THE SUSTAINABLE CORPORATION AND SHAREHOLDER PROFITS

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ABSTRACT

What is a sustainable corporation and why aren't there more of them? This Article argues that corporate law's conventional focus on shareholder profits stifles sustainability efforts inasmuch as sustainable corporations take a broader view of the firm and its goals. The Article also weighs alternatives for increasing the number of sustainable corporations and encouraging corporations of all stripes to act more sustainably. These alternatives include imposing sustainability on corporations, requiring or encouraging sustainability disclosures, and raising awareness that sustainable business practices fully comport with corporate laws and even typically enhance long-term firm value for all of a corporation's stakeholders.

INTRODUCTION

Sustainable businesses, both corporate and otherwise, seem to be everywhere, trumpeting their bona fides to garner the interest and dollars of consumers and investors. Yet a closer examination of these businesses reveals that their dedication to sustainability is often superficial, driven by and limited to their pursuit of shareholder profits. That is, most mainstream corporations today engage in sustainable business practices only when they appear to create immediate financial benefits for the firm. This Article blames this limitation on corporate law's conventional focus on shareholder profits and suggests that corporations need not so restrict themselves. In making this argument, this Article addresses three related questions: (1) what is a sustainable corporation, (2) why aren't there more of them, and (3) what can be done about it?

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I. WHAT IS A SUSTAINABLE CORPORATION?

Sustainability, according to its first and best-known definition, denotes the ability to meet current needs without impairing the ability to continue to do so in the future.[1] For a society to be sustainable, it

> needs to meet three conditions: its rates of use of renewable resources should not exceed their rates of regeneration; its rates of use of non-renewable resources should not exceed the rate at which sustainable renewable substitutes are developed; and its rates of pollution should not exceed the assimilative capacity of the environment.[2]

The concept of sustainability, originally balancing development with conservation,[3] has since evolved into a broader principle that governments, organizations, and individuals should conduct themselves without impinging on the environment and society, now or in the future.[4]

Applied to the business context, sustainability involves attaining financial goals while simultaneously improving, or at least not worsening, the environment and society in the short or long term.[5] This three-dimensional view of a company's performance has

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1. Rep. of U.N. World Comm'n on Env't & Dev., 14th Sess., *Our Common Future* 43, U.N. Doc. A/43/427 (1987) (defining sustainability, in the context of sustainable development, as "[meeting] the needs of the present without compromising the ability of future generations to meet their own needs"). The document is commonly known as the "Brundtland Report" after Norwegian Prime Minister Gro Harlem Brundtland, who led the commission. *See Brundtland Report: Our Common Future*, SUSTAINABLE CITIES, http://sustainablecities.dk/en/actions/a-paradigm-in-progress/brundtland-report-our-common-future (last visited Aug. 28, 2011).

2. JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS 55–56 (1998) (paraphrasing economist Herman Daly of the World Bank). Buckminster Fuller expressed a similar sentiment about the earth's finite resources and renewable energy in R. BUCKMINSTER FULLER, OPERATING MANUAL FOR SPACESHIP EARTH 110–12 (1969).

3. Robert W. Kates et al., *What Is Sustainable Development? Goals, Indicators, Values, and Practice*, 47 ENV'T: SCI. & POL'Y FOR SUSTAINABLE DEV. 8, 10 (2005).

4. *See* ELKINGTON, *supra* note 2, at 70–71; *see also* JOHN R. EHRENFELD, SUSTAINABILITY BY DESIGN: A SUBVERSIVE STRATEGY FOR TRANSFORMING OUR CONSUMER CULTURE 6 (2008) (defining sustainability as "the possibility that human and other life will flourish on the planet forever").

5. The terms "green business" and "sustainable business" have much in common. A green business looks to improve the natural environment while at the same time benefit financially. *See, e.g.*, Dennis D. Hirsch, *Green Business and the Importance of Reflexive Law: What Michael Porter Didn't Say*, 62 ADMIN. L. REV. 1063, 1065 (2010) (defining green business as taking "voluntary actions . . . aimed at achieving better environmental performance and, simultaneously, making the company more competitive"). Green business lacks sustainability's "social" component, although people of course benefit from an improved environment.

come to be known as its "triple bottom line": "the traditional bottom line of financial performance (most often expressed in terms of profits, return on investment . . . , or shareholder value)" plus two additional bottom lines reflecting the business's environmental and social performance.[6] One commentator prefers the term "triple top line," taking the more positive view that sustainable businesses should seek to create "financial benefits for the company, natural world benefits, and social benefits for employees and members of the local community."[7] From whichever perspective, sustainability measures these impacts or benefits over the long term. As a result, a sustainable business takes a view of the firm that is both broader and longer than the typical, conventional focus on short-term financial gains.[8]

A sustainable business should therefore pursue financial goals while at the same time treading as lightly as possible on the earth and its natural resources, supporting the business's employees and local communities, and developing products, services, and technologies that contribute to larger societal efforts to live more sustainably.[9] This might entail being more than minimally compliant with environmental regulations, more than minimally generous with employees and communities, or paying more for goods and services that are sustainably harvested or produced.

Such efforts might sacrifice profits, at least in the short run in that money that might otherwise be distributed to shareholders as dividends is reinvested in the company, environmental efforts, or employees and communities. But such expenditures often benefit the firm, financially and otherwise, over the long run; indeed, several studies have shown that—particularly in consumer-oriented industries, but in the business-to-business context as well—sustainable business practices tend to pay for themselves and frequently turn a profit.[10]

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

7. MATTHEW TUETH, FUNDAMENTALS OF SUSTAINABLE BUSINESS 45–46 (2010). Some depict sustainability's financial, environmental, and social goals with a metaphorical three-legged stool, where an imbalance among the three axes would cause the seat to topple. *See* Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 991 n.12 (2009).

8. *See* David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 530–33 (2011) (emphasizing the long view sustainable businesses take).

