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ABSTRACT

In recent years, a number of states have offered innovative new business forms to accommodate social enterprises, organizations that pursue both profit and social purpose. These hybrid forms are designed to free socially conscious entrepreneurs from the strict pursuit of shareholder value maximization that often controls in business practice and law, allowing them instead to serve the interests of other company stakeholders or even society. One form, the benefit corporation, has been adopted by seven states and is now under consideration in several more. This Note details the development, provisions, and advantages of the benefit corporation. It also identifies and analyzes possible flaws in the benefit corporation as it is structured now. In particular, this Note focuses on the potential enforceability and accountability challenges that might accompany the social obligation provisions that are typical of the form. Finally, the Note explores ways in which states might employ traditional corporate governance mechanisms to strengthen the benefit corporation form and better ensure that it effectively serves its dual commitments to shareholders and stakeholders.

INTRODUCTION

The corporation today is often cast as villain instead of hero. At times it is framed as the exploiter of labor and destroyer of communities. At others, it is the insatiable consumer of natural resources. It may be seen as driven only by the need for growth and profit. Protected by limited liability and emboldened by vast capital resources, the corporation has legal personality, but presumably no interest in humanity. However, some businesspeople and policymakers now believe that the corporation can be reformed and that its considerable power can be harnessed for a public—not profit—focus.

In recent years, a new class of social entrepreneurs has emerged. These individuals seek to make money while also "doing good."[1] While they plan to tackle social problems with business-like ideas and discipline,[2] they also hope for some freedom from the

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[1] J. Gregory Dees, *The Meaning of "Social Entrepreneurship,"* (2001), www.caseatduke.org/documents/dees_sedef.pdf

[2] *Let's Hear Those Ideas*, ECONOMIST, Aug. 12, 2010, http://www.economist.com/node/16789766.

pursuit of profit maximization.[3] These entrepreneurs—and the investors that support them—want their businesses to produce positive social impacts, perhaps even if that means limiting their financial return.[4] In their pursuit, they have sought state business laws and federal tax regulations that are more amenable to their purposes. To this end, several states have created new hybrid organizational forms, specifically for socially conscious businesses.[5]

The most ambitious of these new business forms is the benefit corporation. Enacted first by Maryland and Vermont in spring 2010,[6] and now in place or under consideration in a number of other jurisdictions, the benefit corporation is perhaps the most ascendant social enterprise innovation today.[7] Yet, it also raises the most potential legal concerns. Unlike in other types of business associations, where managers are merely permitted to consider stakeholder interests, in the benefit corporation there is a clear affirmative duty to do so. A benefit corporation is required to have a "general public benefit," which, according to the Maryland statute, is "a material, positive impact on society and the environment."[8] Furthermore, this benefit must be measured using standards or grades developed by a third party.[9]

At this early stage, it is not clear if this new business form will succeed in supporting and protecting legitimate dual-purpose social enterprises operating in a corporate context. This Note assesses the legal viability of the benefit corporation as a new form of business and offers suggestions for its improvement. It considers the benefit corporation as a promising, innovative social enterprise vehicle. It also suggests that the form may be subject to abuse by corporate directors, shareholders, stakeholders, or others, without adjustment to its current design.[10]

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[3] Robert Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 89 (2010).

[4] There has been no systematic study of the motivations of entrepreneurs and investors in the social enterprise field. However, there has been extensive assessment of the motivations of "socially responsible" or "ethical" investors who invest in traditional corporations with supposedly better environmental, social, or governance records. *See, e.g.*, Paul Webley, Alan Lewis & Craig Mackenzie, *Commitment Among Ethical Investors: An Experimental Approach*, 22 J. ECON. PSYCHOL. 27 (2001) (finding that ethical investors are more concerned with a company's ethical profile than financial performance); Alan Lewis & Craig Mackenzie, *Morals, Money, Ethical Investing and Economic Psychology*, 53 HUM. REL. 179, 187 (2000) ("Ethical investors have already put their principles into practice in a number of ways; ethical investing is part of this favoured lifestyle . . . . [T]he majority [of ethical investors] would keep their portfolios much as they are now even if ethicals were to give returns of only 5 percent compared with 10 percent for non-ethicals."). *But see* Craig Mackenzie & Alan Lewis, *Morals and Markets: The Case of Ethical Investing*, 9 BUS. ETHICS Q. 439, 450 (1999) (noting that more sophisticated ethical investors seek financial returns at least comparable to those of traditional investors).

