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DEMOCRATIZING THE FOURTH SECTOR: B CORPS AND BENEFICIARY PARTICIPATION

Joseph Pileri

I. INTRODUCTION

In 2019, Business Roundtable, an influential organization comprised of executives from major American companies, announced that a corporation's purpose is not only to pursue profit but also to advance the interests of a broad set of stakeholders.[1] Workers, suppliers, and the environment were among the stakeholders named in the statement.[2] Although the statement has no legal effect and does not call for legal or structural reform, it raised important questions about the role of corporate activity in American life. Should corporate activity further the interests of diverse stakeholder groups or simply those of capital? Are company executives in a position to deliver value to all stakeholders? Does corporate law determine this ability?

Business Roundtable is not the first to attempt to combine profitability and socially beneficial corporate activities.[3] In April 2015, e-retail giant Etsy held its Initial Public Offering (IPO), raising a total of $267 million.[4] Etsy—by then a household name—is known for creating thousands of jobs for stay-at-home crafters and artisans (many of them women), enabling them to build a business selling goods on Etsy's online marketplace.[5] Etsy is also notable for its status as a certified B Corporation, or "B Corp."[6] B Lab, a nonprofit organization, grants B Corp status to socially-minded for-profit companies that demonstrate a commitment to creating social or environmental benefits.[7] B Corp certification does not come with tax exemption or other government benefits; rather, companies use the status to signal their commitment to a social mission and to communicate that commitment to the public.[8] Etsy was only the second B Corp in history to file for a public offering.[9] At the time of the IPO, Etsy's professed mission was to "to reimagine commerce in ways that build a more fulfilling and lasting world."[10] Etsy claimed it would achieve

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1. David Gelles & David Yaffe-Bellany, *Shareholder Value Is No Longer Everything, Top C.E.O.s Say*, N.Y. TIMES (Aug. 19, 2019), https://nyti.ms/2NqGE7N [https://perma.cc/GC4Z-YE7K].
2. *Id.*
3. *See* Matt Egan, *Etsy Now Worth Over $3 Billion. Stock Jumps 88% After IPO*, CNN (Apr. 16, 2015, 11:15 AM), https://money.cnn.com/2015/04/15/investing/etsy-ipo-16-a-share-wall-street/index.html [https://perma.cc/G6BM-F9RU].
4. *Id.*
5. *See* David Gelles, *Inside the Revolution at Etsy*, N.Y. TIMES (Nov. 25, 2017), https://nyti.ms/2i4GjKE [https://perma.cc/VS9Y-MGGE].
6. *Id.*
7. *About B Corps*, CERTIFIED B CORP., https://bcorporation.net/about-b-corps [https://perma.cc/5M59-MJM2].
8. *See* Jena McGregor, *What Etsy, Patagonia and Warby Parker Have in Common*, WASH. POST (Apr. 20, 2015, 11:13 AM), https://www.washingtonpost.com/news/on-leadership/wp/2015/04/20/what-etsy-patagonia-and-warby-parker-have-in-common/ [https://perma.cc/4K59-7GXL].
9. *Id.*
10. Gelles, *supra* note 5.

this goal by focusing its decision-making on a range of stakeholders including employees, neighbors, members, partners, and the environment.[11]

Etsy's B Corp status did not survive long after the IPO. In 2017, citing market and financial pressures, Etsy's board fired its Chief Executive Officer (CEO), laid off staff, and dismantled its "Values-Aligned Business" team that was charged with overseeing the company's environmental and social impact.[12] Etsy's management then decided not to continue as a B Corp, allowing the company's status to lapse.[13] Employees who were not laid off were devastated.[14] In fact, some cried in the office.[15] Etsy's management made these decisions in response to pressure from its public shareholders and board of directors, many of whom felt that Etsy's social and environmental goals were at odds with profitability.[16]

B Corp status is widely recognized and highly valued.[17] Patagonia, Ben & Jerry's, Warby Parker, and over 3,000 others have obtained B Corp status to signal their commitment to doing business in a way that is socially or environmentally sustainable.[18] This commitment is accomplished through subjecting their company to a yearly audit by B Lab, increasing public transparency, and altering corporate fiduciary duties.[19] Companies pay up to $50,000 annually for B Corp certification,[20] signaling to markets that these businesses are serious about sustainability. These companies also use B Corp status to codify their declared purpose of having a positive effect on corporate or public benefit while profiting within their corporate charters.[21] This public benefit is often defined as creating positive social or environmental outcomes for one or more third-party stakeholders like workers, customers, or communities.[22]

The B Corp movement coincides with the burgeoning fields of social enterprise and impact investing, all of which compel businesses to create

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11. ETSY, PROGRESS REPORT 2014, at 3 (2015), http://extfiles.etsy.com/progress-report/ProgressReportPDF2014.pdf [https://perma.cc/78EX-A6GU].

12. Gelles, *supra* note 5.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. McGregor, *supra* note 8.

18. B Lab, *A Year of Business as a Force for Good: 2019 in Review*, MEDIUM (Dec. 19, 2019), https://bthechange.com/a-year-of-business-as-a-force-for-good-2019-in-review-8e744ed4d620 [https://perma.cc/L5TN-RFW2].

19. *See About B Corps*, *supra* note 7.

20. McGregor, *supra* note 8.

21. *See id.*

22. *Certification*, CERTIFIED B CORP., https://bcorporation.net/certification [https://perma.cc/7PRU-Y4TE].

public benefit alongside pursuing profit.[23] Many businesses that consider themselves social enterprises seek B Corp certification.[24] Like B Corps, social enterprises seek to use commercial methods to solve societal problems traditionally associated with the charitable sector.[25] When social enterprises utilize third-party certification standards, such as B Corp status, alongside new corporate forms, this explicitly allows for-profit enterprises to pursue profit while creating public benefit.[26] Relatedly, impact investing refers to transactions that have an express goal of furthering some public benefit.[27] Impact investing also heavily relies on the use of third-party standards or metrics.[28]

In social enterprise and impact investing, the intended beneficiaries can either be a specific set of stakeholders or the public as a whole.[29] Both fields respond to the perceived norm of profit maximization and its harms.[30] B Corps, along with social enterprises and impact investing generally, comprise the so-called Fourth Sector, which is said to exist for traditional charitable, for-profit, and government sectors to pursue a mix of profit and mission.[31]

That Etsy failed to sustain its course as a B Corp is perhaps unsurprising. The B Corp Declaration of Independence makes clear that the goal of corporate activity is to benefit a wide range of stakeholders beyond a company's shareholders.[32] Although those closest to social problems are best

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23. WILLIAM H. CLARK JR. ET AL., THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION 28–29 (2013), https://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf [https://perma.cc/4SMV-BV4E]; *see also* Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1368 (2011).

24. *See* Suntae Kim et al., *Why Companies Are Becoming B Corporations*, HARV. BUS. REV. (June 17, 2016), https://hbr.org/2016/06/why-companies-are-becoming-b-corporations[https://perma.cc/4CQM-BTXZ]. Generally, social enterprise refers to any enterprise that combines the pursuit of profit with the pursuit of social goals and includes many other types of entities and corporate forms. Page & Katz, *supra* note 23, at 1353.

25. Page & Katz, *supra* note 23, at 1361.

26. Kim et al., *supra* note 24.

27. Deborah Burand, *Contracting for Impact: Imbedding Social and Environmental Impact Goals into Loan Agreements*, 13 N.Y.U. J.L. & BUS. 775, 776 (2017).

28. DANA BRAKMAN REISER & STEVEN A. DEAN, SOCIAL ENTERPRISE LAW: TRUST, PUBLIC BENEFIT AND CAPITAL MARKETS 127 (2017). Social enterprises use evaluative metrics that "measure how much social good is achieved and compare social good generation over time and across entities." *Id.* at 126.

29. *See generally* Burand, *supra* note 27, at 776; Page & Katz, *supra* note 23, at 1366.

30. *See* Page & Katz, *supra* note 23, at 1362.

31. Rae André, *Assessing the Accountability of the Benefit Corporation: Will This New Gray Sector Organization Enhance Corporate Social Responsibility?*, 110 J. BUS. ETHICS 133, 134 (2012).

32. *About B Corps*, *supra* note 7.

situated to fix them, B Corps are not required to empower their stakeholders and intended beneficiaries to govern the company.[33] Despite its lofty goals at the time of going public, Etsy did not employ any governance structures and was not subject to any mechanisms to hold it accountable to its intended beneficiaries.[34] The stakeholders for whose benefit Etsy professed to operate—its employees, neighbors, members, and partners—had no say in Etsy's decision-making process.[35] This lack of participation brings into question whether B Corp status truly holds B Corps accountable to their professed mission.

Public ownership is not necessarily a death knell for B Corp status.[36] Two other B Corps have held IPOs, and publicly traded Natura Cosméticos sought B Corp status as a public company.[37] These companies have not bowed to pressure from public investors to abandon their B Corp status, if such pressure even exists.[38] Still, Etsy is a cautionary tale of how businesses that profess to pursue some social goal but lack the participation of intended beneficiaries will, in fact, ignore the pursuit of this goal. B Lab certified Etsy without requiring beneficiary participation, and Etsy's public shareholders forced the company to abandon its commitment to the social and environmental purpose enshrined in its B Corp certification.[39] Without the participation of its nonshareholder stakeholders, the entities and individuals empowered to drive corporate decision-making—boards of directors, shareholders, and corporate officers—are free, and may even feel encouraged, to engage in behavior contrary to social or environmental outcomes.[40]

This Article is the first to look critically at B Corp certification through a participatory lens. In analyzing B Corps and similar efforts, this Article concludes that American companies trying to produce social or environmental benefits through for-profit activity are not required to empower their intended

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33. *See Certification*, *supra* note 22.

34. Gelles, *supra* note 5.

35. Etsy tried to market its shares to small investors and avoid large institutional investors in order to cultivate a shareholder base that would be more aligned with its founder's social goals and be insulated from a focus on short-term profit. *Id.*

36. *See Are Any B Corps Publicly Traded?*, CERTIFIED B CORP., https://bcorporation.net/faq-item/are-any-b-corps-publicly-traded [https://perma.cc/Z3JA-Z6WS].

37. *Id.*

38. *See id.*

39. *See* Gelles, *supra* note 5.

40. Emily Winston, *Benefit Corporations and the Separation of Benefit and Control*, 39 CARDOZO L. REV. 1783, 1798 (2018). In this Article, I use the term "shareholder" to refer to traditional shareholders; that is, someone given voting rights and a right to share in a company's profit in exchange for an equity investment. A "nonshareholder stakeholder" then, refers to any other party affected by corporate activity.

beneficiaries in the decision-making process. Instead, decisions about the definition, creation, and measurement of public benefit in B Corps are left to traditional corporate governance mechanisms. This Article argues that stakeholder participation is critical for these companies to realize their intended social or environmental benefit.

This Article advocates for participatory measures to be used to create, monitor, and evaluate B Corps. Specifically, this Article suggests a model—grounded in New Governance theory—in which stakeholders and beneficiaries are directly involved in B Corps' decision-making processes. Companies should clearly define beneficiaries and, if necessary, representatives of those beneficiaries. These beneficiaries or representatives should be involved at every stage during the life of a B Corp (design, implementation, and evaluation) to hold the corporation accountable. By adhering to these principles, B Corps can engage in a participatory form of corporate governance that has wide-ranging implications for contemporary debates about the role of corporations in society.

Generally, how a public benefit is created and measured in B Corps and the Fourth Sector is still very much in question.[41] As practiced in the United States, these fields largely fail to include the participation of stakeholders and intended beneficiaries in the pursuit of public benefit.[42] Elsewhere, scholars, corporate law, and certifying organizations place a premium on the participation of intended beneficiaries in a project or program.[43]

B Corp certification should emphasize beneficiary participation for two reasons. First, the efficacy of projects and programs is harmed without the input of intended beneficiaries. Second, in the case of B Corps, the assumptions underlying corporate law that justify giving the power of the franchise to shareholders also apply to nonshareholder stakeholders. This Article articulates principles that should be used to design a certification process that ensures beneficiaries are involved at every stage of the governance of a B Corp—design, implementation, and evaluation.

A company's failure to integrate the participation of stakeholders, other than officers and shareholders, into the design of a B Corp restricts the efficacy of the company's intended social or environmental purpose. Rather than excluding these stakeholders, the company should create conditions for elite capture.[44]

The idea that beneficiary participation leads to more effective projects has animated the design of anti-poverty programs in the United States since the

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41. *See* André, *supra* note 31, at 145.
42. *Id.* at 146.
43. *Id.*
44. *See infra* Section II.B.

War on Poverty[45] and is commonly applied to international development projects.[46] A review of these programs shows that beneficiary participation can be particularly successful when beneficiaries are closely involved in the design and evaluation of programs that are accountable to these beneficiaries.[47]

Theories of corporate governance also lead to the conclusion that B Lab's focus on nonshareholder stakeholders as beneficiaries of corporate activity requires participation in the design and decision-making apparatus of the company.[48] Generally, corporate governance theory views shareholders as owners and beneficiaries of corporate activity[49] and, in exchange, vests the right to elect members of the board in the shareholders alone.[50] As a result, corporate directors and managers run the company as stewards for the company's shareholders.[51] Shareholders, however, are not the sole beneficiaries of B Corps. Thus, within a B Corp, shareholders' exclusive right to determine board membership ought to be curtailed such that intended beneficiaries also have participatory rights.

In Part II, this Article introduces B Corp certification in the context of the social enterprise and impact investing movements and concludes that B Corp statutes largely ignores the participation of B Corp beneficiaries in lieu of a stewardship approach whereby B Corp management and shareholders are trusted to further the best interests of nonshareholder stakeholder groups. Part II also explains that including stakeholders and beneficiaries in the decisions of an enterprise is justified under predominant theories of social change and corporate law. Finally, Part II examines global efforts to create standards and metrics around social enterprise and impact investing and finds a lack of emphasis on beneficiary participation in the American context. A similar analysis of international standards, however, finds that some European social

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45. *See* Wendy A. Bach, *Mobilization and Poverty Law: Searching for Participatory Democracy Amid the Ashes of the War on Poverty*, 20 VA. J. SOC. POL'Y & L. 96, 100 (2012).

46. Jen Friis Lund & Moeko Saito-Jensen, *Revisiting the Issue of Elite Capture of Participatory Initiatives*, 46 WORLD DEV. 104, 104 (2013).

47. Bach, *supra* note 45, at 152–53.

48. *See, e.g.*, Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 719 (2013); *see also* Winston, *supra* note 40, at 1841.

49. David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 224 n.2 (1991) ("[S]hareholder primacy refers to [the] conception of management's responsibility and also to corporate law's commitment to shareholder welfare as the primary objective of corporate activity.").

50. *See* P.M. Vasudev, *The Stakeholder Principle, Corporate Governance, and Theory: Evidence from the Field and the Path Onward*, 41 HOFSTRA L. REV. 399, 401 (2012). This is distinct from corporate law regimes in other countries that guarantee labor groups or other corporate stakeholders a seat on the board. *See id.* at 423.

51. *Corporate Director's Guidebook*, 33 BUS. LAW. 1591, 1601 (1978).

enterprise models endorse stakeholder participation as a key factor of enterprise design.

Part III of this Article first provides a framework—grounded in New Governance theory and Democratic Experimentalism—for granting B Corp beneficiaries decision-making authority. Then, Part III outlines three principles to which such participation should adhere: (1) a B Corp's beneficiaries should be clearly identified; (2) a B Corp's beneficiaries should be granted participatory rights at all stages in the life of the corporation; and (3) a B Corp should be accountable to its beneficiaries through ownership, board membership, or some other means. For example, a B Corp can manifest accountability to its beneficiaries by recognizing them as third-party beneficiaries under contract or corporate charter, giving them with a right to bring suit against the B Corp for failing to bring about a promised benefit. Part III then concludes by proposing practical legal structures to achieve these principles.

Finally, Part IV acknowledges and addresses potential criticisms of beneficiary participation, including concerns that granting additional groups decision-making authority can result in lost efficiencies and that marginalized groups may have limited capacity to engage in meaningful participation within a for-profit enterprise. A thoughtful certification process should directly address concerns about efficiency, the capacity of beneficiaries to engage in meaningful participation, and the risk that participation will become pro forma. These challenges are not insurmountable but must be acknowledged and addressed.

II. B LAB'S CERTIFICATION REQUIREMENTS LACK BENEFICIARY PARTICIPATION

The Etsy story illustrates the incongruity between the stated goals of the B Corp movement and theories of corporate governance in America. The individuals and groups tasked with making decisions in B Corps are entirely distinct from the stakeholders whose benefit the enterprises purport to further.[52] This approach flies in the face of assumptions that the efficacy of projects and programs is harmed without the input of intended beneficiaries.[53] B Corp design deviates from fundamental tenets of predominant theories of social change and corporate law, both of which place beneficiaries of organizational activity within the governance structure of the organization.[54]

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52. Winston, *supra* note 40, at 1788.

53. *See infra* Sections I.B, I.C.

