

NOTES

FIXING INTERNATIONAL LABOR LAW: CORPORATE SOCIAL RESPONSIBILITY, A MEANS OR AN END?

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[I]f you want to change government, you have to aim at changing corporations, and if you want to change corporations, you first have to change the consumers.

Yvon Chouinard, Founder of Patagonia

I. TITANS OF INDUSTRY: A BEGINNING

Andrew Carnegie. John D. Rockefeller. Andrew W. Mellon. Cornelius Vanderbilt. All names associated with philanthropy, research, and education. But who were they, really, during their time? Magnates, monopolists, and robber barons. They are the founders of big business and corporate America. Even so, we remember them fondly because of the legacy they left behind: the realization that money is empowerment, that those who possess more wealth than they can spend should aspire to do good with it. Men like these paved the way for modern philanthropists such as Bill Gates¹ and Warren Buffett:² the two richest Americans, and, not so coincidentally, two of the biggest advocates of philanthropy.

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1. As of 2013, Bill Gates has been reported to have already personally donated roughly \$28 billion. Neil Tweedie, *Bill Gates Interview: I Have No Use For Money. This Is God's Work*, TELEGRAPH (Jan. 18, 2013, 9:38 PM), <http://www.telegraph.co.uk/technology/bill-gates/9812672/Bill-Gates-interview-I-have-no-use-for-money.-This-is-Gods-work.html>. Bill Gates' personal net worth today is estimated to be roughly \$79.2 billion. *Bill Gates*, FORBES, <http://www.forbes.com/profile/bill-gates/> (last visited Feb. 14, 2015).

2. Warren Buffet has pledged to give away more than 99% of his wealth to philanthropy during his "lifetime or at death." Warren Buffet, *My Philanthropic Pledge*, CNN MONEY (June 16, 2010, 8:06 AM), http://money.cnn.com/2010/06/15/news/newsmakers/Warren_Buffett_Pledge_Letter.fortune/. Warren Buffet appears to be making good on his promise—he donated \$3.1 billion to nonprofits in 2012. Maria Di Mento, *Philanthropy 50, No. 1: Warren Buffet*, CHRON PHILANTHROPY (Feb. 10, 2013), <http://philanthropy.com/article/No-1-Warren-Buffett/137111>. Forbes estimates Buffet's net

Still, America was determined never to leave such unbridled capitalism unchecked. With the passage of regulations like the Sherman Act and Clayton Act, America may have expressed the opinion that big business is more likely to hurt society than produce generous philanthropists. Child labor and horrific working conditions—these are the hallmarks of American capitalism.

Today, much of American manufacturing has moved offshore, but big business' image has not improved by much. Stories of labor law violations persist, but rather than taking place in our own backyard, they have shifted to other countries including, but not limited to, China, Bangladesh, and Cambodia. Because these violations occur outside of America, regulation is easier said than done. International labor law reform has progressed, uncertainly and sluggishly. In the name of industrial development, foreign states are hesitant to enact stricter labor law legislation for fear of deterring business opportunities. Furthermore, American corporations have no immediately apparent financial motivation to unilaterally demand better labor conditions in their suppliers' factories and thereby increase production costs.³ In the face of such odds, is international labor law reform possible? Can the process be accelerated?

The International Labour Organization ("ILO") was established in 1919 with the goals of directly addressing child labor, forced labor, minimum wages, and other issues pertaining to work standards and what the ILO considers "decent work."⁴ In its pursuit of "social justice and

worth as of November 2014 to be roughly \$72.9 billion. *Warren Buffet*, FORBES, <http://www.forbes.com/profile/warren-buffet/> (last visited Feb. 14, 2015).

3. Says Nicholas Ashford, former chairman of the National Advisory Committee on Occupational Safety and Health, "But what's morally repugnant in one country is accepted business practices in another, and companies take advantage of that." *Human Costs*, *infra* note 32. The discussion in Part II on the topic of morality being local is also relevant here.

4. According to the ILO, work must be "decent work." Decent work is work that "respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration. It also provides an income allowing workers to support themselves and their families These fundamental rights also include respect for the physical and mental integrity of the worker in the exercise of his/her employment." Comm. on Econ., Soc. and Cultural Rts., THE RIGHT TO WORK: GENERAL COMMENT NO. 18, Nov. 7-25, 2005, U.N. DOC. EC/C.12/GC/18 (2006), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/403/13/PDF/G0640313.pdf?OpenElement>. See generally *Decent Work Agenda*, INT'L LAB. ORG., <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm> (last visited Feb. 17, 2014) (describing the ILO's concept of "decent work" and how it pursues the decent work goal).

internationally recognized human and labour rights,”⁵ the ILO promotes international cooperation through a tripartite governing structure under the rationale that creating an open dialogue among governments, employers, and employees would most effectively address labor issues.⁶ International labor law reform has undeniably seen progress in the last ninety years since the ILO’s inception, but whether the ILO’s focus on international cooperation is the most effective strategy available is questionable. The ILO does not impose sanctions, and while ILO conventions are considered international labor standards, these conventions create legal obligations only for each individual nation that has ratified them.⁷ The result of the ILO’s insistence on volunteering and international cooperation is that progress is painfully slow and sporadic. The United States is, sadly, a prime example. It initially ratified only fourteen of the 189 total ILO Conventions and only two of the ILO’s eight “fundamental” conventions.⁸ A third “fundamental” ILO convention was transmitted by then-President Clinton to the U.S. Senate in 1997 for ratification in 1998.⁹ Regarding the third convention, the United States Department of Labor (“US DOL”) stated matter-of-factly, “[t]he Senate has not yet considered this convention, however.”¹⁰ The United States’ hesitation to bind itself to international labor standards that conflict with its own is a common sentiment shared by other governments.¹¹ Such hesitation has severely handicapped the ILO’s ability to effectuate labor reform. A new framework is needed: one that incentivizes labor law reform through discussions of social or economic stability and increased job or financial security, without focusing on a collective moral imperative as the ultimate goal.

5. See *Mission and Objectives*, INT’L LAB. ORG., <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> (last visited Feb. 17, 2014).

6. *Id.*

7. ILO Adopts Charter for Fundamental Rights, ICTSD (Aug. 1, 1998), <http://www.ictsd.org/bridges-news/bridges/news/ilo-adopts-charter-for-fundamental-rights>; Conventions and Recommendations, ILO, <http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (last visited Mar. 3, 2015).

8. *International Labor Standards and the ILO Standards*, U.S. DEP’T LAB., <http://www.dol.gov/ilab/diplomacy/PC-ILO-page2.htm> (last visited Nov. 10, 2014).

9. *President Clinton Ratifies the New ILO Convention on the Worst Forms of Child Labor to Promote Core Labor Standards Around the World* (Dec. 2, 1999), available at http://www.state.gov/1997-2001-NOPDFS/issues/economic/991202_fswhouse_ilo.html.

10. *Id.*

11. U.S. COUNCIL FOR INT’L BUS., U.S. RATIFICATION OF ILO CORE LABOR STANDARDS (April 2007), available at http://www.uscib.org/docs/US_Ratification_of_ILO_Core_Conventions.pdf.

In this Note, I argue that international labor law reform is ultimately a rational compromise made by governments in consideration of the competing self-interests held by their constituencies: the corporations and the public. By increasing the number of benefit corporations and promoting socially responsible investing (“SRI”), consumers will have more opportunities to purchase ethically produced goods and support corporate social responsibility. Through this manner, when corporate and public interests align and contemporaneously signal an increased demand for corporate accountability, international labor law reform will become the rational choice.

II. LAW AND ECONOMICS: THE EVOLUTION OF CORPORATE SOCIAL RESPONSIBILITY

In the early 1900s, even as society began to acknowledge that unbridled capitalism created certain unfavorable externalities, scholars continued to question, and at times disregard, the value of corporate social responsibility (“CSR”).¹² According to Milton Friedman¹³ in a widely distributed commentary, “social responsibility, and the nonsense spoken in its name by influential and prestigious businessmen, does clearly harm the foundations of a free society.”¹⁴ While individuals possess a “social conscience” and thus owe certain responsibilities to society, Friedman

12. Corporate social responsibility is a term that loosely describes the process of corporations self-regulating their business activities and practices in order to comply with moral and ethical norms, beyond what is legally required of them. CSR seeks to address the fact that businesses often impact communities, society, and the environment in negative ways (one might call them necessary evils). Another similar and equally important concept is “corporate citizenship.” Much as an individual might have civic duties beyond merely paying taxes, so too businesses, as corporate citizens, have duties to society beyond merely paying taxes. *See generally* Donna J. Wood, *Corporate Social Performance Revisited*, 16 *ACAD. MGMT. REV.* 691 (1991), available at <http://www.jstor.org/stable/258977>; *Corporate Accountability*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/corporate-accountability.asp> (last visited Feb. 14, 2014); *Social Responsibility*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/socialresponsibility.asp> (last visited Feb. 14, 2014).

13. In 1976, Friedman received the Nobel Memorial Prize in Economic Sciences. *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1976*, NOBELPRIZE (2014), http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1976/. The Economist called him “the most influential economist of the second half of the 20th century . . . possibly of all of it.” *A Heavyweight Champ, at Five Foot Two*, *ECONOMIST* (Nov. 23, 2006), <http://www.economist.com/node/8313925> (noting that equally influential economist John Maynard Keynes passed away in 1946).

14. Milton Friedman, *The Social Responsibility of Business Is to Increase its Profits*, *N.Y. TIMES MAG.* (Sept. 13, 1970), available at <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>.

considered the corporation an “artificial person” capable of possessing only vague “artificial responsibilities.”¹⁵ The corporation’s artificial responsibilities were not equivalent to the individual’s social responsibilities; stated Friedman rather bluntly, “there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits.”¹⁶ A corporate executive who utilized corporate funds for socially responsible purposes was levying a self-imposed, unnecessary tax upon the corporation and its shareholders: taxation without representation.¹⁷ Friedman’s ultimate argument, then, was that social responsibility¹⁸ was better left to governmental interests and to the individual initiative. The government could allocate part of its budget to socially responsible purposes, because its representatives were elected by constituents who supported their social goals.¹⁹ It would be inequitable, however, to expect, demand, or require all corporations to be socially responsible. Shareholders were shareholders for the purpose of reaping profit from their investments and therefore should not be forced to give up profit they were entitled to for the sake of a vague corporate social responsibility.²⁰ Those shareholders who believed in social responsibility could donate to charitable organizations on their own accord.²¹

Friedman’s taxation without representation argument, however, forecloses several possibilities: shareholders assembling to vote in favor of corporate actions advancing the social welfare,²² electing individuals in favor of social responsibility onto the Board of Directors, or choosing to

15. *Id.*

16. *Id.*

17. *Id.*

18. I use the term “social responsibility” here, but others would prefer to refer to it as a social obligation. See, e.g., N. Craig Smith, *Corporate Social Responsibility: Whether or How?*, 45 CAL. MGMT. REV. 52 (2003).

19. Friedman, *supra* note 14.

20. *Id.*

21. *Id.* See also Richard A. Posner, *The Social Responsibility of Corporations*, BECKER-POSNER BLOG (July 24, 2005, 7:35 PM), <http://www.becker-posner-blog.com/2005/07/the-social-responsibility-of-corporations--posner%C3%A4%C3%B4s-comment.html>. “[O]ne person’s charity is another person’s devility: a shareholder who is opposed to abortion on religious grounds would be offended if his corporation contributed to Planned Parenthood.”

22. In any democracy or republic, some voters will get their way, and others will not. If we follow Friedman’s comparison of corporate shareholders to voters, I see no reason why corporate social responsibility is warranted only if every single shareholder supports it. The taxation without representation argument might hold true if no shareholder supported CSR, but this is likely not the case today. Given the realities of the contemporary corporate and investment scene, Friedman’s original commentary simply is not up to date forty years later.

invest only in corporations with a track record of being socially responsible. Recognizing that the pursuit of shareholder equity and social responsibility are not mutually exclusive in the minds of shareholders is essential for creating an environment in which international labor law reform is not only possible, but encouraged.

While Friedman focused on the normative question of why socially responsible and socially moral considerations have no place in business, Judge Richard A. Posner, renowned legal theorist and economist,²³ has expressed doubts that moral considerations have any bearing at all in this discussion. Because individuals in different ethnic, geographical, and economic communities may possess wildly different values and viewpoints, what one group considers a moral absolute is, at best, only relative: “morality is local.”²⁴ Hence, he warns against the pitfalls of academic moralism because it “has no prospect of improving human behavior.”²⁵ Simply knowing what the moral thing to do is insufficient—morality, by itself, is not a “real motive” or “real motivation” because “motive and motivation . . . come from *outside* morality.”²⁶ The implication, then, is that only non-moral considerations with tangible effects beyond merely feeling good or bad, such as financial gain or the threat of punishment, are universal motivators of human behavior.²⁷ Posner seems to say that it is easy to criticize corporations, which commit environmental or labor law violations as being immoral entities, but without either the carrot or the stick, there is little reason to believe corporations will ever change.

