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NORTH CAROLINA LAW REVIEW

Volume 94 | Number 2

Article 6

1-1-2016

The Corporate Identity Theory Dilemma: North Carolina and the Need for Constructionist Corporate Law Reform

Joseph R. Shealy

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Recommended Citation

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The Corporate Identity Theory Dilemma: North Carolina and the Need for Constructionist Corporate Law Reform*

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INTRODUCTION

In 1919, in the landmark corporate law case of *Dodge v. Ford Motors Co.*,¹ the Michigan Supreme Court held that “[a] business corporation is organized and carried on primarily for the profit of the stockholders” and that “the powers of the directors are to be employed for that end.”² This “traditionalist” holding was in line with all of the states’ interpretations of corporate law and was part of the “property” conception of the corporation, which was the prevailing interpretation of the corporate model in the United States at the turn of the twentieth century.³ However, since 1919, states have begun to acknowledge both the social advantages of considering the well-being of constituents other than shareholders in the corporate decision-making process and the inefficiencies that can result when corporate boards are forced to make decisions based solely on profit maximization.⁴

Acknowledging these twin advantages has led many states to pass constituency statutes and other socially progressive corporate legislation that allow for-profit corporations to account for the impact a particular business decision will have on those with non-ownership interests in the company.⁵ Of course, these statutes do not change the fundamental goals of corporations to make a profit and to provide their shareholders with high investment returns; instead, these statutes simply acknowledge that investors are not the only parties affected by the corporation’s business dealings. Thus, constituency statutes allow directors to make decisions based on goals other than maximizing shareholder profits.⁶

This Comment will discuss the many advantages of adopting constituency statutes and benefit corporation acts and will advocate for North Carolina’s adoption of a new conception of the corporation. Analysis proceeds in four parts. Part I discusses the rationale behind

1. 170 N.W. 668 (Mich. 1919).

2. *Id.* at 684.

3. See *First Union Corp. v. SunTrust Banks, Inc.*, No. 01-CVS-11075, 2001 WL 1885686, at *2 (N.C. Super. Ct. Aug. 10, 2001) (quoting William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–65 (1992) (discussing the traditional “property” conception of the corporation that views a corporation as “the private property of its stockholder-owners” whose “purpose is to advance the purposes of these owners (predominantly to increase their wealth)” and whose directors’ function “is faithfully to advance the financial interests of the owners”)).

4. See discussion *infra* Sections I.E, II.C.

5. See Nathan E. Standley, *Lessons Learned from the Capitulation of the Constituency Statute*, 4 ELON L. REV. 209, 209 (2012).

6. See Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085, 1102 (2000).

constituency statutes, examines different constituency statutes in existence today, and explains why the benefits of constituency statutes far outweigh their drawbacks. Part II introduces the other major type of socially progressive corporate legislation: benefit corporation acts. This Part highlights the main advantages of the new type of business organization those acts allow. Part III considers several North Carolina cases that have dealt with the corporate-conception conflict and discusses the North Carolina legislature's recent failed attempt to allow benefit corporations in the state. Finally, Part IV advocates for North Carolina's ratification of a benefit corporation act and argues that the state should supplement this act with a permissive constituency statute applicable to all non-benefit corporations.

I. CONSTITUENCY STATUTES

A. *Historical Background and Development of Constituency Statutes*

Although the conflict over how to interpret corporate theory dates back to the nineteenth century, it was not until the 1930s that the debate garnered national attention.⁷ At the forefront of this legal debate were two prominent Ivy League law professors, Adolf Berle of Columbia Law School and Merrick Dodd of Harvard Law School.⁸ The two professors had fundamentally different views on the general purpose of the corporation and the accompanying duties that the directors of a corporation owed to a corporation's shareholders.⁹

Berle strongly believed that a corporation was to be viewed as the property of those with ownership interests in it and that the directors of a corporation owed shareholders a fiduciary duty to secure for them the highest possible return on their investment.¹⁰ Berle's approach, known as the "traditionalist" theory, "urged the primacy of shareholder interests" and concluded that the structure of a corporation demanded that the board focus exclusively on increasing shareholder wealth.¹¹ In Berle's mind, consideration of nonshareholder interests was a direct conflict of interest and

7. *Id.* at 1090.

8. *Id.*

9. *See id.*

10. *Id.* ("Berle and other traditionalists urged primacy of shareholder interests because shareholders are traditionally the parties to which directors and officers owe a fiduciary duty to return their initial investment.").

11. *Id.*

constituted a breach of a director's fiduciary duties.¹² Berle's traditionalist theory would eventually evolve into the modern day "shareholder primacy" model, which adheres to the notion that the "best interests of the corporation [are] synonymous with [the] best interests of the shareholders" even when the maximization of such interest is to the detriment of other constituents' wellbeing.¹³

On the other hand, Dodd advocated for the "constructionist theory," which "urged consideration of the interests of various corporate constituents, including both shareholders and stakeholders."¹⁴ According to the constructionist theory, a corporation is not merely the property of its shareholders but is a community entity that "consists of many individuals with a stake in the firm's welfare."¹⁵ Among the nonshareholder constituents that Dodd identified were "employees, suppliers, and creditors, and the general public."¹⁶ Because constructionists do not view a corporation as the property of its shareholders, they do not interpret the corporate model as imposing an absolute obligation on its directors to maximize shareholder profits when doing so would harm other stakeholders.¹⁷

The debate between the traditionalists and constructionists peaked in the 1980s as the corporate world experienced a wave of hostile takeovers.¹⁸ These hostile takeovers presented dilemmas for the boards of target companies, who were faced with a conflict between shareholders' short-term interests in profit maximization and the best long-term interests of the corporation.¹⁹ Although the boards

12. *Id.* ("Because a conflict of interest arises when directors and officers consider interests other than those of shareholders, the traditionalist viewpoint demands that only one group's interests—the shareholders—constitute the focus of director decisionmaking.").

13. Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 90 (1992). Constituents affected by the shareholder primacy model include groups like employees, creditors, suppliers, vendors, and the surrounding community at large, all of whom are affected by a corporation's actions despite the fact that they are not necessarily financially invested in the company. Adams & Matheson, *supra* note 6, at 1105.

14. Adams & Matheson, *supra* note 6, at 1090.

15. *Id.*

16. *Id.*

17. *See id.*

18. Standley, *supra* note 5, at 211; *see also* Andrei Shleifer & Robert W. Vishny, *Takeovers in the '60s and the '80s: Evidence and Implications*, 12 STRATEGIC MGMT. J. 51, 53 (1991), http://scholar.harvard.edu/files/shleifer/files/takeovers_60s_80s.pdf [<http://perma.cc/C2L5-QUGA>] ("Of the 1980 Fortune 500 companies, at least 143, or 28 percent, were acquired by 1989.").

19. Thomas J. Bamonte, *The Meaning of the "Corporate Constituency" Provision of the Illinois Business Corporation Act*, 27 LOY. U. CHI. L.J. 1, 3 (1995).

were technically required to allow the mergers under the traditionalist corporate theory (because doing so would produce the highest profit for stakeholders), in many cases directors feared that allowing mergers would be detrimental to the corporation's vested long-term interests.²⁰

With these potential consequences in mind, directors of target corporations were left "scrambling to find ways to fend off hostile bidders without breaching the fiduciary duties they owed to shareholders."²¹ These pressures forced incumbent directors of many large takeover target companies, wary of their rapidly diminishing job stability, to turn to state legislatures for help.²² State legislatures responded by expediting formidable anti-takeover legislation packages meant to equip directors with the necessary tools to resist impending hostile takeovers.²³ At the forefront of many of these director-friendly packages were corporate constituency statutes.²⁴

In 1983, Pennsylvania enacted the first corporate constituency statute.²⁵ At the time the bill was being considered, two of Pennsylvania's major corporations, Scott Paper Company and Gulf Oil Corporation, each faced a potential hostile takeover and a proxy contest.²⁶ The companies leveraged the state legislature by threatening to move elsewhere if the corporate constituency legislation was not passed—pressure that likely played a role in the statute's expedited ratification.²⁷ However, the statute's passage was also part of a broader, concerted effort to protect the state economy and labor force by offering an array of laws and takeover defense

20. See *id.* at 3–4 (explaining that a corporation's "long-term interests include the interests of labor, creditors, suppliers, and other local community 'constituents' integral to the success of the corporation").

21. Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?*, 42 LOY. L.A. L. REV. 765, 781 (2009).

22. See Bamonte, *supra* note 19, at 7.

23. *Id.*

24. *Id.*

25. Sarah S. Nickerson, Comment, *The Sale of Conrail: Pennsylvania's Anti-Takeover Statutes Versus Shareholder Interests*, 72 TUL. L. REV. 1369, 1372 (1998); Standley, *supra* note 5, at 212.

26. Nickerson, *supra* note 25, at 1372–73. Also known as a proxy fight, a proxy contest is "[a] struggle between two corporate factions to obtain the votes of uncommitted shareholders" that "[usually] occurs when a group of dissident shareholders mounts a battle against the corporation's [current] managers." *Proxy Contest*, BLACK'S LAW DICTIONARY (10th ed. 2014).

