

BETWEEN LAW AND PUBLIC POLICY: A SCALABLE CORPORATE SOCIAL  
RESPONSIBILITY MODEL

By

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## THESIS ABSTRACT

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This thesis looks at corporate social responsibility (CSR) at the intersection between law and public policy while using an alternative dispute resolution (ADR) framework. With more than 99.9% of businesses in the United States being small businesses and not large corporations, there is a major market for implementing strategic changes that can have far-reaching impacts. If small businesses really can build positive momentum, how could encouraging small businesses to invest in CSR also yield a substantial positive impact? This thesis will analyze the public policy and legal landscape of CSR before providing a practical framework that small businesses can apply when seeking to implement CSR principles.

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## I. INTRODUCTION

How can small businesses be more socially responsible? This thesis looks at corporate social responsibility (CSR) at the intersection between law and public policy while using an alternative dispute resolution (ADR) framework.

Corporate Social Responsibility has many subfields. CSR considers everything the company does and uses both a legal lens (what *must* a company do) as well as a normative lens (what *should* a company do?) CSR is exceptionally broad. Workers' rights, corporate governance, consumer protection law, corporate political activity, and the environmental impact of the company's actions are all subject to various federal and state laws, but CSR goes beyond the baseline of the law to answer the question "what *should* corporations do?"

Corporate social accountability (CSA) looks to hold corporations accountable after a harm has occurred and seeks to use punishment as a deterrent. Violations of the law could range from the use of unlawful tax shelters, to supporting human rights violations in the supply chain, and from violating pollution guidelines to failing to adequately protect consumers' data. In each case, CSA would want to hold the company accountable for the harm and seek to prevent corporations from repeating the harm in the future.

Environmental social governance (ESG) is a concept that looks different in the U.S. and in Europe. In the U.S., ESG practitioners emphasize the impact of companies on the environment, while in Europe, ESG has become more of a synonym for CSR. In the U.S., the ESG movement relies heavily on investment (or divestment) strategies to force changes in corporate behavior. For example, an ESG approach in the U.S. might be to reduce funding for the fossil fuel industry by convincing major investors to shift their portfolios. The reasoning behind

this investment or divestment strategy is not fixed. It is possible that the investor cares about the environment and wants to fight against catastrophic climate change. However, it is also possible that the investor simply believes the company is not prepared for the future uncertainty that climate change can bring and wants a more reliable investment.<sup>1</sup>

Yet, CSR literature places a major emphasis on large corporations. In particular, transnational corporations (businesses that operate beyond the boundaries of any country, e.g. by operating in multiple nations) are overrepresented. As a result, small and midsize corporations can be overlooked. This makes sense when we consider the environmental impact of business (the “E” in “ESG.”) For example, a 2017 study found that just 100 companies were responsible for more than 70% of global emissions.<sup>2</sup> The fossil fuel industry is responsible for a significant amount of pollution. Major corporations like Shell, Chevron, and BP, are some of the highest-emitting publicly traded companies since 1988.<sup>3</sup>

Companies can also disrupt democratic systems. For example, the tobacco industry supported at least 994 state-level lobbying registrations in 2021.<sup>4</sup> The world’s number one cause of preventable death is smoking.<sup>5</sup> However, when localities, recognizing the dangers of smoking,

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<sup>1</sup> Michael Copley, “How ESG Investing Got Tangled up in America’s Culture Wars,” *National Public Radio*, September 12, 2022, <https://www.npr.org/2022/09/12/1121976216/esg-explained>.

<sup>2</sup> Tess Riley, “Just 100 Companies responsible for 71% of global emissions, study says,” *The Guardian*, July 10, 2017, <https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change>.

<sup>3</sup> Ibid.

<sup>4</sup> Beth Rotman, Gabrielle Ballweg, and Nichelle Gray, “Exposing Current Tobacco Industry Lobbying, Contributions, Meals, and Gifts,” *Tobacco Induced Disease*, January 21, 2022, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8778494/>.

<sup>5</sup> Ibid.

attempt to implement regulations that would reduce smoking, tobacco lobbyists advocate at the state level seeking to preempt local ordinances.<sup>6</sup>

The 2010 Supreme Court decision in *Citizens United v. FEC* means that corporations now have even more power to interfere with U.S. politics.<sup>7</sup> Fred Wertheimer, one of Washington's top lobbyists, called it, "the most radical and destructive campaign finance decision in Supreme Court history."<sup>8</sup> As a result of *Citizens United*, companies are now able to make unlimited contributions to political campaigns and through a series of legal maneuvers make anonymous donations to Super PACs (political action groups).

Corporations are not only targeting the legislative branch, they are also pouring money into judicial elections. This can have a major impact because state courts hear 95 percent of all cases filed in the country.<sup>9</sup> In addition, the majority of states (38) elect their supreme court justices, meaning that some of the most significant elections in the country are subject to the influence of undisclosed corporate spending.<sup>10</sup>

While some companies may choose to actively and directly interfere with the democratic process (like the tobacco industry) other companies may impact the democratic process without intending to do so. For example social media companies like, Meta, Twitter, and TikTok have been used by terrorist organizations (like ISIS) to recruit members and to coordinate attacks

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<sup>6</sup> Ibid.

<sup>7</sup> *Citizens United v. Fed. Election Comm'n*, 558 US 310 (2010)

<sup>8</sup> Kenneth Vogel, "Court Decision opens Floodgates for corporate Cash," *Politico*, January 21, 2010, <https://www.politico.com/story/2010/01/court-decision-opens-floodgates-for-corporate-cash-031786>.

<sup>9</sup> Brennan Center for Justice, "How Citizens United threatens judicial Independence," 29 September 29, 2020 <https://www.brennancenter.org/our-work/analysis-opinion/how-citizens-united-threatens-judicial-independence>.

<sup>10</sup> Ibid.

despite the companies' attempts to remove them.<sup>11</sup> In addition, just by their very existence and current algorithmic structure, social media companies can threaten the functioning of a democratic society by: (1) promoting distorted information; (2) facilitating political manipulation (3) reducing political engagement; (4) and promoting social and political fragmentation.<sup>12</sup> CSR seeks to interrupt the outcomes of both active and passive corporate activity.

Transnational corporations have significant reach and impact. This is in part due to their very large revenues, which often rival the gross domestic products (GDP) of many small nations. Yet, it is important to note that despite the impressive profits Fortune 500 companies can generate for their shareholders, the vast majority of economic growth in the United States is driven by small businesses. While transnational corporations can have significant impacts on the environment and human rights, small businesses have the ability to impact more workers and local communities.

Small companies have been responsible for all of the net job growth in the U.S. since the onset of the Covid-19 pandemic.<sup>13</sup> Between 1995 and 2021, small businesses were responsible

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<sup>11</sup> Gordon Corera, "ISIS is "still evading Detection on Facebook" Report says," *BBC*, July 13, 2020, <https://www.bbc.com/news/technology-53389657>.

<sup>12</sup> European Parliament, "Key Social Media Risks to Democracy," December 2021, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/698845/EPRS\\_IDA\(2021\)698845\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/698845/EPRS_IDA(2021)698845_EN.pdf).

<sup>13</sup> Dion Rabouin, "Small Businesses Keep Hiring as Fed Raises Rates to Cool Economy," *WSJ* January 25, 2023, <https://www.wsj.com/articles/surge-in-hiring-by-small-business-complicates-feds-effort-to-cool-economy-11674627479>.

for “62.7% of net jobs created.”<sup>14</sup> Small businesses make up 99.9% of American businesses and 99.7% of firms with paid employees.<sup>15</sup> They are also responsible for 43.5% of U.S. GDP.<sup>16</sup>

It can be difficult to remember that small businesses can have a major impact because numerous industries are oligopolies made up of major corporations. However, with more than 99.9% of businesses in the United States being small businesses and not large corporations, there is a major market for implementing strategic changes that can have far-reaching impacts. These companies are not responsible for the vast majority of pollution, but their business decisions can still have an impact on climate change. For instance a 2022 Time article lays out the actions small businesses can take to have a “big impact.” These include using the U.S. EPA’s Center for Corporate Climate Leadership to conduct an energy assessment and establish appropriate targets for reducing the businesses’s carbon footprint.<sup>17</sup> These companies do not have annual revenues that rival national GDPs, but their investments in the local community can still have a meaningful impact. As the Executive Director of the Green Business Network in Washington, D.C. notes, “the domino effect has the potential to build positive momentum across business sectors.”<sup>18</sup> If small businesses really can build positive momentum, how could encouraging small businesses to invest in CSR also yield a substantial positive impact?

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<sup>14</sup> U.S. Small Business Administration Office of Advocacy, “Frequently Asked Questions about Small Business 2023,” <https://advocacy.sba.gov/2023/03/07/frequently-asked-questions-about-small-business-2023/>.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Jeff Wilser, “How Small Businesses can have a big Impact in the Climate Fight,” *TIME*, October 13, 2022, <https://time.com/6213434/climate-change-action-companies-businesses/>.

<sup>18</sup> Ibid, quoting Fran Teplitz.

This thesis argues that, using CSR, small businesses can have a major impact on the communities they serve. If more small businesses choose to incorporate CSR principles into their business plans, we can see a compounding of good that spreads across industries within a locality. This thesis will analyze the public policy and legal landscape of CSR before providing a practical framework that small businesses can apply when seeking to implement CSR principles.

This thesis is broken into small chapters. Chapter one provides a broad overview of the thesis. Chapter two explains the key legal and policy issue that is cited as preventing companies from considering anything other than profit maximization. It begins with a review of the economic argument for shareholder primacy before turning to a review of legal sources for the doctrine. The section ends with a critique of shareholder primacy and legal alternatives to the doctrine. Chapter three gives a history of the field of corporate social responsibility, while considering some of the conditions that gave rise to the need for CSR. Chapter four explains the history of benefit corporations and the role that B Lab has played in changing state laws. It also provides an overview of the distinction between Delaware's public benefit corporation and B Lab's model benefit corporation legislation. This chapter also looks at the relationship between the United Nations Sustainable Development Goals (SDGs) and CSR. In addition, this chapter considers the partnership between B Lab and the UN to promote the SDGs. Chapter five provides examples of landmark CSR litigation in the United States. Chapter six explains the various legal structures businesses may choose from and the requirements that benefit corporations must satisfy in Oregon and Delaware. This chapter also reviews challenges and benefits of benefit status for small businesses, recognizing that small businesses drive economic growth and are key to achieving the SDGs. This chapter also provides a roadmap to creating and

implementing a tailored scalable CSR model for a small business. Chapter seven concludes the thesis with considerations for the future. The appendix is a practical section that explains how to help a small business owner identify key values. Those values can then guide the business in prioritizing its socially responsible actions.

## **II. SHAREHOLDER PRIMACY**

An understanding of shareholder primacy is key to understanding the debate around corporate social responsibility. This is because shareholder primacy is often cited as the reason that corporations are prohibited from taking action to benefit non-shareholding stakeholders. Shareholder primacy is the idea that a company's exclusive purpose is to increase its shareholders' wealth. Shareholder primacy prohibits directors from taking any action that would decrease shareholders' wealth. This viewpoint has been advanced by economists, such as Milton Friedman as well as legal scholars, like David Yosifson and even some judges, for example former Chancellor of the Delaware Court of Chancery and former Chief Justice of the Delaware Supreme Court Leo Strine. I will begin with a review of the economic arguments for shareholder primacy, before turning to legal arguments.

### **1. ECONOMIC ARGUMENT FOR SHAREHOLDER PRIMACY (FRIEDMAN)**

Milton Friedman, a Nobel Prize winning economist argued in his now famous 1970 NYT article, "The Social Responsibility of Business to Increase its Profits," that "in a free-enterprise, private-property system, a corporate executive...has a direct responsibility...to conduct the business... to make as much money as possible while conforming to the basic rules of society.<sup>19</sup>" Friedman argued that promoting business with a social conscience was, "preaching pure and unadulterated socialism."<sup>20</sup> He then called those who support this approach to business

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<sup>19</sup> Milton Friedman, "The Social Responsibility of Business Is to Increase Its Profits," *NYT Sunday Magazine*, September 13, 1970.

<sup>20</sup> *Ibid.*

“unwitting puppets of the intellectual forces that have been undermining the basis of a free society...”<sup>21</sup> Friedman argues that social responsibility requires a business executive to, “act in some way that is not in the interest of his employers.” Friedman then provides three different actions that might be considered by a socially responsible business: (1) when it would be in the best interest of the company to raise the price of a good, but better for society to prevent inflation, choosing not to raise prices; (2) spending money to reduce pollution beyond the amount that would be best for the company simply to improve the environment for society; (3) hiring “hard core unemployed” instead of “better qualified” workers to promote the social goal of reducing poverty.

Friedman claims that all three of these above situations are situations in which the executive, “would be spending someone else’s money for a general social interest.” Friedman supports his claim by explaining that if these actions reduce returns to stockholders, the executive is effectively spending their money. He then argues that if these actions result in higher prices for consumers, the executive is spending consumers’ money, and if the actions lower the wages of employees, the executive is spending their money.

There are many reasons that Friedman’s analysis is subject to critique. First, it is possible that promoting a general social interest could reduce returns to stockholders in the short-term but increase the value of the company in the long-term.<sup>22</sup> In that situation, Friedman’s claim that the executive is essentially stealing from stockholders fails. Rather, spending money to make the

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<sup>21</sup> Ibid.

<sup>22</sup> For example, see Alex Edmans, “The End of ESG,” *Financial Management* 52:3-17 (2023).

business socially responsible is akin to an investment in the business that will yield dividends at a later date.

Second, Friedman's claim that raising prices for consumers, in order to fund a social benefit cause, is essentially stealing from consumers, ignores Friedman's own framework of market behavior. In a free market, if the price of a good is higher than what is supported by the market, consumers will simply choose not to purchase the product—they will not be duped into purchasing a more expensive product. Thus, the company will either adjust its prices to conform with the market, or it will fail due to lack of demand.

Therefore, for this “theft” to occur, there would need be a monopoly, so that consumers had no option but to purchase the over-priced good. In addition, if the product is actually more expensive because it includes some type of benefit activity, such as planting a tree for every item purchased, then the consumer is not over-paying for a good that could be purchased at a lower price from a company that does not claim to be socially responsible—under consumer law the goods are not identical.<sup>23</sup> Instead, they are distinguishable, one comes with the added benefit of planting a tree, while the other does not. Consumers of responsible businesses are not being tricked—they are choosing to support causes they want to support and paying a premium to do so.

Third, Friedman provides no example of an action that a socially responsible business could take that would result in lowering the wages of its employees, but many typical businesses have no qualms reducing wages for employees (by reducing the hourly wage, reducing the

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<sup>23</sup> *Pearson v. Philip Morris, Inc.*, 358 Or 88, 122 (2015).

number of hours available for a worker, or by outsourcing the jobs to locations with lower wages.<sup>24)</sup>

Without context it can be difficult to see why Friedman, whose seminal text is titled *Capitalism and Freedom*, would care whether a business wants to be socially responsible. After all, shouldn't businesses be free to operate how they wish? However, Friedman's aside about the "recent G.M. crusade" reveals what current events may have motivated Friedman to write his essay and why he cares a great deal about preventing socially responsible businesses.

Friedman did not explain what the "G.M. crusade" was, so a brief overview follows. In 1970, General Motors (GM) was the world's largest private employer, the biggest taxpayer, and largest advertiser.<sup>25</sup> GM had revenues that surpassed, "all but a few nations of the world."<sup>26</sup> On February 7, 1970 Ralph Nader announced the opening of a national "Campaign to Make General Motors Responsible."<sup>27</sup> The Campaign purchased 12 shares of GM stock with the intention of bringing up numerous resolutions at GM's annual meeting in May.<sup>28</sup> The Campaign also targeted foundations and universities that held GM stock.<sup>29</sup> The Campaign generated a great deal of controversy. For example, Harvard, which held 305,000 shares, polled its alumni who voted

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<sup>24</sup> For example, in 2021 the last major generic pharmaceutical manufacturing plant in the U.S. closed and sent between 1,500 and 2,000 jobs abroad. Michael Sainato, "When is this going to end?: US Factory Town devastated by Jobs moving Overseas," *The Guardian*, June 20, 2021. Walmart decided to close to Portland area stores, resulting in 580 workers losing their jobs. Rob Manning, "Two Portland Walmarts to close, eliminating 580 Jobs," *OPB*, February 22, 2023, <https://www.opb.org/article/2023/02/22/portland-walmart-retail-jobs-laid-off-layoffs-oregon/>.

<sup>25</sup> Timothy J. Minchin, "'A Gallant Fight': The UAW and the 1970 General Motors Strike," *International Review of Social History* 68, no. 1 (April 2023): 41–73, <https://doi.org/10.1017/S0020859022000293>.

<sup>26</sup> Theodor Jacobs, "The Company and the Union," *New York Times*, March 18, 1973.

<sup>27</sup> Richard Halloran, "Nader to Press for G.M. Reform," *New York Times*, February 2, 1970.

