It’s Actually Pretty Easy Being Green (And Otherwise Socially Responsible): An Assessment of the Current Legal Approaches to Corporate Social Responsibility

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Introduction

Corporations are a fundamental component of global society. Their importance in the macroeconomy is undisputed, as is their role in the lives of everyday citizens. They are so crucial to the solvency of modern civilization that their very functionality can be said to rival that of a government's as they become increasingly powerful and influential.[1] This corporate dominance introduces questions about the ethical obligations a corporation heeds to its employees, resources, and the community in which it resides.[2] Known as "corporate social responsibility" (here after CSR),[3] this notion that corporations should acknowledge their impacts on such entities is not novel, and has in fact been the subject of debate since the 1930s.[4] Despite decades of discussion, there is nonetheless little consensus as to what or whom corporations should be accountable, other than shareholders, and as to whether it is even legal for corporate boards to pursue objectives other than shareholder profit maximization.[5] The lack of consensus is due mostly to lack of coherent statutory or other legal guidance in corporate law that adequately addresses a corporation's ethical duties on a larger scale.[6]

In Part I, this paper will argue first that the legal framework for corporate social responsibility indeed exists and provides for the right of corporate boards of directors to pursue goals that benefit other stakeholders in addition to shareholders. Part I also will examine if and when boards of directors may be held liable for pursuing CSR goals and will discuss the role of shareholders in business decisions. Part I will conclude by asserting that the legal challenges brought by shareholders or others should not disincentivize boards from pursuing CSR objectives.[7] Part II describes the inevitable conflicts between CSR objectives and shareholder interests and reviews Unilever's takeover of Ben & Jerry's to illustrate this tension.[8] Finally, Part III discusses provisions that socially conscious companies can use to better equip themselves to negotiate acquisitions and other hostile situations so as to maximize preservation of their missions.[9]

I. Corporations have the right to pursue CSR goals.

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[1]C.A. Harwell Wells. *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century.* 51 KAN. L. REV. (2008).
[2]*Id.* at 77–78.

[3]Keith Davis. *The case for and against business assumption of social responsibilities*. 16 ACAD. OF MANAGEMENT J 312 (1973), at 312). ("'[CSR refers to] the firm's considerations of, and response to, issues beyond the narrow economic, technical, and legal requirements of the firm to accomplish social [and environmental] benefits along with the traditional economic gains which the firm seeks.'").
[4]Wells, *supra* note 1 at 78–79 (Discussing the first recognized scholarly debate over CSR in 1931 and 1932, which was a dialogue between legal business scholars A.A. Berle and E. Merrick Dodd.).
[5]John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement.* 31 J. CORP. L. 1 (2005).
[6]*Id.* at 2.
[7]*See infra* Part I.
[8]*See infra* Part II.
[9]*See infra* Part III.

Corporations in fact have a legal right to pursue CSR goals.[10] There are a number of statutes by which this right to pursue interests other than those pertaining to shareholder value can be construed.[11] They are presented in turn, beginning with fundamental duties a corporate board is obligated to fulfil, which will dovetail into a defense by which corporate boards may employ to shield their judgments from judicial inquiry.[12]

A. <u>Corporate boards and officers have a Duty of Care that requires them act with good faith in making business decisions.</u>

The Duty of Care[13] is a basic requirement on the part of a corporation's board to "act with good faith and on an informed basis in making a business decision."[14] The purpose of this Duty is to prevent directors from making hasty and erroneous decisions that will negatively affect shareholders. Thus, the board members are obligated to inform themselves of "all material *reasonably* available to them" before making any decision related to business management or operations.[15] The term "reasonable" is intended to include only "material facts that are reasonably available."[16] It does, nonetheless, necessitate that boards of directors fully consider and discuss such material to the degree that all relevant factors have been considered.[17] The rigor and quantity of this dissemination process depends upon the circumstances and magnitude of the decision in question.[18] Though there is no clear form that information gathering must take, boards generally rely on expert opinion, appraisal or fairness opinion, and other related analyses.[19] Whether to pursue CSR goals is certainly a decision that falls within this Duty, and board members are therefore obliged to carefully scrutinize any such proposal with a "critical eye."[20]

Failure to act with a Duty of Care can, in some cases, be grounds for shareholders to bring suit against a board.[21] If it can be shown that the directors purposefully acted maliciously or without adequate examination of pertinent material, the standard under some state laws is

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[10]EDWARD BRODSKY & M. PATRICIA ADAMSKI. LAW OF CORPORATE OFFICERS AND DIRECTORS: RIGHTS, DUTIES AND LIABILITIES § 2:14 (2005).
[11]*See infra*, notes 13, 25, & 33.
[12]*See Infra*, note 33.
[13] *See* Brodsky & Adamski *supra* note 10.
[14] *Id.* at 1.
[15] *Id.* (emphasis added).
[16] *Id.*
[17] *Id.* at 2.
[18] *Id.*
[19] *Id.* at 3. *See also* Sutherland v. Sutherland, 2010 WL 1838968 (Del. Ch.) (There is no "special method that must be followed to satisfy the duty of due care.") (quoting In re KDI Corp. Shareholders Litigation, Fed. Sec. L. Rep. (CCH) P 95727, 1990 WL 201385 (Del. Ch.)).
[20] *Id.*
[21] State statues now permit limits or eliminations of directors' liability for breach of the Duty of Care, with certain notable exceptions including "intentional misconduct or conduct not in good faith." *Id. See also* Official Committee of Unsecured Creditors of Integrated Health Services, Inc. v. Elkins, 30 Del. J. Corp. L. 535, 2004 WL 1949290, *9 n.37 (Del. Ch. 2004) ("The duty of care requires that 'in making business decisions, directors must consider all material information reasonably available. . . .'")

gross negligence.[22] However, because inadequate information gathering is often blatantly obvious in hindsight, courts tend to scrutinize alleged breaches with considerable latitude.[23] In theory, the history of lenient judiciary discretion ought to relieve boards of their indebtedness to shareholders and invite opportunity to explore CSR proposals.[24]

B. <u>The Business Judgement Rule assumes the directors will exercise reasonable judgement in making a business decision and protects them from intense judicial scrutiny.</u>

Closely related to—but not to be confused with—the Duty of Care is the rule by which corporate boards are protected against judicial inquiry: The "Business Judgement Rule" (hereafter "Rule").[25] The Rule provides boards with a shield against liability when making substantive business decisions.[26] While not explicitly mentioned by name in case law until well into the 20th century, the Rule has implicitly governed judicial discretion in cases where boards' decisions are questioned since the 1930s.[27] In the early cases, the courts sided with the boards, which suggests the courts were inclined to give considerable discretion to directors and officers when engaging in business decisions.[28] Indeed, unless it can be plainly shown that the directors acted with flagrant intent to commit fraud or maladministration, it is almost certain that the courts will not permit shareholders to enjoin a board's actions.[29] In other words, if the directors fail to adhere to their Duty of Care, they are not entitled to protection under the Rule: Thus, in