[5] *See infra* subpart I.B.

[6] *Vermont Becomes Second State to Pass B Corporation Legislation*, OUTDOOR INDUSTRY ASS'N (June 2, 2010), http://www.outdoorindustry.org/news.webnews.php?newsId=12600&newsletterId=136&action=display.

[7] *But see infra* note 35 (noting that eight states have adopted low-profit limited liability company (L3C) statutes in recent years).

[8] In helping the corporation fulfill this duty, benefit corporation directors are allowed to consider a variety of interests including those of shareholders, employees, suppliers, customers, the community, the environment, and the benefit corporation itself. *See, e.g.*, MD. CODE ANN., CORPS & ASS'NS § 5-6C-01 (2010).

[9] *Id.* For additional discussion of these third-party, nonfinancial ratings, see *infra* note 132 and accompanying text.

[10] *See infra* Part V.

Part I reviews the concept of social enterprise and the basic challenges it faces. Part II considers social enterprise specifically in the traditional corporate context. This review looks first to the historical origins of the corporation and then to the longstanding debate surrounding its social purpose. Part III considers the various approaches social entrepreneurs have taken under traditional and new corporate laws. Part IV reviews the specific developments, provisions, advantages, and disadvantages of the new benefit corporation form. In closing, Part V offers suggestions to state policymakers and socially conscious entrepreneurs for improving the benefit corporation model. In particular, it focuses on how stronger internal controls and external regulation can help make the benefit corporation a more effective vehicle for pursuing socially beneficial purposes as well as financial profits.

I. THE CHALLENGE FOR SOCIAL ENTERPRISE

Social enterprises have mixed missions. They pursue both profit and social purpose, applying business principles while also serving some socially beneficial end. Beyond these general, shared characteristics, socially conscious enterprises form a diverse set representing a multitude of causes and positions. For instance, Better World Books is an online book retailer, founded in the wake of the dot-com bust.[11] At the expense of maximizing profit, it works to support literacy efforts and charitable book drives.[12] The Redwoods Group, a North Carolina-based insurance company that primarily serves YMCAs and Jewish Community Centers, is another example.[13] It pays each of its ninety employees[14] for forty hours of volunteer work each year.[15] In 2010, though The Redwoods Group faced certain financial losses, its management still refused to institute layoffs to cut costs because, in their estimation, to do so would be "morally repugnant."[16] Instead, Redwoods executives allowed the company to absorb an expected loss of "several hundred thousand dollars."[17] King Arthur Flour, which, at over 220 years old, is the oldest flour company in the United States, also weighs societal interests in its business decisions.[18] King Arthur acts primarily in the interests of its employee-shareholders, but, under its bylaws, it also must consider its customers, business partners,

[11] *Overview: The Online Bookstore with a Soul*, BETTER WORLD BOOKS, http://www.betterworldbooks.com/info.aspx?f=facts (last visited June 8, 2011).
[12] *Id.*; *see also* Halle Tecco, *Not For-Profit, Not Non-Profit, But Somewhere in Between*, THE HUFFINGTON POST (Jan. 4, 2010, 7:05 PM ET), http://www.huffingtonpost.com/halle-tecco/not-for-profit-not-non-pr_b_411117.html.
[13] THE REDWOODS GROUP, http://www.redwoodsgroup.com/ (last visited Jan. 18, 2011).
[14] *Redwoods Company History*, THE REDWOODS GROUP (2010), http://www.redwoodsgroup.com/corporate/newsroom/Redwoods_Media_Kit_History_1.11.pdf.
[15] *Volunteer Leave*, THE REDWOODS GROUP, http://www.redwoodsgroup.com/Serveothers/VolunteerLeave.asp (last visited June 8, 2011).
[16] John Murawski, *Beyond the Bottom Line*, THE NEWS & OBSERVER (Mar. 21, 2010), http://www.newsobserver.com/2010/03/21/397969/beyond-the-bottom-line.html.
[17] *Id.*
[18] *About the King Arthur Flour Company*, KING ARTHUR FLOUR, http://www.kingarthurflour.com/about/ (last visited June 8, 2011).

and the environment when making decisions.[19] By contrast, traditional corporations often have a more singular focus on growing shareholder value.[20]

