares."<sup>252</sup>

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247. See Chermide, *supra* note 244, at 719–30. For example, the status of business trusts is not always clear. They are unincorporated associations that act like corporations and may be considered to have violated corporate laws if not properly registered. In addition, their standing to sue and be sued has been challenged in some jurisdictions. See *id.*

248. DEL. CODE ANN. tit. 12, §§ 3801–24 (2018).

249. *Id.*

250. R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 19.2 (3d ed. 2019).

251. The provision in its entirety states:

"Statutory trust" means an unincorporated association which: (1) Is created by a governing instrument under which property is or will be held, managed, administered, controlled, invested, reinvested and/or operated, or business or professional activities for profit are carried on or will be carried on, by a trustee or trustees or as otherwise provided in the governing instrument for the benefit of such person or persons as are or may become beneficial owners or as otherwise provided in the governing instrument, including but not limited to a trust of the type known at common law as a "business trust," or "Massachusetts trust," or a trust qualifying as a real estate investment trust under § 856 et seq. of the United States Internal Revenue Code of 1986 [26 U.S.C. § 856 et seq.], as amended, or under any successor provision, or a trust qualifying as a real estate mortgage investment conduit under § 860D of the United States Internal Revenue Code of 1986 [26 U.S.C. § 860D], as amended, or under any successor provision; and (2) Files a certificate of trust pursuant to § 3810 of this title.

DEL. CODE ANN. tit. 12, § 3801(g)(1)-(2).

252. Speier, *supra* note 227, at 1075.

“The Act eliminates the requirement imposed by other states that the trust be engaged in the conduct of a trade or business or issue certificates or shares.”<sup>253</sup> Any legal business, for-profit or not-for-profit, including commercial business, suffices.

Common law trusts had several disadvantages that the Act eliminated. For example, the Act provides for the limited liability of both the beneficial owners and the trustees<sup>254</sup> in that the Act clarifies that beneficial owners are “entitled to the same limitation of personal liability extended to stockholders of private corporations for profit” and that no personal liability can be imposed on a trustee unless provided by contract.<sup>255</sup> Additionally, the Act contains highly permissive provisions, allowing the grantor and trustee a staggering degree of freedom to design their relationships with beneficiary-investors. Specifically, the Act gives both grantor and trustee much leeway in the trust’s governing written instrument to define, as they see fit, their responsibilities, liabilities and how the trust is administered. The flexibility embodied in the definition of the “business trust” allows the parties forming the business trust to adopt such characteristics of traditional private gratuitous trusts, corporations, or partnerships as the parties may desire. Further, the critical areas of the beneficial owners’ and trustees’ rights in the trust property and the management of the trust, respectively, are all couched in permissive terms: “[e]xcept to the extent otherwise provided in the governing instrument of [the business] trust.”<sup>256</sup> This highlights the fundamental policies of freedom of contract and flexibility of Delaware’s business trust in that the Act emphasizes the freedom to write into or omit from the trust document almost anything. For example, the duties and liabilities of the trustee may be modified by the trust’s governing instrument and fiduciary duties “may be expanded or restricted or eliminated by provisions in the governing instrument” except the “implied contractual covenant of good faith and fair dealing.”<sup>257</sup> In essence, Delaware offers “a complete opt-out regime as to whether any kind of trust-based duties of care

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253. BALOTTI & FINKELSTEIN, *supra* note 250 § 19.2.

254. DEL. CODE ANN. tit. 12, § 3806(a).

255. *Id.* § 3803; *see also id.* § 3817 (providing for trustee indemnification).

256. *Id.* §§ 3805(e), 3806(a).

257. *Id.* § 3806(c).

or loyalty exist.”<sup>258</sup> Simply, flexibility “may be the greatest advantage of the [business] trust over alternative forms of business organizations.”<sup>259</sup>

### 5. Taxation

An important factor in choosing a business form is taxation. Thus, any article that suggests the use of a specific business form must discuss how that form is taxed. The business trust’s flexibility does not end with its operation. Instead, when it comes to taxation, the business trust continues to be more flexible than the corporate form.