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[22] This is the standard under Delaware Law. *Id. See also* Estate of Detwiler v. Offenbecher, 728 F. Supp. 103, 150 (S.D. N.Y. 1989) (assessing whether decision was informed, courts must determine whether directors acted in "grossly negligent" manner).
[23] *See e.g.* Smith v. Van Gorkom, 488 A.2d 858, 872,(Del. 1985) (overruled by, Gantler v. Stephens, 965 A.2d 695 (Del. 2009)); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (rejected by, Kamen v. Kemper Financial Services, Inc., 908 F.2d 1338, 17 Fed. R. Serv. 3d 224 (7th Cir. 1990)) and (overruled by, Brehm v. Eisner, 746 A.2d 244 (Del. 2000)). See also *Sutherland,* 2010 WL 1838968 (Del. Ch. 2010) (footnotes omitted), ("Moreover, the standard for determining whether the board's decision was 'informed' is one of gross negligence. This standard presents a high hurdle . . to overcome: gross negligence in the duty of care context must amount to 'conduct that constitutes reckless indifference or actions that are without the bounds of reason.'") quoting McPadden v. Sidhu, 964 A.2d 1262, 1274 (Del. Ch. 2008).
[24] Despite relatively consistent judicial rulings on behalf of director autonomy, corporations remain lethargic in proposing socially responsible practices, fearing backlash from shareholders. *Id.*
[25] MATTHEW G. DORE. IOWA PRACTICE SERIES TM: BUSINESS ORGANIZATIONS. PART IV: OPERATION OF CORPORATIONS, § 28:6. (2016).
[26] *Id.* at 1. *See also* 19 C.J.S. *Particular duties* § 564 (2017).
[27] DORE, *supra* note 26.
[28] *Id.* at 14. *See also* Independent Order of Foresters v. Scott, 272 N.W. 68 (Iowa 1936) ("[S]tockholders will not be permitted to displace [officers' and directors'] corporate authority and . . . except in plain cases of such fraud or maladministration. . . . "); Wolf v. Lutheran Mutual Life Insurance Co., 18 N.W.2d 804 (Iowa 1945) (The court did not prevent the board of an insurance company from amending articles of incorporation, despite opposition from its shareholders, reiterating that "courts [should not] interfere in the internal management or policy of a corporation except in cases of fraud, bad faith, breach of trust, gross mismanagement or ultra vires act. . . ."); Natale v. Sisters of Mercy of Council Bluffs, 52 N.W.2d 701 (Iowa 1952) (In declining to enjoin a hospital from rescinding a physician's staff privileges, the court held that "questions of policy and management are left solely to the honest decisions of officers and directors of a corporation . . . [because] the board is the business manager of the corporation, and as long as it acts in good faith its orders are not reviewable by the courts.").
[29] *Id*. at 2.

order to invoke the Rule, the directors must show that they indeed acted on an informed basis to the best of their abilities.[30]

However, the Rule is admittedly nowhere coherently expressed and continues to raise questions about what, if any, standards of director conduct or liability it promulgates.[31] Most state statutes and common law fail to provide a comprehensive description of what the Rule entails and when and how it is to be used.[32] Nevertheless, contemporary legal theory recognizes the Rule to be a "standard of liability by which courts review the decisions of the boards of directors," though precisely what this standard is remains unclear.[33] Some scholars contend it may constitute only a requirement of rationality while others claim it invokes gross negligence or recklessness.[34] The exact definition notwithstanding, most scholars do agree that the Rule implies some sort of reasonably rigorous and impartial appraisal of a board's decision be conducted when challenged in court.[35]

This latter interpretation is evident in *Cede & Co. v. Technicolor, Inc.,* in which the Supreme Court of Delaware was asked to resolve a tangled set of suits involving both appraisal and personal liability actions.[36] The lengthy litigation began in late 1982 when the board of Technicolor approved a merger into MacAndrews & Forbes Group, Inc., entitling Technicolor's shareholders a buyout of $23 cash per share.[37] Plaintiff Cinerama, Inc., who owned just under five percent of Technicolor's remaining stock, disputed the merger, alleging the stock price to be paid to the shareholders was unfair. It also claimed Technicolor's board had violated its Duty of Care in approving the merger because had not done its due diligence in fully disseminating material that was necessary to make an informed decision.[38] Without fully issuing a ruling on the latter issue, the lower court found for Technicolor, maintaining that Cinerama failed to prove damages, considering the appraisal proceeding had determined the fair value of Technicolor's stock at $21.60, which was less than what the shareholders were offered.[39] The state supreme court reversed upon appeal, finding that the board had indeed acted irresponsibly on no less than five accounts, ultimately amounting to a definitive breach of the Duty of Care.[40] In finding for the plaintiff, the court purported a version of the Rule that "preclude[s] a court from imposing

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[30]*Id.*
[31]*See Supra* note 33.
[32]*Id.*
[33] Stephen M. Bainbridge. *The Business Judgment Rule as an Abstention Doctrine.* 57, VAND. L. REV. 83, 2 (2004).
[34]*Id.* at 3.
[35]*Id.*
[36]634 A.2d 345 (Del. 1993).
[37]*Id.* at 349.
[38]*Id.*
[39]The lower court did express "grave doubts" that Technicolor had been fully complicit in its requirement to make an informed decision, it ultimately found for the defendant on causation grounds. Bainbridge, *supra* note 34 at 4 (citing *Technicolor* at 581–84).
[40]Among the failures the court identified were: (1) failure to conduct a proper search of alternative actions prior to approving the merger; (2) failure to consider that competing bids might not transpire; (3) failure to meet the informed decision standard requisite to fulfilling the Duty of Care; (4) failure to be adequately transparent in the acquisition process by allowing MacAndrews & Forbes to finalize the transaction through stock options granted by Technicolor and its two primary shareholders; and (5) failure to show the board was in fact sufficiently informed of all aspects of the merger before approving it. Bainbridge, *supra* note 34 at 4.

itself unreasonably on the business and affairs of a corporation."[41] Thus, the Rule is viewed here as a standard of liability where plaintiff shareholders are strapped with the burden to refute the Rule upon bringing the suit. Put another way, the shareholders must show conclusive evidence that the directors violated their Duty of Care in failing to effectively investigate before making their decision.[42]

An alternative construal suggests the Rule may be better understood not as some vague standard of liability, but rather as a method of judicial abstention by which courts "refrain from reviewing boards' decisions unless *exacting preconditions* for review are satisfied."[43] This interpretation places an even heavier burden of proof on the plaintiff by requiring the rebuttal of "[the] presumption . . .[against judicial review of duty-of-care claims]."[44] Unlike the standard of liability, the judicial abstention approach to the Rule effectively bars courts from assessing the principal merits of the directors' actions "absent highly unusual exemptions."[45] Though mostly present in older cases (and only implicitly so), this judicial abstention doctrine is useful for examining historical attitudes toward director judgment and the Rule writ large.[46]

One of the most well-known cases in corporate law, *Shlensky v. Wrigley*, entertains this very notion.[47] It pitted plaintiff shareholder Shlensky against Phillip Wrigley, who was (at the time) the majority stockholder and president of the Chicago National League Ball Club, Inc. The litigation stemmed from Wrigley's refusal to install lights at the stadium, thus rendering nighttime games infeasible As the team had operated a loss from 1961 through 1965 (the time of Shlensky's complaint), Shlensky maintained that installing the lights and scheduling nighttime games would help to raise revenue.[48] He claimed Wrigley's action was driven by factors irrelevant to shareholder maximization, which therefore amounted to an erroneous decision.[49] Wrigley and the other defendant directors insisted that business decisions made by the board were not subject to judicial review unless they were fraudulent, illegal, or found to be in conflict of interest.[50] Thus, they asserted the court should undertake the abstention doctrine with regard to the Rule.[51]