9. *See id.* at 530 (noting that profit remains an important sustainability goal, in that without it the business would cease to exist).

10. *See generally* Marc Orlitzky et al., *Corporate Social and Financial Performance: A Meta Analysis*, 24 ORG. STUD. 403, 427 (2003) ("[P]ortraying managers' choices with respect to [sustainability and profitability] as an either/or trade-off is not justified in light of 30 years of empirical data."); Joshua

One means of putting these sustainable business concepts into practice is to seek out areas where the firm's financial, environmental, and social goals overlap.[11] For example, reductions in energy consumption and waste save on production, fuel, and disposal costs while also improving environmental impact and, in the case of fuel costs, reducing dependence on foreign oil.[12] Firms can also realize "eco-efficiencies" through better design: by designing (or reconfiguring) production systems and products with

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D. Margolis et al., *Does It Pay to be Good? A Meta-Analysis and Redirection of Research on the Relationship Between Corporate Social and Financial Performance* 21 (July 2007) (unpublished manuscript), *available at* http://stakeholder.bu.edu/Docs/Walsh,%20Jim%20Does%20It%20Pay%20to%20 Be%20Good.pdf. On consumer-oriented industries, see Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 664–65 (2007) (citing studies measuring "a strong positive relationship between CSR ["Corporate Social Responsibility"] behaviors and consumers' reactions to a company's products and services"); Raymond J. Fisman et al., *Corporate Social Responsibility: Doing Well by Doing Good?* (Sept. 2005) (unpublished manuscript), *available at* http://www.kellogg.northwestern.edu/research/fordcenter/conferences/ethics06 /heal.pdf (noting that corporate social responsibility is more positively related to profitability in advertising-intensive, consumer-oriented industries); *see also* ELKINGTON, *supra* note 2, at 110, 119 (relating anecdotes on business-to-business transactions).

11. *See* SAVITZ, *supra* note 6, at 22–27 (terming this area of overlap "the sustainability sweet spot"). Dennis Hirsch's work on green business identifies several areas in which environmental and financial goals overlap:

> (1) directly reducing their own regulated—or unregulated—environmental impacts in ways that will reduce regulatory risk, improve company brand, and allow firms to get out in front of anticipated regulations; (2) reducing their customers' environmental impacts and decreasing their customers' exposure to unhealthy substances; (3) increasing their reuse and recycling of materials used in the production process; (4) improving their energy efficiency or that of their customers; (5) improving their resource productivity or that of their customers; (6) implementing systems to indentify waste reduction, pollution prevention, energy efficiency, or resource productivity opportunities throughout the company or facility; (7) collecting and disseminating more information about the firm's environmental impacts and performance than the law requires; (8) providing more opportunities for stakeholder input into corporate environmental decision making than the law requires; and (9) financing and investing in green products and business models, such as those described above.

Hirsch, *supra* note 5, at 1072.

12. Amory B. Lovins et al., *A Road Map for Natural Capitalism*, 77 HARV. BUS. REV. 145, 146 (1999) (advocating the more productive use of manufacturing inputs); Allison Linn, *Wal-Mart Aims to Cut Energy Use—and Costs*, MSNBC, Apr. 19, 2007, http://www.msnbc.msn.com/id/18075223 (discussing the retailer's fuel-efficiency efforts, which reduced emissions, fuel consumption, and transportation costs by between $35 and $50 million annually).

sustainability in mind, a firm can make better use of manufacturing inputs, use fewer chemicals, create less pollution, make workplaces safer, and benefit financially.[13]

Firms may also use the triple bottom line as an accounting tool. By measuring environmental, social, as well as financial activity over a given period, firms can track and report their performance in each of the triple bottom line areas. In the environmental component, for example, a firm might include its "compliance against [environmental] regulations and other standards; the performance of internal management systems; trends in energy usage, waste production, and recycling; and the use of eco-efficient technologies."[14] And on the social front, a firm might address

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13. William McDonough and Michael Braungart offer an extended example of this involving their design of a better upholstery fabric:

> The team decided on a mixture of safe, pesticide-free plant and animal fibers for the fabric: wool, which provides insulation in winter and summer, and ramie, which wicks moisture away. Together these fibers would make for a strong and comfortable fabric. Then we began working on the most difficult aspect of the design: the finishes, dyes, and other process chemicals. Instead of filtering out mutagens, carcinogens, endocrine disrupters, persistent toxins, and bioaccumulative substances at the end of the process, we would filter them out at the beginning. . . .
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> [W]e eliminated from consideration almost eight thousand chemicals that are commonly used in the textile industry; we also thereby eliminated the need for additives and corrective processes. Not using a given dye, for example, removed the need for additional toxic chemicals and processes to ensure ultraviolet-light stabilization (that is, colorfastness) . . . . What might seem like an expensive and laborious research process turned out to solve multiple problems and to contribute to a higher-quality product that was ultimately more economical.
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> The fabric went into production. The factory director later told us that when regulators came on their rounds and tested the effluent (the water coming out of the factory), they thought their instruments were broken . . . . Not only did our new design process bypass the traditional responses to environmental problems (reduce, reuse, recycle), it also eliminated the need for regulation, something that any businessperson will appreciate as extremely valuable.
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> The process had additional positive side effects. Employees began to use, for recreation and additional workspace, rooms that were previously reserved for hazardous-chemical storage. Regulatory paperwork was eliminated. Workers stopped wearing the gloves and masks that had given them a thin veil of protection against workplace toxins. The mill's products became so successful that it faced a new problem: financial success, just the kind of problem businesses want to have.

WILLIAM MCDONOUGH & MICHAEL BRAUNGART, CRADLE TO CRADLE: REMAKING THE WAY WE MAKE THINGS 107–09 (2002); *see also* Sneirson, *supra* note 7, at 994 (discussing Nike's efforts at "considered design," including the sportswear company's switch from chemical adhesives to stitching in some of its footwear lines).