These businesses, and the hundreds of others like them across the United States, have attempted to serve their investors, employees, and communities. They have tried—and in many respects succeeded—at harnessing the corporate form for more than mere financial gain. Yet for years they have done this without the benefit of much established law or state-sanctioned, specifically tailored organizational forms. The corporations noted above have each assumed their hybrid identities only through independent effort, with little or no direct encouragement, assistance, or protection from state government.[21]

A. The Limits of Traditional Forms

Social entrepreneurs in the United States have long been forced by business law and tax regulation to use one of two primary organizational forms for large-scale endeavors—the corporation or the nonprofit. Unfortunately, both forms are suboptimal for social enterprises.

A corporate arrangement is attractive in that it grants entrepreneurs limited liability and allows them access to abundant capital.[22] However, a corporate form can considerably constrain the pursuit of a nonfinancial mission.[23] Social entrepreneurs can overcome these restrictions if they can recruit likeminded, non-litigious investors who are interested in pursuing a nonfinancial purpose as well as some long-term profit, but such "patient capital" may be difficult to find.[24] And, where similar investors are found, there is no guarantee that they will continue to support the corporation's social mission in the wake of diminished returns.[25] This may lead to a chilling effect in a corporation's financial planning or business conduct. Consider, for instance, the case of Give Something Back, a values-driven office supplier. Despite the firm's capital needs, its

[19] G. Jeffrey MacDonald, *When 'B' Means Better*, THE CHRISTIAN SCI. MONITOR (July 22, 2009), http://www.csmonitor.com/Business/2009/0722/when-b-means-better.

[20] *See, e.g.*, Jay Lorsch & Rakesh Khurana, *The Pay Problem*, HARV. MAG. (May–June 2010), http://harvardmagazine.com/2010/05/the-pay-problem?page=all (noting that many U.S. corporations and their executives use a "shareholder value" framework in decision making).

[21] Better World Books, The Redwoods Group, and King Arthur Flour are all certified as dual-purpose "B Corporations" by the nonprofit organization B Lab. *See infra* discussion accompanying notes 104–112.

[22] As used in this Note, a "corporation" or a business with a "corporate form" is an entity that is chartered by the state and owned by one or more shareholders. It has "three chief distinguishing features: 1. limited liability[;] . . . 2. easy transfer of ownership through the sale of shares of stock[;] 3. continuity of existence." Also, notably, it is an attractive business arrangement as it is able to "obtain capital through expanded ownership" and materially benefit its owners upon growth. BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS 148–49 (8th ed. 2010).

[23] *See infra* text accompanying notes 75–77 (noting that corporate directors are inhibited in their pursuit of nonfinancial ends, even under the permissive business judgment rule).

[24] Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 354–55 (2009) (noting "the practices and the expectations of the normal sources of for-profit capital—venture capitalist and institutional investors such as pension funds—do not line up neatly with the needs of hybrid social enterprises.").

[25] Even if individuals remain "patient" there is no guarantee that they will remain investors. In a number of contexts—death, divorce, bankruptcy—a patient investor may lose possession of a stock, without any control over who will then own it and what will then be done with it.

founders declined to take on outside investors for fear that they would at some point be forced to cede their social pursuits.[26]

Likewise, corporations pursuing social goals may have limited access to other non-equity sources of capital like bonds and loans.[27] Due to their more limited, less certain profitability, such corporations may be subject to higher interest rates from lenders.[28] In addition, because they are still seeking at least some financial return, they cannot easily access grants from private foundations and other socially conscious patrons that often support charities.[29] With limited capital resources, for-profit social enterprises may find it difficult to survive, let alone to scale their operations to serve more people.

A nonprofit entity, on the other hand, allows social entrepreneurs extensive freedom to pursue social goals, but it is subject to even greater capital limitations. Nonprofits often must dedicate considerable time, staff, and other resources to fundraising among private donors because they cannot raise funds through private investors.[30] Also, they may have trouble securing favorable loans from banks and other traditional lenders because of their limited and inconsistent access to capital for repayment.[31] And, although abundant government grants are available, these are not necessarily awarded to the most deserving, efficient, or effective nonprofit organizations.[32] Nonprofits may undertake some commercial activity to support their mission, but their ability to do so is greatly restricted by tax regulations.[33] For all these reasons, social entrepreneurs have sought a third way of organizing and administering their enterprises.