The court ultimately sided with Wrigley and the other director defendants and held that "courts of equity will not undertake to control the policy or business methods of a corporation although it may be seen that a wiser policy might be adopted and the business more successful if other methods were pursued."[52] Further, it found that the motivations behind Wrigley's (and the

[41]*Id.* at 4.
[42]*Id.*
[43] *Id.* at 2 (emphasis added).
[44]*Id.*.
[45]*Id.*
[46]*Id.*
[47] 237 N.E.2d at 175–76.
[48] *Id.*
[49]The other defendant directors, Shlensky claimed, were dwarfed by Wrigley's dominance as principal stakeholder and president and were therefore certainly inclined to cower to Wrigley's judgment. *Id.*.
[50]*Id.*
[51]*Id.*
[52] *Id.* at 178 (quoting Wheeler v. Pullman Iron and Steel Co., 32 N.E. 420, 423 (Ill. 1892)).

board's) decision were immaterial and that the decision itself was not in any way fraudulent, malicious, or otherwise illegal, if otherwise capricious. Therefore, it had no authority to embed itself within the business judgment of a board, stating that "judges are not business experts."[53]

Similarly, in *Hawes v. Oakland*, the court ascertained when and to what extent a shareholder's complaint against a corporation is valid.[54] Here, a plaintiff shareholder of the California-based Contra Costa Waterworks Company (who resided in New York) filed suit against the board for carelessly allocating water to the City of Oakland, a practice which the shareholder claimed resulted in a loss to the company.[55] Contra Costa indeed was authorized to deliver water to the city in cases of fire or other emergency situations.[56] However, the plaintiff maintained that the company was essentially illicitly providing the city with free water for "all municipal purposes" including "watering the streets, public squares and parks, flushing sewers and the like . . ." to the degree that the practice was causing substantial loss in profit, and thus a decrease in stock price.[57] He proceeded to file a complaint seeking to enjoin the company from engaging in this practice.[58] The court dismissed his allegation, pointing out that no provision in the company charter explicitly prohibited the company from furnishing the city with water in this manner and that the company was in fact doing a great public service by doing so.[59] As such, the court found no evidence of misconduct or bad faith judgment on the part of the board in its decision to afford the water to the city for such purposes, and it felt the board members (who actually resided in the City of Oakland) were much better positioned to attend to the company's operations than a shareholder living across the country.[60] In this case, the court was inclined to be skeptical of shareholder interference because it clearly seemed to be a ploy to increase personal wealth rather than further the prosperity of the company, and clearly no breach of Duty had occurred, and the company was protected by the Rule.[61]

Another case that looks at the scope of board discretion is *Parks v. Grant Locomotive Works.*[62] Here stockholders of Grant Locomotive Works brought suit against the board in order to force it to pay them dividends of equal or greater value than was agreed upon.[63] Several years prior to the suit, the company became financially insolvent to the point where its debt to creditors was much greater than that of its assets.[64] An agreement to bring the company back into good standing was drafted and signed by all affected parties (including the shareholders), which devised a provision that temporarily assigned existing stock ownership to creditors. Once the

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[53]*Id.* at 180 (quoting Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919)).
[54] 104 U.S. 450 (1881).
[55] *Id.* at 451.
[56] *Id.* at 450.
[57] *Id.* at 451.
[58] *Id.*
[59] *Id.* ("It may be the exercise of the highest wisdom to let the city use the water in the manner complained of.").
[60] *Id.* at 462 ("The directors are better able to act understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California may take this view of it, and be content to abide by the action of the directors.").
[61] *Id.* at 450–62.
[62]40 N.J. Eq. 114 (1885).
[63]*Id.* at 114–15.
[64]*Id.* at 115.

company was able to regain its creditworthiness, the net profits were to be distributed among the shareholders.[65] However, upon receiving their first dividend checks, the shareholders claimed the amount was insufficient in proportion to the company's net profits (which had exceeded the directors' expectations).[66] The plaintiff shareholders complained they were owed more by the board because the unexpectedly strong profits should constitute a corresponding increase in their dividends.[67] The court disagreed, citing the absence of a specific contractual obligation that required the board to allot more of the profits to shareholder dividends than what had been previously agreed upon.[68] Indeed, the court reasoned that the directors were properly positioned to make the appropriate decisions regarding profits and that the attempted sale of assets at a higher value than what was originally agreed to could be perilous.[69] No breach of Duty was shown to have been committed, and thus the Rule would have applied. Hence, the court implied that boards should be given discretion with regard to decisions involving net profits. This becomes important in the CSR context as boards decide how to distribute excess profits (i.e. among charitable organizations, to support political activism, etc.).

As such, the Rule clearly puts forth a method that corporate boards are entitled to use in defending their business decisions, provided they have acted with good faith in accordance with their Duty, have sufficiently informed themselves of all necessary material and information requisite to making an informed decision, and have sought to maximize shareholder benefit.[70] In pursuing CSR goals, then, boards should hypothetically be well equipped to engage in legal challenges from shareholders, as case law typically yields to the board's discretion in making

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[65] *Id.* ("[A]n agreement, in writing, was made by all persons having an interest in the corporation, either as creditors or stockholders, the design of which was to restore to the corporation the property then in the hands of the receiver, in order that it might be enabled to resume its business. The agreement provides, first, for the clearing of the property of the corporation from encumbrances, by the cancellation of the mortgages thereon; and, secondly, that its creditors, both secured and unsecured, shall receive stock in payment of their debts. No new stock was to be issued, but the stock already issued, and then held by the stockholders of the corporation, was to be assigned to the creditors. . . . That all the net profits of the company, after the payment of taxes, insurance and the necessary amount for the proper maintenance of the property of the company in its present condition and capacity, shall be divided annually among the stockholders.").

[66] *Id.* at 117 ("According to this statement the net profits realized . . . [the net profit] exceeded, by nearly two-thirds, the sum which the directors ordered to be distributed, in dividends. . . . The net profits shown on the face of this statement or balance-sheet are a little over $260,000, but the complainants contend that they are, in truth, $50,100 more, and that their actual amount is $310,100. The value of the assets of the corporation, as given in this statement or balance-sheet, is $50,100 less than the sum at which they were estimated by the officers of the corporation.").

[67] *Id.*

[68] *Id.* at 119.

[69] *Id.* at 121 ("The true statement of the case, then, would seem to be this, profits have been made, provided the securities which the directors have rightfully taken in the proper prosecution . . . of the business of the corporation, are paid. or can be collected, but not otherwise. If it should turn out that part of the securities can be collected, and part cannot, or cannot otherwise be converted, the part not paid or converted will, in no sense, be entitled to be regarded as profits . . . ..[I] f the directors were to attempt to sell the securities of the corporation, which they had taken at par, and which were maturing at short dates and at frequent intervals, at merely nominal prices, or at prices far below their face value, they would attempt to do what, in my judgment, would constitute a flagrant breach of duty against both classes of *cestuis que trust*--both those who have the present interest, and those who have a prospect of having an ultimate interest . . . [T]he complainants were not entitled to a greater dividend…than that which the directors declared.").

