Set It in Stone: Patagonia and the Evolution toward Stakeholder Governance in Social Enterprise Business Structures

RAY LU*

In September 2022, outdoor apparel company Patagonia captured national attention when it announced that a specially designed trust and nonprofit would own and oversee the private for-profit corporation. Patagonia's novel structure, rooted in the concept of steward-ownership, uses a trust to create a mechanism for direct stakeholder governance. A longstanding proponent of business as a means for social good, Patagonia and its new configuration represent the latest structural development in the world of "social enterprises"—defined as companies that aim to achieve positive social or environmental impact along with financial sustainability or gain. Social enterprises were traditionally organized as conventional for-profit entities before the introduction of new hybrid structures such as low-profit liability companies and public benefit corporations. Even these newer options, however, have limitations to integrating the perspectives of non-shareholder stakeholders, leading to skepticism that these entities would pursue or meet their social impact goals.

This Note examines the steward-ownership model in the context of Patagonia and the social enterprise movement more broadly, identifying a trend in using business structures to legitimize social impact goals and foster credibility. The trust and nonprofit structure help separate economic incentives from decision-making authority and legally codifies an avenue for non-shareholder stakeholders to influence the operations of a social enterprise. Part I introduces social enterprises, including the different business structures available to impact-oriented companies. Part II discusses steward-ownership and the use of trusts in social enterprise business structures, comparing Patagonia's new structure to existing

* J.D. 2024, Columbia Law School; M.B.A. 2024, Columbia Business School. The author thanks Professor Lynnise Pantin for advising this Note and providing invaluable guidance throughout law school, the *Journal* staff for their thoughtful advice and edits, his loved ones for their support, and Sophie for everything along the way.

options. Part III examines the implications of steward-ownership, highlighting concerns but finding that the model provides a strong form of stakeholder governance while maintaining the flexibility to incorporate other dimensions of social enterprise innovation. The analysis concludes that steward-ownership models are a definitive, sequential improvement in the use of business structures by social enterprises to reshape business into a force for positive social change.

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INTRODUCTION

"Hopefully this will influence a new form of capitalism that doesn't end up with a few rich people and a bunch of poor people. We are going to give away the maximum amount of money to people who are actively working on saving this planet."

Yvon Chouinard, Founder, Patagonia[1]

On September 14, 2022, Yvon Chouinard, founder and long-time CEO of outdoor apparel company Patagonia, revealed in an exclusive interview with *The New York Times* that the company would be owned by a "specially designed trust and a nonprofit organization" from then on.[2] While Patagonia itself would continue to operate as a traditional private for-profit corporation, the Chouinard family transferred all of the company's voting stock (two percent of total shares) into a new entity called the Patagonia Purpose Trust.[3] Close advisors and family members would oversee the trust, which has the decision-making authority to ensure that Patagonia maintains its socially responsible business methods and charitable giving practices.[4] The remaining 98% of Patagonia, its common shares, were donated to the Holdfast Collective, a newly established 501(c)(4) nonprofit which will receive all of Patagonia's profits and use them to fund efforts to combat climate change.[5] On Patagonia's website, the company declared: "Earth is now our only shareholder."[6]

Patagonia's new business structure[7] is the latest innovation in the world of "social enterprises," broadly defined as companies that

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1. David Gelles, *Billionaire No More: Patagonia Founder Gives Away the Company*, N.Y. TIMES (Sept. 21, 2022), https://www.nytimes.com/2022/09/14/climate/patagonia-climate-philanthropy-chouinard.html [https://perma.cc/RKK9-T7KS].

2. *Id.*

3. *See id.* ("In August, the family irrevocably transferred all the company's voting stock, equivalent to [two] percent of the overall shares, into a newly established entity known as the Patagonia Purpose Trust.").

4. *See id.* ("The trust, which will be overseen by members of the family and their closest advisers, is intended to ensure that Patagonia makes good on its commitment to run a socially responsible business and give away its profits.").

5. *See id.* ("The Chouinards then donated the other 98[%] of Patagonia, its common shares, to a newly established nonprofit organization called the Holdfast Collective, which will now be the recipient of all the company's profits and use the funds to combat climate change.").

6. Yvon Chouinard, *Earth Is Now Our Only Shareholder.*, PATAGONIA, https://www.patagonia.com/ownership/ [https://perma.cc/9P7Q-FRPG].

7. The Internal Revenue Service (IRS) uses the terms "business entity" and "business structure" interchangeably to refer to the legal form of a business. *See, e.g.*, *Business*

aim to create positive social or environmental impact while operating for financial sustainability or gain.[8] Over the past 15 years, the social enterprise movement has risen in tandem with growing concerns about climate change and economic inequality, exacerbated by the effects of the 2008 financial crisis and subsequent lingering resentment towards existing capitalist structures.[9] These companies aspire to reduce the negative social and environmental externalities that have long been accepted as part of business as usual, reimagining the role of business in society to create a more equitable and environmentally sustainable future.

Traditional companies in the United States are often structured as corporations or limited liability companies, but no single business structure defines social enterprises, leading socially conscious founders to use structural innovation to differentiate their mission-oriented businesses from conventional ones.[10] Options were limited, however, for early social entrepreneurs who sought to incorporate non-financial goals into their companies' operations.[11] Without specially tailored business structures, pioneering social enterprises defaulted to organizing as traditional for-profit corporations or limited liability companies while providing external assurances—not written into founding legal documents—that they would pursue a socially beneficial mission.[12] These assurances, however, did not guarantee action, and subsequent innovations in social enterprise business structures have sought to bridge the trust gap between consumers, investors, and managers[13] that the other parties would also pursue purpose

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Structures, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/business-structures [https://perma.cc/EJR3-RALH].

8. See Deborah Burand & Anne Tucker, Legal Literature Review of Social Entrepreneurship and Impact Investing (2007—2017): Doing Good by Doing Business, 11 WM. & MARY BUS. L. REV. 1, 69 (2019).

9. *See* Dina Dalessandro, *The Development of Social Enterprise and Rise of Benefit Corporations: A Global Solution?*, 15 HASTINGS BUS. L.J. 294, 296 (2019) ("The 2008 crisis is said to be the result of capitalistic corporate greed. . . .").

10. *See* Burand & Tucker, *supra* note 8, at 69.

11. *See id.* at 13–14 (stating that Vermont's "low-profit" limited liability company statute created the first "hybrid" entity in the United States in 2008, with earlier social entrepreneurs forced to rely on traditional for-profit models).

12. *See generally* Dalessandro, *supra* note 9, at 298–300 (providing examples of businesses organized as for-profit corporations but with commitments to progressive social goals).

13. "Managers" here refers to founders, CEOs, management, operators, and company leadership generally. For the purposes of this Note, managers are assumed to have an ownership stake in the company they are operating.

and profits in tandem.[14] As a result, in the relatively short history of social enterprises, the field has experienced constant evolution, including the creation of several new "hybrid" business structures—such as public benefit corporations and low-profit liability companies—and external certification organizations.[15] Though these innovations incrementally improved trust between parties, hybrid business structures still failed to adequately integrate non-shareholder stakeholder perspectives and to ensure the preservation and prioritization of non-financial missions.[16]

For the purpose of social enterprises, existing business structures, new hybrid entities, and external certification organizations all have significant limitations. While hybrid business structures enable social enterprises to incorporate purpose statements and non-financial missions into their founding documents, these documents can be amended by shareholder vote, and managers retain considerable discretion in their ability and intent to fulfill their mission.[17] External certification is another helpful signal but can lapse if not renewed and fails to impose additional legal requirements beyond those of hybrid entities.[18] With respect to obtaining financing and succession planning, managers are wary of subsequent mission drift—concerns that new owners would deprioritize the company's social or environmental mission.[19] In response to these challenges, the most

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14. On one hand, socially minded investors and consumers may be skeptical of whether a manager will continue to prioritize a company's social mission. On the other hand, managers may be hesitant to provide ownership stakes to investors who might prioritize shareholders or be misaligned with the social enterprise's non-financial goals. *See* Naveen Thomas, *Golden Shares and Social Enterprise*, 12 HARV. BUS. L. REV. 157, 158–63 (2022) (stating that the central challenge of social enterprise is "to promote trust between managers and investors" and citing Etsy's mission drift caused by outside investors as one example).

15. *See* Emilie Aguirre, *Beyond Profit*, 54 U.C. DAVIS L. REV. 2077, 2098 n.81 (2021) (summarizing the different business structures available to social entrepreneurs).

16. *See* Thomas, *supra* note 14, at 162 (noting the shortcomings of the Delaware public benefit corporation).

17. *See, e.g.*, *id.* at 166 ("But even if directors can legally consider non-stockholder interests in routine decisions, they may struggle to exercise that discretion in practice, because only stockholders are legally authorized to elect directors and to enforce their fiduciary duties.").

18. *See, e.g.*, *id.* at 159–60 ("Etsy eventually let its B Corp Certification lapse to avoid a requirement to legally transform into a benefit corporation. . . .").

19. *See, e.g.*, Ross Kelley, *The Emerging Need for Hybrid Entities: Why California Should Become the Delaware of "Social Enterprise Law,"* 47 LOY. L.A. L. REV. 619, 635 n.130 (2014) ("Mission creep is also referred to as 'legacy problems,' 'mission drift,' or a lack of a 'mission anchor.' It relates to the fact that even if the company is able to pursue its social missions while making a profit, the social purpose is at risk of changing or even

recent development in social enterprise business structures is rooted in the "steward-ownership" movement, which aims to help companies "protect their values regarding the environment, society, and their employees in their legal DNA" through trust or foundation oversight.[20]

With Patagonia's most recent transaction as a case study, this Note examines steward-ownership and its innovative mechanism to create stakeholder governance. Unlike existing social enterprise business structures, steward-ownership models empower non-shareholder stakeholders[21] with direct decision-making capabilities through trust oversight. Part I of this Note provides an overview of the business structures available to social entrepreneurs as well as their respective limitations. Part II examines steward-ownership in detail, highlighting the ability of trust-based models to empower stakeholders with decision-making authority and comparing the model to alternative approaches. A key advantage of steward-ownership models is the retained flexibility to integrate innovations in other dimensions of social enterprise beyond business structure selection. Part III reviews Patagonia's new model and the implications of steward-ownership. Though operational, legal, and political concerns exist, steward-ownership models create a legal mechanism for stakeholder governance, solving a key challenge to the goal of reshaping business into a means for positive societal impact. By addressing the negative social and environmental externalities present in traditional businesses, steward-ownership helps reimagine a more equitable and accountable world.

I. SOCIAL ENTERPRISE BUSINESS STRUCTURES

Social enterprises are a relatively modern innovation based on the idea that businesses can be profitable while creating positive

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disappearing with the addition of new management.") (citing Felicia R. Resor, *Benefit Corporation Legislation*, 12 WYO. L. REV. 91, 99 (2012)).

20. Camille Canon et al., *Steward-Ownership: Rethinking ownership in the 21st century*, PURPOSE FOUND., 1, 2 (2020).

21. This Note defines "non-shareholder stakeholder" as an individual or entity that is affected by the operations of a business but does not hold an equity or ownership stake in that business. Non-shareholder stakeholders may include, but are not limited to, employees, community members, nonprofit leaders, consumers/customers, and the physical environment.

social or environmental impact.[22] The rise of social entrepreneurship coincided with increasing skepticism of traditional business in the wake of climate crises and widening inequality in the twenty-first century.[23] Notably, social enterprises are not bound to a single business structure.[24] Without specifically tailored options, however, early social entrepreneurs could only use existing business structures rooted in shareholder primacy and unsuitable to social impact goals.[25] Over the past 15 years, new legislation has introduced business structures created explicitly for social enterprises, to varying degrees of success.[26]

A. BACKGROUND AND CONTEXT

Growing discontent over the effects of traditional shareholder capitalism contributed to the growth of the social enterprise movement.[27] Over 50 years ago, economist Milton Friedman declared that "the social responsibility of business is to increase its profits," capturing the business sentiment of the era and reinforcing shareholder primacy.[28] In traditional measures of economic growth—such as gross domestic product per capita—the United States has prospered in the last half-century, driven in part by the power of large corporations and their reverberating effects on the economy.[29] These figures, however, fail to capture the

22. *See* Burand & Tucker, *supra* note 8, at 69 ("What distinguishes social enterprises is that they employ a business model that aims to achieve positive social or environmental impacts while also pursuing profits and/or financial sustainability.").

23. *See, e.g.*, Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 671 (2013) (identifying a rise in social enterprise after the global recession).

24. *See* Burand & Tucker, *supra* note 8, at 69 ("Social entrepreneurship is a business model, not simply a legal form.").

25. *See id.* at 13–14 (describing how bespoke entities in the social enterprise space did not emerge until the late 2000s).

26. *See* J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 541 (2016) ("During the last seven years, over [30] states have passed at least one social enterprise statute.").

27. *See* Dalessandro, *supra* note 9, at 296–98 (describing the "public outcry against the traditional accumulation of wealth in only a small portion of the population").

28. Milton Friedman, *A Friedman doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/V5K4-EY42].

29. According to data from the World Bank, gross domestic product (GDP) per capita increased from $5 million in 1970 to over $70 million in 2021 based on current U.S. dollars. *See GDP Per Capita (Current US$)—United States*, THE WORLD BANK,

underlying social and environmental consequences of capitalism. From 1988 to 2017, 100 companies have single-handedly accounted for over 70% of global industrial greenhouse gas emissions, contributing to global warming and the climate crisis.[30] Among other worsening social indicators, income inequality in the United States has increased since 1980 and outpaced that of other advanced economies.[31] Interest in social enterprise has grown in part due to disillusionment with the effects of shareholder capitalism on society and the environment.[32]

Fundamentally, human labor and the natural environment are the foundations of business and society—yet modern corporations have distorted and minimized their importance in an unrestrained

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https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=US [https://perma.cc/S89N-HFFX]. GDP itself has risen from just over $1 trillion in 1970 to $23 trillion in 2021. *See id.* Furthermore, in the three decades from 1970 to 2000, median household income increased by 41%, an annual average rate of 1.2%. *See* Juliana Menasce Horowitz et al., *Trends in Income and Wealth Inequality*, PEW RSCH. CTR. (Jan. 9, 2020), https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/ [https://perma.cc/7JBJ-YQBA].