14. ELKINGTON, *supra* note 2, at 82.

"community relations, product safety, training and education initiatives, sponsorship, charitable donations of money and time, and employment of disadvantaged groups."[15] To the extent that "managers 'manage what they measure,'" such recordkeeping might impel managers to run their firms in a way that maximizes financial, social, and environmental benefits while minimizing related costs.[16]

Firms may incorporate these sustainability principles in their operations to varying degrees. At one end of the spectrum, a firm may have no sustainability ambitions whatsoever and may in fact be out of compliance with applicable labor and environmental laws and regulations.[17] This first type of firm focuses on profits to the exclusion of all other considerations and may even deliberately violate laws in order to maximize profits.[18] A second, slightly more sustainable firm, complies with applicable laws and perhaps engages in generic corporate philanthropy but does little beyond that.[19] Such firms see "no business case" for going beyond compliance or serving stakeholders' interests; by bare compliance (and paying taxes), these firms see themselves as fulfilling their societal obligations.[20]

A third type of firm goes beyond bare compliance with applicable social and environmental laws but does so only where it would be profitable.[21] These profit-driven firms may view sustainability and social responsibility primarily as a public relations matter, for particularly in consumer-focused industries social responsibility attracts customers and social irresponsibility

15. *Id.* at 87–88.

16. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1295 (1999) (arguing for social and environmental disclosures and alluding to Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1355 (1996)).

17. *See* Marcel van Marrewijk & Marco Werre, *Multiple Levels of Corporate Sustainability*, 44 J. OF BUS. ETHICS 107, 112 (2003) (deriving levels of sustainability from Clare Graves's psychology research on value systems and levels of existence and terming this first sustainability level "pre corporate sustainability").

18. On intentional noncompliance to maximize profits, see *infra* note 36 and accompanying text.

19. *See* Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 857 (2008) (terming this category "mere or reactive compliance"); SustainAbility Ltd., *Gearing Up: From Corporate Responsibility to Good Governance and Scalable Solutions* 34–37 (2004) [hereinafter "*Gearing Up*"] (terming this category "compliance"); van Marrewijk & Werre, *supra* note 17, at 112 (terming this category "compliance-driven" corporate sustainability).

20. *See Gearing Up*, *supra* note 19, at 35.

21. *See id.* at 35 (labeling this type of firm a corporate social responsibility "volunteer"); van Marrewijk & Werre, *supra* note 17, at 112 (describing this level as "profit-driven" corporate sustainability).

repels them.[22] Or these companies may simply want to save resources, reduce waste, achieve production efficiencies, and anticipate changing conditions, regulations, and consumer preferences.[23] While these firms may incorporate environmental, ethical, and social considerations at all levels of their operations and decision making, they only act upon these decisions when it would benefit their financial bottom lines.[24]

A fourth type of firm routinely balances economic, social and environmental considerations and does so not in order to comply with applicable laws or to make a profit.[25] Rather, these firms are motivated to "do good" for their various constituencies and for the planet, while still producing returns for their shareholders.[26] These firms also tend to be more pro-active, partnering with government, suppliers, customers, and others in their industry to together innovate sustainable solutions to environmental and other problems.[27]

At the next level, a fifth type of firm integrates sustainability principles into its strategy and business processes, starting with product or service development, such that the way of doing business is "built in, not bolted on."[28] For example, companies at this stage may rethink their design and production processes to reduce waste and utilize improved, sustainable, and even reusable materials, and in some cases eliminate the use of harmful materials altogether.[29]

And at the sixth and highest level, sustainability "is fully

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22. *See supra* note 10; *see also* Jayne W. Barnard, *Corporate Boards and the New Environmentalism*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 291, 291 (2007) (noting a "growing consumer preference for products sold by companies that are good corporate citizens").

23. *See supra* notes 11–13 and accompanying text; *see also* Barnard, *supra* note 22, at 291 (noting that "sophisticated corporate managers" are "[taking] into account the possibility of increased governmental regulation; the increasing risk of a costly response to changing environmental conditions").

24. *See* van Marrewijk & Werre, *supra* note 17, at 112.

25. *See Gearing Up*, *supra* note 19, at 36 (labeling this the "partner" level); van Marrewijk & Werre, *supra* note 17, at 112 (describing this level as "caring" corporate sustainability); Kerr, *supra* note 19, at 857–58 (labeling these firms "pro-active" in corporate social responsibility).

26. *See* van Marrewijk & Werre, *supra* note 17, at 112.

27. *See Gearing Up*, *supra* note 19, at 36; van Marrewijk & Werre, *supra* note 17, at 110; *see, e.g.*, Linn, *supra* note 12 (noting Wal-Mart's efforts to reduce its suppliers' needless packaging).

28. *See Gearing Up*, *supra* note 19, at 36 (labeling this level "integrate"); van Marrewijk & Werre, *supra* note 17, at 112 (describing this level as "synergistic" corporate sustainability); Cynthia A. McEwen & John D. Schmidt, *Leadership and the Corporate Sustainability Challenge*, AVASTONE CONSULTING, 1, 17 (2007), http://www.avastoneconsulting.com/MindsetsInAction.pdf ("What you have to do is build responsibility into every aspect of the way you do business, so it's built in, not bolted on." (quoting a pharmaceutical manufacturer's vice president of corporate responsibility)).

29. *See supra* note 13.

integrated and embedded in every aspect of the organization, which is committed to contributing to the quality and continuation of life of every being and entity, now and into the future."[30] Here, companies also redesign or "reengineer" their business models, finances, and markets to identify and root out any underlying causes inconsistent with sustainability and social responsibility.