[70]*See* Dore, *supra* note 26.

business decisions.[71] While the previous sections have elucidated the former two concepts and shown their relevance to CSR litigation, the latter has yet to be examined in this paper in the context of CSR: This is the subject of the following section.

C. Other constituency statutes provide for even greater directorial discretion by explicitly acknowledging duties to external parties other than shareholders.

While corporate boards are unquestionably obligated to make decisions that will further the maximization of shareholder wealth, they are increasingly called to consider the impact of such decisions on other stakeholders.[72] A product of stakeholder management theory first promulgated in the 1970s and 1980s, these Other Constituency Statutes are designed to give directors the ability and authority to reflect on "the social and economic effects of [a business decision] on . . . employees, suppliers, customers and others," while still considering the long-term consequences for the shareholders.[73] By incorporating the developing public law attributes of corporate law into traditional private law, corporations' charters can become both efficient and equitable.[74]

Though originally conceived to protect the interests of shareholders and employees in narrow settings concerning hostile takeovers and other control transactions, the statutes are increasingly becoming legal tools to be applied in variety of broader circumstances, including supply chain transparency, natural resource impacts, and other capital and labor management protocols.[75] They also affect judicial interpretation of both the Rule and Duty by manipulating the behavior of corporate boards without the presence of legal adjudication. Further, the statutes may have implications for the standards of review by which various types of decisions (i.e. control or reorganization) are considered by the courts.[76]

Despite the potential of these statutes to promote greater inclusiveness and social and environmental welfare in corporate charters (and subsequent legal challenges), they have been

[71]*Id.*
[72]Eric. W. Orts. *Beyond Shareholders: Interpreting Corporate Constituency Statutes.* 61 GEO. WASH. L. REV. 14 (1992).
[73]*Id*. at 3 (quoting Robert H. Winter, et al. discussing early corporate charter amendments that included similar language). *See also infra* Mitchell at 3 (quoting the American Bar Association's Committee on Corporate Law: "[D]irectors have fiduciary responsibilities to shareholders which, while allowing directors to give consideration to the interests of others, compel them to find some reasonable relationship to the long-term interests of shareholders when so doing.").
[74]Lawrence E. Mitchell. *A Theoretical and Practical Framework for Enforcing Other Constituency Statutes.* 70 TEX. L. REV. (1992).
[75]*Id.* at 3–4.
[76]Orts, *supra* at 11. *See also* Kentucky State District Council of Carpenters Pension Trust Fund, et al. v. Robert Mysers, et. al., F. Supp. 2d. No. 4:10—CV—0032 (2010).
("Under the Constituency Statute, corporate directors, when evaluating a tender offer, can consider a number of non-shareholder constituencies, including the corporation's employees, suppliers, creditors, customers, and the community in which the corporation operates. Iowa Code § 490.1108A(1)(a)-(b) . . . Consideration of any or all of the community interest factors is not a violation of the business judgment rule or of any duty of the director to the shareholders, or a group of shareholders, even if the director reasonably determines that a community interest factor or factors outweigh the financial or other benefits to the corporation or a shareholder or group of shareholders.").

considered only a few times by the courts, all involving hostile takeover scenarios.[77] In one such case, *Baron v. Strawbridge & Clothier,* a Pennsylvania court upheld the state's constituency statute in declining to grant a motion to stop Strawbridge's board from reclassifying its stock as it resisted a takeover by the plaintiff.[78] The court found that, along with acting in accordance with their Duty, "in adopting the defensive measure 'it was proper for the company to consider the effects the . . . tender offer would have, if successful, on the Company's employees, customers and community.'"[79] At least two other cases cite state constituency statutes in upholding poison-pill mechanisms whereby boards' decisions to preserve company assets were deemed permissible and in "best interests of the shareholders and corporation [as well as the] company's employees, its customers and suppliers, and communities in which offices of the corporation are located."[80] In all of these cases, however, the constituency statutes were not in fact "essential" in the courts' rulings; each was decided on somewhat narrow grounds that relied more on the facts of the cases (i.e. inadequacy of merger agreements or stockholder buyouts) than on the constituencies enumerated in the statute.[81]

There is nonetheless a recent trend in state courts to apply a stricter standard of review when deciding cases regarding board decisions, due to increased managerial and directorial power that led to egoistic decision-making tendencies.[82] Indeed, economic theory posits that those in executive positions will be inclined to engage in behaviors that further their own self-interest at the expense of their inferiors and the entities they manage.[83] Thus, corporations—especially publicly traded ones—are subject to severe instances of moral hazard as result of these principal-agent relation problems.[84] Recognizing the selfish motives behind such inapt directorial judgment, courts have begun to wield their judicial power by developing an "enhanced duty" to which shifts the burden to the defendant. Under this stricter standard, the board is compelled to show (1) reasonable bases upon which a belief of a "threat" to the company is realistic, and that (2) *any* defense mechanism is reasonable in proportion to the perceived risk.[85] Additionally, the Delaware Supreme Court developed a new "Duty to Auction" that requires the board to yield the company to the highest bidder in a scenario where the sale of the corporation becomes unavoidable.[86] This concept will be will be further explained in the next section and becomes

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[77]Baron v. Strawbridge & Clothier, 646 F. Supp. 690 (E.D.Pa. 1986).
[78] *Id.*
[79] Bainbridge, *supra*, note 34 at 7 (quoting *Barron* at 696–97).
[80] *Id.* (quoting Georgia-Pacific Corp. v. Great Northern Nekoosa Corp., 727 F. Supp. 31 (D. Me. 1989) at 33). *See also* Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984 (E.D.Wis.), aff'd on other grounds, 877 F.2d 496 (7th Cir.), cert. denied, 493 U.S. 955 (1989).
[81]*Id.* at 8 (emphasis added).
[82] *Id.* at 13.
[83] *Id.*
[84]*Id.* (citing footnote 173 "Standard sources for the moral hazard problem posed in principal-agent relationships include Bengt Holmström, Moral Hazard and Observability, 10 Bell J. Econ. 74 (1979); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Steven Shavell, Risk Sharing and Incentives in the Principal and Agent Relationship, 10 BELL J. ECON. 55 (1979)").
[85] *Id.*, at 13 (emphasis added).
[86] *Id.* (citing Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), holding that when the sale of a company becomes inevitable, duty of board is to maximize the company's sale value).

relevant in Parts II and III, as tensions surrounding this obligation become the source of CSR litigation.[87]

D. Takeover scenarios trigger a special judicial standard known as the Revlon Doctrine.

Despite the broad judicial discretion allowed by the Rule and the passing of other constituency statues in several states, corporate board members may still be held liable for attempting to promulgate CSR initiatives.[88] One of the most well-known cases involving a corporate breach of Duty is *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* where plaintiff shareholders sought to enjoin directors from allowing a third party corporation from engaging in deals with the board regarding options, sale of assets, and other dealings provisions.[89] In abdicating the process to a third party, the shareholders maintained that the board had violated its Duty and inappropriately attempted to invoke the Rule in order to cover up its wrongdoings.[90] The Supreme Court of Delaware agreed, holding that the board was liable for breaching its duties of care and fiduciary credibility for failing to maximize shareholder wealth in its dealings with the third party.[91] In its landmark ruling, the court put forth a set of criteria by which to govern directorial behavior in takeover or other control transaction situations.[92] Known as the "Revlon Doctrine," the court reasoned that when confronted with a potential takeover involving the sale of all or part of a company (and its assets, including stock), the board should consider the effects of the sale on other stakeholders *only* to the extent that they could be reasonably be expected to be of some advantage to the shareholders, and that the duties of the board shift from asset salvation to sale price maximization in order to accrue the greatest possible value of the company for the shareholders.[93]