54. Mohsen Manesh, *Introducing the Totally Unnecessary Benefit LLC*, 97 N.C. L. REV. 603, 612–13 (2019).

Whereas corporate law designates shareholders as corporate beneficiaries and grants those shareholders the right to elect members of the board of directors,[55] social change theory gives program beneficiaries some say in the governance of that program.[56]

Anti-poverty and international development programs have long adopted a theory of social change under which the participation of intended beneficiaries is required for the ultimate efficacy of the program.[57] However, B Corp certification adopts the stewardship theory of governance, in which an organization's management is believed to share interests with the organization's principles and is, therefore, best positioned to act toward those interests.[58] American corporate law largely adopts this stewardship approach; however, in for-profit companies, owners elect directors that are granted other governance powers.[59] Thus, while for-profit corporate directors are seen as "steward[s] for the owners of the organization[]"[60] remaining accountable to shareholder beneficiaries, beneficiaries in B Corps have no such right of accountability.[61]

The stewardship theory also animates the law of charitable organizations, which vests in directors and managers the duty and ability to further the interests of the charity's beneficiaries.[62] While a charity's beneficiaries generally play no role in charitable governance, government actors such as state attorneys general and the Internal Revenue Service (IRS) do enforce a charity's commitment to public benefit.[63] There is no analogous public actor to enforce a B Corp's commitment to its stated purpose. Both the lack of beneficiary franchise and government oversight in B Corps demand an increased role for beneficiaries.

A. Introduction to B Corp Status

B Corp status is a prominent, highly sought-after certification granted solely to companies that demonstrate an institutional commitment to pursuing social or environmental business practices.[64] B Corp status was first

55. Millon, *supra* note 49, at 232–33.
56. Bach, *supra* note 45, at 112.
57. *Id.* at 97; Lund & Saito-Jensen, *supra* note 46, at 104.
58. *See Corporate Director's Guidebook*, *supra* note 51, at 1601.
59. Vasudev, *supra* note 50, at 401.
60. *Corporate Director's Guidebook*, *supra* note 51.
61. Winston, *supra* note 40, at 1788.
62. Tracey M. Coule, *Nonprofit Governance and Accountability: Broadening the Theoretical Perspective*, 44 NONPROFIT & VOLUNTARY SECTOR Q. 75, 77 (2015).
63. *See* Reiser, *supra* note 48, at 720–24.
64. McGregor, *supra* note 8.

promulgated in 2006 by the Pennsylvania-based nonprofit organization B Lab.[65] B Corp certification was created to assist companies and entrepreneurs interested in pursuing mission alongside profit.[66] B Corp certification measures a company's social or environmental performance by placing three primary requirements on the company.[67] First, the company must embed a public purpose into its corporate charter.[68] Second, the company must report its performance based on a number of factors.[69] Finally, the company must subject itself to audits by B Lab in order to obtain a score reflecting how the company's operations and business model impact its workers, community, customers, and the environment.[70] Unlike organizations that are granted 501(c)(3) tax-exempt status by the IRS, B Corps do not receive tax exemption or other government benefit.[71]

B Lab does not always place strict requirements on B Corps. Instead, B Lab evaluates a company's efforts in certain areas.[72] Companies may take divergent approaches to solve certain problems or satisfy some requirement.[73] For example, the certification process contains a governance metric that analyzes whether a company has adopted a social or environmental mission and if so, how it engages its employees, board members, and the community to achieve that mission.[74] This metric also evaluates employee access to information, customer opportunities to provide feedback, and the diversity of

65. *How Did the B Corp Movement Start?*, CERTIFIED B CORP., https://bcorporation.net/faq-item/how-did-b-corp-movement-start [https://perma.cc/F9SF-FZUD].

66. *See* Page & Katz, *supra* note 23, at 1368.

67. *Certification*, *supra* note 22.

68. *Id.*

69. *Id.*

70. *Id.* B Lab employs a B Impact Assessment tool that evaluates how a company's business model and operations impact its workers, community, environment, and customers. *Id.* The B Impact Assessment tool gives companies a numerical score based on such factors as governance, workers, community, environment, and customers, and tailors its analysis to a company's industry. *Frequently Asked Questions*, B IMPACT ASSESSMENT, https://bimpactassessment.net/how-it-works/frequently-asked-questions/the-b-impact-score [https://perma.cc/53VQ-ZJQU]. Among these other forms are the low-cost limited liability company or L3C, special purpose corporation, and benefit limited liability company. Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 142 (2016).

71. *See* I.R.C. § 501.

72. *The Standards*, B IMPACT ASSESSMENT, https://bimpactassessment.net/how-it-works/frequently-asked-questions/the-standards [https://perma.cc/9FFQ-LZXF].

73. *See id.*

74. *Id.*

the company's governing bodies.[75] It does not, however, mandate specific governance structures.[76] There is no requirement that workers, customers, or any other stakeholder be given a formal role in the management of the company.[77] Even the presence of a unionized workforce—a mechanism that, through collective bargaining, grants workers a say in company affairs—is absent from the B Corp standards.[78]

The B Corp certification process arose out of the social enterprise movement, which seeks to use commercial methods to solve societal problems traditionally associated with the charitable sector.[79] B Corps can, therefore, be described as hybrids of for-profit and charitable organizations.[80] The benefit corporation is a relatively new corporate form that allows companies to opt into a legal regime that allows them to pursue a public benefit alongside profit without running afoul of corporate law—specifically, without violating directors' fiduciary duties to shareholders.[81] While B Corp status is distinct

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75. *Best for the World*, B IMPACT ASSESSMENT, https://kb.bimpactassessment.net/en/support/solutions/articles/43000519824-best-for-the-world [https://perma.cc/K9HS-9543].

76. *See Frequently Asked Questions*, *supra* note 70 (explaining that the Assessment covers only "best practices").

77. *Id.*

78. *Id.*

79. To backers of social enterprise, neither the traditional for-profit businesses nor charitable sectors were suited to tackling major social issues. *See* Page & Katz, *supra* note 23, at 1362. On the one hand, the for-profit sector focused too heavily on maximizing short-term profits at the expense of nonshareholder stakeholders. *Id.* In fact, many social enterprise backers felt that for-profit corporations were bound to do so by fiduciary duties. *Id.* at 1382 n.179. The charitable sector, on the other hand, faced too many tax and regulations that limited the range of activities that organizations could undertake to address social issues. *Id.* at 1362. Social enterprise boosters believed that traditional corporate forms were not suited to the task of social enterprise and that new corporate forms were required to accommodate purpose and profit. *See id.* at 1354 ("'Social enterprise' is a loose term for businesses that aim to generate profits while advancing social goals."); Patience A. Crowder, *Impact Transaction: Lawyering for the Public Good Through Collective Impact Agreements*, 49 IND. L. REV. 621, 631 (2016) ("Social enterprises are businesses that make profits both for the benefit of the owners' compensation as well as the advancement of a specific social purpose or mission."); Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215, 225 (2013).

80. Page & Katz, *supra* note 23, 1368.

81. Benefit corporations use different mechanisms that allow a company to pursue a public interest. Authorizing legislation provides that benefit corporations are to have the purpose, enshrined in the company's charter that "creat[e] general public benefit." MODEL BENEFIT CORP. LEGIS. § 201(a) (BENEFIT CORP. 2017). These statutes also require directors to consider the impact of corporate action on non-shareholder stakeholders and the public. Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 598 (2011). Further, they grant immunity to directors who take the interests of nonshareholder stakeholders into account when making decisions. *Id.* Benefit corporations may also have a designated benefit director, who is tasked with preparing the benefit report

from the benefit corporation form, there is overlap between the two.[82] Both require changes to corporate charter, and B Corp status often requires conversion to the benefit corporation form.[83] Further, B Corp standards are a common third-party standard against which benefit corporations are to judge and report on their efforts.[84]

In 2019, B Lab reported there were over 3,100 certified B Corps.[85] In addition to Etsy, household names Ben & Jerry's and Warby Parker are also certified B Corps.[86] B Corps signal to the customers and investors alike that a company has met a standard of sustainability and is dedicated to some public purpose.[87] Customers interested in supporting environmentally friendly businesses, for example, may choose to patronize a B Corp over a competitor who is not comparably certified.[88] Similarly, so-called impact investors interested in investing in socially conscious companies may rely on the certification when evaluating potential investments.[89]

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mentioned above and overseeing the creation of a public benefit generally. MODEL BENEFIT CORP. LEGIS. § 301(c). Notably, scholars have suggested that corporate law does not in fact prevent companies from engaging in environmentally and socially beneficial behavior and that that benefit corporation is therefore unnecessary. *See, e.g.*, Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY'S L.J. 617, 647–48 (2013).

82. *See* Tu, *supra* note 70, at 143–53 (comparing benefit corporations and B Corps). B Lab worked closely with the drafters of the Model Benefit Corporation Legislation. Mark J. Loewenstein, *Benefit Corporation Law*, 85 U. CIN. L. REV. 381, 383 (2017).

83. Traditional corporations, like Etsy at the time of its IPO, may be B Corps, but benefit corporations need not seek B Corp certification. *See Legal Requirements*, CERTIFIED B CORP., https://bcorporation.net/certification/legal-requirements [https://perma.cc/WV9N-LKDE].

84. Other organizations, such as Social Enterprise Mark and Green America offer certifications for qualifying social enterprises and may be used by benefit corporations in their self-evaluation process. *See* SOC. ENTER. MARK CIC, https://www.socialenterprisemark.org.uk/ [https://perma.cc/M8S2-NZKQ]; *Green Business Certification*, GREEN AM., https://www.greenamerica.org/subsite/green-business-certification [https://perma.cc/TH32-7PZX]. There also exist standards that apply to specific industries. *How Do I Pick a Third Party Standard?*, BENEFIT CORP., https://benefitcorp.net/how-do-i-pick-third-party-standard [https://perma.cc/66UH-8TG7]. The Federal Trade Commission, for example, has created standards that apply to companies that make environmental claims. Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260 (2020).

85. B Lab, *supra* note 18.

86. McGregor, *supra* note 8.

87. *Certification, supra* note 22.

88. Kim et al., *supra* note 24.

89. The last decade or so has seen the rise of impact investing. ABHILASH MUDALIAR ET AL., GLOB. IMPACT INVESTING NETWORK, 2017 ANNUAL IMPACT INVESTOR SURVEY (7th ed. 2017). According to the Global Impact Investing Network, impact investing refers to "investments made into companies, organizations, and funds with the intention to generate social and environmental impact alongside a financial return." *Id.* at 158. By the end of 2016, the GIIN

Many founders also trust that B Corp standards require processes and monitoring that will ensure a company is dedicated to its mission, particularly as the company grows and strains are placed on its commitment to that mission.[90] As a result, companies, customers, and investors rely on B Lab to hold companies accountable for their social or environmental goals—in effect outsourcing due diligence.[91]

The ability to grant or withhold status permits B Lab to exert significant influence over companies seeking certification, as well as over companies that do not seek official certification but nonetheless use B Corp standards to judge their efforts in creating some social or environmental benefit.[92] Therefore, B Corp status merits assessment on its own and as a window into the American approach by utilizing private, for-profit actors to create socially and environmentally beneficial outcomes.

B. Promoting Beneficiary Participation Enhances Efficacy

Failing to integrate the participation of intended beneficiaries into the design of a B Corp limits the ultimate efficacy of that company's intended social or environmental purpose. Scholars have argued elsewhere that participation results in programs that are more responsive to beneficiaries' needs.[93] As described above, B Corp design currently lacks beneficiary participation and instead relies on metrics and decision-making procedures that empower "stewards" to act on behalf of intended beneficiaries.[94] Without the involvement of stakeholders, these efforts may realize the same outcomes

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counted $114 million in impact investments worldwide. *Id.* at xiii. Major philanthropic organizations have begun to look to impact investing as a strategy. *Id.* at 42. Private, for-profit funds are also increasingly looking to impact investing as an investment strategy. *Id.* at 2. In 2017, the Ford Foundation announced a $1 billion commitment to impact-driven investments. *Ford Foundation Commits $1 Billion from Endowment to Mission-Related Investments*, FORD FOUND. (Apr. 5, 2017), https://www.fordfoundation.org/the-latest/news/ford-foundation-commits-1-billion-from-endowment-to-mission-related-investments [https://perma.cc/LP5G-85EM]. Aqua-Spark, a for-profit Dutch fund that invests in sustainable aquaculture businesses around the world, is an example of an impact investor. AQUA-SPARK, http://www.aqua-spark.nl/ [https://perma.cc/4Z8E-JEVP].

90. *See Certification*, *supra* note 22.

91. Winston, *supra* note 40, at 1803–05.

92. Sarah Dadush, *Impact Investment Indicators: A Critical Assessment*, *in* GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS 394 (2012).

93. Bach, *supra* note 45, at 100.

94. *See* discussion *supra* Section II.A.

as did similarly designed anti-poverty and economic development programs in the past—namely, ineffective programs and elite capture.[95]

The lessons of anti-poverty programs in the United States demonstrate that participation of the programs' beneficiaries was critical to their success.[96] They also identify ways in which beneficiary participation can result in effective programming.[97] For instance, the Economic Opportunity Act of 1964 called for "maximum feasible participation" by poor communities in federally funded anti-poverty programs.[98] Through maximum feasible participation, programs attempted to involve poor communities in the design and evaluation of various programs intended to benefit those communities.[99] Maximum feasible participation was a response to earlier New Deal-era programs that were characterized by a top-down approach and, as a result, designed in a patronizing and nonresponsive manner.[100] Maximum feasible participation was designed to enable community members to participate in the betterment of their own communities.[101] In putting poor people in positions to set priorities and make decisions about the implementation of anti-poverty policies, these programs hoped to benefit poor Americans and foster political power among poor communities.[102] While maximum feasible participation was considered necessary for public programs seeking to serve a particular interest or community as a check against majoritarian policies, which naturally disfavor minority groups, counter-majoritarian considerations are less essential in programs that aim to serve the public at large.[103]

The idea of maximum feasible participation was and still is criticized for creating overly burdensome program structures, for failing to revolutionize poverty policy in the United States, and, ultimately, for failing to eliminate poverty.[104] However, maximum feasible participation succeeded in certain

95. Bach, *supra* note 45, at 100.

96. *Id.* at 128.

97. These lessons also illuminate where beneficiary participation can fall short. *See id.* at 128–31.

98. Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 202(a)(3), 78 Stat. 508, 516 (1964).

99. Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1, 3 (2010).

100. *Id.* at 31. Maximum feasible participation also represented an alternative to an anti-poverty approach that saw poor people as market actors, opting instead to empower beneficiaries of these programs through fostering the growth of political power. Id. at 3–4; *see also* Bach, *supra* note 45, at 104.

101. Bach, *supra* note 45, at 100.

102. *Id.* at 105–06.

103. *Id.* at 103–04.

104. *Id.* at 122–29.

places by creating programs that benefitted poor communities and fostered the growth of political power in many instances.[105] These successful programs shared some key characteristics. In places where the program did succeed, independent organizations were closely involved in the design and evaluation of programs, participated in the governance of the project through membership on the governing board, and held the programs accountable.[106] On the other hand, the failure of anti-poverty programs such as low-income housing projects has been blamed on a lack of participation by intended program beneficiaries.[107]

Debate over the involvement of poor communities and other beneficiaries of public programs continues in the design and evaluation of anti-poverty programs, and newer anti-poverty programs continue to utilize beneficiary participation as a component of program design.[108] To various degrees, programs like HOPE VI and the Obama Administration's Social Innovation Fund drew on the principles and lessons of maximum feasible participation.[109] HOPE VI reflects the belief that resident participation is required to produce housing developments that adequately address the needs of low-income tenants.[110]

Beneficiary participation is also viewed as a tool to prevent against elite capture, particularly in the context of international development programs.[111] In elite capture, elites, rather than members of a beneficiary class, take leadership positions within organizations and direct benefits of a program toward themselves and not the program's intended beneficiaries.[112] Elite capture can rise to the level of corruption if funds and resources are misappropriated, but it can also refer to the frustration of the program's

105. *Id.* at 103 (describing the implementation and success of maximum feasible participation in Durham, NC).

106. Effective representatives "were similar to neighborhood residents in socially relevant ways—in this case race and class." *Id.* at 152.

107. Yap Kioe Sheng, *Community Participation in Low-Income Housing Projects: Problems and Prospects*, 25 COMMUNITY DEV. J. 56, 56 (1990).

108. Bach, *supra* note 45, at 115.

109. *Id.* at 112–13.

110. *See* Susan Bennett, *"The Possibility of a Beloved Place": Residents and Placemaking in Public Housing Communities*, 19 ST. LOUIS U. PUB. L. REV. 259, 302–04 (2000) (noting that it was too early to determine whether participatory requirements would be effective and that HUD data thus far showed a wide range in the amount and quality of community participation in HOPE VI projects). See *infra* Part III for a discussion of the applicability of these characteristics to B Corps.