23. Richard Allen Posner is a judge for the United States Court of Appeal for the Seventh Circuit. He is a leader in the field of law and economics, and has been identified as the most cited legal scholar of the twentieth century. Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL. STUD. 409, 424 (2000), available at <http://www.jstor.org/stable/10.1086/468080>.

24. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 6 (1999). Because morality is local, “there are no *interesting* moral universals.” *Id.* That is, the only way to come up with a truly universal moral consensus is to fabricate a statement, such as “do not lie to everyone all the time” or “do not kill everyone indiscriminately,” which is so broad, so generalized, and so abstract that it offers nothing of value. *Id.* (emphasis added). Truly “interesting” morals such as “do not murder,” for example, are relative and non-universal. *Id.* We might idealize a world in which murder never occurs, but what is considered murder varies by each legal system, and in certain life-or-death and self-defense situations, murder might even be excused. *Id.*

25. *Id.* at 7.

26. *Id.* (emphasis added).

27. This begs the question: does the lack of a universal morality or universal ethic necessarily mean that morality can never be a “true motivation”?

Such criticisms of the so-called “cloak of social responsibility”²⁸ are topics heavily discussed and elaborated on by other authors. Ideally, CSR promotes socially beneficial objectives such as developing more educated labor pools for the future or increasing corporate transparency. However, it often provides only “a patchwork approach to improving the public good,” which eventually devolves into “greenwashing,” or simply searching for “the type of PR opportunity a business can capitalize on” to deceptively advertise its products as being “green.”²⁹ For example, Corporate Watch documented an instance in which a Fortune 500 corporate executive was purposefully photographed with the United Nations Secretary-General Kofi Annan in front of the UN flag for PR purposes, even though the corporation never made “any substantial effort” to adhere to the UN’s Global Compact principles.³⁰ Little surprise then, that CSR is often equated with hypocrisy. Many corporations voluntarily pledge to adhere to certain standards of behavior and labor standards, but when confronted with evidence of morally repugnant working conditions in factories located in developing countries, they resort to arguing that they already operate within the law of the countries in which they are located.³¹

Although the degree to which critics disapprove of corporate social responsibility varies (ranging from claiming that CSR should never be pursued by corporations, to recognizing a need for some form of CSR but finding that it is not currently effective and is only mere lip service),³² a common general criticism is that big businesses, as historical proponents of capitalism, free markets, and deregulation, over-zealously pursue profit with no regard for the exploitation of wage labor.³³ In response, a growing number of modern economists and legal-economic scholars are shying away from this view to better account for modern realities. Writes Posner, “[n]oneconomists tend to associate economics with money, capitalism, selfishness, a reductive and unrealistic conception of human motivation and behavior, a formidable mathematical apparatus, and a penchant for cynical,

28. Friedman, *supra* note 14.

29. Deborah Doane, *The Myth of CSR*, STAN. SOC. INNOVATION REV. 23 (Fall 2005), available at http://www.ssireview.org/pdf/2005FA_Feature_Doane.pdf.

30. Kenny Bruno, *The UN’s Global Compact, Corporate Accountability and the Johannesburg Earth Summit*, CORP WATCH (Jan. 24, 2005), www.corpwatch.org/article.php?id=1348.

31. Doane, *supra* note 29.

32. Compare, e.g., Friedman, *supra* note 14, with POSNER, *supra* note 24.

33. That corporations pursue profits, first and foremost, is perhaps a universal observation. Normatively speaking, whether this is what corporations *should* do, however, is up for debate.

pessimistic, and conservative conclusions The essence of economics is *none* of these things.”³⁴

Law and economics explicitly concede that corporate actors’ decisions are not necessarily purely profit-driven. In lieu of the overly generalized and simplified classical law and economics view, more neo-liberal law and economics approaches recognize that while wealth maximization is the penultimate goal, actors utilize cost-benefit analyses to choose the best available means to that end. Hence, corporate decisions do often entail considerations of social benefit, insofar as they affect the costs and benefits of certain business decisions.³⁵ What these motives and considerations actually are, and how they influence a corporation’s decisionmaking, however, are left to conjecture. Posner acknowledges their existence in the grand scheme of efficiency and profit maximization, but does not elaborate much further.

III. AAPL, FOXCONN, AND THE BATTLE FOR THE BOTTOM LINE

In January 2012, the New York Times published a report on labor conditions at Foxconn,³⁶ one of Apple’s biggest manufacturing partners.³⁷ The report revealed, among other things, that employees (some underage) typically worked twelve hours per day for six or seven days per week under horrific conditions.³⁸ The article documented several explosions in factories manufacturing iPads and reported that one particular supplier even directed

34. RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 35 (2001) (emphasis added).

35. *Id.* at 256 (stating that “[Individuals are not taken to be] hyper rational, emotionless, unsocial, supremely egoistic, omniscient, utterly selfish, nonstrategic men or women, operating in conditions of costless information acquisition and processing.”).

36. Charles Duhigg & David Barboza, *In China, Human Costs Are Built into an iPad*, N.Y. TIMES (Jan. 21, 2012), available at <http://www.nytimes.com/2012/01/26/business/economy-apples-ipad-and-the-human-costs-for-workers-in-china.html?src=xps&pagewanted=all> [hereinafter *Human Costs*].

37. Foxconn, or Hon Hai Precision Industry Co., Ltd., is an international electronics contract manufacturing company with factories in Asia (13 in China), South America, and Europe. These factories together assemble around 40% of all consumer electronic products sold in the world. See Charles Duhigg & Keith Bradsher, *How the U.S. Lost Out on iPhone Work*, N.Y. Times (January 21, 2012), available at <http://www.nytimes.com/2012/01/22/business/apple-america-and-a-squeezed-middle-class.html> [hereinafter *How the U.S. Lost*]; Mimi Lau, *Struggle for Foxconn Girl Who Wanted to Die*, S. CHINA MORNING POST (Dec. 15, 2010, 12:00 AM), <http://www.scmp.com/article/733389/struggle-foxconn-girl-who-wanted-die>. Mimi Lau.

38. *Human Costs*, *supra* note 36.

employees to use a poisonous chemical to clean iPhone screens.³⁹ The very next day, Apple CEO Tim Cook sent out a lengthy letter to all Apple employees, proudly proclaiming that “no one” in the technology industry had done as much as Apple had to improve working conditions and that the company was “attacking problems aggressively with the help of the world’s foremost authorities on safety, the environment, and fair labor.”⁴⁰ Suggesting otherwise was “patently false and offensive.”⁴¹ Two weeks later, Aurret van Heerden, president of the Fair Labor Association (“FLA”), echoed Cook’s earlier statements and publicly remarked, in stark contrast to the New York Times’ findings, that Foxconn factories were actually “first-class” and that working conditions there were “way, way above average of the norm.”⁴²

Fast forward seven months to September 2012: Apple (ticker: “AAPL”) shares briefly trade above \$700, giving it a market capitalization of over \$650 billion and making Apple the most valuable U.S. publicly traded company.⁴³ Consequently, Apple is the perfect case study for the interplay between CSR and law and economics. Every action Apple takes (or declines to take) has extraordinary repercussions, not only with respect to its coffers, but because Apple’s business decisions affects consumer markets and labor markets in every nation.

One of the most common criticisms of Apple is that it uses cheap labor to increase the profit margins on its products.⁴⁴ It is important to note, however, that in reality, the cost of labor is actually negligible when

39. *Id.*

40. Mark Gurman, *Tim Cook Responds to Claims of Factory Worker Mistreatment: “We Care About Every Worker in Our Supply Chain,”* 9TO5MAC (Jan. 26, 2012, 9:27 PM), <http://9to5mac.com/2012/01/26/tim-cook-responds-to-claims-of-factory-worker-mistreatment-we-care-about-every-worker-in-our-supply-chain/>.

41. *Id.*

42. Terril Yue Jones, *Apple iPad Plant Conditions Better Than the Norm: Agency*, REUTERS (Feb. 15, 2012, 1:20 PM), <http://www.reuters.com/article/2012/02/15/us-china-apple-idUSTRE81E1FQ20120215>.

43. David Goldman & Hibah Yousuf, *Apple Stock Tops \$700*, CNN MONEY (Sept. 18, 2012, 4:27 PM), <http://money.cnn.com/2012/09/18/investing/apple-stock-high/>. Throughout the fourth fiscal quarter of 2013, Apple stock traded between \$500 and \$550. From late 2012 to late 2013, Apple and Exxon Mobil have traded positions as the most valuable U.S. publicly traded companies several times. In early 2014, Apple announced and subsequently underwent a stock split. Apple retained its title throughout 2014.

44. *See, e.g., Apple, Foxconn Deal Could Spell the End of Cheap Chinese Labor*, HUFFINGTON POST (April 3, 2012), http://www.huffingtonpost.com/2012/04/03/apple-foxconn-deal-spell-end-cheap-chinese-labor_n_1401553.html.

compared to the expense of buying hundreds of different components produced by different manufacturers and then bringing these parts together at one final location to assemble the product.⁴⁵ In fact, Foxconn's amazing growth and expansion⁴⁶ over the last four decades is not attributed to cheap labor, but to its unparalleled flexibility and ability to source labor and components at unimaginable speeds with little notice.⁴⁷ For example, before deciding to contract with Chinese factories, Apple had considered manufacturing their iPhone products in the United States. Apple analysts forecast that it would take as long as nine months to locate nine thousand qualified industrial engineers to oversee and guide assembly-line workers in American factories.⁴⁸ Foxconn did it in two weeks.⁴⁹ Said Apple's former worldwide supply demand manager, "[Foxconn] could hire 3000 people overnight. What U.S. plant can find 3000 people overnight and convince them to live in dorms?"⁵⁰ Another undisclosed former Apple executive commented: "The entire supply chain is in China now. You need a thousand rubber gaskets? That's the factory next door. You need a million screws? That factory is a block away. You need that screw made a little bit different? It will take three hours."⁵¹

If the foremost criticism of Apple, or any other large corporation, is that it seeks to exploit cheap labor for profit, it would seem that criticisms of manufacturing decisions may be a little unfair and harsh. After all, inexpensive labor is not the only consideration, or anything more than even a nominal consideration. On the other hand, the reality is that decreasing labor costs, along with streamlining the supply chain and decreasing production times, are still all a set of tools that Chinese factories such as

45. *How the U.S. Lost*, *supra* note 37.

46. Foxconn's talent for leveraging economies of scale with its unique access to supply chains has established it as one of the biggest electronics manufacturers in the world, earning it contracts with many of the biggest names in the tech industry: Apple, Dell, and Amazon, to name a few. Eric Mack, *Just How Big is Foxconn?*, CNET (May 30, 2011 10:18 AM), http://news.cnet.com/8301-17938_105-20067246-1/just-how-big-is-foxconn/. As of 2012, Foxconn was the tenth largest employer in the world, with 1.2 million employees. Anna Leach, *Foxconn is World's 10th Biggest Employer: 1.2 Million on Payroll*, REGISTER (Mar. 20, 2012, 17:19), http://www.theregister.co.uk/2012/03/20/foxconn_tenth_biggest_employer/.

47. *How the U.S. Lost*, *supra* note 37.

48. *Id.*

49. *Id.*

50. David Murphy, *A Foxconn Breakdown: Its Strengths, Strangeness, and Scrutiny*, PCMAG (Jan. 22, 2010, 7:08 PM), <http://www.pcmag.com/article2/0,2817,2399186,00.asp>.

51. *Id.*

Foxconn utilize in conjunction to reach the same ultimate goal of increased profit margins.⁵²

To be fair, though its human rights record is far from spotless, Foxconn has displayed a willingness to implement labor law reform. For example, an outcry of criticism was leveled at Foxconn in 2010 when it was revealed that roughly fourteen employees had committed suicide at its various factories.⁵³ In response, Foxconn declared that it would increase salaries by two-thirds for about 85 percent of the employees at its Shenzhen factories, even though a raise of 30 percent had already been given to employees in that same factory just two months prior.⁵⁴ Defenders of Foxconn also quickly pointed out that the company's workplace suicide rate for 2010 (the worst year in its history of operation) was 1.5 per 100,000 employees, which was not only far lower than that of the Chinese population in general (22.2 deaths per 100,000 individuals) but was also lower than that of *all* fifty United States that year (22.6 per 100,000 in Wyoming, 9.2 in California, and 6.9 in New York).⁵⁵ Similarly, after the New York Times published its Foxconn reports in January 2012, Foxconn pledged to cut down on overtime by reducing work hours to a maximum of forty-nine hours per week, in conjunction with giving its employees a raise of 16-25 percent.⁵⁶ This trend of following every scandal and tragedy with labor reform seems to suggest that Foxconn is not motivated by a sense of benevolence and morality, but instead implements labor reform out of

52. See *infra* note 70 for a discussion of how journalists present labor law violations as the best evidence of the negative repercussions of the corporate pursuit of profit, even though labor costs are minimal when compared to the total cost of producing a good, because they know that the public will be deeply affected when confronted with evidence of human rights violations.

53. *Foxconn Worker Plunges to Death at China Plant: Report*, REUTERS (Nov. 5, 2010, 6:05 AM), <http://www.reuters.com/article/2010/11/05/us-china-foxconn-death-idUSTRE6A41M920101105>.