E. Shareholders' role in promoting CSR objectives.

Though the majority of corporate decision-making is performed by the board, shareholders are permitted to submit proposals pertaining to the company's charter, transactions, or other pertinent business matters for the board to consider.[94] Such proposals are to be included in the board's "proxy materials" in its meetings where it will be disseminated and discussed by

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[87]*Infra*
[88]*Infra*, see Revlon, Inc. v. MacAndrews & Forbes, Holdings, Inc., 506 A.2d 173 (Del. 1986).
[89] 506 A.2d 173 (Del. 1986).
[90] *Id.* at 176–79.
[91] *Id.* at 185.
[92] *Id.* at 173.
[93]*Id.*. ("The Supreme Court, Moore, J., held that: (1) lockups and related agreements are permitted under Delaware law where their adoption is untainted by director interest or other breaches of fiduciary duties; (2) actions taken by directors in the instant case did not meet that standard; (3) concern for various corporate constituencies is proper when addressing a takeover threat; (4) that principle is limited by the requirement that there be some rationally related benefit accruing to the stockholders; (5) there were no such benefits in the instant case; and (6) when sale of the company becomes inevitable, duty of board of directors changes from preservation of the corporate entity to maximization of the company's value at a sale for the stockholders' benefits.") (emphasis added).
[94] Elizabeth S. Miller & Robert A. Ragazzo. 20 Tex. Prac., Business Organizations § 32:10, 3rd ed. (2016). ("Rule 14a-8 grants each shareholder the right to submit proposals for shareholder action to management for inclusion in the company's proxy solicitation materials." Shareholders must also conform to certain eligibility requirements set forth by the Securities and Exchange Commission to ensure no conflicts of interest exist.).

the board members unless the board refuses to include it.[95] Thus, shareholders might submit proposals that address CSR objectives, especially as mounting political and social pressure to adopt them diffuses into the corporate world.[96] These proposals, however, can be a point of contention between a shareholder and the board, which unsurprisingly often results in legal skirmishes, as the cases below demonstrate.

In *Roosevelt v. E.I. Du Pont de Nemours & Co.*, the Court questioned the reasonableness of Du Pont Chemical Co. board's rejection of the plaintiff shareholder's proposal to phase out the use of chlorofluorocarbons (CFCs) in manufacturing.[97] In 1991, the environmental group Friends of the Earth submitted a proposal to the board of Du Pont Chemical Co. on behalf of shareholder Amelia Roosevelt that sought to hasten the timeline with which Du Pont planned to eliminate CFCs, present relevant research concerning more environmentally friendly substitutes, and offer a scheme to market the substitutes.[98] The board refused to consider the proposal in its proxy materials at its annual meeting, believing it to be improper and unnecessary. Per SEC regulation, the board filed a notice of omission, to which Friends of the Earth filed a counter submission on behalf of Roosevelt.[99] The SEC subsequently issued a "no-action letter," citing the "Ordinary Business Operations" exception to shareholder proposal inclusion.[100] Because Roosevelt's proposal was not one of novelty with regard to the elimination of harmful emissions (As Du Pont had already committed itself to doing), but was instead seeking to quicken the process, the court reasoned that including the proposal would thus interfere with the "ordinary business operations" of the company.[101] This exception barring shareholder proposals that would hinder a corporation's daily functions is certainly a barrier to shareholder direction regarding CSR, it is not insurmountable. Courts may be inclined to see the broader picture with regard to pro-CSR shareholder proposals if they address particularly flagrant business practices.[102]

In *Lovenheim v. Iriquois Brands, Ltd.*, plaintiff Peter Lovenheim, a shareholder of Irquious Brands (a food and beverage company), enlisted a complaint to bar the company from

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[95] A refusal to consider the proposal can occur if the shareholder proponent fails to meet one of the eligibility requirements or is rejected on subject matter grounds, which include, but are not limited to proposals that are: in violation of state or federal law, contradictory to management proposals, affect an insignificant portion of the company's assets or holdings, directed at individual board members, would benefit only the proponent to the stagnation or detriment of other shareholders, or attempts to confront matters beyond the ability of the board to implement). *Id.* at 3.

[96] *Id.*

[97] 958 F.2d 416 (1992). *See also* James W. Elkins, CHLOROFLUOROCARBONS (CFCS), THE CHAPMAN & HALL ENCYCLOPEDIA OF ENVIRONMENTAL SCIENCE, ED. DAVID E. ALEXANDER AND RHODES W. FAIRBRIDGE, 78--80, KLUWER ACADEMIC, 1999. ("Chlorofluorocarbons (CFCs) are nontoxic, nonflammable chemicals containing atoms of carbon, chlorine, and fluorine. They are used in the manufacture of aerosol sprays, blowing agents for foams and packing materials, as solvents, and as refrigerants…Whereas CFCs are safe to use in most applications and are inert in the lower atmosphere, they do undergo significant reaction in the upper atmosphere or stratosphere.").

[98] *Id.* at 417–18.

[99] *Id.*

[100] *Id.* at 418. *See also* Miller & Ragazo *supra* note 97.

[101] *Id.* ("Roosevelt's proposal deals with matters relating to the conduct of the ordinary business operations of Du Pont. Therefore, [under Rule 14a–8(c)(7)], Du Pont properly omitted her proposal from its proxy statement….Roosevelt differs with Du Pont on a less fundamental matter—the rapidity with which the near-term phase out should occur. Roosevelt seeks a target no later than 1995 ("surpassing [Du Pont's] global competitors which have set a 1995 target date"). In contrast, when this litigation began, Du Pont had set a target of "as soon as possible, but at least by the year 2000.").

[102] *Id.*

excluding proxy materials that he intended to use to propose a resolution regarding the production of foie gras, one of the company's imported products.[103] Concerned with the perceived severe animal welfare violations, Lovenheim sought to investigate:

> "the methods by which its French supplier produces paté de foie gras, and report to the shareholders its findings and opinions, based on expert consultation, on whether this production method causes undue distress, pain or suffering to the animals involved and, if so, whether further distribution of this product should be discontinued until a more humane production method is developed."[104]

Iriquious argued that considering the proposal would "clutter" its proxy materials and effectively set a precedent that would bar companies from acting free of "harassment" by unnecessary rules.[105] The court, however, sided with Lovenheim, agreeing that his proposal met the eligibility criteria set forth by the SEC, and more importantly that it was of such "ethical or social significance" that even if the proposal had failed to meet some of the SEC's requirements, the proposal should be considered regardless.[106] Hence, if it can be shown that the proposal means to address issues of great moral consequence or of imminent public interest, courts can assert special exceptions and effectively force boards to include them in proxy materials. Shareholders can then invoke this principle when drafting CSR proposals for board consideration.[107]

This Part explored several existing legal approaches applicable to CSR and have shown their strengths and weaknesses as litigation tools. Nevertheless, the Duty of Care and the Business Judgment Rule clearly support a legal right to pursue CSR goals.[108] Now that this Right to Pursue has been established, Part II will elaborate on the CSR litigation process by performing a case study.