<sup>28</sup> *Ibid.*

<sup>29</sup> Herbert Mitging, "G.M. Challenged on 'Responsibility,'" *New York Times*, May 17, 1970.

three-to-two in favor of the Campaign, but Harvard's treasurer was still in support of GM because the Campaign represented, "an opening wedge in a movement to socialize the traditional American way of doing business."<sup>30</sup>

Nader's Campaign proposed things like increasing the company's board of directors from 24 to 27, to make room for three representatives of the public.<sup>31</sup> The Campaign offered its own nominees (President Johnson's former advisor on consumer affairs, a Pulitzer Prize winning biologist, and the president of the Housing and Development Corporation.)<sup>32</sup> The Campaign also advocated for the creation of a shareholders' committee for corporate responsibility, with members representing not only shareholders but also stakeholders.<sup>33</sup>

It is interesting to note that two of the issues that the Campaign raised were likely to be very meaningful to stockholders not just stakeholders. The first issue was poor construction. GM had recalled its school busses three times between 1966 and 1969.<sup>34</sup> The reputational damage of these recalls on the company should have been of interest to many stockholders. The second issue was that GM was generating 35% of the nation's air pollution and, the Campaign claimed, violating air pollution laws.<sup>35</sup> As the country's largest corporation at the time, a GM stockholder would be remiss to think that if the company were violating federal law it would be easily

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<sup>30</sup> Ibid.

<sup>31</sup> Halloran, "Nader to press for G.M. Reform."

<sup>32</sup> Ibid.

<sup>33</sup> To include: management, United Automobile Workers, consumers, academics, civil rights groups, scientists, religious and social services groups, and small shareholders. Ibid.

<sup>34</sup> Mitgang, "G.M. Challenged."

<sup>35</sup> Halloran, "Nader to press for G.M. reform."

overlooked. Thus, the Campaign seemed to raise a complex combination of issues that would have been of varying interests to stockholders and stakeholders.

The Campaign raised these issues at a stockholder meeting on May 22, 1970 and despite obtaining less than 3% of the vote, it seems to have made a significant impact on the company.<sup>36</sup> At the end of August, GM announced a new public policy committee.<sup>37</sup> The committee was created to, “give matters of community concerns, ‘a permanent place on the highest level of management.’”<sup>38</sup>

In September, just two days after Friedman’s article was printed, the United Automobile Workers staged a 67 day strike against GM. More than 400,000 workers participated, impacting 145 plants across the United States and Canada, and causing GM to lose more than \$1 billion.<sup>39</sup> At the end of the strike, UAW secured, “significant wage increases, better healthcare, retirement after thirty years, an end to cost-of-living allowance caps, and no restrictions on the number of grievances that can be filed.”<sup>40</sup>

By March 1971, the New York Times reported that, “many of America’s major corporations have taken steps to meet public demands that they look beyond, ‘mere profit-making’ and consider the impact of their activities on society as a whole.”<sup>41</sup> The article highlights some of GM’s recent updates including the public policy committee, as well as

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<sup>36</sup> New York Times, “Responsibility: At Least One Share of Stock for the Public,” *New York Times*, February 7, 1971.

<sup>37</sup> Donald Schwarz, “Proxy Power and Social Goals - How Campaign GM Succeeded,” *St. John’s Law Review* 764, no. 4 (May 1971).

<sup>38</sup> *Ibid.*

<sup>39</sup> Minchin, “The UAW and the 1970 GM Strike,” 2.

<sup>40</sup> Minchin, “The UAW and the 1970 GM Strike,” 4.

<sup>41</sup> NYT, “One Share of Stock for the Public.”

appointing the first Black member of the GM board, appointing a “California pollution authority” as VP of environmental activities, transferring \$5 million to Black-owned banks, placing a \$1 million order with a Black-owned company, and opening a toll-free hotline for consumer car complaints.<sup>42</sup>

## 2. LEGAL ARGUMENTS FOR SHAREHOLDER PRIMACY

Three cases are often cited as the source for shareholder primacy.<sup>43</sup> These cases are: *Dodge v. Ford Motor Co.*; *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.*; and *eBay Domestic Holdings, Inc. v. Newmark., et al.*<sup>44</sup> This thesis will now provide a brief overview of each case before turning to a discussion of the development and importance of shareholder primacy doctrine.

*Dodge v. Ford Motor Co.* is a 1919 case from Michigan.<sup>45</sup> *Dodge* involved a dispute between minority shareholders and the director, Henry Ford, who held a majority stake in the company (58%).<sup>46</sup> Between 1911 and 1916 the board of directors declared special dividends.<sup>47</sup> However, director Ford declared, “the settled policy of the company not to pay in the future any special dividends, but to put back into the business for the future all earnings of the company, other than

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<sup>42</sup> Ibid.

<sup>43</sup> Mohsen Manesh, “Introducing the Totally Unnecessary Benefit LLC,” *North Carolina Law Review* 97, no. 2019 (July 24, 2018): 603–72.

<sup>44</sup> Ibid.

<sup>45</sup> *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507 (1919).

<sup>46</sup> Ibid. 467.

<sup>47</sup> Ibid. 464.

the regular dividend.”<sup>48</sup> Ford wanted to increase wages for workers while lowering costs for consumers.<sup>49</sup> To that end, he decided to simultaneously hire more workers and to reduce the price of Ford Motor Company’s car. Ford Motor Company originally sold its car for more than \$900, but the price was lowered to \$360 for the year beginning August 1916.<sup>50</sup> Minority shareholders were outraged and sued Ford for violating his fiduciary duty. The case went to the Michigan Supreme Court. In its decision, the Court explained, “[a] business corporation is organized and carried on primarily for the profit of the shareholders. The powers of directors are to be employed for that end.”<sup>51</sup>

Although the case is as Yosifson writes, “familiar to just about anyone who has [taken] a survey course in corporate law,”<sup>52</sup> Manesh describes it as having “dubious precedential value.”<sup>53</sup> While Stout calls *Dodge*’s description of corporate purpose, “mere dicta in an antiquated case that...has not been validated by today's Delaware courts.”<sup>54</sup> Yosifson’s 2014 analysis found that the case had been cited 68 times by state and federal courts, of which three times were in Delaware, but never for corporate purpose.<sup>55</sup> In addition to Manesh and Stout’s critiques, the case is not particularly relevant because this is a Michigan Supreme Court case and would only

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<sup>48</sup> *Ibid.* 468.

<sup>49</sup> David Yosifson, “The Law of Corporate Purpose,” *Berkeley Business Law Journal*, no. 10 (2014): 181–230, 187.

<sup>50</sup> *Dodge*, 204 Mich. 459, 465 (1919).

<sup>51</sup> *Ibid.*

<sup>52</sup> Yosifson, “The Law of Corporate Purpose,” 188.

<sup>53</sup> *Dodge*, 204 Mich. 459, 507 (1919).

<sup>54</sup> Lynn A. Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public*, 1st ed (San Francisco: Berrett-Koehler, 2012), 24.

<sup>55</sup> Yosifson, “The Law of Corporate Purpose,” 188.

be binding on companies that have incorporated in Michigan. However, the majority of Fortune 500 companies are incorporated in Delaware.<sup>56</sup>

*Revlon* is a 1986 case from Delaware.<sup>57</sup> *Revlon* involved a hostile takeover and was the first time that the Delaware Supreme Court considered, “the validity of...defensive measures in the face of an active bidding contest for corporate control.”<sup>58</sup> The *Revlon* Court explained that, “[t]he Revlon board’s authorization permitting management to negotiate a merger or buyout with a third party was a recognition that the company was for sale. The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company’s value at sale for the stockholders’ benefit.”<sup>59</sup>

As Manesh emphasizes, the *Revlon* decision, “applies in only a narrow and specific circumstance.”<sup>60</sup> Stout adds that, “it is only when a public corporation is about to stop being a public corporation that directors lose the protection of the business judgement rule.”<sup>61</sup> Johnson and Ricca note that the *Revlon* decision has left companies wondering when courts will apply a *Revlon* analysis.<sup>62</sup> Despite this uncertainty, the broadly construed notion of shareholder primacy,

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<sup>56</sup> 66.8% of Fortune 500 Companies are registered in Delaware. Delaware Secretary of State, “Annual Report Statistics,” available at : <https://corp.delaware.gov/stats/>.

<sup>57</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A2d 173, 176 (Del 1986)

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.* 183.

<sup>60</sup> <sup>60</sup> Manesh, “Unnecessary Benefit LLC,” 623.

<sup>61</sup> Stout, *The Shareholder Value Myth*, 26.

<sup>62</sup> Lyman Johnson and Robert Ricca, “The Dwindling of Revlon,” *Washington and Lee Law Review* 167 (2014): 167–227,180.

in which a director must always prioritize wealth maximization for shareholders has no support in *Revlon*, which is only applicable during a very particular situation.

*eBay* is a 2010 case from Delaware.<sup>63</sup> The dispute, as in *Dodge*, was between minority shareholders and the directors, whom the minority accused of breaching their fiduciary duties. In *eBay*, minority shareholder eBay brought suit against Craigslist challenging three actions taken by the directors: (1) preventing eBay from forcing an agent onto the Craigslist board of directors; (2) issuing indemnification agreements for Craigslist directors; and (3) approving the right of first refusal all Craigslist shareholders were given. The founder of Craigslist, Craig, and the CEO of Craigslist Jim, together held a majority of the company. They were both directors, which made them fiduciaries of the stockholders, and as controlling stockholders, they were fiduciaries of the minority stockholders.<sup>64</sup> Jim and Craig did not want eBay to transform the company, which they hoped to keep from focussing on stockholder wealth maximization. <sup>65</sup> In this case, the court explained that the corporate form, “is not an appropriate vehicle for purely philanthropic ends, at least not when there are stockholders interested in realizing a return on their investment.”

Manesh argues that like *Dodge*, *eBay* should be understood as an extremely context specific decision. The cases both involved disputes between majority and minority shareholders, thus any shareholder primacy precedents that they may set, must be applied within that context, “not as a broader judicial mandate that corporations must always maximize shareholder

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<sup>63</sup> *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010)

<sup>64</sup> *Ibid.* 26.

<sup>65</sup> *Ibid.* 34.

wealth.”<sup>66</sup> Yosifson calls *eBay*, “*Dodge v. Ford* for the 21st century, in Delaware.”<sup>67</sup> He also completely disagrees that shareholder primacy is relegated to one narrow context, arguing that if Delaware thought it was appropriate for, “directors to sacrifice profits in the public interest, then Delaware could also easily allow it in the takeover context.”<sup>68</sup>

## **IS THE SHAREHOLDER PRIMACY DOCTRINE LEGALLY BINDING?**

Sneirson, citing Stout, argues that shareholder primacy is not mandated by any American corporate law; instead Sneirson argues shareholder primacy is a “powerful social norm.”<sup>69</sup> Despite his position on shareholder primacy, Yosifson provides support for Sneirson’s social norm view writing, “[Judge] Chandler did not cite a single case, statute, or piece of scholarship to support his conclusion [in *eBay*]...the proposition seemed so obvious and fundamental to Chandler that it needed no citation.”<sup>70</sup>

In some areas of law, norms can become legally binding. For example, in tort law, an industry norm can be legally required, even if there is no statute specifically requiring the action.<sup>71</sup> Other examples of legally binding norms are peremptory norms of international law (*jus cogens*), which prohibit things like slavery (regardless of whether a country has a legal

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<sup>66</sup> Manesh, “Benefit LLC,” 623.

<sup>67</sup> Yosifson, “The Law of Corporate Purpose,” 193.

<sup>68</sup> *Ibid.* 205.

<sup>69</sup> Judd Sneirson, “The History of Shareholder Primacy, from Adam Smith through the Rise of Financialism,” in *The Cambridge Handbook of Corporate Law, Corporate Governance, and Sustainability*, Cambridge University Press: Cambridge. (2020) 73-85, 74-75.

<sup>70</sup> Yosifson, “The Law of Corporate Purpose,” 194.

<sup>71</sup> *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

prohibition against the practice).<sup>72</sup> While norms can become legally binding, they are not necessarily binding. Just because many academics believe that shareholder primacy is legally binding does not make it so. Manesh argues state corporation statutes, “allow for the formation of a corporation, ‘for *any* lawful business.’”<sup>73</sup> Of course, the counterargument is that if shareholder primacy is the law, then it would be *unlawful* to carry out a business that does not operate to maximize shareholder profit.

Whether or not shareholder primacy doctrine governs and what it truly requires can only be debated when there are shareholders. For example, a business that is organized as an LLC instead of as a corporation, does not have shareholders who can bring a breach of fiduciary duty case against a director. In addition, many organizations that are organized as corporations (e.g. many small businesses) generate such low revenue, that it is impractical for a reasonable shareholder to bring a breach of fiduciary duty case against the director. This means that even if shareholder primacy is legally binding, which it may be for corporations that are incorporated in Delaware, the enforcement of shareholder primacy can be implausible against many small businesses.

In addition, as will be discussed next, even if shareholder primacy is binding, the business judgement rule provides a valid defense to a breach of fiduciary duty claim that asserts a violation of shareholder primacy. The Restatement of the Law of Corporate Governance outlines the business judgment rule as follows:

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<sup>72</sup> Report of the International Law Commission: Seventy-First Session. UN GAOR, 74th Sess, Supp. No. 10, at 142, UN Doc. A/74/10 (2019).

<sup>73</sup> Manesh, “Benefit LLC,” 622.

(a) A director or officer who makes a business judgment is not liable to the corporation or its shareholders if the director or officer:

(1) acts in good faith;

(2) is independent with respect to and not interested in the subject of the business judgment;

(3) is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes is appropriate under the circumstances; and

(4) rationally believes that the business judgment is in the best interests of the corporation.

(b) A court shall defer to a corporation's business judgment unless the person challenging that judgment proves that the decision makers of the corporation have not met the requirements of subsection (a).

In Delaware, the business judgment rule is “a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”<sup>74</sup> Some legal scholars have suggested that the business judgement rule could be asserted as a defense to a breach of fiduciary duty claim in which the director is accused of having violated shareholder primacy.<sup>75</sup> However, this has not yet been attempted in an actual Delaware court case, so its validity is currently purely theoretical. Today, many academics still cite the shareholder primacy doctrine as a reason that corporations are not allowed to consider a triple bottom line (people, planet, profit) and instead must focus exclusively on making a return on investment for shareholders. This risk-averse approach to shareholder primacy was largely responsible for the CSR movement’s push to create a new corporate structure—one that did not require exclusive subservience to shareholders. The next section will provide an overview of CSR within academic literature, before turning to the conditions that prompted the CSR movement.

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<sup>74</sup> *Parnes v. Bally Ent. Corp.*, 722 A.2d 1243, 1246 (Del. 1999).

<sup>75</sup> Manesh “Benefit LLC”; Stout *Shareholder Myth*.

### III. CORPORATE SOCIAL RESPONSIBILITY

Corporate Social Responsibility (CSR) has gone by many different names. Archie Carroll, who created, “one of the most well-known models of CSR,” the Carroll Pyramid of CSR, lays out a useful history of the field in his 2021 article, “Corporate Social Responsibility: Perspectives on the CSR Construct’s Development and Future.”<sup>76</sup> A review of the history of CSR will require the reader’s patience as the field is full of acronyms. According to Carroll, “[d]iscussions of what constituted CSR exploded in the 1970s.”<sup>77</sup> Carroll credits William Frederick with coining the terms CSR<sub>1</sub> for Corporate Social Responsibility and CSR<sub>2</sub> for Corporate Social Responsiveness.<sup>78</sup> CSR<sub>1</sub> focussed on, “an implicit *obligation* embedded in CSR,” while CSR<sub>2</sub> focussed on, “how companies should *respond* to the social environment.”<sup>79</sup> Carroll notes that in the late 1970s, corporate social performance (CSP) joined the CSR family.

Then in the 1980s, “stakeholder theory,” was a “major conceptual contribution to CSR.”<sup>80</sup> In 1991 Carroll presented a four-part definition of CSR as a CSR Pyramid. This framework understood multiple simultaneous responsibilities of the corporation, “to make a profit, obey the law, be ethical, and be a good corporate citizen.”<sup>81</sup>

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<sup>76</sup> Wayne Visser, “Revisiting Carroll’s CSR pyramid: an African perspective” in M. Huniche & E. P. Rahbek (Eds.), *Corporate citizenship in developing countries—new partnership perspectives* (pp. 29–56). Copenhagen: Copenhagen Business School Press (2006).

<sup>77</sup> Archie Carroll, “Corporate Social Responsibility: Perspectives on the CSR Construct’s Development and Future,” *Business & Society*, 60(6) 1261, 1265-67

<sup>78</sup> Ibid.1260.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid. 289.