30. *See New Report Shows Just 100 Companies Are Source of Over 70% of Emissions*, CDP WORLDWIDE (July 10, 2017), https://www.cdp.net/en/articles/media/new-report-shows-just-100-companies-are-source-of-over-70-of-emissions. [https://perma.cc/878Z-GGBM] ("Groundbreaking 'Carbon Majors' research finds 100 active fossil fuel producers . . . are linked to 71% of industrial greenhouse gas emissions since 1988. . . .").

31. *See* Horowitz, *supra* note 29 ("[I]ncome inequality in the U.S. has increased since 1980 and is greater than in peer countries"). Despite empirical uncertainties around the root cause, the sustained divergence in economic inequality has heightened public concern and negatively affected business sentiment. *See id.* (describing how "[m]ost Americans think there is too much economic inequality"). The Great Recession in 2007–08, the worst American economic disaster since the Great Depression, has exacerbated these worries. *See* Renae Merle, *A Guide to the Financial Crisis—10 years later*, WASH. POST (Sept. 10, 2018), https://www.washingtonpost.com/business/economy/a-guide-to-the-financial-crisis--10-years-later/2018/09/10/114b76ba-af10-11e8-a20b-5f4f84429666_story.html [https://perma.cc/2NK4-D5HJ] (describing the impact of the 2008 financial crisis). Racial inequality among middle-income families increased during the Great Recession and persists today, and the wealth gap between upper-income families and lower-to-middle-income families continues to widen. *See* Rakesh Kochhar & Anthony Cilluffo, *How Wealth Inequality Has Changed in the U.S. Since the Great Recession, by Race, Ethnicity and Income*, PEW RSCH. CTR. (Nov. 1, 2017), https://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/ [https://perma.cc/V985-YKC8] (describing how wealth inequality has changed in the United States since the Great Recession). In 2009, 62% of informed adults worldwide from ages 25 to 64 reported trusting business less than they did a year ago. *See* Scott Malone, *Global Trust in Business Plummeted in 2008: Survey*, REUTERS (Jan. 27, 2009), https://www.reuters.com/article/us-corporate-trust/global-trust-in-business-plummeted-in-2008-survey-idUKTRE50Q1K920090127 [https://perma.cc/PZM6-7SKX] ("[Sixty-two] percent of informed adults . . . [said] they trusted business less than they had a year ago.").

32. *See* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 3–4 (2012) (describing a motivation for the "social enterprise movement").

pursuit of wealth and profit.[33] The pernicious effects of the resulting inequities are far-reaching and structurally embedded, eroding social institutions and reducing health and life outcomes.[34] Social enterprises attempt to mitigate the negative externalities in modern business, building on research showing that organizations with a concrete corporate purpose can coalesce stakeholders and reduce conflict.[35] Every organization has an underlying legal structure, and innovation in social enterprise business structures reflects the importance of a configuration that helps achieve and sustain a social or environmental mission. Organizational structure determines who controls and benefits from the operations, and shifting ownership and control to workers, the environment, and other stakeholders can help address economic inequality and climate change.[36]

Interest in social enterprises has grown as more companies and individuals begin to confront today's economic and environmental reality, and the gradual reevaluation of business practices has catalyzed innovation in the space. Best practices for social enterprises have continually moved towards assuring investors[37] and the general public of an unassailable dedication to positive societal impact, leading to the most recent innovation at Patagonia.

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33. *See* YVON CHOUINARD, LET MY PEOPLE GO SURFING: THE EDUCATION OF A RELUCTANT BUSINESSMAN 182 (John Dutton ed., 17th prtg., 2016).

34. *See, e.g.*, *Inequality and Health*, INEQUALITY.ORG, https://inequality.org/facts/inequality-and-health/ [https://perma.cc/NT9A-ZU2D] (illustrating how economic inequality links to health outcomes).

35. *See* Witold J. Henisz, *The Value of Corporate Purpose*, HARV. BUS. REV. (Nov. 20, 2023), https://hbr.org/2023/11/the-value-of-corporate-purpose [https://perma.cc/QX4L-LNCW] (describing how a shared sense of purpose can offer a useful guidepost).

36. *See* Andrea Armeni et al., *Investing in Enterprises That Work for Everyone*, STAN. SOC. INNOVATION. REV. (Oct. 23, 2023), https://ssir.org/articles/entry/investing_in_enterprises_that_work_for_everyone [https://perma.cc/HG64-USJF] ("Who owns an enterprise, and what rights are associated with that ownership, determines a large part of who controls and benefits from the economy.").

37. Capital allocation by institutional and retail investors alike has increasingly focused on companies that produce positive social and environmental outcomes, collectively known as "impact investing" or "sustainable investing." *See, e.g.*, Penelope Wang, *What Is Sustainable Investing? How You Can Make Money and Tackle Climate Change*, NEWSWEEK (Oct. 25, 2023), https://www.newsweek.com/2023/11/03/what-sustainable-investing-how-you-can-make-money-tackle-climate-change-1837142.html [https://perma.cc/UZB8-CJ4Z] (explaining sustainable investing). Tools such as nonprofit As You Sow's "Invest Your Values" helps shareholders determine which companies to support with their investment or savings dollars, refining a previously opaque process of understanding an organization's social or environmental impact. *See Invest Your Values*, AS YOU SOW, https://www.asyousow.org/invest-your-values [https://perma.cc/T947-EFH4].

B. TRADITIONAL BUSINESS STRUCTURES AND SOCIAL ENTERPRISE

There is no universally accepted legal definition or single business structure for social enterprises, leading social entrepreneurs to turn to existing for-profit structures while advocating for legislation to create new ones.[38] Legal scholars have defined social enterprises as companies that "employ a business model that aims to achieve positive social or environmental impacts while also pursuing profits and/or financial sustainability"[39] and are neither fully profit-driven nor entirely philanthropic.[40] While interest in social enterprises has grown, consensus around definition and description is still lacking, in part due to constant evolution in the space.[41] Research is further constrained by a dearth of empirical analysis and practical case studies, driven in part by the fact that many social enterprises, including Patagonia, are private companies with limited publicly available data.[42] The legal ambiguity and fluidity, however, have also contributed to the field's structural innovation.

According to the Internal Revenue Service (IRS), the most common forms of for-profit business entities are sole proprietorships, partnerships, and corporations.[43] Limited liability companies (LLCs) are also prevalent and vary based on state statutes.[44] A sole proprietor is the singular owner of an unincorporated business,[45] and a partnership is a structured relationship between two or more people to do business.[46] In a corporation, prospective shareholders receive capital stock in the

38. *See generally* Burand & Tucker, *supra* note 8 (providing an in-depth overview of the legal literature around social entrepreneurship).

39. *Id.* at 69.

40. *See* Cassady V. Brewer, *A Novel Approach to Using LLCs for Quasi-Charitable Endeavors (A/K/A "Social Enterprise")*, 38 WM. MITCHELL L. REV. 678, 680 (2012) (discussing limited liability companies).

41. *See* Burand & Tucker, *supra* note 8, at 27 (discussing the absence of a common lexicon).

42. *See id.* at 38–39 ("[M]uch of social enterprise and impact investing occurs in private markets where information is not publicly available and datasets are hard to come by").

43. *See Business Structures*, *supra* note 7.

44. *See id.* ("A limited liability company (LLC) is a business structure allowed by state statute.").

45. *See Sole Proprietorships*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/sole-proprietorships [https://perma.cc/V4WL-WZ88].

46. *See Tax Information for Partnerships*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/partnerships [https://perma.cc/6GR4-5RDV].

corporation in exchange for money or property,[47] while LLCs are functionally similar to corporations but differ based on state.[48] Each structure has distinct tax and legal considerations that may appeal to different entrepreneurs.[49]

Many early social enterprises turned to LLCs as their business entity of choice given the tax advantages, limited liability protections, and flexibility to modify operating agreements[50] to engage in nonprofit and non-business activities—unlike traditional corporations.[51] LLCs, however, are not specifically tailored to social enterprises, and the business structure was used for its passive flexibility rather than its active promotion of social missions.[52] The flexibility that permits an LLC to add a non-financial purpose to its formation documents also allows it to remove that same purpose.[53] Because managers owe a fiduciary duty to shareholders, structuring a social enterprise as a traditional for-profit business fails to engender public trust in the company's dedication to serve all stakeholders.[54]

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47. *See Forming a Corporation*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/forming-a-corporation [https://perma.cc/AN8E-7472].

48. *See Limited Liability Company (LLC)*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/limited-liability-company-llc [https://perma.cc/7VN9-VHMA].

49. *See Business Structures*, *supra* note 7.

50. *See* Dana Thompson, *L3Cs: An Innovative Choice for Urban Entrepreneurs and Urban Revitalization*, 2 AM. U. BUS. L. REV. 115, 133–34 (2012) (explaining the tax advantages and other benefits to LLCs); Murray, *supra* note 32, at 19–20 (discussing the flexibility of LLCs).

51. *Cf.* J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273, 282 (2010) (describing how Vermont "has modified its LLC statute to, inter alia, allow LLCs to engage in nonprofit businesses and nonbusiness activities"). Corporations are also permitted to make charitable donations. *See, e.g.*, A. P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 590 (N.J. 1953) (sustaining the validity of a donation made by a corporation).

52. *See* Callison & Vestal, *supra* note 51, at 282 (discussing the malleability of the LLC form and how subsequent L3C innovations added additional flexibility to actively promote social missions in contrast to the passivity of LLC advantages).

53. *See* Thompson, *supra* note 50, at 143 ("Yet, if the parties to the LLC subsequently decide they no longer want to pursue charitable purposes, they may amend the operating agreement and remove these charitable purposes and fiduciary duties.").

54. *See* Michael A. Hacker, *"Profit, People, Planet" Perverted: Holding Benefit Corporations Accountable to Intended Beneficiaries*, 57 B.C. L. Rev. 1747, 1762–63 (2016) (surveying the limitations in traditional business structures for social enterprises). Hacker previews a similar critique of public benefit corporations, discussed later in this Note at Part I.C.ii: "[D]irectors of benefit corporations and directors of traditional corporations do not owe a fiduciary duty to any constituency other than the shareholders."). *Id.*

Shareholder primacy, as a general theory, has been a tenet of corporate law for traditional for-profit businesses.[55] Fifty years before Friedman's proclamation, the Michigan Supreme Court held in *Dodge v. Ford Motor Co.* that "a business corporation is organized and carried on primarily for the profit of stockholders."[56] In 1986, the Delaware Supreme Court held that a board must pursue the highest share price possible and cannot sacrifice shareholder value for other considerations.[57] Shareholder value maximization was reinforced in 2010 in *eBay Domestic Holdings, Inc. v. Newmark*,[58] which centered on eBay's attempts to acquire Craigslist, a competitor structured as a traditional for-profit corporation.[59] The court found Craigslist's argument that a takeover by eBay would threaten its unique corporate values unpersuasive as a defense.[60] Corporate law precedent highlighted the need for alternative business entities that could help social enterprises pursue non-financial goals.[61]

C. NEW SOCIAL ENTERPRISE BUSINESS STRUCTURES

Limitations in existing business structures and growing advocacy for social enterprises have led state legislatures to create corporate forms specifically for social enterprises, collectively

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55. *See id.* at 1752 (explaining the shareholder primacy theory of corporate law and how it has dominated discussions in the field for the past century).

56. 170 N.W. 668, 684 (Mich. 1919).

57. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1986); *see also* Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in* Revlon *Land?*, 42 LOY. L.A. L. REV. 765, 779–80 (2009) ("[W]hen a corporation . . . has entered auction mode . . . the sole fiduciary duty of the board is to maximize immediate shareholder value.").

58. *See* 16 A.3d 1, 6–7 (Del. Ch. 2010).

59. *Id.*

60. *See id.* at 34–35.

61. Unilever's acquisition of ice cream producer and social enterprise Ben & Jerry's is another example of the pitfalls of traditional for-profit business structures for mission-oriented organizations. Ben & Jerry's was notable for its social and charitable commitments, including donating 7.5% of its profits to a charitable foundation and procuring ingredients from suppliers who supported traditionally marginalized communities. *See* Dalessandro, *supra* note 9, at 299 (discussing Ben & Jerry's pursuit of social goals). In the aftermath of the acquisition, critics voiced concerns that the large multinational parent company would ultimately deprioritize Ben & Jerry's social mission—a fear that has largely been realized, further indicating a need for alternatives to traditional for-profit business structures. *See, e.g.*, Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 212 (2010).

referred to as "hybrid organizations" or "hybrid entities."[62] Low-profit limited liability companies (L3Cs) and public benefit corporations (PBCs) are the two most well-known hybrid structures.

1. *Low-Profit Liability Companies (L3Cs)*

In 2008, Vermont passed the country's first L3C legislation.[63] The statute required that: (1) the L3C further the accomplishment of charitable or educational purposes and would not have been formed but for its connection to these purposes; (2) no significant purpose of the L3C be income production or capital appreciation; and (3) no purpose of the L3C be directed at political or legislative goals.[64] Organizations that meet these criteria are given an L3C designation in their articles of organization but, should they fail to meet the statutory requirements, must change their name and operate as a standard LLC.[65] The Vermont statute and other subsequent L3C legislation were rooted in the world of charitable foundations, which could not invest in for-profit social enterprises due to IRS limitations on charitable giving and "program-related investments" (PRIs).[66] L3Cs were conceived as a way for private foundations to invest in for-profit socially-conscious organizations without jeopardizing tax-exempt status.[67]

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62. *See* Aguirre, *supra* note 15, at 2088–89 (describing the novel business entities formed by these statutes and defining hybrid organizations as "those that combine organizational goals that are not usually thought to go together—such as social purpose and profit").

63. VT. STAT. ANN. TIT. 11, ch. 21, § 3001(27) (2009).

64. *See* Callison & Vestal*, supra* note 51, at 283–84 (describing the requirements to attain L3C statute).