27. See Nickerson, *supra* note 25, at 1372–73.

mechanisms that would encourage corporations to remain in Pennsylvania.²⁸

Many other states have since followed suit by passing their own corporate-friendly constituency statutes modeled after Pennsylvania's.²⁹ Forty-one states currently have some form of a constituency statute.³⁰ Though these statutes vary in form and scope, "the unifying principle common to all constituency statutes is that they enable corporate directors to consider interests other than those of their shareholders when exercising their corporate decision-making authority."³¹ A constituency statute often contains the provisions such as:

1. The board of directors of a corporation may consider the interests and effects of any action upon nonshareholders.
2. The relevant nonshareholder groups include employees, suppliers, customers, creditors, and communities.
3. The directors may consider both long-term and short-term interests of the corporation.
4. The directors may consider local and national economies.
5. The directors may consider any other relevant social factors.³²

Though interpretation and application of these constituency statutes has sometimes caused debate among legal scholars, there are four commonly agreed-upon principles for the interpretation of constituency statutes: (1) the statutes are permissive; they allow directors to consider the interests of constituents other than shareholders, but do not *require* them to do so; (2) the statutes emphasize serving the best interests of the corporation rather than shareholder wealth maximization; (3) the majority of the statutes apply regardless of whether times are calm or the corporation finds itself in the midst of a takeover attempt, when corporate control is at stake; and (4) the statutes fail to expressly vest any legally enforceable rights or remedies in nonshareholder constituents, and

28. *See id.* at 1373.

29. Orts, *supra* note 13, at 27.

30. Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 833 (2003); Standley, *supra* note 5, at 212.

31. Bisconti, *supra* note 21, at 781–82.

32. *Id.* at 782 (citing various state constituency statutes).

thus, the nonshareholder constituents have no means of legal redress if directors seemingly fail to consider their interests when making a particular business decision.³³ Aside from these core elements, legislatures have tailored the statutes' terms and scope to satisfy the particular state's objectives.³⁴

B. Types of Constituency Statutes

All constituency statutes can be categorized as one of four distinct types.³⁵ The first category is a permissive statute that covers all corporate decisions.³⁶ Pennsylvania's statute serves as a good example; its key provisions read as follows:

(a) *General rule.*--In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors of a business corporation may, in considering the best interests of the corporation, consider to the extent they deem appropriate:

(1) The effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located.

(2) The short-term and long-term interests of the corporation, including benefits that may accrue to the corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the corporation.

(3) The resources, intent and conduct (past, stated and potential) of any person seeking to acquire control of the corporation.

(4) All other pertinent factors.³⁷

The Pennsylvania statute is permissive because it permits but does not require directors of Pennsylvania corporations to consider the effect a decision would have on nonshareholders.³⁸ The term "may"

33. Bamonte, *supra* note 19, at 7.

34. See Standley, *supra* note 5, at 213.

35. *Id.*

36. *Id.*

37. 15 PA. STAT. AND CONS. STAT. ANN. § 1715(a) (West 2015).

38. See *id.* (using a permissive "may" rather than a mandatory "shall").

indicates legislative intent to permit boards of directors to consider other constituents at their discretion without requiring them to do so for every business decision.³⁹ Furthermore, the absence of language to the contrary indicates that the statute was meant to apply to all business decisions, not just those relating to hostile takeovers.⁴⁰ This type of constituency statute is therefore the broadest in its application and allows for the maximum amount of director discretion.⁴¹

The second type of constituency statute, like Illinois's, takes a different approach to the constituency problem. Rather than merely empowering corporate boards to take nonshareholders into consideration, this type of statute actually declares that a corporation's interests, which include the interests of a corporation's subsidiaries, should take priority over individual shareholders' interests.⁴² Illinois's statute reads as follows:

In discharging the duties of their respective positions, the board of 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.⁴³

This type of statute clearly establishes that it is not a corporation's shareholders to whom the directors owe a primary fiduciary duty.⁴⁴ In doing so, the statute rejects the shareholder primacy approach, instead providing that the directors owe a primary duty to promote the well-being of all "pertinent" stakeholders involved by acting in the best interest of the corporation as a whole.⁴⁵

39. See Standley, *supra* note 5, at 213–14 (characterizing the language of the Pennsylvania statute as "permissive, not mandatory").

40. *Id.*

41. See *In re Total Containment, Inc.*, 335 B.R. 589, 606 (Bankr. E.D. Pa. 2005) (holding that a corporation's directors will be protected by the business judgment rule so long as they have not acted in "fraud, bad faith, or self-interest"). "The business judgment rule is a judicially created doctrine that protects directors from personal civil liability for the decisions they make on behalf of a corporation." Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 WM. & MARY BUS. L. REV. 521, 521 (2013).

42. Standley, *supra* note 5, at 213.

43. 805 ILL. COMP. STAT. ANN. 5/8.85 (LEXIS through Pub. Act 99-220 of the 2015 Leg. Sess.).

44. Standley, *supra* note 5, at 214.

45. Bamonte, *supra* note 19, at 8.

By allowing Illinois directors to view the corporation as a community entity, instead of as the property of corporate shareholders, the legislature adopted the constructionist theory of corporate conceptualization, thus providing for the well-being of those stakeholders who have made nonfinancial investments in the company.⁴⁶

The third type of constituency statute is a permissive statute that only applies to decisions related to hostile takeovers.⁴⁷ For example, Oregon's statute reads as follows:

When evaluating any offer of another party to make a tender or exchange offer for any equity security of the corporation, or any proposal to merge or consolidate the corporation with another corporation or to purchase or otherwise acquire all or substantially all the properties and assets of the corporation, the directors of the corporation may, in determining what they believe to be in the best interests of the corporation, give due consideration to the social, legal and economic effects on employees, customers and suppliers of the corporation and on the communities and geographical areas in which the corporation and its subsidiaries operate, the economy of the state and nation, the long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation, and other relevant factors.⁴⁸

This type of statute, which has also been adopted by several other states,⁴⁹ is similar to the first two types of constituency statutes in that it is permissive. Yet, this type of statute is simultaneously unique because it limits its permissive nature to decisions made by directors in light of a potential hostile takeover.⁵⁰ In fact, the Oregon legislature further underscored this statutory limitation to hostile

46. See *First Union Corp. v. SunTrust Banks, Inc.*, No. 01-CVS-10075, 2001 WL 1885686, at *5 (N.C. Super. Ct. Aug. 10, 2001) (discussing the Illinois constituency statute, which “specifically authorize[s] directors to consider the interests of corporate constituents other than shareholders when responding to a hostile takeover, . . . adjust[ing] the balance of power between shareholders and other corporate constituents”).

47. Standley, *supra* note 5, at 213. A hostile takeover is “[t]he acquisition of ownership or control of a corporation,” which is “typically accomplished by the purchase of shares or assets, a tender offer, or a merger,” and “is resisted by the target corporation.” *Hostile Takeover*, BLACK’S LAW DICTIONARY (10th ed. 2014).

48. OR. REV. STAT. § 60.357(5) (West, Westlaw through 2015 Reg. Sess.).

49. See, e.g., IOWA CODE ANN. § 491.101B (West 2015); MO. ANN. STAT. § 351.347 (West 2015); R.I. GEN. LAWS ANN. § 7-5.2-8 (West 2015); S.D. CODIFIED LAWS § 47-33-4 (2015).

50. See Standley, *supra* note 5, at 215.

takeover contexts by rejecting a house bill that proposed the statute's expansion to all corporate decisions in 2009.⁵¹ Because a wave of hostile takeovers brought these constituent-interest issues to light and prompted states to begin enacting constituency statutes in the first place, states enacting these types of constituency statutes tend to limit their statutes to hostile takeover situations.⁵² Although these statutes stringently protect the interests of most stakeholders, they often fail to provide for community and environmental interests, which can be affected more by day-to-day decisions than by decisions made in response to hostile takeover attempts.⁵³

The final type of constituency statute is a formally mandatory statute.⁵⁴ Connecticut was the only state to enact this type of statute, but even the Connecticut statute was amended in 2010 and is now permissive.⁵⁵ Prior to the 2010 amendment, the relevant portion of the Connecticut statute read as follows:

(d) For purposes of sections 33-817, 33-830, 33-831, 33-841 and 33-844, a director of a corporation . . . *shall* consider, in determining what he reasonably believes to be in the best interests of the corporation, (1) the long-term as well as the short-term interests of the corporation, (2) the interests of the shareholders, long-term as well as short-term, including the possibility that those interests may be best served by the

51. H.R. 2829, 75th Legis. Assemb., Reg. Sess. (Or. 2009); *see also* Standley, *supra* note 5, at 215.

52. *See* Standley, *supra* note 5, at 215.

53. By limiting the scope of the constituency statute to hostile takeover situations, the harmful environmental effects of a daily practice like toxic dumping may be ignored for the sake of shareholder profit maximization. *Cf.* Judd F. Sneirson, *Race to the Left: A Legislator's Guide To Greening a Corporate Code*, 88 OR. L. REV. 491, 503 (2009) ("To become a little greener, a jurisdiction without an other constituency statute should adopt one, and a jurisdiction with an other constituency statute limited to takeover situations should remove the limitation."). For example, Siltronic Corporation, a semiconductor-related manufacturer located in Portland, Oregon, discharged 350,562 pounds of chemicals into the Willamette River in 2012, accounting for over twenty-five percent of the state's toxic chemical dumping that year. Edward Russo, *Siltronic Plant in Portland Dumps the Most Toxics into Oregon Rivers*, PORTLAND TRIB. (June 20, 2014, 4:35 PM), <http://portlandtribune.com/sl/224914-87113-siltronic-plant-in-portland-dumps-the-most-toxics-into-oregon-rivers> [<http://perma.cc/P35Z-AXAE>]. While this method of waste disposal is likely a cost-efficient one, it fails to consider the detrimental effect that such a practice will inevitably have on the environment and the surrounding community. *Cf.* Benita M. Beamon, *Designing the Green Supply Chain*, 12 LOGISTICS INFO. MGMT. 332, 341 (1999) ("No longer is it acceptable or cost effective to consider only the local and immediate effects of products and processes; it is now imperative to analyze the entire life-cycle effects of all products and processes.").