The taxation of a U.S. trust depends on its purpose. If a trust “is created to protect or conserve trust property on behalf of trust beneficiaries,” like an ordinary donative trust, it will be taxed as a trust under Subchapter J.<sup>260</sup> This means that trust income is generally taxed to the beneficiaries upon distribution.<sup>261</sup> If the trust income is held by the trust for later distribution, it will be taxed to the trust until distribution.<sup>262</sup> Upon that later distribution, it will be taxed to the beneficiaries and the trust will get a tax credit for the tax it previously paid on that income.<sup>263</sup>

By contrast, if a trust has a “business purpose” and “associates,”<sup>264</sup> as a true business trust would, it is not subject to traditional trust taxation.<sup>265</sup> For tax purposes, business trusts are considered more of a *business* than a *trust*.<sup>266</sup> In fact, Department of Treasury Regulation Section 301.7701-4(b) defines a business trust as an entity that is not classified as a trust for purposes of the Internal Revenue Code. One of the prerequisites for classification as a business trust is that the organization must have a *business*

258. Oh, *supra* note 195, at 272. *But see* Frankel, *supra* note 236, at 332, 340 (asserting that despite the language of the Act, the Act could not eliminate all vestiges of fiduciary duties).

259. BALOTTI & FINKELSTEIN, *supra* note 250 § 19.2.

260. Carter G. Bishop, *Forgotten Trust: A Check-the-Box Achilles' Heel*, 43 SUFFOLK U. L. REV. 529, 531–32, 554 (2010).

261. Carter G. Bishop, *Trusts, Taxes and Business: Dealing with 'Check-the-Box' Regulations*, 13 ABA BUS. L. SEC. (Nov./Dec. 2003), <http://apps.americanbar.org/buslaw/blt/2003-11-12/bishop.shtm> [<https://perma.cc/G53X-ZXD7>].

262. *Id.*

263. *Id.*

264. *Id.* A business trust will have a business purpose if the “trust instrument granted the trustee broad powers to conduct a business with trust property.” *Id.* A business trust has associates if the “beneficiaries [] share or influence the trustee’s duties under the trust.” *Id.* Bishop notes that to avoid having associates, a trust “should not be created by the beneficiaries . . . and . . . should specifically prohibit the beneficiaries from exercising any trustee powers.” *Id.*

265. Bishop, *supra* note 260, at 554.

266. *Morrissey v. Comm’r*, 296 U.S. 344, 359 (1935) (explaining that the object of the business trust is not to hold and conserve particular property, as in the traditional type of trusts, but to provide a medium for conducting business and sharing gains).

purpose.<sup>267</sup> In contrast, a *trust* generally does not have a business purpose or associates.<sup>268</sup>

Instead, business trusts are subject to the check-the-box tax regulations.<sup>269</sup> Under the check-the-box regulations, a business trust will be treated as either a disregarded entity or a partnership.<sup>270</sup> If the business trust has one beneficiary, it will be treated as a disregarded entity, which means the business trust's income will be taxed to the beneficiary under the individual income tax regime.<sup>271</sup> If the business trust has more than one beneficiary, it will be treated as a partnership.<sup>272</sup> The default for such a business trust under check-the-box regulations is to be taxed as a partnership under Subchapter K, but the regulations also allow it to elect to be taxed as a corporation under Subchapter C.<sup>273</sup>

Generally, businesses perform fact-specific analyses to determine whether, given specific circumstances, corporate or partnership tax status is preferable.<sup>274</sup> In conjunction with the default rules, the Internal Revenue Code and state statutes may dictate when business entities must be treated as corporations.<sup>275</sup> Federal law mandates corporate tax treatment only in

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267. *Id.* at 352.