65. *See id.* at 283.

66. *See id.* at 273–74 (discussing limitations on the value of the L3C construct).

67. Under the IRS § 501(c)(3), nonprofit corporations are provided the benefit of tax-exempt income and donors to charitable organizations are allowed tax deductions for their contributions, helping fund these organizations. *See id.* at 275. There are two types of tax-exempt 501(c)(3) organizations: public charities and private foundations. *See id.* at 275–76. Private foundations are generally funded by a limited number of contributors, while public charities are backed by broad public support. *See id.* Private foundations are also subject to different tax rules, including a tax on grants to private businesses without sufficient expenditure oversight. *See id.* at 276. I.R.C. § 4944 applies a ten percent tax to a private foundation's jeopardizing investments—those made without the ordinary business care and prudence needed to carry out its tax-exempt purpose for the short- and long-term. *See id.* at 276–77. PRIs, however, are not considered jeopardizing investments and give private foundations increased ability to invest in private enterprises. *See id.* at 277 (describing tax exemption under IRS § 501(c)(3) and how PRIs fit in the existing menu of investments available to private foundations). "[T]he IRS has never expressly announced that L3Cs will qualify as PRIs[.]" Jamie Hopkins, *Low-Profit Limited Liability Companies: High-Risk Tax*

For the purposes of social enterprises, L3C statutes are limited in that there is no external determination of whether the L3C "significantly furthers" its purpose, and L3Cs can easily let their status lapse or reorganize back into a traditional business structure.[68] In this way, L3Cs are effectively self-actualizing, and bad actors may take advantage of the structure for non-bona fide purposes by claiming to support social or environmental causes to attract customers and investors without actually attempting to create a positive impact.[69]

2. *Public Benefit Corporations (PBCs)*

Concurrent with the rise of L3Cs, several states created an alternative for-profit business structure known as the "benefit corporation" or "public benefit corporation" (PBC).[70] Generally, these statutes require PBCs to: (1) have a corporate purpose that positively benefits society or the environment; (2) oblige its managers to consider interests beyond the financial interest of shareholders; and (3) report annually on its social and environmental performance using a credible third-party standard.[71]

These requirements differentiate PBCs from traditional corporations in several ways. First, traditional corporations have

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Fad or Legitimate Social Investment Planning Opportunity?, 2014 CARDOZO L. REV. DE-NOVO 35, 42 (2014). Furthermore, the IRS has refused requests to issue statements automatically deeming L3Cs as PRIs. *See* Lloyd Hitoshi Mayer & Joseph R. Ganahl, *Taxing Social Enterprise*, 66 STAN. L. REV. 387, 397–98 (2014) ("[T]he Internal Revenue Service has refused requests to issue rulings that would deem an equity investment or loan to an L3C as a PRI automatically").

68. *See* Callison & Vestal, *supra* note 51, at 284 (noting the lack of administrative process to determine whether the LLC "significantly furthers" any permitted purpose).

69. There is also concern that, given certain mismatches between PRI requirements and state L3C statutes, the L3C movement actually detracts from the ability of private foundations to support social enterprises. *See id.* at 285–94 (discussing attempts to repair the mismatch between federal PRI rules and state L3C statutes).

70. *See* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 819 (2012) (providing an overview of benefit corporations). Note that the word "public" in "public benefit corporation" refers to the benefit of the general public and not the publicly traded nature of a corporation. Public benefit corporations can be either privately held or publicly traded. *See* Matthew L. Dulac, *Sustaining the Sustainable Corporation: Benefit Corporations and the Viability of Going Public*, 104 GEO. L.J. 171, 178 (2015) (stating that there were no publicly traded public benefit corporations as of publication in 2015); *Publicly Traded B Corps*, B. LAB. IMPACT ASSESSMENT, https://kb.bimpactassessment.net/support/solutions/articles/43000632643-publicly-traded-b-corps [https://perma.cc/FNH3-5WP2].

71. *See* Clark & Babson, *supra* note 70, at 818–19.

no explicit purpose requirement, while PBCs are required to have one or more "specific public benefit" purposes in their founding documents.[72] Second, these statutes redefined fiduciary duties, allowing managers to consider the effects of business decisions on not only shareholders but also other stakeholders, including the immediate community and society at large.[73] Lastly, PBCs track performance by requiring third-party impact reports, while traditional corporations do not.[74]

Like L3Cs, PBCs also face limitations in ensuring the pursuit of non-financial goals. First, managers hold considerable discretion in determining whether an action would negatively affect stakeholders, potentially weakening accountability via an expansion of the business judgment rule.[75] In addition, externally reported metrics can be challenging for stakeholders to interpret and come with monitoring costs, and third-party evaluators often have inconsistent standards among themselves.[76] Furthermore, shareholders are the only parties with derivative standing to hold managers accountable for pursuing the non-financial purpose, leading to potential incentive misalignment.[77] Despite additional

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72. *See id.* at 840 ("The stakeholder consideration mandate is an important distinguishing feature from the basic corporation statutes. . . .").

73. *See id.* at 840–41 (providing an example of a statute that expanded PBC directors' fiduciary duty to include "community and societal considerations, including those of any community in which offices or facilities of the benefit corporation or the subsidiaries or suppliers of the benefit corporation are located."). The mandatory requirement to consider non-shareholder interests is a notable elevation from permissive constituency statutes. *See id*. at 840 ("[T]he consideration of non-shareholder interests is permissive, while under the benefit corporation statutes it is mandatory.").

74. *See id.* at 842–43 (discussing the required annual report for benefit corporations). Though helpful in terms of providing some degree of accountability, these reports are complicated by a lack of standardization today. *See id.*

75. *See* Hacker, *supra* note 54, at 1764 (explaining that "the very nature of the benefit corporation, however, extends the scope of the business judgment rule; directors of a benefit corporation could defend a decision that eschews short-term profit not only on the grounds that the decision would eventually lead to long-term profits, but also that the decision furthers the creation of the corporation's public benefit.").

76. *See, e.g.*, Shiva Rajgopal, *Holding Firms Accountable To ESG Goals Is Tricky*, FORBES (Mar. 18, 2020), https://www.forbes.com/sites/shivaramrajgopal/2020/03/18/holding-firms-accountable-to-esg-goals-is-tricky/?sh=7d987d5c3d42 [https://perma.cc/DD8Y-F98H] (discussing the challenge of assessing whether ESG goals have been met).

77. *See* David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461, 485 (2017) (explaining derivative standing with respect to PBCs and how it can actually be more challenging to have standing given ownership requirements in PBC statutes). PBC shareholders are the only party with standing to bring derivative lawsuits claiming that the PBC has not achieved the public benefit outlined in the founding documents. *See id.* at 475 n.60 ("The default rule in Delaware is that only shareholders have standing to bring derivative claims while the firm is solvent, and the creditors have standing to bring such claims where the firm is

reporting requirements and expanded founding documents, PBCs are still subject to mission drift[78] and remain largely similar to traditional corporations[79] while also dealing with unique problems in the pursuit of serving multiple purposes.[80] Overall, the legal obligations in hybrid entities are inadequate to ensure that perspectives of non-shareholder stakeholders are incorporated into a company's operations.

3. *External Certification Organizations*

Beyond state legislation creating hybrid entities, private organizations have devised third-party labels and certifications to help businesses distinguish themselves from traditional companies based on their social impact. B Lab is a leading nonprofit in the space, supporting "entrepreneurs and investors seeking to use business to solve social and environmental problems."[81] The organization lobbies for social enterprise-related legislation and provides its own accreditation, known as "B Corporation" (B Corp) status, to companies that fulfill its social impact criteria.[82] While L3Cs and PBCs are created by state law, B Corp status is a privately designed label of social impact

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insolvent."). The competing financial incentive for shareholders has, in part, led to a dearth of case law.

78. *See, e.g.*, Aguirre, *supra* note 15, at 2103–04 (describing the pitfalls to public benefit corporations and manager discretion).

79. Prior to PBC legislation, states adopted statutes that allowed company managers to consider stakeholders beyond shareholders, known as "constituency statutes." *See* Clark, Jr. & Babson, *supra* note 70, at 828–29. This adoption represented an initial challenge to the doctrine of shareholder primacy, though most of these statutes were developed as an additional layer of protection for target companies in case of a hostile takeover rather than to support social enterprises. *See id.* at 829. Notably, Delaware, which houses more than half of all the United States' publicly traded companies, has not adopted a constituency statute. *See id.* at 830–31. Furthermore, these constituency statutes are generally permissive, creating the option and not the requirement for managers to factor in non-shareholder interests. *See id.* at 832–33. The limitations of these constituency statutes fueled the development of PBCs, a new business structure for socially conscious entrepreneurs and investors. *See id.* at 828–39 (discussing constituency statutes generally as well as their permissive nature and deference to manager discretion).

80. Without robust enforcement mechanisms and direct input from non-financial stakeholders, PBCs are vulnerable to the "sheep's clothing principle," the idea that a benevolent corporate act is also a carefully designed advertising scheme. *See* Hacker, *supra* note 54, at 1757. Actors with bad intentions may abuse the added goodwill that comes from incorporating as a PBC, potentially leading to even worse social outcomes than through operating a traditional corporation. *See id.* at 1757–59 (arguing that some benefit corporations reap the goodwill benefits while only pretending to pursue public benefits).

81. Esposito, *supra* note 23, at 695.

82. *See id.* at 696.

dedication based on assessments by B Lab and amendments to a company's articles of incorporation.[83] B Corp status is one of the most prominent corporate social impact certifications. As of July 3, 2024, there were 8,913 B Corps in the world across 101 countries.[84]

B Corp status, however, fails to create obligations beyond those already found in L3C and PBC legislation. Depending on a company's existing business structure as well as its state and country of domicile, B Lab imposes different requirements for organizations seeking certification.[85] In California and other states with PBC statutes, corporations can "meet the legal requirement for B Corp Certification by electing benefit corporation status."[86] In other words, social enterprises that are structured as PBCs automatically meet the standard to be a B Corp.[87] For L3Cs, LLCs, and partnerships without a stated purpose, B Lab requires the following purpose clause, among other language, in the company's founding legal documents: "The purpose of the Company shall include creating a material positive impact on society and the environment, taken as a whole, from the business and operations of the Company."[88] Legal language from this version of B Corp status is functionally similar to that of L3Cs and PBCs—and has the same shortcomings. In states without

83. *See id.* ("B Corporations are subject to a private regulatory system").

84. *Make Business a Force for Good*, B LAB, https://www.bcorporation.net/en-us/ [https://perma.cc/U2WA-K37A].

85. *The Legal Requirement for Certified B Corporations*, B LAB, https://www.bcorporation.net/en-us/about-b-corps/legal-requirements [https://perma.cc/L3WG-PTHV] ("The specific legal requirements for a company differ based on the company's legal entity type: corporation, limited liability company, partnership, co-operative, etc.").

86. *United States California—Corporation Legal Requirement*, B LAB, https://www.bcorporation.net/en-us/legal-requirement/country/united-states/province/california/corporate-structure/corporation [https://perma.cc/2SA8-8C8B]. It is worth noting that B Lab has advocated for PBC legislation across the country, with PBCs and B Corp status arising in tandem in certain jurisdictions. *See The Policy #BehindtheB: How We're Creating New Rules for the Global Economic System*, B LAB, https://www.bcorporation.net/en-us/news/blog/behind-the-b-inside-policy-at-b-lab/ [https://perma.cc/3STR-HXN5] (describing some of B Lab's past efforts to pass benefit corporation legislation). The jurisdictional overview here highlights how "B Corp" status can have different implications in different states.

87. *See* Cindy S. Woods, *The Implications of the B Corp Movements in the Business and Human Rights Context*, 6 NOTRE DAME J. INT'L COMP. L. 77, 88 (2016) ("[T]he legal requirements for [B Corp] certification are formed around building a company that is either a benefit corporation or as akin to one as legally possible.").

88. *United States California—L3C Legal Requirement*, B LAB, https://www.bcorporation.net/en-us/legal-requirement/country/united-states/province/california/corporate-structure/l3c [https://perma.cc/CP5J-DNS9].

hybrid entities, such as Mississippi, B Lab states that "for now, the best we can do together is to build the language of the B Corp legal framework into your B Corp Agreement for Certification."[89] Social enterprises in these states, therefore, gain little legal fortification from becoming a B Corp.[90] Overall, B Corp status, not technically a business structure on its own, fits within the confines of existing PBC and L3C statutes and is subject to the same limitations, with even fewer protections depending on state laws.[91]

The landscape for social enterprise business structures was inadequate for companies such as Patagonia, which was already incorporated as a PBC and holds B Corp status.[92] Driven in part by concerns around succession planning, Patagonia's latest transaction sought to concretize its social and environmental impact in the event that Chouinard no longer led the company.[93] Structuring as a PBC or L3C and maintaining B Corp status does not guarantee that the next managers of the company would prioritize its environmental mission given the considerable manager discretion, lack of third-party oversight, and failure to ensure the consideration of all stakeholders. A trust, however, can provide decision-making authority to non-shareholder stakeholders, allowing them to directly oversee a social enterprise.

89. *United States Mississippi—Corporation Legal Requirement*, B LAB, https://www.bcorporation.net/en-us/legal-requirement/country/united-states/province/mississippi/corporate-structure/corporation [https://perma.cc/NR72-65M6].

90. Additional limitations of B Corp status include the potential for a B Corp to allow its status to lapse, the risk of public confusion regarding a company's business structure and B Corp certification, the cost of the certification process, and the considerable manager discretion allowed in meeting social and environmental goals.

91. *See* Aguirre, *supra* note 15, at 2083 (describing limitations to B Corps and social enterprise business structures). Another framework for social entrepreneurs is the United Nations' Sustainable Development Goals, a set of 17 categories established in 2015 to provide "a shared blueprint for peace and prosperity for people and the planet, now and into the future." *The 17 Goals*, UNITED NATIONS DEPT. OF ECON. & SOC. AFFS., https://sdgs.un.org/goals [https://perma.cc/WNY4-USSD]. These principles, however, are not legally binding and primarily serve as guideposts for companies looking to serve social missions. *See United Nations Sustainable Development Agenda*, UNITED NATIONS, https://www.un.org/sustainabledevelopment/development-agenda-retired/ [https://perma.cc/U8NQ-C9A5].