The 2000s saw an increase in attention to globalization, resulting in a distinction between implicit CSR and explicit CSR.<sup>82</sup> Implicit CSR, “emerges whenever the government raises social, labor, environmental, or human rights standards” while explicit CSR, “require corporations to undertake CSR,” for example by implementing mandatory disclosure laws.<sup>83</sup> Another concept to join the CSR literature was the “triple bottom line” (TBL) also called 3Ps of TBL “people, purpose, and profit.”<sup>84</sup>

Historically, CSR is a, “product of industrialization.”<sup>85</sup> In the late nineteenth and into the twentieth century, industrialization meant oligopolies, the unregulated use of child labor, and working conditions that frequently resulted in severe injury or death.<sup>86</sup> In the late 1800s, public pressure persuaded the U.S. government to create new laws to control major corporations that had formed in the railroad and petroleum industries.<sup>87</sup> For example, the first antitrust law, the Sherman Act passed in 1890 was, “aimed at preserving free and unfettered competition as the

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<sup>82</sup> Ibid. 1265

<sup>83</sup> Li-Wen Lin, “Mandatory Corporate Social Responsibility Legislation around the World: Emergent Varieties and National Experiences,” *University of Pennsylvania Journal of Business Law* 23, no. 2 (2021): 429–69, 430-431.

<sup>84</sup> Suntae Kim, Matthew Karlesky, Christopher Myers, and Todd Schiefeling, “Why Companies are becoming B Corporations,” *Harvard Business Review*, (17 Jun 2016).

<sup>85</sup> George Cheney, Juliet Roper, and Steve May, “Overview” in *The Debate over Corporate Social Responsibility*, Oxford University Press: Oxford, (2007) 3-15, 4.

<sup>86</sup> Oligopolies existed in many industries including, “steel, automobiles, petroleum, refining, railroads, copper, business machines, and agricultural implements,” Edward Burkowitz and Kim McQuaid, “Businessman and Bureaucrat: The Evolution of the American Social Welfare System, 1900-1940,” *The Journal of Economic History*, 38 No.1 (Mar 1978):120-142; Michael Schuman, “History of Child Labor in the United States—part 2: The Reform Movement,” Bureau of Labor Statistics, available at: <https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-2-the-reform-movement.htm>; see also, Judson MacLaury, “Government Regulation of Workers’ Safety and Health, 1877-1917,” U.S. Department of Labor, available at: <https://www.dol.gov/general/aboutdol/history/monoregsafeintrotoec>.

<sup>87</sup> Ibid.

rule of trade.”<sup>88</sup> In 1914, two more antitrust laws were introduced: the Federal Trade Commission Act and the Clayton Act.<sup>89</sup> The purpose of these three laws was to incentivize businesses to, “operate efficiently, keep prices down, and keep quality up.”<sup>90</sup> Between 1890 and 1910 eighteen percent of children between the ages of 10 and 15 worked.<sup>91</sup> In 1916, the Keating-Owen Child Labor Act, the nation’s first child labor law was passed.<sup>92</sup> Two years later it was ruled unconstitutional.<sup>93</sup> It was not until the 1938 Fair Labor Standards Act that child workers were protected by federal law.<sup>94</sup> Corporations responded to the increasingly negative public perception by creating, “industrial welfare programs.”<sup>95</sup> These programs included, “education, recreation, and socialization for workers.”<sup>96</sup> Originally, these programs, “were largely directed towards the improvement of the worker and had in them a big element of paternalism and benevolence.”<sup>97</sup> Many of these industrial era corporations’ approaches to corporate social responsibility acted as if reducing externalities was a benevolent gift to society. The International

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<sup>88</sup> Federal Trade Commission, “The Antitrust Laws,” available at: <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws>.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Michael Schuman, “History of Child Labor in the United States-part 1: Little Children Working,” Bureau of Labor Statistics, available at: <https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-1.htm>.

<sup>92</sup> National Archives, “Keating-Owen Child labor Act (1916),” available at: <https://www.archives.gov/milestone-documents/keating-owen-child-labor-act>.

<sup>93</sup> *Hammer v. Dagenhart* 247 U.S. 251 (1918).

<sup>94</sup> Ibid. When the FLSA was challenged at the Supreme Court, the Court upheld the Act and reversed *Hammer*.

<sup>95</sup> <sup>95</sup> George Cheney, Juliet Roper, and Steve May, “Overview” in *The Debate over Corporate Social Responsibility*, Oxford University Press: Oxford, (2007) 3-15, 4.

<sup>96</sup> Ibid.

<sup>97</sup> E.T. Kelly and M.L. Haskins, “Foundations of Industrial Welfare,” *Economica*, 2 (May 1921): 116-131, 119.

Monetary Fund defines an “externality” as the impact of production, consumption, or investment decisions made by individuals, households, or firms on people not directly involved in the transaction.<sup>98</sup> A technical externality exists when, “the price of consumption does not include the externalities.”<sup>99</sup> Externalities can be positive or negative. When the social costs outweigh the private costs, the externality is negative, when the social benefit outweighs the private costs, the externality is positive.

This thesis will focus on negative externalities. A frequently cited example of a negative externality is pollution. This can include everything from an accidental pollution incident like the recent Norfolk Southern train derailment in Ohio, to intentional pollution associated with daily production, as seen in the fossil fuel industry.<sup>100</sup> Understanding externalities is key to understanding the debate around CSR. This is because a great deal of the debate around corporate social responsibility has to do with what responsibilities a corporation has and what responsibilities it ought to have.

Examples of negative externalities during industrialization include: (1) a company that hires children, preventing them from attending school, thereby increasing the number of people who are illiterate in society; (2) operating a factory with exceedingly dangerous conditions that regularly maim and injure workers—particularly when the hospital bill must be born by the

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<sup>98</sup> Thomas Helbling, “Back to Basics: What are Externalities?” *Finance and Development* 47 no. 4. (Dec 2010) available at: <https://www.imf.org/external/pubs/ft/fandd/2010/12/basics.htm>.

<sup>99</sup> *Ibid.*

<sup>100</sup> 38 railcars derailed and started a fire; 11 of the derailed cars contained hazardous materials like vinyl chloride. Ana Faguy, “EPA Orders Norfolk Southern to pay for Cleanup after disastrous Ohio Train Derailment,” *Forbes*, February 21, 2023, <https://www.forbes.com/sites/anafaguy/2023/02/21/epa-orders-norfolk-southern-to-pay-for-cleanup-after-disastrous-ohio-train-derailment/?sh=7b5ecef5a56>.

See also, Peter Eavis, Mark Walker, and Niraj Chokshi, “Norfolk Southern’s Push for Profits Compromised Safety, Workers Say.” *NYT*, April 2, 2023.

laborer, or society (in the event the worker cannot pay and must rely on a charity hospital); (3) creating a monopoly on which all consumers must rely if they wish to have a particular service; (4) forcing other businesses (and consequently other employers) out of town and leaving no other employment option for the workers who remain in the town.

Corporations began to reduce these externalities and to frame the improved corporate activity as benevolent, rather than compliant (with social norms if not the law.) “Welfare capitalism” was a response to growing tensions between workers and corporations. Many corporations simply implemented these programs to, “co-opt their employees’ loyalties and pacify public anger.”<sup>101</sup>

As Wisman and Davis note, “by the 1920s ‘industrial relations’ had come forth as a science of motivating workers...sold as ‘welfare capitalism.’”<sup>102</sup> One innovation of industrial welfare programs was the company town. These were, “communities built by businesses” and they were supposed to be seen as an act of corporate goodwill.<sup>103</sup> Corporations hired architects to design these towns, which planners designed as, “both social and physical entities, focussing their plans around town centers with social and communal facilities and providing numerous parks, playgrounds, and other recreational amenities.”<sup>104</sup> However, companies chose not to follow these plans, building housing and structures for commercial services without recreational

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<sup>101</sup> Nikki Mandell, “Allies or Antagonists? Philanthropic reformers and Business Reformers in the Progressive Era,” *The Journal of the Gilded Age and the Progressive Era*, 11 (Jan 2012): 71-117, 71.

<sup>102</sup> Jon Wisman and Matthew Davis, “Degraded Work, declining Community, rising Inequality, and the Transformation of the Protestant Ethic in America, 1870-1930” *The American Journal of Economics and Sociology*, 72 No. 5 (Nov 2013): 1075-1105, 1085.

<sup>103</sup> Michele Hirsch, “America's Company Towns, then and now,” *Smithsonian*, September 4, 2015.

<sup>104</sup> Margaret Crawford, “The New Company Town,” *Perspecta* 33 (1999): 48-57, 49.

spaces.<sup>105</sup> A few decades later, a wave of federal legislation tackled many of these issues, reducing workers' and consumers' vulnerability to exploitative corporate practices.

By 1953, economist Howard Bowen proposed, “one of the earliest conceptions of CSR.”<sup>106</sup> However, rapid change came with the advent of federal regulatory bodies. The Civil Rights Act of 1964 created the Equal Employment Opportunity Commission to eliminate unlawful employment discrimination.<sup>107</sup> The Occupational Safety and Health Act of 1970 created the Occupational Safety and Health Administration.<sup>108</sup> That same year, the Environmental Protection Agency was created.<sup>109</sup> In 1972 the Consumer Product Safety Act created the Consumer Product Safety Commission.<sup>110</sup> The creation of these agencies was extremely important, because it set a new floor for corporate behavior. More than 100 years ago Kelly and Haskins made an observation that is strikingly relevant today. They wrote, legislation “is generally behind the most enlightened firms in its requirements. It is always pulling up the backward to the level of the medium.”<sup>111</sup> By 1972, corporations were constrained by numerous regulatory bodies that had the power to reduce the externalities companies would be permitted to create.

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<sup>105</sup> Ibid.

<sup>106</sup> Cheyney, Roper and May, “Overview,” 5.

<sup>107</sup> U.S. EEOC, “Timeline of Important EEOC Events,” available at: <https://www.eeoc.gov/youth/timeline-important-eeoc-events>.

<sup>108</sup> U.S. DOL, “OSHA’S 30th Anniversary,” available at : <https://www.osha.gov/aboutosha/30-years>.

<sup>109</sup> U.S. EPA, “The Origins of EPA,” available at: <https://www.epa.gov/history/origins-epa>.

<sup>110</sup> U.S. CPSC, “Who we are- What we do for You,” available at: <https://www.cpsc.gov/Safety-Education/Safety-Guides/General-Information/Who-We-Are---What-We-Do-for-You>.

<sup>111</sup> Kelly and Haskins, “Foundations of Industrial Welfare,” 121.

Within the context of these new regulatory systems, activists sought to push for a new baseline in corporate conduct. For example, Nader's 1970 GM Campaign called for GM to go beyond the letter of the law. "We do the bare minimum," is not a corporate tagline that inspires confidence in consumers or loyalty in employees. Recognizing that GM could not assert mere compliance with the law in light of mounting public displeasure, the corporation created a public policy committee, something that no regulatory body required at the time. Skeptics of GM's intentions might view this as an early example of "greenwashing," "the practice of making unwarranted or overblown claims of sustainability or environmental friendliness in an attempt to gain market share."<sup>112</sup> However, it was not until 1992 that the Federal Trade Commission published its, "Guide for the Use of Environmental Marketing Claims" specifically regulating green claims in the marketplace.<sup>113</sup>

These federal regulations set a new floor, a new bare minimum for corporations to accomplish. As a result, the field of corporate social responsibility encapsulates a large area of major impact. These include: workers' rights, human rights in the supply chain, the environmental impact of manufacturing, the impact of the corporation on national and global economies, the political outcome of actions a corporation takes and more. Despite the previously discussed examples of corporations choosing to behave in unethical (if not illegal) ways, at times corporations have also decided to go beyond what the law requires.

For example, during the early stages of the COVID-19 pandemic, the U.S. federal government allowed state and local governments to determine whether or not to require mask

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<sup>112</sup> Richard Dahl, "Greenwashing: Do you know what you're buying?" *Environmental Health Perspectives*, Vol. 118 No. 6 (June 2010): A246-A252, A247.

<sup>113</sup> *Ibid*; 16 CFR 260.

use. Some large corporations decided to make store policies exceed the limits of the law in states that did not have mask mandates. So many chose to do so, that the New York Times compiled a list of major retailers that announced mask requirements even where the government did not require them.<sup>114</sup> On July 17, 2020 Home Depot, a publicly traded corporation that employees over 400,000 people announced a company-wide policy to require masks in all of their U.S. stores.<sup>115</sup> Two days earlier, Walmart announced a nationwide policy to require masks in all stores—even though nearly 35% of their stores were in locations without mask mandates.<sup>116</sup> The following year, corporations again chose to take action beyond what the government required by mandating vaccines for their employees.<sup>117</sup> The mask mandates impacted hundreds of thousands of employees and consumers. Since mask wearing is, “associated with a notable reduction in SARS-CoV-2 transmission,” corporate mask mandates, particularly in places that did not have government mask mandates, likely helped to reduce community transmission.<sup>118</sup> Without access to internal company documents, we are left to speculate as to why the corporations implemented mask requirements. It is possible that corporations wanted to prevent all of their employees calling in sick at the same time.

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<sup>114</sup> Gillian Friedman, “McDonald's joins Walmart and dozens of other chains with Mask Mandates,” *NYT*, July 29, 2021.

<sup>115</sup> Home Depot, “The Home Depot to require Face Masks in all U.S. stores,” <https://ir.homedepot.com/news-releases/2020/07-17-2020-183752620>.

<sup>116</sup> Walmart, “A simple Step to help keep you safe: Walmart and Sam’s Club require Shoppers to wear Face Coverings,” <https://corporate.walmart.com/newsroom/2020/07/15/a-simple-step-to-help-keep-you-safe-walmart-and-sams-club-require-shoppers-to-wear-face-coverings>.

<sup>117</sup> Haley Messenger, “From McDonald’s to Goldman Sachs, here are the Companies mandating Vaccines for all or some Employees,” August 3, 2021, <https://www.nbcnews.com/business/business-news/here-are-companies-mandating-vaccines-all-or-some-employees-n1275808>.

<sup>118</sup> Gavin Leech et. al., “Mask wearing in community Settings reduces SARS-CoV-2 Transmission,” *PNAS*, May31, 2022, <https://www.pnas.org/doi/10.1073/pnas.2119266119>.

In the 2010s, building on the ideas of CSR and CSP, creating shared value (CSV), which “focuses on the connections between societal and economic progress,” joined the field.<sup>119</sup> Another term to join the field was political CSR (pCSR) which consists of, “responsible business activities that turn corporations into political actors.”<sup>120</sup> While PCSR focusses on the impact on society, a related term, corporate political activity (CPA) focuses on the organizations that implement CPA.<sup>121</sup> Keeping the history of CSR terminology in mind, we can now turn to the current definitions that international organizations use.

Today, the United Nations Industrial Development Organization (UNIDO) defines corporate social responsibility as a, “management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders.”<sup>122</sup> The International Labour Organization (ILO) defines corporate social responsibility as, “a way in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors. CSR is a voluntary, enterprise-driven initiative and refers to activities that are considered to exceed compliance with the law.”<sup>123</sup> The

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<sup>119</sup> Carroll, “Corporate Social Responsibility,” 1265.

<sup>120</sup> Andreas Scherer, Andreas Rasche, Guido Palazzo, and André Spicer, “Managing for Political Corporate Social Responsibility: New Challenges and Directions for PCSR 2.0,” *Journal of Management Studies*, Vol. 53 No. 3 (May 2016): 273-298, 278.

<sup>121</sup> Kathleen Rehbein, Frank de Hond, and Frank de Bakker, “Aligning Adverse Activities? Corporate Social Responsibility and Political Activity,” in Eds. James Weber and David Wasieleski, *Corporate Social Responsibility*, Emerald, 295-324.

<sup>122</sup> UNIDO, “What is Corporate Social Responsibility?” <https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr>.

<sup>123</sup> ILO, “The ILO and Corporate Social Responsibility (CSR)”, [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_116336.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_116336.pdf).

European Commission defines corporate social responsibility as a, “concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.”<sup>124</sup>

All three of these definitions show CSR as a public policy concept. It is now possible to return to a discussing the context that created the need for CSR. Once in a generation public health crises are not the only situation in which corporations have the ability to make a significant impact on society. For example, in 2022, companies responded to the wave of anti-LGBTQ+ legislation that was sweeping the country. The Human Rights Campaign reported that more than 200 corporations signed the organization’s “Business Statement on Anti-LGBTQ+ Legislation.”<sup>125</sup> As of April 6, 2023, the signatories include: 3M, Amazon, Apple, AstraZeneca, AT&T, BP, Cargill, Meta, General Motors, Google, IBM Corp., Johnson and Johnson, Nestle USA, PayPal, Shell USA Inc, and Unilever United States.<sup>126</sup> While some signatories may choose to make statements without changing their actions, others have a demonstrated history of making business decisions based on state legislation. For example, in response to North Carolina’s anti-LGBTQ+ legislation in 2016, PayPal canceled a \$3.6 million global operations center it had planned to build there and sent the 400 jobs it would have created to another state.<sup>127</sup> And in response to anti-LGBTQ+ legislation in Georgia in 2016, multiple corporations, including Dow

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<sup>124</sup> European Commission, Memo/09/109 “Corporate Social Responsibility (CSR),” March 16, 2009, [https://ec.europa.eu/commission/presscorner/detail/en/memo\\_09\\_109](https://ec.europa.eu/commission/presscorner/detail/en/memo_09_109).