111. Lund & Saito-Jensen, *supra* note 46, at 104.

112. *Id.* at 109.

purpose.[113] Beneficiary participation can serve as a bulwark against elite capture by inserting diverse stakeholders in leadership positions and encouraging buy-in among the beneficiary class.[114] Consequently, democratizing leadership and involvement results in programs that are responsive to beneficiary needs and immunized against hijacking by self-interested elites.[115]

C. B Corp as a Hybrid Model

B Corps can be described as hybrids of for-profit and charitable organizations,[116] and key assumptions underlying corporate and charity law lead to the conclusion that beneficiaries should participate in B Corp governance. Many theories of corporate and charity law provide positive descriptions of what these entities are and, from there, make normative arguments about how corporate governance should work.[117] B Lab has provided a description of corporate purpose: to produce some social or environmental benefit alongside profit.[118] This Article employs widely accepted normative accounts of corporate and charity law in support of democratic beneficiary participation in B Corps.

B Corps designate nonshareholder stakeholders as explicit beneficiaries of corporate activity alongside shareholders.[119] On the contrary, corporate law situates shareholders as the beneficiaries of corporate behavior and gives them certain rights, namely the right to elect directors and bring derivative suits.[120]

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113. DIYA DUTTA, ELITE CAPTURE AND CORRUPTION: CONCEPTS AND DEFINITIONS 9–10 (2009).

114. Lund & Saito-Jensen, *supra* note 46, at 110.

115. Even a participatory governance process that guards against elite capture could result in self-dealing. Imagine a corrupt union boss using her members' power to direct corporate resources to related parties. Even short of outright corruption, the more stakeholders are involved in company governance, the more opportunities are created for conflicts of interest. Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 CALIF. L. REV. 393, 396–430 (2003). In the case of B Corps, fiduciary duties and other mechanisms intended to prevent conflicts of interest would constitute the primary preventative mechanisms against beneficiary self-dealing.

116. *See* Page & Katz, *supra* note 23, at 1368.

117. *See* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 202–04. Millon notes that the relationship is not entirely one-directional, and that corporate law and corporate governance can also help craft theories of the corporation. *Id.* at 204–05. Because the primary innovation of B Corps is a clear statement about what purpose B Corps should serve—to produce some social or environmental benefit alongside profit—this Article begins from that articulation of corporate purpose and prescribes a form of participatory governance rooted in that purpose.

118. *About B Corps*, *supra* note 7.

119. *See supra* Section II.A.

120. *See supra* Section II.A.

As co-beneficiaries of B Corps, nonshareholder stakeholders should receive a similar set of rights.[121] Charity law, however, requires that organizations elect a charitable purpose and insert the state as the representative of a beneficiary group.[122] The charity law approach acknowledges that some actor must speak for the intended beneficiaries of B Corps; this Article suggests that beneficiaries themselves are best situated to do so.

1. *Corporate Law*

Fundamental principles of corporate law support the argument that B Lab's focus on nonshareholder stakeholders as beneficiaries of corporate activity requires their participation in the design and governance apparatus of the company. Several scholars draw on fundamental principles of corporate law to argue that a focus on nonshareholder stakeholders as beneficiaries of corporate activity requires participation in the design and decision-making apparatus of the company.[123] B Lab places nonshareholders alongside shareholders as primary beneficiaries of the corporation's activities;[124] nonshareholder beneficiaries should receive rights akin to those enjoyed by shareholders.

Often, corporate law is described in agency law terms: shareholders, as owners of the corporation, are the principals, and directors are the shareholders' agents.[125] This agency relationship is meant to preserve the connection between ownership and control of the corporation. Shareholders grant authority to the board through either monitoring the board's activities by electing new directors or bringing derivative suits against directors and officers in the name of the corporation.[126] The directors are, in turn, bound by fiduciary duties to exercise care when managing the corporation and to put

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121. I continue to refer to non-investor parties, like employees, who are given voting rights in corporate governance as "nonshareholder stakeholders" even though they may have shareholder-like voting rights. These stakeholders are not granted rights in exchange for an investment; they are granted rights in recognition of the effect that corporate activity has on them.

122. *See supra* Section II.A.

123. *See, e.g.*, Reiser, *supra* note 48, at 707; Winston, *supra* note 40, at 1832.

124. Winston, *supra* note 40, at 1832.

125. *See, e.g.*, Millon, *supra* note 117, at 201 (describing a corporate law theory of "corporate law as governing little more than the private relations between the shareholders of the corporation and management, which acts as their agents or trustees").

126. Under federal law, shareholders can make proposals on corporate policy. 17 C.F.R. § 240.14a–8 (2020). State corporate laws also grant to shareholders the right to vote on certain major decisions, such as a sale or merger of the company. *See* Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 59–60 (2008).

the interests of the corporation over their own personal interests.[127] These duties allow directors to check management behavior, overseeing CEOs whose incentives may not be closely aligned with those of shareholders.[128] These duties also help control agency costs that arise from multiple constituents within the corporation attempting to monitor each other and from the difficulty of coordinating large groups of shareholders.[129]

Each level of accountability within the corporation entails costs, and those costs—along with the tendency of managers and other corporate constituents to direct financial benefit to themselves rather than shareholders—constitute agency costs.[130] Agency costs detract from the corporation's profits, and shareholders are expected to monitor those costs.[131] Shareholder monitoring requires coordination, however, and so as a company's shareholders grow more numerous and disparate, their monitoring will become more costly and less effective.[132] Duties to maximize shareholder value attempt to align interests between shareholders and directors and minimize these agency costs.[133]

The doctrine of shareholder primacy stems from this agency analysis.[134] Under shareholder primacy—widely (though not universally) accepted by the end of the last century as the animating principle behind corporate law—a corporation's primary purpose is to further the interests of its shareholders.[135]

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127. *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010).

128. This ignores a reality of modern corporations in which CEOs and other high-level executives often are themselves major shareholders of the company. *See* Theo Francis & Vanessa Fuhrmans, *Big Companies Pay CEOs for Good Performance—and Bad*, WALL ST. J. (May 17, 2019, 5:11 PM), https://www.wsj.com/articles/big-companies-pay-ceos-for-good-performanceand-bad-11558085402?st=0ip55mskqq9uazy [https://perma.cc/7MY2-LBF7].

129. Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L.R. 1416, 1424 (1989).

130. *Id.*

131. *Id.* at 1422–23.

132. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309 (1976).

133. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 248–49 (1999).

134. Millon, *supra* note 49, at 227.

135. *Id.* at 223–24 n.2 (defining "shareholder primacy" as a "conception of management's responsibility and also to corporate law's commitment to shareholder welfare as the primary objective of corporate activity."). Other theories of American corporate law have been offered that differ from or build upon shareholder primacy. *Id.* at 232–33. Among them are the theory that the corporation is a "nexus of contracts" among various constituents and the theory that corporate law should play some public purpose and regulate the relationship between the corporation and society. *Id.* at 269–70. While these theories offer different rationales and carry different implications for which constituents get corporate governance rights and what those rights are, none challenge the right of shareholders to participate in the governance of a corporation. *Id.* at 247.

Those interests are often, though not always, defined as maximizing profits to the shareholders.[136] As a corollary, American corporate law vests the right to elect members of the board of directors in the shareholders alone.[137] The reasons for vesting such control in the shareholders are varied, and the amount of additional power that the shareholders should have in governing the corporate has been subject to much debate.[138] American corporate law is clear on one point, however: As primary beneficiaries of the corporation, shareholders have the right to say who sits on the board of directors of the corporation.[139]

Scholars give several reasons for the exclusive shareholder franchise.[140] Under shareholder primacy, shareholders (as owners of the corporation) exercise control over their property by electing members of the board who, in turn, set the company's strategic priorities and make other large decisions.[141] Emily Winston refers to this as the "separation of benefit and control"—shareholders are the beneficiaries of the corporation, while corporate directors make most decisions regarding the management of the corporation.[142] Directors are stewards for the interests of shareholders and accountable to those shareholders.[143] In order to align the interests between these two groups, directors must be held accountable to shareholders through the shareholders' voting rights.[144] Other stakeholders, such as customers or employees, have rights created through contract, and creditors have certain rights in bankruptcy

136. David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1018–19 (2014).

137. *See* Vasudev, *supra* note 50, at 424. This is distinct from corporate law regimes in other some countries, which comparative regimes that guarantee labor or other corporate stakeholders a seat on the board. *Id.* at 423.

138. *See* Grant Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071, 2083 (2009).

139. Whether shareholders are able to actually exercise this right has been questioned. *See, e.g.*, Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 680 (2007); Hayden & Bodie, *supra* note 138, at 2074–75.

140. Bebchuk, *supra* note 139, at 711–12.

141. Hayden & Bodie, *supra* note 138, at 2083.

142. Winston, *supra* note 40, at 1788.

143. Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 6 (2002).

144. Millon, *supra* note 49, at 223. This interpretation of corporate law is prominent, but not universally accepted. *Id.* at 223–24. Some scholars view the corporation as the "nexus of contracts" between and among various stakeholders, while others still advocate for a view that corporations exist, or should exist, to benefit society as a whole. Winston, *supra* note 40, at 1806–07.

and insolvency situations.[145] Shareholders' unique position as corporate owners establishes that only they have the right to elect corporate directors.[146]

B Corps challenge many positive descriptions of American corporate law and therefore implicate a different governance approach than the sole franchise granted to shareholders in traditional corporations. B Corps, benefit corporations, and related forms employ a variety of mechanisms to enforce the commitment to public benefit—benefit directors and managers charged with specifically overseeing social purpose, public disclosure of social and environmental initiatives, expanded fiduciary duties, the use of third-party standards, and others.[147] However, these mechanisms do not fundamentally alter the relationships and incentives that underlie corporate law.

B Corps seek to change or expand the purposes of corporate law to include furthering the interests of nonshareholder stakeholders, thereby placing those stakeholders alongside shareholders as primary beneficiaries of the company.[148] However, B Corps do not vest in these stakeholders the right to elect members of the board of directors or to otherwise participate in the governance of the corporation.[149] The lack of beneficiary franchise in B Corps represents a break from the corporate law norm that directors must be accountable to beneficiaries through enfranchisement in order to be effective stewards of their interests.[150]

Much of the reasoning that justifies shareholder enfranchisement, therefore, also applies to nonshareholder stakeholders in the case of B Corps.[151] In these companies, directors are told to further the interests of shareholders and third-party beneficiaries but are only accountable to shareholders.[152] This leaves B Corp shareholders as both beneficiaries of corporate behavior and as trustees for other stakeholders, holding equity and

145. Winston, *supra* note 40, at 1807.

146. It has also been suggested that shareholders, as the sole residual corporate claimants, claimants, deserve participatory rights. Hayden & Bodie, *supra* note 140, at 2083. "Shareholders benefit from maximization of the residual because they are not paid until all other claimants receive their entitlements. This gives shareholders, and shareholders alone, the appropriate incentives to exercise discretion in a way that maximizes value for the entire corporation." *Id.* While B Corps and benefit corporation legislation does not make nonshareholder stakeholders residual claimants, they are promised other benefits and the incentives differ from those in a traditional corporation. Winston, *supra* note 40, at 1786–87.

147. *See* Thomas Kelley, Law and Choice of Entity on the Social Enterprise Frontier, 84 TUL. L. REV. 337, 340 (2009).

148. *See supra* Section II.A.

149. *See* Winston, *supra* note 40, at 1834.

150. *See id.* at 1830.

151. *See id.* at 1820.

152. *See id.* at 1820–21.

voting for the stated benefit of some third-party.[153] The power to enforce a B Corp's social mission is left to its shareholders through traditional corporate mechanisms or affirmative lawsuits.[154]

While some investors in B Corps are "impact investors" who explicitly seek out companies that produce some public benefit, often with an expectation of below-market-rate returns,[155] reliance on these investors to actually enforce public benefit is problematic. It should not be assumed that the interests of impact investors and other beneficiaries are aligned. Impact investors may be placed in the awkward position of having to choose between a course of action that benefits themselves and one that benefits other stakeholders.[156] At the time of this writing, no action by a shareholder against a B Corp director or officer for violating the company's public purpose has ever been filed.[157]

Though granting B Corp beneficiaries participatory rights would make corporate stewards accountable to them, it has the potential to create more agency costs than traditional corporate structures. There is a robust scholarly debate over whether shareholders, as beneficiaries of corporate activity, should have greater control over the corporation.[158] One school of thought, led primarily by Professor Lucian Bebchuk, argues that shareholders should be given more power within the corporation to make various decisions.[159] This enhanced power can tighten the link between ownership and control, thereby

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153. MODEL BENEFIT CORP. LEGIS. § 201(c) (BENEFIT CORP. 2017).

154. *See id.* §§ 102, 305(c). Some states' benefit corporation statutes allow shareholders and other designated entities to bring enforcement proceeding against directors if the company fails to adhere to its stated purpose. *Id.*

155. Reiser, *supra* note 48, at 734.

156. Winston, *supra* note 40, at 1821. This will be the case whether investors agree on a corporate goal or not. "If shareholders are uncoordinated and inactive, then neither share price nor social mission will be defended. If shareholders are coordinated and active, we cannot be certain how they will divide their efforts between promoting share price and promoting social mission." *Id.* at 1824; *see* Sarah Dadush, *Regulating Social Finance: Can Social Stock Exchanges Meet the Challenge?*, 37 U. PA. J. INT'L L. 139, 169 (2015).

157. Winston, *supra* note 40, at 1804.

158. *See* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 912 (2005).

159. *See id.* at 836. Another school of thought, associated with the work of Professor Stephen Bainbridge, argues that most decisions are properly left in the hands of directors and corporate management and that shareholder power should be limited to electing members of the board of directors. *See* Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment Response to Increasing Shareholder Power*, 119 HARV. L. REV. 1735, 173 (2006). The Bainbridge argument also seems to require that the power to elect directors, at the very least, should rest with the intended beneficiaries of the directors' actions, and not with the shareholders alone, in a B Corp. Under such a design, directors are still ultimately responsible for corporate decision-making but at least owe their position to these stakeholders.

reducing agency costs in the corporation and resulting in better outcomes for the shareholders.[160] Under the logic of Bebchuk, granting participatory power to corporate beneficiaries will result in a corporate structure that is more responsive to their needs, rather than one that leaves this responsibility in the hands of directors and officers accountable only to shareholders.[161]

This Section treats the intended beneficiaries of a B Corp equal to its shareholders and posits that these beneficiaries should receive rights that are close to identical or on par with shareholder rights. One way to put these groups on the same footing is to grant nonshareholder beneficiaries the right to elect members of a B Corp's board of directors. Board representation is a common tool to provide nonshareholders stakeholders, such as workers, a voice in company governance.[162] Another equalizing method is granting beneficiary groups ownership in a company, thus erasing the divide between shareholders and other beneficiary groups. For example, a pension fund may be a major shareholder of a corporation and give workers and retirees the same rights as other shareholders.[163] However, board representation and equity ownership are not the only means to grant nonshareholder stakeholders participatory rights. Section III.B below explores the ways in which B Corps can grant participatory rights to diverse beneficiaries.

2. *Charity Law*

B Corp design also merits a different approach than that taken by the nonprofit charitable sector. Unlike corporations, nonprofit organizations are not accountable to their beneficiaries;[164] the state, rather than the beneficiaries, plays the central role in ensuring these organizations comply with their stated purpose.[165] The government defines acceptable charitable purposes, how an organization may further its mission, and the consequences for failing to do so.[166]

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160. *See* Bebchuk, *supra* note 139, at 677–79.

161. *See id.* at 681–82.

162. *See infra* Section II.D (discussing European requirements around worker board representation).

163. *See* Bebchuk, *supra* note 158, at 884–85.

164. *See* William H. Simon, *Whom (Or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CALIF. L. REV. 57, 112 (2003).

165. *Id.* at 112–13.

166. *See* David S. Walker, *A Consideration of an LLC for a 501(C)(3) Nonprofit Organization*, 38 WM. MITCHELL L. REV. 627, 631–32 (2012).

As stewards of an organization's charitable mission, directors owe a duty of obedience to the organization to carry out its mission.[167] State attorneys general and the IRS largely oversee the regulation of charitable organizations.[168] Breaches of duty, failure to diligently pursue a charitable mission, and deviations from the nonprofit organization's lawful mission are all subject to enforcement actions by both the IRS and state attorneys general.[169]

Unlike for-profit corporations, nonprofit charities have no owners; "nonprofit" refers to an organization lacking shareholders to whom it can distribute profit.[170] The public, or a narrower beneficiary class if the charity so elects, is the primary beneficiary of charitable activity rather than shareholders.[171] A charity's directors and officers are still its stewards, but an organization's principals cannot elect or sue them. Given that charities lack owners to act as principals, charity law has long required the government to step in to represent beneficiaries.[172]

The doctrine of *parens patrie*, or "parent of the nation," dates back to seventeenth century England and requires the state (originally, the crown) to protect the young, the ill, and others commonly aided by charities.[173] This doctrine—first used to justify the state's role in matters of guardianship over minors and those lacking capacity—expanded to require the state to play a substantial role in holding charities to their public purposes.[174] Charities exist to serve the public at large, and, to the extent that charities have direct beneficiaries, those beneficiaries are poor, infirm, and otherwise unable to monitor charitable activity.[175] Who better to stand in for them than the government?[176] This lack of ownership leaves a void in the principal-agent relationship that the government must fill.