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[26] While the founders still had success with Give Something Back, they likely could have grown faster and larger with support from outside investors. Hannah Clark Steiman, *A New Kind of Company: A "B" Corporation*, INC. (Magazine) (July 1, 2010), http://www.inc.com/magazine/20070701/priority-a-new-kind-of-company.html.

[27] *See, e.g.*, Matthew F. Doeringer, Note, *Fostering Social Enterprise: A Historical and International Analysis*, 20 DUKE J. COMP. & INT'L L. 291, 303 (2010).

[28] *Id.*

[29] Kelley, *supra* note 24, at 356.

[30] *See, e.g.*, John Tozzi, *Turning Nonprofits into For-Profits*, BUSINESSWEEK (June 15, 2009) http://www.businessweek.com/smallbiz/content/jun2009/sb20090615_940089.htm (detailing the plight of Bikestation, a California organization that had to abandon its nonprofit status in order to raise private investment capital to keep up with mounting demand for its services). To be clear, in this context, while both "donors" and "investors" may give an organization money, they differ distinctly as only the "investor" hopes to receive a financial return on the expenditure. By contrast, no contributor to a tax-exempt nonprofit organization can benefit from that organization's net earnings. 26 U.S.C. § 501(c)(3) (2010).

[31] Kelley, *supra* note 24, at 354.

[32] *Cf.* Natalie Privett & Feryal Erhun, *Efficient Funding: Auditing in the Nonprofit Sector*, 13 MANUFACTURING & SERVICE OPERATIONS MGMT. 471, 471 (2011) (finding, through analysis, that current "funding methods do not facilitate efficient allocation of funds" to nonprofits). Some evidence suggests that government grants themselves may make nonprofits "more inefficient and bureaucratic." Peter Frumkin & Mark Kim, *The Effect of Government Funding on Nonprofit Administrative Efficiency: An Empirical Test*, 15 (Fall 2002), http://www.innovations.harvard.edu/cache/documents/26/2600.pdf.

[33] Doeringer, *supra* note 27 at 298 (explaining that "insubstantial commercial activity is allowed so long as it does not stand in the way of the organization primarily operating for an exempt purpose, and substantial activity is allowed as long as it furthers the organization's exempt purpose"); *see also* Michael D. Gottesman, *From Cobblestones to Pavement: The Legal Road Forward for the Creation of Hybrid Social Organizations*, 26 YALE L. & POL'Y REV. 345, 347–50 (2007); Hadley Rose, *The Social Business: The Viability of a New Business Entity Type*, 44 WILLAMETTE L. REV. 131, 135–46 (2007).

B. A Third Way

In recent years, some state policymakers have sought to help socially conscious entrepreneurs escape the for-profit or nonprofit binary. They have focused on creating different kinds of hybrid organizational forms. The low-profit limited liability company (L3C) is one of the latest attempts to allow entrepreneurs to legally pursue both social and financial returns. First adopted by Vermont in 2008,[34] the business form has since been approved by seven states and considered by at least eleven others.[35] It aspires to modify the popular limited liability company (LLC) form[36] to pursue charitable goals.[37] Most notably, it attempts to streamline the process by which socially conscious LLCs can receive investments from private, charitable foundations.[38]

Many social entrepreneurs have welcomed the L3C innovation.[39] It is, after all, designed to provide certain financial, organizational, and branding advantages.[40] Still, it is not appropriate for use by all social enterprises, no more than the traditional LLC is a viable arrangement for all businesses. Many social entrepreneurs, in fact, would still prefer a corporate form instead. Like the LLC, the corporation protects its officers and directors from personal liability. However, the corporation also offers further advantages. First, it allows business managers to quickly raise large amounts of new capital through the sale of stocks or bonds. It is also well-suited for growth and scaling its operations up in size or scope. Finally, it can incorporate great numbers of new investors, managers, and even other businesses without having to change its fundamental organization or its status before the law. Thus, it offers social entrepreneurs the best legal and business advantages of private enterprise. Unfortunately, the corporation, at least in its traditional form, also constrains these individuals in their pursuit of nonfinancial goals.

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[34] VT. STAT. ANN. tit. 11, § 3001 (2009).