92. *See Annual Benefit Corporation Report Fiscal Year 2021*, PATAGONIA WORKS, 2, 17 (2021).

93. *See* Gelles, *supra* note 1.

II. STEWARD-OWNERSHIP

In response to limitations in existing social enterprise business structures, some social entrepreneurs have turned to steward-ownership, an innovation from the field of business succession planning.[94] Steward-ownership models are derived from nineteenth- and twentieth-century European companies that established charitable foundations to oversee for-profit companies.[95] In recent years, nonprofit organizations supporting steward-ownership principles have advocated for increased adoption, citing advantages in preserving non-financial missions.[96] There is no singular steward-ownership model, though most revolve around oversight by a trust or foundation.[97] With direct input from non-financial stakeholders, these new structures provide a layer of fortification lacking in hybrid business entities.

A. BACKGROUND AND CONTEXT

Steward-ownership refers to business structures with trust or foundation oversight[98] that separate economic incentives from decision-making authority.[99] According to steward-ownership advocates, this separation helps social enterprises ensure that profits serve purposes beyond shareholder financial enrichment while maintaining a degree of self-governance.[100] Non-shareholder stakeholders, then, can directly influence business operations and profit allocation, using capital for traditional means, such as business reinvestment or investor dividends, in addition to mission-driven goals, such as charitable donations or community support.[101] Separating business operations from shareholder interests, with decision-making authority held by "stewards" or

94. *See* Susan N. Gary, *The Oregon Stewardship Trust: A New Type of Purpose Trust That Enables Steward-Ownership of a Business*, 88 U. CIN. L. REV. 707, 708 (2020).

95. *See* Canon et al., *supra* note 20, at 10 ("One of the first modern examples of steward-ownership is the German optics manufacturing company Zeiss, founded in 1846 by Carl Zeiss. After Zeiss died in 1888, Ernst Abbe—a fellow researcher—created the Carl Zeiss Foundation, which has owned the company ever since.").

96. *See id.* at 65 (discussing Ecosia, which transitioned to steward-ownership to protect its mission of fighting deforestation, as one example of the Purpose Foundation's advocacy).

97. *See id.* at 16.

98. *See* Gary, *supra* note 94, at 708.

99. *See* Canon et al., *supra* note 20, at 16.

100. *See id.* at 11 (describing financial profitability and self-governance, the two primary principles of steward-ownership).

101. *See id.* at 11, 16.

"people in or close [to] the business," allows the trust, comprising relevant stakeholders, to preserve the social mission in the business' operations without distorted financial incentives.[102]

The roots of steward-ownership trace back to German optics manufacturing company Zeiss and the Carl Zeiss Foundation, established in 1889 to succeed its late founder.[103] Under the ownership of the foundation, Zeiss cannot be sold, and profits are either reinvested in the company or donated to the public good.[104] Different forms of steward-ownership have emerged since, including in the structures overseeing American internet company Mozilla and Danish healthcare company Novo Nordisk.[105] Advocates maintain that steward-owned companies are six times more likely to survive over 40 years than conventional companies, increasing productivity, social cohesion, and worker job security along the way.[106]

B. STEWARD-OWNERSHIP MODELS

1. *Common Forms*

Given legal complexities across jurisdictions, there are multiple models of steward-ownership.[107] The Purpose Foundation, a nonprofit steward-ownership advocate, provides an overview of some common forms, including the: (1) Golden Share, (2) Single Foundation, (3) Trust Foundation, (4) Trust Partnership, and (5) Perpetual Purpose Trust.[108]

The Golden Share model creates distinct share classes with a "Golden Share" holding the right to veto attempted sales or structural changes that would undermine the company's purpose.[109] The structure separates the voting and economic rights of ownership to disincentivize mission drift,[110] with the Golden

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102. *See id.* at 16.
103. *See id.* at 10.
104. *See* Canon et al., *supra* note 20, at 10.
105. *See id.*
106. *See id.* at 13–14.
107. *See id.* at 16.
108. *See id.* at 17–25.
109. *See* Canon et al., *supra* note 20, at 17. As one example, a company could have a class of A-shares that provides voting rights or the "steward-shares," a class of B-shares that provides dividend rights to investors or other economic beneficiaries, and a singular or class of Golden Shares to provide the veto right. *See id.*
110. *See id.*; *cf. Introducing: Tony's Mission Lock—A Future-proof Legal Structure for Impact Companies*, TONY'S CHOCOLONELY (May 31, 2023), https://tonyschocolonely.com/nl/

Share, held by a separate and independent "veto-service" foundation,[111] preventing misaligned decisions.[112] Scholarship on the Golden Share model in the United States finds that the central features likely do not present any apparent legal issues in Delaware, though the model, like most social enterprise business structures, has yet to be tested in court.[113]

In the Single Foundation model, a charitable entity or foundation owns the entire social enterprise, including both economic rights and voting rights, and provides company oversight.[114] At the foundation, a corporate council executes operational decisions while a separate charitable board distributes donations.[115] In the Trust Foundation variant, a trust holds decision-making authority rather than a council at the foundation.[116]

The Trust Partnership model consists of a trust typically owned or controlled by the social enterprise's employees rather than a foundation or charitable entity.[117] The Perpetual Purpose Trust creates a non-charitable trust for the benefit of a purpose, rather than people, and is overseen by a committee of stakeholders who guide decision-making.[118]

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en/our-mission/news/introducing-tonys-mission-lock-a-future-proof-legal-structure-for-impact-companies [https://perma.cc/3WTQ-FESP] (describing Tony's Chocolonely's new business structure, meant to guard against mission drift, which closely resembles the Golden Share model).

111. *See* Canon et al., *supra* note 20, at 18. The Golden Share can be held by whoever the social enterprise chooses and is not limited to foundations.

112. *See id.* at 17–19.

113. *See* Thomas, *supra* note 14, at 176. Some large technology companies have effectively replicated the Golden Share model in their public offerings by including nonvoting stock so that the original founders can preserve decision-making authority. *See id.* at 176–77. Limitations to the model include (1) the risk that management will fail to consistently prioritize mission or disproportionately increase salaries given veto rights are typically limited to charter amendments and company sales, (2) caps on financial incentives which may discourage managers, (3) trade-offs between a company's mission and its treatment of employees during economic downturns, and (4) a resemblance to an extreme form of dual-class stock structure. *See id.* at 188–95. Thomas proposes several additional elements to the Golden Share model, including (1) impact metrics to assure mission prioritization, (2) consent rights for investors for certain events, and (3) a voting trust. *See id.* at 202–12. A voting trust could be similar in form and function to Patagonia's new structure.

114. *See* Canon et al., *supra* note 20, at 20.

115. *See id.* The Single Foundation model is more prevalent in Europe given tax regulations. *See id.*

116. *See id.* at 21.

117. *See id*. at 23.

118. *See id*. at 24. A "Trust Protector Committee," comprising a variety of stakeholders, leads the trust, which owns the company itself and decides what to do with the company's

2. *Steward-Ownership in the United States*

Perpetual Purpose Trusts, which are similar to Patagonia's new structure, have received the most attention in the United States.[119] At least four states have laws with the built-in flexibility[120] for a Perpetual Purpose Trust model: Delaware, New Hampshire, Wyoming, and Maine.[121] While most trusts need an ascertainable beneficiary or charitable purpose to be enforceable, states with the requisite flexibility for steward-ownership models have relaxed these requirements.[122] For example, the founders of sustainable agriculture producer Organically Grown Company created a business structure using Delaware's trust statute to transition

profits. *See id.* This model is most compatible with U.S. trust laws and forms the basis for the steward-ownership movement in the country. *See id.*

119. *See* Purpose Foundation, *The Patagonia Structure in the Context of Steward-Ownership*, MEDIUM (Sept. 22, 2022), https://medium.com/@purpose_network/the-patagonia-structure-in-the-context-of-steward-ownership-e9db3d260dc6 [https://perma.cc/KH5E-849N]. In Canada, legislation effective in 2024 aims to create a framework for "employee ownership trusts" that draws on the principles of steward-ownership. *See* Roodgally Senatus, *With Employee Trusts, Canada Opens a Pathway to Worker Ownership*, IMPACTALPHA (Dec. 14, 2023), https://impactalpha.com/with-employee-trusts-canada-opens-a-pathway-to-worker-ownership/?mc_cid=cb578bb3bf&mc_eid=bbd40fef06 [https://perma.cc/3338-BPRF].

120. *See* Canon et al., *supra* note 20, at 24. These states have permissive statutes that enable Perpetual Purpose Trusts without explicitly naming the practice of steward-ownership.

121. *See id.* The flexibility in Delaware, the most popular state for incorporation, is significant for the growth of steward-ownership in the United States. *See About the Division of Corporations*, DEL. DIV. OF CORPS., https://corp.delaware.gov/aboutagency/ [https://perma.cc/4N6E-8Q6Z] ("The State of Delaware is a leading domicile for U.S. and international corporations. More than 1,000,000 business entities have made Delaware their legal home. More than 66% of the Fortune 500 have chosen Delaware as their legal home."); J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 369–370 (2014) (discussing the influence of Delaware's PBC law).

122. *See* Gary, *supra* note 94, at 713. The Uniform Trust Code (UTC) § 409's restrictions can be challenging for social enterprises pursuing steward-ownership. Historically, in the common law of trusts in the United States, a trust without an ascertainable beneficiary or charitable purpose was generally unenforceable. *See id.* Non-charitable trusts had either a social or personal purpose, such as providing property to friends. *See id.* at 713–14. The law, however, generally views these uses as distinct from charitable, and "purpose" or "honorary" trusts were still held unenforceable in the Restatement (Third) of Trusts § 47, though the literature does acknowledge a growing acceptance of treating noncharitable purpose trusts as honorary trusts. *See id.* at 714–16. Two sections of the UTC discuss noncharitable trusts that lack an ascertainable beneficiary—UTC § 408 allows a trust for animal care, UTC § 409 allows for other exceptions—and both align with the common law Rule against Perpetuities by establishing time limits. *See id.* at 716. To address the common law rule against capricious purposes, additional restrictions limit the amount that can be held in a trust "not required for the intended use." *See id.* at 717. Certain states have passed statutes that reduce these requirements, including Delaware and South Dakota. *See id.* at 721–23.

ownership while still ensuring the pursuit of social and environmental goals.[123]

In 2019, Oregon adopted a statute that specifically facilitated the creation of "stewardship trusts," derived from Uniform Trust Code (UTC) § 409 and rooted in the world of business succession planning.[124] Oregon's House Bill 2598 is more specifically tailored toward steward-ownership and allows trusts to be created for a business purpose without an identifiable beneficiary.[125] The Oregon stewardship trust must include: (1) a trustee with legal title to the partnership interests, (2) a trust enforcer, and (3) a trust stewardship committee with the power to direct the company.[126] The stewardship trust holds all of the voting shares and, for capital needs, can only issue non-voting redeemable preferred stock to investors.[127] Because any stakeholder, not just shareholders, designated in the trust agreement can be a trustee, steward-ownership models directly create stakeholder governance.[128]

C. ALTERNATIVE APPROACHES

Steward-ownership models help bridge the trust gap between social enterprises and the communities they affect by creating an explicit channel for stakeholder participation. Other approaches to social enterprise have also tried to bridge existing trust gaps but with different methodologies. These include recent innovations in impact investing, corporate governance, nonprofits, cooperatives, and employee ownership. Notably, however, steward-owned companies can incorporate elements of all these alternatives, demonstrating its flexibility and strength as a structural model.

1. *Impact Investing*

Social enterprises have struggled to receive funding from traditional institutions, turning instead to impact-focused

123. *See* Gary, *supra* note 94, at 711–12.

124. *See id.* at 709.

125. H.B. 2598, 80th Leg. Assemb., Reg. Sess. § 2(1) (Or. 2019).

126. *See* Gary, *supra* note 94, at 725–26. While Oregon's purpose trusts have a 90-year limit, stewardship trusts can be indefinite. *See id.* at 728. Modification is deliberately challenging and possible only with unanimous action by the trust enforcers and the trust stewardship committee. *See id.*

127. *See id.* at 729–30.

128. *See* Canon et al., *supra* note 20, at 12.

investors who are aligned in creating positive social or environmental change while generating returns or preserving capital. The term "impact investing" is broad and generally refers to investors who deploy capital "with the intention of generating social and/or environmental returns as well as financial returns," serving as the financial partner of the social enterprise movement.[129] Beyond the basic willingness to invest in social enterprises and alternative business structures,[130] cutting-edge impact investors are developing new investment theses and financial tools to facilitate investment in social enterprises and steward-ownership, such as funds dedicated to grassroots community change[131] or equity instruments with capped returns.[132] Steward-ownership is inextricably linked to impact investing, with innovations from the financing level supporting social enterprises at the operating level.

2. *Corporate Governance*

Some organizations have attempted to reshape businesses within existing structures, turning to corporate governance solutions in an attempt to meaningfully incorporate stakeholder perspectives.[133] In 2021, investment firm Engine No. 1 used proxy

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129. *See* Burand & Tucker, *supra* note 8, at 4–5 (describing the scope and size of the impact investing space). The continuum of impact investing spans various strategies between traditional investing and philanthropy. *See id.* at 4 n.2. These strategies include investing in everything from public markets with an Environmental, Social, and Governance (ESG) framework to investments with an impact return but still seeking market-rate returns to more philanthropic ventures with below market-rate or breakeven returns. *See* Tasha Seitz, *The Spectrum of Impact Investing*, IMPACT ENGINE (Jan. 9, 2018), https://www.theimpactengine.com/bloghome/thespectrumofimpactinvesting [https://perma.cc/38ZF-GXMF]. The Global Impact Investing Network (GIIN) estimates that the worldwide impact investing market is around $1.164 trillion, and within that market there is a subset of capital managers seeking more impact-forward returns. *See What You Need to Know About Impact Investing*, GLOB. IMPACT INV. NETWORK, https://thegiin.org/impact-investing/need-to-know/ [https://perma.cc/A29C-MPWP].