Aside from a few outliers, however, most businesses limit themselves to the first three of these levels; that is, most firms engage in sustainable business practices, if at all, only to the extent it returns profits.[31] While this might encompass a great deal of sustainable business behavior,[32] and have an enormous impact,[33] this limitation is unfortunate and unnecessary. As the next part of this Article argues, corporate law's conventional focus on shareholder profits fuels this limitation, stifling corporate efforts toward greater sustainability and perpetuating an overly narrow view of the firm and its purposes.

II. WHY AREN'T THERE MORE SUSTAINABLE BUSINESSES?

Why aren't there more sustainable businesses and why are mainstream businesses seemingly unable to move beyond a profit focus and deepen their commitments to sustainability? The answer to both of these questions lies in the conventional view in law and business that corporations are to be managed for the sole purpose of maximizing shareholder profits.

This attitude—known as "shareholder primacy"—prioritizes shareholder interests above all other considerations and renders

30. Marcel van Marrweijk, *A Developmental Approach Towards Corporate Sustainability: The European Corporate Sustainability Framework for Managing Complexity and Corporate Transition* 1, 5 (2005), *available at* http://www.vanmarrewijk.nl/pdf/A%20developmental%20approach%20to%20CS-R.pdf; *see Gearing Up*, *supra* note 19, at 36 (calling this level "reengineer"); Kerr, *supra* note 19, at 858 (calling this "creative capitalism"); van Marrewijk & Werre, *supra* note 17, at 112 (terming this level "holistic" corporate sustainability).

31. *See Gearing Up*, *supra* note 19, at 37.

32. Joseph A. Grundfest, *Corporate Social Responsibility: Why the Concept Is, and Will Always Be, Confusing and Controversial*, Keynote Address at Hofstra University Zarb School of Business (Dec. 1, 2011) (estimating that eighty percent of socially responsible business behavior can be rationalized as profitable over the long term and that the remaining twenty percent involves much heavy lifting for little gain).

33. For example, whether it is motivated by profit or by a genuine care for the environment, Wal-Mart's success in conserving fuel and reducing wasteful packaging has had a significant impact environmentally and on the retail industry. *See* Linn, *supra* note 12 ("The company is so big, and the network of companies that supply its products so vast, that experts see the potential for Wal-Mart to have a tangible impact on problems such as greenhouse gas emissions.").

deep commitments to sustainability difficult.[34] According to this view, corporate managers may not sacrifice potential profits to benefit society, the environment, or future generations; rather, firms should aim to maximize shareholder returns and eschew sustainable alternatives that are not profit-maximizing. For example, a firm should incur workplace safety costs only to the extent necessary to comply with applicable laws and regulations, or to the extent such expenditures are otherwise financially justifiable (in that they improve employee morale, attendance, or productivity, or that they result in lower insurance premiums or other corporate outlays).[35] Some profit-maximizing firms may even deliberately violate applicable laws and regulations on the view that any fines or penalties incurred are mere costs of doing business and preferable if outweighed by expected costs of compliance.[36]

Perhaps the most famous expression of the shareholder primacy view appears in *Dodge v. Ford Motor Company*.[37] There, in rejecting the decision of company founder and majority shareholder Henry Ford to suspend the company's practice of paying special dividends, the Supreme Court of Michigan wrote:

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

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34. *See, e.g.*, D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 290–91 (1998).

35. *See* Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TULANE L. REV. 983, 984 (2011) (arguing that BP's environmental compliance and workplace safety suffered as a result of the company's undue focus on shareholder profits); *see also* Sabrina Tavernise, *Report Faults Mine Owner for Explosion That Killed 29*, N.Y. TIMES, May 20, 2011, at A11 (quoting a government report that faulted Massey Energy's workplace safety compliance in the company's 2010 coal mine disaster).

36. In weighing costs of compliance and the potential fines and penalties, firms often discount the latter according to the likelihood of getting caught, prosecuted, and found liable. *See* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 73–74 (2006) (criticizing the view that "[t]he obligation to obey the law is subservient to the obligation to make money" and arguing that courts should treat decisions not to comply with applicable laws as *ultra vires* and hold decision makers personally liable to the corporation for any fees and penalties). For arguments in favor of the "law as price" view of corporate compliance, see Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1524–25 (1984); Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1168 n.36 (1982); David Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 1 (1979).

37. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

stockholders in order to devote them to other purposes.[38]

Noted economist Milton Friedman echoed this sentiment some fifty years later, writing that a corporate executive's responsibility is "to make as much money as possible" for the firm's shareholders, and that expenditures not tied to shareholder wealth amount to stealing what rightfully belongs to shareholders.[39]

These and similar statements create the impression that shareholder primacy is a corporate-law mandate, a social norm that should be abided, and the proper result of market forces. The following sections examine these propositions, and their implications for sustainability, in more detail.

A. Law

No corporate law statute or court decision explicitly requires firms to adhere to the shareholder primacy view.[40] While the *Dodge* case speaks of shareholder profit as the central purpose of the corporation,[41] and three subsequent decisions contain similar expressions,[42] all of these passages appear in dicta, and none of these cases hold or stand for the legal proposition that a corporation must maximize shareholder profits. In fact, later decisions cite these cases for other points of law, if at all.[43]

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38. *Id.* at 684 (stating also that "it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholder and for the primary purpose of benefitting [sic] others").

39. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33.

40. *See* Sneirson, *supra* note 7, at 995–1007 (arguing that corporate law contains no requirement of shareholder profit maximization).

41. *See supra* note 38 and accompanying text.