II. The right to pursue CSR goals can lead to legal tension when the board of directors faces threats to its bottom line.

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[103] 618 F. Supp. 554 (1985). *See also* French Code, Article L654-27-1 (By French law, "[f]oie gras is understood to mean the liver of a duck or a goose specially fattened by gavage." Typically, this process is undertaken with force-feeding mechanisms, which raises serious ethical questions about the human treatment of the geese. Other sources on the force-feeding process include Daniel. Guemene and G. Guy, *The past, present and future of force-feeding and "foie gras production.* WORLD'S POULTRY SCI. J. 60 (2004) and W. Skippon, *The animal health and welfare consequences of foie gras production.* CANADIAN VETERINARY J. 54 (2013)).

[104] *Id.* at 210.

[105] *Id.*

[106] *Id.* citing footnote 8 ("The assertion that the proposal is significant in an ethical and social sense relies on plaintiff's argument that "the very availability of a market for products that may be obtained through the inhumane force-feeding of geese cannot help but contribute to the continuation of such treatment." Plaintiff's brief characterizes the humane treatment of animals as among the foundations of western culture and cites in support of this view the Seven Laws of Noah, an animal protection statute enacted by the Massachusetts Bay Colony in 1641, numerous federal statutes enacted since 1877, and animal protection laws existing in all fifty states and the District of Columbia. An additional indication of the significance of plaintiff's proposal is the support of such leading organizations in the field of animal care as the American Society for the Prevention of Cruelty to Animals and The Humane Society of the United States for measures aimed at discontinuing use of force-feeding [sic.].").

[107] *Id.*

[108]Bainbridge, *supra* note 34 at 5. *See also* notes 26 and 33.

Despite recognizing that corporate boards may in fact legally pursue the interests of other stakeholders beyond shareholders, they (and in some cases even shareholders) can still be held liable for pursuing such interests if a number of criteria are not met.[109] As previously described, boards are still obligated to fulfill their Duty of Care, to make an informed decision, and to act on behalf of and in the primary interest of their shareholders.[110] Hence, the enactment of internal CSR goals can be ripe for legal action.[111]

A. CSR goals may conflict with shareholders' interests

First, and perhaps most obviously, CSR objectives may diverge from shareholder priorities.[112] Initiatives that promote social and environmental welfare are often costly (upfront and in some cases long-term) and are therefore not attractive to either investors or shareholders.[113] Though tactics like increasing employee pay and benefits, engaging in community organizations, and investing in environmentally friendly practices are shown to produce considerable cost savings and improve a company's overall bottom line, the payback period may be significantly delayed and/or be unquantifiable.[114] While it is beyond the scope of this paper to discuss the intricacies of CSR cost-benefit analyses, it is relevant to note that CSR initiatives appear to be inherently inconsistent with the maximization of shareholder wealth and can lead to lawsuits.[115] The remaining sections will elaborate on this premise using the case study of Unilever's acquisition of Ben & Jerry's.

B. Unilever's acquisition of Ben & Jerry's illustrates the complicated nature of balancing a corporation's social mission with its duty to shareholders.

Founded in 1978 by two free-spirited, self-described hippies, Ben & Jerry's Homemade, Inc. (herein "Ben & Jerry's") is an internationally celebrated iconoclast of the ice cream world.[116] Most of its customers will equate it with whacky flavors packed with its signature chunks (which is what co-founder Ben Cohen complained was from other ice creams at the time).[117] The brand has also become synonymous with social activism and is a vocal proponent of progressive values, which has brought the company sweet, sensational success that has been unfortunately tainted with bitter chunks of failure.[118]

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[109]*See supra* note 86.
[110]Bainbridge, *supra* note 34 at 5.
[111]*See Infra* Part III.
[112] *See supra* notes 47, 60.
[113] *Id.*
[114] NATIONAL CENTER FOR ENVIRONMENTAL ECONOMICS, OFFICE OF POLICY; U.S. ENVIRONMENTAL PROTECTION AGENCY, GUIDELINES FOR PREPARING ECONOMIC ANALYSIS (2014). (For example, allowing workers more flexibility in their hours and paying them a higher wage often has upfront monetary costs that are realized in benefits such as worker satisfaction, which is not easily quantified.).
[115]*See supra* note 47.
[116]ICE CREAM SOCIAL: THE STRUGGLE FOR THE SOUL OF BEN & JERRY'S. BRAD EDMONSON (Berrett-Koehler Publishers, Inc. 2014). (Discussing the founding of the company and the background of its founders).
[117] *Id.* at 4–9.
[118] Dirk Sampselle, *Unilever-Ben & Jerry's: A Merger For Good?* OTMT 641.11, Pepperdine University.

Ben & Jerry's is a remarkable company on several accounts; from its inception, the founders, Ben Cohen and Jerry Greenfield, intended to run things differently.[119] Neither was fond of typical corporate culture and were resistant to the notion of shareholder primacy, which was the dominant perspective in American business.[120] They were (and remain) staunch advocates of social activism and were early crusaders of the CSR movement.[121] Thus, they initiated the idea of "linked prosperity;" that is, the company would be beholden not just to its shareholders, but also to its employees, suppliers, and communities.[122] The company would remain steadfast in its commitment to these goals, which proved to be a novel experiment in corporate governance.[123]

The company's rogue management techniques and business practices were bold and unprecedented—it took stances on political issues, campaigned for social justice initiatives, created and funded its own foundation, and sought out suppliers who observed similar values.[124] Upon its initial public offering in 1984, the company limited its sale to residents of Vermont so it could "give its best customers a piece of the action."[125] A year later, it sought first to sell its stock directly to its customers rather than investors.[126] In 1988, co-founder Ben unveiled One Percent for Peace, a separate organization that would donate one percent of its pre-tax sales of novelty ice creams (the most famous of which being Peace Pops) to the Ben & Jerry's Foundation.[127] Later that year, the company would officially adopt its three-pronged mission statement that committed itself to creating superior product, pursuing ambitious social initiates, and justly compensating its shareholders.[128] The board approved a five-to-one salary ratio (meaning that the highest paid employee received no more than five times the entry-level salary), and provided benefits to same-sex couple employees. It served as the primary plaintiff in a case against Monsanto, fighting to keep the right to inform consumers about rGBH, a growth hormone used for dairy cows that the company believed was dangerous and unethical.[129] It also procured its milk, nuts, brownie bits, and other ingredients from Vermont-based dairy farmers, fair-trade co-ops, and bakeries that employed ex-felons.[130] Ben & Jerry's certainly always strived to walk its talk, but its well-intentioned walk came at the expense of sound management and at times caused considerable internal chaos. Though overall it was proving that businesses could do good by doing well, it reported losses for several years in the mid-1990s and struggled to prop up