130. *See, e.g.*, *Steward-ownership: A Short Guidebook to Legal Frameworks*, PURPOSE FOUND. 32–33 (2021).

131. *See, e.g.*, Jen Alstone, *25 Funds Transforming Finance for People and Planet*, INTEGRATED CAP. INV., https://iciaptos.com/the-transformative-25/ [https://perma.cc/UZ32-482K] (listing impact investing firms with innovative investment theses).

132. *See, e.g.*, Jonathan Soros, *A New Way to Scale Social Enterprise*, HARV. BUS. REV. (Apr. 15, 2021), https://hbr.org/2021/04/a-new-way-to-scale-social-enterprise [https://perma.cc/6S2L-8ZYY] (describing the idea of capped or "mission equity" which limits the returns of mission-aligned equity investors).

133. *See, e.g.*, Alina S. Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. 919, 979–81 (2016) (describing current hybrid entity failures in incorporating stakeholder perspectives). One example of a corporate governance solution includes having equal

fights to elect three of its nominees to multinational oil and gas company ExxonMobil's board, with the goal of motivating the company to change its behavior and combat the climate change crisis.[134] While the victory was groundbreaking for climate-focused shareholder advocacy, experts predicted that meaningful change would be difficult to accomplish given Engine No. 1's minority position and a lack of support from other shareholders.[135] Engine No. 1 continues to promote shareholder activism through exchange-traded funds (ETFs),[136] helping investors vote in shareholder proposals to "strategically hold companies and leadership teams accountable while focusing on sustainability issues that create value."[137] Other shareholder advocacy firms have followed suit, but despite increased attention and participation, evidence of sustained and legitimate change is wanting.[138] While new corporate governance practices can enhance oversight, significant decisions will still require some degree of shareholder approval, and large public companies are particularly resistant to structural change.[139]

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numbers of stakeholders and shareholders on a social enterprise's board of managers. *See* Aguirre, *supra* note 15, at 2116–17. Ben & Jerry's notably created a "social purpose board" after its acquisition by Unilever in an attempt to preserve its social mission during the integration. *See id.* at 2116–18 (identifying ways for social enterprises to incorporate stakeholders onto their boards).

134. *See* Bernard S. Sharfman, *The Illusion of Success: A Critique of Engine No. 1's Proxy Fight at ExxonMobil*, 12 HARV. BUS. L. REV. ONLINE 1, 3–4 (2021) (explaining the timeline of Engine No. 1's proxy fight).

135. *See, e.g.*, Peter Eavis & Clifford Krauss, *Activists Crashed Exxon's Board, But Forcing Change Will Be Hard*, N.Y. TIMES (May 27, 2021), https://www.nytimes.com/2021/05/27/business/economy/exxon-board-climate-change.html [https://perma.cc/CWU4-JHYL].

136. Exchange-traded funds are publicly listed investment securities comprised of a basket of different securities. *See* James Chen, *Exchange-Traded Fund (ETF) Explanation with Pros and Cons*, INVESTOPEDIA (Jan. 20, 2024), https://www.investopedia.com/terms/e/etf.asp [https://perma.cc/GR4V-BD9B].

137. *Engine No. 1 Exchange Traded Funds*, ENGINE NO. 1, https://etf.engine1.com/vote/ [https://perma.cc/DX8X-AAMF]. Engine No. 1's ETF business was recently acquired by The TCW Group. *Engine No. 1 Closes Sale of ETF Business to TCW*, ENGINE NO. 1 (Oct. 16, 2023), https://engine1.com/transforming/articles/engine-no-1-closes-sale-of-etf-business-to-tcw/ [https://perma.cc/L7ZY-VDHQ].

138. *See, e.g.*, Hemang Desai et. al., *Opinion: Is an Activist Hedge Fund's Climate-Linked Coup of Exxon's Board Simply a Case of 'Greenwashing'?*, MARKETWATCH (June 8, 2021), https://www.marketwatch.com/story/is-an-activist-hedge-funds-climate-linked-coup-of-exxons-board-simply-a-case-of-greenwashing-11623103432 [https://perma.cc/ME7D-Q57U] ("[C]haracterizing Engine No. 1's victory as a win for climate action is akin to greenwashing when the concrete actions that oil and gas firms must take to transition sustainably, both from a financial and environmental perspective, remain elusive.").

139. *See* Ball, *supra* note 133, at 957. Furthermore, most of the existing regulation around corporate governance is directed toward large public companies, which can create legal uncertainties for installing stakeholder governance at private or smaller companies.

3. *Nonprofit Models*

In the alternative, should for-profit social enterprises prove fundamentally incompatible with non-financial aims,[140] nonprofits may remain a key business structure for social impact despite their own limitations.[141] Scholars have highlighted alternatives to the modern "non-profit industrial complex," including: (1) sociocratic nonprofits focusing on non-hierarchical decision-making; (2) worker self-directed nonprofits[142] placing employees as lead decision-makers; (3) hub-and-spoke nonprofit counter-institutions

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See id. at 953–54 ("The established corporate governance paradigm . . . is largely based on regulating and monitoring public companies."). Earlier this year, ExxonMobil sued two sustainability-focused investors for promoting shareholder proposals calling for greenhouse gas emissions reductions. *See* Collin Eaton & Paul Kiernan, *Exxon Sues Two ESG Investors*, WALL ST. J. (Jan. 22, 2024), https://www.wsj.com/business/energy-oil/exxon-sues-two-esg-investors-2057e696 [https://perma.cc/AF7L-96ZE].

140. *See, e.g.*, Friedman, *supra* note 28. That for-profit business can be a sustained driver of social impact is a hypothesis and not a fact. Critics of social enterprise, whether in support of profit-maximizing business practices or more philanthropic models, argue that profit-seeking may be inherently incompatible with social and environmental purposes. *See, e.g.*, Alstone, *supra* note 131.

141. In the 1970s, the modern standard for nonprofit organizations came into the mainstream, marked by features such as: (1) a reliance on grants and earned income rather than member contributions, (2) organizational direction from a board of directors, (3) leadership from nonprofit professional managers supported by policy experts, (4) concentrated power in nonprofit staff members with less oversight, and (5) a focus on providing services or engaging in advocacy on specific social or political issues. *See* Michael Haber, *The New Activist Non-Profits: Four Models Breaking from the Non-Profit Industrial Complex*, 73 U. MIAMI L. REV. 863, 871–72 (2019). This model came to dominate and led the number of American nonprofit organizations to skyrocket. The nonprofit sector fills a need for services where the public sector has not adequately stepped in or the for-profit sector is not financially motivated to do so, but nonprofits are generally limited in scale and scope. *See id.* at 872. Reliance on grant funding also requires nonprofits to divert time and resources away from their mission to complete a bureaucratic and competitive process for financial sustainability. *See id.* Furthermore, and driven in part by the rising inequality in the United States, many nonprofits and foundations are supported by ultra-high-net-worth individuals—who may own or lead the very companies creating the issues nonprofits are trying to address. *See id.* at 873. As a result, these organizations are often subject to the whims of an individual millionaire or billionaire and their desire to provide funding. Reliance on tax-exempt status also ties nonprofits to federal policies and lobbying. *See id.* at 871. By the 2000s, grassroots activists became increasingly critical of the modern, professionalized nonprofit, coining the phrase the "nonprofit industrial complex" to refer to the inability of these organizations to engage in meaningful change without fundraising, significant bureaucracy, and placating grantors. *See id.* at 872.

142. The Sustainable Economies Law Center, a nonprofit law group, pioneered worker self-directed nonprofits, which are rooted in solidarity economy principles. *See Worker Self-Directed Nonprofits*, SUSTAINABLE ECONS. L. CTR., https://www.theselc.org/worker_selfdirected_nonprofits [https://perma.cc/XHZ9-D8DQ]; *see also* Haber*, supra* note 141, at 877 ([W]orker self-directed non-profits . . . developed out of the recent surge in interest in worker-owned cooperatives and the broader solidarity economy movement.") (emphasis omitted).

operating in small, decentralized groups; and (4) swarm organizations with informal networks of loosely connected individuals.[143] In contrast to the hierarchical professionalization of nonprofits today, these approaches can "increase volunteer participation, deepen organizational democracy, connect more closely with social movements, and aim to maintain accountability."[144] Innovations in the nonprofit sector may enhance the space's overall impact and provide sustained social good more effectively than for-profit social enterprises, though it is unclear if reforms can address concerns about scalability and mitigate existing reliance on external funding.[145]

4. *Cooperatives*

Others have argued that cooperatives, which date back several centuries, were the original social enterprises and should not be overlooked in the movement's search for best practices.[146] Cooperatives are unique for-profit organizations directly owned and managed by the members that the cooperative intends to benefit.[147] For-profit businesses suffer from "an inherent tension between providing a profit for shareholders while spending money on charitable endeavors," while "community benefit is not just a consequence of the cooperative business model; it is a fundamental part of its structure."[148] These organizations are derived from the agriculture space, which established workers' cooperatives and farmers' cooperatives "not necessarily to make a profit or to increase shareholder value" but to "serve the needs of its

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143. *See* Haber, *supra* note 141, at 876–77.

144. *Id.* at 866.

145. A reliance on external capital is also, in part, a reliance on excess profits derived from for-profit business practices. *See, e.g.*, William Claiborne, *Philanthropies Astir Over Henry Ford's Criticism*, WASH. POST. (Jan. 12, 1977), https://www.washingtonpost.com/archive/politics/1977/01/13/philanthropies-astir-over-henry-fords-criticism/5d014d0f-1768-4f22-9eaa-f5cc4a6f4c23/ [https://perma.cc/Y3CC-5FYS] (discussing a critique of foundations by Henry Ford II and commentary from other foundation leaders that "foundations are a product of capitalism. Their assets are the result of capitalism.").

146. *See generally* Elaine Waterhouse Wilson, *Cooperatives: The First Social Enterprise*, 66 DEPAUL L. REV. 1013 (2017) (providing a history of cooperatives and their community-oriented impact).

147. *See id.* at 1016; *cf.* Wendy Lee, *His L.A.-Based Podcast Company Faced a Crossroads. Now Jesse Thorn's Employees are Owners*, L.A. TIMES (Mar. 20, 2023), https://www.latimes.com/entertainment-arts/business/story/2023-03-20/maximum-fun-jesse-thorn-podcasts-cooperative [https://perma.cc/8Z3V-8BKH] (example of a recent successful transition into a cooperative).

148. Wilson, *supra* note 146, at 1015–16.

members."[149] In addition, cooperatives have often been rooted in movements for social change, leading most to hold values that "emphasize democracy, community, equality and sustainability."[150]

Cooperatives can increase worker equity and promote democratic corporate governance practices but, like all business structures, are not without their own risks, including around anticompetition, funding sources, taxation, and state statute inconsistencies.[151] In addition, leaders of cooperatives may still view the organizations as commodities to be sold for the benefit of the members, potentially leading to mission drift that could be otherwise prevented with steward-ownership.[152]

5. *Employee Ownership Trusts*

Employee ownership trusts[153] combine the cooperative model with elements of steward-ownership,[154] utilizing a trust owned and controlled by the employees, rather than a council of stakeholders, to oversee operations.[155] The strength and weakness of employee ownership trusts, however, are one and the same: a singular focus on worker empowerment can strengthen employee outcomes but may also create other negative externalities through traditional

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149. *Id.* at 1016.

150. *Id.* at 1017.

151. Subchapter T of the Internal Revenue Code also contains a provision for tax-exempt status as a farmers' cooperative under § 531 or under certain sections of § 501. *See* Wilson, *supra* note 146, at 1028. Under Subchapter T, cooperatives are effectively taxed as C corporations unless they operate on a cooperative basis. Every state also has its own statute regarding cooperatives, some of which treat cooperatives as a separate entity and others that consider it a type of corporation. *See id.* at 1029–32.

152. *Cf.* Canon et al., *supra* note 20, at 16 ("Coop arrangements, in which each stakeholder is granted one vote, still view the company as a commodity that can be sold for the benefit of its members. Although steward-owned companies can be set up as coops, steward-ownership structures separate economic and voting rights, so no one is incentivized to sell."). As one example, outdoor equipment retailer Recreational Equipment, Inc. (REI) is one of the largest and most well-known consumer cooperatives but has still faced scrutiny regarding worker treatment. *See, e.g.*, Emily Hofstaedter, *REI Calls Itself a Co-op. But That Doesn't Mean It's Worker-Friendly.*, MOTHER JONES (Feb. 18, 2022), https://www.motherjones.com/politics/2022/02/rei-coop-union-busting/ [https://perma.cc/2BSK-SFHQ].

153. Employee ownership trusts are also referred to as "employee-focused purpose trusts." *See* Dennis Price, *Through 'Ownership Trusts,' Investors Can Help Employees Become Owners and Owners Retire*, IMPACTALPHA (Nov. 30, 2022), https://impactalpha.com/through-ownership-trusts-investors-can-help-employees-become-owners-and-owners-retire/ [https://perma.cc/DP8L-MTYH].

154. *See* Canon et al., *supra* note 20, at 23.

155. *See* Price, *supra* note 153.

profit-maximizing business practices.[156] These alternative ownership structures promote worker empowerment but, like cooperatives, do not guarantee that employee-led trustees will address the organization's effects on non-employment matters such as environmental concerns or social justice issues.[157] In contrast, Patagonia's trust committee can both represent employees and integrate the views of non-financial stakeholders. Employee ownership trusts are popular with steward-owned companies in the United States,[158] though they also have unique funding challenges beyond existing constraints in cooperatives and other steward-ownership models.[159]

Overall, the key strength of steward-ownership is that stakeholder governance frameworks can also incorporate these innovations from different dimensions of the social enterprise movement. Combining these approaches would, at least, maximize the signaling effect distinguishing a social enterprise from a traditional company. A steward-owned company can operate

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156. This is, to some extent, a variation on shareholder primacy manifesting in shareholders who are also employees.