268. See Treas. Reg. § 301.7701-1(b) (2018). For purposes of determining whether a trust is an ordinary trust or a business trust, courts consider whether trust beneficiaries are “associates”: those who are beneficially interested in business operations and seek to share in advantages of a common enterprise, either by joining in business activities from the outset or by later participation in the business arrangements. *Morrissey*, 296 U.S. 344, at 356–57. Associates are beneficiaries; however, beneficiaries are not necessarily associates. See *id.* Therefore, where beneficiaries engage in business activities, the entity is generally considered a business trust. See *Thrash Lease Tr. v. Comm’r*, 99 F.2d 925, 928 (9th Cir. 1938).

269. Bishop, *supra* note 260, at 554–55.

270. *Id.* at 531.

271. *Id.*

272. *Id.*

273. Karen C. Burke, *Passthrough Entities: The Missing Element in Business Tax Reform*, 40 PEPP. L. REV. 1329, 1331 (2013); see also Treas. Reg. § 301.7701-1–4 (check-the-box regulations). Prior to 1997, this was not the case. Bishop, *supra* note 260, at 533. The old regulations made it much more difficult to classify a business trust. While ordinary donative trusts were taxed under Subchapter J, business trusts proved more complicated. *Id.* at 530. If a business trust more closely resembled a partnership, it would be taxed as a partnership. *Id.* at 544. If a business trust resembled a corporation, it would be taxed as a corporation. *Id.* Thus, a business trust needed to be closely analyzed before it was clear which taxation regime it would fall under. The pre-1997 regulations incorporated the standards in *Morrissey*, 296 U.S. 344. Bishop, *supra* note 260, at 562. *Morrissey* articulated four corporate characteristics: centralized control, continuity, limited liability, and transferable certificates. *Morrissey*, 296 U.S. at 360. Under the old regulations, if a business trust had at least three of these characteristics, it would be deemed a corporation. Bishop, *supra* note 260, at 562 & n.198. If it had less than three of these characteristics, it would be deemed a partnership. *Id.*

274. A discussion of the relative advantages of partnership and corporate tax treatment is beyond the scope of this Article.

275. See Treas. Reg. § 301.7701-2(b) (2018). Under this section, the following entities must be treated as a corporation for federal income tax purposes:

limited circumstances, such as when a business entity is publicly traded.<sup>276</sup> If a business trust is publicly traded, then, it must be taxed as a corporation.<sup>277</sup>

The Internal Revenue Code prevents business trusts from being taxed like ordinary trusts.<sup>278</sup> Nonetheless, a for-profit entity will likely benefit from being taxed as a partnership or corporation rather than as an ordinary trust, especially if it plans to accumulate net income.<sup>279</sup> As compared to partnerships, ordinary trusts are treated like individuals except they incur the maximum income tax rate significantly faster than individual partners.<sup>280</sup> For 2018, the maximum individual income tax rate of 37% applies to ordinary trusts when undistributed net income exceeds \$12,500; alternatively, married-filing-jointly taxpayers use the same rate only once taxable income exceeds \$600,000.<sup>281</sup> As compared to corporations, ordinary trusts pay higher tax rates on taxable income over \$2,550.<sup>282</sup> For 2018, an ordinary trust pays income taxes at a rate of 24%, 35% or 37% while corporations are subject to a flat tax rate of 21% on the same taxable income.<sup>283</sup> Notably, the previous comparisons consider neither the effect of trust distributions nor double-taxation on corporate earnings. Still, the comparisons highlight why business trusts would likely prefer partnership or corporate tax treatment over ordinary trust treatment. Essentially, the fact

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“(1) [a] business entity organized under a Federal or State statute, or under a statute of a federally recognized Indian tribe, if the statute describes or refers to the entity as incorporated or as a corporation, body corporate, or body politic; (2) [a]n association (as determined under § 301.7701-3); (3) [a] business entity organized under a State statute, if the statute describes or refers to the entity as a joint-stock company or joint-stock association; (4) [a]n insurance company; (5) [a] State-chartered business entity conducting banking activities, if any of its deposits are insured under the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1811 *et seq.*, or a similar federal statute; (6) [a] business entity wholly owned by a State or any political subdivision thereof, or a business entity wholly owned by a foreign government or any other entity described in § 1.892-2T;” and “(7) [a] business entity that is taxable as a corporation under a provision of the Internal Revenue Code.”