54. *Foxconn to Raise Wages Again at China Plant*, REUTERS (Oct. 1, 2010, 8:42 AM), <http://www.reuters.com/article/2010/10/01/us-foxconn-idUSTRE6902GD20101001>.

55. Nicholas Carlson, *Don't Mean to Be Rude, But Suicide Rate at Apple's iPad-Maker Foxconn Is Lower Than All 50 U.S. States*, BUSINESS INSIDER (May 26, 2010, 9:58 AM), <http://www.businessinsider.com/apple-and-dell-investigating-the-foxconn-working-conditions-2010-5>; *China's Suicide Rate Among Highest in World*, FREAKONOMICS (Sept. 9, 2011, 2:30 PM), <http://freakonomics.com/2011/09/09/chinas-suicide-rate-among-the-highest-in-the-world/>; *Suicides at Foxconn: Light and Death*, ECONOMIST (May 27, 2010), available at <http://www.economist.com/node/16231588>.

56. Poornima Gupta & Edwin Chan, *Apple, Foxconn Revamp China Work Conditions*, REUTERS (Mar. 29, 2012), <http://www.reuters.com/article/2012/03/29/us-apple-foxconn-idUSBRE82S19720120329>; Damon Poeter, *Foxconn, Apple to Share Chinese Factory Improvement Costs*, PCMAG (May 10, 2012, 9:36 PM), <http://www.pcmag.com/article2/0,2817,2404307,00.asp>.

necessity.⁵⁷ One could argue that this is nothing more than self-preservation—a fight to keep its largest client from jumping ship. However, it is sufficient to recognize that Foxconn does not seek to lower manufacturing costs only when bidding for contracts. Rather, Foxconn recognizes it cannot retain its largest client, Apple, without making concessions on the labor front, and that some measure of corporate social responsibility is thus a necessary step in its pursuit of profit. Posner’s argument that non-moral motives and motivations best influence actors, it seems, is quite persuasive. Absent market forces,⁵⁸ Foxconn and other Asian manufacturers have little incentive to remedy these violations. But when they begin to feel a pinch on their wallets, they are eager to change.

Will Foxconn’s strangle on corporate America continue into the future? One former member of the Monitoring International Labor Standards committee at the National Academy of Sciences predicted in 2012 that Apple is “not going to leave Foxconn and they’re not going to leave China. There’s a lot of rationalization.”⁵⁹ However, it may be a sign of changing times that Apple’s recently-unveiled iPhone 5c would be manufactured by Pegatron Corp (“Pegatron”). A much smaller manufacturer, Pegatron’s Q1 2013 revenues were only a *quarter* of Foxconn’s.⁶⁰ This dramatic manufacturing shift effectively broke the monopoly Foxconn once held over Apple.⁶¹ This may be a signal that Apple really does value social responsibility and is finally fed up with Foxconn’s missteps. On the other hand, Pegatron might simply be willing to contractually accept thinner margins than Foxconn, especially since labor reform has surely increased Foxconn’s costs over the past few years. Although we, as corporate outsiders, may never fully know why Apple is distancing itself from Foxconn, this choice deserves attention because it

57. See *supra* notes 22–25 and accompanying text (claiming that motive and motivation must come from something outside of morality).

58. Posner would remind us that morality and immorality are “local” concepts. POSNER, *supra* note 24. In fact, some defenders of these factories note that even though working conditions are abhorrent by American standards, the standard of lifestyle and pay provided by these factories are far superior to Chinese laborers’ other options. Thus, whether these conditions are even immoral is up for debate, but this intriguing discussion is unfortunately outside of the scope of this paper. I return to this thought at the end of this part, and in a brief discussion in footnote 65.

59. *Human Costs*, *supra* note 36.

60. Eva Dou, Apple Shifts Supply Chain Away from Foxconn to Pegatron, WALL ST. J. (May 29, 2013, 3:26 PM), <http://online.wsj.com/news/articles/SB10001424127887323855804578511122734340726>.

61. *Id.*

supports neo-liberal law and economics theories that argue that considerations of social responsibility can affect corporation's cost and benefit analyses.

Apple is not the only corporation beginning to distance itself from Foxconn. Since 2010, Hewlett-Packard ("HP"), also a former Foxconn client, has begun moving its manufacturing contracts to Quanta, a small manufacturer with working conditions much more amenable to the Western stomach.⁶² HP's products are manufactured in a plant in Chongqing, where HP has agreed to pay higher initial prices so that workers are afforded a better quality of life: better facilities and better dormitories.⁶³ But there are trade-offs: Quanta expressly prohibits overtime shifts, which means that Quanta employees actually earn less overall than their Foxconn counterparts.⁶⁴ Said one twenty-one year-old Quanta employee, "I'd like to work eighty hours a week."⁶⁵ He does not expect to leave this job, but is still worried because he now earns nearly a third less than what he earned at his last factory job.⁶⁶

IV. CONSTRUCTIVISM: AN INTRODUCTION TO THE INDIVIDUAL

As legal entities, corporations are entitled to certain legal rights and legal responsibilities. And yet, corporations cannot themselves actually possess values or follow norms; it is the employees—the people—who possess and follow those values and norms.⁶⁷ This assumption leads to an inescapable conclusion: if corporations cannot possess values or follow norms, they cannot have a moral compass, and consequently, corporate pursuits of moral obligations must be initiated and imposed by the individual. Thus, whenever corporate interests stand at odds with what society deems socially, morally, or ethically acceptable, it is the role and

62. Keith Bradsher & Charles Duhigg, *Signs of Changes Taking Hold in Electronics Factories in China*, N.Y. TIMES (Dec. 26, 2012), <http://www.nytimes.com/2012/12/27/business/signs-of-changes-taking-hold-in-electronics-factories-in-china.html?pagewanted=4&src=xps&pagewanted=all>.

63. *Id.*

64. *Id.*

65. *Id.* Is our moral abhorrence of the hours Chinese factory workers work a byproduct of a subconscious, imperialist superiority complex that completely misunderstands the Chinese reality? It is easy for us to sit in the comfort of our homes and declare that no man should have to work X number of hours a week, when in reality, many people want (or need) to work more hours. It is a thorny issue.

66. *Id.*

67. In making this claim, I find Friedman's views on the corporation as an "artificial person" most persuasive. See *supra* text accompanying note 12.

responsibility of the individual to operate as the primary check on corporations. Unfortunately, people, for all their beliefs, ethics, and values, are still consumers whose needs are catered to by corporations.⁶⁸ As a consumer,⁶⁹ the individual is compelled to maximize the utility of his or her dollar. At the same time, as a citizen in a functioning society, as a person with a sense of right and wrong, the individual is unnerved when confronted with evidence of moral wrong-doing.⁷⁰ It is the oft-conflicting balance between an individual as a consumer and as a person, and what motivates the individual to abandon one role in favor of the other, that is the focus of this section.

The constructivist theory allows us to better examine what motivates the individual, both as a citizen and as a consumer. Though there are many variants,⁷¹ constructivism is a broad approach that generally seeks to explain actors' behaviors by examining the shared culture, ideas, values, norms, and rules, which together, form a context in which the individual may affect, modify, or reinforce state behavior.⁷² Communities and groups

68. Philosophers, ethicists, and other scholars distinguish between morals and ethics. Generally speaking, morality focuses on the principles with respect to right or wrong as applied to the individual, while ethics refers to the aggregation of morals and how a particular social group defines right or wrong. For our purposes, the distinction is not particularly important, but I attempt to utilize the two terms consistently with their accepted uses throughout this note.

69. Business schools typically differentiate between customers and consumers: one purchases products and the other uses them, respectively. This distinction, for our purposes, is irrelevant, and I treat them as one and the same. Additionally, in recent years, use of the word "consumer" has also become unpopular, with the term being increasingly viewed as derogatory and implying that a person exists solely to "consume." True as such criticisms may be, they are similarly irrelevant to this note. I consciously choose to use the label "consumer" because it allows me to better distinguish between the individual's two roles of citizen and consumer.

70. As discussed earlier, journalists following human rights and labor law abuses abroad focus heavily on labor cost cutting, even though it is actually a very small portion of a corporation's overall cost of goods sold. Nonetheless, this makes sense because the individual, as a person and as a citizen, cares about rights and whether socially accepted moral norms are being followed, and journalists seek to target those emotions in their writing. The fact that journalism so heavily focuses on the rights of laborers abroad is a testament to the fact that the individual is the origin of, and the ultimate enforcer of, moral and ethical behavior.

71. Constructivists classify themselves as structure-oriented, norm-oriented, or rule-oriented constructivists, with each focusing on, respectively, how agents contextualize norms when rationally pursuing state interests, the cultural and social identities and interests of actors, and the rules of socially acceptable behavior constraining actors. DANIEL M. GREEN, *CONSTRUCTIVISM AND COMPARATIVE POLITICS* 65–69 (Daniel M. Green ed., 2002). Due to length restrictions and to prevent over-complicating my analysis, I refer to constructivists as a group, inclusive of these main three and other subcategories.

72. *Id.* at 67. See also MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* 1–4 (1996). See also *International Norm Dynamics*, *infra note 75*.

of individuals observe norms, or “shared expectations about appropriate behavior.” Thus, norms are inherently subjective and, unfortunately, can be violated.⁷³

Because norms are “shared expectations,” they are malleable. Constructivists therefore avoid making the claim that actors inherently know what they want and pursue those static goals. For example, although law and economics will flatly assume that corporations will always pursue profit, constructivists are more flexible and encourage conducting comparisons to “explore social change . . . by looking at shifts in prevailing rules.”⁷⁴ That is, actors’ preferences, actions, and interests constantly shift in relation to their own evolving values and beliefs and with respect to the attitudes and norms held by others around them.⁷⁵ Constructivist scholars employ a three stage framework to track the evolution of norms over time, which begins with norm emergence, a phase in which norm entrepreneurs, often motivated by nothing but their own personal ideational commitments, venture out to persuade others of their beliefs.⁷⁶ If others view these beliefs as legitimate or reputable, this belief is said to have reached the second stage, norm cascade, in which a particular belief becomes institutionalized or socialized as a communal value or a norm.⁷⁷ Finally, over time, a widely accepted norm may reach the third stage of internalization, become universally recognized, and result in conformity.⁷⁸ Because norms

73. Recall Posner’s claim that morality is local. POSNER, *supra* note 24. The fact that norms can be violated is particularly important; demand for low prices often motivates people to turn their backs on their personal values and other norms if the perceived financial benefit is high compared to the personal or social costs. This is discussed more in depth in my later discussion of how Wal-Mart has become successful even though its labor law violations are well known; many consumers simply cannot afford higher priced ethically-produced goods. See *infra* notes 102–22 and accompanying text.

74. GREEN, *supra* note 71, at 72.

75. Finnemore, *supra* note 72. Different constructivists argue about the significance of these social variables. Some consider social norms to have a causal effect, others see norms as more of a constraining force or as more of a backdrop in which an actor pursues his own rationalized self-interests. Here, I generalize among these theoretical variants and simply acknowledge that these norms are variables, subject to change, and that actors will reorient themselves in relation to that change, without taking into consideration the aforementioned debated degree of causality. See also Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 889–96 (1998), available at http://home.gwu.edu/~finnemor/articles/1998_norms_io.pdf [hereinafter *International Norm Dynamics*].

76. *International Norm Dynamics*, *supra* note 75, at 896–901.

77. *Id.* at 902–04.

78. *Id.* at 904–05. One of the best examples of this constructivist three-stage process is the Red Cross’ ability to bring the sufferings of war and its effect on civilians and soldiers to the public eye and to the state’s attention. Beginning with the extraordinary efforts of one individual, Clara Barton, the

gradually shift over time, this three-stage cycle is in constant effect as new norms arise and old norms fade away or become more firmly entrenched.⁷⁹

One common criticism of constructivism is that it is difficult to know what a norm truly is.⁸⁰ If a norm is defined as a shared expectation about appropriate behavior, a norm can be construed to mean almost anything. For example, how does one identify and measure the presence of a norm?⁸¹ To what degree must they be shared before they can be called a norm?⁸² And if there are so many norms, how does one determine the significance of each?⁸³ Though these are all valid questions which sadly lie outside the scope of this piece, they are worth keeping in mind as this Note moves on towards the next topic: how do consumers reconcile the desire to conform to socially acceptable norms with self-centered desires which society views less favorably?

V. BETWEEN A ROCK AND A HARD PLACE: THE CONSUMER

Whether or not the United Nations' Universal Declaration of Human Rights ("the UDHR") has truly been institutionalized is a question up for debate. However, so many countries have adopted the UDHR that it has undeniably attained some sort of norm status and it is helpful to treat the UDHR as such. This section thus begins with a brief look at Articles 4, 23, 24, and 25(1), of the UDHR, which are particularly relevant:⁸⁴

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

organization eventually established itself as a reputable organization with a legitimate cause, and today it is one of the premier humanitarian organizations. You would be hard-pressed to find another organization whose cause is more universally recognized and internationally welcomed. *Our History*, AM. RED CROSS, <http://www.redcross.org/about-us/history> (last visited Feb. 18, 2014).

79. *International Norm Dynamics*, *supra* note 75, at 895–96.