[35] Illinois, Louisiana, Maine, Michigan, North Carolina, Utah, Vermont, and Wyoming have all adopted the L3C form. Arkansas, Colorado, Kentucky, Maryland, North Dakota, New York, Missouri, Massachusetts, Tennessee, Virginia, and Wisconsin have all considered L3C legislation without passing it. Carter G. Bishop, *Fifty State Series: L3C & B Corporation Legislation Table*, 1–19 (Suffolk Univ. Law Sch. Legal Studies Research Paper Series No. 10–11, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561783.

[36] Kelley, *supra* note 24, at 370 (noting that limited liability companies are attractive to entrepreneurs generally and social entrepreneurs specifically because of the flexibility they allow for assigning financial returns and organizational responsibilities among participants).

[37] Elizabeth Schmidt, *Vermont's Social Hybrid Pioneers: Early Observations and Questions to Ponder*, 35 VT. L. REV. 163, 163–64 (2010).

[38] *Id*. *But cf.* Doeringer, *supra* note 27, at 321 (noting that uncertainty remains as the IRS has not yet stated that it will allow L3C investments to count as PRIs).

[39] *See, e.g.*, Schmidt, *supra* note 37, at 172 (noting that Vermont registered eighty-three L3Cs in under two years after passing the new legislation).

[40] *Id.* at 169.

II. THE CORPORATION IN SOCIETY

A. Historical Background

Interest in social enterprise and its related principles has increased in recent years in the wake of fresh corporate scandals and growing societal concerns.[41] However, the idea that a business corporation might act for a public purpose and with social responsibilities is not new. Indeed, the pursuit of state and community benefit helped spur the development of even the earliest commercial corporate forms.[42] In Europe, governments often relied on corporations to meet "important state objectives" including exploration, colonization, and development.[43] Likewise, in the early United States, while governments issued many corporate charters to organizations with quasi-public objectives, they granted relatively few to pure business enterprises.[44] It was only later that this orientation changed.

In the nineteenth century, the United Kingdom and United States embraced general incorporation statutes, which allowed corporations to operate without stating an intention to serve any specific public purpose.[45] It was often enough for a new enterprise to claim a general public benefit, which might be nothing more than contributing to the development of the market itself.[46] The receipt of a new charter became nearly automatic.[47] Soon the public "understood [the corporation] to be an essentially private enterprise," formed and operated for private interests.[48] Exactly *which* private interests the corporation is to benefit remains the fundamental question in modern corporate law.

B. Shareholders v. Stakeholders

In the midst of the Great Depression, two scholars framed the general debate over the role and responsibilities of the corporation in modern society.[49] Adolf Augustus Berle

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[41] *See, e.g.*, Celia R. Taylor, *Carpe Crisis: Capitalizing on the Breakdown of Capitalism to Consider the Creation of Social Business*, 54 N.Y. L. SCH. L. REV. 743 (2010) (arguing that the recent financial crisis presents an opportunity to rethink the role of corporations in society); Lawrence Delevigne, *Surprising Survivors: Corporate Do-Gooders*, CNN MONEY (Jan. 20, 2009, 3:04 PM), http://money.cnn.com/2009/01/19/magazines/fortune/do_gooder.fortune/index.htm (noting that many companies continued to invest in social initiatives in the midst of the recession); David Scheffer, *BP Shows the Need for a Rethink of Regulation*, FIN. TIMES (May 27, 2010) http://www.ft.com/cms/s/0/919f37fe-69c1-11df-8432-00144feab49a.html#axzz1PfVDKUpI (calling for more accountability on corporate social responsibility matters in the wake of the BP oil spill).

[42] MICHAEL KERR ET AL., CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS 58 (2009).

[43] DAVID A. WESTBROOK, BETWEEN CITIZEN AND STATE: AN INTRODUCTION TO THE CORPORATION 33–35 (2007).

[44] By some estimates, only 4% of the charters issued in the United States from 1780 to 1801 were for general business corporations. The vast majority were awarded to enterprises that did quasi-public work including, for instance, the provision of water and the development of turnpikes, toll bridges, and inland waterways. Gary von Stange, Note, *Corporate Social Responsibility Through Constituency Statutes: Legend or Lie?*, 11 HOFSTRA LAB. L. J. 461, 464 n.10 (1994) (citing JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970 15 (1970)).

[45] KERR ET AL., *supra* note 42, at 58.

[46] *Id.* at 59.

[47] *Id.*

[48] WESTBROOK, *supra* note 43, at 36.