Treas. Reg. § 301.7701-2(b)(1)–(7).

276. See I.R.C. § 7704 (2018) (mandating corporate treatment for publicly traded business entities, including business trusts).

277. *Id.*; GEORGE K. YIN & KAREN C. BURKE, PARTNERSHIP TAXATION 29, 14 (3d ed. 2016).

278. Treas. Reg. § 301.7701-4(b).

279. I.R.C. §§ 651, 661. Accumulated and undistributed net income is taxed at the ordinary trust level. Net income distributed to beneficiaries, however, is deducted from taxable income when calculating the ordinary trust’s tax liability. Beneficiaries who receive the distributed net income are responsible for reporting their share of the trust’s net income and paying the income taxes at their individual tax rates.

280. I.R.C. §§ 1, 641(b).

281. See STAFF OF JOINT COMM. ON TAXATION, 115TH CONG., GENERAL EXPLANATION OF PUBLIC LAW 115–97, at 6 (Comm. Print 2018).

282. *Id.*

283. *Id.*; I.R.C. § 11.

that a business trust is considered a trust for certain purposes does not provide a competitive advantage from a federal income tax perspective.<sup>284</sup>

In addition to federal income tax considerations, those interested in forming a business trust must review state-specific tax consequences. Most states have enacted business trust statutes that provide default rules for determining whether a business trust shall be considered a partnership or corporation for state tax purposes.<sup>285</sup> Federal income tax rules generally defer to state statutes regarding whether an entity must be considered a corporation.<sup>286</sup> Note, however, if a business trust is classified as a corporation and it meets criteria for making an S-Corporation election, pass-through taxation may still be available.<sup>287</sup>

In conclusion, a business trust has broad discretion under the Internal Revenue Code and regulations to classify itself as a partnership or corporation. Default classifications may be changed readily, with some limitations. Under no circumstances, however, will a business trust engaged in business operations be treated as an ordinary trust for tax purposes.<sup>288</sup> State-specific statutes may provide additional default rules, which should be reviewed prior to formation.

### III. BUSINESS TRUSTS AS AN ORGANIZATIONAL FORM FOR SOCIALLY-CONSCIOUS ENTREPRENEURS

Business trusts provide an attractive alternative business construct—both positively and normatively—to efficiently effectuate the evolving model of business sustainability. Positively, business trusts offer a mechanism—a flexible and vetted organizational form—to implement sustainability measures without running afoul of the legal uncertainties associated with shareholder primacy. Normatively, business trusts provide a cohesive means of serving the true purposes of the sustainability movement while taking all stakeholders into account. Accordingly, the dual goals of seeking profits while being socially responsible can co-exist more organically

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284. Treas. Reg. § 301.7701-4(b) (2018).

285. State statutes may use the terms “commercial trusts” or entities organized under “common-law declarations of trust” instead of “business trusts.” An analysis of various state-specific business trust statutes is beyond the scope of this Article.

286. Treas. Reg. § 301.7701-2(b).

287. See I.R.C. §§ 1361–62. A detailed discussion of a corporation’s S-corporation election is beyond the scope of this Article.

288. Treas. Reg. § 301.7701-4(a).



within a trust structure than within a corporate structure that is constrained with burdensome common law doctrines and potential regulatory intrusion.

Historically, business trusts were used as “a tool to circumvent strict incorporation statutes,”<sup>289</sup> so using business trusts to circumvent overly-restrictive corporate organizational and legal limitations should not seem like a novel concept. As early as the thirteenth century, business trusts were used to evade the primogeniture laws.<sup>290</sup> Later, in the eighteenth century, they were used to avoid the strict authorization requirements for corporations in England.<sup>291</sup> This use of trusts as a more flexible business form continued in America. In Massachusetts, the first state in which business trusts thrived, business trusts were used to avoid the state’s strict incorporation statute and the prohibition on dealing in real estate that was placed on corporations.<sup>292</sup> This history shows that business trusts have always been used as an entity to avoid inflexible and problematic corporate organizational limitations and laws. In line with this history, business trusts can be used once again in order to avoid shareholder primacy’s restrictions on sustainability.