80. PAUL KOWERT & JEFFREY LEGRO, NORMS, IDENTITY AND THEIR LIMITS: A THEORETICAL REPRISAL, IN *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* 482–97 (Peter Katzenstein ed., 1996).

81. *Id.* at 483.

82. *Id.*

83. *Id.* at 487.

84. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://daccess-ods.un.org/TMP/1830405.5929184.html>.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Most people would agree that they value the rights to free choice of employment, fair working conditions, compensation reasonably commensurate with their level of provided labor, rest and leisure, and certain minimum standards of living.⁸⁵ That involuntary servitude is morally wrong, for example, is a rule the American public expects corporations to abide by and to internalize. Thus, the American individual reasonably expects that his next job will not lead to his enslavement. The

85. By “most people,” I mean most Americans. This distinction is important, because I seek to discuss how American norms and American ethics prompt us to act when presented with norms violations abroad and how we might choose to overlook these violations. Additionally, restricting these generalities to the American public permits us to avoid the issue of whether other countries would similarly treat these articles as norms. *See also supra* notes 78–80 and accompanying text. I parrot Posner yet again: “morality is local.” POSNER, *supra* note 24.

American public also generally accepts and believes that one has the right not to come into physical contact with poisonous chemicals in one's line of work,⁸⁶ and that someone with a college degree has a right to more than twenty-two dollars a day after overtime.⁸⁷ However, how do American consumers behave when human rights violations do not affect themselves personally, but rather those in a distant continent?⁸⁸ Will American consumers actively avoid products that they know are produced by laborers in working conditions they would never personally work in? Does a factory with a record of human rights or ethical norms violations affect the average American consumer, and if so, how?

Fortunately, consumer preferences are thoroughly studied and documented. Polls and surveys have consistently found that 60 percent of Americans exhibit some sort of preference for products made in the United States.⁸⁹ However, 20–30 percent of consumers either do not pay attention to where products are made or are unwilling to pay more for products made in the United States.⁹⁰ Most interestingly, in a 2012 New York Times poll, 8 percent of respondents erroneously believed that Apple products were manufactured entirely in the U.S. (the correct answer being China), and another 20 percent simply had no idea where they were made.⁹¹ This

86. See *Human Costs*, *supra* note 36 (referencing working conditions in China).

87. *Id.* This is precisely why it is important to distinguish here between American norms and norms held by those elsewhere. It may well be that Chinese laborers reasonably expect pay at such levels. Whether that should be expected, normatively speaking, is an entirely different question.

88. Human rights violations in Asian factories are well documented and may be even considered common knowledge. However, I do not make the claim that such knowledge is readily available to all communities; in fact, it is likely the case that many social groups are not aware of such news.

89. Jeffrey M. Jones, *Patriotism, Jobs Primary Motivations for 'Buying American,'* GALLUP (April 30, 2013), <http://www.gallup.com/poll/162110/patriotism-jobs-primary-motivations-buying-american.aspx> (finding that 64% of Americans are willing to pay more for US-made products, but 55% of Americans still make no special effort to buy U.S.-made, and 33% of Americans are unwilling to pay more for U.S.-made); *Made in America*, AYTM (July 3, 2012), <https://aytm.com/surveys/173334/stat/52b9b74d1b9d2f5d428029f051350395#charts/chart=pie,color=0> (finding that 80% of respondents believed it was "very important" or "somewhat important" that products be made in America, but that 19.5% agreed that they "don't really pay attention" to where products were made.); *National Pride Matters as Three in Five Americans More Likely to Purchase Product When Ad Emphasizes it is "Made in America,"* HARRIS INTERACTIVE (Oct. 8, 2010), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/580/Default.aspx> (finding in 2010 that 59% of respondents are "more likely to buy" a product that is advertised as made in America).

90. See *supra* note 89 and accompanying text.

91. Marjorie Connelly, *Poll Finds Consumer Confusion on Where Apple Devices Are Made*, N.Y. TIMES (Jan. 25, 2012), available at <http://www.nytimes.com/2012/01/26/business/poll-on-iphone-and-ipad-finds-consumer-confusion-on-apples-manufacturing.html?ref=business>.

stunning revelation is cause for concern. If nearly 30 percent of Americans cannot correctly identify where Apple, crowned the world's most valuable brand for three consecutive years,⁹² manufactures its products, one must question whether respondents who claim to buy U.S.-made products are actually doing so.⁹³ It is quite possible that consumers do not care nearly as much about where their products originate from as they think or claim that they do. By extension, consumers also might not value the obedience of social and ethical norms as much as they would like to think that they do.

One could argue that this result is not by choice. The consumer who decides to only purchase music players, cell phones, and other electronic devices manufactured entirely in the United States will never succeed, because such products do not exist.⁹⁴ Thus, perhaps it is not that consumers do not care; the problem is that consumers do not have the option of purchasing alternative products manufactured in better conditions. If a spectrum of products were to exist, maybe consumers would opt for products that they know are aligned with their personal values, morals, and relevant social and ethical norms.

92. Kurt Badenhausen, *Apple Dominates List of the World's Most Valuable Brands*, FORBES (Oct. 6, 2013, 11:56 AM), http://www.forbes.com/sites/kurtbadenhausen/2013/11/06/apple-dominates-list-of-the-worlds-most-valuable-brands/?commentId=comment_blogAndPostId/blog/comment/985-13148-4518.

93. See Michael Skapinker, *In Search of the Ethical Consumer*, BUS. DAY (Aug. 8, 2012), <http://www.bdlive.co.za/articles/2012/06/11/michael-skapinker-in-search-of-the-ethical-consumer;jsessionid=394458BA5E4F0B450970C1A50FBDDDB96.present2.bdfm> (finding that only about 10% of those consumers who claim to be "ethical shoppers" actually are).

94. Here, the assumption is that products manufactured and produced in the United States are less likely to have resulted in labor law and other human rights violations. It is certainly true that rights violations do exist in the United States, but my focus is on violations abroad and thus for comparative purposes I assume that, generally speaking, American-produced goods are "more" ethically produced. It is also true that there do exist certain technological devices manufactured entirely in the United States, even if the components have been sourced from abroad. These products are undeniably few and far between, however. Two products of note: Apple recently unveiled its newly designed Mac Pro computer, to be manufactured in Texas. Its starting price is a jaw-dropping \$2,999, something few consumers could possibly afford. Peter Burrows, *Apple's Cook Kicks Off 'Made in USA' Push with Mac Pro*, BLOOMBERG (Dec. 18, 2013, 9:01 PM), <http://www.bloomberg.com/news/2013-12-18/apple-s-cook-kicks-off-made-in-usa-push-with-mac-pro.html>. A second recent product of note is Google's Nexus Q: a spherical device manufactured in the United States, which streams music and video. The Nexus Q's base price was \$299, but even though it was meant to stream music and video, it possessed no screens or speakers of its own. Few people outside of the tech world have heard of this device, and for good reason: it was a spectacular failure. Google gave the few consumers who pre-ordered a Nexus Q one for free and discontinued the product. The Nexus Q has never been sold in retail stores and was dubbed by CNN as one of 2012's "top 10 tech fails." Doug Gross, *The Top 10 Tech 'Fails' of 2012*, CNN (Jan. 4, 2013, 5:21 PM), http://www.cnn.com/2012/12/28/tech/web/tech-fails-2012/index.html?hpt=hp_bn5. It is safe to say that electronics made in the United States are a rarity.

This argument tends to be supported by studies conducted on the sales of fair-trade food products. For example, in recent years, sales of free-range eggs in the United Kingdom and in Australia have grown by as much as 99 percent, while the sale of eggs from caged hens dropped by at least 50 percent (in particular, Australia introduced a law requiring all retailers to unambiguously label egg cartons as caged, free-range, or organic).⁹⁵ In fact, the more expensive free-range eggs, which typically command prices 25 percent higher than those of standard grade eggs, now account for roughly two-thirds of total egg sales in the UK.⁹⁶ While this may be a victory for proponents of ethically produced goods and services, there is one major caveat.⁹⁷ Although “more expensive” free-range eggs sales grew exponentially, the “most expensive” organic eggs sales slumped,⁹⁸ indicating that consumers do not necessarily feel a need to purchase the “most” ethical goods available. In this particular case, fair-trade goods may occupy the sweet spot in consumers’ minds. Fair-trade goods, such as free-range eggs, permit consumers to satisfy their natural desire to support ethical goods (hence the decline in sales of caged hens’ eggs, which are produced under less humane circumstances) without forcing them to sacrifice too much in the way of personal finances (thus the simultaneous decline in sales of organic eggs, which command the highest prices).

A similar trend can be identified in the shoe industry as well. TOMS, a for-profit shoe company founded in 2006, has gained much recognition⁹⁹

95. Smith, *supra* note 18; Elizabeth Byrne, *Labelling Sees Free-Range Egg Sales Soar*, AUSTRALIAN BROADCASTING CORP., <http://www.abc.net.au/news/2011-01-03/labelling-sees-free-range-egg-sales-soar/1892582> (last updated Jan. 3 2011, 10:16 AM); *Make Mine Free Range: Sales of Ethical Goods and Services Grow Despite The Recession*, MIRROR (Dec. 30, 2012, 4:00 PM), <http://www.mirror.co.uk/news/uk-.,news/make-mine-free-range-sales-1510456>.

96. Smith, *supra* note 18, at 18; *Free-Range Eggs Do Well in New Purchasing Survey*, POULTRY SITE (Mar. 2, 2010), <http://www.thepoultrysite.com/poultrynews/19645/freerange-eggs-do-well-in-new-purchasing-survey>.

97. See also Smith, *supra* note 18 (noting that at least some of the increase in preference for free-range eggs over the years should be attributed to the belief that free-range eggs are safer because they are less likely to contain salmonella).

98. Byrne, *supra* note 95.

99. TOMS has been recognized as a stellar example of a recent successful social entrepreneur by Forbes, Fast Company, and even the Obama Administration. See, e.g., John Carney, *Ivanka Trump Works the White House*, BUS. INSIDER (Mar. 7, 2009, 8:38 AM), <http://www.businessinsider.com/ivanka-trump-plays-social-butterfly-at-obama-economic-conference-2009-3>; Cathleen McGuigan, *Designed to Help: A Pair for You, a Pair for the Needy*, NEWSWEEK (Oct. 18, 2007, 8:00 PM), <http://www.newsweek.com/designed-help-pair-you-pair-needy-103349>; Laura Sherman, *Can Green Retailers Make Green?*, FORBES (July 24, 2008, 6:00 PM), http://www.forbes.com/2008/07/24/green-retail-shops-tech-paperplastic08-cx_ls_0724retail.html;

for its successful “One for One” model, in which the company donates a pair of shoes to a child in need for every pair of shoes purchased through retail.¹⁰⁰ As of June, 2013, TOMS has been able to donate ten million pairs of shoes.¹⁰¹ According to its founder Blake Mycoskie, TOMS’ costs are comparable to that of traditional shoemakers; TOMS simply spends what would otherwise be its advertising budget on philanthropy, and lets the promotion and publicity generated by such philanthropy serve as its advertising.¹⁰² This has proven to be so effective that TOMS recently branched out and created a similar program in the eyewear business; the proceeds from every pair of TOMS glasses sold are used to help purchase a pair of glasses for visually impaired children.¹⁰³ Though even the cheapest pair of TOMS shoes retail for forty dollars,¹⁰⁴ TOMS’ accomplishments indicate that, like in the egg industry, many consumers are willing to pay a higher price for ethically produced goods. Consumers can only make that ethical choice, however, if they are given the choice to begin with.

VI. WAL-MART: THE PRICE IS NOT RIGHT

Today, Wal-Mart is the largest American employer, with a workforce of roughly 2.2 million people worldwide, with 1.3 million of that workforce employed in the United States.¹⁰⁵ Wal-Mart’s story is intriguing for our purposes not only because of its size, but also because of its meteoric growth, achieved through its ability to aggressively expand and satisfy consumers’ desires for lower prices. And yet, despite a reputation for hurting local businesses and facing torrents of bad press and litigation

Danielle Sacks, *Most Innovative Companies – Retail*, FAST COMPANY (Feb. 12, 2010, 11:50 AM), <http://www.fastcompany.com/1548625/most-innovative-companies-retail>.

100. *Giving Report*, TOMS, http://www.toms.com/static/www/pdf/TOMS_Giving_Report_2013.pdf (last visited Dec. 15, 2013).

101. *Id.* at 14.

102. Sherman, *supra* note 99. Compare this with the practice of spending money on PR to merely create the impression of being “green.” Imagine if every dollar spent pretending to be socially responsible was actually used to promote social responsibility. This TOMS case study seems to imply that companies would at the very least not be worse off, if not better off.

103. *Giving Report*, *supra* note 100, at 16–22.

104. *See generally Classics*, TOMS, <http://www.toms.com/mens/shoes/classics/c?view=all> (last visited Jan. 21, 2015).