<sup>125</sup> Henry Berg-Brousseau, “200+ Major U.S. Companies oppose anti-LGBTQ+ State Legislation,” March 31, 2022) <https://www.hrc.org/press-releases/200-major-u-s-companies-oppose-anti-lgbtq-state-legislation>.

<sup>126</sup> HRC, “Business Statement on anti-LGBTQ+ State Legislation,” <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/2023-National-Biz-Statement-on-Anti-LGBTQ-State-Legislation.pdf>.

<sup>127</sup> Edward Helmore and Matt Kessler, “Leading Businesses take stand against States’ new anti-LGBTQ+ Laws,” *The Guardian*, April 10, 2016.

Chemicals threatened to boycott the state.<sup>128</sup> Given these developments, it seems that there is a significant relationship between state law and business activity.

State law is crucial to businesses. The state law where a business is incorporated determines what shareholder primacy doctrine is ( for example if, when, and how it applies.) The state law where a business is incorporated can also impact other domains of the company's activities. For example, until the 1938 Fair Labor Standards Act, child labor, if it was regulated, was regulated at the state or city level. Before 1938, corporations could simply choose to operate in locations with more or less stringent child labor laws. In 1940, the FLSA was amended to set a forty hour maximum on the workweek.<sup>129</sup> Before 1940, corporations could choose where to operate and consequently choose whether or not to be subject to workweek restrictions.

Regardless of the restrictions on child labor and the limitations on working hours, corporations were still able to choose to implement company policies that went beyond the letter of the law. For example, Henry Ford set the base wage in his factories at double the industry standard in 1914. For workers, this perk came at a steep price. Ford offered his workers benefits that were very difficult to refuse.<sup>130</sup> In addition to the unmatched wage, the company's legal department was required to assist employees with all legal issues (such as purchasing a home or navigating the pathway to citizenship) at no cost to the worker. Ten doctors and 100 nurses were kept on staff full time, to provide medical care for any worker who required it. The company also

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<sup>128</sup> Jared Keller, "In the Crusade against anti-LGBT Legislation, Corporations are People too," *PSMag*, April 12, 2016, <https://psmag.com/news/in-the-crusade-against-anti-lgbt-legislation-corporations-are-people-too>.

<sup>129</sup> Alexi Horowitz-Ghazi, "How the 40-Hour Work Week became the Norm," *NPR*, November 5, 2021, <https://www.npr.org/2021/11/05/1052968060/how-the-40-hour-work-week-became-the-norm>.

<sup>130</sup> The description of Ford company benefits comes from Richard Snow, "Henry Ford's Experiment to build a better Worker," *WSJ*, (May 9, 2013, <https://www.wsj.com/articles/SB10001424127887324059704578471112978065632>).

ran its own English language school for the thousands of immigrants it employed. By 1919, the average Ford employee had over \$2,000 in savings.

In exchange for these benefits, Ford employees consented to comply with the company's policies regulating their personal lives and to submit to investigations to ensure compliance. For example, men under the age of 22 had to be married. If they had children, those children had to be kept healthy. The home had to be kept neat.

These investigations were thorough. One of the Ford investigators reported that he found an immigrant worker living in a, "filthy, foul-smelling home." The investigator uncovered that the worker owed back rent and had unpaid grocery bills. The family was, "hungry-looking." The investigator immediately acted to help the worker. He ordered his wages to be paid daily rather than once every two weeks. Took out a loan equivalent to two weeks' pay, in the company's name, paid the landlord and the grocery bill, then moved the family to a new home with brand new furniture, and new clothing for everyone.

These conditions seem wonderful—how amazing to have a benevolent employer that pays more than a living wage, that ensures access to medical care, that provides English language services and a pathway to citizenship! The alternative: longer hours for lower wages, a lack of access to medical care, and no time or support in improving one's education seems far inferior. Regardless of the corporation's motivations, these policies were highly coercive. Workers cannot leave and expect to earn similar wages. Workers with limited English might forfeit their only chance to develop vocational English skills and the employment opportunities improved English creates if they chose to leave. Immigrants who are seeking citizenship would

be giving up their free legal support and might endanger their chances for acquiring citizenship if they did not stay with the company.

Corporations will usually exercise a certain amount of control over their workers, but the more that the government sets new baselines, the more companies will need to increase the quality of their workplaces to recruit and retain workers. For example, some of the 2016 anti-LGBTQ+ state laws described previously were permissive rather than proscriptive. Meaning that companies *could* choose to discriminate against LGBTQ+ people, but they were also free to choose *not to discriminate*. Many businesses chose to make public statements denouncing anti-LGBTQ+ laws. Then, in 2020, the Supreme Court made it illegal for companies with at least 15 employees to discriminate based on sexual orientation or gender identity setting a new baseline for workplaces across the country.<sup>131</sup> That meant that the major corporations that signed the statement two years later (and were already subject to the new law) were making a statement that was unrelated to how they planned to treat their workers.

Much like the United Nations Universal Declaration of Human Rights, which is often mentioned as a landmark expression of political will, that despite lacking an enforcement mechanism, was the catalyst for many binding treaties, a corporation's public expression of support for socially beneficial behavior can become the foundation for enforceable internal policies or provide the impetus for new binding legislation.

Today many companies have released statements to shareholders and to consumers that promote an image of the company as a positive actor. In addition, thanks to the significant lobbying work of B Lab (a nonprofit organization that provides third-party benefit corporation

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<sup>131</sup> *Bostock v. Clayton County, GA*, 140 S.Ct. 1731 (U.S. 2020).

certification), many states have now updated their business laws to recognize a new type of corporation: the benefit corporation.

#### IV. BENEFIT CORPORATIONS

Benefit corporations are not restricted by shareholder primacy. Instead, they are required to provide some type of public benefit. They have become increasingly popular and are one option under the CSR umbrella. This section will begin with an explanation of some commonly used structures available to businesses in the United States: LLC, corporation, benefit corporation, and benefit LLC before considering the challenges and benefits of forming as a benefit entity.

A limited liability company is a structure that does not have shareholders. Neither Oregon nor Delaware require an LLC to have board of directors.<sup>132</sup> An LLC may be controlled by one or more “members.”<sup>133</sup> In Delaware, an LLC can elect to be taxed as a sole proprietorship, a partnership, or as corporation.<sup>134</sup> In Oregon, an LLC can elect to be taxed as a partnership or as a corporation.<sup>135</sup>

A corporation is owned by shareholders and controlled by a Board of Directors.<sup>136</sup> A corporation can elect its tax filing status; common selections include C corporation (“C Corp”) and S corporation (“S Corp”). A C Corp is taxed twice. First, business income is taxed at the corporate rate, then profits are distributed to shareholders who are taxed at their individual

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<sup>132</sup> Delaware Division of Corporations, “How to form a new Business entity,” <https://corp.delaware.gov/howtoform/>; State of Oregon, “Oregon Business Xpress,: Choose a Business Structure,” <https://www.oregon.gov/business/Pages/choose.aspx>.

<sup>133</sup> Delaware Division of Corporations, “How to form a new Business entity.”

<sup>134</sup> Ibid.

<sup>135</sup> State of Oregon, “Choose a Business Structure.”

<sup>136</sup> Delaware Division of Corporations, “How to form a new Business entity,” ; State of Oregon, “Choose a Business Structure.”

income tax rates.<sup>137</sup> An S Corp pays no tax on business income. Instead, shareholders are taxed at their individual income tax rates.<sup>138</sup>

Unlike a traditional corporation, a benefit corporation is formed to provide a public good. In Delaware, a business can form as a public benefit corporation (“PBC.”) A PBC is, “a for-profit corporation...that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner.”<sup>139</sup> A PBC must be managed, “in a manner that balances the stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct, and the public benefit or public benefits identified in its certificate of incorporation.”<sup>140</sup> In addition, the PBC must list one or more specific public benefits it will promote within its statement of business or purpose. Delaware defines public benefit as, “a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests...including...effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature.”<sup>141</sup> In addition, PBCs must provide its stockholders with a public benefit statement once every two years.<sup>142</sup> The statement must include the following: (1) objectives the board of directors has established to promote such public benefit; (2) standards the board has adopted to measure the

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<sup>137</sup> Delaware Division of Corporations Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Del Code Ann tit. 8, § 362. This definition of public benefit is similar to the Internal Revenue Code § 501(c)(3) requirements for exempt purposes (for non-profit organizations) which are: “charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals.”

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup>Del Code Ann tit. 8 § 366 (b).

corporation's progress in promoting such public benefit; (3) objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting such benefit; and (4) an assessment of the corporation's success in meeting the objectives of promoting such public benefit.<sup>143</sup>

In Oregon, a business can form as a benefit company. A benefit company must have the purpose of, "providing a general public benefit."<sup>144</sup> A benefit company may also choose to identify a specific public benefit.<sup>145</sup> In determining the best interests of the benefit company, a governor<sup>146</sup> must consider how the company's actions will affect the following: (1) shareholders or members of the benefit company; (2) the employees and workforce of the benefit company and the employees and workforce of the benefit company's subsidiaries and suppliers; (3) the benefit company's subsidiaries and suppliers' (4) the interests the benefit company's customers have in receiving a portion of the general public benefit or specific public benefit that the benefit company provides; (5) the communities that the benefit company's activities affect; (6) the local and global environment; (7) the short-term and long-term interests of the company; and (8) the benefit company's ability to fulfill the company's general public benefit purpose and any specific public benefit identified in the benefit company's articles of incorporation.<sup>147</sup> Benefit companies must prepare benefit reports annually.<sup>148</sup> These reports must contain two parts: a narrative

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<sup>143</sup> Ibid. (1)-(4)

<sup>144</sup> ORS § 60.758 (1)

<sup>145</sup> Ibid. (2)(a).

<sup>146</sup> This is equivalent to a director of a for profit business.

<sup>147</sup> ORS §60.760(1)(a)-(h).

<sup>148</sup> ORS §60.768 (1).

description and an assessment section. The benefit report must give a narrative description of: (1) the extent to which the benefit company provided a general public benefit and the actions and methods the benefit company used to provide the general public benefit; (2) the extent to which the benefit company provided a specific public benefit and the actions and methods the benefit company used to provide the specific public benefit; (3) any circumstances that hindered or prevented the benefit company from providing a general public benefit or a specific public benefit.<sup>149</sup> In addition, the report must: (1) assess the extent to which the benefit company met or exceeded a third-party standard that the benefit company selected and identified in the benefit report (these must be consistent with previous benefit reports, or include an explanation of why the assessment is not consistent); (2) describe the process and rationale the benefit company used to select or to change the third-party standard.<sup>150</sup> The benefit report does not need to be completed or verified by a third-party.<sup>151</sup> The benefit report must be made publicly available.<sup>152</sup>

A benefit LLC is an LLC that is formed to provide a public benefit. In Delaware, a company may form as a benefit LLC and will follow the same guidelines as a PBC. In Oregon, a company may form as a benefit LLC and will follow the same guidelines as a benefit company.

Benefit entities are available in part because of the significant lobbying efforts of one organization: B Lab a 501(c)(3) nonprofit organization that provides B Corp certification to businesses. B Lab was founded in 2006 and the first B Corps were certified in 2007.<sup>153</sup> In

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<sup>149</sup> Ibid.(2)(a)(A)-(C).

<sup>150</sup> Ibid 2(b)(A)-(B).

<sup>151</sup> ORS § 60.768 (2)(c)

<sup>152</sup> Ibid. (4)

<sup>153</sup> B Lab, “How did the Movement start?”, <https://www.bcorporation.net/en-us/faqs/how-did-b-corp-movement-start/>.

addition to providing B Corp certification, B Lab also worked to change state corporate laws so that businesses could undertake activities that would directly violate shareholder primacy. To support these efforts, B Lab had an attorney draft Model Benefit Corporation Legislation (MBCL.)<sup>154</sup>

As a result of B Lab’s advocacy, in 2010, the state of Maryland adopted the country's first benefit corporation statute.<sup>155</sup> The statute relied heavily on the MBCL. Under Maryland law, benefit corporations can be formed for either, “general public benefit,” which means, “a material, positive impact on society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits,” or for “specific public benefit,” which the statute defines with a non-exhaustive list that “includes: preserving the environment, improving human health, and promoting the arts.”<sup>156</sup>

### **MBCL or Delaware PBC?**

Three years later, rather than adopt the MBCL, Delaware chose to write its own benefit corporation statute, creating the “public benefit corporation.”<sup>157</sup> According to Manesh, there are two primary paths that are available to corporations: the MBCL, and the Delaware public benefit

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<sup>154</sup> Manesh, “Benefit LLC,” 609.

<sup>155</sup> Md. Code Ann., Corps. and Ass’ns. § 5-6C-01—5-6C-08.-

<sup>156</sup> Md. Code Ann., Corps. and Ass’ns. § 5-6C-01(c); Ibid. §5-6C-01(d)(3)-(5).

<sup>157</sup> Kennan El Khatib, “The Harms of the Benefit Corporation,” *American University Law Review* 65, no. 1 (2015): 151–89. 153.

corporation statute.<sup>158</sup> Today, thirty-six states now have some form of benefit corporation statute.<sup>159</sup>

Manesh notes that there are three key differences between the MBCL requirements and Delaware's PBC requirements.<sup>160</sup> First, Delaware requires a specific public benefit, while the MBCL merely permits corporations to elect a specific public benefit (requiring only a general public benefit.)<sup>161</sup> Second, while Delaware requires biennial benefit reporting, the MBCL requires annual reporting.<sup>162</sup> The MBCL requires that benefit reports be made publicly available, while Delaware only requires the report be made available to shareholders.<sup>163</sup> Third, while the MBCL requires a third party standard be used in assessing the businesses benefit activities, Delaware permits, but does not require a third party assessment.<sup>164</sup>

In their critique of the benefit corporation, management professors Wilburn and Wilburn argue that benefit corporation certification is similar to Fair Trade, USDA Organic, and LEED certifications because they all have, "no legal standing."<sup>165</sup> El Khatib goes further, arguing that benefit corporation status "potentially promote[s] 'legalized greenwashing.'"<sup>166</sup> Manesh notes

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<sup>158</sup> Manesh, "Benefit LLC," 610; Del. Code Ann. Tit8, §§ 361-368.

<sup>159</sup> Steven Alberty, "Chapter 9 Corporations with a Social Purpose," in *Advising Small Businesses* (June 2023 Update).

<sup>160</sup> Manesh, "Benefit LLC," 616.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.* 617.

<sup>165</sup> Kathleen Wilburn and Ralph Wilburn, "Benefit Corporations: An Analysis of Social Benefit Reporting," *Business & Professional Ethics Journal*, 38:2 (Summer 2019) 223-247, 225.

<sup>166</sup> Khatib, "The Harms of the Benefit Corporation," 154.

that both MBCL and Delaware PBC requirements lack an enforcement mechanism for non shareholding stakeholders.<sup>167</sup> However, these critiques overlook another important area of law: consumer protection law. The Federal Trade Commission prohibits greenwashing under Section 5 of the FTC Act, 15 U.S.C. 45.<sup>168</sup> El Khatib and Wilburn and Wilburn worry that consumers may be led astray by an organization’s benefit corporation certification or benefit corporation status and lack legal recourse. However, under state unfair trade practices law and federal unfair deceptive or abusive acts or practices (UDAP) law, consumers may have the right to sue a company for claiming to provide a benefit and then failing to do so.

For example, in 2022, consumers in Oregon filed a putative class action against Tillamook County Creamery Association (“Tillamook”) under Oregon’s Unfair Trade Practices Act (UTPA).<sup>169</sup> Tillamook became B Corp certified in November 2021. Plaintiffs claimed Tillamook's marketing violated the UTPA in the following three ways: (1) claiming its products were exclusively sourced from dairy farms in Tillamook Oregon; (2) claiming its products were made using methods that closely resemble small-scale traditional farming; and (3) claiming its products came from cows allowed to graze on pasture and treated better than those on factory farms.<sup>170</sup> Plaintiffs also argued that consumers are willing to pay more to support local and ethical businesses.<sup>171</sup> Although Tillamook prevailed, it was not because the company had complied with the UTPA. Instead, Tillamook succeeded because plaintiffs failed to adequately

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<sup>167</sup> Manesh, “Benefit LLC,” 612.

<sup>168</sup> 77 FR 62124, Oct 11, 2012.

<sup>169</sup> *Bohr v. Tillamook Co. Creamery Assoc.*, 321 Or. App. 213 (2022)

<sup>170</sup> *Id.* at 217.

<sup>171</sup> *Id.* at 218.

plead reliance with regard to the putative class—which included individuals who had never observed any Tillamook marketing before making their purchase.<sup>172</sup>

Thus, it is conceivable that an adequately pleaded class action could succeed against a benefit corporation that failed to meet its benefit requirements. Such a case could be brought under state or federal law. As will be discussed in the CSR litigation section, even when corporations prevail, the costs (reputational and monetary) of litigation, which can incentivize non-benefit corporations to change their behavior, may also encourage benefit corporations to fulfill their obligations to non-shareholder stakeholders.