54. *See* Standley, *supra* note 5, at 213.

55. *Id.* at 216.

continued independence of the corporation, (3) the interests of the corporation's employees, customers, creditors and suppliers, and (4) community and societal considerations including those of any community in which any office or other facility of the corporation is located. A director may also in his discretion consider any other factors he reasonably considers appropriate in determining what he reasonably believes to be in the best interests of the corporation.⁵⁶

Under this type of statute, most legal scholars interpreted the word "shall" to mean that directors were *required*, and not merely *allowed*, to consider the interests of nonshareholder constituents that the director "reasonably considers appropriate" when making corporate decisions.⁵⁷ Even under this mandatory form, Connecticut's statute, like all other constituency statutes examined in this Part, lacked an enforcement mechanism for nonshareholders who wished to protect their interests in a legal proceeding.⁵⁸ Accordingly, even if the statute was intended to be mandatory, the absence of an enforcement mechanism or legal remedy for constituents immunized directors from liability for failure to abide by the statute, thus nullifying the very mandate upon which the statute was premised.⁵⁹ Regardless, the Connecticut legislature amended the statute in 2010 by replacing the mandatory "shall" with a permissive "may."⁶⁰ In doing so, the legislature eliminated the only purportedly mandatory constituency statute in existence and ended the debate over enforcement of such a statute before the courts ever addressed the issue.⁶¹ The failure of this mandatory statutory construction provides important lessons and instructive historical context as North Carolina considers adopting its own constituency statute.

To date, there are still nine states, including North Carolina, that have yet to enact any form of a constituency statute.⁶² Legal scholars have proposed two theories as to why these states have not yet adopted statutes: (1) "with the exception of Delaware, [the states that

56. CONN. GEN. STAT. ANN. § 33-756(d) (West 2015) (emphasis added).

57. Standley, *supra* note 5, at 216. Bisconti states that the statute seemed to be an explicit challenge to the theory of shareholder primacy, which indicated to both courts and directors "that the consideration of nonshareholder interests must be more than just an afterthought." Bisconti, *supra* note 21, at 798.

58. Bisconti, *supra* note 21, at 783.

59. *See id.*

60. Act of May 10, 2015, No. 10-35, § 10(d), 2010 Conn. Acts H.B. 5530 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. ANN. § 33-756(d) (West 2015)).

61. Standley, *supra* note 5, at 216.

62. *Id.* at 217.

have not yet adopted constituency statutes] were not significantly impacted by the hostile takeover wave of the 1980s”; and (2) states that did not adopt the statutes may have felt that states that did adopt statutes “were overreacting by taking unnecessary steps in the face of hostile takeovers.”⁶³ Thus, states that have not yet adopted these statutes may consider waiting in order to observe the impact constituency statutes have on the corporate landscape in states that have adopted constituency statutes.

C. *Delaware’s Creation of a Quasi-Constituency Statute at Common Law*

Though nearly every state has attempted to protect corporate constituents through action by the legislative branch, Delaware, by contrast, created a similar doctrine through its judicial branch. While Delaware is among the nine states that have not yet formally adopted a constituency statute, the state’s corporate law precedent has been interpreted as having instead created a common law, quasi-constituency statute.⁶⁴ Delaware case law strikes a balance between shareholders’ and nonshareholder constituents’ interests by “allowing directors to consider the interests of others as long as there is some reasonable connection to the long-term interests of the corporation and shareholders.”⁶⁵ This “quasi-constituency statute” was affirmed in the landmark case of *Paramount Communications, Inc. v. Time, Inc.*⁶⁶ In *Paramount Communications*, the Supreme Court of Delaware upheld the Time board’s decision to reject a highly profitable tender offer by Paramount Communications in favor of a merger with Warner Brothers.⁶⁷ Even though the merger was significantly less favorable to Time’s shareholders, Time’s directors felt that the

63. *Id.*

64. *Id.* at 219 (“[T]he Delaware judiciary has aligned its common law to primarily conform to constituency statutes.”).

65. *Id.* at 222. Compare *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) (holding that directors may consider the interests of nonshareholder constituents in the face of a possible takeover and are not obligated to approve a combination simply because it would result in short-term shareholder profits), with *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 181 (Del. 1986) (holding that when a takeover becomes inevitable (i.e. the “*Revlon*” moment occurs), directors may no longer consider nonshareholder interests and are obligated to act as unbiased auctioneers in an effort to maximize shareholder profits), and *Paramount Commc’ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1150 (Del. 1990) (holding that, provided there is no inevitable impending takeover, directors are free to make corporate decisions that may not necessarily maximize short-term shareholder profits as long as the decision promotes the long-term interests of both shareholders and the corporation in general).

66. 571 A.2d 1140, 1152–53 (Del. 1990).

67. *See id.* at 1152–53.

Warner deal would provide better long-term benefits for the corporation.⁶⁸ While the powerful precedent set by several of Delaware's constituency cases—and exemplified by *Paramount Communications*—seems to be clear enough to settle the constituency debate in Delaware, corporate directors in the other eight states (including North Carolina) remain without explicit statutory law to guide corporate governance. Because the case law in the area is seemingly very limited, corporations in these eight states are left guessing as to how a constituency case would play out in their own state courts.

D. Responding to the Primary Arguments Against Constituency Statutes

Despite the fact that forty-one states have already adopted constituency statutes, many legal scholars who promote Berle's traditionalist theory still reject the constructionist-based laws, claiming such statutes promote an improper conceptualization of the corporate model. This Section will address some of the most common criticisms of constituency statutes, including arguments that these statutes are unconstitutional and claims that they offend public policy.

1. Constitutional Arguments Against Constituency Statutes

Critics of constituency statutes often attack them by challenging their constitutionality.⁶⁹ One constitutional argument against constituency statutes is that they violate the Contracts Clause of the United States Constitution.⁷⁰ In order to understand this argument, one must conceptualize the modern-day corporation as a “‘nexus of contracts’ involving various constituents, including shareholders, directors, managers, and employees.”⁷¹ Critics of constituency statutes argue that, under this contract-based corporate theory, shareholder interests are the “foremost aspect” and that “any state law impairing these previously existing contracts . . . must be declared unconstitutional under the Contracts Clause.”⁷² However, a state's constituency statute only violates the Contracts Clause if it is proven

68. Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, LAW & CONTEMP. PROBS., Autumn 2004, at 109, 123–24 (2004).

69. See Adams & Matheson, *supra* note 6, at 1096.

70. *Id.*; see U.S. CONST. art I, § 10, cl. 1 (forbidding states from passing any “law impairing the obligation of contracts”).

71. Adams & Matheson, *supra* note 6, at 1096.

72. *Id.*

that the statute caused some loss of investment by retroactively impairing an existing contractual relationship.⁷³ Thus, because one cannot assume that a corporation in a state governed by a constituency statute produces any less profit than a corporation operating in a state without a constituency statute, the Contracts Clause argument seemingly lacks legal justification.⁷⁴

Another constitutional argument against constituency statutes is that the consideration of nonshareholders' rights constitutes a "taking," and thus, a violation of the Fifth Amendment.⁷⁵ Arguably, considering the interests of other parties "constitutes a taking because shareholders' legal claim to the residual interest of the firm is reduced by consideration of constituent interest, which reassigns property rights from shareholders to stakeholders."⁷⁶ However, "constituency statutes do not completely strip shareholders of the entire value of their stock; they merely limit the preferential treatment of shareholder interests."⁷⁷ Because legislation that merely "reallocates benefits and burdens among private parties" is not considered a taking under the Fifth Amendment, it follows that a claim that constituency statutes violate the Fifth Amendment cannot be sustained.⁷⁸

2. Policy Arguments Against Constituency Statutes

Traditionalists have also made several public policy arguments against constituency statutes. The first such argument is that state legislatures only enacted constituency statutes because they were pressured to do so by the powerful executives from the states' largest corporations.⁷⁹ These executives petitioned for the new statutes out of

73. *Id.* at 1097.

74. *Id.*

75. *Id.*; see U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

76. See Adams & Matheson, *supra* note 6, at 1097. "Residual interest" refers to an equity holder's property rights in the corporation, which opponents of constituency statutes argue are devalued by the consideration of additional constituents' interests. *Id.*

77. *Id.* at 1098. In *United States v. General Motors Corp.*, the Supreme Court made it clear that whether an action constitutes a taking under the Fifth Amendment depends on whether the action deprives the owner of the property, not whether it affects ancillary interests associated with such property. See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945) ("[T]he Fifth Amendment concerns itself solely with the 'property,' i.e., with the owner's relation as such to the physical thing and not with other collateral interests which may be incident to his ownership.").

78. Al Meyers, *Whom May the Corporation Serve?—An Argument for the Constitutionality of Non-Stockholder Constituency Statutes*, 39 N.Y.L. SCH. L. REV. 449, 475–76 (1994).