105. Alexander E.M. Hess, *The 10 Largest Employers in America*, USA TODAY (Aug. 22, 2013, 7:48 AM), <http://www.usatoday.com/story/money/business/2013/08/22/ten-largest-employers/2680249/>.

over wages and working conditions in the United States and factories abroad, there are no signs that Wal-Mart is slowing down.¹⁰⁶

One of Wal-Mart's most egregious labor law (and perhaps human rights) violations in the United States was a little-known Wal-Mart policy called the "lock-in."¹⁰⁷ Every night before store managers left, they would lock the stores.¹⁰⁸ A fairly standard procedure, perhaps, but for the fact that Wal-Mart employees continued to work inside the stores, stocking shelves throughout the night.¹⁰⁹ Because Wal-Mart stores were locked both from the inside and outside, employees were effectively locked in the store until their managers returned the next morning.¹¹⁰ According to Wal-Mart's vice president for communications, this policy protected not only the stores but also the employees themselves in high-crime areas.¹¹¹ Former store managers, however, were less optimistic and believed that the policy was simply to prevent overnight stockers and thieves from stealing items when managers were not there.¹¹² This policy created some disastrous situations. In one instance, an overnight stocker died in an accident when paramedics could not enter the store; employees inside could not open the locked doors

106. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554-57, 2560-61 (2011) (denying class-action certification to up to 1.6 million women alleging discrimination by Wal-Mart, but expressly not ruling on whether the plaintiffs were victims of discrimination and simultaneously permitting individual claims to proceed in litigation); Parija Kavilanz, *China Accuses Wal-Mart of 'Deceptive Prices,'* CNN (Jan. 26, 2011, 3:37 PM), http://money.cnn.com/2011/01/26/news/international/walmart_china_fines/ (reporting that The National Development and Reform Commission of China formally accused Wal-Mart of price gouging through advertising false discounts on goods sold in stores by inflating original prices on products to make discounts on those goods seem better than they actually were); Dina Spector, *18 Facts About Wal-Mart Wal-Mart That Will Blow Your Mind*, BUS. INSIDER (Nov. 15, 2012, 9:03 AM), <http://www.businessinsider.com/crazy-facts-about-walmart-2012-11?op=1> (finding that in 2000, Wal-Mart was sued 4,851 times, or once every two hours); *Walmart Campaign*, INT'L LAB. RTS F., <http://www.laborrights.org/creating-a-sweatfree-world/wal-mart-campaign> (last visited Dec. 14, 2013) (detailing various minimum wage, health care, bathroom breaks, and other labor violations in Wal-Mart factories abroad); *Wal-Mart Wal-Mart and its Temp Agencies Violate Federal, Illinois Labor Law*, UNITED FOOD & COM. WORKERS INT'L UNION (Oct. 22, 2012), <http://www.ufcw.org/2012/10/22/walmart-and-its-temp-agencies-violate-federal-illinois-labor-law/> (detailing a class action suit alleging Chicago temporary workers were not paid even minimum wage).

107. Steven Greenhouse, *Workers Assail Night Lock-Ins by Wal-Mart*, N.Y. TIMES (Jan. 18, 2004), available at <http://www.nytimes.com/2004/01/18/us/workers-assail-night-lock-ins-by-wal-mart.html?pagewanted=all&src=pm>.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

and nobody could reach a manager with a key.¹¹³ Even in stores that left the fire escapes unlocked, employees refused to use these emergency exits even in cases of severe injury, claiming they had been repeatedly told that using the fire escapes or emergency exits would automatically lead to their termination.¹¹⁴

If Wal-Mart were a country, its revenues would place it near the GDP of the 25th largest economy in the world;¹¹⁵ Wal-Mart alone imported twenty-seven billion dollars' worth of products from China in 2006.¹¹⁶ It is this massive size that provides Wal-Mart with the bargaining power to negotiate lower prices for its consumers. For example, Wal-Mart has been associated with the demise of Rubbermaid, a household name in storage and trash containers.¹¹⁷ In the 1990s, Rubbermaid began selling more and more of its products directly to retailers such as Wal-Mart. When an increase in raw material costs forced Rubbermaid to increase its prices, Wal-Mart refused to accept the higher price. It simply dropped Rubbermaid products from its stores and gave Rubbermaid's former shelf space to cheaper competitors. Losing Wal-Mart as a client impacted Rubbermaid so negatively that it never recovered and was promptly sold to a competitor.¹¹⁸

Fearful of ending up like Rubbermaid, manufacturers have no choice but to cave in to Wal-Mart's demands, even if it means skirting or

113. *Id.*

114. *Id.*

115. Vincent Trivett, *25 US Mega Corporations: Where They Rank if They Were Countries*, BUS. INSIDER (Jun. 27, 2011, 11:27 AM), <http://www.businessinsider.com/25-corporations-bigger-than-countries-2011-6>. See also Wal-Mart Stores, Inc., Annual Report (Form 10-K), (Mar. 26, 2013), <http://www.sec.gov/Archives/edgar/data/104169/000010416913000011/wmt10-k.htm> (explaining that Wal-Mart's total revenues in 2013 totaled \$469.2 billion); *Gross Domestic Product 2013*, WORLD BANK (Dec. 16, 2014), <http://databank.worldbank.org/data/download/GDP.pdf> (finding that Belgium, ranked 26th, had a GDP of \$508 billion in 2013 and Venezuela, ranked 27th, had a GDP of \$438 billion).

116. Robert E. Scott, *The Wal-Mart Effect*, ECON. POL'Y INST. (June 25, 2007), <http://www.epi.org/publication/ib235/>. I unfortunately could not locate a more recent value, but it is safe to say this number has increased in the past half-decade.

117. Jim Hopkins, *Wal-Mart's Influence Grows*, USA TODAY (Jan. 29, 2003, 9:09 AM), http://usatoday30.usatoday.com/money/industries/retail/2003-01-28-walmartnation_x.htm; Alan Lowhorn, *Special Report on 'Is Wal-Mart Good for America?' on PBS Frontline, Nov. 16, 2004*, INST. FOR RURAL JOURNALISM & COMMUNITY ISSUES <http://www.uky.edu/CommInfoStudies/IRJCI/reports/reportswalmart.htm> (last visited Dec. 12, 2013).

118. See *id.* Today, products are still sold under the Rubbermaid brand because when Rubbermaid was acquired by Newell in 1999, Newell took the name Newell Rubbermaid to take advantage of the popularity of the Rubbermaid brand. *Id.*

disobeying labor laws entirely.¹¹⁹ Commented the owner of a manufacturing company, “You give [Walmart] your price . . . If they don’t like it, they give you theirs . . . Your price is going to be whittled down like you never thought possible . . . If you’re doing things legally, you can’t.”¹²⁰ Wal-Mart is such a big retailer that no manufacturer can afford not to sell to Wal-Mart when other lower priced competitors are eagerly waiting to replace them. Therefore, it should come as no surprise that labor violations have been documented at so many of Wal-Mart’s factories in China, Indonesia, and Bangladesh, to name a few. According to Wal-Mart’s suppliers, cutting costs is the name of the game.¹²¹ For example, the International Labor Rights Forum has found that workers are routinely forced to work sixteen to eighteen hours a day, not only without overtime, but also at rates up to 30 percent below their country’s legal minimum wage.¹²² Workers have no right to form unions and even need tickets and permission just to take timed bathroom breaks.¹²³ Nevertheless, for budget-minded consumers, Wal-Mart’s low prices cause the decision to shop there a no-brainer. “You can’t beat the prices,” said one hotel cashier who makes only four hundred dollars a week, “I come here because it’s cheap.”¹²⁴

The sad reality is those consumers who purchase free-range eggs and TOMS shoes will do so because they can afford to care a little more about where their products come from and what types of businesses they are supporting. But there will always be people who cannot afford to pay the ethical premium that comes with goods produced under better labor conditions—200 million people to be exact. 200 million customers visit Wal-Mart stores every week, propping up an industry giant that has shown no intention of slowing down.¹²⁵

119. Charles Fishman, *The Wal-Mart You Don't Know*, FAST COMPANY (Dec. 1, 2003, 5:00 AM), <http://www.fastcompany.com/47593/wal-mart-you-dont-know> (stating that “[o]n basic products that don’t change, the price Wal-Mart will pay, and charge shoppers must drop year after year.”).

120. Abigail Goldman & Nancy Cleeland, *An Empire Built on Bargains Remakes the Working World*, L.A. TIMES (Nov. 23, 2003), <http://articles.latimes.com/2003/nov/23/business/fi-walmart23>.

121. *Wal-Mart Campaign*, *supra* note 106.

122. *Id.*

123. *Id.*

124. Goldman & Cleeland, *supra* note 120.

125. *CSR Profile of Wal-Mart Stores, Inc.*, CSR WIRE, <http://www.csrwire.com/members/12774-Wal-Mart-Stores-Inc-> (last visited Dec. 10, 2013).

VII. PROFITS AND NORMS: A RECONCILIATION

Although corporations can and often do consider ethical norms and the social good when conducting cost-benefit analyses, corporations are ultimately beholden to their shareholders, not to the people. And what do shareholders crave? Profit. Shareholder equity. Dividends. Revenues. To profit-minded shareholders, corporations are an investment, and shareholders seek a return on their investments. Therein lies the dilemma; law and economics theory predicts that corporations seek to maximize shareholder value, because that is precisely what the shareholders want. Corporations generally seek profit because their shareholders seek profit.

However, if corporations can be counted upon to act in the interests of their shareholders, then it follows logically that if shareholders send a message to corporations that profit should not be the sole objective and that certain labor rights should be the norm, corporations would follow the shareholders' lead.¹²⁶ Placed within the constructivist framework, it is clear how international labor law reform must be initiated.¹²⁷ Passionate individuals must first pave the way.¹²⁸ Whether this is accomplished through the work of non-governmental organizations, charitable organizations, or reporters, it is the citizen shareholder who must take the initiative. Corporations will not, on a whim, decide that labor reform is necessary. However, as many critics rightfully point out, CSR is often simply an effort to appease the public and create good PR.¹²⁹ Thus, it is critical that shareholders do more than simply bring attention to the labor law violations committed by big business—the shareholders must demand that the situation be rectified or preempted. Corporations answer to the consumer only to the extent that lost consumers mean lost profit. Thus, even though nonprofit organizations and watchdog groups can educate and condition, or socialize, society in favor of newer, stricter norms regarding labor law violations,¹³⁰ the only guaranteed result of their efforts is bad press. Corporations can easily respond to bad press with PR stunts and

126. See *supra* Part III. This is why Foxconn increases wages and lowers hours after every scandal. When the public, the shareholders, and Foxconn's corporate clients clamor for improvements in factory conditions, Foxconn can either oblige or lose business. Also, consider Friedman's argument that corporations that commit to CSR are imposing an unwarranted tax on shareholders. If shareholders demand corporate social accountability, then CSR cannot be considered taxation without representation.

127. See *supra* text accompanying notes 72–75.

128. See *International Norm Dynamics*, *supra* note 75, at 896–901.

129. See *supra* notes 26–29 and accompanying text.

130. See *International Norm Dynamics*, *supra* note 75, at 902–04.

other shameless forms of greenwashing. Therefore, it is the shareholder who can most effectively, most efficiently, and most quickly institutionalize new norms in the corporation. It is through the shareholder's will that any large corporation will ever internalize a new norm.¹³¹

VIII. INTERNATIONAL LABOR LAW REFORM: A RATIONAL CHOICE

Thus far, this Note has discussed labor law reform in the context of what corporations willingly impose upon themselves and has focused less on labor law reform in the context of international and domestic laws. American consumers, however, should not be content to relegate the duty of labor law reform to corporations and their shareholders. The nation-state, too, must internalize these norms in order to bring about true international labor law reform. How this process should come about has not been detailed thoroughly by either law and economics or constructivism, which necessitates discussion of one last framework—rational choice theory.

According to rational choice theory, a state will participate in some international movement (international labor law reform, for example) to the extent that the movement enables it to further maximize its benefits and minimize its costs.¹³² Simply put, if a state perceives international labor law reform as beneficial and international labor law violations as costly, it will make the *rational choice* to initiate labor law reform and cooperate in international labor law reform.

How can a state's preferences shift to create such an environment? While rational choice theory permits the possibility of the state making such a choice, the theory fails to explain why the state would prefer to make that choice. Rational choice theory does not delve into what any one state's preferences actually are; instead, it simply assumes that each state has a unique set of stable and transitive yet undisclosed preferences, with certain preferences taking priorities over others.¹³³ Thus, while rational choice theory predicts that states will prioritize international labor law

131. *Id.* at 904–05.

132. *Rational Choice Theory*, WIKIPEDIA, http://en.wikipedia.org/wiki/Rational_choice_theory (last visited Mar. 3, 2015).

133. *Id.* See also ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 18, 21 (2010).

reform if the correct set of preferences are in place, this theory does not explain what psychological, sociological, or premoral factors would successfully motivate a state to prioritize this reform.¹³⁴ More importantly, the theory's assumption that state preferences remain constant ignores the fact that social preferences and behaviors evolve over time. This necessitates the integration of constructivism into the rational choice framework because it allows us to better account for consumer behavior and helps us predict how a change in citizen and consumer behavior might shape a state's approach towards international labor law.¹³⁵

Although scholarly proponents of rational choice consider the nation state to be a singular actor, it would be more accurate to perceive it as an aggregation of its constituencies, with the two most important being corporations and the people.¹³⁶ Corporations are generally motivated by profit, whether by increasing sales, retaining big clients, or performing damage control over a recent boycott,¹³⁷ while citizens are motivated by moral norms to the extent that they believe they can financially afford to support moral causes.¹³⁸ Together, the constructivist and law and economics frameworks provide insight into what a state's preferences are and what choices a rational state actor will take if it aggregates the preferences of corporations and the people. If the public truly values labor law reform and institutionalizes that norm in corporations, states will naturally rank the rectification of labor law violations abroad higher among their preferences. Thus, the extent to which states will make a rational choice to push for international labor law reform and increase regulation is determined by the extent to which consumers are willing to pay for more expensive products and able to institutionalize a corporate willingness to self-regulate.