CSR is possible without benefit corporation status or third-party certification. In 2019, an association of chief executives, called the Business Roundtable, released a statement on the purpose of the corporation. The statement claimed a, “fundamental commitment to all of our stakeholders,” and expressed a commitment to serve shareholders while also: (1) delivering value to customers; (2) investing in employees; (3) dealing ethically with suppliers; (4) and supporting the communities the companies operate in.<sup>173</sup> Skeptics claim that the 2019 Business Roundtable statement was merely an illusory promise.<sup>174</sup> Noting that any significant change in business activities would require approval from the board of directors, Bebchuk and Tallarita contacted the public relations offices of 173 companies whose CEOs signed the statement. While many declined to respond to the researchers, 48 answered. Of those who responded, only one

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<sup>172</sup> Id. at 215.

<sup>173</sup> Business Roundtable, “Statement on the Purpose of a Corporation,” (2019), available at: [https://system.businessroundtable.org/app/uploads/sites/5/2023/02/WSJ\\_BRT\\_POC\\_Ad.pdf](https://system.businessroundtable.org/app/uploads/sites/5/2023/02/WSJ_BRT_POC_Ad.pdf).

<sup>174</sup> Lucian Bebchuk and Roberto Tallarita, “The Illusory Promise of Stakeholder Governance,” Discussion Paper No. 2020-1 of the Harvard Law School Program on Corporate Governance.

actually had board approval; the other 47 did not.<sup>175</sup> This is compelling evidence that the statement itself is not likely to result in a meaningful change in corporate conduct, at least not at the corporations whose CEOs signed the statement.

Some academics, such as Koehn, have noted that CSR depends on corporations being given wide discretion, relying on the protection the business judgement rule will provide if business leaders choose to “do the right thing.”<sup>176</sup> Other academics, such as Greenfield, argue that greater regulation is the best way to ensure that businesses behave as good corporate citizens.<sup>177</sup> Greenfield’s critique that the benefit corporation structure will, “embolden other [non-benefit corporation] companies to act poorly” is not wholly persuasive.<sup>178</sup> Corporate law allows companies to form to engage in “any lawful activity<sup>179</sup>” This broad purpose would suggest that a company formed with the intention of disregarding state or federal law would have no corporate law protection.

Further, what is “lawful” is not determined exclusively by corporate law (e.g. the uniform commercial code, the law of business associations, or trademark law.) Instead, “lawful” includes *all* state and federal laws. The law provides a floor, mandating some socially beneficial behavior. For example, child labor is strictly regulated at the state and federal level, discrimination in the

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<sup>175</sup> Bebchuk and Tallarita, “Illusory Promise of Stakeholder Governance,” 34.

<sup>176</sup> Daryl Koehn, “Why the New Benefit Corporations May Not Prove to Be Truly Socially Beneficial,” *Business & Professional Ethics Journal* 25, no. 1 (July 30, 2015): 17–50, 22.

<sup>177</sup> Kent Greenfield, “A Skeptic’s View of Benefit Corporations,” *Emory Corporate Governance and Accountability Review*, Boston College Law School Legal Studies Research Paper No. 367, 1, no. 1 (August 4, 2015): 17–21, 19-20.

<sup>178</sup> *Ibid.*

<sup>179</sup> Elizabeth Pollman, “The History and Revival of the Corporate Purpose Clause,” *Texas Law Review* 99 (2021): 1423–52, 1437,

workplace based on a protected class is prohibited, and where and how a company may generate pollution is regulated.

Yet, despite facing lawsuits, fines, and public relations scandals, corporations still knowingly and intentionally engage in unlawful behavior. This is not likely to be caused by the advent of the benefit corporation structure, as Greenfield suggests. A more likely culprit is the insufficiency of current deterrence models. Take for example, Pacific Gas & Electric (“PG&E”) a corporation that was convicted of six felony counts of falsifying records and safety violations in 2016 after its natural gas lines exploded in 2010 killing eight people.<sup>180</sup> In 2018, while PG&E was serving a five-year probation sentence for the 2010 explosion, PG&E’s equipment sparked the Camp Fire, which according to the California Department of Forestry and Fire Protection is the deadliest and most destructive wildfire in California’s history.<sup>181</sup> Charges were filed against the company. PG&E pled guilty to involuntary manslaughter because of its role in creating the fire. So many people lost their lives that it took nearly half an hour to read through the victims’ names and for PG&E’s CEO to respond “guilty.”<sup>182</sup> No one from PG&E went to jail. Instead, the company was given the maximum fine the law permitted: \$3.5 million (\$10,000 per victim), and prosecutors agreed to a \$25.5 billion settlement.<sup>183</sup> PG&E then filed for bankruptcy,

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<sup>180</sup> *U.S. v. Pacific Gas and Electric Co.* Case No. 14-cr-00175-TEH, Not reported in F. Supp. 3d. (N.D. Cal. 2015.)

<sup>181</sup> The fire covered an area of at least 153,336 acres and destroyed more than 18,000 structures. Two towns, Paradise and Concow were more than 95% destroyed. 5,596 firefighters worked simultaneously during the peak of the fire. Cal Fire, "Remembering the Camp Fire," n.d., <https://www.fire.ca.gov/our-impact/remembering-the-camp-fire#:~:text=The%20fire%20caused%20at%20least,within%20the%20first%20four%20hours>.

<sup>182</sup> PG&E pled guilty to 84 separate counts of involuntary manslaughter. Vanessa Romeo, “PG&E Pleads Guilty On 2018 California Camp Fire: 'Our Equipment Started That Fire.'” *NPR*, June 16 2020, <https://www.npr.org/2020/06/16/879008760/pg-e-pleads-guilty-on-2018-california-camp-fire-our-equipment-started-that-fire>.

<sup>183</sup> *Ibid.*

complicating the claims process for what the New York Times estimates could be as many as 70,000 victims who are eligible for compensation.<sup>184</sup> Despite all this, PG&E's CEO, the same person who entered a guilty plea for the company's manslaughter charges released a statement saying, "with this important milestone now accomplished, we are focused on emerging from Chapter 11 as the utility of the future that our customers and communities expect and deserve."<sup>185</sup>

Given this, it is difficult to see how benefit corporation status could be the primary cause for such brazen corporate disregard for people and the planet, when the regulatory system has not been successful in reforming corporate behavior. Rather than blaming the benefit corporation structure for incentivizing non-benefit companies to behave badly, a more likely culprit is that our current regulatory system does not have a deterrent effect. For example, the Department of Labor found that Packers Sanitation Services Inc. (one of the country's largest food safety sanitation services providers) employed more than 100 children (ages 13-17) in hazardous jobs working overnight shifts at plants in eight different states.<sup>186</sup> The company was fined \$1.5 million (\$15,138 per child, which was the maximum penalty permitted by federal law.)<sup>187</sup> Packers Sanitation Services Inc. ("PSSI") was bought by Blackstone, an asset manager, in

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<sup>184</sup> Ivan Penn and Lauren Hepler, "Overwhelmed or Ill Informed, 70,000 Wildfire Victims May Get Nothing," *New York Times*, October 6, 2019, <https://www.nytimes.com/2019/10/06/business/energy-environment/pge-wildfire-victims.html>.

<sup>185</sup> Bhargav Acharya, "Bankrupt PG&E Reaches \$13.5 Billion Settlement with California Wildfire Victims," *Reuters*, December 6, 2019, <https://www.reuters.com/article/us-california-wildfire-pg-e-us/bankrupt-pge-reaches-13-5-billion-settlement-with-california-wildfire-victims-idUSKBN1YB03M>.

<sup>186</sup> DOL, "More than 100 Children illegally employed in hazardous jobs, Federal Investigation finds; Food Sanitation Contractor pays \$1.5M in Penalties," February 17, 2023, <https://www.dol.gov/newsroom/releases/whd/whd20230217-1>.

<sup>187</sup> *Ibid.*

2018.<sup>188</sup> To put the fine into context, Blackstone currently manages \$991 billion, making the fine equivalent to 0.00015% of the company's managed assets.<sup>189</sup> Likely far more economically significant than the DOL fine for PSSI was the loss of major contracts with Tyson, Cargill, and JBS.<sup>190</sup> If a business does not fear breaking the law, then the mere existence of benefit companies is not likely to motivate said business to be worse, because it is already willing to operate outside the pale of legal conduct.

It is problematic that non-shareholder stakeholders must rely on the benevolence of corporations to go beyond the letter of the law. It is even more worrying that non-shareholder stakeholders must rely on other corporations to make breaking the law actually hurt. Why for example were Tyson, JBS, and Cargill able to rescind contracts with values that likely far exceeded the fines the government was able to impose on PSSI? And why does PG&E get to continue to operate, despite its deplorable track record? Greenfield's warning that the benefit corporation structure promotes misbehavior misplaces the blame. From the examples above, it is not difficult to conclude that the regulatory system is unable to effectively prevent corporate wrongdoing. If benefit corporation legal status were to result in more law breaking by non-benefit corporations, one might expect it to be difficult to find examples of corporate wrongdoing before 2010. This is not the case. For example, major corporations like Coca Cola and Shell were accused of supporting gross human rights violations decades before the benefit

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<sup>188</sup> Heather Gillers, "Calpers, Calstrs worried about Child Labor," WSJ, March 16, 2023, <https://www.wsj.com/livecoverage/stock-market-news-today-03-16-2023/card/calpers-calstrs-worried-about-child-labor-0XyGJypQO2HuRAD0vP4x>.

<sup>189</sup> Blackstone, "Build with Blackstone," n.d., <https://www.blackstone.com/>.

<sup>190</sup> Josh Funk, "Packers Sanitation Services Loses Contracts after Child Labor Violations," *Associated Press*, May 2, 2023, <https://pbswisconsin.org/news-item/packers-sanitation-services-loses-contracts-after-child-labor-violations/>.

corporation legal structure or B Lab certification were available.<sup>191</sup>Greenfield's idealistic view of increasing regulation also ignores the need for a more exigent process. B Lab certification and benefit corporation status have the potential to be far better than the status quo and to come more swiftly than any type of regulatory changes. In addition, CSR principles can be implemented even without third-party certification. One simple way that a business could implement CSR principles is by supporting the United Nations Sustainable Development Goals, which will be discussed in the next section.

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<sup>191</sup> *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (C.A. 11 (Fla.), 2009) was brought against Coke and alleged the following: systematic intimidation, kidnapping, detention, torture, and murder. The plaintiffs alleged these events began in 1986 and continued into 1996. *Kiobel v. Royal Dutch Petroleum Co. et. al.* 133 S. Ct. 1659 (2013) was brought against Shell and alleged the following: extrajudicial killings, crimes against humanity, torture and cruel treatment, arbitrary arrest and detention, violations of the right to life, liberty security and association, forced exile, and property destruction. It is discussed in further detail in the CSR litigation section.

## V. CSR LITIGATION

2011 was a very exciting time for human rights law in the United States. As the New York Times reported in August of that year, the Supreme Court was poised to grant certiorari to a case that considered whether companies can be sued for human rights violations.<sup>192</sup> The case was *Kiobel v. Royal Dutch Petroleum Co.*<sup>193</sup> Two years before, three related cases against the company settled for \$15.5 million. In a public statement to the Wall Street Journal about the decision to settle, the head of the company's exploration and production unit claimed, "we believe the right way forward is to focus on the future for the Ogoni people, which is important for peace and stability in the region."<sup>194</sup>

In *Kiobel*, Plaintiffs alleged defendants facilitated the Nigerian government in the following nine activities prohibited by customary international law: (1) extrajudicial killing; (2) torture; (3) rape; (4) arbitrary arrest and detention; (5) cruel, inhuman and degrading treatment; (6) crimes against humanity; (7) forced exile; (8) restrictions on assembly; and (9) destruction of private property.<sup>195</sup> Esther Kiobel, the first named plaintiff, was granted asylum in the United

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<sup>192</sup> Lawrence Hurley, "Supreme Court May Consider Whether Companies Can Be Sued over Human Rights," *New York Times*, August 11, 2011, <https://archive.nytimes.com/www.nytimes.com/gwire/2011/08/11/11greenwire-supreme-court-may-consider-whether-companies-c-23629.html?ref=eart>.

<sup>193</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *aff'd*, 569 U.S. 108, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013).

<sup>194</sup> Isabel Ordonez and Russell Gold, "Shell Settles Nigeria Case," *Wall Street Journal*, June 10, 2009, <https://www.wsj.com/articles/SB124450531968496113>.

<sup>195</sup> Amended Class Action Complaint, 2004 WL 7081121 (S.D.N.Y.) para 1.

States because of her experiences in Nigeria.<sup>196</sup> Her husband was executed by the Nigerian government for his participation in environmental activism against defendants.<sup>197</sup>

The class sought to bring their case under a law from 1789, the Alien Tort Statute (ATS).<sup>198</sup> As legal scholars observed, “[c]ourts had few occasions to interpret and apply the ATS for most of US history.”<sup>199</sup> However, in 1980 a novel application of the law in *Filartiga v. Pena-Irala* gave the Second Circuit Court of Appeals an opportunity to consider the boundaries of the ATS.<sup>200</sup> The Filartigas were citizens of Paraguay and brought an ATS complaint against Pena-Irala for causing the torture and death of their son. The *Filartiga* Court held that the three requirements for ATS jurisdiction were satisfied because: (1) plaintiffs are alien; (2) their complaint is for a tort only; and (3) the tort was committed in violation of the law of nations.<sup>201</sup>

The next major case to be brought under the ATS, *Sosa v. Alvarez-Machain*, went to the Supreme Court.<sup>202</sup> In this case, a Mexican citizen brought a complaint against agents of the U.S. Drug Enforcement Agency, Mexican civilians, and a former Mexican police officer for abducting him from Mexico to face a criminal trial in the United States. In *Sosa* the Supreme Court found no violation of customary international law.<sup>203</sup> Although the first two ATS cases did not deal with corporations, they created a legal framework for activists to believe that it might be possible for a

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<sup>196</sup> Amended Class Action Complaint, 2004 WL 7081121 (S.D.N.Y.) para 6 (c).

<sup>197</sup> Amended Class Action Complaint, 2004 WL 7081121 (S.D.N.Y.) para 6 (b).

<sup>198</sup> Judiciary Act of 1789 § 9,1 Stat 73,76-77, codified as amended at 28 USC § 135.

<sup>199</sup> Anthony Bellia and Bradford Clark, “The Alien Tort Statute and the Law of Nations,” *University of Chicago Law Review* 78, no. 2 (Spring 2011): 447–551, 485.

<sup>200</sup> *Filartiga v. Pena-Irala*, 630 F2d 876 (2d. Cir. 1980).

<sup>201</sup> *Ibid.* 887.

<sup>202</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, (U.S. 2004).

<sup>203</sup> *Ibid.* 738.

corporation to be held accountable for violations of the law of nations under the ATS. This belief is what led attorneys to bring Kiobel’s case.

Kiobel and her co-plaintiffs did not prevail. The Supreme Court explaining its reasoning, wrote, “there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.”<sup>204</sup> The Supreme Court affirmed the lower court holding that the violations occurred outside the United States and did not, “touch and concern the territory of the United States,” with sufficient force to, “displace the presumption against extraterritorial application.”<sup>205</sup> The Court expounded that, “mere corporate presence” is insufficient.<sup>206</sup>

Chevron, Dole Food Company, Dow Chemical Company, Ford Motor Company, Glaxosmithkline PLC, and the Procter & Gamble Company submitted an *amici curiae* brief in support of Royal Dutch Petroleum.<sup>207</sup> In 2012, the year the *amici curiae* brief was submitted, Royal Dutch ranked first on Fortune’s Global 500 list (an annual ranking of the “largest 500 corporations worldwide as measured by total revenue.”), Chevron was 11 while Procter and Gamble were 89.<sup>208</sup> These companies were opposed to, “the unjustified expansion” of the ATS. Interestingly, these companies chose to express an “unequivocal[] condemn[ation] [of] human

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<sup>204</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1668 (U.S. 2013).

<sup>205</sup> *Ibid.* 1669.

<sup>206</sup> *Ibid.*

<sup>207</sup> Brief for the Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, Glaxosmithkline PLC, and the Procter & Gamble Company in support of the respondents, at 1, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (U.S. 2013).