In addition to the historic use of business trusts to circumvent corporate barriers, two other characteristics of the business trust make it a particularly attractive organizational alternative for socially-conscious entrepreneurs. These unique aspects of business trusts are relevant in seeking an organizational form that is more suitable for socially-conscious entrepreneurs because business trusts offer opportunities for innovation and flexibility that corporations do not.

#### A. Structure

The structure of business trusts is uniquely suited to sustainability. Business trusts are treated as entities independent from their settlors, trustees, and beneficiaries. Unlike corporations, where shareholders may be deemed to “own” the corporation, beneficiaries do not own the business trust. Unlike corporations, trustees are the “masters” of the business trusts. And unlike corporations, where executives and directors are deemed agents of the shareholders, trustees are not agents of the beneficiaries.<sup>293</sup> These

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289. Speier, *supra* note 227, at 1066 (“Citizens seeking the benefits of a corporate structure were forced to create voluntary associations, such as business trusts, to avoid strict government oversight.”).

290. *Id.*

291. *Id.* at 1067–68.

292. Oh, *supra* note 195, at 269–70.

293. See Tritt, *supra* note 180, at 2602–06 for a discussion concerning why there is no principal-agency relationships in trusts.

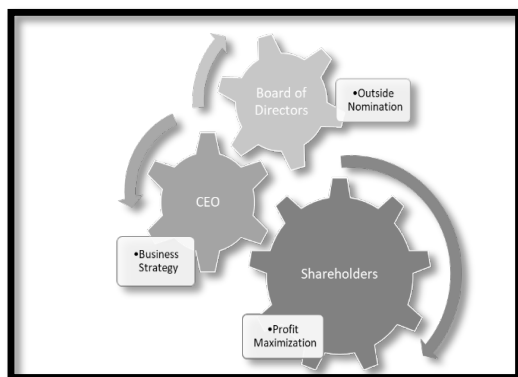
differences are important. Agents are obliged to carry out the wishes of a principal, whereas a fiduciary's obligation is to exercise independent judgement on behalf of the beneficiary's interest in light of the purpose of the trust. Business trusts are independent entities whereby management's authority comes from the trust agreement (and state law). In addition, business trusts permit a more expansive conception of a fiduciary duty, one that permits social responsibility and sustainability to be part of a trustee's essential role in a way that might be problematic for corporations. With proper drafting, business trusts can be managed to serve business purposes as well as social and environmental purposes. A business trust may serve multiple purposes and serve many functions in business and society.

This leads to a critical difference between corporations and business trusts: unlike the shareholders of a corporation, the beneficial owners of a business trust that is formed with the purpose of sustainability should not be able to sue the trustee for breach of its fiduciary duties because it practiced a sustainable management model. For business trusts, trustees need not adhere to so-called shareholder primacy models, shareholder wealth maximization norms, or agency-principle dynamics. Instead, trustees are primarily controlled by the governing instrument, which may require either shareholder primacy or sustainability if the drafter of the instrument so chooses. The flexibility business trusts offer allows the drafter of the governing instrument to tailor the liability of the trustee. Corporations do not have the freedom to draft out of shareholder primacy in this way.

Additionally, entrepreneurs seeking the benefits of a corporate structure can create business trusts to avoid strict government oversight. One critical part of these business forms is the Board of Directors (Trustees). The selection process for a corporate board has changed substantially over the past decades. For instance, the corporate board selection process now involves: "(1) board selection by a nominating committee rather than the CEO; (2) more equity compensation for directors; and (3) more director control of board meetings through appointment of a lead director or outside chairman, annual CEO reviews, and regular sessions with outside directors only ('executive sessions')." <sup>294</sup> This diffusion of power away from the CEO reduces the ability of a corporation to be driven by a sole leader.