The government also grants substantial benefits to charities—most notably, exemption from income taxes.[177] This is a major benefit for charities

167. Walker, *supra* note 166, at 627, 660 (2012). *But see* RESTATEMENT OF THE L. OF CHARITABLE NONPROFIT ORGS. § 3.01 (AM. L. INST., Tentative Draft No. 1, 2016) (allowing directors to amend governing documents and mission statement from time to time).

168. Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 CORNELL J.L. & PUB. POL'Y 1, 8 (2009).

169. *See id.* at 13, 17–18.

170. *See* Walker, *supra* note 166, at 662.

171. *Id.* at 669–70.

172. Helge, *supra* note 168, at 15.

173. *See* George Rossman, *Parens Patriae*, 4 OR. L. REV. 233, 237 (1925).

174. *See* Margaret S. Thomas, *Parens Patriae and The States' Historic Police Power*, 69 SMU L. REV. 759, 771 (2016).

175. *See* Helge, *supra* note 168, at 16.

176. *See id.*

177. I.R.C. § 501 (2018).

but comes with significant strings attached. Tax exemption can be seen as a subsidy paid to charitable organizations from the tax-paying public.[178] The government must step in to ensure that charities further some charitable purpose, for example by scrutinizing charities' finances to prevent them from competing unfairly with for-profit companies or otherwise misusing their subsidy.[179] For-profit entities strike no such bargain with government.[180]

The state-centric model of charity law is ill-suited to B Corps. For one, neither the federal government nor any state grants tax exemption to B Corps, benefit corporations, or any other for-profit corporate form or certification.[181] State governments have comparatively little interest in closely regulating companies without such benefit. This lack of regulation gives B Corps flexibility in defining their purpose, identifying their beneficiaries, and choosing their business methods. Consequently, B Corp beneficiaries are left without significant representation by either the company's shareholders or the government. As stated in Section II.B above, beneficiaries themselves are well-positioned to ensure that a B Corp is meeting its social purpose—whatever this purpose may be—and should step in to fill this void.[182]

Minimizing regulatory oversight of mission-driven social enterprises makes sense given the animating goals of the B Corp movement. B Lab and others believe the charitable sector faces too many regulations that limit what organizations can do to address social issues.[183] To these advocates, commercial methods do not prevent the furtherance of social or environmental purposes.[184] Rather, commercial methods can and should be used to solve societal problems traditionally addressed by the charitable sector.[185] Doing so prevents relying on the state to act as stewards of the public interests and instead empowers the intended beneficiaries of corporate action.[186]

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178. *See* Helge, *supra* note 168, at 32.

179. *See* Walker, *supra* note 166, at 658.

180. State corporate codes in fact permit corporations to be chartered in furtherance of any lawful activity. Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 711 (2019).

181. *See* I.R.C. § 501. Several states and localities offer procurement preference for benefit corporations and related companies; however, this benefit is small compared to tax-exemption for charitable organizations. Michelle Baker, *Socially Responsible Businesses Get a Boost from Local Governments*, NONPROFIT L. BLOG (May 8, 2013), http://www.nonprofitlawblog.com/socially-responsible-businesses-get-a-boost-from-local-governments/ [https://perma.cc/R6U5-HJNU].

182. *See supra* Section II.B.

183. *See* Page & Katz, *supra* note 23, at 1361–62.

184. *See id.* at 1362.

185. *Id.* at 1368.

186. See *infra* Section III.B for a discussion of the role of soft law mechanisms like B Corp certification in fourth sector regulation.

D. The European Approach to the Fourth Sector Focuses More on Beneficiary Participation than the American Approach

As explained above, B Corp design largely adopts the stewardship approach of corporate and charity law without either preserving the connection between corporate beneficiaries and control of the corporation or tasking the state with overseeing the creation of some social or environmental benefit. It tasks corporate directors—and shareholders to a lesser extent—with furthering the interests of a B Corp's intended beneficiaries without granting those beneficiaries participation in governing the company. This structure stands in sharp contrast to the social enterprise approach used by other countries, particularly in continental Europe.[187] Many European social enterprise models deliberately place intended beneficiaries of a company in the decision-making structure of the enterprise.[188] Rather than endorsing the top-down approach adopted by B Lab, European social enterprise structures and standards reflect the desire to empower nonshareholder stakeholders through enterprise design.[189]

1. American Structures Lack Beneficiary Participation

As the most well-known American organization certifying social enterprises, B Lab sets highly influential standards in the field.[190] While B Lab is not the only American organization to promote using commercial methods for social or environmental purposes, most American organizations adopt a similar approach to the one B Lab uses.[191] American Fourth Sector standards-setting bodies (such as B Lab) and corporate structures (such as the benefit corporation) empower shareholders, directors, and officers to make decisions for the company as they would in any for-profit corporation.[192]

Investor preferences, corporate culture, and public statements about sustainability perhaps constrain such decisions, but there is generally little

187. *See* Katharine V. Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 HASTINGS BUS. L.J. 309, 312 (2011) (analyzing stakeholder investors for corporations in America, Germany, and the United Kingdom).

188. *See infra* Section II.D.2.

189. *Id.* at 310–12.

190. Mara Leighton, *B Corps Are Businesses Committed to Using Their Profit for Good – These 14 Are Making Some Truly Great Products*, BUS. INSIDER (Mar. 23, 2020, 3:04 PM), https://www.businessinsider.com/b-corp-retail-companies [https://perma.cc/U3S8-ERML].

191. *See* Page & Katz, *supra* note 23, at 1368.

192. *See* Jackson, *supra* note 187, at 312.

accountability to or control by the beneficiaries themselves.[193] B Lab places these ongoing requirements on B Corps.[194] Moreover, B Lab uses soft law rather than hard law measures to enforce these requirements.[195] Companies seeking a certification like B Corp status are audited by the relevant certification body (B Lab in the case of B Corps), and B Corps that fail to consider third-party stakeholders' interests may lose B Corp status.[196] B Corps do not make this information public, however, which weakens what enforcement power B Lab has. B Corps can also abandon the certification without sanction.[197] Etsy's decision to let its B Corp status lapse, for example, shows that companies may feel this certification is of questionable value such that compliance with its requirements is not worthwhile.

In the field of impact investment, organizations around the globe have created (or are in the process of creating) standards or metrics by which transacting parties can measure their efforts to create impact.[198] These efforts

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193. *See* Fairfax, *supra* note 126, at 96–97; Winston, *supra* note 40, at 1788.

194. *Certification Requirements*, CERTIFIED B CORP., https://bcorporation.net/certification/meet-the-requirements [https://perma.cc/G2MU-89EL]

195. *See id.*

196. *Id.*

197. *See id.*

198. Burand, *supra* note 28, at 779. These indicators are often referred to as environment, social, and governmental or "ESG" metrics. J. Haskell Murray, *Social Enterprise and Investment Professionals: Sacrificing Financial Interests?*, 40 SEATTLE U. L. REV. 765, 773 (2017). Some commonly used indicators include the Principles for Responsible Investment, *About the PRI*, PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/pri/about-the-pri [https://perma.cc/ZV4D-XQ2L], Impact Reporting and Investment Standards promulgated by the GIIN, *IRIS Catalog of Metrics*, IRIS+ SYS. | STANDARDS, https://iris.thegiin.org/metrics/ [https://perma.cc/U7W8-9XKF], and those promulgated by the Sustainable Accounting Standards Board ("SASB"). *Standards Board*, SUSTAINABILITY ACCT. STANDARDS BD., https://www.sasb.org/governance/standards-board/ [https://perma.cc/98MN-6TMB]. These measures attempt to define concrete standards by which impact investors and recipients of impact investments can judge their efforts at creating social impact. Similar to social enterprise metrics discussed in Section II.D, many of these metrics are sector-specific and focus on an organization's governance, reporting, and utilization of various strategies and policies. The IRIS metrics look at a company's use of strategies to reduce the use of energy, water, and greenhouse gases, for example. *IRIS Catalog of Metrics*, *supra*. A major value-added of these forms relates to branding: entities incorporated as L3Cs or Benefit Corporations communicate unambiguously to investors, clients, and consumers that they are mission-driven and that they weigh social and environmental returns heavily. Kevin Davis et al., *Introduction: Global Governance by Indicators*, *in* GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS, *supra* note 92, at 27; Dadush, *supra* note 92, at 433 ("GIIRS and IRIS both structure and influence decision-making by investors and investees. In so doing, they build a market for impact investing, making possible its graduation from idea to industry to asset class. GIIRS and IRIS also play an important role as interventions that can influence, stimulate, and even incubate regulation by governmental actors, thus contributing to the official policy landscape into which impact investing could be inserted.").

largely rely on the parties to a transaction to set the terms upon which its intended impact will be created and measured.[199] Parties may tie payment terms to the satisfaction of certain quantifiable outcomes, and they may enforce other covenants when certain events occur that relate to public benefit. But these devices expand on traditional lending concepts and largely treat the question of impact as a contractual one between the parties, rather than a collaborative endeavor involving intended beneficiaries.[200]

Though varied, these metrics have much in common. They are primarily industry-specific, such that companies operating in certain industries have unique mandates and considerations.[201] Although many focus on diversity within a company's workforce and decision-making bodies, most extoll the virtue of stakeholder engagement—the process by which stakeholders are informed, and even consulted, on corporate decisions.[202] American impact investing standards do not require that stakeholders or intended beneficiaries actually participate in the company's or transacting parties' decision-making processes, however.[203] Likewise, few emphasize collective worker bargaining.[204]

Table 1 is a summary of American Fourth Sector standards, starting with B Corp requirements and including other standards for social enterprise and impact investing.[205] This summary focuses on each set of standards' overall

199. Dadush, *supra* note 92, at 425.

200. *See, e.g.*, Burand, *supra* note 27, at 778–82.

201. *See* Dadush, *supra* note 92, at 394.

202. *See id.* at 408.

203. *See Shareholder*, *supra* note 158, at 844–47.

204. *B Lab Controversial Issues Statement—Unionization Efforts by Employees*, B LAB (Apr. 2018), https://blab-mktg-bcorporation-production.s3.amazonaws.com/Union%20Controversial%20Issues.pdf [https://perma.cc/RZ69-PTLQ]. B Lab has voiced tepid support for collective bargaining, stating in 2018:

> Companies who have taken a public stance against unionization, or have engaged in activities that can be perceived as taking a stance against union organizing activities, are required, at minimum, to make their stance and practices transparent on their B Corp public profile. Specific practices that impede the rights of workers to organize, such as the violation of laws designed to protect the right of employees to organize, or the hiring of outside consultants specializing in responses to union organizing activity, will also be reviewed by the Standards Advisory Council to determine if additional actions, including remediation or ineligibility for the Certification, should be taken.

Id.

205. Fourth Sector metrics are foundational or evaluative. Foundational metrics are standard data inputs that standards-setting organizations use to compare entities. Evaluative metrics seek to measure how much social good is created. *See* REISER & DEAN, *supra* note 28, at 126. Because this Article focuses on beneficiary participation and collective bargaining in all Fourth Sector metrics, the tables in this Section are not divided between foundational and evaluative metrics.

mission and metrics as they relate to governance, beneficiary participation, and beneficiary engagement, to the extent they exist. The summary also highlights the extent to which these standards focus on employee ownership, collective bargaining, or both. This metric is included because employees are frequently designated as beneficiaries of corporate activity, and employee ownership and collective bargaining have historically been used as tools to encourage employee participation in corporate decision-making. Many companies whose purpose is to benefit some set of nonshareholder stakeholders identify employees as beneficiaries.[206] This is especially true for companies organized as worker cooperatives, employee stock ownership plans, or other corporate forms that explicitly grant employees ownership rights in the company.[207] Similarly, collective bargaining grants employees the right to participate in company decisions, particularly those that affect employees, through negotiated contracts between company management and labor unions.[208]

206. *See* Norman D. Bishara, Hybrid Entities and the Psychological Contract with Employee-Stakeholders, 22 U. PA. J. BUS. L. 303, 312, 341 (2020). Fourth sector certifications and forms like B Corp status and the benefit corporation are touted as being particularly promising for companies who are organized to benefit employees as a class. *Id.*

207. *Id.* at 341.

208. *Id.*

Table 1. Summary of American Fourth Sector Standards

	B Lab
Year Founded	2006[209]
Location	Pennsylvania, U.S.[210]
Mission	B Corp is a certification promulgated and administered by the nonprofit B Lab. B Corp certification measures a company's entire social and environmental performance. This is carried out through B Impact Assessment, which evaluates how the operations and business model impact the workers, community, environment, and customers.[211]
Key Corporate Governance Metrics	The B Impact Assessment's governance section evaluates a company's mission: whether it has adopted a social or environmental mission; how it engages its employees, board members, and the community to achieve that mission; and the diversity of the company's governing bodies.[212]
Beneficiary Participation and Engagement	The B Impact Assessment does not include beneficiary participation. A company's stakeholder engagement strategy may result in a higher B Impact Assessment score.[213]
Employee Ownership and Collective Bargaining	The B Impact Assessment's area scores for workers measure compensation and wages; benefits; training and education; worker ownership, management, and communication; job flexibility; and corporate culture.[214]

209. *Our History*, CERTIFIED B CORP., https://webarchive.loc.gov/all/20151014104554/https://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/our-history.

210. *Contact Us*, CERTIFIED B CORP., https://bcorporation.net/contact-us [https://perma.cc/Z3FC-S54N].

211. *About B Corps*, CERTIFIED B CORP., *supra* note 7.

212. *Certification*, CERTIFIED B CORP., *supra* note 22.

213. Ruben Burga, *Stakeholder Engagement, B Corp Certification and Benefit Corporations*, BORÉALIS (Feb. 6, 2018), https://www.boreal-is.com/blog/stakeholder-engagement-b-corp-certification/ [https://perma.cc/VGZ3-EU33].

214. *Completing the B Impact Assessment*, CULTIVATING CAP., https://www.cultivatingcapital.com/completing-the-b-impact-assessment/ [https://perma.cc/7TGV-B72T]. Worker ownership does appear to be favored in B Lab's Impact Assessment process—King Arthur Flour received an extra thirty points in its worker measurement for being worker owned.

Table 1. Summary of American Fourth Sector Standards

Global Impact Investment Rating System (GIIRS)	
Year Founded	2011[215]
Location	New York, U.S.[216]
Mission	GIIRS is a comprehensive, comparable, and transparent system for assessing the social and environmental impact of companies and funds. It has a ratings and analytics approach analogous to Morningstar investment rankings. Additionally, GIIRS provides investors and investment advisors with access to aggregated ratings information through a product called GIIRS Analytics.[217]
Key Corporate Governance Metrics	Governance themes include corporate accountability and transparency. These include mission and engagement, governance, transparency and reporting, and anti-corruption.[218]
Beneficiary Participation and Engagement	GIIRS is silent on beneficiary participation and engagement.
Employee Ownership and Collective Bargaining	Worker-related themes include compensation, benefits, and training; employee ownership, work environment, and human rights and labor policies; compensation, training and benefits; worker ownership; and work environment.[219]

215. *Launch of GIIRS Ratings & Analytics*, CLINTON FOUND., https://www.clintonfoundation.org/clinton-global-initiative/commitments/launch-giirs-ratings-analytics [https://perma.cc/D3ZG-TCK2].

216. *Global Impact Investing Network, Inc.*, CHARITY NAVIGATOR, https://www.charitynavigator.org/ein/273166994 [https://perma.cc/2L9V-TQ7K].

217. Beth Richardson, *Sparking Impact Investing Through GIIRS*, STANFORD SOC. INNOVATION REV. (Oct. 24, 2012), https://ssir.org/articles/entry/sparking_impact_investing_through_giirs [https://perma.cc/LBE6-XSUM].

218. *See, e.g.*, *Company Report: Education Tools R Us*, B ANALYTICS (2014), https://b-analytics.net/sites/default/files/documents/Education_Tools_R_Us_Company_Report.pdf [https://perma.cc/R5AV-MJGS].

219. *See, e.g.*, *id.*

Table 1. Summary of American Fourth Sector Standards

Impact Reporting and Investment Standards (IRIS)	
Year Founded	2008[220]
Location	New York, U.S.[221]
Mission	IRIS is the catalog of generally accepted performance metrics that leading impact investors use to measure social, environmental, and financial success; evaluate deals; and augment the sector's credibility. IRIS is an initiative of the Global Impact Investing Network (GIIN), a nonprofit organization based in New York that is dedicated to increasing the scale and effectiveness of impact investing. The IRIS catalog does not judge whether performance is good or bad. Using IRIS metrics does not result in a certification or performance rating. Instead, IRIS metrics can be incorporated into different performance systems, such as assessment tools, proprietary scorecards, and methodologies.[222]
Key Corporate Governance Metrics	The IRIS governance and ownership metrics focus on board membership and the extent to which corporate governance policies are communicated with stakeholders, among others.[223]
Beneficiary Participation and Engagement	The Community Engagement Strategy indicates whether the organization implements a strategy to manage its interactions with local communities affected by its operations. The strategy may dictate methods (e.g., memorandum of understanding) for considering, informing, and consulting with existing community groups before implementing organizational activities that affect the community.[224]
Employee Ownership and Collective Bargaining	The Worker Freedom of Association Policy metric indicates whether the organization has a written policy to monitor, evaluate, and ensure its workers' freedom of association.[225]

220. *IRIS+ System | About*, IRIS+, https://iris.thegiin.org/history/ https://perma.cc/NLK9-QS9V].