<sup>208</sup> “How the Companies Stack Up,” *Fortune International* 168, no. 2, July 22, 2013, 106; Fortune, “Methodology for Global 500,” available at: <https://fortune.com/franchise-list-page/global-500-methodology-2022/>.

rights abuses,” and a commitment to, “conducting global commercial affairs in a lawful and responsible manner that is respectful of all persons where they do business.”<sup>209</sup>

This was not the only *amicus* brief submitted by major corporations<sup>210</sup> in support of Royal Dutch. BP America, Caterpillar, Conoco Phillips, General Electric, Honeywell, International Business Machines, and Monsanto submitted their own *amici curiae* brief as well.<sup>211</sup> In their brief, these companies claimed to, “strongly condemn human rights violations and abide by detailed corporate social responsibility policies.”<sup>212</sup> However, the increase in ATS litigation targeting corporations that have extensive global operations was imposing, “severe litigation and repetitional costs on corporations,” and had the ability to, “chill further investment.”<sup>213</sup>

Although Kiobel did not prevail in her Supreme Court case, she brought a new suit against the company at the District Court of The Hague in 2017. In March 2022, the Court determined that there was not sufficient evidence to support a finding of the company's involvement.<sup>214</sup> In November 2022, the widows withdrew their appeal. Their attorney attributed the decision to withdraw to the, “lengthy and demanding procedure, which makes them relieve

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<sup>209</sup> Brief for the Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, Glaxosmithkline PLC, and the Procter & Gamble Company as *Amici Curiae* in support of the respondents, at 1, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (U.S. 2013).

<sup>210</sup> On Fortune’s Global 500 list, BP was number 6, Conoco Phillips was 144, International Business Machines was 62, and General Electric was 24. “How the Companies Stack Up,” *Fortune International* 168, no. 2 (July 22, 2013): 106.

<sup>211</sup> Brief for BP America, Caterpillar, Conoco Phillips, General Electric, Honeywell, International Business Machines, and Monsanto at *Amici Curiae* in support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (U.S. 2013).

<sup>212</sup> *Ibid.* at 1.

<sup>213</sup> *Ibid.*

<sup>214</sup> Toby Sterling, “Dutch Court rejects Suit of Nigerian Widows against Shell,” Reuters, March 23, 2022, <https://www.reuters.com/business/energy/dutch-court-rejects-suit-nigerian-widows-against-shell-2022-03-23/>.

horrible events, while the outcome is most uncertain.”<sup>215</sup> Shell never accepted responsibility for any wrongdoing.

*Kiobel* was not the only case to test the limits of the ATS. For example, in 2009 a class action was brought against Nestle and Cargill Cocoa in the U.S. District Court for the Central District of California.<sup>216</sup> Plaintiffs claimed Nestle and Cargill aided and abetted violations of international law norms that prohibit: (1) slavery; (2) forced labor; (3) child labor; (4) torture; and (5) cruel, inhuman, or degrading treatment.<sup>217</sup> The District Court granted Nestle’s motion to dismiss holding that, “international law does not recognize corporate liability for violations of international law.”<sup>218</sup> Plaintiffs appealed to the Ninth Circuit Court which reversed the District Court and vacated for further proceedings consistent with *Kiobel*.<sup>219</sup>

Nestle appealed and the Supreme Court granted certiorari in 2020. Interestingly, Coca-Cola and Chevron each submitted their own amicus curiae briefs in support of Nestle. In its brief, Coca-Cola calls ATS litigation a “serious threat” to “productive efforts of responsible corporate citizens” while noting that the company has been subject to “multiple actions” under the ATS.<sup>220</sup>

In its brief, Chevron emphasizes its, “strong interest in the proper interpretation of the

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<sup>215</sup> Mike Corder, “Widows of executed Nigerian Activists end Case against Shell,” AP, November 8, 2022, <https://apnews.com/article/europe-africa-business-netherlands-nigeria-335d100b204b1b14aa805864d8a1105e>.

<sup>216</sup> *John Doe v. Nestle*, 2009 WL 2921081 (C.D.Cal.) (Trial Pleading).

<sup>217</sup> *Doe v. Nestle, S.A.*, 748 F.Supp.2d 1057, 1064 (C.D.Cal., 2010)

<sup>218</sup> *Doe v. Nestle, S.A.*, 748 F.Supp.2d 1057, 1124 (C.D.Cal., 2010)

<sup>219</sup> *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1027 (C.A.9 (Cal.),2014).

<sup>220</sup> Brief for the Coca-Cola Company as *Amicus Curiae* supporting Petitioners at 1, *Nestle USA, Inc. v. Doe*, 141 S.Ct., 1931, (U.S., 2021).

Alien Tort Statute.”<sup>221</sup> Like Coca-Cola, Chevron observes that, “corporations with a global presence...have been subject to ATS claims that seek enormous damages for alleged wrongdoing by third parties...in foreign countries.”<sup>222</sup> Chevron, like Coca-Cola has been a defendant in several ATS cases.<sup>223</sup> Chevron also claims to be, “committed to conducting its global commercial affairs in a lawful and responsible manner that is respectful of all persons wherever it does business.”<sup>224</sup>

The Court was asked to consider whether the ATS, “exempts corporations from suit,” but as Justice Gorsuch writes in his concurrence, “rested its decision on other grounds.”<sup>225</sup> The Supreme Court held that the plaintiffs, “improperly seek extraterritorial application of the ATS.”<sup>226</sup> Explaining that, “allegations of general corporate activity—like decisionmaking [sic]—cannot alone establish domestic application of the ATS.”<sup>227</sup>

There are some interesting trends that unite the various *amicus* briefs that corporations submitted. In particular, there were repeated statements of commitment to corporate responsibility. For example, Coca-Cola’s “responsible corporate citizens,” BP et. al.’s “corporate social responsibility policies,” and Chevron’s commitment to respecting all persons.<sup>228</sup>

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<sup>221</sup> Brief for the Chevron Corporation as *Amicus Curiae* supporting Petitioners at 1, *Nestlé USA, Inc. v. Doe*, 141 S.Ct., 1931, (U.S., 2021).

<sup>222</sup> Emphasis added. *Ibid.*

<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid.* at 3.

<sup>225</sup> *Nestlé USA, Inc. v. Doe*, 141 S.Ct. 1931, 1940 (U.S., 2021)

<sup>226</sup> *Nestlé USA, Inc. v. Doe*, 141 S.Ct. 1931, 1936 (U.S., 2021).

<sup>227</sup> *Nestlé USA, Inc. v. Doe*, 141 S.Ct. 1931, 1937 (U.S., 2021)

<sup>228</sup> Coke, Chevron, and BP *Amicus* briefs.

Another refrain was the concern about the increasing burden of litigation. However, none of the *amicus* briefs mentioned the number of cases that had been brought against them under the ATS. A search of Westlaw reveals that there are 1,457 cases that cite the ATS, with 915 occurring before the end of 2012.<sup>229</sup> 1Royal Dutch Petroleum’s \$15.5 million settlement in 2009 may seem like, what Chevron describes as an, “enormous” amount. However, Royal Dutch Petroleum’s revenue in 2009 was \$278 billion, meaning the settlement cost 0.0056% of the company’s annual revenue.<sup>230</sup> By 2012, when *amicus* briefs on *Kiobel* were submitted by major companies, Royal Dutch Petroleum had an annual revenue of \$467 billion.<sup>231</sup>

From the industrial revolution until today, corporations have had a significant impact on the people and places where they operate. For example, the combined market value of listed companies in the world at the end of 2017 was “equivalent to the global GDP.”<sup>232</sup> When corporations have revenues that equal global GDP, their economic behavior will have a greater impact on the financial ecosystem, than it would if the corporations’ revenues were far less than global GDP. There are many opportunities for a major transnational corporation to have a major impact, and a variety of domains in which these impacts can occur. Although small businesses get less recognition as individual organizations (compared to transnational corporations), cumulatively small businesses drive the economy, and have significant social impact (e.g.

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<sup>229</sup> Searched for: 28 USC § 1350, narrowed citing references, further narrowed to cases.

<sup>230</sup> Shell, “Annual Report 2012,” <https://reports.shell.com/annual-report/2012/businessreview/ourbusinesses/selectedfinancialdata.php?cat=b>.

<sup>231</sup> *Ibid.*

<sup>232</sup> De La Cruz, A., A. Medina and Y. Tang (2019), “Owners of the World’s Listed Companies”, 5, OECD Capital Market Series, Paris, [www.oecd.org/corporate/Owners-of-the-Worlds-Listed-Companies.htm](http://www.oecd.org/corporate/Owners-of-the-Worlds-Listed-Companies.htm).

providing more than half of the jobs in the U.S.) Small businesses can also partner to make changes that impact neighborhoods, districts, or even entire cities.

## VI. SMALL BUSINESSES

The Office of Advocacy of the U.S. Small Business Administration (“SBA OA”) defines a small business as one that has fewer than 500 employees.<sup>233</sup> “Small companies have been responsible for all of the net job growth in the U.S. since the onset of the Covid-19 pandemic and account for almost four out of five available job openings”<sup>234</sup> Between 1995 and 2021, small businesses were responsible for “62.7% of net jobs created.”<sup>235</sup> Small businesses make up 99.9% of American businesses and 99.7% of firms with paid employees.<sup>236</sup>

These statistics demonstrate the major impact that small businesses can have. If 99.7% of firms with paid employees are small businesses, and just half of them chose to undertake internal policies that improve working conditions, it could have a significant impact on the American workforce. Small businesses represent a major segment of the economy and the labor market—so it is crucial that they be included in the CSR movement, because their actions will also have an impact on stakeholders.

Implementing a CSR strategy can be a good business decision. For example, a 2021 Deloitte survey of more than 22,000 Millennial and Gen Z respondents found that 44% of Millennials and 49% of Gen Z surveyed chose the type of work or organization they would work

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<sup>233</sup> U.S. Small Business Administration Office of Advocacy, “Frequently Asked Questions about Small Business 2023.”

<sup>234</sup> Rabouin, “Small Businesses Keep Hiring as Fed Raises Rates to Cool Economy,” WSJ, January 25, 2023.

<sup>235</sup> U.S. Small Business Administration Office of Advocacy, “Frequently Asked Questions about Small Business 2023.”

<sup>236</sup> Ibid.

for based on personal ethics.<sup>237</sup> Deloitte’s 2023 survey found that 29% of Millennials and 32% of Gen Z respondents were very satisfied with employer’s diversity equity and inclusion (“DEI”) efforts.<sup>238</sup> From these two data points it is possible to extrapolate that a workplace that aligns with a worker’s personal ethics and has a robust DEI campaign will be more like to recruit new talent than a business that does neither.

In addition to helping a business recruit and retain employees, CSR strategies attract consumers. For example, another survey found that 62% of Gen Z and Millennial consumers prefer sustainable brands, while 73% of Gen Z and 68% of Millennials will pay more for sustainable products.<sup>239</sup> Fifty percent of Millennials and 54% of Gen Z said they would tolerate a more than 10% price increase to buy sustainable products. Consumers now expect businesses to do more than just provide a good or a service. In order to maintain a competitive advantage, businesses must explain what they are doing to be socially responsible.

One of the benefits of implementing a CSR strategy is that the business can make a positive impact in the community. This can be extremely motivating for a business owner that is passionate about serving their community. This may be particularly true for business owners that live in the community they serve. It can also increase consumer loyalty. If the business cares about and supports the community, the community will have an incentive to support the business.

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<sup>237</sup> Deloitte, “A Call for Accountability and Action: The Deloitte Global 2021 Millennial and Gen Z Survey,” (2021), 28, <https://www.deloitte.com/content/dam/assets-shared/legacy/docs/insights/2022/2021-deloitte-global-millennial-survey-report.pdf>.

<sup>238</sup>Deloitte, “2023 Gen Z and Millennial Survey,” (2023), 8, <https://www.deloitte.com/global/en/issues/work/content/genzmillennialsurvey.html>.

<sup>239</sup> First Insight, “The State of Consumer Spending: Gen Z Shoppers Demand Sustainable Retail” (2020) 4, <https://160569.fs1.hubspotusercontent-na1.net/hubfs/160569/1.14.2020%20The%20State%20of%20Consumer%20Spending%20Gen%20Z%20Shoppers%20Demand%20Sustainable%20Retail.pdf>.

Many small businesses that struggled during the beginning of 2020 because of COVID-19 restrictions were supported by their local communities, in part because of their commitments to community service. Another benefit of implementing a CSR strategy is that the business owner can align the business with the owner’s personal values. Consider Justin King who opened Ben & Esther’s as a traditional deli in Portland, despite being a vegan. In an interview, explaining why he served animal products, King said that when he opened the restaurant he was, “very business-minded.” However, after a year, King, “couldn’t reconcile [serving animal products] with my principles” and transitioned into a vegan deli.<sup>240</sup> The vegan deli was a success and is now expanding to Seattle and San Diego.<sup>241</sup> Despite his concern, King discovered that authentic value-driven small businesses can provide a social benefit while remaining lucrative.

Another benefit of implementing a CSR strategy is that the business can make positive internal changes within their own organization aimed at employee satisfaction. For instance, workplaces can be toxic without breaking the law. For example, workplace bullying is entirely legal if the bullying is not tied to a protected category (race, color, religion, sex, national origin, age, or disability).<sup>242</sup> Examples of actions that are not illegal include: assigning unjustified blame or criticism, setting unrealistic deadlines, micromanaging, and excessive monitoring. Further, even humiliating workers, and shouting or swearing at workers may not break the law. Workers

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<sup>240</sup> Brooke Jackson-Glidden, “Portland’s Own Ben & Esther’s wants to make Vegan Jewish Delis ubiquitous,” *PDX Eater*, September 17, 2021, <https://pdx.eater.com/2021/9/17/22679864/ben-and-esthers-jewish-deli-vegan-vegetarian-alberta-san-diego>.

<sup>241</sup> Michael Russell, “Portland’s vegan Jewish Deli expands to Seattle, San Diego; closing original Location,” *Oregonian*, April 18, 2023.

<sup>242</sup> U.S. EEOC, “Who is protected from Employment Discrimination,” [https://www.eeoc.gov/employers/small-business/3-who-protected-employment-discrimination#:~:text=Applicants%2C%20employees%20and%20former%20employees,\(including%20family%20medical%20history\)](https://www.eeoc.gov/employers/small-business/3-who-protected-employment-discrimination#:~:text=Applicants%2C%20employees%20and%20former%20employees,(including%20family%20medical%20history)).

have very little recourse to address these actions if they are not tied to a protected category. They can attempt to confront the bully, which may work, but could also make the situation worse.

Another option is for the worker to complain to HR if the organization has an HR department (many small businesses may not.) However, HR is not a neutral advocate for good working conditions, it is a department designed to quash the threat of litigation. Because bullying is not illegal, HR may have no policies or procedures for stopping it. Exposure to workplace bullying is not just uncomfortable it is “detrimental for health.”<sup>243</sup> When a target attempts to stop the bullying, instead of the situation improving, the target is likely to encounter additional structural roadblocks that make any option other than leaving untenable. In a positive work environment, employees feel heard and appreciated, are able to sense the company and their supervisors are genuine, are treated like valued members of a team, and are motivated and incentivized to do a good job. Workplace bullying makes employees want to leave. Although not required by law, eliminating workplace bullying can be crucial to the long-term success of a business.

Small businesses do not have to settle for workplaces that are merely decent. Instead, they can strive to foster positive work environments. One low-cost way for small businesses to demonstrate that their employees are appreciated and valued is to implement a gratitude practice. Research shows that people who express gratitude are perceived as warmer, more competent, and more caring about others.<sup>244</sup> In addition, people who are thanked do more work for the person

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<sup>243</sup> Løvvik, Camilla et al. “Associations between workplace bullying and later benefit reciprocity among workers with common mental disorders,” *International archives of occupational and environmental health* vol. 95,4 (2022): 791-798, 791.

<sup>244</sup> Sara Algoe, “Why It’s Important to Show Gratitude at Work--and What’s the Best Way to Do It,” *Wall Street Journal*, April 16, 2023, <https://www.wsj.com/articles/show-gratitude-work-aaf8f20c>.

who thanked them.<sup>245</sup> To be most effective, the acknowledgment should focus on what the other person did, which will make the person feel most valued.<sup>246</sup>

One of the major challenges that a small business is likely to face when attempting to implement any CSR strategy is the significant cost involved. Many CSR strategies cost time, money, or both. While a major corporation can afford to hire a consulting firm to conduct a CSR audit, develop a tailored CSR strategy, help implement the strategy, and create an accompanying marketing campaign, a small business is not likely to have the same resources and may find that approach cost prohibitive. Currently, interest rates for small business loans are up 3.42 percentage points from a year earlier and banks are increasingly reluctant to grant small businesses loans.<sup>247</sup> Therefore, businesses need viable CSR strategies that are cost-efficient and that can be implemented without a business loan. This means small businesses will need to use their own playbook instead of attempting to copy the strategies of major corporations. Small businesses need strategies that are quick, simple, and effective. One excellent option for small businesses is to incorporate conflict and dispute resolution strategies.

## **CONFLICT AND DISPUTE RESOLUTION**

One of the foundational principles to the conflict resolution field is that litigation is not always the most appropriate solution to resolve a conflict. In fact, litigation can carry high costs in reputation damage and litigation fees. Alternative dispute resolution (abbreviated often as

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<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

<sup>247</sup> Ruth Simon, "Banks Raise Roadblocks to Small-Business Loans," *Wall Street Journal*, n.d., <https://www.wsj.com/articles/new-borrowing-hurdles-leave-small-businesses-in-limbo-89cf1ea3>.