157. *See* Julie Menter & Curt Lyon, *Alternative Ownership Enterprises Challenge Conventional Models for Companies and Funds*, IMPACTALPHA (Jan. 22, 2024), https://impactalpha.com/alternative-ownership-enterprises-challenge-conventional-models-for-companies-and-funds/ [https://perma.cc/QAD7-5K6R].

158. In notable contrast to the media attention around Patagonia and purpose trusts, research shows that of the 32 companies in the United States that have adopted some form of a trust ownership, 22 are actually structured as employee ownership trusts. *See* Anne-Claire Broughton et al., *Employee Ownership Trusts, Perpetual Purpose Trusts, and Stewardship Trusts in the United* States, HARV. DATAVERSE (Nov. 7, 2022), https://dataverse.harvard.edu/file.xhtml?fileId=6697043&version=1.1 [https://perma.cc/S9FW-HUSR]. Clegg Auto, the first employee ownership trust in Utah, doubled its profits a year after its transition. *See* Zoe Schlag, *Clegg Auto Announces Doubled Profits a Year After Its Transition to Employee Ownership*, COMMON TRUST (Aug. 2023), https://www.common-trust.com/blog/clegg-autos-employee-ownership-trust-benefits-for-employees [https://perma.cc/M4T2-C4AM].

159. For employee-shareholders, there are trade-offs to owning equity stakes in lieu of immediate cash flow from salaries, exacerbated by the potential lack of a secondary market (i.e. no one to buy their shares at a meaningful price). In other words, employees may prefer cash compensation but might not receive it. *See* Dana Muir, *Groundings of Voice in Employee Rights*, 36 VAND. J. TRANSNAT'L L. 485, 494 (2003) (explaining how an employee might have "no interest in ownership, perhaps because current consumption needs negate any voluntary trade-off between current and deferred compensation"). A variation of this concern likely exists in all businesses but would be particularly challenging in the rigidity of an employee ownership trust, because employee-shareholders can only sell to other employee-shareholders to preserve the business structure. *See, e.g.*, Poonkulali Thangavelu, *Equity vs. Salary in Tech: What's the Difference?*, INVESTOPEDIA (Nov. 3, 2022), https://www.investopedia.com/articles/personal-finance/041515/equity-vs-salary-what-you-need-know.asp [https://perma.cc/8VWL-J2U2] (explaining the employee trade-offs to receiving cash or stock compensation at a startup company).

under trust or foundation ownership as well as incorporate the underlying entity as a PBC or L3C, obtain B Corp certification, partner with pioneering impact investors, implement corporate governance innovations, and include nonprofit, cooperative, or employee ownership structures.[160]

III. PATAGONIA'S NEW STRUCTURE AND IMPLICATIONS

Steward-ownership is the most effective way to give non-shareholder stakeholders direct oversight and governance capabilities—legitimizing a social enterprise's claim that it pursues non-financial missions and mitigating the negative externalities of shareholder profit maximization embedded in corporate law. This Note examines Patagonia's new business structure as a case study for the effectiveness and risks of steward-ownership.

Since its inception, Patagonia has been a leader in incorporating non-financial missions into its business, with a focus on environmental causes.[161] Founder Yvon Chouinard's decision to transform the company's business structure, therefore, is unsurprising and preserves the company's social impact leadership. The latest transaction allows stakeholders to sustain Patagonia's social mission through a steward-ownership model.[162] Under the guidance of the trust, Patagonia's profits will be directed

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160. Furthermore, the growing solidarity economy movement—centered on a "new economic system rooted in economic democracy, social solidarity, and environmental sustainability"—explores alternative business practices that may lay even further outside the traditional confines of capitalism than social enterprises and steward-ownership. *See* Renee Hatcher, *Solidarity Economy Lawyering*, 8 TENN. J. RACE, GENDER & SOC. JUST. 23, 25 (2019). These include a focus on worker self-directed nonprofits, cooperatives, and other "collective experiments that seek to build alternative mechanisms for both economic justice and social liberation." *See id.* at 26. The search for impactful organizational and modern political economy structures will continue to evolve as practitioners and the public alike reevaluate the role of business in society. *See, e.g.*, Elizabeth Schmidt, *New Legal Structures for Social Enterprises: Designed for One Role but Playing Another*, 43 VT. L. REV. 675, 678 (2019) (describing the shifting focus "from shareholder maximization toward a more holistic and community-minded view of the role of business in society."). Steward-ownership models retain the flexibility to integrate new innovations at the company level while creating a mechanism for stakeholder governance through trust ownership. *See* Chouinard, *supra* note 6 (describing Patagonia's new ownership structure in addition to being a "certified B Corp and California benefit corporation.").

161. *See* Jamie Ding, *Patagonia Made Him a Billionaire. Now He's Giving It Away to Save the Climate*, L.A. TIMES (Sept. 14, 2022), https://www.latimes.com/business/story/2022-09-14/patagonia-founder-yvon-chouinard-donating-shares-history [https://perma.cc/8D99-BFLH].

162. *See* Purpose Foundation, *supra* note 119.

to the new nonprofit and used for the non-financial mission of combating climate change.[163] While Patagonia's steward-ownership framework is a definitive improvement over existing social enterprise business structures in terms of stakeholder governance, it also shows how the model introduces new operational, legal, and political concerns.

A. PATAGONIA AS A CASE STUDY FOR STEWARD-OWNERSHIP

1. *Background and Context*

Patagonia has a long and unique history of corporate activism dating back to its founding, ranging from donating a share of its revenue to charity to spearheading the use of sustainable materials and renewable energy.[164] In the past several years, the company has become more involved in politics and advocacy, leading voting access initiatives and filing lawsuits against then-President Donald Trump's plans to reduce national monuments.[165] Patagonia also positioned itself as a thought leader in the world of social enterprise, publishing guides for other social entrepreneurs

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163. *See* Gelles, *supra* note 1.

164. Chouinard began selling outdoor gear in 1957, and Patagonia was officially founded in 1973. *See* Ding, *supra* note 161. By 1985, the company was donating ten percent of its profit to conservation groups, which was later updated and amended to one percent of all revenue. *See id.* In 1989, the company joined REI, North Face, and Kelty to create the Conservation Alliance, a membership group that collects dues to distribute to grassroots environmental organizations. *See id.* The company has also been involved with non-environmental social issues, donating money to Planned Parenthood in 1990. *See id.* Patagonia's activism continued into the 1990s. *See id.* In 1996, Patagonia began exclusively using 100% organic cotton, and in 1998 the company was the first commercial customer in California to commit to purchasing 100% renewable wind energy. *See id.* In 2002, Chouinard helped found 1% for the Planet, a nonprofit that encourages businesses to donate one percent of their revenue to charity. *See id.* In 2011, the company again captured national attention by placing an ad in the *New York Times* reading "Don't Buy This Jacket" and highlighting its Common Threads Initiative that allows consumers to buy or trade used Patagonia apparel. *See id.* The company began making Fair Trade Certified clothing in 2014 and donated 100% of global Black Friday sales in 2016. *See id.*

165. In 2017, the company sued then-President Donald Trump for his plans to reduce national monuments. *See id.* In 2018, the company endorsed Senate candidates for the first time and helped launch "Time to Vote," encouraging companies to give employees time to vote on Election Day. *See id.* The company also donated $10 million to climate change, representing the taxes Patagonia did not have to pay as a result of the Trump administration's corporate tax breaks. *See id.* In the past few years, the company also removed all of its social media advertisements from Facebook and Instagram, citing insufficient protocols to prevent the spread of misinformation and propaganda, and donated $1 million to fighting restrictive voting laws in Georgia. *See id.*

to replicate their earlier process and structure.[166] The company's track record of social and environmental activism strengthened the company's image[167] and contributed to its financial success,[168] with a valuation of $3 billion driven by annual sales of $1 billion and profits of $100 million.[169]

Because Patagonia is a privately held company, details on its shift to steward-ownership are primarily limited to interviews with *The New York Times*, online disclosures, and public comments. According to the initial *New York Times* article announcing the change, Patagonia itself will continue to operate as a private for-profit public benefit corporation based in Ventura, California.[170] All of the company's voting stock, two percent of total shares, was transferred from the Chouinard family to the newly-established Patagonia Purpose Trust, overseen by "members of the family and their closest advisers."[171] The Patagonia Purpose Trust intends "to ensure that Patagonia makes good on its commitment to run a socially responsible business and give away its profits."[172] The remaining 98% of the shares, the common shares of the company, were donated to the Holdfast Collective, a newly established nonprofit organization that will receive all the company's profits and use the capital to combat climate change.[173] As a 501(c)(4), the Holdfast Collective can also make unlimited political contributions and has distributed over $71 million to more

166. *See generally* Abigail Barnes et al., *A Legislative Guide to Benefit Corporations*, PATAGONIA, https://www.patagonia.com/on/demandware.static/-/Library-Sites-PatagoniaShared/default/dwa1f599e3/PDF-US/Legislative-Guide-B-Corps_Final.pdf [https://perma.cc/VWK5-MMEH].

167. *See* Allyson Chiu, *5 Things to Know about Patagonia's Unusual History of Activism*, WASH. POST. (Sept. 15, 2022), https://www.washingtonpost.com/climate-solutions/2022/09/15/patagonia-chouinard-environmental-activism-climate/ [https://perma.cc/6RVY-SFE8] (describing Patagonia's long history of supporting environmental and social causes).

168. *See* Dalessandro, *supra* note 9, at 308–09 (describing Patagonia's financial and social impact success). In 2023, Patagonia was ranked "the most reputable brand" in the United States, and its success is often cited by marketing, sustainability, and business professionals. *See, e.g.*, Doug Sundheim, *How Patagonia Became the Most Reputable Brand in the United States*, FORBES (Dec. 12, 2023), https://www.forbes.com/sites/dougsundheim/2023/12/12/how-patagonia-became-the-most-reputable-brand-in-the-united-states/?sh=12bf7d7f1473 [https://perma.cc/DS8L-KA5G].

169. *See* Gelles, *supra* note 1.

170. *Id.*

171. *Id.* Though David Gelles writes that "the Chouinards, who controlled Patagonia until last month, no longer own the company," if the family plays a substantial role in the trust, this could be considered a form of ownership. *Id.*

172. *Id.*

173. *Id.*

than 70 environmental groups and political organizations since September 2022.[174]

2. *Patagonia and Steward-Ownership*

Patagonia's structure reflects the principles of steward-ownership.[175] In a recent article, Chouinard and Patagonia's Director of Philosophy Vincent Stanley discussed how the company's new structure has been prevalent in northern Europe "for more than a century," citing examples such as Ikea and Rolex.[176] A separate interview by Stanley revealed that discussions about Patagonia's structure began 15 years ago, though trust ownership was not possible at the time "because legally a trust had to benefit human beings. But those laws have changed and a purpose trust is now possible—and feasible."[177] When considering the transaction, Stanley cited the importance of preserving existing values while operating without discontinuity or new ownership.[178] The separation of voting rights and economic incentives is a fundamental premise of steward-ownership, in which the board of the trust comprises stakeholders not solely incentivized to maximize profits.[179] Details remain unclear, however, regarding the exact composition of Patagonia's trustees as well as its principles for succession, both of which must be carefully tailored to preserve the integrity of the trust.

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174. The Holdfast Collective created five separate "nonprofit groups"—the Holdfast Trust, Chalten Trust, Sojourner Trust, Wilder Trust and Tail Wind Trust—to make donations. *See* David Gelles & Kenneth P. Vogel, *Patagonia's Profits Are Funding Conservation—and Politics*, N.Y. TIMES (Jan. 30, 2024), https://www.nytimes.com/2024/01/30/climate/patagonia-holdfast-philanthropy.html [https://perma.cc/F4MK-8SVD]. There is no formal grant application process, and former Patagonia deputy general counsel Greg Curtis is the only full-time employee. *See id.* Each recipient is recommended by Curtis and approved by committees on the nonprofit groups, with the Chouinard family "personally approv[ing] many of the gifts." *Id.*

175. *See* Purpose Foundation, *supra* note 119.

176. *See* Vincent Stanley & Yvon Chouinard, *What's Next for Patagonia?*, STAN SOC. INNOVATION REV. (Dec. 5, 2023), https://ssir.org/books/excerpts/entry/whats_next_for_patagonia# [https://perma.cc/YB86-4LFH].

177. *See* Christopher Marquis, *Vincent Stanley from Patagonia on the Future of the Responsible Company*, FORBES (Sept. 12, 2023), https://www.forbes.com/sites/christophermarquis/2023/09/12/vincent-stanley-from-patagonia-on-the-future-of-the-responsible-company/?sh=2ea515d959ef [https://perma.cc/4NGY-4WDA]. The interview did not mention which state the purpose trust was established in. Unlike corporations, which are typically recorded and searchable with each state's Secretary of State, the recording of trusts is not available in public records in many states.

178. *See id.*

179. *See* Purpose Foundation, *supra* note 119.

A significant concern in the world of social enterprise is that managers of a company—even one with purpose embedded into its founding documents—fail to operate the company in a way that achieves its social mission, whether on their own or as a result of investor pressure.[180] Patagonia's steward-ownership model bridges the trust gap between investors, the public, and the company by unbundling equity ownership.[181] In contrast to traditional companies in which shareholders possess all of the voting and economic rights, Patagonia has separated the ability to direct the company's operations from the potential to share in the company's profits.[182] Depending on trustee composition and the process for trustee election and succession, investors and the public can have increased trust in Patagonia's pursuit of its social impact mission.[183] However, the novel business structure—in the pursuit of positive social and environmental impact—also produces a variety of new implications and considerations.

B. IMPLICATIONS

Trust models such as Patagonia's introduce a novel form of stakeholder governance by allowing non-shareholder stakeholders to hold voting rights and oversee the direction of the company. So long as those with decision-making power are aligned with the company's mission, steward-ownership is a powerful way for social enterprises to distinguish their commitment to social impact. While steward-ownership can increase the trust between relevant

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180. *See* Thomas, *supra* note 15, at 185 (describing how investor pressure or manager change of heart can lead to mission drift and the failure to pursue a social impact goal). Because Patagonia is privately held, there are few public details about whether Chouinard faced similar difficulties. Chouinard's children were uninterested in assuming operations, and Chouinard also expressed skepticism that the public market would preserve the company's social mission, limiting options for succession. *See* Gelles, *supra* note 1.