42. *See* Granada Invs., Inc. v. DWG Corp., 823 F. Supp. 448, 459 (N.D. Ohio 1993) ("[T]he sole duty of a corporation's officers is to maximize shareholder wealth."); Katz v. Oak Indus., Inc., 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders."); Long v. Norwood Hills Corp., 380 S.W.2d 451, 476 (Mo. Ct. App. 1964) ("[T]he ultimate object of every ordinary trading corporation is the pecuniary gain of its stockholders . . . ."). The recent decision in eBay Domestic Holdings, Inc. v. Newmark, C.A. No. 3705-CC, 2010 WL 3516473 (Del. Ch. Sept. 9, 2010), suggests something similar in dicta. There, in invalidating the controlling shareholders' dead-hand poison pill, the Chancery Court wrote, "Having chosen a for-profit corporate form, the craigslist directors are bound . . . to promote the value of the corporation for the benefit of its stockholders. The 'Inc.' after the company name has to mean at least that." *See id*. at *34. This statement is closer to the Delaware requirement that corporate decisions ultimately benefit the firm's shareholders than a requirement to maximize, as oppose to merely promote, shareholder welfare. *See infra* note 44,

43. *See* Sneirson, *supra* note 7, at 1003–04 (examining the citation history of these decisions). Interestingly, a recent reexamination of *Dodge v. Ford* concluded that the case was more about close corporations and minority-

A few corporate law decisions do seemingly endorse and encourage shareholder primacy, however subtly. For example, under Delaware law, corporate decision makers may have regard for nonshareholder constituencies like workers and the environment, but any decisions that benefit these stakeholders must benefit the firm's shareholders as well.[44] Thus, in choosing between two competing merger partners, a board may opt for the less generous proposal only if it represents a better strategic combination, preserves valuable company culture, or similarly enhances firm value in the long term.[45] Similarly, in making normal operational decisions, corporate fiduciaries may only benefit nonshareholder constituencies if some benefit will ultimately redound to shareholders.

Corporate law also projects a shareholder-centric bent in describing the nature of corporate fiduciaries' legal obligations. Although corporate fiduciary duties are generally understood to run to the enterprise,[46] many judicial opinions state "that corporate directors have a fiduciary duty to act in the best interests of the corporation's shareholders,"[47] or alternatively, that corporate fiduciaries must act in the best interests of the corporation *and its shareholders*.[48] While, at least in the long run, there may not even

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shareholder oppression than dividends and shareholder wealth. *See* Smith, *supra* note 34, at 318–19.

44. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings Inc., 506 A.2d 173, 182 (Del. 1985) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."); *see also eBay*, 2010 WL 3516473, at *33 ("Promoting, protecting, or pursuing nonstockholder considerations must lead at some point to value for stockholders."). This rule and caveat applies to normal governance issues under Delaware corporate law; where the company is undergoing a "change in control" or sale and inevitable breakup, shareholder-centric duties kick in and preclude the board from sacrificing shareholder interests to serve other stakeholders. *See Revlon*, 506 A.2d at 182.

45. *See, e.g.*, Paramount Comms., Inc. v. Time, Inc., 571 A.2d 1140, 1144 n.4 (Del. 1989) (validating Time's efforts to prefer Warner over Paramount as merger partners, a preference which was ostensibly motivated to protect the "Time culture" of journalistic integrity). This assumes that the *Revlon* duties described in the previous footnote have not been triggered. *See supra* note 44.

46. *See* E. Norman Veasey & Christine T. DiGuglielmo, *How Many Masters Can a Director Serve? A Look at the Tensions Facing Constituency Directors*, 63 BUS. LAW. 761, 764 (2008) (citing N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007) ("It is well settled that directors owe fiduciary duties to the corporation.")).

47. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) ("[O]ur analysis begins with the basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders.").

48. *See* Veseay & DiGuglielmo, *supra* note 46, at 764 (citing a different passage in *N. Am. Catholic Educ. Programming Found., Inc.*, 930 A.2d at 99) ("It is well established that the directors owe their fiduciary obligation to the corporation and its shareholders."). For a cogent explanation of this inconsistency, see Lawrence E. Mitchell, *A Theoretical and Practical*

be a discernable difference between these three statements,[49] the recurring message is that shareholders and their profits trump all other considerations.[50]

Perhaps the American Law Institute's ("ALI") *Principles of Corporate Governance* best summarizes corporate law on this point.[51] According to the ALI, "a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."[52] This "enhancing" (as opposed to maximizing)[53] is to be over the long term,[54] and firms may also pursue limited objectives beyond profit and shareholder gain:

> Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business . . . may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of businesses; and may devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.[55]

Complicating this conclusion somewhat is the business judgment rule—even if corporate law requires some degree of shareholder focus, the business judgment rule affords corporate

Framework for Enforcing Corporate Constituency Statutes, 70 TEX. L. REV. 579, 590–96 (1992) (positing that courts speak in terms of the corporation's best interests when resolving a "vertical conflict of interest" between the firm and its managers, and the shareholders' best interests when resolving a "horizontal conflict of interest" between shareholders and other stakeholder groups).

49. *See* Smith, *supra* note 34, at 285 ("'[T]he best interests of the corporation' are generally understood to coincide with the best long-term interests of the shareholders."); *see also* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1439 (1993) ("In most situations, shareholder and nonshareholder constituency interests coincide."); Millon, *supra* note 8, at 530; Veasey & Di Guglielmo, *supra* note 46, at 764–65 & n.9 (acknowledging that "operating a business in an environmentally sustainable way" may make "good business sense and therefore increase[] long-term financial value").

50. Corporate law also prefers shareholders by granting them, but no other corporate constituency, the power to elect directors and sue derivatively on behalf of the organization.

51. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1994).

52. *See id.* § 2.01(a).

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

54. *See* ALI, *supra* note 51, § 2.01(a) cmt. f ("[E]nhancing corporate profit and shareholder gain . . . does not mean that the objective of the corporation must be to realize corporate profit and shareholder gain in the short run."); *see also id.* illus. 1 & 2.