134. According to Guzman, the “interaction of interest groups is extremely complex . . . difficult, and *perhaps impossible*.” GUZMAN, *supra* note 133 (emphasis added). Thus he chooses to “retain[] the assumption of a unitary state.” *Id.* I, on the other hand, seek to use constructivism, law, and economics to provide insight into sub-state interactions and how they define state preferences.

135. *Id.*

136. Here, I consider NGOs and nonprofit groups to fall under the category of “the people.” Under my constructivist interpretation, these organizations represent the ethical norms established by society.

137. My earlier discussion of the dynamic relationship between Apple and Foxconn is particularly fitting here. *See supra* notes 34–62 and accompanying text.

138. My earlier discussion of the relationship between Wal-Mart and the consumer, and the popularity of ethically produced goods such as cage-free eggs and TOMS is also relevant here. *See supra* notes 91–100 and accompanying text.

IX. “B CORPORATIONS” FOR A BETTER FUTURE

In order for consumers to purchase ethically-made goods, they must first have the choice to do so.¹³⁹ Thankfully, a new trend is slowly sweeping the nation and changing the way corporations do business. In 2010, Maryland became the first state to pass “benefit corporation” legislation, which created a new class of corporations—the benefit corporation, or the B corporation.¹⁴⁰ Like traditional C corporations, B corporations exist to create shareholder value, but this value is not limited to profit.¹⁴¹ B corporations are directed to also create materially positive impacts on society or the environment. Thus, directors who serve on the boards of B corporations have duties not only to corporate *shareholders*, but also to other non-financial *stakeholders* such as their employees (even if they do not own company stock), the community, and the environment.¹⁴² B corporations are required to publish annual benefit reports to promote transparency and accountability, and shareholders even have rights of action against the corporation if the B corporation fails to fulfill its mission statement.¹⁴³

To understand how B corporations are radically changing the corporate landscape, it is important to understand the two key attributes of traditional C corporations that hamper CSR. The first is “shareholder primacy norm,” the theory that the corporation’s primary fiduciary duty is

139. My earlier discussion of sales of free-range egg and TOMS shoes, both of which are products commanding higher than average prices but have managed to increase year by year, is relevant here. *See supra* notes 91–100 and accompanying text.

140. *Maryland First State in Union to Pass Benefit Corporation Legislation*, CSRWIRE (Apr. 14, 2010, 10:57 AM), http://www.csrwire.com/press_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation. Andrew Kassoy, co-founder of B Lab, the nonprofit which helped draft this ground-breaking benefit corporation legislation, commented: “Milton Friedman would have loved this. . . . For the first time, we have a market-based solution supporting investors and entrepreneurs who want to make money and make a difference.” *Id.*

141. *Id.*

142. *What Are the Requirements?*, BENEFIT CORP. INFO. CENTER, <http://www.benefitcorp.net/business/become-a-benefit-corporation/what-are-the-requirements> (last visited Mar. 1, 2014).

143. *Id.* Further legislation or case law is necessary to clarify the duty of directors in a B corporation to the public. Directors and officers in traditional corporations are heavily protected by the business judgment rule and are given wide discretion in their roles as management. *See infra* notes 140–41 and accompanying text. However, directors of B corporations possess additional duties to non-financial stakeholders, a phenomenon not contemplated and accounted for by the current legal framework. How courts’ current application of the business judgment rule will be modified with regard to the benefit corporation remains to be seen.

to the stockholder.¹⁴⁴ Though directors and officers have duties to not defraud or be disloyal to the firm, their loyalty ultimately resides with the shareholder.¹⁴⁵ Thus, public demand for social accountability is very much at odds with what corporate directors and officers are legally bound to do, since corporate executives and officers have no legal duty to the environment or even to society in general—their “primary” duty is to create profit for the shareholders.¹⁴⁶ This tension is precisely why the practice of greenwashing has risen. Corporations want to create the impression of being socially responsible because the public demands it, but their legal duty requires them only to make (and save) money. Many corporations choose to use their marketing budgets to rebrand their business practices and products as socially responsible through good PR, appeasing consumers without actually making any socially responsible contributions.¹⁴⁷ This permits the corporation to avoid incurring higher costs associated with actually being green or selling ethically produced goods.

This problem is compounded by the second key attribute of the traditional C corporation: the “business judgment rule,” a judicially created principle that corporations should be granted wide discretion to make business decisions.¹⁴⁸ It protects management from ex-ante legal objections to business decisions—which, in hindsight, turn out to be less than

144. David Ronnegard & N. Craig Smith, *Corporate Social Responsibility and Legitimacy of the Shareholder Primacy Norm: A Rawlsian Analysis* (Jan. 2010), available at http://www.insead.edu/facultyresearch/centres/governance_initiative/documents/CSRandshareholderWP_CraigSmith.pdf.

145. RICHARD D. FREER & DOUGLAS K. MOLL, *CONCISE HORNBOOKS: PRINCIPLES OF BUSINESS ORGANIZATIONS* 253 (2013) [hereinafter *BUSINESS ORGANIZATIONS*].

146. One of the most well known decisions on this topic is *Dodge v. Ford Motor Co.*, 170 N.W. 668, 685 (Mich. 1919). See also *BUSINESS ORGANIZATIONS*, *supra* note 145, at 408–09. Henry Ford sought to end Ford Motor’s then standard policy of doling out special dividends to its shareholders, claiming that the money would be better spent re-investing in new plants, increasing wages of Ford employees, and lowering the price of the Ford Model T. *Id.* The Michigan Supreme Court famously held that as a corporation, Ford Motor existed to maximize shareholder wealth, and therefore Ford must continue with its policy of paying out dividends to its shareholders, instead of re-investing in corporate infrastructure. *Id.* This decision has been criticized; some scholars have suggested Ford was trying to squeeze out two major investors in Ford Motor, the Dodge brothers (who Ford correctly suspected were creating a rival car company, Dodge). Other scholars have even attributed this decision to communist paranoia. Regardless, this decision (and the underlying shareholder primacy norm) is still good law today.

147. See, e.g., Joshua Karliner, *A Brief History of Greenwash*, CORPWATCH (Mar. 22, 2001), <http://www.corpwatch.org/article.php?id=243>

148. *BUSINESS ORGANIZATIONS*, *supra* note 145, at 262–69.

favorable—and creates a strong presumption of legality for business decisions that can generally only be overcome by a showing of fraud, illegality, or reckless or intentional violation of some fiduciary duty.¹⁴⁹ In the context of this Note, for example, Apple’s business decision to work with Foxconn would be protected by the business judgment rule, even if there were other more socially conscious alternatives like Quanta available, because courts would simply assume that there were valid business reasons for choosing Foxconn over Quanta. Shareholders suing Apple over labor law violations committed by Apple’s manufacturers and suppliers would be able to overcome motions for summary judgment or motions to dismiss only if they were able to show that Apple somehow purposefully chose to violate applicable law (unlikely, since these violations are perpetrated by Apple’s suppliers and manufacturers, not by Apple employees themselves), or that Apple’s Board of Directors violated their fiduciary duties (also unlikely, since these directors owe no fiduciary duties to the Chinese laborers and, strictly speaking, owe no duty to consider the social impact caused by their foreign contractors business practices).

Incorporating as or converting to a B corporation solves many of the problems that plague corporations trying to maximize profit while maintaining socially responsible practices. Because directors and officers in B corporations are legally required to consider the social consequences of their business decisions, the incentive to greenwash is eliminated.¹⁵⁰ A director in a regular C corporation who spends too much money on socially responsible ventures could be in violation of the shareholder primacy norm.¹⁵¹ Because he has breached his fiduciary duty to the shareholders, the business judgment rule protection no longer applies, and he is liable in a court of law for his actions.¹⁵² Shareholders in B corporations, on the other hand, have no such claims against management because directors of B corporations who commit to corporate social responsibility are merely upholding their fiduciary duty to non-financial stakeholders. Conversely, whereas directors in regular C corporations can refuse to support corporate social responsibility under the protection of the business judgment rule, no such protection exists for directors in benefit corporations; failure to create

149. *Id.* at 264–65.

150. *See supra* notes 135–37 and accompanying text.

151. BUSINESS ORGANIZATIONS, *supra* note 145, at 146–48 (“There are limits, however, on the corporation’s largesse. These are for-profit enterprises, and, accordingly, they cannot give away everything. Charitable contributions must be reasonable.”).

152. *Id.* at 262–69.

a materially positive impact on society or the environment would be a fiduciary duty violation that would create liability for the directors.¹⁵³ Thus, B corporation legislation provides businesses with legal clarity as to directors' and officers' fiduciary duties to society.¹⁵⁴ It empowers directors to prioritize concerns regarding the public good by (1) shielding them from profit-seeking shareholders with potential plaintiffs' actions if the corporation funds unprofitable ventures in the name of corporate social responsibility and (2) forcing corporations to truly commit to incorporating corporate social responsibility into their business framework or else run the risk of becoming liable for breach of fiduciary duty claims.¹⁵⁵

This innovative new corporate structure has only been passed in roughly half of the states, but the movement is gaining momentum: benefit corporation legislation has already been introduced in more than half of the remaining states.¹⁵⁶ Because the B corporation is a new concept, it is constantly evolving. For example, in October 2014, Connecticut developed a new concept it termed the "preservation clause," which prevents a registered B corporation from later reverting into a traditional C corporation and thus abandoning its social responsibilities.¹⁵⁷

If the B corporation continues to gain acceptance, it will effectively shift the preferences of the entire United States towards international labor law reform. Wider adoption of B corporation legislation will show that the legislature supports corporate social responsibility, and an increase in the number of B corporations will show that consumers support corporate social responsibility as well. Social responsibility is not only a moral cause, but can also be profitable, and the demonstrated ability of benefit corporations to support fair labor practices and safe working conditions without sacrificing profitability would send a signal to states that morality and profitability are not mutually exclusive pursuits. Writes one executive, "[t]here is nothing wrong with making money, but there are less-than-

153. *Id.* at 149, 263.

154. What their liabilities are, however, is still uncertain. See *supra* note 136 for a discussion of current caselaw's application of the business judgment rule, which is now inadequate in states that have passed benefit corporation legislation.

155. BUSINESS ORGANIZATIONS *supra* note 145, at 149–51.

156. *Legislation, B CORP.*, <http://www.bcorporation.net/what-are-b-corps/legislation> (last visited Jan. 19, 2015). See also *State by State Legislative Status, BENEFIT CORP.*, <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited Jan. 19, 2015).

157. Christine Stuart, *20 Connecticut Social Entrepreneurs Convert Their Companies to Benefit Corporations*, CT NEWS JUNKIE (Oct. 1, 2014, 2:50 PM), http://www.ctnewsjunkie.com/archives/entry/social_entrepreneurs_celebrate_new_corporate_structure/.

scrupulous ways to make more of it.”¹⁵⁸ The adoption of benefit corporation legislation by more states each year and the rising number of them (despite the fact that being a B corporation bestows no tax or other monetary benefits over standard C corporations) is a strong indication of growing consumer demand for responsible commerce.

X. BETTER BUSINESS: A REAL THING

A number of successful, well known corporations today are radically changing the way business is done by operating as B corporations, proving that corporate social responsibility can be more than “a minor penance, used by giant companies to shape their public images, or to salve the consciences of their higher-ups.”¹⁵⁹ For example, Etsy is a popular online marketplace for homemade products with over 800,000 sellers in over 200 countries.¹⁶⁰ An even more well-known example is Ben & Jerry’s, whose

158. Deborah Sweeney, *Are Benefit Corporations the New Limited Liability Company?*, HUFFINGTON POST (Aug. 28, 2013, 5:02 PM), http://www.huffingtonpost.com/deborah-sweeney/are-benefit-corporations_b_3819590.html.

159. Seth Stevenson, *Patagonia's Founder Is America's Most Unlikely Business Guru*, WALL ST. J. (Apr. 26, 2012), <http://online.wsj.com/news/articles/SB10001424052702303513404577352221465986612>.