221. *Id.*

222. Amit Bouri, *How Standards Emerge The Role of Investor Leadership in Realizing the Potential of IRIS*, 6 INNOVATIONS 117, 118, 122 (2011).

223. *Governance Policies*, IRIS+ (2019), https://iris.thegiin.org/metric/5.0/oi2330/ [https://perma.cc/NW2L-YFJZ].

224. *Community Engagement Strategy*, IRIS+ (2019), https://iris.thegiin.org/metric/5.0/oi2319/ [https://perma.cc/D2EA-76P8].

225. *Worker Freedom of Association Policy*, IRIS+, https://iris.thegiin.org/metric/5.0/oi4364/ [https://perma.cc/CSP6-JMEN].

Table 1. Summary of American Fourth Sector Standards

Sustainable Accounting Standard Board (SASB)	
Year Founded	2011[226]
Location	San Francisco, U.S.[227]
Mission	SASB standards help businesses around the world identify, manage, and report on the sustainability topics that matter most to their investors. "Sustainability accounting reflects the corporation's management of environmental and social impacts arising from the production of goods and services, as well as its management of the environmental and social capitals necessary to create long-term value."[228]
Key Corporate Governance Metrics	SASB's sustainability topics are organized under five broad sustainability dimensions: environment, social capital, human capital, business model and innovation, and leadership and governance. Leadership and governance "involves the management of issues that are inherent to the business model or common practice in the industry and that are in potential conflict with the interest of broader stakeholder groups[.]" When in conflict, these issues "create a potential for liability or limitation or removal of a license to operate. This includes regulatory compliance, risk management, safety management, supply chain and materials sourcing, conflicts of interest, anticompetitive behavior, and corruption and bribery."[229]
Beneficiary Participation and Engagement	This standard includes a discussion of community engagement processes to identify and mitigate concerns regarding a project's environmental and community impacts. The metric for community relations values the processes to manage risks and opportunities associated with community rights and interests.[230]

226. *The SASB Foundation Board of Directors*, STANFORD SOC. INNOVATION REV., https://www.sasb.org/governance/foundation-board/ [https://perma.cc/8M6Y-7EF7].
227. *Contact Us*, STANFORD SOC. INNOVATION REV., https://www.sasb.org/contact/ [https://perma.cc/5THW-L9FM].
228. *See Why SASB?*, STANFORD SOC. INNOVATION REV., https://www.sasb.org/ [https://perma.cc/NC8J-R3UY].
229. *Materiality Map*, SUSTAINABILITY ACCT. STANDARDS BD., https://www.sasb.org/standards-overview/materiality-map/ [https://perma.cc/2MQ2-WVPS].
230. *See id.*

Table 1. Summary of American Fourth Sector Standards

Employee Ownership and Collective Bargaining	The Labor Relations metric incorporates a metric for the percentage of active workforce covered under collective-bargaining agreements, broken down by U.S. and foreign employees.[231]

2. *International Certifying and Standards-Setting Bodies Emphasize Beneficiary Participation*

International organizations' social enterprise and impact investing metrics and standards place a higher premium on beneficiary participation than do American organizations.[232] This is particularly true in continental Europe, where stakeholder participation generally and worker participation specifically have long been features of corporate law and design.[233] In Germany, for example, half of German companies' supervisory board seats must be comprised of workers' representatives.[234] By building on this history, European models place companies' intended beneficiaries within an enterprise's decision-making apparatus more often than their American counterparts.[235]

This approach is not surprising given that European law has a history of employee board representation and stakeholder governance. The tradition of codetermination likely primed standards-setting organizations to focus on the participation of companies' and transactions' intended beneficiaries. As a result, many international social enterprise-certifying organizations have metrics and structures grounded in the tradition of codetermination and trade unions.[236]

231. *See, e.g.*, SUSTAINABILITY ACCT. STANDARDS BD., AIRLINES: SUSTAINABILITY ACCOUNTING STANDARD 8 (2014), https://www.sasb.org/wp-content/uploads/2014/09/TR0201_ProvisionalStandard_Airlines.pdf [https://perma.cc/V82K-UW5X].

232. *See infra* Table 2.

233. *See* Jackson, *supra* note 187, at 310–11. Many European countries required that workers actually be represented on company boards of directors. *Id.*

234. *Id.* at 311. Nineteen countries require that workers be represented on the board of directors of either large private companies or state-owned enterprises. *Board-level Representation*, WORKER-PARTICIPATION.EU, http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation2 [https://perma.cc/U8PK-RZES].

235. *See* Jackson, *supra* note 187, at 310.

236. *Id.* Senator Elizabeth Warren has proposed the Accountable Capitalism Act, which includes a provision that at least forty percent of board of director seats of large American

Table 2. Summary of International Standards

Outcomes Matrix	
Year Founded	2012[237]
Location	London, U.K.[238]
Mission	The Outcomes Matrix is a free tool to help organizations plan and measure their social impact. It was developed by Big Society Capital in partnership with social investment financial intermediaries, front line organizations and impact experts including the Good Analyst, New Philanthropy Capital, Social Value International, and Triangle Consulting.[239]
Key Corporate Governance Metrics	These metrics include outcomes and measures for nine outcome areas and fifteen beneficiary groups.[240]
Beneficiary Participation and Engagement	Metrics focus on institutional and organizational engagement with stakeholders (e.g. engagement through consultation with employees or parents at schools and employee/parent participation in decision-making), as well as levels of stakeholder involvement in the provision of services and in their employment, training, and education.[241]
Employee Ownership and Collective Bargaining	Opportunities for collective bargaining and worker representation are viewed favorably.[242]
Social Return on Investment (SROI)	
Year Founded	2007[243]

corporations be selected by employees. At the time of writing, this remains a proposal. Benjamin Swasey, *Warren Bill Would Have A Big Corporation's Employees Elect Nearly Half Of Board Members*, WBUR: BOSTONOMIX (Aug. 15, 2018), https://www.wbur.org/bostonomix/2018/08/15/warren-co-determination-capitalism-act [https://perma.cc/C8A7-6W9C].

237. *Outcomes Matrix*, GIIN IMPACT TOOLKIT, https://impacttoolkit.thegiin.org/outcomes-matrix/ [https://perma.cc/4QZD-WAQM].

238. *The Outcomes Matrix*, GOOD FIN., https://goodfinance.org.uk/impact-matrix [https://perma.cc/U4BH-79QX].

239. *Id.*

240. *Id.*

241. *See Outcomes Matrix - Employment, Training, and Education*, GOOD FIN., https://www.goodfinance.org.uk/impact-matrix/filter/93 [https://perma.cc/7CYQ-NZET].

242. *See* Matt Black, *Helping Hand to Secure Investment*, GOOD FIN. (Apr. 9, 2018), https://www.goodfinance.org.uk/latest/post/blog/helping-hand-secure-investment [https://perma.cc/WB2D-UEHQ] (pointing readers towards employee ownership experts).

243. *About Us*, SOC. VALUE UK, http://www.socialvalueuk.org/about-social-value-uk/ [https://perma.cc/X8RX-C5KW].

Table 2. Summary of International Standards

Location	Liverpool, U.K.[244]
Mission	SROI is the application of a set of principles to map out impact. This provides a consistent approach to understanding and managing impact with the flexibility to respond to different activities in different organizations with different stakeholders. The SROI method provides a clear process for determining what drives value within an organization and helps an organization determine which outcomes resulting from an activity should be managed.[245]
Key Corporate Governance Metrics	SROI is closely aligned with ethical governance and social responsibility.[246]
Beneficiary Participation and Engagement	SROI is premised on seven principles. "Involve stakeholders" is the first.[247] "Stakeholders are those people or organisations that experience change as a result of your activity – and they are best placed to describe the change. This Principle means that stakeholders need to be identified and then consulted throughout the analysis. This means that the value and the way that it is measured, is informed by those affected by, or who affect, the activity."[248]
Employee Ownership and Collective Bargaining	SROI is silent on employee ownership and collective bargaining.
	EMES
Year Founded	1996[249]
Location	Liege, Belg.[250]

244. *What is Social Value?*, SOC. VALUE UK, http://www.socialvalueuk.org/what-is-social-value/ [https://perma.cc/E8F9-KTRT].

245. *Id.*

246. Alexandros Antonaras et al., *Measuring Social Return on Investment Using the EBEN GR Business Ethics Excellence Model*, 6 VERSLO IR TEISĖS AKTUALIJOS [CURRENT ISSUES OF BUS. & L.] 69 (2010).

247. SOCIAL VALUE UK, A GUIDE TO SOCIAL RETURN ON INVESTMENT 1, 9 (2012), http://www.socialvalueuk.org/app/uploads/2016/03/The%20Guide%20to%20Social%20Return%20on%20Investment%202015.pdf [https://perma.cc/YY24-R5DC].

248. SOCIAL VALUE INTERNATIONAL, STANDARD ON APPLYING PRINCIPLE 1: INVOLVE STAKEHOLDERS VERSION 2.0 3 (2019), http://www.socialvalueuk.org/app/uploads/2019/06/Standard-on-Stakeholder-Involvement-V2.0-FINAL-1.pdf [https://perma.cc/RND2-TRYK].

249. *Who We Are*, EMES INT'L RSCH. NETWORK, https://emes.net/who-we-are/ [https://perma.cc/UL26-KWBQ].

250. *Id.*

Table 2. Summary of International Standards

Mission	EMES is a network of established university research centers and individual researchers whose goal has been to gradually build up an international corpus of theoretical and empirical knowledge—pluralistic in disciplines and methodologies—around four "SE" concepts: social enterprise, social entrepreneurship, social economy, and solidarity economy and social innovation. The nine criteria defining the social enterprise include decision-making power not based solely on capital ownership and participatory nature but which also involves other parties affected by the company's activity.[251]
Key Corporate Governance Metrics	The research group has not formulated standards or indicators to measure social enterprises. However, the EMES approach focuses on social, economic, and political dimensions.[252]
Beneficiary Participation and Engagement	The EMES approach favors participatory governance. The ideal EMES social enterprise is based on collective dynamics and involvement of different stakeholders in the governance of the organization. In many cases, social enterprises aim to foster democracy at the local level through economic activity, among other things. The decision-making power is not based on capital ownership, and it reflects the quest for more economic democracy in the line of the cooperative tradition.[253]
Employee Ownership and Collective Bargaining	Work Integration Social Enterprise models in Europe encourage workers to participate in the decision-making process.[254]
Global Reporting Initiative (GRI)	
Year Founded	1997[255]
Location	Amsterdam, Neth.[256]
Mission	GRI helps businesses and governments worldwide understand and communicate their impact on critical sustainability issues

251. *Focus Areas*, EMES INT'L RSCH. NETWORK, https://emes.net/focus-areas/ [https://perma.cc/JTJ2-GBYA].
252. *Id.*
253. Victor Pestoff, *The Role of Participatory Governance in the EMES Approach to Social Enterprise*, 2 J. ENTREPRENEURIAL & ORGANIZATIONAL DIVERSITY 48, 54 (2013); *Focus Areas*, *supra* note 251.
254. Catherine Davister et al., *Work Integration Social Enterprises in the European Union: An Overview of Existing Models* 21 (Eur. Rsch. Network, Working Paper No. 04/04, 2004).
255. *Mission & History*, GRI, https://www.globalreporting.org/about-gri/mission-history/ [https://perma.cc/Q6T9-5N5V].
256. *Id.*

Table 2. Summary of International Standards

	such as climate change, human rights, governance, and social well-being.[257]
Key Corporate Governance Metrics	GRI governance standards focus on the organization's governance structure and the highest governance body's role in setting the organization's purpose, values, and strategy.[258]
Beneficiary Participation and Engagement	Standards require that organizations implement local community engagement. Stakeholders are consulted on how to build reporting standards and the effect of the enterprise on stakeholders. The governance structure has elements of a list of stakeholder groups, and it identifies and selects stakeholders' approach to stakeholder engagement.[259]
Employee Ownership and Collective Bargaining	Standards favor freedom of association, which includes the right of workers to collectively bargain the terms and conditions of work. The social standards under GRI have a topic-specific standard on freedom of association and collective bargaining. The disclosures in this standard can provide information about how an organization's impacts are related to freedom of association and collective bargaining and how the organization manages these impacts.[260]

III. WAYS TO DEMOCRATIZE THE FOURTH SECTOR

Certifying organizations like B Lab have an opportunity to promote intended beneficiaries' meaningful participation in B Corp governance and the Fourth Sector. Certifying organizations should articulate social and environmental goals and implement them at the individual company level through participatory mechanisms.[261] B Corp certification should require that

257. *About GRI*, GRI, https://www.globalreporting.org/Information/about-gri/Pages/default.aspx [https://perma.cc/X34B-N4J4] (describing the purpose and goals of GRI).

258. *GRI 102: General Disclosures*, GRI 18 (2016), https://www.globalreporting.org/standards/gri-standards-download-center/?g=51e0294b-d263-48b3-9ff1-f06f98940200 [https://perma.cc/H3F5-A8N7].

259. *GRI 413: Local Communities*, GRI 4, 6 (2016), https://www.globalreporting.org/standards/gri-standards-download-center/?g=51e0294b-d263-48b3-9ff1-f06f98940200 [https://perma.cc/5G65-DS68].

260. *GRI 407: Freedom of Association and Collective Bargaining*, GRI 4 (2016), https://www.globalreporting.org/standards/gri-standards-download-center/gri-407-freedom-of-association-and-collective-bargaining-2016/ [https://perma.cc/5FRK-QXWN].

261. Charles Sabel, Dewey, Democracy, and Democratic Experimentalism, 9 Contemp. Pragmatism 35, 44–45 (2012) ("[A successful New Governance program] begins with

companies involve beneficiaries at every stage in the life of a B Corp, including designing, implementing, and evaluating the company. This Section first contends that B Corp certification should look to New Governance theory and Democratic Experimentalism to empower stakeholders and beneficiaries.[262] It also proposes reforms to B Corp certification that take into account prerequisite conditions for effective beneficiary participation and are mindful of the limitations of such participation.

This Section does not intend to articulate a complete set of standards that B Lab should implement; this Article anticipates an iterative process in which B Lab first articulates principles and then develops standards as B Corps and beneficiaries experiment with participatory models. This Section, therefore, attempts to articulate principles of beneficiary participation within B Corps that satisfy some, if not all, of the conditions for successful New Governance participation, particularly among marginalized beneficiaries. This Section introduces key concepts of New Governance, its benefits and limitations, and its application to corporate governance. It pays special attention to whether participation is feasible in B Corp governance and what prerequisites must exist to make that participation work.

Participatory corporate governance mechanisms can take the form of procedures that (1) involve beneficiaries in designing the company and making major decisions[263] or (2) give intended beneficiaries certain enforcement rights, such as the right to sue the company.[264] This Section also identifies examples of beneficiary participation as currently practiced and evaluates those examples against the general principles articulated in Section III.B below. In doing so, this Section highlights best practices and suggests models for adoption by individual B Corps.

As used here, "beneficiary participation" rises above the level of stakeholder engagement endorsed by many of the standards-setting organizations listed in Section II.D. Rather, the level of participation this

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agreement at the highest-level jurisdiction (for example, the federal level in the US, the Union level in the European Union) on broad framework goals. Lower level actors (the states in the US, the member states in the EU, or administrative agencies acting through their local units or in collaboration with state or member state administrations) are given discretion to advance the general goals in their own way, but on condition that they elaborate either by themselves, and more typically with others, standards that specify the goals and set metrics for gauging progress towards them. Lower level experience is then periodically compared against the backdrop of these standards and metrics, and these comparisons of implementation experience call attention to the need for either changes in particular lower-level administrations or revisions of the standards and metrics, or the framework law or some combination of all of them.").

262. *See infra* notes 271, 277.

263. *See, e.g.*, Bebchuk, *supra* note 158, at 865.

264. *See, e.g.*, MODEL BENEFIT CORP. LEGIS. § 102 (BENEFIT CORP. 2017).

Article suggests requires that beneficiaries (or their representatives) be clearly identified and empowered in the company and that the company be accountable to those beneficiaries or representatives.

A. New Governance and Democratic Experimentalism

New Governance theory—a theory based on the work of John Dewey[265] which was first suggested in public program design[266] but later applied to corporate governance[267]—gives a framework for standards-setting bodies, such as B Lab, to set beneficiary participation as an aspiring goal for individual B Corps. New Governance seeks to shift decision-making power within a program away from those who traditionally hold power and toward a wider set of participants.[268] New Governance programs are characterized by "[i]nclusiveness, decentralized problem solving, and learning-by-doing . . . ."[269] Both private and public stakeholders collaborate to "create, implement, and continually renegotiate programmatic goals and structures."[270]

Under New Governance, local stakeholders experiment with program design, and a central authority identifies best practices and attempts to standardize and replicate them elsewhere.[271] New Governance recognizes that "all stakeholders affected by a problem should be engaged in the process of solving it."[272] Regulators identify a policy failure and encourage programs to innovate within a given framework to address that failure rather than institute top-down mandates.[273] The participation of local stakeholders, in particular, is important at every stage in this experimentation and monitoring process, which is constructed in a deliberate manner and may involve non-governmental organizations' cooperation.[274]

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265. Sabel, *supra* note 261, at 35.