55. *See id.* § 2.01(b).

decision makers so much latitude as to render any such requirement unenforceable and meaningless.[56] Under the business judgment rule, courts defer to fiduciaries' business judgments so long as no conflict of interest is present and the decision is reached conscientiously, on the basis of reasonably full information, and with a good-faith belief that the decision is in the best interests of the firm.[57] If these predicates are met, company decisions, including sustainability-motivated decisions that depart from a profit-maximizing objective, will withstand shareholder challenges.[58]

Further, most state corporation codes contain provisions reaffirming this stance. These "other constituency" statutes further protect business decisions made in the interests of the entire firm, typically stating that directors and officers may consider all of the firm's constituencies—not just its shareholders—when determining what constitutes the company's best interests.[59] About two-thirds of

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56. *See* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 651 (2007) ("Although *Dodge v. Ford* is frequently cited, no modern court has struck down an operational decision on the ground that it favors stakeholder interests over shareholder interests."); Thomas W. Joo, *Race, Corporate Law, and Shareholder Value*, 54 J. LEGAL EDUC. 351, 361 (2004) ("[D]irectors' supposed duty to 'maximize' shareholder wealth is a toothless one. No courts actually require management to maximize shareholder wealth . . . [i]ndeed, such a showing would be all but impossible."); Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 180–81 (2008) (arguing that corporate law requires shareholder wealth maximization but conceding that, like the speed limit on the Merritt Parkway, it is not enforced because enforcement would prove to be difficult or impossible); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2072 (2001) (noting that "corporate law's instructions to managers" to enhance shareholder gain do not "determine what they do"); Smith, *supra* note 34, at 286 ("[T]he business judgment rule makes the shareholder primacy norm virtually unenforceable against public corporations' managers.").

57. *See* Joy v. North, 692 F.2d 880, 885–86 (2d Cir. 1982) (presenting rationales for the business judgment rule); William T. Allen et al., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAWYER 1287, 1297 (2001) (describing the business judgment rule as "an expression of a policy of non-review of a board of directors' decision"); *see also* Stephen M. Bainbridge, CORPORATION LAW & ECONOMICS § 6.2 (2002) (viewing the business judgment rule as an abstention doctrine). For an analysis of the "reasonably full information" predicate, see Judd F. Sneirson, *Doing Well By Doing Good: Leveraging Due Care for Better, More Socially Responsible Corporate Decisionmaking*, 3 CORP. GOVERNANCE L. REV. 438, 465–68 (arguing that the duty of care's information component requires fiduciaries to assess and consider effects on the firm's nonshareholder constituencies).

58. *See, e.g.*, Joy, 692 F.2d at 880; Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1052 (Del. Ch. 1996); Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. 1968) (upholding the decision not to install lights at Wrigley Field); Kamin v. Am. Express Co., 383 N.Y.S.2d 807 (Sup. Ct. 1976) (upholding a dividend that squandered a sizable corporate tax deduction).

59. The Illinois provision is typical of the American statutes. It provides:

> In discharging the duties of their respective positions, the board of

these provisions are generally applicable, providing an extra measure of comfort where corporate managers make decisions that serve the firm through its nonshareholder constituencies; the remaining third are limited to the takeover context and therefore only offer this statutory protection to a narrower class of decisions.[60]

In sum, while corporate law can be read to encourage adherence to the shareholder primacy view, it simultaneously refuses to enforce any such requirement.[61] Perhaps by this contradiction courts intend to endorse but not enforce a profit-focused norm, in keeping with corporate law's traditional deference to informed business judgments.[62] For whatever reason, the law fosters this ambivalence, lending support both to the view that corporations exist to serve their shareholders through profit maximization, and to the contrary view that firms may safely engage in sustainable business practices that might detract from shareholder profits. The resulting uncertainty may be enough to dissuade interested firms from aspiring to deeper levels of sustainability.

B. Norms

Even if no law requires shareholder primacy, a prevalent social norm can have much the same effect.[63] That is, whether or not

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> directors, committees of the board, individual directors and individual officers may, in considering the best long term and short term interests of the corporation, consider the effects of any action (including without limitation, action which may involve or relate to a change or potential change in control of the corporation) upon employees, suppliers and customers of the corporation or its subsidiaries, communities in which offices or other establishments of the corporation or its subsidiaries are located, and all other pertinent factors.

805 ILL. COMP. STAT. 5/8.85 (2011). Most of the states that enacted these provisions did so during the surge of corporate-takeover activity in the 1980s, often to help local corporations fend off out-of-state suitors. *See* Sneirson, *supra* note 7, at 997–98.

60. *See* Sneirson, *supra* note 7, at 998 nn.52–53 (surveying "other constituency" statutes).

61. *See* William T. Allen et al., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067, 1068 (2002) (identifying this ambivalence); Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1386 (2008) (same); Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 902 (1990) (same).

62. Brett McDonnell, Comment to *Shareholders Versus Stockholders*, ProfessorBainbridge.com (May 5, 2010, 8:00 AM), http://www.professorbainbridge.com/professorbainbridgecom/2010/05/shareholders-versus-stakeholders.html ("[Perhaps] courts put forth a norm that boards should maximize return to shareholders but outside a few special circumstances they do not enforce that norm in a way that gives rise to liability for violating it.").

63. Norms are "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external

corporate law requires managers to maximize shareholder wealth, social norms may induce many of them to do so, because that is what they learned in business school, because that is how they view their jobs, because that is what they perceive is expected of them, and because they believe—rightly or wrongly—that the law requires them to do so.[64] Some have concluded that such a norm grips mainstream American business culture, has "been fully internalized by American managers,"[65] and constitutes "the appropriate goal in American business circles."[66]

Others argue that this description vastly overstates the prevalence of the shareholder primacy norm, observing that corporate managers routinely make decisions that do not maximize shareholder value and citing studies showing "ambivalence" among directors toward shareholder wealth maximization.[67] What is more, norms governing business decision making may be evolving to reflect a business purpose broader than shareholder profit as environmental and social issues continue to enter the American mainstream.[68] Business schools have reflected "this trend, integrating [stakeholder] concepts in core and extracurricular

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non-legal sanctions, or both." *See* Richard H. MacAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997); *see also* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 235 (1999) (defining norms as "those normative constraints imposed not through the organized or centralized actions of a state, but through the many slight and sometimes forceful sanctions that members of a community impose on each other"); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996) (defining norms as "social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done"). *See generally Symposium, Norms & Corporate Law*, 149 U. PA. L. REV. 1607 (2001).