181. *See* Purpose Foundation, *supra* note 119. A purpose trust also shifts the focus of succession planning from traditional wealth transfer to the preservation of positive social impact. *See* Matthew Erskine, *Does The Future of the Responsible Company Lie with a Purpose Trust?*, FORBES (Nov. 13, 2023), https://www.forbes.com/sites/matthewerskine/2023/11/13/does-the-future-of-the-responsible-company-lie-with-a-purpose-trust/?sh=268b81e6160a [https://perma.cc/DTK9-WN5P].

182. *See* Purpose Foundation, *supra* note 119.

183. For example, the Organically Grown Company's stewardship committee comprises members from each of five different stakeholder groups: community allies such as nonprofit organizations and trade partners, customers, employees, farmers, and investors. *See* Gary, *supra* note 94, at 728–29. This allows non-financial stakeholders to have an explicit and direct say in the company's direction, rather than operate at the behest of the company's managers. *See id.*

parties, it also raises a host of new questions and implications. These concerns fall into three categories: (1) operational, (2) legal, and (3) political.

1. *Operational Concerns*

Steward-ownership operational concerns are vulnerabilities in the business structure that may compromise the social mission of the organization. Different operational partners—managers, trustees, and investors—present different complexities.

a. Manager-Related

Steward-ownership does not solve for manager-related operational concerns. First, steward-owned companies are still exposed to ordinary business risk,[184] and imprudent management can lead to losses and bankruptcy even without the added challenge of generating capital to serve a social mission.[185] Underlying the tension between profits and purpose is that the former is often a prerequisite for effectuating the latter, and a well-constructed business structure does not guarantee success, financial or otherwise.

Second, principal-agent problems still exist in steward-owned social enterprises. For example, managers may improperly manage costs, such as by paying disproportionately high salaries or overspending generally, whether inefficiently or nefariously, and reduce the profits remaining for the non-financial mission.[186] Boards and trusts can likely address the most egregious mismanagement offenses, but more subtle transgressions may be challenging to spot regardless of business structure.[187]

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184. *See, e.g.*, Thomas, *supra* note 14, at 158–60 (describing how financial performance at Etsy contributed to the eventual compromise of its social mission).

185. *See generally* Jonathan Brown, *When Social Enterprises Fail*, 62 VILL. L. REV. 27 (2017) (describing business operations challenges that also apply to social enterprises).

186. Dividends are the amount of profit or capital available to a company after addressing operational costs and any other costs required to run the business itself. Adam Hayes, *Dividends: Definition in Stocks and How Payments Work*, INVESTOPEDIA (Dec. 13, 2023), https://www.investopedia.com/terms/d/dividend.asp [https://perma.cc/3ZGL-9PV5].

187. Consider a related concern in which a manager, committed to a social or environmental cause, engages in business practices with negative externalities that are indirect or unrelated to their company's mission. Prudent managers and social enterprise stewards will recognize that impact is interconnected and likely expand their mission to include stakeholders indirectly affected. This hypothetical, however, raises the issue of stakeholder scope (i.e., whether stakeholders are all humans, living things, tangible things,

Lastly, steward-ownership models come with increased complexity and, in turn, increased transaction costs, potentially prohibiting smaller-scale social entrepreneurs from replicating the framework with the same level of sophistication as a company like Patagonia.[188] All of these manager-level operational concerns, however, also exist in every other business structure—steward-ownership solves for stakeholder governance but not all structural issues.

b. Trustee-Related

Trustee-related operational concerns, however, are unique to steward-owned companies. First, trustee composition is of paramount importance for proper steward-ownership. Trusts are difficult to dissolve by design, and misaligned trustees can create catastrophic consequences. Those who oversee the trust must adequately represent the affected stakeholders—these may include, but are not limited to: academic scholars, allies, consumers, employees, investors, managers, neighbors, suppliers, and other partners.[189] Investors, shareholders, and others with financial incentives could still participate in trust oversight, but this relationship must be carefully managed to avoid the pitfalls of

all things, or some other defined category—or future stakeholders that may not yet exist) and, therefore, whether all stakeholders are stakeholders of all companies. If so, and assuming negative externalities are inevitable in business operations, a related question emerges as to which companies are allowed to produce which negative externalities that affect which stakeholders. In addition, social enterprises likely want to provide as much support as possible to their social impact goals. Therefore, if (1) all stakeholders are stakeholders of all companies, (2) all business operations have some negative externalities, and (3) social enterprises aim to give the most money possible to their causes, social enterprises are effectively choosing the profit-maximizing behavior with the fewest negative consequences. Theoretically, social enterprises, then, are profit-maximizing and externality-minimizing entities, and barring improvements in impact measurement, the optimal balance will be largely subjective. Though thought experiments tend to push practical boundaries, the hypothetical highlights an inherent difficulty in pursuing profits and purpose—the fundamental tenet of social enterprises.

188. A similar problem exists in the world of impact investing and ESG analysis generally. *See* Florent Deixonne, *SRI, Data and Bias: Fund Managers' Bermuda Triangle*, SOCIETE GENERALE (July 16, 2019), https://www.securities-services.societegenerale.com/en/insights/views/news/sri-data-and-bias-fund-managerse-bermuda-triangle/ [https://perma.cc/79MA-NN24] (explaining some of the ESG reporting transaction cost scale advantages to large companies). Larger companies have more resources and are able to, in turn, score higher by providing more information to third party questionnaires. *See id.*

189. One notable consequence of maintaining a class of non-shareholder stakeholders, however, is exactly that they are not financially incentivized and will not benefit from increasing share prices and profitability, preventing a group affected by a social enterprise's business operations from sharing in the business' financial growth.

traditional shareholder primacy, such as by limiting the number of financially-incentivized stakeholders serving as trustees. Succession plans must also be carefully crafted to prevent power abuses by future generations, introducing additional democracy and fairness considerations.

Second, even if all stakeholders, trustees, and managers are broadly aligned, there is no guarantee they will all have the same interpretation of the mission and how to achieve it.[190] Artificial intelligence company OpenAI's recent high-profile dispute provides an early case study on the challenges and limitations to successful steward-ownership governance.[191] In November 2023, the company's board, which oversees OpenAI's nonprofit that houses a for-profit entity, voted to oust CEO Sam Altman, purportedly over the "hasty commercialization of OpenAI products"—ostensibly in defiance of the organization's original goal to develop ethical artificial intelligence products.[192] After pressure from investors, including software company Microsoft, which had committed $13 billion to OpenAI, and over 700 of the company's 770 employees committing to leave if Altman did not return, Altman was reinstated within days and OpenAI assembled a new board.[193] The OpenAI saga shows that management and overseers can be broadly mission-aligned but differ in methodology; Altman and the board may have both thought that they were advancing the organization's original mission, yet still found themselves in conflict.[194] OpenAI also demonstrated that trust oversight can be circumvented by employee exodus—the board would have been left with a shell organization to steward

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190. Proponents of traditional business such as Milton Friedman maintained that profit maximization serves an important incentive-alignment function. *See* Friedman, *supra* note 28.

191. Similar to steward-ownership models, OpenAI began as a nonprofit and later created a "capped profit" for-profit subsidiary to capitalize on its generative artificial intelligence technology. *See Our Structure*, OPENAI, https://openai.com/our-structure [https://perma.cc/W2G5-PG5G]. The profit cap itself does not appear to be disclosed and, given limited public information, it is unclear whether OpenAI's structure explicitly aligns with the principles of steward-ownership. *See id.*

192. Bobby Allen, *How OpenAI's Origins Explain the Sam Altman Drama*, NPR (Nov. 24, 2023), https://www.npr.org/2023/11/24/1215015362/chatgpt-openai-sam-altman-fired-explained [https://perma.cc/DKC4-SF44].

193. *See id.* (providing a timeline of Altman and OpenAI's conflict in November 2023).

194. *See* Jahnavi Nidumolu et al., *Elon Musk Sues OpenAI for Abandoning Original Mission for Profit*, REUTERS (Mar. 1, 2024), https://www.reuters.com/legal/elon-musk-sues-openai-ceo-sam-altman-breach-contract-2024-03-01/ [https://perma.cc/QP98-SY2P] (describing a former OpenAI co-founder's legal challenge to the company's current mission).

had Altman and the majority of the employees departed.[195] Furthermore, the OpenAI board was forced to act by the behavior of those it meant to oversee—co-opted, in a sense, through a form of "trustee capture" akin to regulatory capture.[196] The volatility of the OpenAI episode may chill investor interest in companies with alternative business structures.[197] Democratic and transparent trust leadership can mitigate some of these concerns, as trustees should always consist of more than one individual, represent all stakeholders, maintain a careful succession plan, and align with organizational leaders on process.

Lastly, trusts have governance risk analogous to that of the dual-class stock structures popular in large modern technology companies,[198] which allow founders to control most of the voting power and influence the company's direction to their liking.[199] Though for a different purpose, steward-ownership models with multiple share classes are functionally similar and therefore have similar governance concerns—particularly that those who decide

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195. One could argue that forcing those who are not mission-aligned to leave is a feature of steward-ownership, not a bug. The overarching question is whether this process would still create a net benefit to the organization's social mission.

196. Regulatory capture is defined broadly as interest groups asserting influence over the regulators meant to oversee their behavior. *See* William C. Hudson, *When Influence Encroaches: Statutory Advice in the Administrative State*, 26 WM. & MARY BILL OF RTS. J. 657, 669–70 (2018) ("Regulatory capture is defined here to mean: the result or process by which regulation, in law or application, through means induced by industry, is directed away from the public interest and towards the interests of the regulated industry."). Board capture or trustee capture is similar in that the OpenAI board in this case ultimately acquiesced to the company's managers and employees. *Cf*. Randall S. Thomas, *Explaining the International CEO Pay Gap: Board Capture or Market Driven?*, 57 VAND. L. REV. 1171, 1173–74 (2004) (explaining how company executives can use "board capture" to staff a friendly board and increase executive compensation). Usurping trustee oversight is antithetical to the premise of steward-ownership but may warrant further consideration as a self-regulating mechanism.

197. In the alternative, one could read the OpenAI leadership turmoil as a lesson in monetary interests ultimately superseding non-financial aims. It is also important to distinguish OpenAI, a potentially transformational yet fledgling company with little revenue and no profitability backed by significant outside investor interest, from Patagonia, an established and profitable company wholly owned by the founders and shielded from external pressure. Patagonia's ability to self-fund its growth and operations provides governance flexibility.

198. *See* Thomas, *supra* note 14, at 176–77 (discussing the share classes at Snap and how voting shares are concentrated with the founders despite the company being publicly traded).

199. *See generally* Matthew L. Strand, *Total Control: Corporate Governance, Firm Performance, and Possible Solutions for Reducing Downside Risk in Technology Companies with Dominant CEOs*, 105 IOWA L. REV. 1899 (2020) (describing corporate governance challenges with technology CEOs who control a majority of their company's voting rights).

on the company's direction may improperly exert their outsized influence.[200]

c. *Investor-Related*

The complexity of steward-ownership also introduces additional investor-level challenges. First, steward-ownership requires significant ownership concentration to approve the transfer of voting and economic rights,[201] and maintaining concentrated ownership can be challenging when partnering with traditional investors who expect voting equity shares in exchange for funding.[202] Founders can preserve their voting interests by issuing non-voting shares or buying back[203] outstanding shares prior to effectuating steward-ownership,[204] but aspiring steward-owned companies must be cognizant of these concentration requirements and funding concerns.[205]

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200. It is possible to view trustee-related operational concerns as problems with "benevolent dictatorship"—that the decisions of select individuals may sometimes align with stakeholder interests but that the stakeholders have no agency over the decisions themselves. *Cf.* Catherine A. Hardee, *Religious Exemptions and Harm to Others*, 106 KY. L.J. 751, 778–79 (2018) (describing examples of "benevolent paternalism" by business owners throughout history akin to this Note's definition of "benevolent dictatorship").

201. Non-shareholder stakeholders must also trust that these concentrated owners will eventually convert to steward-ownership and integrate non-shareholder input. In the case of Patagonia, news reports implied that the Chouinard family owned all the company's equity prior to the transaction. *See* Gelles, *supra* note 1 (describing how the Chouinards donated a total of 100% to consummate the trust ownership transaction, with 98% to the Holdfast Collective and two percent to the Patagonia Purpose Trust).

202. *See* Thomas, *supra* note 14, at 201 (explaining how the Golden Share model can exacerbate investor concerns by "entrenching managers who may turn out to be inept and enabling them to extract private benefits from the corporation, without any check from investors."). Though, as noted, some large modern technology companies have raised significant capital with a dual class stock structure. *Cf.* Strand, *supra* note 199 (noting governance concerns in large publicly traded technology companies with CEOs who hold significant voting rights).

203. *Cf.* Samantha Dorisca, *Black-Owned Whiskey Brand Uncle Nearest Reportedly on the Brink of Reaching Unicorn Status*, AFROTECH (Feb. 16, 2024), https://afrotech.com/uncle-nearest-on-the-brink-of-reaching-unicorn-status [https://perma.cc/6W9L-L7TB] (highlighting one founder's "right of first refusal on every investment" in her company as well as her plans to "buy . . . [her] investors out.").

204. The Purpose Foundation suggests several alternative forms of funding to preserve steward-ownership principles, including revenue-sharing arrangements and non-voting redeemable preferred equity. *See* Canon et al., *supra* note 20, at 29–34. Innovations in impact investing also attempt to solve for these concerns.

205. Denmark proves that steward-ownership can work at scale—steward-owned companies comprise 70% of the Danish stock market's value, driven by non-voting or low-voting initial public offerings (IPOs) that help preserve decision-making authority in foundations and trusts. *See id.* at 35.