[119] EDMONSON, *supra* 119, at 5–10.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 4–5, 237 (Also known colloquially among employees as the "Double Dip," the commitment to pursuing profit and social objectives simultaneously was a virtual anomaly at the time.).
[123] *Id.* at 237.
[124] *Id.*
[125] *Id.* at 22 ("The company got serious about its 'ice cream for the people' on April 26, 1984, the day the company made its first stock offering. That is when they really started haring the company's wealth with the communities that supported it. That is when the company went public—but only Vermont residents could buy the stock.").
[126] *Id.* at 25 (The company printed special labels on its pints urging customers to "Scoop Up [Its] Stock" and included a toll-free telephone number to field prospectus calls.).
[127] *Id.* at 43.
[128] *Id.* at 47–48.
[129] *Id.* at 127–29,
[130] *Id.* at 227–28, 134-35, 133.

its stock value.[131] Further, as the ice cream industry became more consolidated, Ben & Jerry's scrambled to find ways to increase its distribution, but ultimately came up short. The board feuded frequently and was bitterly divided about how to proceed—A sale was looking more inevitable as time passed, but some members remained adamantly opposed, fearing it would completely obliterate the social mission and take with it the very soul of the company.[132]

C. The board was theoretically legally obligated to sell the company to the highest bidder.

Beginning in 1998, it was clear the board was facing what amounted to a hostile takeover situation. The country's largest ice cream distributer, Dreyer's, was locked in a battle with Unilever, a multinational conglomerate.[133] Unilever wanted to buy the company outright for cash while Dreyer's was seeking to negotiate a merger and stock swap.[134] Further complicating the matter was a desperate attempt to take the company private, offered by a wealthy investor and co-founder of Calvert Social Funds.[135] Talks dragged on for two agonizing years, during which the board remained mostly deadlocked, bickering over which deal would offer the company the most autonomy and best preserve the social mission while also being fair to the shareholders.[136] Each options had its significant drawbacks: Making the company private through a socially responsible investment firm was the best option to keep the company independent and would best keep the social mission intact, but the investors simply could not come up with the equity to offer what Unilever and Dreyer's could.[137] Meanwhile, Unilever and Dreyer's kept outbidding one another with various offers on stock prices. The board was overwhelmed. It knew it had to sell, but to whom still swirled with uncertainty.[138]

D. The board was not actually legally required to sell the company.

In 1998, the Vermont legislature passed a bill that came to be known as "Ben & Jerry's Law," which allowed a board to judge a potential buyer on factors other than its stock offering or price.[139] In other words, it was essentially another constituency statute that permitted a board to circumvent the Revlon Doctrine.[140] However, the law had not yet been tested in court, and the board was certain that it would be sued if it declined to accept the highest bid, thereby failing to adhere to its Duty to Auction.[141] The investment group offering to take the company private was willing to go to court—if nothing else to help establish an important precedent in corporate

[131] *Id.* at 170–90.
[132] *Id.* at 177.
[133] *Id.* at 165–69.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at 172–75.
[139] *Id.* at 174.
[140] *Id.* at 175 ("The board knew that because of 'Ben & Jerry's Law," they could consider other things besides just selling the company to the highest bidder.").
[141] *Id.* ("They also knew that law had never been tested in court, that they would certainly be sued if they accepted a lower bid. and that every lawyer in the room was urging them to focus on their fiduciary responsibility to shareholders.").

law—but the board was not.[142] It knew the company could not afford a costly legal battle, given its already strained financial situation.[143] So, on April 11th, 2000, almost sixteen years to the day it had gone public, Ben & Jerry's sold to Unilever, its highest bidder.[144]

E. Ben & Jerry's board and shareholders negotiated a deal with Unilever that maintained the company's autonomy and protected its social mission.

Though seen as a devastating loss to many members of the board and to the founders, the sale would prove to be an important exercise in managing CSR. The sale agreement included several unique provisions in order to maintain the social mission's integrity.[145] For example, the board of Ben & Jerry's was almost completely independent, had the ability to appoint its successors, and maintained the right to "give full faith consideration" to any potential Chief Executive Officer (CEO) that Unilever might appoint.[146] Additionally, Unilever pledged to give pretax profits to charity, allowed the company to remain headquartered in Vermont, barred layoffs for two years, and contributed $5 million to the Ben & Jerry's Foundation.[147] Unilever also agreed to contribute an additional $5 million to support and fund minority-owned and socially responsible enterprises.[148]

While the sale was (and remains) an oddity in the corporate takeover literature in that it did strike at least a surface-level balance between the social mission and shareholder maximization, Ben & Jerry's has had its share of tumultuous spats with its parent company, and there remain doubts about its success.[149] Many corporate legal scholars surmise that it could have been better negotiated to the favor of Ben & Jerry's, particularly as corporate statutes become more flexible and inclusive.[150] Nevertheless, the story of Ben & Jerry is remarkable both as a heroic tale of a small, socially conscious company fighting tooth and nail to maintain its integrity and as a cautionary example of a corporate takeover that may not have been as socially conscious as it was intended to be.[151]

III. Strategies and guidelines exist whereby socially conscious companies can more readily pursue CSR goal.

This Part will present suggestions for how like-minded companies can protect their social missions when confronting external threats and describe a broader framework proposed by the

[142] *Id.*
[143] *Id.* ("[T]hey saw a chance to add an important precedent to corporate law by testing the Vermont statute. But the [offer] became unacceptable to most members of the board of Ben & Jerry's if a lawsuit would be attached to it. The suit would add expense and complications to a company that was already in crisis.").
[144] *Id.* at 177–78.
[145] *Id.* at 179.
[146] *Id.* at 181. *See also* Robert A. Katz and Antony Page. *The Truth About Ben & Jerry's.* Stanford Social Innovation Rev. 39–43 (2012), at 40.
[147] *Id.* at 40-41.
[148] *Id.* at 41.
[149] *Id.*
[150] *Id.*
[151] *Id.*

United Nations that seeks to clarify the roles of the public and private sectors with regard to international CSR.

A. <u>Some states allow for flexible or hybrid corporate charters.</u>

New organizational structures that seek to promote integration of CSR objectives with shareholder maximization have recently been encated.[152] Nine states, including Vermont, have sanctioned low-profit limited liability companies (known as L3C), which is a variation on the limited liability company (LLC).[153] Profit generation is not necessarily considered the sole purpose under this structure; companies instead are directed to pursue a "charitable or educational purpose" with permission to allocate some its profits to investors.[154] The legislation parallels federal tax regulations (via the Internal Revenue Service) and aims to facilitate the flow of funds from foundations and other philanthropic entities to profit-seeking enterprises.[155] The structure is flexible by design, allowing for contract customization.[156]

Similarly, the benefit corporation status has been sanctioned in at least seven states. This status is bestowed upon new or existing businesses that seek to have a positive social and environmental impact.[157] Benefit corporations must publish an annual report detailing their initiatives in multiple impact areas (including the environment and social welfare) and compare it to a third-party standard.[158] Some states also include provisions that allow for shareholders to initiate legal proceedings if the board fails to adhere to its CSR goals.[159]

Finally, California has promulgated the flexible purpose corporation (known as a social purpose corporation in Washington) that is a derivative of the benefit corporation.[160] This organizational form requires that a corporation "pursue . . . a specific public benefit, defined as a benefit that that serves one or more public welfare, religious, charitable, scientific, literary, or educational purposes, or other purpose or benefit beyond the strict interest of the shareholders."[161] The social and environmental initiatives and impacts must be published in an annual report, but unlike benefit corporations, an independent verifier is not required.[162]

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[152] *Id.* at 42.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158]*Id.*
[159] *Id.* (Benefit corporations are different from those certified as "Benefit Corporations" or "B-Corps," which refers to a certification given by the non-profit organization B-Lab. Business wishing to be considered a B-Corp undertake an assessment to analyze their current practices and are scored according to their environmental and social impact. Applicants must achieve a certain score in order to be certified, which indicates voluntarily adherence to social and environmental welfare. More information about B-Corps can be found at https://www.bcorporation.net/.).
[160] *Id.*
[161] *Id.*
[162] *Id.*

B. The United Nations (UN) has developed a framework that seeks to clarify the roles of the public and private sectors in order to more formally address CSR on an international level.