ADR) developed as new way for litigants to solve their conflict. Formal ADR options include arbitration and mediation.

A typical corporate arbitration can offer advantages to a company. First, arbitration is not subject to records request laws. Arbitration hearings and decisions do not become public record. Second, a common corporate arbitration process is to create a panel of arbitrators. Unlike typical litigation, where parties are unable to select the particular judge that will hear the case, or the specific judges that will sit on an appeal panel, forming an arbitration panel is a collaborative process. Each side will select one arbitrator, with the two selected arbitrators partnering to select the third arbitrator. This gives participants more procedural agency than they would have in the standard litigation process, which can result in greater satisfaction, making the participants less likely to pursue additional formal avenues. It is for these reasons that as ADR began to develop, the meaning behind the acronym transformed from “alternative” to “appropriate.”<sup>248</sup>

The field of conflict and dispute resolution looks outside the traditional litigation framework to find solutions to problems before they become lawsuits. This is done by recognizing different stages of conflict, including what Musheno calls, brewing “trouble,” situations that *could* develop into violence (including physical altercations) without a conflict resolution process, but that could also be resolved with an appropriate conflict resolution process.<sup>249</sup> Bullying and microaggressions can create very tense work environments for targets.

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<sup>248</sup> For example, the Oregon Department of Justice ADR website reads, “Appropriate Dispute Resolution (ADR),” available at: <https://www.doj.state.or.us/oregon-department-of-justice/client-resources/appropriate-dispute-resolution/>.

<sup>249</sup> Calvin Morrill and Michael C. Musheno, *Navigating Conflict: How Youth Handle Trouble in a High-Poverty School*, The Chicago Series in Law and Society (Chicago ; London: The University of Chicago Press, 2018), 57.

An appropriate dispute resolution approach could help resolve the conflict and repair the harm caused. This can create a more satisfying resolution for everyone involved.

Corporations can spend millions of dollars on litigation fees. For example, a 2010 survey of 40 Fortune 200 Companies, found that the average outside litigation cost was \$115 million in 2008, a 73% increase from eight years before.<sup>250</sup> This amount does not account for the reputational harm a corporation can suffer in response to litigation. For example, *Kiobel* was covered internationally, both while the original Supreme Court case was pending and years later when the case was filed in The Hague.<sup>251</sup> A high profile human rights case is likely to damage the reputation of any company. The damage is likely worse for a company like Royal Dutch Petroleum that in 1996 publicly supported the Universal Declaration of Human Rights before facing multiple lawsuits for allegedly supporting human rights violations.<sup>252</sup> The adage “an ounce of prevention is worth a pound of cure” is very true in the corporate world. Litigation is expensive. For small businesses, the cost can be even higher, in part because the cost of defending against a baseless claim, particularly for a small business that does not have litigation insurance, can be devastating. In addition, litigation can be high profile and cause significant damage to the business’s reputation. ADR provides an alternative to litigation *and* it also provides a potential resolution to many problems that can lead to litigation. For example,

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<sup>250</sup> U.S. Courts, “Litigation Cost Survey of Major Companies,” 2, presented at the 2010 Conference on Civil Litigation, available at: [https://www.uscourts.gov/sites/default/files/litigation\\_cost\\_survey\\_of\\_major\\_companies\\_0.pdf](https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf).

<sup>251</sup> France: <https://www.france24.com/en/20170629-nigerian-widows-seek-sue-shell-dutch-courts;> Germany: <https://www.dw.com/en/nigeria-ogoni-9-activists-remembered-25-years-on/a-55547897>; UK: <https://www.theguardian.com/law/2012/feb/27/supreme-court-kiobel-human-rights>.

<sup>252</sup> Letter from Shell’s VP for External Relations, Policy, and Social Responsibility Robin Aram to the UN High Commissioner for Human Rights (24 Sep 2004), 2, <https://www2.ohchr.org/english/issues/globalization/business/docs/shell.pdf>; *Wiwa et al v. Royal Dutch Petroleum et al*.

workplace conflicts can result in a number of problems for a business. Conflict is a natural and inherent element of human interactions, but without appropriate strategies to navigate conflict, a small business can become enmeshed in the time-consuming side-effects of not having appropriate strategies (which could include employee burnout, high turnover, lack of employee engagement, and dissatisfied customers.)

For small businesses, conflict and dispute resolution takes on its own dimension and can be a practical tool to deal with workplace conflict. In addition to thinking of ADR as an alternative to litigation, conflict and dispute resolution strategies can be specifically designed to support a business in its daily operations. These systems can create and maintain a team that works well together. Not having a toxic workplace should be a floor, not a ceiling. Thus, small businesses should strive to create positive work environments. Another useful strategy is public acknowledgement—thanking an employee at a staff meeting can show the entire team that you will notice, appreciate, and be grateful for their hard work. Businesses should be cautious when implementing a gratitude practice. Authenticity is crucial, so forcing everyone on the team to say something they are grateful for could actually backfire. Instead, small business owners should lead by example, without requiring employees to emulate their gratitude.

Because bullying has such a negative impact on the target, and because workplaces often lack effective anti-bullying policies and procedures, a worker's best option will be to quit, and to not disclose that bullying was the reason for the departure. This means that a business with a bullying problem could have little to no indication of the problem—targets have no incentive to report bullying and bullies have an incentive not to report against themselves. One solution that small businesses could implement is to have a workplace anti-bullying policy. Having such a

policy could expose a business to increased liability if it is not drafted correctly, so a small business that wants to implement an anti-bullying provision should do so with the help of an appropriate expert.

State and federal laws prohibit workplace discrimination based on a protected class, however microaggressions may not be prohibited by state or federal laws. Microaggressions are, “derogatory slights or insults directed at a target person or persons who are members of an oppressed group.”<sup>253</sup> Despite their name, microaggressions, “take heavy psychological and physical toll on targets.”<sup>254</sup> Workplace microaggressions can cause workers to experience depression and isolation, leading to increased absenteeism.<sup>255</sup> They can also lead to turnover.<sup>256</sup> Without an internal policy prohibiting these behaviors, an employee may have no recourse other than to quit. However, businesses can take action to address and prevent microaggressions in the workplace. For example, a small business could work with a facilitator to provide microaggression training to all employees. As with any new skill, it can take practice to become more successful, particularly if the concept of microaggression is completely new to the employees. In this case, there is likely to be a period of time where employees are aware of microaggressions and able to recognize them in other’s actions (but may lack the same awareness for their own actions). This could generate significant conflict. However, if the team

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<sup>253</sup> Torino, G.C., Rivera, D.P., Capodilupo, C.M., Nadal, K.L. and Sue, D.W. “Everything You Wanted to Know About Microaggressions but Didn’t Get a Chance to Ask,” in *Microaggression Theory* (eds. G.C. Torino, D.P. Rivera, C.M. Capodilupo, K.L. Nadal and D.W. Sue), 3 (2018). For examples of micro aggression see UCSC, “Tool: Recognizing Microaggressions and the Messages they Send,” available at: [https://academicaffairs.ucsc.edu/events/documents/Microaggressions\\_Examples\\_Arial\\_2014\\_11\\_12.pdf](https://academicaffairs.ucsc.edu/events/documents/Microaggressions_Examples_Arial_2014_11_12.pdf).

<sup>254</sup> Ibid., 9.

<sup>255</sup> Ibid., 12.

<sup>256</sup> Ibid.

also had some basic conflict resolution training, or a discussion with a trained facilitator, they could work through the conflict in a productive way and find that their work bonds are strengthened by the process.

In addition to conflict and dispute resolution, the UN's Sustainable Development Goals also offer a powerful tool for small businesses. In 2015, the 2030 Agenda for Sustainable Development was adopted by all UN Member States.<sup>257</sup> The preamble for the 2030 Agenda lays out an ambitious 17 sustainable development goals with 169 associated targets.<sup>258</sup> The goals form the foundation for B Lab's certification requirements and have influenced B Lab's model benefit company legislation. Although the UN SDGs fall under the umbrella of CSR, they are not an exhaustive list of action items for businesses. Instead, they are merely another option that businesses can consider when developing a CSR strategy.

The 17 sustainable development goals are:

- (1) end poverty in all its forms everywhere;
- (2) end hunger, achieve food security and improved nutrition and promote sustainable agriculture;
- (3) ensure healthy lives and promote well-being at all ages;
- (4) ensure inclusive and equitable quality education and promote lifelong learning opportunities for all;
- (5) achieve gender equality and empower all women and girls;
- (6) ensure availability and sustainable management of water and sanitation for all;

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<sup>257</sup> UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, (21 Oct. 2015), A/RES/70/1.

<sup>258</sup> *Ibid.* 1.

- (7) ensure access to affordable, reliable, and sustainable modern energy for all;
- (8) promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all;
- (9) Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation;
- (10) Reduce inequality within and among countries;
- (11) Make cities and human settlements inclusive, safe, resilient and sustainable;
- (12) Ensure sustainable consumption and production patterns;
- (13) Take urgent action to combat climate change and its impacts;
- (14) Conserve and sustainably use the oceans, seas and marine resources for sustainable development;
- (15) Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss;
- (16) Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels; and
- (17) Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development.<sup>259</sup>

The UN categorizes the Sustainable Development Goals (“SDGs”) into five “areas of critical importance”: people, planet, prosperity, peace, and partnership.”<sup>260</sup> The people category

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<sup>259</sup> Ibid. 14.

<sup>260</sup> Ibid. 2.

focuses on eliminating poverty, hunger, and inequality.<sup>261</sup> The planet category focuses on protecting the environment through sustainable consumption and production, and includes taking “urgent action on climate change.”<sup>262</sup> The prosperity category focuses on ensuring that all human beings can, “enjoy prosperous and fulfilling lives,”<sup>263</sup> The peace category focuses on creating, “peaceful, just and inclusive societies which are free from fear and violence.”<sup>264</sup> Lastly, the partnership category focuses on activating the participation of all countries, all stakeholders, and all people to accomplish the SDGs.<sup>265</sup>

Businesses were quick to respond to the release of the SDGs. A PwC engagement survey conducted during June and July 2015 found that 91% of businesses were aware of the SDGs with 71% of businesses already planning their responses to the SDGs.<sup>266</sup> Citizens were also motivated by the SDGs with 78% responding that they were more likely to buy goods and services from companies that had signed up to the SDGs. One benefit of the SDGs is that they are a unified and standardized list generated by a reputable organization. Another benefit is that unlike other standards that a company might choose to use (e.g. USDA organic certification), a commitment to the SDGs does not require completing a costly certification process, making it an accessible option for many budgets. One affordable way for small businesses to implement the SDGs is by using a free assessment.

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<sup>261</sup> Ibid.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

<sup>264</sup> Ibid.

<sup>265</sup> Ibid.

<sup>266</sup> PwC, “Make it your Business: Engaging with the Sustainable Development Goals,” (2015), 8, [https://www.pwc.com/gx/en/sustainability/SDG/SDG%20Research\\_FINAL.pdf](https://www.pwc.com/gx/en/sustainability/SDG/SDG%20Research_FINAL.pdf).

For instance, B Lab uses the UN SDGs as part of its guiding principles for businesses. Arguably, partnering with the United Nations gives B Lab’s certification more credibility. The partnership also helps B Lab to reach a wider international audience. For example, B Lab partnered with UN Global Compact to create an online self-assessment tool that is available at no cost to any business.<sup>267</sup> According to B Lab this tool allows businesses to: learn which SDGs are most relevant to their business, analyze potential positive impacts and risks as they relate to SDGs, visualize progress towards goals, and use a benchmarking feature to compare against other businesses in the same industry.<sup>268</sup> According to B Lab more than 18,000 companies have used the SDG Action Manager.<sup>269</sup>

Skeptics may worry that businesses will selectively choose which of the 17 SDGs to prioritize, and overlook those that could be most beneficial if they also happen to be the most costly. There are a number of solutions to this. First, businesses could commit to all 17 SDGs, however that may not be practical for a small business. In that case, a better option might be to use the SDG Action Manager which automatically selects the most relevant SDGs for a business based on its industry. This selection may be perceived as more ethical when explained to consumers. However, an important consideration is what consumers value the most. For example, if the business invests heavily in the SDG where it can have the most impact, but neglects the SDGs that are most meaningful to consumers, that could result in consumers undervaluing the actions the business takes. For example, a PwC survey found that the top five

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<sup>267</sup> B Lab, “SDG Action Manager: Helping all Businesses take action for the Sustainable Development Goal,” <https://www.bcorporation.net/en-us/programs-and-tools/sdg-action-manager/>.

<sup>268</sup> Ibid.

<sup>269</sup> Ibid.

SDGs ranked for citizens were: (1) zero hunger; (2) climate action; (3) quality education; (4) no poverty; and (5) clean water and sanitation, while the top five SDGs ranked for business were: (1) decent work and economic growth; (2) industry innovation and infrastructure; (3) affordable clean energy; (4) climate action; and (5) responsible consumption and production.<sup>270</sup> The only SDG with business and citizen overlap was climate action. Regardless of which SDGs a business decides to address first, publicly expressing the intention to support all of the SDGs can be an important first step. History shows that expressing such an intention can lead to meaningful changes.

For example the 1948 United Nations Universal Declaration of Human Rights (UDHR) was not enforceable and skeptics claimed it was a meaningless statement of political aspirations, but it was the catalyst for a collection of treaties that are now the basis for international human rights law.<sup>271</sup> Similarly, the UN SDGs do not contain any enforcement mechanism, and could be categorized as “merely” a statement of political aspiration, however international and domestic regulations could change in response to the SDGs, and businesses who adopt them sooner will be

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<sup>270</sup> Ibid.

<sup>271</sup> For example, the UDHR and the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR) are often referred to as the International Bill of Rights. Christine Chinkin, “Sources” 78 in *International Human Rights Law*, ed. Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (2014): Oxford University Press. The International Bill of Rights led to the International Convention on the Elimination of All Forms of Racial Discriminations (1965) (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW); the Convention against Torture and Other Cruel Inhuman or Degrading Treatment (1984) (UNCAT), the International Convention on the Rights of the Child (1989) (CRC) the International Convention on the protection of the rights of All Migrant Workers and Members of their Families (1990); the Convention on the Rights of Persons with Disabilities (2006) (CRPD); and the International Convention for the Protection of All Persons from Enforced Disappearance (2006).

at an advantage if related regulations do come into force.<sup>272</sup> In addition, as more companies embrace the SDGs, a company that chooses not to will be at a disadvantage as consumers prefer to support businesses that have committed to the SDGs over those that have not.

Small businesses will need to carefully consider how best to implement the SDGs and many strategies that are viable for a major corporation are impractical for a small business. For example, while large corporations can afford to hire a management consulting firm to conduct a thorough CSR audit and to develop a strategic plan, a small business likely will not have the resources for that approach. Instead, a small business could use the free SDG Action Manager. An even simpler approach for a small business would be to take an inventory of the actions the business regularly takes, and to see if any have a positive impact that relates to any SDGs. Many small businesses may be surprised at how much they are already implementing the SDGs without having made a plan to do so.

When it comes to accomplishing the SDGs, small businesses have an advantage over major corporations: community. Small business owners often live in the communities they serve, this can be emphasized to demonstrate the authenticity of a business's commitment to implementing socially beneficial practices. Small businesses may also be more attuned to the particular needs of their communities. For example, a small business near a low-performing

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<sup>272</sup> For example, NASDAQ's Board Diversity Rule requires companies listed on the Nasdaq's U.S. exchange to publicly disclose board-level diversity statistics annually using a standardized template and have or explain why they do not have diverse directors. Nasdaq, "Nasdaq's Board Diversity Rule: What Companies Should know," February 28, 2023, <https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf>. In addition, the U.S. Securities and Exchange Commission (SEC) has proposed a new rule to enhance and standardize climate-related disclosures for investors that would require registrants to include climate-related disclosures in their registration statements. March 21, 2022, <https://www.sec.gov/news/press-release/2022-46>.

high-needs school might recognize the need to give students additional support.<sup>273</sup> As a result, this business could choose to reward academic performance. In addition to benefiting the community, this would support SDG 4 (quality education). In addition, if one small business decides to adopt CSR principles and to educate its consumers about these changes, consumers in that area are likely to look for CSR principles in other business—meaning that one small business can have a significant impact within a local community. In addition, building coalitions with other small businesses or community organizations, to commit to just one of the SDGs will also promote another SDG 17 (partnership), meaning that small businesses can quickly support two SDGs. It would also support SDG 8 (decent work and economic growth). If those same businesses committed to supporting just one SDG in addition to improving working conditions, that SDG would have significant support. The SDGs were designed with a goal of accomplishing them all by 2030. Without broad support at the local, small business level, these goals will not be realized.<sup>274</sup> Small businesses are crucial to accomplishing the SDGs. Because so many of the SDGs are interconnected, small businesses can quickly and simply implement multiple SDGs simultaneously. However, it is very important to keep in mind that a commitment to the SDGs is not legally binding, so if a company would like to demonstrate a stronger commitment it could consider changing its legal form.