79. Adams & Matheson, *supra* note 6, at 1099.

fear that they would lose their jobs should the hostile takeovers of their companies succeed.⁸⁰ Critics argue that by submitting to this political pressure, states that passed constituency statutes allowed these same officers and directors to “hide behind the law when [their] decisions are questioned, making the process one which benefits managers instead of the constituents [the statutes] are meant to serve.”⁸¹ However, while constituency statutes may have ultimately resulted in such executives and directors being able to keep the high-paying positions that they would have lost had a merger succeeded, the statutes were likely primarily driven by state legislatures’ desire for large corporations to remain incorporated in, or even relocate to, the state, thus bolstering the state’s labor force and serving its best economic interests.⁸²

Perhaps the most convincing policy argument against constituency statutes is that they lack an enforcement mechanism for the constituents they purport to protect.⁸³ None of these statutes provide any way for constituents to force directors to consider their interests, nor do they allow constituents to challenge director decisions that have a detrimental effect on them.⁸⁴ In fact, some state constituency statutes even go so far as to explicitly deny nonshareholder constituents such a remedy.⁸⁵ This means that directors often have no choice but to prioritize stockholding constituents’ interests to the exclusion of the interests of other stakeholders because of the threat of potential legal action by the shareholders, who, unlike nonshareholders, do maintain statutorily enabled litigation options.⁸⁶

Yet the reason constituency statutes lack enforcement rights is likely because they are permissive, and not mandatory, in nature.⁸⁷ Because constituency statutes merely give directors the option to consider nonshareholder constituents’ interests, a court would be hard-pressed to find a violation when those directors simply choose not to exercise this option.⁸⁸ Accordingly, states that have passed

80. *See id.*

81. *Id.* at 1100.

82. *See, e.g., supra* notes 25–28 and accompanying text.

83. *See Adams & Matheson, supra* note 6, at 1110.

84. *See id.* at 1100–01.

85. Standley, *supra* note 5, at 218; *see also* GA. CODE ANN. § 14-2-202(b)(5) (2003); NEV. REV. STAT. ANN. § 78.138(6) (LEXIS through 2014 Spec. Sess.); N.Y. BUS. CORP. LAW § 717(b)(v) (McKinney, Westlaw through L.2015, chapters 1–558).

86. Standley, *supra* note 5, at 218.

87. Adams & Matheson, *supra* note 6, at 1101.

88. *See id.*

constituency statutes have effectively done so with the hope that the expansion of director capabilities will not be in vain. Because there is no way nonshareholder constituents' interests can be legally enforced, the legislatures in states that have passed constituency statutes must trust that directors will take it upon themselves to create socially conscious corporate governance structures in which all stakeholders' interests are considered.⁸⁹ While this may be effective to a certain extent, a mandatory constituency statute, such as the one this Comment advocates for North Carolina to enact, will ensure more consistent consideration of stakeholder interests.

E. Arguments in Favor of Constituency Statutes Outweigh the Criticisms

Several commentators have recognized the need to consider the best interests of other important corporate constituents, advocating the constructionist corporate model and highlighting the many potential benefits of constituency statutes. These proponents emphasize several policy arguments relating to the economic efficiency and equitable corporate structure that constituency statutes promote.⁹⁰

First, constituency statutes allow directors to acknowledge the importance of constituents who make essential but noncapital investments in the company, and to consider their interests when making business decisions.⁹¹ Though they may not have made financial investments in the corporation, nonshareholder constituents, like employees, "have made a much greater investment in the enterprise by their years of service" and in many cases "may have a greater stake in the future of the enterprise than many of the stockholders."⁹² Because these stakeholders lack the ability to protect their noncapital investments in the firm contractually, they need access to alternative protections to secure their interests.⁹³

89. *See id.* at 1103.

90. *See, e.g., id.* at 1104 ("Constituency statutes allow consideration of those other than shareholders who have contributed to a corporation's success by allowing all constituencies to influence the decisions of companies they help operate and depend on for financial security."); Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 995 (1992) ("[D]irectors may balance a decision's effects on shareholders against its effect on stakeholders. If the decision would harm stakeholders, the directors may trade-off a reduction in shareholder gains for enhanced stakeholder welfare.").

91. Adams and Matheson, *supra* note 6, at 1102.

92. *Id.*

93. *Id.* at 1103–04.

Constituency statutes allow directors to balance the concurrent interests of shareholders and other stakeholders, thus permitting the directors to pursue a course of action that ultimately sacrifices a portion of shareholder gains if doing so is necessary to protect the noncapital interests of other constituents.⁹⁴ Allowing directors to conduct business in this way helps promote an environment within the corporation in which all corporate actors feel “as if they share common goals, rather than placing them in selfish competition with one another.”⁹⁵

The second argument in favor of constituency statutes is that these statutes inspire socially responsible behavior and allow corporations to uphold their ethical responsibilities, thereby encouraging corporations that value these goals to incorporate in, or relocate to, the state.⁹⁶ The general idea is that these companies that “do good for society” will also tend to “do well in the market,” thus benefitting the state as a whole.⁹⁷ Because constituency statutes are meant to encourage socially responsible corporate behavior, such statutes will help states attract ethically and socially responsible businesses, which will lead to a more “attractive business climate” and benefit the statewide economy.⁹⁸

Legal scholars in favor of constituency statutes maintain that corporations must become institutions with moral identities that recognize and accept their ethical obligation to the many different nonshareholder constituents who are integral to a corporation’s success.⁹⁹ In doing so, a corporation must account for the external effects of its internal decisions by holding its directors to a high moral standard and requiring them to consider all of the relevant interests at stake when making a decision.¹⁰⁰ Allowing directors to consider these

94. Bainbridge, *supra* note 90, at 995.

95. Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 642–43 (1992) (“[Considering stakeholder interests] helps redress the malaise caused by corporate displacement of those in the process who have limited, if any, power to participate in or influence that process.”).

96. *See* Bisconti, *supra* note 21, at 786.

97. Virginia Harper Ho, “*Enlightened Shareholder Value*”: *Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 103 n.221 (2010) (explaining that empirical studies have revealed a positive correlation between corporate social performance and corporate financial performance); *see also* Marc Orlitzky, *Corporate Social Performance and Financial Performance: A Research Synthesis*, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 113, 127 (Andrew Crane et al. eds., 2008) (concluding that corporate citizenship and corporate financial performance are mutually reinforcing and positively correlated).

98. Bisconti, *supra* note 21, at 786.

99. Adams & Matheson, *supra* note 6, at 1108–09.

100. *See id.* at 1109.

nonshareholder constituents' interests helps foster positive relations between a business and its community, which is important for both a corporation's financial success and the welfare of the general public.¹⁰¹

Finally, constituency statutes are simply more consistent with the modern theory of the corporation.¹⁰² According to proponents of constituency statutes, modern corporate law has clearly rejected the traditionalist theory that the corporation is the sole property of its shareholders.¹⁰³ Instead, modern corporate law views the corporation as an interdependent system of personal and economic relationships.¹⁰⁴ Corporate structure is supported by a "web of contracts, explicit and implicit, among a variety of participants: stockholders, lenders, employees, managers, suppliers, distributors, and customers."¹⁰⁵ Because all of these constituents bear some type of residual risk, proponents of constituency statutes argue that directors must make decisions based on what is best for society as a whole, not just what is best for maximizing shareholder wealth.¹⁰⁶

Taken together, the arguments in favor of constituency statutes outweigh those against them. Though the statutes may have originally been passed as anti-takeover devices, they have become mediums through which corporations can make socially conscious decisions that benefit those with financial and nonfinancial investments in the company alike.¹⁰⁷

II. BENEFIT CORPORATION ACTS: ANOTHER TYPE OF PROGRESSIVE CORPORATE LEGISLATION

While permissive constituency statutes are the oldest and most common type of progressive corporate legislation, more radical corporate reforms have also recently taken shape. In the past five years alone, a new type of corporate reform legislation has emerged

101. *See id.*

102. *Cf. Mitchell, supra* note 95, at 630 ("We have long since passed the point of seriously describing the corporation as an anthropomorphic entity, directed in an otherwise indeterminate world by the generalized interests of its 'owners' in wealth maximization. It is obvious that the corporation is far more complex an undertaking, consisting of intertwined human and economic relationships, than the traditional stockholder-owner model permits.").

103. *Id.*

104. *Id.*

105. Adams & Matheson, *supra* note 6, at 1105 (quoting Morey W. McDaniel, *Stockholders and Stakeholders*, 21 STETSON L. REV. 121, 149 (1991)).

106. *Id.*

107. *See id.* at 1109.

and begun to catch on in many states: the benefit corporation act.¹⁰⁸ Benefit corporation statutes were likely created in response to the common criticism that the permissive nature of constituency statutes often results in nonshareholder constituents' interests being ignored.¹⁰⁹ By eliminating the permissive element of constituency statutes, these more modern benefit corporation statutes have sought to solve this problem and to assure that such interests are always considered in a corporation's decision-making process.¹¹⁰

A. *What Is a Benefit Corporation?*

Benefit corporations are a new type of business association designed to address the inequity between shareholder and stakeholder interests.¹¹¹ Benefit corporations (1) strive to create a corporate purpose that will have a positive impact on both society and the environment; (2) are not simply permitted to, but are required to consider the impact their business decisions will have on both shareholders and all other nonshareholder constituents;¹¹² and (3) are required to release an annual report to the public assessing the company's overall social and environmental performance using an objective third-party standard.¹¹³ While the ultimate goal of benefit corporations is still to make money, this type of business association enables “[c]ommunity and environmentally minded business owners [to] preserve their social goals without sacrificing the ability to make a profit.”¹¹⁴

Although benefit corporations can be viewed as an alternative to constituency statutes and some states have chosen to implement either one or the other, many states are beginning to enact benefit

108. See, e.g., MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 to 5-6C-08 (LEXIS through 2015 legislation).

109. See James Surowiecki, *Companies with Benefits*, NEW YORKER (Aug. 4, 2014), <http://www.newyorker.com/magazine/2014/08/04/companies-benefits> [<https://perma.cc/9M3K-VL8Z> (dark archive)]. Benefit corporation acts *require* that directors of those companies consider nonshareholder interests rather than simply giving them the option to do so. See *FAQ*, BENEFITCORP.NET, <http://benefitcorp.net/faq> [<http://perma.cc/3FA9-KT4R>].