Indeed, as the legal, political, and social landscapes surrounding corporations' duties become increasingly convoluted, there is a need for some cohesive guidance for multisector cooperation. The United Nation's (UN) Protect, Respect, Remedy Framework provides guidance on citizen welfare protection, validation, and legal remediation for public and private sectors.

A disturbing history of workers' rights violations, environmental degradation, and other resource exploitation practices throughout the twentieth century prompted the UN to take action.[163] The Sub-commission of what was at the time the UN Commission on Human Rights published a set of guidelines entitled "Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" in 2004, which received fervent backlash from the business community.[164] This reaction prompted then-Secretary General Kofi Anan to appoint a Special Representative to serve as a liaison to resolve the disputes and clarify the roles of each sector in rectifying the rights of all affected entities.[165]

While the original Norms proposed binding obligations on the part of private enterprises to adopt international human rights laws as equivalent to their respective state laws,[166] the new guidelines created a framework within which the functions and responsibilities of each sector were outlined. Produced in 2008 by the Human Rights Council, the "Protect, Respect, Remedy" Framework put forth a structure divided into three "pillars:" The onus of the State to defend human rights' violations from third parties (including private entities) with appropriate policy, regulation, and/or judicial remediation; the responsibility of private enterprises and corporations to respect and protect human right to the best of their abilities and to take measures to both prevent and remediate violations of such rights; and provide for increased access to legal, social, or other forms of corrective action for those harmed.[167] Known as the UN Framework, it effectively coalesced major initiatives regarding CSR and became the first multinational agreement to do so.[168]

Specifically, the Framework calls for corporations to "act . . . with due diligence to avoid infringing on the rights of others, and addressing harms that do occur."[169] Though admittedly not

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[163] JOHN RUGGIE, THE UN "PROTECT, RESPECT AND REMEDY" FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS. (2008).
[164] *Id.* at 1.
[165] *Id.*
[166] *Id.* ("'[T]o promote, secure the fulfillment of, respect, ensure respect of, and protect human rights,' with the only distinctions being that states would have 'primary' duties and companies would have 'secondary' duties, and that the duties of companies would take effect within their 'spheres of influence.").
[167] *Id.* ("The 'Protect, Respect and Remedy' Framework rests on three pillars: the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access by victims to effective remedy, both judicial and non-judicial.").
[168] *Id.*
[169] *Id.* at 2.

enforceable, these responsibilities are generally reflected in some form in domestic regulations or other soft-law mechanisms, and the UN endorsement gives them more weight. Though the Framework was developed and sponsored by the UN Council on Human Rights and seeks to advocate for workers' rights, it makes a point of extending the corporate responsibilities to other affected third parties, including members of its supply chain, state actors, and the communities in which it resides and operates.[170] Companies, according to the Framework, have the potential to affect "the entire spectrum" of a society and should therefore be responsible for maintaining and protecting the resultant rights.[171] Further, in order to ensure companies are in fact adhering to their responsibilities, the Framework puts forth a "due diligence process" that will hold corporations accountable for their actions while endorsing preventative measures by which future violations will be arrested upon their inception. With regard to corporations, it expressly calls for stated commitments to human and other rights, an impact assessment analyzing the current state of rights prioritization within the corporation, an assimilation of culture of respect for such rights throughout the day-to-day operations, and a means of communication so as to remain transparent and accountable. [172] Additionally, companies are urged to enact internal policies by which to absolve disputes or apparent breaches of conduct that result in the violation of rights.[173]

While certainly not a panacea for the adoption of widespread CSR, the Framework nonetheless is a valuable tool and provides well-intentioned guidance for corporations seeking to improve their social impact. Indeed, its integration of public and private responsibilities is unique among other voluntary guiding principles, and both private enterprise and public organizations should closely follow, if not adopt, the Framework's key principles in developing their own ethical obligations.[174]

Conclusion

CSR has become an increasingly popular tenent of corporate culture in recent decades, perhaps burgeoning on becoming obligatory. Indeed, corporations are embracing the notion that their role in society necessarily implies a Duty of Care not just to their shareholders, but also to

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[170] *Id.* at 2–3.

[171] *Id.* at 3 ("Companies can affect virtually the entire spectrum of internationally recognized rights. Therefore, the corporate responsibility to respect applies to all such rights. . . .For an authoritative list of internationally recognized rights, companies should look to the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the core conventions of the International Labor Organization. The principles those instruments embody are the most universally agreed upon by the international community, and they comprise the human rights benchmarks by which other social actors judge companies.").

[172] *Id.* ("In order to 'know and show' that they are meeting this responsibility, companies need a human rights due diligence process, whereby they become aware of, prevent, and address their adverse human rights impacts. Drawing on well-established due diligence practices and combining them with what is unique to human rights, the UN framework describes the core elements of human rights due diligence: based on a statement of commitment to respecting rights and supporting policies, human rights due diligence should include assessing human rights impacts, integrating respect for human rights across relevant internal functions and processes, and tracking as well as communicating performance.").

[173] *Id.*

[174] *Id.*

their stakeholders, which include their employees, communities, suppliers, resources, etc. Some corporations, such as Ben & Jerry's, have gone even further in their pursuit of social impact by purporting progressive values in the form of political activism and unconventional business practices that push the envelope of CSR.[175] Whether this kind of corporate activism will become embedded in hard law remains to be seen, it is abundantly clear from case law and recent legislation that corporations indeed possess the right to pursue CSR objectives.[176] Further, courts have tended to show lenient deference when examining boards' business decisions, which should spur boards to consider being more proactive in pursuing CSR goals.[177] As social and environmental problems continue to plague global society, corporations should wield the legal tools at their disposal in order to better themselves and the world. Ben Cohen summed up the sentiment rather poignantly in a message to Harvard's Kennedy School of Government upon receiving the George S. Dively Award for Corporate Public Initiative:

> "Corporations have been granted the right to become the major depositories and bestowers [sic.] of wealth in our society . . .With all of this power, there is just no way businesses can walk away from the world's pressing problems…the narrow view of maximizing profits is imply unacceptable when business is directly and indirectly responsible for so many of our problems . . . business must be a part of the solution, or there won't be a solution."[178]

[175]EDMONSON, *supra* 119 at 79.
[176] *See supra* Part I.
[177]*Id.*
[178] EDMONSON, *supra* 119 at 79–80.