64. *See* Fisch, *supra* note 56, at 654–55 (noting a study finding "that the norm of shareholder wealth maximization was implicit in most business school courses"); Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263, 1288 (1992) ("Directors seem to believe that their legal duty is to the stockholders."); Roe, *supra* note 56, at 2073 ("Norms in American business circles, starting with business school education, emphasize the value, appropriateness, and indeed the justice of maximizing shareholder wealth.").

65. Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657, 717 (1996).

66. Roe, *supra* note 56, at 2065.

67. *See* Smith, *supra* note 34, at 290–91 (citing studies and relating that "managers often make decisions that do not maximize value for shareholders"); Fisch, *supra* note 56, at 655 (citing similar, subsequent studies).

68. *See* Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 677–78, 699, 710 (2006) (suggesting "a growing [societal and investor] dissatisfaction with the shareholder primacy norm" and that these groups find the broader stakeholder model of corporate governance "acceptable if not more palatable than shareholder primacy"); Robert C. Illig, *Al Gore, Oprah, and Silicon Valley: Bringing Main Street and Corporate America into the Environmental Movement*, 23 J. ENVTL. L. & LITIG. 223, 229 (2008) (noting popular acceptance of environmental concerns).

courses, and in the increasing desire by MBA students to fuse social endeavors with profit-making ones."[69] While these changes may not indicate a wholesale abandonment of the shareholder primacy norm, they perhaps portend a "paradigm shift" toward a new norm of balancing the shareholder-profit objective with longer-term, sustainable, and socially responsible business practices.[70]

C. Markets

Markets—the stock market, the market for capital, the market for managerial talent, and the market for corporate control—also influence corporate decision making by focusing corporate decision makers, in many instances, on shareholder returns.[71] Because stock price is a commonly used metric for assessing executive performance, executives pay considerable attention to it, particularly when their compensation is tied to it.[72] Robust stock prices also facilitate raising capital and fend off unwelcome takeover attempts which might culminate in corporate executives losing their positions.[73] To this extent, corporate decision makers have strong incentives to maximize shareholder returns and stock prices and avoid sustainable behaviors that might detract from them.

However, these pressures should not discourage all sustainable business efforts. As noted above, a great many sustainable business practices contribute to, rather than reduce, corporate profits.[74] These market forces should therefore encourage corporate decision makers to pursue such initiatives, not discourage them from being more sustainable. Furthermore, according to a leading financial economist, running a business in this way—with a broader understanding of the firm, and focused on more than just shareholders and profits—best maximizes the value of the firm over the long run.[75]

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69. Fairfax, *supra* note 68, at 677.

70. *See* Sneirson, *supra* note 7, at 1012.

71. *See* LESSIG, *supra* note 63, at 235–36 (identifying four categories of regulators in cyberspace and elsewhere: "the law, social norms, the market, and architecture").

72. *See, e.g.*, Richard A. Posner, *Are American CEOs Overpaid, and, if so, What if Anything Should be Done About It?*, 58 DUKE L.J. 1013, 1026–27 (2009) (criticizing the common practice of showering CEOs with stock options as unduly focusing executives on the short term).

73. *See* Sneirson, *supra* note 7, at 1007–09.

74. *See supra* notes 10–13 and accompanying text.

75. *See* Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 14 J. APPLIED CORP. FIN. 8, 16–17 (2001) (setting forth an "enlightened stakeholder theory" whereby corporate decision makers maximize the long-term value of the firm by tending to all of the firm's constituencies).

III. WHAT CAN BE DONE ABOUT IT?

While corporate law, norms, and markets each have the potential to impede sustainability efforts, such does not have to be the case: corporate law permits sustainability considerations in decision making, markets affirmatively encourage a great number of sustainable business practices, and sustainable business concepts are gradually gaining acceptance as a new social norm. What can be done to further sustainability in light of this state of affairs? Some options include requiring firms to be more sustainable through legal requirements, encouraging sustainable behavior through legal and nonlegal means, or simply continuing the current practice of permitting firms to engage in sustainable business practices but doing nothing to promote such activity.

Sustainability is not for every firm, and broadly imposing it would disrupt central tenets of modern corporate law. For one, requiring firms to be sustainable would be inconsistent with corporate law's enabling approach that permits firms to engage in a broad range of business activity with few mandatory rules.[76] A law requiring sustainability would also be difficult to enforce—under the business judgment rule, informed and disinterested decisions thought to be in the best interest of the firm enjoy deference, whether they are sustainable, unsustainable, or somewhere in between.[77] Discarding the business judgment rule and limiting board authority would constitute a radical change to corporate law, and it would be most unrealistic to expect legislatures or courts in Delaware or elsewhere to take such extreme measures.[78]

A slightly more palatable approach would offer firms the choice of complying with sustainability goals, such as triple bottom line reporting, or following sustainable decision-making procedures, or explaining publicly to their shareholders why they have not done so.[79] This middle ground between mandatory reforms and voluntary action can work to establish the suggested behaviors as new norms

76. *See* BAINBRIDGE, *supra* note 57, § 2.1, at 40 (characterizing modern corporate law as "enabling"); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 674 (2005) ("[O]ur statute is, by design, a broad enabling one that permits and facilitates company-specific procedures . . . [and] keeps statutory mandates to a minimum.").

77. *See supra* notes 56–58 and accompanying text.

78. *See, e.g.*, David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After* Citizens United, 89 N.C. L. REV. 1198 (forthcoming 2011) (expressing pessimism about the future of corporate influence over legislatures).