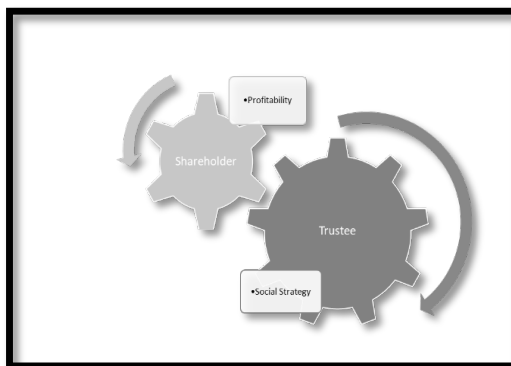
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294. Bengt Holmstrom & Steven N. Kaplan, *The State of U.S. Corporate Governance: What's Right and What's Wrong?*, in U.S. CORPORATE GOVERNANCE 26, 36 (Donald H. Chew & Stuart L. Gillan eds., 2009).

**Figure 2**<sup>295</sup>

This structure contrasts with trustee leadership, which allows for sole direction and can be changed as needed. Further, regarding investment experimentation, it has been stated that controlling corporate governance further would be costly and inflexible.<sup>296</sup> Demand for viable ways to circumvent this overstepped

corporate governance will increase as technology continues to develop at an exponential rate and firms strain to keep up. This leaves the door wide open for newly formed organizations to use trusts as a practical and flexible organizational form.

**Figure 3**<sup>297</sup>

### B. Flexibility

The unique aspects of business trusts as an organizational form make it more suitable for sustainability-conscious entrepreneurs because business trusts offer opportunities for innovation and flexibility that corporations do

295. This figure represents the structure of a corporation. The CEO directs the business strategy of the corporation, but the board of directors is nominated by a special nomination committee, not the CEO. The shareholders are the biggest organ of the corporation, and the directors and CEO have a duty to maximize profits for the shareholders.

296. Holmstrom & Kaplan, *supra* note 294, at 44.

297. This figure represents the structure of a business trust. If structured in this way, the trustee is the biggest organ of the organization, which allows the trustee to control the social strategy while creating profitability for the beneficial owners of the trust.

not. Under Delaware's statutory trust act, most of the rules may be modified by the governing instrument,<sup>298</sup> which provides a great deal of flexibility. For example, the act sets out the rules on liability of beneficial owners and trustees, "[e]xcept to the extent otherwise provided in the governing instrument."<sup>299</sup> Additionally, the act allows the governing instrument to set forth the way in which the trust will be managed,<sup>300</sup> thereby providing business trusts greater flexibility than corporations in management decision-making, including sustainability issues (in essence, keeping flexibility in terms of partnership by retaining the right to amend the contract that comprises the trust agreement while benefiting from treatment similar to a corporation). Simply, business trusts allow for increased flexibility through default rules that can be modified through drafting. This means that the trustee can have "more power over the trust property than the officers of a corporation have over a corporation."<sup>301</sup>

This kind of flexibility allows the drafter of the governing instrument of a Delaware business trust to direct the trustees to incorporate sustainability practices into the management of the trust. Unlike constituency statutes,<sup>302</sup> the social purposes are not constrained by state statute. The business trust can incorporate whatever social purpose it wants in its governing instrument. Unlike benefit and social-purpose corporations,<sup>303</sup> this flexibility also allows the drafter of the governing instrument to make it simple for a business trust to change its social purpose. Additionally, rather than enumerating specific social purposes like a benefit or social-purpose corporation must,<sup>304</sup> the business trust's governing instrument could have a broad provision that allows the trustees to generally participate in sustainability practices. Businesses that will be able to be more forward-looking, and bend-not-break when industry paradigm shifts happen in the market place, are less likely to cause harm to stakeholders. This flexibility is the primary reason business trusts are the ideal business form for socially-

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298. *See generally* DEL. CODE ANN. tit. 12 (2018).