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<sup>273</sup> 20 USC §6631(b)(2) The term “high-need school” means a public elementary school or secondary school that is located in an area in which the percentage of students from families with incomes below the poverty line is 30 percent or more. Low-performing is defined at the state level, and is determined by the ranking of the school’s standardized testing results compared to other schools within the state. It may also consider absenteeism and attrition rates.

<sup>274</sup> Teodorina Lessidrenksa, “SMEs and SDGs: Challenges and Opportunities,” *OECD Development Matters*, April 23, 2019, <https://oecd-development-matters.org/2019/04/23/smes-and-sdgs-challenges-and-opportunities/>.

When deciding whether to take a new legal form or simply to work with a third-party certifier, there are a number of things a small business will need to consider. The Small Business Administration reports that 74.7% of small employer businesses choose to form as a corporation.<sup>275</sup> A Delaware incorporated small business that wanted to take the next step could amend its status and become a public benefit corporation. An Oregon incorporated small business that wanted to take the next step could amend its status and become a benefit corporation. The requirements in these two states are very different. Delaware requires benefit reporting once every two years, while Oregon requires benefit reporting annually. In addition, the Oregon report must be made publicly available, while the Delaware report only needs to be sent to shareholders. Another key distinction is that Oregon law requires a benefit corporation to receive third party certification, while Delaware has no such requirement. Obtaining third-party certification can be an expensive and time consuming process. However, considering how much Millennial and Gen Z employees and consumers value socially responsible businesses, it could be well worth the cost.

The process for becoming a benefit corporation will be determined by the state where the business is incorporated. In Delaware, benefit corporations are not required to obtain third-party certification, instead the corporation self-generates benefit reports once every two years and provides them to shareholders (they do not need to be made publicly available.) In other states, the requirements can be more complex. For example, Oregon law requires third-party certification (the company can choose any certifier) and annual benefit reports that are made

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<sup>275</sup> 52.4% used the S-Corporation structure while 22.3% used a C-Corporation or other corporate structure. US SBA OA, "Frequently Asked Questions March 2023."

publicly available. Becoming a benefit corporation will require filing paperwork with the secretary of state and drafting updated articles of incorporation (e.g. to include the new benefit purpose.) Although the process does not require an attorney, business owners may feel more comfortable working with a lawyer to make these changes. Using an attorney will significantly increase the cost.

Another option is for a business to obtain third-party certification. This thesis looks at two different third-party certification options. B Lab, which is a global provider, and Benefit Corporations For Good, which provides domestic certification, almost exclusively to Oregon-based companies. Every third-party organization has its own certification criteria. For example, B Lab requires a business impact assessment (“BIA”) with a qualifying score. There are consultancies that can guide businesses through the application process, or the business can complete the BIA without external support. Once the business has a qualifying score, it will need to pay B Lab a one time review fee that ranges from \$150-\$900 and the annual certification fee, which begins at \$2,000 per year. B Lab’s pricing model is variable and increases as a company’s revenues increase. BCFG uses a pricing model based on the number of employees a business has. Certification costs \$299-\$795 with a flat \$199 renewal fee.

To reap the benefits of third-party certification, the business needs to explain the certification to its consumers. For a well-known certification like Fair Trade or Leaping Bunny, consumers who value fair trade goods or products that are animal cruelty free, will seek out products with the certification, and will choose products with the certification over products without certification. B Lab has established itself as the major third-party certification provider for benefit corporations. B Corp certification has international brand recognition. Because B Lab

has undertaken a major campaign to educate consumers—a business that becomes a certified B Corp will need to invest less time explaining the certification to its consumers. In fact, B Corp is arguably recognizable enough that some consumers require no explanation. Other third-party certification may require more effort on the part of the business to explain the certification to consumers.

For example, BCFG does not have global brand recognition. However, it has created a niche in the Oregon business community. It is a local organization that certifies local businesses. Like B Lab, BCFG has lobbied for benefit corporations, but has done so only in Oregon. Going beyond the legal recognition that B Lab sought, BCFG hopes to gain a competitive advantage for benefit companies in the state. House Bill 3572 A, if passed, would give benefit companies preference when they bid on state contracts through the office of procurement.<sup>276</sup> The bill has passed the House and Senate Committee and is awaiting a floor vote in the Senate. A local brand that emphasizes its connections to the community might be better served by regional certification. However, if the business wants to expand beyond the region, B Corp certification might be a better option. When deciding whether or not to obtain third party certification, it is important to consider the impact having and then choosing to give up that certification will have on a business's brand. For example, could it be harmful for a business to be a certified B Corp for one year and not the next? The answer may be yes, even if nothing else changes about the business' practices. Consumers are likely to wonder why the corporation "lost" its B Corp status, even if the company voluntarily chose not to renew it. This speculation could harm the company.

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<sup>276</sup> Oregon State Legislature, "2023 Regular Session, HB 3572 A," available at: <https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/HB3572>.

Therefore, small businesses should carefully consider whether they want to obtain third-party certification and what the long-term requirements for maintaining certification will be.

For some businesses, restructuring as a benefit corporation and seeking third-party certification is a poor business decision. The benefit corporation status provides no fiscal benefit and imposes additional reporting requirements, as well as annual certification fees. A better option may be to emphasize consumer education, meaning the business explicitly explains the various ways that it is socially responsible.

This can be done by increasing transparency. For example, a food truck can explain where it sources its ingredients, which could range from a vague “locally sourced ingredients” to a more specific listing that names the farm that sources its produce. Businesses could also share information about how their employees are compensated. This could also be vague, “employees receive a living wage.” Or, it could be more specific and state the hourly wage. Wage and supply chain transparency can help a business recruit high quality talent and help consumers understand the prices the business charges.

The business can also do its own sustainability reporting and advertise it. The best way to do this type of reporting will be determined by the environmental impact of the particular business. For example a laundromat that updates its facilities to have the most efficient machines available could advertise how much less water its facility uses compared to a traditional laundromat or old residential machine. A restaurant that participates in a biodiesel program for its cooking oil could advertise the impact of this business decision.

Community service is something that many small business owners may value and engage in, but fail to track. For example, if a restaurant donates leftovers to a food pantry, this could be

explained to consumers as a twofold benefit: first, it reduces food waste which helps reduce the carbon footprint of the business, second it helps reduce hunger, which is a positive social impact. If business owners informally volunteer their time, for example to talk to another small business owner who asked for advice, they should track it. This is volunteer time, and could add up to a significant contribution to the community (both the impact of supporting other local businesses and the monetary value of an in-kind contribution).

Simply communicating the good work that a small business does can help consumers understand the value of the business and strengthen the reputation of the business as value-driven. The process of evaluating how a business is socially responsible can help small business owners have a more accurate understanding of what the business currently does, and allow them to consider other socially responsible actions they might want to take.

Given the variety of tools available, small business owners should consider their own priorities when determining what approach to CSR would be most helpful. Completing an assessment is likely to feel like filing taxes. If a business owner prefers the ease of hiring someone else to prepare the business's taxes, they are likely to prefer hiring a consultant. If the business owner prefers filing the business' taxes themselves, they may prefer to select and complete the assessment on their own.

There are many free resources available that small businesses could use. For example, the B Lab UN Global Compact SDG Action Manager or the Environmental Protection Agency's Center for Corporate Climate Leadership.<sup>277</sup> However, both of these resources can be time-

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<sup>277</sup> B Lab, "SDG Action Manager," <https://www.bcorporation.net/en-us/programs-and-tools/sdg-action-manager/>; U.S. EPA, "Center for Corporate Climate Leadership," <https://www.epa.gov/climateleadership/#:~:text=EPA's%20Center%20for%20Corporate%20Climate,of%20GHG%20measurement%20and%20management>.

consuming to use. A small business owner is not likely to have enough time to use either of these resources without some guidance. For example the SDG Action Manager has approximately 20 questions per SDG that the business owner will need to answer in order to receive recommendations. Responding for just 5 SDGs (a commonly recommended amount within the Action Manager) could require answering more than 100 questions, many of which could require sorting through utility bills, payroll, or other accounting documents to answer. The EPA's simplified greenhouse gas (GHG) emissions calculator, although free, is only supported in Excel, meaning that it might be difficult to use without a Microsoft 365 account (which is not free.) Another guide in the EPA's Center for Corporate Climate Leadership, the GHG Inventory Development Process and Guidance, while only consisting of four steps, repeatedly refers to an eleven chapter document on GHG Protocols that users would need to read in order to implement the four steps.<sup>278</sup>

These tools can be excellent resources for small businesses that can afford to hire a consultant who is able to quickly select the best resource and to help the business owner prepare to complete an assessment. These tools can also be appropriate for a business owner who is able to invest significant time into selecting and completing an assessment and then implementing the recommendations the program generates. If the business owner has a background in business or environmental studies this might be a reasonable project. However, if the business owner is working 14+ hour days and does not have any experience working with this kind of data, it could be an unrealistic goal. However, other CSR approaches, such as microaggression training, or

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<sup>278</sup> US EPA, "GHG Inventory Development Process and Guidance," December 6, 2022 <https://www.epa.gov/climateleadership/ghg-inventory-development-process-and-guidance>.

conflict coaching could be more realistic as they require less time, can be less expensive, and can generate results fairly quickly.

## VII. CONCLUSION

Although major transnational corporations are often the target of CSR initiatives, small businesses can benefit from many of the principles of CSR. If enough local businesses adopt a CSR approach, that critical mass can generate substantial influence that extends throughout the community. This can have a cumulative effect with more businesses partnering to work together and to create positive internal and external outcomes for their companies.

If a small business considers CSR exclusively within the realm of major corporations, it will be impossible to envision how small businesses can apply CSR principles. However, as this thesis has shown, there are many ways that CSR principles can be scaled and adapted to the needs of a small business. There are many changes small businesses can implement at a low cost.

Low-cost internal CSR strategies that small business can employ include: prohibiting workplace bullying, educating their workforce on microaggressions, and developing a culture of appreciation that seeks to make employees valued members of a team. Small businesses that have both a healthy business culture and a responsible business model can expect consumers and potential employees to be drawn to the business. For example, respecting an employee's pronouns acknowledges that individual's dignity. Reducing microaggressions in the workplace will make the workers who were targets of microaggressions healthier, happier, and more productive. It can also allow the small business to recruit and retain a diverse team. Creating a workplace that is respectful does not have to be costly or difficult, but it can be transformative.

Low-cost external CSR strategies that small businesses can employ include: educating consumers about CSR issues, explaining how the business is socially responsible and why it matters, and promoting local nonprofits on the business' social media. Small businesses drive the

economy, and can empower not only business owners, but also the communities they serve to accomplish significant social good. Small businesses can form coalitions to petition the government for changes that will benefit their businesses and the communities they serve. For example, in Oregon, Benefit Corporations for Good has been lobbying for benefit corporations to receive preferential treatment when bidding for state contracts. If the proposed law passes, benefit companies will have a competitive advantage, this will incentivize more companies to form or restructure as benefit companies, which could lead to more benefit companies providing more benefits for the public.

A key challenge is ensuring that a small business maintains its authenticity. In the short-term, a small business could choose to adopt performative CSR changes and find some success. However, as the small business' reputation as an inauthentic company becomes more well-known, the company could face severe backlash. Therefore, to ensure long-term success, a business needs to adopt a CSR model that it will actually be able to implement and that truly aligns with the owners' values. That is why it is so important for a small business to create their own playbook by drafting and implementing their own mission statement. A mission statement that clearly outlines what public benefit the company offers, the steps it takes to promote that benefit, and the way its performance is measured can keep the business focused, earn consumers' trust, and strengthen a business' reputation as authentic, accountable, and reliable.

For example, while denouncing racism in response to the murder of George Floyd, as many companies did in 2020, was an important first step, a CSR approach supported by a value driven mission statement can produce more tangible social good. Although numerous organizations publicly condemned the murder of Mr. Floyd *and* claimed to be doing more to

support racial equity in response they did so without a structured CSR plan. Unless a business defines what “doing more” means *and* chooses to make information about those actions publicly available, consumers will not be able to tell if the company is actually doing anything to promote racial equity. If the only step a company takes is claiming to prioritize racial equity, consumers and employees will quickly realize that the company’s statements are hollow. Alternatively, if the company denounces racism and then takes a CSR approach to support equity, consumers and employees will recognize that the business is sincere.

Small businesses really do have the potential to create major positive changes for workers, consumers, and other stakeholders. This can be done by going beyond legal requirements, and even by going beyond the quasi-regulatory requirements of third-party benefit certification companies. Small businesses can leverage their connections to the community and tailor socially responsible practices to address needs that are unique to their communities. By using a precise approach to CSR, with specific public benefits, rather than a broad general socially responsible approach, a small business has the ability to make a more meaningful impact both internally on its employees and externally on the community it serves.

## APPENDIX

The following is a series of questions that can be used to guide a small business owner through the process of beginning to implement scalable CSR principles.

### Question 1.

*Where is your business incorporated and how?*

The state a business is incorporated in will largely determine what its rights and obligations are. How the entity is structured (LLC, BLLC, Corporation, or B Corporation) will specify what these rights and obligations are. Check this on the secretary of state website regardless of whether the business owner knows how the business is structured (with non-lawyer business owners this can be a common area of confusion).

### Question 2.

*Does your company have a mission statement?*

If not, ask the owner to think about two questions, (1) “other than making money, why did you start this business?” and (2) “what do you hope to accomplish with your business?”

You may want to have the business owner send you a rough draft answer before you meet (consider offering to let them send you a voice note, or some other non-written response, in case they prefer to speak rather than write). The goal of this process is to work with the strengths of the business owner, so building as much flexibility into the process as possible can be extremely helpful.

When you meet, your goal is to understand what the company values. Therefore, you may find it helpful to use a strategic sequence of “why” to get to their root values. Before using this strategy, explain it to the business owner, otherwise this line of inquiry can be really frustrating for participants. Frame this as leading them through this line of inquiry to discover what the business values. Explain how this will have significant benefits to the business. One helpful facilitation strategy is writing down their answers somewhere they can see them. Consider using a whiteboard (either a digital white boarding program or a physical one if you meet in person). This can be a helpful way to visualize the progress of the conversation. Keeping questions open-ended will allow you to elicit useful information from the business owner. For example you might get something like this:

*I want to help community (**why?**)—>because my community helped me (**how?**) —>through mentorship and encouragement (**what does that mean?**)—> I finished school and managed to stay out of trouble with the law (**why is that important?**)—>gives you more opportunities in life, empowers you (**how has that impacted your business?**) —>qualified for business loan, able to be own boss and hire members of the community, now I can give back—> (**how would you like to give back?**)*

You want to get to the root values, so that you are able to create or refine the mission statement. Writing the inquiry lets you show how your questions help uncover their values. In this case, the

business owner cares about (generally) helping the community. You have a few ideas of ways that the business owner may want to give back to the community (hiring locally, supporting youth mentorship).

There are a lot of ways that these goals could be accomplished. Running through some options with the business owner will let you get a sense of what does and does not resonate with them. Figure out what the owner likes. Invite them to think of their own ways they might want to accomplish the broad goal of helping the community, then formulate a draft SMART goal for the mission statement.<sup>279</sup>

The company's finished mission statement should involve SMART goals; these are specific, measurable, achievable, relevant, and time-bound.<sup>280</sup> A SMART mission statement will state what the company aims to accomplish, actions the company will take to accomplish those goals, what data will be used to measure the goals, explain how the goals are interrelated and why they are important, and include a time frame for accomplishing the goals. SMART goals will clarify the purpose of the company. This can have the added benefit of simplifying future decisions. For example, knowing the company's values can influence hiring decisions—what makes someone a “good fit” for the company? If the company's values are clearly defined, then when a potential hire demonstrates an alignment with those values, the decision is easy for the business to make. Another benefit of using SMART goals is that a business can quickly convey its accomplishments to consumers.

Sometimes a goal will be very important and meaningful to the business, but difficult to define. For example, what does it mean to stand up for racial equality? What does supporting the LGBTQIA+ community mean? When the company has a very complex goal that can be addressed in a variety of ways, a helpful option is to consider 3-5 examples of the domains where the goal might have an impact, and discuss them at a follow up meeting with the business owner—so that the company can decide which goals are attainable, then work through SMART goal setting for each of the goals the owner wants to pursue.

### **Question 3.**

*What is your plan?*

The business is now ready to make a plan for assessment. When will the company conduct an inventory of its accomplishments? What frequency makes the most sense for tracking the necessary data (monthly, quarterly, yearly?) Who will write the inventory? Where will it be made available? Planning ahead for the types of information that the business will need can make it much easier for the company both to collect the information and to convey it in a meaningful way to consumers.

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<sup>279</sup> Mun Yu Chan, Christian Swann, and James Donnelly, “Are S.M.A.R.T Goals Really Smart? The Psychological Effects of Goal-Setting in a Learning Task,” *Frontiers in Psychology* 9 (2018), <https://doi.org/10.3389/conf.fpsyg.2018.74.00020>.

<sup>280</sup> Ibid.

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