79. *Cf.* Sarbanes-Oxley Act of 2002 § 406, 15 U.S.C. § 7264(a) (2011) (requiring issuers to adopt ethics codes for senior financial officers or explain why they have not done so); Jennifer G. Hill, *Regulatory Responses to Global Corporate Scandals*, 23 WIS. INT'L L.J. 367, 377 (2005) (discussing the "comply or explain" approach of recent British corporate law reforms).

supporting sustainability and exert subtle pressure on firms to comply instead of explain.

Other, strictly voluntary ways of encouraging sustainable business would require no changes to current corporate law. One of these involves sustainability reporting. Although the securities laws do not currently require it,[80] many firms voluntarily disclose their environmental and social activities,[81] and investor pressure seems to induce even more firms to follow suit.[82] As noted above, disclosing environmental and social performance alongside financial performance creates incentives to produce results one would be proud or at least not embarrassed to report.[83] Two recognized drawbacks with voluntary triple bottom line reporting have been the variability in formats and related difficulty in comparing different companies' performances, but the Global Reporting Initiative Sustainability Reporting Guidelines, now in their third version, provide some standardization and may alleviate these problems.[84]

Another voluntary means of encouraging sustainable business draws on private certifications. Like a *Good Housekeeping* seal of approval, private certifications can be used to harness consumer and investor preferences for sustainable businesses and products.[85] B

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80. *See* Thomas Joo, *Global Warming and the Management-Centered Corporation*, 44 WAKE FOREST L. REV. 671, 672 (2009) (concluding that climate-change disclosures are not required per the securities laws' materiality filter).

81. *See, e.g.*, Fairfax, *supra* note 68, at 691–93, 713–15 (noting that most of the *Fortune* 500 in 2005 made voluntary social-responsibility disclosures in their annual reports or in separate social-responsibility reports). This trend has continued through at least 2010, with all but four of the Fortune 50 making voluntary social-responsibility disclosures in their annual reports or in separate social-responsibility reports. *See generally* Jousha T. Ebersole, Voluntary CSR Disclosures of *Fortune* 50 Companies (Apr. 25, 2011) (on file with author).

82. *See id.* at 691, 702–03 (noting such a trend and concluding that investors desire such information as well as socially responsible corporate behavior).

83. *See supra* note 16 and accompanying text.

84. *See* ELKINGTON, *supra* note 2, at 82, 84 (noting difficult comparisons); MARC J. EPSTEIN, MAKING SUSTAINABILITY WORK: BEST PRACTICES IN MANAGING AND MEASURING CORPORATE SOCIAL, ENVIRONMENTAL, AND ECONOMIC IMPACTS 224–25 (2008) (discussing the "GRI" guidelines and noting that nearly one thousand firms in more than sixty countries use the GRI framework and "34 companies in the [Standard & Poor's] 100 Index use . . . it for their external reporting"). *But see* Holger Meyer, *Varieties of Capitalism and Environmental Sustainability: Institutional Explanation for differences in Firms' Corporate Environmental Responsibility Reporting Across 21 OECD Economies*, SOC. SCI. RES. NETWORK, http://ssrn.com/abstract=1900217 (last visited Aug. 28, 2011) (challenging "the common perception of a trend towards more homogeneous global corporate responsibility" reporting and arguing instead that reporting standards "remain embedded in national institutional frameworks").

85. *See supra* note 10 (noting sustainable businesses' success in consumer-oriented industries); *see also* GOOD HOUSEKEEPING SEAL, http://www.goodhousekeeping.com/product-testing/history/about-good-housekeeping-seal (last visited Aug. 28, 2011). *Good Housekeeping* also maintains a

Labs offers one such certification, blessing corporations that are sufficiently benevolent and responsible with its "B Corporation" mark,[86] and similar private certifications exist for fair-trade coffee and chocolate and for sustainably-harvested wood.[87] As these and similar symbols develop further prominence, they may encourage greater sustainability through the force of the markets for goods, services, and capital.

A final way of encouraging greater sustainability is simply to raise awareness in law and business circles that corporate law does not require shareholder primacy and profit maximization, that firms may wholeheartedly engage in sustainable business practices without breaching legal duties or contravening social norms, and that such efforts even tend to pay off financially.[88] Such efforts, including this symposium, can perhaps have a greater impact on business, the environment, and society than any set of corporate law reforms.

CONCLUSION

For too long, the shareholder primacy view and its incessant focus on profits have stifled corporate efforts to become more sustainable. As a result, shareholders have profited at the expense of the environment, society, and the future. This need not be the case: corporate laws, norms, and markets should not stand in the way of sustainable business efforts and, to a large degree, should affirmatively encourage corporate decision makers to pursue sustainable goals for the benefit of the entire enterprise. Only then, when corporations take a broader view of the firm, its purposes, and fiduciary obligations to it, will we create a future where business, the environment, and society may all continue to thrive.

"green" version of its seal for products that meet the magazine's environmental criteria. *See id.*

86. *See* Sneirson, *supra* note 7, at 1017–19 (discussing the "B Corporation" concept and mark). Several states recently enacted legislation to create a statutory counterpart to "B Corporation" certifications. *See* Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 594 (2011) (describing "benefit corporation" enactments in Maryland, New Jersey, Vermont, and Virginia). For a different state statutory model, *see* Sneirson, *supra* note 7, at 1019–20 (discussing Oregon's 2007 corporate law amendment, codified at OR. REV. STAT. § 60.047(2)(e), permitting Oregon corporations to include in their articles of incorporation a provision "authorizing" or "directing" that the firm be run in an environmentally and socially responsible manner).

87. *See* FAIR TRADE USA, http://www.transfairusa.org (last visited Aug. 28, 2011); FOREST STEWARDSHIP COUNCIL, http://www.fsc.org (last visited Aug. 28, 2011).

88. *See supra* Part II.