266. *See, e.g.*, Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 343–44 (2004).

267. *See, e.g.*, Tamara C. Belinfanti, *Shareholder Cultivation and New Governance*, 38 DEL. J. CORP. L. 789, 792 (2014).

268. Jaime Alison Lee, *"Can You Hear Me Now?": Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL'Y REV. 405, 415 (2013).

269. *Id.* at 410.

270. Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239, 256.

271. *See* Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 WIS. L. REV. 441, 483–85.

272. Lee, *supra* note 268, at 409.

273. *See* Belinfanti, *supra* note 267, at 794–95 (applying New Governance theory to the problem of incongruity between shareholders and management).

274. *See* Lee, *supra* note 268, at 410–11.

New Governance emerged in recent years as a critique of the perceived top-down style of program management that was common in public programs.[275] Programs that embrace New Governance are characterized by a collaboration between government and local stakeholders, particularly intended beneficiaries of those programs.[276] In espousing these collaborations, New Governance strives to create programs and policies that better meet the government's need and facilitate democratic engagement and empowerment among the citizenry.[277]

Scholars point to many benefits of the New Governance approach, including a program's increased efficacy.[278] In considering the viewpoints of multiple stakeholders to a program's monitoring and design, New Governance brings multiple perspectives and approaches to a problem.[279] Structured correctly, a program that utilizes New Governance can be particularly helpful in promoting the participation of marginalized groups. Marginalized groups' participation in a program intended for their benefit can result in increased accountability over those programs as those groups contain invaluable information and perspectives.[280]

Applied to corporate governance, New Governance seeks to promote both regulatory compliance and innovation within corporate design and management.[281] New Governance in the corporate context identifies market failures and promotes changes in corporate behavior to address those

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275. *See* Bach, *supra* note 270, at 255–56.

276. *See* ORLY LOBEL, *New Governance as Regulatory Governance*, *in* THE OXFORD HANDBOOK OF GOVERNANCE 65, 65 (David Levi-Faur ed., 2012).

277. *See* Bach, *supra* note 270, at 259. Democratic Experimentalism similarly provides a theoretical basis under which B Corp design can utilize a participatory process to create a public benefit. Entities organized pursuant to Democratic Experimentalism feature broad governing norms—benefit for a specific stakeholder or set of stakeholders in the case of a B Corp—and utilizes flexible, collaborate processes to advance these norms. *See* Charles F. Sabel & William H. Simon, *Democratic Experimentalism*, *in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT (Justin Desautels-Stein & Christopher Tomlins, eds., forthcoming 2017) (manuscript at 8–9) (on file with the *South Carolina Law Review*). Local actors are responsible for implementing programs but are ultimately accountable to some central authority. *See id.* (manuscript at 9). Under Democratic Experimentalism, multiple perspectives brought by stakeholders of an entity are seen as fonts of knowledge for the group rather than hindrances to efficient decision-making. *See id.* (manuscript at 4). The resulting corporate activity is, therefore, the result of the input of a range of stakeholders or beneficiaries and relies on participation rather than markets or bureaucracy to produce benefit for an intended stakeholder. *See id.* (manuscript at 10).

278. Lee, *supra* note 268, at 406.

279. *See id.* at 412.

280. *See id.*

281. Belinfanti, *supra* note 267, at 808.

failures.[282] A New Governance model views the corporate form as a forum through which various stakeholders can negotiate among themselves.[283] As explained in Section II.B, tension in corporate governance often arises from the misalignment of interests between various corporate stakeholders, including directors, managers, shareholders, and creditors.[284] The Fourth Sector attempts to integrate another external stakeholder's interests into those stakeholder relationships.[285] A New Governance approach to corporate governance in the Fourth Sector facilitates negotiation among these competing interests, providing a structure through which designated beneficiaries can participate alongside more entrenched corporate actors.[286] B Corps require participatory governance structures so these negotiations can take place.[287]

B Corps should first identify a goal of furthering certain stakeholder interests and then be given the flexibility to create and implement structures that allow for beneficiary participation in a way that is best suited to a particular stakeholder's needs. Focusing on B Corp standards rather than regulatory reform at this point allows companies to experiment with participatory corporate governance structures. A focus on B Corp standards may also prevent a race to the bottom in which companies incorporate in or move to a jurisdiction with the most lenient legal regime.[288] In attempting to adhere to B Lab's standards, B Corps will act as laboratories of corporate governance, taking advantage of a mix of the mechanisms set forth below. Lessons will be learned, best practices can be developed, and effective mechanisms can be disseminated throughout the industry and promoted by the standards-setting bodies.[289]

Structural support for participation is necessary for successful New Governance systems,[290] and a non-governmental organization, such as B Lab, is an apt vehicle to promote beneficiary participation. Aside from enacting benefit corporation legislation, there is little government regulation around B

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282. *Id.* at 804. These failures can be the result of the interaction of regulations and market actors. *Id.* Examples of such failures include the subprime mortgage crisis and resulting 2008 financial crisis. *Id.*

283. *See id.* at 807–08.

284. *See id.* at 806.

285. *See id.* at 815.

286. *See id.* at 872.

287. *See* MODEL BENEFIT CORP. LEGIS. § 301(a) (BENEFIT CORP. 2017).

288. Marco Ventoruzzo, *The Role of Comparative Law in Shaping Corporate Statutory Reforms*, 52 DUQ. L. REV. 151, 155, 160 n.40 (2014).

289. Lee, *supra* note 268, at 410.

290. *Id.* at 435.

Corps and related Fourth Sector companies.[291] Without government regulation, standards-setting organizations like B Lab are best positioned to promote beneficiary participation while allowing for the kind of flexibility and experimentation discussed above.[292] As these fields grow and develop, standards-setting organizations like B Lab will be on the cutting edge of best practices in the industry.[293] Efforts to standardize practices in the Fourth Sector are still in their relatively nascent stages and should continue as the space expands.[294]

New Governance is not without limitations, however. Participatory processes are costly in both time and money—they require careful design and capacity building among stakeholders initially, and even then, coordination of various stakeholder groups can be trying.[295] The principles set forth in Section III.B acknowledge these limitations and attempt to promote the positives of New Governance design while minimizing the harms of participatory processes. For example, some have criticized the reliance on third-party organizations to set standards for Fourth Sector entities in lieu of regulation.[296] Scholars have pointed out that these organizations couple a lack of prescriptive rules with weak (or no) enforcement powers[297] or may be susceptible to undue influence from certain stakeholders (particularly if those

291. *See supra* Section II.A. Nor have there been significant regulatory developments that apply to impact investing. *See supra* Section II.A.

292. Dadush, *supra* note 92, at 424 ("The previous sections elucidated the roles that GIIRS and IRIS play in governance, as interventions that create structures for and influence decision-making by impact investors, investees, and official policy-makers, particularly during the marketbuilding stage. These manifestations of indicator-power are relatively concrete. At a more abstract level, indicators also act as powerful knowledge producers, influencing not only decision outcomes, but also the very process of decision-making, fundamentally altering the values and the logics involved."). So-called "soft law" regimes, through which enforcement of some norm is through "informal social pressures rather than material sanctions," has been seen as an alternative to "hard law" enforcement when legal regimes lack capacity for such enforcement. Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 81 (2011). Standards-setting bodies like B Lab can be said to be engaging in private lawmaking, operating largely without the scrutiny of "hard law" regimes. *See* David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371 (2003).

293. *Id.* at 419 ("Until government assumes explicit regulatory functions within the impact investing sphere, the fact that both IRIS and GIIRS have financially and reputationally strong networks of supporters, and that they currently have no direct competition, lends credence to the view that stakeholders will come to rely on them as the primary rule-setters and governors of the social investing space.").

294. *See id.*

295. *See* Lee, *supra* note 268, at 412–13.

296. Reiser, *supra* note 48, at 611.

297. *Id.* at 624.

stakeholders wield disproportionate wealth).[298] Large impact investors, for example, who are not eager to share corporate power with intended beneficiaries may lean on entities such as B Lab to promulgate favorable standards that curb nonshareholder stakeholders' influence. Despite professed alignment with beneficiary groups, impact investors are necessarily compelled by a portfolio company's bottom line—even the most socially-minded investors do not want to make unprofitable investments. These disagreements could exist between other corporate constituencies—a company's workforce could be opposed to hiring undocumented workers, for example, even if a local immigrant community is articulated as a company beneficiary. Recall that Etsy listed employees, neighbors, members, partners, and the environment as key beneficiaries. Whose preference will become company policy?

The proposals articulated in this Article attempt to address these critiques. First, the B Corp certification's marketing value is such that, even without other enforcement capabilities, the risk of losing this certification ought to be sufficient to encourage companies to engage in compliant behavior[299]—though Etsy is a clear example of the opposite.[300] Second, focusing on articulating goals rather than particular structures will lessen the incentives for stakeholders to "capture" standards-setting bodies such as B Lab. Powerful stakeholders will instead engage in a process of sorting out competing incentives on the individual enterprise level, as is the case in traditional corporations. This process of self-governance through experimentation, monitoring, and adaptation is key to the New Governance model.[301]

A New Governance frame allows for B Lab to promote the development of participatory structures that are well-suited to a B Corp's specific

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298. *See* Rutsel S.J. Martha & Sarah Dadush, *Going Against the Grain: When Private Rules Shouldn't Apply to Public Institutions*, 9 INT'L ORGS. L. REV. 87, 100 (2012).

299. Richard Stammer, *It Pays to Become a B Corporation*, HARV. BUS. REV. (Dec. 6, 2016), https://hbr.org/2016/12/it-pays-to-become-a-b-corporation [https://perma.cc/LK86-U4TE].

300. Martha & Dadush, *supra* note 298, at 102. Among the values of certification like B Corp status is that these certifications signal something about the sustainability of a good or service, allowing a company to charge a premium for that good or service. Margaret Chon, *Marks of Rectitude*, 77 FORDHAM L. REV. 2311, 2313 (2009).

301. Sabel, *supra* note 261, at 44 ("The shift towards experimentalist lawmaking requires complementary changes in the way laws are constructed and the way they are administered or applied to various contexts: the law has to encourage adaption and revision when applied in context; the contextual adaption has to make possible the detection of local error, permit learning across contexts, and prompt reconsideration of the original legislation when, on reflection, necessary.").

beneficiary and corporate mission.[302] Future iterations of B Corp standards can then endorse certain actions and elevate best practices in the field. The following Section elaborates on these goals and highlights participatory practices from the field.

B. *The Practical Involvement of B Corp Beneficiaries*

B Lab ought to require that, in setting beneficiary participation as a criterion for certification, B Corps comply with the following three principles: (1) that intended beneficiaries are clearly identified; (2) that beneficiaries are involved in designing, implementing, and evaluating the B Corp; and (3) that the B Corp is accountable to those beneficiaries.

This Article argues that the efficacy of B Corps—that is, the ability to create or promote some stated social or environmental benefit—will be harmed absent intended beneficiaries' input. Even if metrics can be developed where standard analysis of the effect of B Corps on nonshareholder stakeholders can be objectively measured, this Article argues that even such measurement fails absent beneficiary participation. Instead, an intended benefit should be measured on terms set forth by the intended beneficiaries and not aloof corporate persons or distant standards-setting bodies. Drawing on the work of Bill Simon and Chuck Sabel, among others, Jaime Lee argues that two preconditions are necessary for successful participation in New Governance Design: (1) the parties must be motivated toward some common goal and (2) participants within a program or enterprise must recognize the value of the other participants' contributions.[303] The three principles articulated in this Section seek to satisfy these preconditions.

Given the difficulties of measuring outcomes in this space, this Article prefers an emphasis on process rather than outcome.[304] Under New

302. *Id.* at 89 ("[B]est practices often become benchmarks for a wide range of institutions, notwithstanding fundamental institutional differences. . . . [T]he adoption of externally generated rules must be pursued in a systematically cautious, critical and coordinated manner in order to avoid producing practices that run against the very grain of a public institution's constitution and mandate. . . . [R]obust governance structures are necessary to avoid institutional digressions.").

303. Lee, *supra* note 268, at 422. Pragmatists in the Dewian tradition have long favored such an emphasis on process, particularly processes that involved "provisionality and experiment." Sabel & Simon, *supra* note 277, at 3.

304. Outcome and process are termed "product" and "process" in international trade law, with "product" referring to information about the product itself and "process" referring to how the product is produced, including "the labor conditions of workers who produce a consumer good, the environmental effects of a good's production, the use of controversial engineering

Governance models, the level of stakeholder participation can exist at different points on a continuum.[305] Preserving flexibility should be a higher priority than endorsing a particular arrangement, and beneficiaries themselves deserve to have input in the design of participatory structures rather than having those structures thrust upon them.

Two organizations based in Boston, Massachusetts, certify or promote Fourth Sector enterprises through championing beneficiary participation. The Boston Ujima Project promotes community-based economic development in Boston, Massachusetts, by certifying and funding companies that embrace a participatory approach.[306] Every year, the Boston Ujima Project certifies thirty-six companies that satisfy eight "Good Business" categories as members of the Ujima Business Alliance.[307] These categories include a "commitment to employee ownership" and "[s]tructures that empower employees in relevant decisions" and "incorporate consumer governance or maintain robust feedback channels . . . ."[308] Among the benefits of membership in the Ujima Business Alliance are exposure, access to technical assistance, reputational benefits, and a connection to anchor institutions like universities that support participatory companies.[309]

Similarly, Transform Finance is an organization that promotes alternative financial models by convening a network of impact investors, producing research and case studies, and providing advisory services to impact investors.[310] Among Transform Finance's focus areas are fostering employee ownership and developing a methodology to measure the effectiveness of impact investing projects.[311] Key to Transform Finance's work is the idea that an enterprise's ownership and control can be separated such that a company's

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techniques such as genetic modification to create a good, or any number of other social, economic, or environmental circumstances that are related causally to a consumer product." Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 528–29 (2004).

305. *See* Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216, 217 (1969) (comparing levels of participation to ladder rungs). For a discussion of other frameworks for participation, see Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 J. DISP. RESOL. 269, 291–92.

306. *See Another Boston is Possible*, BOS. UJIMA PROJECT, https://www.ujimaboston.com/ [https://perma.cc/G36L-VXF2].

307. *Rewrite the Rules*, BOS. UJIMA PROJECT, https://www.ujimaboston.com/standards [https://perma.cc/KL85-5YUT].

308. *Id.* (listing all eight "Good Business" categories).

309. Telephone Interview with Charles Wallace-Thomas IV (Jan. 7, 2020).

310. *Our Work*, TRANSFORM FIN., http://transformfinance.org/ourwork [https://perma.cc/X26E-MD8Y].

311. *Id.*

stakeholders can have a say in the governance of the enterprise without being owners.[312]

To varying degrees, the work of the Boston Ujima Project and Transform Finance satisfy the three criteria laid out above. The following Section expounds on these organizations' efforts and provides examples of enterprise and transaction design that comply with these criteria. Many of these examples involve the use of guaranteed board representation or grants of equity ownership in an enterprise to give some beneficiary group participatory rights in the governance of a company.[313] Empowering workers through cooperative structures, grants of equity, or pension fund ownership, for example, is well established.[314] This Section examines these arrangements and explores how they can be extended to other beneficiary groups. This Section also examines participatory mechanisms that do not involve a company's ownership in the context of a broad set of potential beneficiaries.

1. *Clearly Identified Beneficiaries or Representatives*

B Corps should clearly and narrowly identify their intended beneficiaries and, if necessary, identify a representative of those beneficiaries.[315] Most obviously, identifying a specific beneficiary allows a B Corp to target its efforts to a certain goal or beneficiary. Amorphous sets of beneficiaries, on the other hand, introduce such a diverse set of interests that it can be hard (if not impossible) for all stakeholders to agree on a common goal for the enterprise.

Several scholars note that the new corporate forms fail to sufficiently narrow the scope of these corporations' beneficiaries.[316] Legislation authorizing the benefit corporation form, for example, has been criticized for its lack of guidance in requiring that benefit corporation management sift through the company's effects on a variety of stakeholders in order to produce a public benefit.[317] For example, the Model Benefit Corporation Legislation requires directors to consider the corporate action's impact on nonshareholder

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312. Telephone Interview with Andrea Armeni (Jan. 6, 2020); *Developing A Transformative Impact Methodology Tool*, TRANSFORM FIN., http://transformfinance.org/impact-methodology [https://perma.cc/L27Z-KUPR].

313. *See supra* Section II.D; *see also infra* note 337.

314. *See generally* Jackson, *supra* note 187.

315. MODEL BENEFIT CORP. LEGIS. § 301(a) (BENEFIT CORP. 2017).

316. *See* Alicia E. Plerhoples, *Social Enterprise as Commitment: A Roadmap*, 48 WASH. U. J.L. & POL'Y 89, 109 (2015) (noting criticism of other scholars in relation to model legislation).

317. *See* Winston, *supra* note 40, at 1826; Plerhoples, *supra* note 316, at 110.

stakeholders and the public.[318] Directors of Delaware public benefit corporations are to "balance[] the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation."[319] Identifying a specific beneficiary or set of beneficiaries will assist corporate directors and managers in understanding their obligations.