110. See Surowiecki, *supra* note 109.

111. See *FAQ*, *supra* note 109.

112. *Id.* This is the primary reason for having benefit corporations even in states that already have constituency statutes. “Constituency statutes are permissive and as a result directors ‘may’ consider non-financial interests. This also means that they ‘may not’. [sic.] The objective of benefit corporation legislation is to require directors to consider non-financial interests.” *Id.*

113. *Id.*

114. Doug Bend & Alex King, *Why Consider a Benefit Corporation?*, FORBES (May 5, 2014, 9:00 AM), <http://www.forbes.com/sites/theyec/2014/05/30/why-consider-a-benefit-corporation/> [<http://perma.cc/CFB8-9M2V>].

corporation legislation in addition to their pre-existing constituency statutes.¹¹⁵ In fact, since Maryland became the first state to adopt a benefit corporation act in 2010, twenty-five more states and the District of Columbia have passed legislation allowing businesses to incorporate as benefit corporations.¹¹⁶

Whereas the standard corporation is typically allowed to form for any lawful purpose, companies organized as benefit corporations must “have a purpose of creating ‘general public benefit’ and are *allowed* to identify one or more ‘specific public benefit’ purposes.”¹¹⁷ For example, Maryland defines a “general public benefit” as a “material, positive impact on society and the environment, as measured by a third-party standard, through activities that promote a combination of some specific public benefits.”¹¹⁸ “Specific public benefit” is defined to include the following:

- (1) Providing individuals or communities with beneficial products or services;
- (2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
- (3) Preserving the environment;
- (4) Improving human health;
- (5) Promoting the arts, sciences, or advancement of knowledge;
- (6) Increasing the flow of capital to entities with a public benefit purpose; or
- (7) The accomplishment of any other particular benefit for society or the environment.¹¹⁹

115. See *State by State Status of Legislation*, BENEFITCORP.NET, <http://benefitcorp.net/policymakers/state-by-state-status> [<http://perma.cc/L2VK-KDAY>]. To date, thirty-one states have passed benefit corporation legislation and five others have introduced bills to adopt similar legislation in their states. *Id.*

116. Jacob E. Hasler, *Contracting for Good: How Benefit Corporations Empower Investors and Redefine Shareholder Value*, 100 VA. L. REV. 1279, 1279 & n.1 (2014).

117. William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 839 (2012).

118. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(c) (LEXIS through 2015 legislation).

119. § 5-6C-01(d).

Now that the general structure of the benefit corporation has been introduced, the next Section addresses the criticisms and advantages most commonly associated with this novel corporate form.

B. Addressing the Major Criticisms of Benefit Corporation Acts

Critics of benefit corporations point to three major drawbacks of benefit corporation acts.¹²⁰ First, organizing as a benefit corporation leads to a significant increase in administrative costs because of the heightened reporting requirements to which benefit corporations are subjected.¹²¹ The relatively extensive reporting requirements are exemplified by the Maryland Benefit Corporation Act, which requires all benefit corporations to: (1) prepare an annual report assessing the company's societal and environmental performance over the past year; (2) promptly deliver the report to each stockholder at the close of the fiscal year; and (3) either post the most recent report on the company's publicly accessible website or provide a copy of the most recent report on demand and without charge to any person who requests it.¹²² The expenses associated with these reporting requirements could be a deterrent for potential investors in a publicly traded benefit corporation, particularly if the company is forced to pass these administrative costs along to the shareholders in the form of lower dividends.

Second, because benefit corporations have only been in existence since 2010, another major concern is that the model has not yet proven to be effective.¹²³ Benefit corporations' increased emphasis on social responsibility and their somewhat decreased emphasis on maximizing shareholder returns has critics wondering whether investors will ultimately be willing to sacrifice a portion of their would-be profits for the greater social good.¹²⁴ Some experts argue

120. See Bend & King, *supra* note 114.

121. See *id.* ("One of the major drawbacks is expanded reporting requirements. This is to provide shareholders with adequate information to determine if your business is achieving its stated purpose. Each year a benefit corporation must give each shareholder an annual report.").

122. See MD. CODE ANN., CORPS. & ASS'NS § 5-6C-08.

123. See Bend & King, *supra* note 114 ("Another potential drawback is uncertainty. Benefit corporations are fairly new legal entities. It is unclear how courts will interpret their mandates to not only seek profits, but also to consider potential benefits to society. Furthermore, the impact on raising capital and how angel investors and venture capitalists will react remains uncertain.").

124. See Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY'S L.J. 617, 657 (2013) (noting that many "investors are fully entrenched in the business and cultural norm

that the mandatory general benefit purpose clause creates such a concern in potential investors and that this concern may cause them to invest in traditional business corporations instead.¹²⁵ Specifically, Justin Blount, a Professor of Business Law at Stephen F. Austin University, and Kwabena Offei-Danso, an in-house corporate attorney, have questioned the economic sustainability of benefit corporations, stating that when

investors face the opportunity to invest in a benefit corporation that articulates its primary purpose as the creation of a general public benefit or, on the other hand, a socially minded business corporation that embraces a profit goal via a socially responsible business plan, the latter is more likely to receive capital.¹²⁶

Even those who advocate “socially responsible investments,” such as companies incorporated as benefit corporations, concede that many socially conscious investors still invest with the primary goal of making a return.¹²⁷ Thus, although this aspect of benefit corporations suggests that most multi-billion dollar companies with extremely wealthy institutional investors are unlikely to re-organize as benefit corporations, the business form may be an attractive option for companies with investors who are interested in turning a profit but are also committed to investing in a company that places a premium on social responsibility.

The last major criticism of benefit corporation acts is a procedural one. Critics point out that although benefit corporations require directors to consider the interests of nonshareholder constituents, benefit corporation acts, like constituency statutes, fail to provide these nonshareholder constituents with a mechanism to enforce their rights.¹²⁸ Legislatures in states with benefit corporation acts have likely left such enforcement provisions out of their statutes to avoid “the difficult and inefficient judicial problem that would develop if the benefit corporation were subject to suit by any of the stakeholders whose interests they are required to consider.”¹²⁹ Because nonshareholder constituents are left without remedy, critics believe the benefit corporation “falls short of being a true

commonly taught in business schools—that the purpose of the corporation is to maximize shareholder wealth”).

125. *Id.* at 657–58.

126. *Id.* at 657.

127. *Id.*

128. *See id.* at 648–49.

129. *Id.* at 648.

stakeholder-centric model” because the company cannot be held accountable by the very parties the corporate form is meant to protect.¹³⁰ However, while the statutes do not provide nonshareholder constituents with a right of enforcement, such a right is available to shareholders, who may bring a claim against a benefit corporation’s directors for failure to uphold the company’s stated general or specific public benefit purposes.¹³¹ Furthermore, it seems likely that those who would be willing to invest in benefit corporations would also be inclined to hold such companies accountable and ensure that nonshareholder constituents’ interests are properly considered.¹³²

C. Benefit Corporations’ Numerous Socioeconomic Advantages Offset Their Potential Drawbacks

The first major advantage of benefit corporation acts is that they require companies organized as benefit corporations to adhere to the higher social standards created by their general and specific benefit purposes, regardless of circumstances.¹³³ A benefit corporation is able to ensure it will uphold its beneficial purposes because directors are afforded “secured legal protection necessary to consider the interests of all stakeholders” and shareholders are provided with ample means of enforcement.¹³⁴ Shareholders may enforce director compliance in several ways: They may (1) seek an injunction by initiating a benefit enforcement proceeding; (2) engage in a proxy contest; and (3) vote for terms in the entity’s governing documents that require routine auditing of directors’ actions.¹³⁵ Though similar means of enforcement are available in the traditional corporation as well, social investors in benefit corporations are much more likely to hold directors accountable for a deviation from the company’s general or specific beneficial purposes “because their stock purchase was conditioned on a promise that directors would act in a socially responsible manner.”¹³⁶

130. *Id.* at 648–49.

131. Surowiecki, *supra* note 109 (“Shareholders can sue [a benefit corporation’s] directors for not carrying out the company’s social mission, just as they can sue directors of traditional companies for violating their fiduciary duty.”). *See infra* Section II.C for more details on ways in which shareholders can ensure that benefit corporations operate according to their stated beneficial purposes.

132. *See* Hasler, *supra* note 116, at 1319.

133. Surowiecki, *supra* note 109 (“Whereas a regular business can abandon altruistic policies when times get tough, a benefit corporation can’t.”).

134. *Id.*

135. Hasler, *supra* note 116, at 1319.

136. *Id.*

Another advantage of benefit corporation acts is that they insulate directors of benefit corporations from investor pressure.¹³⁷ Because shareholders are but one of the many constituent groups whose interests must be considered by benefit corporations, directors need not fear for their jobs every time they make a socially responsible decision that may marginally decrease shareholder profits; doing so is simply part of their fiduciary duty.¹³⁸ This prevents directors from being forced into solely monetary-based decisions. For instance, in 2000, the Ben & Jerry's board of directors strongly opposed the acquisition of their company by Unilever from a social standpoint but nonetheless felt bound by their fiduciary duty to the shareholders to approve the acquisition.¹³⁹ However, if Ben & Jerry's had been organized as a benefit corporation, the directors would not have owed the shareholders any such duty. The directors would have been free to oppose the combination for legitimate social reasons despite the fact that doing so may have deprived the shareholders of the highest possible profit.