160. *Etsy*, B CORP., <http://www.bcorporation.net/community/etsy> (last visited Jan. 15, 2013); The Muse, *What Every Entrepreneur Can Learn From the Crafting Industry?*, FORBES (Dec. 9, 2011), <http://www.forbes.com/sites/dailymuse/2011/12/09/what-every-entrepreneur-can-learn-from-the-crafting-industry/>. A moment of distinction: Etsy is a “certified B corp” but not actually a *registered* B corporation. B-Lab is an independent nonprofit that audits companies and confers “B corp certification” on companies that willingly take upon legal requirements. Because this title is conferred by B-Lab and not state legislatures, the legal requirements are technically unenforceable by state law (contract law is another story). The requirements, however, in general, are similar. *See generally* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications and Benefit Corporation Statutes*, 2 *Am. U. Bus. L. Rev.* 21 (2012) (describing in more detail the differences between private certification as a B corp and public registration as a benefit corporation); Pooja Bahatia, *A New Kind of Corporate Charter for Public Benefit*, POPULAR RESISTANCE (Feb. 12, 2014), <http://www.popularresistance.org/a-new-kind-of-corporate-charter-for-public-benefit/> (discussing the difficulty C corps face in becoming legally registered benefit corporations and how many, like Etsy, choose B-Lab’s B corp certification as an intermediary step). How B-Lab’s certification affects the ability of a corporation to stay true to its social mission when compared to bona fide benefit corporations is a question worthy of further scholarly pursuit, but not one I pursue in detail here. I believe that this distinction may be similar to that of organic and free-range eggs. I discuss the B corporation as a next step in creating a market for goods produced at different “levels” of social responsibility (standard caged hens, free-range, and organic), but alternatively, one could also perceive this as a new emerging market for socially responsible corporations (standard C corporations, B-Lab certified B corporations, and legally registered B corporations).

famous ice cream is ubiquitous.¹⁶¹ But, one of the best success stories is Patagonia, which on January 3, 2012, became the first company in California to become a B corporation.¹⁶²

Patagonia was founded in 1973, by Yvon Chouinard, a prominent mountain climber, who, fed up with the quality of climbing equipment, decided to teach himself blacksmithing and began building his own mountaineering equipment.¹⁶³ As Chouinard also began to import clothing durable enough to withstand the elements, Patagonia slowly evolved from a store selling technical gear into an outdoor-clothing retailer that is now an internationally known fashion brand.¹⁶⁴ Most importantly, Chouinard never lost sight of his own personal commitment to the environment: he integrated his vision into Patagonia from the ground up, an approach that attracted much attention as the company's clothing gained popularity.¹⁶⁵ For example, in 1996 Patagonia became the first major clothing retailer to switch from using organic cotton to using recycled soda bottles when producing fleece jackets.¹⁶⁶ Since 1985, the company has been committed to donating 1 percent of total sales or 10 percent of its profit, whichever is

161. Ben and Jerry's, *Ben & Jerry's Joins the Growing B Corporation Movement*, CSRWIRE (Oct. 22, 2012, 8:00 AM), http://www.csrwire.com/press_releases/34773-Ben-Jerry-s-Joins-the-Growing-B-Corporation-Movement-. Like Etsy, Ben & Jerry's is a certified B corp as well, not a registered benefit corporation.

162. Stevenson, *supra* note 159. Patagonia is a legally registered benefit corporation, not just a certified B corporation. *See also* B Lab, *Patagonia Registers as First California Benefit Corporation*, CSRWIRE (Jan. 3, 2012, 12:30 PM), http://www.csrwire.com/press_releases/33565-Patagonia-Registers-as-First-California-Benefit-Corporation.

163. Stevenson, *supra* note 159. To be more accurate, Chouinard had begun selling climbing hardware for almost two decades by this time as part of a retailing partnership with his climber friends. *Id.* The name "Patagonia," however, was not coined until 1973. *Id.*

164. *Id.*

165. Patagonia has won multiple "Gear of the Year" awards from National Geographic and awards from OutdoorGearLab. It was also crowned "Eco Brand of the Year" in 2008. *See, e.g.*, Julia Brownley, *Honoring Patagonia Founder Yvon Chouinard, Recipient of the Los Padres Forest Watch Wilderness Legacy Award*, 113 Cong. Rec. (2013–2014), <http://www.gpo.gov/fdsys/pkg/CREC-2013-04-10/pdf/CREC-2013-04-10-extensions.pdf>; Chris McNamara, *Patagonia Leashless Jacket Review*, OUTDOORGearLAB (Aug. 22, 2013), <http://www.outdoorgearlab.com/Hardshell-Jacket-Reviews/Patagonia-Leashless-Jacket>; Sam, *Eco Brand of the Year*, HIGH SPORTS (Feb. 4, 2008), <http://www.highsports.co.uk/blog/eco-brand-of-the-year/>; Patrick, *North Face, Patagonia Win 'Gear of the Year' Awards*, WILDERNESS COUTURE (Oct. 6, 2010), <http://wildernesscouture.blogspot.com/2010/10/north-face-patagonia-win-gear-of-year.html>.

166. Amanda Little, *An Interview with Patagonia Founder Yvon Chouinard*, GRIST (Oct. 23, 2004), <http://grist.org/article/little-chouinard/>.

higher, to environmental causes.¹⁶⁷ Patagonia is also well known for its unique Black Friday “marketing,” in which instead of offering traditional discounts, Patagonia places advertisements urging consumers to bring their used and worn clothing into Patagonia stores to have them repaired in lieu of purchasing new clothes.¹⁶⁸

Patagonia’s trek has not been a smooth one. According to Chouinard, he had no credit in the early 1990s, and his accountant introduced him to “a mafia guy” who offered to lend him money at an interest rate of 28 percent.¹⁶⁹ At another point, Chouinard sought out the advice of famous business consultant Dr. Michael Kami, chief strategic planner for IBM and Xerox during their super-growth heydays.¹⁷⁰ Kami told Chouinard that Patagonia was worth roughly one hundred million dollars, and advised him that the best way to leave a positive environmental impact was to simply sell his clothing company and donate the proceeds.¹⁷¹

Even so, Patagonia’s business model (and norm entrepreneur Chouinard’s enthusiasm for corporate social accountability) has persevered, and Patagonia has flourished in the past few years. Patagonia owned thirty-nine stores in 2006,¹⁷² fifty-three in 2010,¹⁷³ and then eighty-eight in 2012.¹⁷⁴ Although it is unlikely that Patagonia will be able to

167. 1% for the Planet, PATAGONIA, <http://www.patagonia.com/us/patagonia.go?assetid=81218&ln=450> (last visited Jan. 19, 2015).

168. Gina-Marie Cheeseman, *Patagonia “Anti” Black Friday Campaign Urges Customers to Repair Worn Clothing*, TRIPLEPUNDIT (Nov. 28, 2013), <http://www.triplepundit.com/2013/11/patagonia-black-friday-campaign-urges-customers-repair-worn-clothing/>. Like TOMS, Patagonia’s marketing model is remarkable in that it is almost non-existent. Patagonia spends less than 1% of its sales on marketing and advertising. See YVON CHOUINARD, LET MY PEOPLE GO SURFING 157–58 (2005). 1% is a significantly low number. By comparison, a 2013 study conducted by Gartner found that the average company in 2012 spent over 10% of revenues on marketing. See *Key Findings from U.S. Digital Marketing Spending Survey, 2013*, GARTNER (Mar. 6, 2013), <http://www.gartner.com/technology/research/digital-marketing/digital-marketing-spend-report.jsp>. The study also projected that marketing budgets would increase by at least 6% in 2013. See *id.* Socially responsible companies in general seem to require, or choose to spend, a significantly lower amount of money on marketing and advertising.

169. Stevenson, *supra* note 159.

170. *Id.*

171. *Id.*

172. Steve Hamm, *A Passion for the Planet*, BLOOMBERG (Aug. 20, 2006), <http://www.businessweek.com/stories/2006-08-20/a-passion-for-the-planet>.

173. Jim Little, *53 and Growing – Announcing the Opening of Our Latest Patagonia Stores*, PATAGONIA (Jan. 31, 2011), <http://www.thecleanestline.com/2011/01/53-and-growing-1.html>.

174. Hugo Martin, *Outdoor Retailer Patagonia Puts Environment Ahead of Sales Growth*, L.A. TIMES (May 24, 2012), available at <http://articles.latimes.com/2012/may/24/business/la-fi-patagonia-20120525>.

sustain this growth pace, it has demonstrated a clear ability to integrate social responsibility into a profitable business model, both before and after incorporating as a B corporation.¹⁷⁵ When asked to comment on his decision to file benefit corporation papers for Patagonia, Chouinard expressed worries that if Patagonia, a private company, was ever taken public, it would no longer be able to continue to fully commit to corporate social responsibility without being sued by shareholders: “Now I can say what our values are, and that forever the company must continue to donate 1% of sales.”¹⁷⁶ Chouinard’s comments illustrate precisely what the problem with corporate law is today: the combination of the shareholder primacy norm and the business judgment rule makes it difficult for a corporation to truly embrace corporate social responsibility without risking the wrath of the purely profit-driven shareholder.¹⁷⁷ Incorporating as a B corporation, however, allows norm entrepreneurs to signal to would-be investors that social responsibility is a necessary component of the way their companies do business, and to unashamedly contribute to socially responsible causes “with no threat of shareholders revolting if [they] sacrifice a bit of profit in the name of menschy communitarianism.”¹⁷⁸

XI. INVESTING IN THE FUTURE: SOCIALLY RESPONSIBLE INVESTING

Buoyed by socially conscious norm entrepreneurs with business acumen, B corporations are increasing in number and proving that integrating social responsibility within a for-profit framework can be a successful endeavor. To better comprehend how socially responsible business can bolster labor law reform, it is helpful to look at the advent of socially responsible investing (“SRI”).¹⁷⁹ Socially responsible investments

175. *Id.*

176. *Id.* Chouinard further explains his desire to further social goals: “Our mission statement says nothing about making a profit. In fact . . . I consider our bottom line to be the amount of good that the business has accomplished over the year.” CHOUINARD, *supra* note 168, at 160.

177. *See supra* notes 133–47 and accompanying text for a discussion of how the shareholder primacy norm and business judgment rule work together to prevent socially conscientious corporations from fully committing to CSR and actually perversely encourage corporations to pretend to be socially responsible.

178. Stevenson, *supra* note 159.

179. *See generally* Michael Chamberlain, *Socially Responsible Investing: What You Need To Know*, FORBES (Apr. 24, 2013, 3:31 PM), <http://www.forbes.com/sites/feeonlyplanner/2013/04/24/socially-responsible-investing-what-you-need-to-know/> (explaining that socially responsible investors “are looking to promote concepts and ideals

have existed for centuries, but SRI in its more modern context arose in the 1980s, when some pension funds, mutual funds, and other professionally managed collective investment schemes began a process of “negative screening.”¹⁸⁰ As access to stock exchanges and other securities increased, morally conscientious investors began to protest the practice of profiting from legal but otherwise morally or ethically objectionable goods and services such as tobacco, alcohol, firearms, and gambling. Thus, the first SRI mutual funds purposely excluded securities in so-called “sin stocks,” even if these stocks were extremely profitable. Over time, negative screening gave way to “positive screening,”¹⁸¹ a more proactive form of socially responsible investing, in which investment managers created portfolios composed of only ethical corporations that actively create and drive positive social impact.¹⁸² Every fund or index utilizes its own unique

they feel strongly about” through investment, shareholder advocacy, and community investing); Amy Domini, *Want to Make a Difference? Invest Responsibly*, HUFFINGTON POST (Mar. 15, 2011, 3:38 PM), http://www.huffingtonpost.com/amy-domini/want-to-make-a-difference_b_834756.html (noting that for socially responsible investors, “impact starts by changing the dialog. That’s what is accomplished by setting standards to what you buy.”); Chris Lott, Ritchie Lowry, & Reid Cooper, *Subject: Strategy—Socially Responsible Investing*, INVESTMENT FAQ (Mar. 23, 2001), <http://invest-faq.com/articles/strat-sri.html> (describing SRI as a strategy by investors to make sure that their investments are used in a manner that aligns with their personal ethical values).

180. See generally Melissa D. Berry, *History of Socially Responsible Investing in the U.S.*, THOMSON REUTERS (Aug. 9, 2013), <http://sustainability.thomsonreuters.com/2013/08/09/history-of-socially-responsible-investing-in-the-u-s/> (explaining that in the 1980s, “SRI proponents focused on screening investments in South Africa with the goal of pressuring the South African government to end apartheid.”); William Donovan, *A Short History of Socially Responsible Investing*, ABOUT.COM, <http://socialinvesting.about.com/od/introductiontosri/a/HistoryofSRI.htm> (last visited Mar. 1, 2014) (giving examples of a few of the funds: Dreyfus Third Century, Calvert Social Investment Fund Balance Portfolio, and Parnassus Fund); *History of Socially Responsible Investing*, SOC. EQUITY GRP., <http://www.socialequity.com/Socially-history.htm> (last visited Mar. 1, 2014) (noting that “ranks of socially concerned investors grew dramatically throughout the 1980s as millions of people, churches, universities, cities, and states focused investment strategies on pressuring the white minority government of South Africa to dismantle its racist system of apartheid.”).

181. The distinction between negative and positive screening is a thin one. It can be thought of as such: a fund or index based off positive screening will actively seek out companies that create actual social benefit whereas negative screening is a broader approach which omits investments that profit from morally objectionable goods and services but does not impose any level of CSR as a requirement for inclusion. See sources cited *supra* note 172.