299. *Id.* § 3803.

300. *Id.* § 3806. The default management system is under the direction of the trustees, but this may be modified by the governing instrument. *Id.* § 3806(a). However, if the beneficial owners so choose, they can be responsible for the direction of the trustees. *Id.*

301. Speier, *supra* note 227, at 1066.

302. *See supra* Section I.C.1.

303. *See supra* Section I.C.2.

304. *See supra* Section I.C.2.

conscious entrepreneurs looking to practice sustainability while avoiding liability.

[Businesses] can prosper over the long term only if they're able to learn, adapt, and regularly transform themselves. In some industries today, companies may need reinvention every five years to keep up with changes in markets, competition, or technology. Changes of this sort, already difficult, are made more so by the idea that management is about assigning individuals fixed decision rights, giving them clear goals, offering them incentives to achieve those goals, and then paying them (or not) depending on whether the goals are met.<sup>305</sup>

Business trusts' flexibility allows companies to do just that.

Further, the flexibility of business trusts also allows the drafter of the governing instrument to decide how much power the trustee will have. The default rule is that the trustees direct the management of the company.<sup>306</sup> This rule, like most of the provisions of the Delaware business trust code, may be modified by the governing instrument. However, giving the trustee this kind of power is ideal for sustainability, because it allows the trustee to adapt their investment practices to the changing needs of society.

Unlike a traditionally owned corporation, more thought can be put into the direction of the company. Further, this power allows for much more creativity and innovation within the business. Regardless of the company's leadership or strategic ability, it allows a visionary to lead the company. Often, vision is lost and businesses which were formed to serve a social purpose become diluted and profit-driven. This amount of control allows for entrepreneurship and social good to remain at the center of an organization.

The most obvious benefit of a business trust lies within its profit-based responsibilities. The Shareholder Primacy,<sup>307</sup> CSR, and Sustainability<sup>308</sup> sections of this Article are at the heart of the shareholder versus stakeholder crux. For businesses to truly "do good" and properly plan for the future, a balance must be struck. When considering the formation and investment of a company, leadership is the piece that ties it all together. In order for the business trust schema to truly work, leadership's hand must not be forced.

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305. Bower & Paine, *supra* note 22, at 58.

306. DEL. CODE ANN. tit. 12, § 3806(a).

307. *See supra* Section I.A.

308. *See supra* section I.B.

Although business trusts offer many benefits to socially-conscious entrepreneurs, there may be some drawbacks.<sup>309</sup> These potential disadvantages aren't legal or tax-oriented, but more pragmatic. These shortcomings arise from the grip of corporate governance structure, complacency within the business world and corporate legal culture, the fact that business trust case law is thinner than corporate law (which could lead to uncertainty and hesitancy), and the lack of knowledge of business trusts by important players such as banks and potential investors (particularly venture capitalists). Similar to the preference many investors expressed for investing in corporations over LLCs during LLCs' nascent stages, investors may prefer to work with corporations over business trusts because of a general comfort level with the organizational form.<sup>310</sup> In addition, because of business trusts' limited governance requirements, outside investors may be wary.<sup>311</sup> Yet, analogous to the evolution of the use of LLCs, pertinent players may become more familiar and comfortable with business trusts with their expanding use.

Another disadvantage may be the misperception in the United States that business trusts cannot be used for large scale operating entities, but this is proved wrong by their use in certain foreign markets. In the United States, business trusts are largely ignored as profitable operating entities, and their use is mostly restricted to specific industries.<sup>312</sup> In order to maintain viability in growing socially-conscious markets—both domestically and internationally—the American entrepreneurs will need to stay current with innovative, emerging economies. Upon revelation of the possible use of

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309. Advantages and disadvantages from the perspective of other stakeholders, such as management, unitholders, or society, are outside the scope of this Article.