The final advantage of benefit corporations is that they appeal to young, talented employees who are part of an increasingly socially conscious generation and who are seeking to start their careers at companies with similar values.¹⁴⁰ In fact many young employees are even willing to "take less compensation in exchange for a greater sense of purpose."¹⁴¹ If benefit corporations are able to attract and retain this type of top-tier talent, their efficiency will increase and they will be able to stay true to their beneficial and charitable purposes while still managing to turn a healthy profit.¹⁴²

In sum, benefit corporations have become a popular alternative for new and existing companies that do not wish to conform to the traditionalist view of the corporation.¹⁴³ By voluntarily holding themselves to a higher social standard, these companies are able to recognize the needs of all those whose interests the corporation affects.¹⁴⁴ This progressive business model in turn attracts qualified young minds and socially conscious investors who support the

137. See Surowiecki, *supra* note 109.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *See id.*

143. For example, see *infra* Section IV.A for a discussion of Patagonia, a recently reorganized California benefit corporation that has managed to achieve financial success while remaining true to its stated public benefit purposes.

144. See Surowiecki, *supra* note 109.

company's noble goals.¹⁴⁵ The ultimate result can be a more efficient company that is able to turn a healthy profit while making meaningful societal contributions, satisfying all of its constituents.

III. HOW NORTH CAROLINA HAS DEALT WITH THE CORPORATE THEORY CONFLICT

A. *Lack of North Carolina Case Law on the Issue*

Unlike Delaware, North Carolina case law does not create a quasi-constituency statute or address the question of whether nonshareholder constituents may be considered in a corporation's decision-making process.¹⁴⁶ However, North Carolina courts have acknowledged the existence and importance of the conflict between different constituents' interests, thus reinforcing the argument that North Carolina could benefit from legislation that expressly defines the scope of director discretion.¹⁴⁷

In 1983, the Supreme Court of North Carolina handed down perhaps the most definitive rule available on the corporate theory conflict in the state. In *Meiselman v. Meiselman*,¹⁴⁸ the court asserted that directors of corporations, "[w]hile technically not trustees . . . stand in a fiduciary relation to the corporation and its stockholders."¹⁴⁹ By conceptualizing directors as "quasi-trustees," the court seems to endorse the traditionalist, property-based theory of corporate identity.¹⁵⁰ The opinion suggests that the corporation is to be viewed as the "property" of its investors and the directors, as "quasi-trustees," are to manage the business accordingly.¹⁵¹ Though

145. *See id.* ("Having a social mission can also be an important selling point with consumers, as the success of the fair-trade movement makes clear."). The fair-trade movement is an international commercial trade initiative that seeks to reduce poverty and increase sustainable development by securing rights for marginalized producers and workers and creating more equitable trading conditions. WORLD FAIR TRADE ORG., A CHARTER OF FAIR TRADE PRINCIPLES 2-7 (Jan. 2009), http://www.fairtrade.net/fileadmin/user_upload/content/2009/about_us/documents/Fair_Trade_Charter.pdf [<https://perma.cc/G3T4-886U>].

146. *See* Standley, *supra* note 5, at 217, 221-23.

147. *See, e.g., Meiselman v. Meiselman*, 309 N.C. 279, 288-96, 307 S.E.2d 551, 557-61 (1983).

148. 309 N.C. 279, 307 S.E.2d 551 (1983).

149. *Id.* at 308, 307 S.E.2d at 568 (quoting *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939)).

150. *See generally id.*, 307 S.E.2d 551 (discussing the directors' fiduciary duty to shareholders of the company).

151. *See id.* at 308, 307 S.E.2d at 568 ("Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound

the courts of several other states have disputed the ruling in this case, *Meiselman* has yet to be overturned by the Supreme Court of North Carolina.¹⁵²

In *First Union Corp. v. SunTrust Banks, Inc.*,¹⁵³ the Superior Court of Guilford County, North Carolina, identified the lack of clarity in corporate identity theory as a major hindrance to effective application of North Carolina corporate law.¹⁵⁴ In doing so, the court acknowledged that the two opposing theories of corporate identity always have been, and will continue to be, at the root of most intra-corporation conflict.¹⁵⁵ Because corporations “exist to create value,” and producing profits or creating nonfinancial, external gains can create such value, it is important that directors have a clear sense of how they are permitted to run a corporation and which values they are permitted to foster.¹⁵⁶

B. North Carolina Legislature’s Rejection of the Benefit Corporation Act

Perhaps in response to North Carolina courts expressing a need for clarity as to the bounds of directors’ duties, the state’s general assembly recently considered instituting a benefit corporation act.¹⁵⁷ In February of 2013, the North Carolina Senate proposed and passed a bill to ratify the North Carolina Benefit Corporation Act.¹⁵⁸ The bill was then promptly filed in the house of representatives and, after being referred to several committees, was ultimately rejected by a

knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it.” (quoting *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939)).

152. The Court of Special Appeals of Maryland disagreed with this case in *Lerner v. Lerner Corp.*, 750 A.2d 709, 721–22 (Md. Ct. Spec. App. 2000), and several other states’ highest or intermediate appellate courts have declined to follow it.

153. No. 01-CVS-10075, 2001 WL 1885686 (N.C. Super. Ct. Aug. 10, 2001).

154. *See id.* at *1.

155. *Id.* at *2 (“Two inconsistent conceptions have dominated our thinking about corporations since the evolution of the large integrated business corporation in the late nineteenth century.”).

156. *See id.* at *1.

157. H.B. 440, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013).

158. Legislative History of North Carolina Senate Bill 99: North Carolina Benefit Corporation Act, N.C. GEN. ASSEMBLY, <http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=S99> [http://perma.cc/R2DR-457E].

count of sixty to fifty-two.¹⁵⁹ The terms of the North Carolina Benefit Corporation Act proposed by the bill were very similar to those in the statutes of other states that allow benefit corporations.¹⁶⁰ The Act would have required that a business incorporated as a benefit corporation “have as one of its corporate purposes the creation of a general public benefit” and would have required the directors of benefit corporations to consider the financial, social, and environmental impact of a potential business decision.¹⁶¹

Though two Republican representatives sponsored the bill, the vast majority of the Republicans in the house of representatives voted against it.¹⁶² The “no” votes from the Republican majority were ultimately enough to overcome the nearly unanimous Democratic support of the bill.¹⁶³ Those who opposed the bill were concerned that “its goal [was] to move the corporate system and capitalism in general toward socialism by suggesting that there’s a higher, better purpose than maximizing profit.”¹⁶⁴ However, the bill’s sponsor, Representative McGrady (R-Henderson County), and other supporters explained that there was no socialist agenda and that the proposed act was simply meant to recognize the aspirations of the socially conscious younger generation, who “want to make a profit,” but also want to “be about good things.”¹⁶⁵

C. Possible Explanations for North Carolina’s Failure To Adopt Either Type of Statute

There are several possible explanations for why North Carolina’s General Assembly has not yet chosen to adopt either major type of

159. *Id.*; Laura Leslie, *House Votes Down Benefit Corporations*, WRAL: @NCCAPITOL (May 14, 2013), <http://www.wral.com/house-votes-down-benefit-corporations/12451435/> [http://perma.cc/X2HH-NJ7B].

160. See Leslie, *supra* note 159.

161. H.B. 440 § 55-18-30(a).

162. Roll-Call Transcript for May 15, 2013, Vote on North Carolina House Bill 440, N.C. GEN. ASSEMBLY, <http://www.ncga.state.nc.us/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2013&sChamber=H&RCS=724> [http://perma.cc/9LXJ-XW7T].

163. *Id.* However, the vote was immediately reversed, and the resurrected bill has since been sent to the House Committee on Commerce and Job Development for reconsideration, with the possibility for it to be presented to the house again at a later date. Leslie, *supra* note 159.

164. Leslie, *supra* note 159 (“Members also received a handout from free-market think-tank Civitas Institute reinforcing that point.”). There was also some suggestion by sponsor Rep. Chuck McGrady, a Republican from Henderson County, that many who voted against the bill did so because they believed the bill promoted the United Nations’ “Agenda 21” sustainability efforts, which some conspiracy theorists allege is a socialist plot. *Id.*

165. *Id.*

progressive corporate law reform. The first is that, unlike many of the states that rushed to adopt constituency statutes, North Carolina was not significantly impacted by the 1980s wave of hostile takeovers that sparked many other states to pass those statutes.¹⁶⁶ This argument is substantiated by both the general nature of the 1980s takeover trend and the landscape of the North Carolina economy at the time.¹⁶⁷ As Harvard Economics Professor Andrei Shleifer and University of Chicago Business Professor Robert Vishny explained in their article, *Takeovers in the '60s and the '80s: Evidence and Implications*,¹⁶⁸ the takeover targets in the 1980s wave were generally much larger corporations, such as Fortune 500 companies.¹⁶⁹ In fact, twenty-eight percent of the Fortune 500 companies of 1980 had been acquired by hostile takeover by 1989.¹⁷⁰ However during this period, North Carolina was experiencing a complete economic overhaul.¹⁷¹ It was not until the late 1980s that North Carolina's economy began to shift away from smaller companies engaged in the textile and farming industries towards much larger companies in the financial and technology-based industries.¹⁷²

Thus, it is quite possible that the North Carolina General Assembly was disinclined to follow the constituency statute trend that began in the mid-1980s simply because the textile and agricultural companies that made up a majority of the state's economy were not consistently targeted.¹⁷³ However, the influx of large corporations in the state since the late 1980s has led to a vastly different modern economy that is no longer completely dependent upon such industries.¹⁷⁴ In fact, in 2013, North Carolina had the nation's tenth highest GDP.¹⁷⁵ At the center of this growth is the city of Charlotte, which has become the second-largest financial center in the country

166. See Standley, *supra* note 5, at 217.

167. See Shleifer & Vishny, *supra* note 18, at 53–55 (explaining the nature of 1980s takeovers and the general state of the United States economy at the time).

168. *Id.*

169. *Id.* at 53.