182. Another recent development in the investment scene is “impact investing.” Like positive screening, it creates a pipeline of capital to businesses and funds that create positive social and environmental impacts. However, unlike positive screening, impact investing is typically directed at those who do not have access to conventional forms of financing. Thus, impact investors provide financing (often in the form of micro-finance or micro-credit) to anyone from unproven clean-tech startups to low-income entrepreneurs in third-world countries. Many impact investment funds exist, and platforms such as Kiva have become increasingly popular. The intersection of impact investing and

standards to evaluate which stocks and equities to invest in, but common criteria for selecting companies include promotion of gender equality, consumer protection, or environmentally sustainable development.¹⁸³

Today, socially responsible investing is no longer a phenomenon reserved only for the quirky investor. Although consumers commonly express a worry that SRI funds are less profitable than other mainstream investments, socially responsible investing has established itself as a credible and profitable investment strategy that rivals comparable investment. As shown below, indices tracking socially responsible companies have yielded impressive results, outperforming the S&P 500, the NASDAQ, and other moderate to low risk investments.¹⁸⁴

micro-finance is a fascinating new development in the world of SRI, but it is a relatively novel phenomenon that I am forced to relegate to a footnote because crowd-sourced micro-financing platforms such as Kiva often provide zero interest to the investors and do not even guarantee return of principal. This makes it less relevant to my framework, but is something I wanted to point out because it is an interesting phenomenon and should be monitored closely in upcoming years as this ecosystem matures. *See generally* Jessica Freireich & Katherine Fulton, *Investing for Social & Environmental Impact*, MONITOR INST. (Jan. 2009), http://www.monitorinstitute.com/downloads/what-we-think/impact-investing/Impact_Investing.pdf (providing a report on how to advance impact investing systematically with an “impact on urgent social and environmental issues.”); Melinda Fulmer, *Is Microfinance for You?*, ENTREPRENEUR (Apr. 21, 2012), <http://www.entrepreneur.com/article/223391> (explaining that since Kiva’s launch in 2005, it has “loaned \$302 million to more than 760,000 borrowers in 60 countries”); *About Microfinance*, KIVA, <http://www.kiva.org/about/microfinance#III-I> (last visited Mar. 10, 2014) (describing microfinance as “financial services . . . involv[ing] small amounts of money” given to “low-income individuals or to those who do not have access to typical banking services”).

183. *See* sources cited *supra* notes 170–71. For example, whether or not to include AAPL in SRI funds and indices has become a topic of much debate among SRI investment managers today. Many funds have chosen to exclude Apple stock because of the labor law violations that take place in its factories, as described earlier in this paper. Other investment managers take the position that Apple’s demonstrated willingness to work with its manufacturers and suppliers to improve labor conditions makes it worthy of inclusion in SRI funds. *Compare* James K. Glassman, *5 Mutual Funds for Socially Responsible Investors*, KIPLINGER (May 2012), <http://www.kiplinger.com/article/investing/T041-C016-S001-5-mutual-funds-for-socially-responsible-investors.html> (noting that Apple was the second largest holding of the Calvert Social Index, but revealing that Calvert Investments was debating whether or not to drop the stock) and Charlie Kannel, *How to Become a Socially Responsible Investor*, MOTLEY FOOL (Sept. 14, 2012), <http://www.fool.com/investing/general/2012/09/14/how-to-become-a-socially-responsible-investor.aspx> (noting that Apple’s “dependence on Chinese manufacturing gives pause to some socially responsible investors”), with Ben Strubel, *Dumb Investment of the Week: Socially Responsible Investing*, STRUBEL INV. MGMT., LLC (Feb. 3, 2014), <http://strubelim.com/wp/dumb-investment-of-the-week-socially-responsible-investing/> (criticizing one SRI fund for including Apple because of its relationship with Foxconn).

184. I have included for comparison the S&P 500 and the NASDAQ, two of the most followed market indices in the United States. The Vanguard Group is one of the most well known and recognized investment management companies in the United States, and I have selected funds which I believe to be

Investment	One Year Return	Vanguard Social Index	Five Year Annual Return	Vanguard Social Index
S&P 500 ¹⁸⁵	11.81%	+3.94%	13.08%	+3.13%
NASDAQ ¹⁸⁶	13.94%	+1.81 %	15.89%	+0.32%
Social Index				
Vanguard FTSE ¹⁸⁷	15.75%	-	16.21%	-
Moderate Risk Index ¹⁸⁸				
Vanguard Balanced Index Fund ¹⁸⁹	9.84%	+5.94%	11.18%	+5.03%
Conservative Risk Index ¹⁹⁰				
Vanguard LifeStrategy Conservative Growth Fund ¹⁹¹	6.95%	+8.8%	7.57%	+8.64%

representative of successful SRI investments, moderately risked investments, and conservative, low-risk investments. The funds chosen are by no means perfectly representative and indicative of the market as a whole, they are simply a quick way to gauge and reference the successes of social index funds today.

185. Performance measured as of Dec. 31, 2014. *S&P 500*, GOOGLE FINANCE (last visited Feb. 1, 2015),

<https://www.google.com/finance?chdnp=1&chdd=1&chds=1&chdv=1&chvs=maximized&chdeh=0&chfeh=0&chdet=1420059600000&chddm=99314&chls=IntervalBasedLine&q=INDEXSP:.INX&ntsp=0&ei=v5nOVLG9EKr7igLPs4GADg>; *Comparing the Annualized Growth Rates of the DJIA, S&P500 and NASDAQ in the United States Between Any Two Dates*, MEASURINGWORTH (last visited Feb. 1, 2014), http://www.measuringworth.com/DJIA_SP_NASDAQ/index.php.

186. Performance measured as of Dec. 31, 2014. *NASDAQ Composite*, GOOGLE FINANCE (last visited Feb. 1, 2015),

<https://www.google.com/finance?chdnp=1&chdd=1&chds=1&chdv=1&chvs=maximized&chdeh=0&chfeh=0&chdet=1420059600000&chddm=99314&chls=IntervalBasedLine&q=INDEXNASDAQ:.IXI C&ntsp=0&ei=vpnOVPnSAAk1iAKimoD4Cg>; *Comparing the Annualized Growth Rates of the DJIA, S&P500 and NASDAQ in the United States Between Any Two Dates*, MEASURINGWORTH (last visited Feb. 1, 2014), http://www.measuringworth.com/DJIA_SP_NASDAQ/index.php.

187. Measured as of Dec. 31, 2014. *Vanguard FTSE Social Index Fund*, U.S. NEWS (last visited Feb. 1, 2015), <http://money.usnews.com/funds/mutual-funds/large-growth/vanguard-ftse-social-index-fund/vftsx>.

188. Moderate risk funds typically invest in more stable, large-cap corporations.

189. Measured as of Dec. 31, 2014. *Vanguard Balanced Index Fund*, U.S. NEWS (last visited Feb. 1, 2015), <http://money.usnews.com/funds/mutual-funds/moderate-allocation/vanguard-balanced-index-fund/vbinx>.

190. Conservative risk funds are typically an aggregate of safe investments.

191. Measured as of Dec. 31, 2014. *Vanguard LifeStrategy Conservative Growth Fund*, U.S. NEWS (last visited Feb. 1, 2015), <http://money.usnews.com/funds/mutual-funds/conservative-allocation/vanguard-lifestrategy-conservative-growth-fund/vscgx>.

As indicated above, the Vanguard Social Index Fund manages to outperform every other investment. Additionally, it should be noted that the Vanguard Social Index Fund's performance in the past year saw an average of roughly one percentage point above the five year annualized yearly return. Though this increase might not seem significant at first glance, it indicates that socially responsible companies are not only doing better than the market on average, but that in recent years, that performance gap has also increased. Such a conclusion is not too far-fetched: as discussed earlier, the demand for cage-free eggs has skyrocketed in the past few years, and the success experienced by socially responsible retailers such as TOMS and Patagonia all indicate that corporate social responsibility is something consumers are increasingly looking for, and businesses are taking note. A McKinsey study found that two-thirds of CFOs and three-quarters of investment professionals agreed that environmental, social, and governance activities create value for shareholders, though they did disagree as to what extent.¹⁹² A two-thirds majority also agreed that this shareholder value would increase for the near future.¹⁹³

Over \$3.74 trillion in total managed assets are invested in SRI in the United States today.¹⁹⁴ SRI has grown by 22 percent in the past two years, and the equivalent of a little over 10 percent of every dollar invested under professional management today can be classified as a socially responsible investment.¹⁹⁵ These statistics and the table above do not purport to show a full and complete picture of the financial investment landscape; they provide nothing more than a quick glance at the state of socially responsible investing today. However, they indicate that investors are increasingly looking toward SRI as a valid financial strategy because it is

192. *Valuing corporate social responsibility: McKinsey Global Survey Results*, MCKINSEY & COMPANY (2009), http://www.mckinsey.com/insights/corporate_finance/valuing_corporate_social_responsibility_mckinsey_global_survey_results.

193. *Id.*

194. These numbers pertain to "managed assets." This includes mutual funds, pension funds, index funds, and other similar types of portfolios, which are overseen by investment managers, and excludes money invested by individuals who seek out ethical and socially responsible companies on their own initiative. *See* Chamberlain, *supra* note 179.

195. *Id.*

in many ways as profitable as, if not more profitable than, other available investments.¹⁹⁶

XII. INTERNATIONAL LABOR LAW REFORM: A RATIONAL CHOICE, REVISITED

According to the rational choice theory, we can expect a state to take international labor law more seriously when, after weighing its unique situation and preferences, it rationally determines that doing so is in its best interests. As this Note's discussion of law and economics and constructivism illustrates, a precious balance between corporate interests and public interests determines a state's preferences. Oftentimes, this balance does not sufficiently signal a desire for increased labor law reform. Moving forward, this must be remedied by promoting corporate social responsibility in two ways. First, C corporations can achieve this by converting to B corporations, a process which will better enable corporations to embrace CSR and eliminate greenwashing. Second, consumers can encourage (or demand) CSR either by purchasing ethically produced goods or partaking in socially responsible investing, both of which will ultimately reward socially responsible companies while punishing companies which violate labor laws or refuse to participate in labor law reform. Together, this will create an environment in which both corporations and consumers recognize that corporate social responsibility is more than just profitable: it is an integral part of doing business.¹⁹⁷ And when this basic truth is universally recognized, the state will rationally choose to reform international labor law.

XIII. CONCLUSION: IS PATAGONIA AN AFTERTHOUGHT OR AN END GAME?

Once, when asked whether consumers help guide Patagonia's efforts to improve environmental sustainability and promote labor reform,

196. For example, I have excluded comparisons of more aggressive hedge funds, venture capital funding, and risk-free treasury bonds because these investments occupy the far ends of the equity spectrum. Knowing what the riskiest and most conservative investments look like is less pertinent and probably would do nothing but distort and skew our perception of what we can and should reasonably expect from our investments.

197. It is also more than just the "right" or "ethical" thing to do. *But see supra* Part III and accompanying discussion. The point of this Note is to engage in a discussion of how labor law reform can be achieved by discussions of economic and financial stability or security without necessarily implicating what, normatively speaking, is the "right" or "ethical" thing to do.

Patagonia's founder Chouinard responded, "we don't learn much from our customers—we are so far ahead of them."¹⁹⁸ He later clarified his fighting words: Patagonia's progressiveness does not mean that consumers are irrelevant. Rather, consumers are a necessary component of fostering "real and sustaining change," and, in particular, Chouinard noted that when it comes to greenwashing, "[m]illennial kids see through all that bullshit."¹⁹⁹

And Patagonia has certainly demonstrated that it does value its consumers' input: Patagonia provides the name and address of every textile mill and factory that it works with online, inviting not only feedback, but more importantly, scrutiny.²⁰⁰ Patagonia discloses what efforts it has taken to eliminate human trafficking and began doing so over a decade before it was mandated under California law.²⁰¹ Last, but not least, Patagonia's Social/Environmental Responsibility Team has the unique authority to veto any decision to work with a new factory,²⁰² proving that corporations truly can make decisions not based solely on profit-seeking motives. Whether Patagonia is as far ahead of the curve as Chouinard claims is up for debate, but one thing is certain: Patagonia is certainly paving the way in labor law and environmental transparency, responding and reacting to market demands for social accountability. Will other corporations elect to pursue a similar approach? Or is the benefit corporation's business model a gimmick that only eccentric entrepreneurs could pull off?

Only time (and your dollars) will tell.

198. Mary Catherine O'Connor, *Yvon Chouinard on Why He Hates Consumerism, 'Sustainability,' and the SkyMall Catalog*, OUTSIDE (Mar. 7, 2013), <http://www.outsideonline.com/outdoor-adventure/the-current/footprint/Yvon-Chouinard-on-Why-He-Hates-Consumerism-Sustainability-and-the-SkyMall-Catalog.html>.

199. *Id.*

200. *History of CR and Patagonia*, PATAGONIA, <http://www.patagonia.com/us/patagonia.go?assetid=67580> (last visited Mar. 5, 2014).

201. *California Transparency in Supply Chains Act of 2010 (SB 657)*, PATAGONIA, <http://www.patagonia.com/us/patagonia.go?assetid=67581> (last visited Mar. 5, 2014).

202. *History of CR and Patagonia*, *supra* note 200.