Furthermore, steward-owned companies not only fail to solve the social enterprise struggle to attract traditional funding but also introduce additional complications, such as ownership restrictions and trustee influence, which may give investors pause. At the same time, traditional investors and the public market have often pressured socially responsible companies into mission drift, indicating a degree of incompatibility.[206] As a result, impact investing innovations and financing models in other countries are essential to unlocking the growth of social enterprises and steward-ownership. Cutting-edge social enterprises are increasingly raising capital in creative ways, including embedding steward-ownership commitments in funding arrangements and offering capped future profit sharing instead of voting rights.[207] European public markets support companies with a variety of different business entities and social missions, and a few publicly traded PBCs exist in the United States, including shoe company Allbirds, insurance company Lemonade, egg distributor Vital Farms, and eyewear company Warby Parker—though none are steward-owned.[208] Working alongside socially conscious impact investors, steward-ownership structures have the flexibility to find creative solutions to address funding concerns.

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206. Etsy is often cited as a case study in the pitfalls of social enterprise. Buoyed by its own commercial success, the company raised millions of dollars in venture capital funding and eventually became publicly traded via an IPO. *See* Thomas, *supra* note 14, at 158–60. A period of slowing growth led to investor pressure and a series of internal reforms in 2017. *See id.* at 159. While Etsy's financial performance rebounded, it greatly reduced many elements of its social mission in the process, eventually allowing its B Corp certification to lapse to avoid a requirement to structure as a benefit corporation. *See id.* at 159–60. Investor resistance to non-financial goals has also led to the ouster of company leadership elsewhere, including at French food products company Danone. *See, e.g.*, Vivienne Walt, *A Top CEO Was Ousted After Making His Company More Environmentally Conscious. Now He's Speaking Out*, TIME (Nov. 21, 2021), https://time.com/6121684/emmanuel-faber-danone-interview/ [https://perma.cc/J5ND-TKYH]. Furthermore, publicly traded companies advocating for social change often face immense investor pressure if equity prices decline, reflecting the principle of shareholder primacy entrenched in the public market. *See, e.g.*, Tomi Kilgore, *Walt Disney Stock Heads for 17-month Low as Florida, Streaming Troubles Weigh*, MARKETWATCH (Apr. 21, 2022), https://www.marketwatch.com/story/walt-disney-stock-heads-for-17-month-low-as-florida-streaming-troubles-weigh-2022-04-21 [https://perma.cc/KGC6-AFTA].

207. *See* Jessica Pothering, *Alt-capital and Alt-ownership Models for Circular Hygiene Startup Vyld*, IMPACTALPHA (Jan. 23, 2024), https://impactalpha.com/alt-capital-and-alt-ownership-models-for-circular-hygiene-startup-vyld/ [https://perma.cc/9UEC-V6YA].

208. *See Publicly Traded B Corps*, *supra* note 70.

2. *Legal Concerns*

Legal concerns regarding social enterprise business structures and steward-ownership primarily stem from tax implications and a lack of case law. Court decisions on social enterprise and steward-ownership are extremely limited, if not virtually nonexistent.[209] The state provisions that allow for steward-ownership in the United States are derived from trust statutes and the UTC,[210] and some of these applications may stretch interpretations of existing statutes and could be subject to scrutiny if challenged in court.[211] This issue can be extrapolated beyond steward-ownership models to L3Cs and PBCs as well, which are also relatively new business structures lacking legal precedent.[212] Though shareholder value maximization still underpins much of corporate law, some scholars have recently argued that the business judgment rule allows operators of Delaware-based corporations to consider social missions and other non-stockholder interests if those interests are included in the company's founding documents.[213]

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209. As one example, in 2017, the Court of Appeals of Oregon heard a case brought by policyholders against a public benefit corporation alleging violations of its articles of incorporation by accumulating excess profits and not using them to the benefit of policyholders. The court held that the plaintiffs did not have standing to bring the case. *See* Dischinger Orthodontics, PC v. Regence BlueCross BlueShield, 405 P.3d 164, 168–69 (Or. Ct. App. 2017). Other lawsuits regarding hybrid entities address similar topics and fail to reach the question of whether the legal language on pursuing non-financial missions is enforceable.

210. *See generally* Gary, *supra* note 94 (describing the trust law characteristics that enable current forms of steward-ownership in the United States).

211. For example, while the central features of the Golden Share model, the dual stock class structure and veto rights, likely do not present legal issues in Delaware, the transfer restrictions and redemption requirements are "of less certain enforceability, given the lack of case law that addresses the arguments." Thomas, *supra* note 14, at 176.

212. In public benefit corporations, legal scholars have speculated that the scope of accountability measures is relatively limited even for shareholders and directors who have standing. *See, e.g.*, Justin Blound & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY'S L.J. 617, 645 (2013) (explaining how shareholders can bring benefit enforcement proceedings). For hybrid entities in California, only shareholders, directors, and the corporation itself have standing to sue for "benefit enforcement proceedings." These proceedings can only produce injunctive relief and not money damages. *See* Linda J. Rosenthal, *Benefit Corporations: Who Enforces the Rules?*, FOR PURPOSE L. GRP. (Aug. 28, 2017), https://www.fplglaw.com/insights/benefit-corporations-who-enforces-the-rules/ [https://perma.cc/MNX9-NSVW]. A review of legal databases yields no results for relevant case law for the search term "benefit enforcement proceeding" as of July 2024.

213. *See* Thomas, *supra* note 14, at 166. The business community has also started to acknowledge the need for corporations to pursue goals beyond shareholder value maximization. *Cf., e.g.*, Maria Antonia Tigre & Cynthia Hanawalt, *The Fiduciary Duty of*

Second, a primary criticism of the Patagonia transaction other steward-owned businesses might also face is that the ownership transfer is a form of corporate tax avoidance.[214] Chouinard paid no gift tax on the transfer to the tax-exempt Holdfast Collective and $17.5 million in gift tax on the transfer to the Patagonia Purpose Trust, because it is not a charitable organization.[215] Critics argue that Chouinard would have paid significantly more taxes in an exit through sale—but a sale would have also resulted in Chouinard privately retaining the proceeds rather than the new nonprofit.[216] Still, some argue that taxes, which fund public services, provide greater social benefits in the government's hands than in Patagonia's nonprofit.[217]

3. *Political Concerns*

The final category of concerns relates to political risk, specifically with respect to political contributions and questions around the modern political economy and capitalism. When a steward trust is created to own a social enterprise, it may also incorporate a 501(c)(4) that can make unlimited political contributions.[218] For Patagonia, this 501(c)(4) is the Holdfast

Directors to Manage Climate Risk: An Expansion of Corporate Liability Through Litigation?, SABIN CTR.: CLIMATE L. (Feb. 15, 2023), https://blogs.law.columbia.edu/climatechange/2023/02/15/the-fiduciary-duty-of-directors-to-manage-climate-risk-an-expansion-of-corporate-liability-through-litigation/ [https://perma.cc/3P8B-JUQC] (describing a pending shareholder derivative suit against Shell Oil's Board of Directors, alleging that their failure to manage climate risks constituted a breach of United Kingdom Company Law).

214. *See, e.g.*, Jen Rose Smith, *How Patagonia Surfed Around Death and Taxes*, SIERRA CLUB (Sept. 18, 2022), https://www.sierraclub.org/sierra/how-patagonia-surfed-around-death-and-taxes [https://perma.cc/DC4F-RRTZ] (explaining how the Patagonia transaction adhered to tax laws but diverted funds from the government to the hands of powerful individuals, bringing a large and opaque cash infusion into politics).

215. *See* Gelles, *supra* note 1.

216. *See* Smith, *supra* note 214 (explaining how the Chouniard family does not retain the value of the transaction for private use, with the implied tax savings funding additional charitable activity). In other words, the taxes Chouinard avoided would only have been paid if the family chose to personally financially benefit from the sale of the company.

217. *See, e.g.*, Devon Pendleton & Ben Steverman, *Patagonia Billionaire Who Gave Up Company Skirts $700 Million Tax Hit*, BLOOMBERG, https://www.bloomberg.com/news/articles/2022-09-15/patagonia-billionaire-who-gave-up-company-skirts-700-million-tax-hit#xj4y7vzkg [https://perma.cc/68MD-7BU6]. Another view is that this is not a traditional tax avoidance strategy motivated by personal financial gain, but rather an exercise of control over which public goods one's money will fund instead of allowing the government to make that decision through the collection of tax dollars. Whether allowing wealthy individuals to make this decision instead of the government is a positive or negative development is discussed *infra* Part III.B.iii.

218. Gelles, *supra* note 1.

Collective. While public reaction to Patagonia's new model was generally positive, support is likely contingent on political alignment.[219] For example, in 2021, Republican benefactor and businessman Barre Seid donated his entire company to a nonprofit organization that funds conservative causes,[220] drawing criticism from the other end of the political spectrum.[221] The political influence of steward-owned companies is not necessarily normatively bad, but the confluence of money and politics might further entrench the power of wealthy organizations. In another vein, donations by social enterprises like Patagonia could be considered a self-imposed tax, potentially signaling that existing corporate tax rates do not properly account for the cost of negative externalities in businesses today. Given the permissive nature of corporate political contributions in the United States,[222] the development of the social enterprise movement and steward-ownership is another way to express political preference and wield political power, further entangling the business and political spheres.[223]

Second, steward-ownership is an evolution of capitalist principles, which means that the structure may fail to address broader concerns about the political economy framework. Social enterprises and steward-ownership aim to reshape ideas about business, but the profit-seeking element means that the companies still operate with capitalist ideas.[224] A company like Patagonia is both a leading steward-owned social enterprise as well as a

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219. *See, e.g.*, Thomas Catenacci, *Major Outdoor Clothing Company Quietly Operating Liberal Dark Money Group Hit with FEC Complaint*, FOX BUS. (Feb. 22, 2024), https://www.foxbusiness.com/politics/major-outdoor-clothing-company-quietly-operating-liberal-dark-money-group-hit-fec-complaint [https://perma.cc/9UEY-W3SH] (demonstrating the conservative political characterization of Patagonia's new structure; a company spokesperson responds in the article to address the FEC complaint allegations as rooted in a filing error).

220. *See* Gelles & Vogel, *supra* note 174.

221. *See, e.g.*, Craig Kennedy, *The Media are Offside on Seid*, PHILANTHROPY DAILY (Sept 6, 2022), https://philanthropydaily.com/the-media-is-offside-on-seid/ [https://perma.cc/XFN8-Q8Z4] (critiquing the liberal political criticisms of Seid's donation).

222. *See generally* Citizens United v. FEC, 558 U.S. 310 (2010) (landmark corporate and election law case expanding corporations' ability to make independent expenditures for political campaigns).

223. Furthermore, a political science perspective may interpret the political involvement of private actors as the result of disaffection with political gridlock and the lack of policymaking through traditional means.

224. *Cf.* Larry Fink, *The Power of Capitalism*, BLACKROCK (2022), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter [https://perma.cc/8J2W-722S] (CEO of one of the world's largest financial institutions explaining his perspective of the role of capitalism in society).

company with a groundbreaking marketing strategy that creates a competitive advantage by leveraging structural innovation in social enterprise business structures.[225] The inherent tension between profit and purpose underpins many of the challenges in steward-ownership, and the normative value of these implications is contingent on subjective evaluations of the modern political economy.[226] Nonetheless, innovators in the space should keep these larger considerations in mind as related critiques may pose future political risk.[227]

C. STRENGTH OF THE STEWARD-OWNERSHIP MODEL

Given the longstanding authority of shareholder capitalism in the United States, all organizational structures have shortcomings for the purposes of reducing the negative externalities of business. The primary advantage of the steward-ownership model is that the structure creates a strong form of stakeholder governance while still maintaining the flexibility to incorporate new innovations in business structures and other dimensions of social impact. A hybrid entity with novel governance procedures, an innovative nonprofit rooted in solidarity economy principles, and cooperatives and employee ownership trusts can all be embedded in steward-ownership structures. Steward-ownership models give agency to stakeholders who have long been harmed by the negative externalities of traditional stakeholder capitalism without recourse. Stakeholder governance prevents companies from making business decisions without considering the repercussions for society and the natural world. Limiting the negative effects of businesses today helps create a more sustainable tomorrow.

There are many valid critiques and outstanding questions with respect to steward-ownership, including a variety of operational considerations, some unique to the structure and some not, and philosophical considerations rooted in the social enterprise

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225. *See, e.g.*, Poonkulali Thangavelu, *The Success of Patagonia's Marketing Strategy*, INVESTOPEDIA (Dec. 2, 2022), https://www.investopedia.com/articles/personal-finance/070715/success-patagonias-marketing-strategy.asp [https://perma.cc/CW73-2ADK].

226. Climate change is a global challenge that governments of all economic and political frameworks seem to struggle to address.

227. Some economists argue that the modern political economy is at an inflection point, driven by societal dissatisfaction with traditional shareholder capitalism. *See, e.g.*, Martin Sandbu, *Economic Thinking Is at a Crucial Inflection Point*, FIN. TIMES (June 12, 2022), https://www.ft.com/content/4575b986-ef11-478d-a7e2-0451ae71b0e1 [https://perma.cc/438J-E8KD].

movement's tension between profit and purpose. Steward-ownership, however, still solves for the lack of stakeholder governance in existing social enterprise business structures, utilizing a trust overseen by non-shareholder stakeholders to assure all parties of a commitment to social good in addition to sustainable business operations. Steward-ownership models address a key challenge to the fundamental goal of social enterprises: to make business a force for positive societal impact.

Conclusion

As the world continues to look for ways to address its most pressing issues, including climate change and economic inequity, innovations such as steward-ownership provide creative solutions from the world of social enterprises. Patagonia's model is the latest high-profile example of business structure innovation for positive social and environmental change. Steward-ownership creates stakeholder governance by giving non-shareholder stakeholders direct company oversight through a trust, increasing confidence that a company will pursue its non-financial goals. With a new model, however, also comes new challenges, and steward-ownership practitioners should continue to monitor the structure's operational, legal, and political implications while remaining open-minded to innovations on other dimensions of social impact beyond business structures. Nonetheless, steward-ownership and Patagonia represent the latest frontier in the world of social enterprise—increasing public interest in alternative business structures and providing a stronger legal tool for socially conscious companies to achieve their larger missions.