Narrowly defining an intended beneficiary also facilitates the participation of that beneficiary. Group members such as workers or community members may be granted a right to vote for a social enterprise's management. For example, some companies give workers, through grants of stock in the company or some other mechanism, the right to vote for board members or on other issues.[320] Employees are, in fact, a common beneficiary of B Corps and other Fourth Sector companies.[321] Employee ownership has long been championed as a method of encouraging corporate activity that is responsive to the needs of its workforce.[322] Further, workers are often seen as more representative of other nonshareholder stakeholder groups, and employee participation and ownership is often seen as an antidote to a narrow focus on short-term profit seeking.[323]

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318. Reiser, *supra* note 48, at 598–99. Those nonshareholder stakeholders are defined in the statute as:

> (i) [T]he shareholders of the benefit corporation; (ii) the employees and work force of the benefit corporation, its subsidiaries, and its suppliers; (iii) the interests of customers as beneficiaries of the general public benefit or a specific public benefit purpose of the benefit corporation; (iv) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located; (v) the local and global environment; (vi) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and (vii) the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose in addition to any additional groups listed in the benefit corporation's charter.

MODEL BENEFIT CORP. LEGIS. § 301(a) (BENEFIT CORP. 2017).

319. DEL. CODE ANN. tit. 8, § 365 (West, Westlaw through ch. 292 of the 150th General Assembly).

320. *See, e.g.*, *infra* note 345.

321. *See supra* Section II.B.

322. *See* Priya Baskaran, *Introduction to Worker Cooperatives and Their Role in the Changing Economy*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 355, 360 (2015).

323. *See id.* at 361. Even worker representation has been subject to criticism, however. Adding worker representation to a company's board of directors can present additional transaction costs that hurt the profitability of the business. Some critics argue that employees themselves can capture companies, looting corporate resources and rendering the company valueless. For a discussion of these criticisms and a response to critiques, see Lenore Palladino,

In situations where B Corps designate discrete groups, such as employees as beneficiaries, it is appropriate for those groups to represent themselves by exercising their participation rights (or by electing representatives by exercising those same rights). In other situations, however, intended beneficiaries may not be able to enjoy such direct participation and designing participatory governance structures becomes progressively more difficult as the designated beneficiary becomes larger and more amorphous. Some companies or deals may designate communities outside the corporate structure as the intended beneficiary, or it may be impractical to grant a beneficiary group voting rights. B Corps could, for example, designate a very large group, such as refugees, as a beneficiary. Cotopaxi, an outdoor apparel and equipment brand, supports employment initiatives for refugees, but Cotopaxi does not appear to grant "refugees" a role in the company's governance—doing so for such a large group would be impracticable.[324] A Fourth Sector company could also designate an environmental feature, such as a nearby waterway, as its beneficiary. In the first case, identifying every potential beneficiary to grant a right to vote to and then overseeing the exercise of that right would be overly burdensome. In the second case, the beneficiary is not a group of individuals at all.

If it is impractical or inappropriate to directly grant beneficiaries participatory rights in a company or transaction, B Corps should identify and empower a representative of the intended beneficiary. Proxies, such as nonprofit organizations, labor unions, and other nongovernment organizations, have been utilized in lieu of direct participation elsewhere.[325] The selection of beneficiary representatives should comply with several basic principles. First, representatives should be individuals who are independent of the company and, aside from status as beneficiary representatives, disinterested—the representative should not be a corporate insider.[326] Further,

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Worker Representation on U.S. Corporate Boards (Oct. 28, 2019) (unpublished manuscript) (on file with the *South Carolina Law Review*).

324. Mara Leighton, *B Corps Are Businesses Committed to Using Their Profit for Good—These 12 Are Making Some Truly Great Products*, BUS. INSIDER (Mar. 23, 2020, 3:04 PM), https://www.businessinsider.com/b-corp-charitable-business-2018-8 [https://perma.cc/VDM7-HQGU]. It is not clear that Cotopaxi grants refugees any participatory rights in the governance of the company, and they are not required to do so by B Lab. *Id.*; *see supra* note 77 and accompanying text.

325. *See* Lee, *supra* note 268, at 429.

326. The IRS includes current and former officers, directors, trustees, key employees, family members thereof, and certain entities owned or controlled, in part, by those officers, directors, trustees, and key employees in its definition of "Interested Persons." *See* INTERNAL REVENUE SERV., INSTRUCTIONS FOR SCHEDULE L (FORM 990 OR 990-EZ) 1 (2019), http://www.irs.gov/pub/irs-pdf/i990sl.pdf [https://perma.cc/K8EH-FAN3].

designated representatives should be both appointed and removed by beneficiaries themselves or, where impractical, by organizations representing those beneficiaries' interests.[327] For example, Cotopaxi may designate an nongovernmental organization (NGO), whose membership is comprised of refugees as the beneficiary representative, and grant that NGO participatory rights.

To the extent that a B Corp names a beneficiary for whom a representative is not easily identifiable, an independent nonprofit organization may assume the role of beneficiary representative. In the case of a company that makes infrastructure investments with purported environmental benefits, for example, an NGO whose charter lists a public purpose that is the same or similar to the purpose espoused by the parties to the deal would be a suitable representative.[328] B Lab could play a role in this by naming a list of acceptable beneficiary representatives for common beneficiary groups. Such an organization's principals (i.e., board members and management) must satisfy the same independence standard set forth above.

While clearly identifying a discrete beneficiary group or groups is preferable, many B Corps name impersonal beneficiaries (the environment, in Etsy's case) or even the public at large as beneficiaries of corporate activity. In the case of companies who name the public at large as the beneficiary, state regulation or disclosure may substitute for beneficiary participation. In charity law, the government is seen as the appropriate representative for the public, and both the IRS and state attorneys general are given powers to oversee American charitable organizations.[329] B Lab would not be able to grant the government this kind of oversight role unilaterally, and statutory changes would be required in each B Corp's state of incorporation. This may also contradict one of goals of the B Corp movement, which is to encourage companies to address social problems without the cumbersome regulations that burden the charitable sector.

An alternative to a stronger role for government could be mandated disclosure. Disclosure has been used as a mechanism to enforce human rights compliance against private entities. In 2010, for example, California passed the California Transparency in Supply Chains Act, which requires that companies publicly disclose efforts to identify and ameliorate human rights

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327. Substantive representation, in which an organization correctly perceives and even shares a community's needs, should be distinguished from description representation, in which an organization simply reflects a community's demographic and other traits. Susan D. Bennett, *Little Engines That Could: Community Clients, Their Lawyers, and Training in the Arts of Democracy*, 2002 WIS. L. REV. 469, 477–78.

328. *See* Winston, *supra* note 40, at 1836.

329. *See infra* Section II.C.2.

abuses, such as human trafficking, in their supply chains.[330] Proponents of disclosure believe that, armed with information about a company's practices, customers and suppliers will put pressure on a company to address human rights issues.

That said, corporate disclosure requirements regarding human rights abuses have been widely critiqued and described as inefficient. Critics say that these requirements lack sanction or remedies; that the information disclosed is not widely known; and that customers, suppliers, and stakeholders have not demonstrated an ability or willingness to push for company change or legal reform as a result of this information.[331] It is therefore unlikely public disclosure of a B Corp's corporate practices will adequately guarantee that the company is acting in the interest of the public at large.

2. *Participation at All Stages*

Beneficiaries, through their representatives, should be involved in all stages of a B Corp's life: design, implementation, and evaluation. The design phase includes identifying a B Corp's beneficiaries and consulting with those beneficiaries in the development of the corporation's purpose and design of corporate governance.[332] Implementation refers to the ongoing governance of the B Corp, and evaluation refers to the certification process itself and the set of metrics by which the company's performance is judged.[333]

a. *Design*

Rather than dictating a corporate purpose and set of beneficiaries, B Lab, company founders, and beneficiaries themselves ought to have a say in defining the enterprise's goal. Involving beneficiaries in a Fourth Sector company's design means that beneficiaries and, if necessary, their representatives should be identified early in the planning process. At some point, of course, a decision has to be made about the goal of corporate activity. This may take place before that beneficiary group is brought into the design

330. CAL. CIV. CODE § 1714.43 (West, Westlaw through ch. 372 of 2020 Reg. Sess.).

331. *See, e.g.*, Marcia Narine, *From Kansas to the Congo: Why Naming and Shaming Corporations through the Dodd-Frank Act's Corporate Governance Disclosure Won't Solve a Human Rights Crisis*, 25 REGENT U. L. REV. 351 (2012); Aaron A. Dhir, *Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights*, 47 OSGOODE HALL L.J. 47 (2009); Marcia Narine, *Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts*, 47 COLUM. HUM. RTS. L. REV. 84 (2015).

332. *See* Bach, *supra* note 270, at 287–88.

333. *Id.*

process and certainly before implementation. Even the most well-intentioned founders will bring their own biases and priorities to this selection of corporate beneficiaries, and the articulation of corporate purpose may not necessarily reflect the priorities of corporate stakeholders. That said, identifying beneficiaries and seeking beneficiary consultation early is important, and B Lab is well positioned to encourage and facilitate this consultation.

Excluding beneficiaries from initial corporate design, or at least an initial articulation of corporate goals, is unavoidable to some extent. Although B Corps should retain flexibility in defining their corporate purpose and beneficiary designation, initial decisions necessarily anchor future activity. To counter this, Fourth Sector entrepreneurs should conduct careful market research that includes consultation with a wide set of stakeholders before settling on a specific corporate purpose and intended beneficiary. Entrepreneurs and funders should be encouraged to discuss beneficiary identification as early as possible and, once they identify beneficiaries, should consult them. Beneficiaries and their representatives can provide valuable feedback as a B Corp articulates its goals and its governance structure begins to take shape. They should also have a say in setting benchmarks by which B Corps will judge their own success. Doing so allows for compromise in defining a corporate purpose and creating a set of goals that reflects diverse constituencies' needs and interests.

An example of participatory enterprise design can be seen in an investor and a local community's participation in developing an enterprise to own and operate a coffee mill in rural Colombia.[334] In the mid-2010s, nonprofit investment fund Acumen approached an association of coffee growers in rural Colombia about supporting a project to assist those living in areas of the country affected by decades of armed conflict.[335] Acumen learned from the growers that a wet mill, which allowed coffee growers to produce more and higher quality coffee, was desirable.[336] Acumen and the growers' association formed the Gigante Central Wet Mill as a new enterprise to be jointly owned by Acumen and the growers. Acumen made an initial debt and equity investment in the mill, with equity ownership returning to the growers over time.[337] Acumen set an initial goal but consulted a set of beneficiaries early in

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334. *See* ANDREA ARMENI & MIGUEL FERREYRA DE BONE, MULTILATERAL INV. FUND, INNOVATIONS IN FINANCING STRUCTURES FOR IMPACT ENTERPRISES: SPOTLIGHT ON LATIN AMERICA 31 (2017), https://static1.squarespace.com/static/54cfca5be4b06d2d0d7c0f1d/t/59aec6a0be42d663bf3db549/1504626340896/Transform-Finance-Innovations-in-Financing-Structures-for-Impact-Enterprises.pdf [https://perma.cc/QT89-6P3V].

335. *Id.*

336. *Id.*

337. *Id.*

the process to find out what those beneficiaries needed most.[338] Acumen then spent time working with the growers to develop both a business plan and a financial and governance structure that suited the growers' needs and capacity.[339]

b. Implementation

Second, beneficiaries should be involved in implementing B Corps' activities. As used here, participation is a higher standard than the stockholder engagement that many American certifying organizations currently encourage.[340] Broadly stated, participation requires that beneficiaries have some input into the company's decision-making process. In determining the level of participation, B Corps should have the flexibility to balance efficiency and beneficiary input. Different constituencies have different decision-making authority within an enterprise (e.g., shareholders, boards, and officers all have different authority), many of which are negotiated on individual bases, and certifying bodies like B Lab should be mindful of the transaction costs imposed by a complex decision-making process that involves another set or sets of stakeholders.[341] Beneficiaries, therefore, ought to have a say in large, strategic decisions within the company.

B Corps may be accountable to a company's intended beneficiaries by granting those beneficiaries ownership through equity—voting representation on the board that does not involve ownership or otherwise create management structures that involve those beneficiaries. Both employees and others who contribute capital to a company can be owners, but this Section contemplates granting ownership rights based on membership in a beneficiary group. Employee owners can be distinguished from other shareholders when they receive ownership rights in exchange for their labor rather than contributions of capital.[342] Ben and Jerry's, for example, raised money by offering to sell shares to Vermont residents to give Vermonters the chance to participate in and benefit from the company's operations in that state.[343] Companies can also grant corporate beneficiaries an ownership stake in the company, much like union pension funds often hold stock in employers and use their voting

338. *See id.*

339. *Id.* at 32.

340. *See supra* Section II.D.

341. *See* Winston, *supra* note 40, at 1821.

342. *See generally id.* at 1795 (explaining the differences among managers, shareholders, and various stakeholders such as employees and customers).

343. Bruce G. Posner, *A Scoop of the Action*, INC. (July 1, 1984), https://www.inc.com/magazine/19840701/8016.html [https://perma.cc/JF66-SNTC].

power to further employees' and pensioners' interests.[344] Many worker cooperatives, on the other hand, admit workers as owners solely in exchange for service to the company.[345] King Arthur Baking, for example, is a prominent B Corp that utilizes 100% employee-ownership as one way to achieve its mission of "bringing people together and building stronger communities."[346]

The rights and obligations of ownership groups can be varied as set forth in the B Corp's governing documents or by contract. Nonshareholder beneficiaries can exercise direct participatory rights by electing members of a board of directors or other advisory board. This requires that board members elected by those beneficiaries appoint (and fire) individuals with day-to-day responsibilities within the company. In doing so, beneficiaries and their representatives can set goals and strategies for the organization and have a say in appointing individuals tasked with implementing those goals. Board seats may be reserved for representatives elected by stakeholders and intended beneficiaries, much like corporate law regimes in some countries reserve seats for directors elected by workers. Social enterprises may also create stakeholder advisory boards wherein stakeholders advise corporate decision-makers on the impact of various corporate actions.[347]

Employees also exercise participatory rights through collective bargaining, and many European companies guarantee board representation to workers without granting them ownership.[348] Other beneficiaries may negotiate agreements similar to community benefit agreements often negotiated between real estate developers and communities.[349] These community benefit agreements include binding obligations related to community needs on those developers.[350]

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344. Fairfax, *supra* note 126, at 85. See also Belinfanti, *supra* note 267, at 845–61, for a discussion of "shares that have superior voting rights and economic rights, and which could be issued to targeted shareholders who commit to fulfilling certain mission-sustaining criteria . . . ." *Id.* at 796.

345. *What is a Worker Cooperative?*, DEMOCRACY AT WORK INST., https://institute.coop/what-worker-cooperative [https://perma.cc/U247-MXW5].

346. *B-Corp Report Card*, KING ARTHUR BAKING CO., https://www.kingarthurbaking.com/about/mission/b-corp-report [https://perma.cc/FY7A-YCQQ].

347. *See* J. Haskell Murray, *Adopting Stakeholder Advisory Boards*, 54 AM. BUS. L.J. 61, 94–98 (2017).

348. *See supra* Section II.D.

349. *See* Thomas A. Musil, *The Sleeping Giant: Community Benefit Agreements and Urban Development*, 44 URB. L. 827, 829–30 (2012) (discussing community benefit agreements in the real estate development context).

350. *Id.*

In many states' corporate statutes, shareholders have the right to approve fundamental transactions, such as a sale of the company.[351] Likewise, in B Corps, major corporate actions, like the approval of a merger or the issuance of shareholder dividends, should also hinge on beneficiary approval.