310. See Eric H. Franklin, *A Rational Approach to Business Entity Choice*, 64 U. KAN. L. REV. 573, 574 (2016) (“Many legal advisors see the decision [between forming a corporation and an LLC] as a foregone conclusion, with the conventional wisdom offering that if you are seeking outside investment, form a corporation; if not, form an LLC.” (footnote omitted)); Richard Harroch, *10 Key Issues in Setting up an LLC*, FORBES (Jan. 18, 2017, 9:13 PM), <https://www.forbes.com/sites/allbusiness/2017/01/18/10-key-issues-in-setting-up-an-llc/#2c4058f1633d> [<https://perma.cc/994A-VT2C>] (“Many investors, especially venture capital firms, prefer to invest in corporations and not LLCs.”).

311. Andrew Stephenson, *Seeking Outside Investors? Better Think About Converting Your LLC into a C Corp*, CROWDCHECK (July 29, 2013), <http://www.crowdcheck.com/blog/seekingoutside-investors-better-think-about-converting-your-llc-c-corp> [<https://perma.cc/N286-GN9Q>] (“[O]utside investors are often wary of LLCs because of the limited corporate governance requirements. . . . [F]or an entrepreneur seeking outside investment, using a C corporation rather than an LLC has real advantages. . . . It may also be more appealing for outside investors to get a better picture of how the company is run and what their potential exit might be.”).

312. Sitkoff, *supra* note 19, at 38. It should be noted, though, that trusts are used as an organizational form by large not-for-profit organizations, so the idea that business trusts can be used successfully as large operating entities is not a radical concept.

business trusts as an organizational form to pursue social purposes, a look abroad shed light on using business trusts as operating entities.<sup>313</sup> As mentioned earlier, Singapore's emerging economy is one of the best in the world,<sup>314</sup> and it is known for being innovative and business-friendly. This emerging market is already taking advantage of this international use of business trusts. Amidst this booming economy, business trusts are becoming more popular on the Singapore Exchange.<sup>315</sup> The success of Singapore business trusts on the Singapore Exchange shows that they can be effective as operating entities.

Despite some pragmatic drawbacks, business trusts nevertheless offer many unique benefits for socially-conscious entrepreneurs. Therefore, the use of business trusts should be part of the overall discourse concerning how best to achieve sustainability in the business world.

#### CONCLUSION

The modern trend in business is to consider all stakeholders, not just shareholders. In the United States, companies are increasingly incorporating sustainability practices into their business management models. However, by practice and by law, shareholder wealth maximization norms conflict with the sustainably-conscious management model. Under this theory, shareholders may be able to sue the board of directors for breaching their perceived duty to maximize profits, which may occur if the board pursues sustainability. Some states have realized the shortcomings of the traditional corporate form and have enacted constituency statutes or created new corporate forms. However, these statutes and corporate forms have their own significant shortcomings.

Despite many advantages, business trusts are not a popular operating entity within the United States. This may be due to the shareholder primacy paradigm, the effects of the stock market, or complacency within corporate legal culture. However, when compared to successful emerging economies that are taking divergent actions from the U.S. economic system, perhaps socially-conscious entrepreneurs should ask themselves why business trusts are not used as operating entities.

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313. For an in-depth comparison and analysis of business trust law in the United States and Singapore, see Tritt & Teschner, *Rise of Business Trusts*, *supra* note 20.

314. *See id.* Many Americans may not have been aware of this fact until the popular film, *Crazy Rich Asians*, became a box office hit in 2018. This film portrayed just how successful some Singaporeans are. *CRAZY RICH ASIANS* (Warner Bros. 2018).

315. *See* Tritt & Teschner, *Rise of Business Trusts*, *supra* note 20.

Historically, business trusts have been used to circumvent overly-restrictive corporate organizational and legal limitations. Entrepreneurs should once again look to this business form to provide flexibility to pursue sustainable measures while maintaining profitability. Due to the structure and flexibility of business trusts, they may be the ideal vehicle for sustainable businesses.