170. *Id.*

171. *North Carolina*, ENCYCLOPEDIA.COM, http://www.encyclopedia.com/topic/North_Carolina.aspx [<http://perma.cc/PUS8-F393>].

172. *Id.*

173. See Shleifer & Vishny, *supra* note 18, at 53 (noting that “the size of the average [takeover] target increased enormously from the modest level of the ‘60s”).

174. See *id.* at 53–55.

175. News Release, Bureau of Econ. Analysis, U.S. Dep't of Commerce, Broad Growth Across States in 2014: Advance 2014 and Revised 1997–2013 Statistics of GDP by State (June 10, 2015), http://www.bea.gov/newsreleases/regional/gdp_state/2015/pdf/gsp0615.pdf [<http://perma.cc/8JTE-QCTX>].

and is now home to many large corporate takeover targets.¹⁷⁶ Though it may not have made sense for North Carolina to adopt a constituency statute in the 1980s, it is clear that the state's corporate landscape has seen significant change over the past thirty-five years, and it is imperative that North Carolina revamp its corporate law to better reflect this reality.

Another plausible explanation for North Carolina's failure to adopt either a constituency statute or a benefit corporation act is that the general assembly is wary of the effect the statutes may have and "want[s] to observe the impact" of constituency statutes and benefit corporation acts in other states.¹⁷⁷ Regarding constituency statutes in particular, North Carolina may have felt that other states were "overreacting" by desperately expediting the constituency statutes in the face of the 1980s hostile takeover wave.¹⁷⁸ If the general assembly felt the state could survive the wave of takeovers without passing a constituency statute, it would have been to North Carolina's advantage to observe the effect of such statutes in practice in other states before deciding whether to adopt one itself.

Though this argument fails to explain why the general assembly still has not ratified a constituency statute over thirty years after the nation's first one was passed, it may explain the house of representatives' reluctance to pass the recent North Carolina Benefit Corporation Act, a type of legislation that has only been in existence for five years.¹⁷⁹ However, by limiting both the scope of its directors' power and the types of business associations it allows to organize in the state, North Carolina may be constraining its corporations in a way that could negatively impact the state's economy in the not-so-distant future by forcing some of these companies to take their business elsewhere.

176. Les Christie, *10 Fastest Growing U.S. Cities*, CNN MONEY (Apr. 5, 2012, 12:42 PM), http://money.cnn.com/galleries/2012/real_estate/1204/gallery.US-Cities/ [<http://perma.cc/U2VT-ADNY>].

177. Standley, *supra* note 5, at 217.

178. *Id.*

179. Shortly after the bill was voted on, Sen. Tim Moore of Cleveland County expressed concerns about benefit corporation legislation, which many states have been quick to adopt. "The bottom line is, you don't need a B-corp." Leslie, *supra* note 159.

IV. RECOMMENDATIONS FOR NORTH CAROLINA CORPORATE LAW GOING FORWARD

A. *Adopt the North Carolina Benefit Corporation Act*

It is imperative that North Carolina recognize the advantages of the newest major corporate law reform and ratify a benefit corporation act. It is of course true that doing so would not provide any clarity as to whether directors of traditional business corporations are allowed to consider the interests of nonshareholder constituents, like a constituency statute would. However, it would provide an attractive alternative business organization option, both for entrepreneurs who want to start a company that strives to make a profit while “be[ing] about good things” and for existing companies willing to commit themselves to a higher standard of social accountability.¹⁸⁰

In just five years, twenty-seven jurisdictions have adopted benefit corporation acts.¹⁸¹ Though benefit corporations are still very new, they have already proven to be a viable business form under which a company can satisfy the interests of both its shareholders and stakeholders. For example, Patagonia, a well-known outdoor-clothing company incorporated in California, amended its articles of incorporation to become a benefit corporation just two days after the California Benefit Corporation Act became effective in January of 2012.¹⁸² Patagonia’s founder, Yvon Chouinard, is known for his environmental philanthropy, and the company had been redirecting a portion of its profits to social and environmental causes since 1986, despite being classified as an ordinary business corporation.¹⁸³ However, by establishing itself as a benefit corporation, the company charged its directors with a “legally binding fiduciary responsibility to take into account the interests of workers, the community and the environment as well as its shareholders,” thus “creat[ing] the legal framework” necessary for Patagonia to “remain true to [its] social goals.”¹⁸⁴ Furthermore, despite Patagonia’s revamped commitment to the environment and other nonshareholder constituents, it has

180. See Leslie, *supra* note 159; see also Surowiecki, *supra* note 109.

181. *State by State Legislative Status*, *supra* note 115.

182. *B Corps: Firms with Benefits*, ECONOMIST (Jan. 7, 2012), <http://www.economist.com/node/21542432> [<http://perma.cc/CK3S-Q9WR>].

183. See *Patagonia Road Tests New Sustainability Status*, BLOOMBERG (Jan. 4, 2012, 7:57 AM), <http://www.bloomberg.com/news/2012-01-04/patagonia-road-tests-new-sustainability-legal-status.html> [<http://perma.cc/Z836-3GDR>].

184. *B Corps: Firms with Benefits*, *supra* note 182.

managed to remain extremely profitable.¹⁸⁵ In fact, since 2008, the company has doubled in size and its profits have tripled.¹⁸⁶ Though benefit corporation acts are still in their adolescence, the success of a reputable company like Patagonia suggests that benefit corporations may very well be able to achieve both their social and economic goals by carrying out their established benefit purposes while still managing to produce a healthy bottom line.

Another important reason for North Carolina to ratify a benefit corporation act is that it will allow the state's corporations to "attract and retain talented employees" who "want to work for socially conscious companies, and will take less compensation in exchange for a greater sense of purpose."¹⁸⁷ In the past, recent college graduates who fit this description have often been inclined to work at nonprofits.¹⁸⁸ However, because the "ability to have an impact on a large scale is . . . greater in the for-profit world," allowing benefit corporations will likely provide a more attractive option for these highly qualified workers, thus leading to a more competent and efficient work force.¹⁸⁹ Similarly, the fact that a company has made a commitment to a noble social or environmental cause can be "an important selling point with consumers," thus encouraging them to give their business to, or invest in, companies that they otherwise would not have.¹⁹⁰ Much like benefit corporation investors, who are willing to potentially sacrifice a portion of profits, many consumers are willing to pay slightly more for goods and services provided by socially and environmentally responsible corporations because they realize that doing so will help further social causes.¹⁹¹

In short, adopting a benefit corporation act in North Carolina will likely result in both a more efficient supply chain and increased consumer demand.¹⁹² By creating a sustainable model in which a corporation makes a commitment to conduct its business for the benefit of its shareholders, as well as its employees and the

185. See Drake Baer, *How Patagonia's New CEO Is Increasing Profits While Trying To Save the World*, FAST COMPANY (Feb. 28, 2014, 5:44 AM), <http://www.fastcompany.com/3026713/lessons-learned/how-patagonias-new-ceo-is-increasing-profits-while-trying-to-save-the-world> [<http://perma.cc/YEC5-B4MD>].

186. *Id.*

187. Sorowiecki, *supra* note 109.

188. *Id.*

189. *Id.*

190. *See id.*

191. *See id.*

192. *See id.*

environment, companies like Patagonia have blazed the trail for socially conscious corporations with similar aspirations.

One final reason to pass a benefit corporation act in North Carolina is that it would provide both the courts and the would-be directors of benefit corporations with substantial legal clarity. By creating a duty that requires benefit corporation directors to consider nonshareholder constituents, benefit corporation acts make clear that a company is bound to uphold its stated benefit purposes even “when times get tough.”¹⁹³ Furthermore, by providing shareholders with clearly defined and enforceable legal rights, benefit corporation acts establish an important check on the board’s power that assures this important duty will be followed.¹⁹⁴ In turn, the unambiguous provisions of benefit corporation acts leave little room for alternative interpretation, foreseeably easing the North Carolina courts’ burden should they be required to interpret the meaning of the statute in future litigation.¹⁹⁵

Though the North Carolina General Assembly has thus far declined to adopt a benefit corporation act, there is still hope for ratification of such a statute in the near future. After rejecting the proposed legislation in May of 2013, the house of representatives immediately decided to resurrect the bill by reversing the vote on a motion for reconsideration by Sen. Tim Moore.¹⁹⁶ The bill has since been referred again to the house commerce committee for further consideration.¹⁹⁷ Passing the bill would create a new type of legal business association with mandatory director duties and clearly defined shareholder rights of enforcement.¹⁹⁸ In addition, it would foster a more efficient economy with a highly qualified workforce that

193. *Id.*

194. *See* Hasler, *supra* note 116, at 1319.

195. For example, the proposed North Carolina Benefit Corporation Act from 2013 clearly defines directors’ duties and shareholder right of action, neither of which are defined in constituency statutes. Under the proposed North Carolina Benefit Corporation Act, directors *shall* consider the following constituents’ interests and company objectives: (1) shareholders, (2) employees, (3) customers, (4) the community and society, (5) the local and global environment, (6) the short- and long-term interests of the benefit corporation, and (7) the company’s general and specific public benefit purpose. H.B. 440, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013) (defining directors’ duties under proposed statute N.C. GEN. STAT. § 55-18-40(a)). Furthermore, the proposed North Carolina General Statute section 55-18-43 gives shareholders, directors, and equity holders the right to enforce these required director duties through a “benefit enforcement proceeding.” *Id.*

196. Leslie, *supra* note 159.

197. H.B. 440, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013), <http://www.ncleg.net/gascrpts/BillLookUp/BillLookUp.pl?Session=2013&BillID=h440> [<http://perma.cc/R7SZ-PV2T>].