In individual transactions, beneficiaries and their representatives should be engaged in designing the transaction, especially in crafting metrics and conditions upon which the parties' financial obligations hinge.[352] In impact investing deals, for example, beneficiaries should have a say in defining benchmarks on which certain financial outcomes are based. Further, approving beneficiaries or their representatives should be a key component of contingent financial terms, such as debt repayment obligations.[353] Correctly designed, this strategic input should be strong enough to affect company culture, trickling down to individuals who make day-to-day decisions within the company but without creating unnecessary bureaucratic complexity.[354]

Companies certified by the Boston Ujima Project must include workers in their governance by granting workers at least one elected seat on a corporate board, and outside investors and certified companies may not engage in union blocking or intimidation.[355] Outside stakeholders do not get direct participation rights, but certified companies must engage customers and community members.[356] Elsewhere, the Boston Ujima Project encourages and supports cooperative ownership models.[357] The Bowdoin Bike School, for example, is a member of the Ujima Business Alliance and is working with the Boston Center for Community Ownership to transform the business into a worker-owned co-op so those who built Bowdoin Bike School will get an opportunity to share ownership.[358]

Transform Finance's methodology assesses an enterprise across four categories, one of which is Enterprise Governance.[359] Companies are rated on a scale of zero to three—zero being no inclusion of affected communities into governance structure and three being cooperative democratic management structures.[360] Notably, this category looks not only at worker participation in

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351. *See* Murray, *supra* note 347, at 67 n.32.
352. *See* Burand, *supra* note 27, at 821.
353. *See id.* at 784, 801–02, 818.
354. *See* discussion *infra* Part IV.
355. *Rewrite the Rules*, *supra* note 307.
356. *Id.*
357. *Id.*
358. *See Economy Builders*, BOS. UJIMA PROJECT, https://www.ujimaboston.com/economybuilders [https://perma.cc/QHL9-Z9WB].
359. *See Developing A Transformative Impact Methodology Tool*, *supra* note 312.
360. *Id.*

governance but also at a broad swath of a company's stakeholders.[361] Transform Finance's methodology, therefore, attempts to capture the amount of both economic interest and governance that stakeholders have.[362] Interested companies can apply this methodology themselves or can request an audit from Transform Finance.[363] Transform Finance also authored a report on using a private equity model to support conversions to employee ownership structures.[364]

In addition to designing a financing structure that returned more control to the growers over time, Acumen worked with the local coffee growers to build capacity to govern the enterprise.[365] Acumen recognized that this kind of investment was required in addition to the capital investment they made in the mill. So, while governance responsibilities are shared jointly at first, the growers will gain more power over governing the mill as their capacity to exercise that power grows.[366]

c. *Evaluation*

Finally, intended beneficiaries should be involved in evaluating a B Corp's effectiveness. To satisfy this, beneficiaries and their representatives can be involved in creating standards by which certified businesses are to be judged.

The Boston Ujima Project heavily involves company beneficiaries in evaluating the companies on the Ujima Business Alliance List.[367] Community members nominate companies for inclusion on the Ujima Business Alliance list,[368] and a committee of representative business owners and NGO employees, with the input of community members, determine the standards by which those companies are judged.[369] These community members include "current and displaced working-class Boston residents, grassroots partner organizations, community business owners and their employees[.]"[370] Community members can flag that a company listed on the Ujima Business

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361. *Id.*

362. *See id.*

363. *See Our Work*, *supra* note 310.

364. *See Our Projects*, TRANSFORM FIN., http://transformfinance.org/programs [https://perma.cc/33HT-X3KV].

365. *See* ARMENI & FERREYRA DE BONE, *supra* note 334, at 32.

366. *Id.*; Telephone Interview with Lynn Roland & Esha Mufti (Oct. 31, 2019).

367. *See Economy Builders*, *supra* note 358.

368. *Rewrite the Rules*, *supra* note 307.

369. *Id.*

370. *Everybody Is an Investor*, BOS. UJIMA PROJECT, https://www.ujimaboston.com/finance [https://perma.cc/D7E8-68KT].

Alliance is failing to meet its requirement, which initiates an inquiry.[371] As a result of the inquiry, the Ujima Business Alliance can remove the company from the list.[372] Unlike B Lab, whether a company has been removed from the Ujima Business Alliance is readily available.[373]

The Boston Ujima Project also has an investing arm called the Ujima Fund.[374] Investments favor participatory processes and result from such processes. The fund, launched in 2018, made its first investment in the form of debt in a composting cooperative in Boston.[375] Before issuing the debt, members of the Boston Ujima Project approved terms of the deal.[376] The Ujima Fund uses community members to assess other future investments, and community members consult with business owners on how they can best meet the Ujima Project's standards.[377]

3. *Accountability to Beneficiaries*

B Corps should be accountable to beneficiaries or beneficiaries' representatives. Accountability provides incentive or coercion to ensure that corporate constituents remain motivated to pursue the enterprise's stated goal. Contractual mechanisms may grant intended beneficiaries the express right to sue the company should it fail to satisfy some standard or engage in a participatory process. B Corps may grant some nonshareholder stakeholder or representative of a nonshareholder stakeholder the right to sue for injunctive relief should the company fail in its pursuit of public benefit. Similar rights may be granted to shareholders, as is provided for in the Delaware Public Benefit Corporation legislation.[378]

Courts are generally reluctant to grant nonshareholder stakeholders the right to sue a company as a third-party beneficiary absent an explicit grant of

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371. *See Invest in Ujima*, BOS. UJIMA PROJECT, https://www.ujimaboston.com/invest [https://perma.cc/ME5Y-7F7B] (discussing how annual business reviews conducted by the member-elected Community Standards Committee ensure businesses meet the project's Good Business Standards).

372. Telephone Interview with Charles Wallace-Thomas IV (Jan. 7, 2020).

373. *Id.*

374. *Everybody Is an Investor*, *supra* note 370.

375. *See, e.g.*, Oscar Perry Abello, *The First Democratically Managed Investment Fund Launches in Boston*, NEXT CITY (Dec. 28, 2018), https://nextcity.org/daily/entry/the-first-democratically-managed-investment-fund-launches-in-boston [https://perma.cc/BH7R-B94Z].

376. *Everybody Is an Investor*, *supra* note 370.

377. *Id.*

378. DEL. CODE ANN. tit. 8, § 367 (West, Westlaw through ch. 292 of the 150th General Assembly).

the right to do so.[379] In impact investing deals, transaction documents may grant beneficiaries certain enforcement rights should the transaction fail to meet certain outcomes or include meaningful participation.[380]

IV. COMMON CRITICISMS OF BENEFICIARY PARTICIPATION

As mentioned in Section III.A, beneficiary participation is not without critiques. This Section acknowledges some of these drawbacks and addresses them in the specific B Corp context.

A. *Efficiency Concerns*

Putting governance power in the hands of a B Corp's nonshareholder beneficiaries may limit the efficiency of the corporate decision-making process. Corporations, of course, are not perfectly efficient organizations to begin with.[381] Some assume that shareholders have homogenous interests and that granting shareholders the sole franchise among corporate constituents avoids political breakdowns, voting pathologies, and difficulties in apportioning voting power.[382] It has been shown that shareholders do not have homogenous interests, however, so the likelihood that shareholders can or do coalesce around a common goal is low.[383] As noted above, director duties may help align interests between shareholders and corporate insiders, but they do little to coordinate efforts and align interests among shareholders themselves.[384] Democratic systems, including the corporation, exist to "take a set of individual preference profiles and aggregate them into a group choice . . . ."[385]

This same problem exists in a B Corp that has multiple beneficiaries or purposes. Those beneficiaries will jockey for priority within the decision-making apparatus of the company. Even B Corps with a singular purpose could see competition between beneficiaries and shareholders. Well-designed participatory mechanisms should facilitate group choice among these stakeholders.[386] B Corps have one advantage over traditional corporations in

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379. *See* Tiffany M. Burba, *To "B" or not to "B": Duties of Directors and Rights of Stakeholders in Benefit Corporations*, 70 VAND. L. REV. EN BANC 329, 345 (2017).

380. *See id.* at 338.

381. *See* Hayden & Bodie, *supra* note 138, at 2085.

382. *Id.*

383. Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 448–49 (2008).

384. *See id.* at 470.

385. Hayden & Bodie, *supra* note 138, at 2102.

386. See *supra* Section III.B for a discussion regarding principles.

that they have leeway in how narrowly, or broadly, they define their public purpose.[387] A narrow and clearly defined set of beneficiaries should create a more efficient decision-making process, and B Corp standards should favor specifically defined public benefits and sets of beneficiaries.[388]

As many have pointed out, the input of additional parties to the decision-making structure of an enterprise slows down the decision-making process, adding transaction costs and decreasing efficiency.[389] The reasons for not granting additional power to shareholders, for example, are amplified in the event that power is shared with outside stakeholder groups. European governance structures that allow for worker representation on company boards, discussed in Section II.D.2, have been criticized for resulting in inefficient corporate governance when compared to American companies.[390]

While some loss of efficiency may not be completely avoidable in the Fourth Sector,[391] that loss need not be fatal to a company's effectiveness and should not deter B Corps from embracing the goal of beneficiary participation. So-called impact investors are often willing to accept below market returns on their investments in a B Corp or other purpose-driven company.[392] They are drawn to the mission of a company as much as to the potential for profit, and some see that lower return as the internalization of negative externalities produced by traditional corporations.[393] Further, as discussed in Section III.A, this Article advocates for B Corp standards that encourage experimentation to allow companies and beneficiaries to build structures that respond to the needs of particular beneficiaries and situations while maintaining flexible, responsive governance structures.

As applied to B Corps, one possible critique of beneficiary participation derives from empirical evidence that increased shareholder power results in better outcomes for employees, consumers, customers, and broader communities.[394] If shareholders are able to create positive outcomes for these constituents, perhaps efficacy can be achieved without granting participatory rights to others, particularly if shareholders are properly cultivated by the

387. Winston, *supra* note 40, at 1826.

388. See *supra* Part III for a discussion regarding the B Corp certification process.

389. *See, e.g.*, Bainbridge, *supra* note 159, at 1745–46.

390. Jackson, *supra* note 187, at 310–12.

391. *See id.* at 390.

392. MUDALIAR ET AL., *supra* note 89, at iii. Some investment funds have sought B Corp certification themselves. *See e.g.*, *Certified B Corp*, NAT. INVS. LLC, https://www.naturalinvestments.com/about/certified-b-corp/ [https://perma.cc/A7TL-MG44] (describing what a B Corp certification is and how it is obtained). Natural Investments LLC is a B Corp investment fund that invests in what it considers to be sustainable portfolio companies. *Id.*

393. *See* Winston, *supra* note 40, at 1823.

394. Fairfax, *supra* note 126, at 96.

enterprise.[395] This would seem to endorse stewardship theory—corporate systems as currently structured do indeed facilitate management decision-making in the interests of stakeholders, rendering the efficacy-based argument in Section II.B moot.[396]

It may be the case that, in their nascent stages, impact investors and other shareholders in B Corps are especially attuned to the needs of nonshareholder stakeholders and are willing to use their power as shareholders to hold management accountable for their purpose-related actions. As the field grows, however, capital will flow into these enterprises from a larger pool. There is no guarantee this large pool will have either the same dedication or sophistication as early-stage impact investors. As a result, future Fourth Sector investors may be less willing or able to enforce public benefit. The input of beneficiaries themselves is needed to counteract this.

This loss of efficiency, real or perceived, could also discourage companies from opting into B Corp certification or into incorporation under one of the new corporate forms. Details of governance are surely one factor that drives entity choice for entrepreneurs, but external factors also play a role.[397] As B Corps proliferate, they will continue to appeal to a customer base that is interested in patronizing sustainable businesses, and B Corp certification is a common and well-known signal that a company operates in the interests of society and the environment.[398] The marketing advantage of successfully applying for B Corp status could offset the burden of participatory requirements, especially if B Lab and others are able to make the case made in this Article—that beneficiary participation results in more effective companies and programs. Further, it should not be assumed that the success of a movement like the B Corp movement is measured by the number of companies that seek the certification.[399] This success should be measured by the viability of those B Corps that hold themselves accountable to beneficiaries; to focus on numbers is to dilute this new idea of corporate purpose.

B. Beneficiary Capacity for Participation

There are also concerns that beneficiary groups, particularly if composed of marginalized populations, lack the capacity to engage in meaningful

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395. *See* Belinfanti, *supra* note 267, at 817.
396. *See id.* at 865–66.
397. *See* Winston, *supra* note 40, at 1796.
398. *See* Tu, *supra* note 70, at 152.
399. *See* Winston, *supra* note 40, at 1836 (explaining how B Corps report on their public benefit goals and the extent to which they have reached those goals).

participation.[400] Suggesting that an already burdened or marginalized population (or even organization) add strategic decision-making within a for-profit enterprise to its responsibilities can seem daunting.[401] Similar concerns were voiced about maximum feasible participation during and since the War on Poverty.[402] Careful consideration is required before burdening these groups, and resources (i.e., time and money) may be required to build participatory capacity.[403] Scholars of New Governance also argue that participatory mechanisms can themselves result in robust participation and enhanced capacity.[404] Participatory structures that comply with the principles set forth in this Article can create a virtuous cycle in which Fourth Sector enterprises truly feel stakeholder communities' interests and who, in turn, find themselves better able to direct corporate activity. For investors and entrepreneurs serious about social and environmental sustainability, this is a worthwhile investment. While this kind of mobilization is expensive, impact investors who expect lower returns over a longer time are well-positioned to provide the initial capital required to organize and train beneficiaries.[405]

Similar concerns have been raised in the context of Democratic Experimentalism—structures that empower diverse stakeholders to participate in their governance will necessarily replicate and even exacerbate preexisting power imbalances and inequality.[406] Here again, B Lab has an important role to play in safeguarding marginalized groups through mandating that permissible corporate purposes remain flexible and that participation continues throughout the life of the company, while also emphasizing the threat of meaningful sanctions for companies that fail to engage in this process, like public reprimand or removal of a company's B Corp status. Democratic Experimentalism tries to account for the possibility of uncooperative behavior, like disputes between a company's workforce and some other stakeholder, with thoughtful design, punitive actions when actors do not take into account stakeholders' interests, and a limit on the universe of possible outcomes.[407] "The combination of ambitious, open-ended goals,

400. *See* Bach, *supra* note 270, at 261.

401. *See* William H. Simon, *New Governance Anxieties: A Deweyan Response*, 2010 WIS. L. REV. 727, 734.

402. *See* Bach, *supra* note 45, at 103–06.

403. *See, e.g.*, *id.*

404. *See id.* at 156.

405. *See* Winston, *supra* note 40, at 1823 (describing the long-term perspective of impact investors).

406. Sabel & Simon, *supra* note 277, at 24.

407. *Id.* at 51 ("People sometimes worry that experimentalism is insensitive to distributive issues and that the move to experimentalist regimes will exacerbate the situation of

planning obligations and threat of potentially draconian penalties for obstinately uncooperative behavior encourage investigation of new possibilities, including contextualized variants of general solutions, and collaboration among regulated parties and between them as a group and the regulator."[408]

C. *Cosmetic Participation*

Finally, new governance apparatuses risk resulting in participation that is cosmetic rather than altering the underlying power structure of a program or enterprise.[409] A program that employs cosmetic participation will appear to the outside to reflect beneficiaries' input; however, beneath the veneer of participation, a program's activities reflect the goals and desires of other, more powerful stakeholders. B Lab could give the imprimatur of B Corp status to a company because the enterprises adopt a pro forma participatory measure without empowering the interests of intended beneficiaries ahead (or at least alongside) those of management and capital.

This risk is particularly acute when beneficiaries are poor or otherwise marginalized.[410] As discussed in Section IV.B, these stakeholder groups require investment to build the capacity to engage in meaningful participation.[411] Absent this investment, the harms of a lack of participation will be amplified. The impression that marginalized groups' participation is meaningful will further silence them.[412]

In addition to building capacity among marginalized beneficiary groups, successful New Governance programs compel participants to seek consensus or to at least strive toward consensus to combat the risk of cosmetic participation.[413] Both corporate law and practice recognize there are situations in an enterprise's life that require a higher level of consent than majority

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disadvantaged stakeholders. They are, of course, clearly right to emphasize that the outcome of a collaborative process will be affected by the relative resources of the participants. Even if a group's consent is required to go forward, that consent may be inflected by the group's disadvantage. Experimentalist regime design does try to take account of these factors in three ways. . . . First, procedural design can try to mitigate inequality. . . . Second, if design can reach background default rules, than [sic] it can enhance equality by shaping the rule that will govern in the absence of stakeholder agreement. . . . Third, certain possible outcomes can be ruled out as substantively unacceptable.").

408. Dani Rodrik & Charles F. Sabel, Building a Good Jobs Economy (Nov. 2019) (unpublished manuscript) (on file with the *South Carolina Law Review*).

409. Lee, *supra* note 268, at 414.

410. *Id.* at 406, 414.

411. *See supra* Section IV.B.

412. *See* Lee, *supra* note 268, at 406, 415.

413. *See id.* at 418.

approval.[414] As applied to corporate governance, for instance, beneficiaries or their representatives could be given veto power over significant transactions. Requiring absolute consensus is difficult, but super-majoritarian requirements and veto rights that force a B Corp to not only consult but also follow the wishes of beneficiaries in certain circumstances can serve as a powerful counter against cosmetic participation.

V. CONCLUSION

The democratic ideal rests on the idea that a person for whose benefit a system operates should have some input into how that system is run.[415] A novel application of this principle to B Corp certification and related developments in corporate law provides an opportunity to build a participatory economy. The B Corp movement represents an opportunity to create an economic model grounded in the fundamentals that underlie both American corporate law and anti-poverty and economic development program design. A more participatory B Corp certification can result in companies that are more responsive to specifically designated corporate beneficiaries' interests. Doing so requires that B Corps and related companies involve beneficiaries at the enterprise's design, implementation, and evaluation stages. To do so necessarily risks adding administrative complexity, lowering efficiency, and placing additional weights on already burdened communities. New Governance theory provides helpful guidance in this area, encouraging flexible corporate governance mechanisms and allowing for enterprise designs that adapt to the needs and capabilities of beneficiary groups.

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414. *See id.*

415. Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is . . . and Is Not*, 2 J. DEMOCRACY 75, 76 (1991) ("Modern political democracy is a system of governance in which rulers are held accountable for their actions in the public realm by citizens, acting indirectly through the competition and cooperation of their elected representatives.").