198. *See* H.B. 440 § 55-18-40, -41, -43.

would allow benefit corporations to appease shareholder and nonshareholder constituents alike.

B. Enact a Constituency Statute

Though adopting a benefit corporation act would prove valuable to North Carolina in many ways, doing so would not solve the corporate identity conflict in the context of traditional business corporations. Because North Carolina has yet to adopt a constituency statute and the case law fails to clearly fill the statutory gap, one can only assume that the state still conforms to the traditionalist “property” school of thought.¹⁹⁹ Accordingly, the shareholder primacy theory requires directors of North Carolina corporations to operate in a way that maximizes shareholder profits and considers only the best interests of a corporation’s owners.²⁰⁰

The current traditionalist theory of corporate identity can deter a socially conscious business from incorporating in the state and prevent current North Carolina corporations from fully developing their “moral identity.”²⁰¹ The first major benefit of adopting a constituency statute is that it would remove the burden caused by a North Carolina corporation director’s duty to maximize shareholder profit, instead allowing directors to make decisions that benefit the corporation as a whole.²⁰² While in actuality directors probably manage to escape liability for decisions that involve the consideration of nonshareholder interests on a fairly regular basis,²⁰³ the fact remains that, under current North Carolina law, such actions constitute a breach of fiduciary duty for which the shareholders are legally entitled to sue.²⁰⁴ Adopting a constituency statute in North Carolina would provide explicit immunity for directors of nonbenefit corporations, thus encouraging open and consistent consideration of stakeholder interests as part of the board’s decision-making

199. See *Meiselman v. Meiselman*, 309 N.C. 279, 307–08, 307 S.E.2d 551, 568–69 (1983) (explaining that a corporate officer holds a fiduciary duty to perform on behalf of the corporation and its stockholders).

200. See *First Union Corp. v. SunTrust Banks, Inc.*, No. 01-CVS-11075, 2001 WL 1885686, at *2 (N.C. Super. Ct. Aug. 10, 2001); *Adams & Matheson*, *supra* note 6, at 1090; *Orts*, *supra* note 13, at 90.

201. See *Adams & Matheson*, *supra* note 6, at 1109.

202. *Id.* at 1101.

203. See *Standley*, *supra* note 5, at 220–21 (discussing how the business judgment rule “serves as a backstop for directors contemplating a variety of interests,” creating a presumption in favor of the board and making it more difficult for a shareholder to prevail on a claim for breach of fiduciary duty).

204. See *Meiselman*, 309 N.C. at 307, 307 S.E.2d at 568.

process.²⁰⁵ And without such liability on a corporation's directors, the corporation can develop a strong "moral identity" within its community and uphold what many consider to be its implied ethical obligations.²⁰⁶

Another significant benefit of adopting a constituency statute is that its adoption would make North Carolina's corporate law more consistent with the modern theory of the corporation in the United States, as exemplified by corporate law trends in a vast majority of the states.²⁰⁷ By allowing directors to formally recognize the interests of all those who sustain the corporation through important noncapital investments, North Carolina would be "recogniz[ing] both the inextricable interdependence of corporate actors and the desirability of treating participants in a common enterprise as if they share common goals, rather than placing them in selfish competition with one another."²⁰⁸ In doing so, the general assembly would align the state's corporate law with the modern constructionist theory of corporate identity embraced by nearly all other states.²⁰⁹

Further, operating under the constructionist theory and considering the interests of the corporate entity as a whole rather than just those of the shareholders would allow directors to maximize the long-term wealth-producing value of the firm.²¹⁰ The fact that an

205. See Adams & Matheson, *supra* note 6, at 1101.

206. See *id.* at 1108.

207. See Standley, *supra* note 5, at 212.

208. Mitchell, *supra* note 95, at 642–43.

209. Standley, *supra* note 5, at 212 (emphasizing that forty-one states have adopted constituency statutes, which reject the traditionalist theory by "enabl[ing] corporate directors to consider interests other than those of their shareholders when exercising their corporate decision-making authority").

210. See Adams & Matheson, *supra* note 6, at 1105 (arguing that modern corporate directors must consider the interests of all corporate stakeholders to ensure the best result for society overall). The stark contrast between pure shareholder profit maximization and long-term company value maximization is perfectly exemplified by IBM, one of the United States' most iconic companies. At the company's peak in the 1980s, there were over 10,000 IBM employees working and living in Endicott, New York. Now, just thirty years later, only 700 IBM employees remain in Endicott. See Jia Lynn Yang, *Maximizing Shareholder Value: The Goal that Changed Corporate America*, WASH. POST (Aug. 26, 2013), http://www.washingtonpost.com/business/economy/maximizing-shareholder-value-the-goal-that-changed-corporate-america/2013/08/26/26e9ca8e-ed74-11e2-9008-61e94a7ea20d_story.html [<http://perma.cc/WVT2-8QRC>]. Continuous pressure on the board to maximize shareholder profits has forced the company to implement sizeable layoffs and to export much of its manufacturing work overseas. *Id.* The company has also made significant cuts in its pension and retirement plans. *Id.* However, the company's job cuts and benefits alterations have resulted in a twenty-five-fold return in stock value since 1980. *Id.* The trend at IBM over the past thirty years shows a shift from a constructionist-minded model in which constituents' (like employees') interests were a major

investor's shares in a company are almost always freely transferable means that the general interests of the corporation's shareholders will frequently change, depending upon the age and level of risk aversion of the particular shareholders at any given time.²¹¹ Because "[a] corporation is an entity whose interests will generally remain the same over an extended period of time . . . a more consistent result will come from pursuing the goals of a corporate entity rather than seeking to satisfy the constantly changing, volatile goals of shareholders."²¹²

In summary, adopting a constituency statute in North Carolina would "attract socially responsible businesses" not already incorporated in the state²¹³ and would provide directors of those that are with the legal immunity necessary to consider nonshareholder interests more openly and consistently.²¹⁴ The ratification of a constituency statute would also make the state's body of corporate law more consistent with the modern theory of the corporation.²¹⁵ Current North Carolina corporate law seemingly fails to recognize the value of the nonfinancial investments that stakeholders make in a company, instead placing all the value on the capital investments provided by its shareholders.²¹⁶ Many scholars like Edward Adams and John Matheson, both business law professors at the University of Minnesota School of Law, refute this theory of the corporation, asserting that nonshareholder constituents, like employees, actually "may have made a much greater investment in the enterprise by their years of service, may have less ability to withdraw, and may have a greater stake in the future of the enterprise than many of the stockholders."²¹⁷ Adopting a constituency statute in North Carolina would allow directors to recognize the interests of all those invested in the corporation and would lead to a more efficient and cooperative corporate model.²¹⁸

consideration to a traditionalist model strictly focused on delivering the highest possible returns to shareholders. *Id.*

211. Adams & Matheson, *supra* note 6, at 1106.

212. *Id.* at 1106–07.

213. Bisconti, *supra* note 21, at 786.

214. See Standley, *supra* note 5, at 219–21 (explaining that, in states without constituency statutes, boards are still bound by the common law duty to manage the company with shareholder interests as the primary consideration).

215. See *id.* at 212.

216. See *Meiselman v. Meiselman*, 309 N.C. 279, 308, 307 S.E.2d 551, 568 (1983) (noting that corporate officers and directors "stand in a fiduciary relation to the corporation and its stockholders").

217. Adams & Matheson, *supra* note 6, at 1102.

218. See *id.* at 1105.

CONCLUSION

Corporate identity theory has come a long way since the early 1920s, when state courts consistently held that directors' sole duty was to maximize shareholder profits, even if doing so was to the detriment of other stakeholders' interests.²¹⁹ Since then, many states have abandoned the outdated, traditionalist shareholder primacy model in favor of an all-inclusive, constructionist corporate identity theory through the passage of socially progressive corporate law legislation.²²⁰ In doing so, these states have responded to the need for a more equitable corporate model that considers the interest of all parties who have made investments in a corporation, whether financial or otherwise.²²¹ It is time for North Carolina to follow this trend and pass some progressive corporate laws of its own.

Enacting a benefit corporation act would encourage socially and environmentally responsible corporations to incorporate in the state. These corporations would then be able to attract and retain young, talented employees who are determined to pursue careers that will make a difference in the world, as well as socially conscious consumers who are committed to supporting these companies' beneficial purposes. A benefit corporation act would also provide substantial legal clarity to the directors of benefit corporations and enable them to hold corporations to higher social standards.

Additionally, adopting a constituency statute would permit directors of nonbenefit corporations to consider the interests of nonshareholder constituents by freeing them from legal liability for failure to maximize shareholder profits. By embracing the constructionist corporate model, a constituency statute in North Carolina would allow directors to maximize the long-term wealth-producing value of the corporation by recognizing the important nonfinancial investments made by a corporation's many stakeholders.

While the objective of a for-profit corporation is ultimately to have a healthy bottom line, directors should not be forced to completely disregard the interests of nonshareholder constituents in pursuit of that goal. Allowing for benefit corporations and providing directors of nonbenefit corporations with the ability to consider stakeholder interests would lead to a more efficient economy in

219. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.").

220. Standley, *supra* note 5, at 212.

221. See Adams & Matheson, *supra* note 6, at 1105.

North Carolina and would make North Carolina corporate law much more consistent with the prevailing modern theory of the corporation. It is time the state steps into the future by abandoning the traditionalist school of thought and joining the constructionist reform movement.

JOSEPH R. SHEALY**

** I would like to thank Professor Thomas Lee Hazen for his guidance in the early stages of this Comment, as well as Claire O'Brien and the rest of the *North Carolina Law Review* board and staff for their tireless work throughout the process. I am also very grateful to my friends and family—without their constant encouragement and support I would never have been able to accomplish this goal.