[49] For a more detailed review of the scholarly exchange, see, e.g., C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L.

argued that corporate directors should act only for the purpose of generating profits for shareholders.[50] By contrast, Edwin Merrick Dodd believed that corporate directors should account in their decision making not only for the interests of shareholders, but also for the interests of employees, customers, creditors, and other stakeholders.[51] Although Dodd's approach still provided for shareholder wealth enhancement, many saw it as irreconcilable with Berle's more absolute position.[52]

Today, following Berle, people often understand corporate directors to be bound to maximize shareholder wealth.[53] Business-world norms[54] and stock market expectations[55] reinforce this position. The law, or at least corporate directors' fear of litigation, have supported this model as well.[56] However, while the threat of shareholder suits to enjoin wealth maximization continues to lurk in U.S. boardrooms,[57] it rarely materializes in the courtroom.[58]

C. Flexibility in the Corporation

Traditional corporate practice and law in many ways prevent any shareholder primacy standard from being legally enforced. Although they have the ability to do so, most corporations do not officially adopt a policy of shareholder wealth maximization.[59]

REV. 77, 82–99 (2002); Antony Page & Robert Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1358–65 (2011).

[50] Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367–69 (1932).

[51] E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147–48 (1932). Note that Berle and Dodd in essence adopted the opposing positions advanced in the earlier, often referenced *Dodge v. Ford Motor Co*., 170 N.W. 668, 684 (1919). There, the Michigan Supreme Court held that a business corporation exists to enrich its owners, the shareholders, not to benefit employees or other stakeholders as the defendant Henry Ford had suggested.

[52] *See, e.g.*, von Stange, *supra* note 44, at 465 ("In the corporate arena, a zero sum game is often played: if one constituency is favored, another is concomitantly disfavored.").

[53] Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL'Y REV. 1, 8–9 (2008) (noting "because of a mix of law, norms, and market dynamics, the touchstone of corporate success is the maximization of shareholder return . . . . On the whole, shareholder primacy is a fact of life in the United States in the early twenty-first century.").

[54] Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 1011–12 (2009).

[55] *See* Lisa M. Fairfax, *Achieving the Double Bottom Line: A Framework for Corporations Seeking to Deliver Profits and Public Service*, 9 STAN. J.L. BUS. & FIN. 199, 228 (2004) ("The capital markets may represent a powerful external force pressuring directors to focus on profits. Such markets force directors and officers to focus on profit rather than other nonfinancial goals because shareholders measure corporate conduct based on stock prices and financial statements."); Sneirson, *supra* note 54, at 1007–08 (noting "managing a company well *should* translate to higher stock prices and managing the company in the best way possible *should* lead to shareholder-wealth maximization.") (italics added).

[56] *See, e.g.*, Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423–24 (1993) (suggesting that "the mainstream of corporate law remains committed to" shareholder wealth maximization). *But see* Sneirson, *supra* note 54, at 1004 (noting that the shareholder wealth standard is not absolute as the American Law Institute's *Principles of Corporate Governance* say only that a corporation *should* seek to *enhance* shareholder value).

[57] *See, e.g.*, Doeringer, *supra* note 27, at 304 (noting "there still remains the risk of shareholder derivative suits if profits are not reinvested to create economic gains or distributed to the shareholders").

[58] *See, e.g.*, *id.* (noting that courts have rarely required a corporation to issue special dividends).

[59] Sneirson, *supra* note 54, at 996–97.

Additionally, in most jurisdictions, it is difficult to hold directors liable for failing to pursue absolute profit. Indeed, under the widely recognized business judgment rule, there is the "presumption that in making a business decision, the [corporation's] directors act on informed basis, in good faith, and in the honest belief that the action taken is in the best interest of the company."[60] Thus, under normal circumstances,[61] a court will uphold a board's decision unless the shareholder plaintiff can prove fraud, self-dealing, waste, or an invalid business purpose.[62] This grants the board considerable power and independence.[63] With it, directors are able to account for stakeholder interests as Dodd proposed, as long as doing so in some way benefits (or at least fails to harm) the shareholders.[64] This proposition undergirds much corporate social responsibility work in traditional corporations.

Some corporations have long supported social initiatives as a means of enhancing their own profits and long-term viability.[65] Through charitable donations, community programs, or holistic decision making, corporations have pursued intangible goals, such as improving workforce comfort or engendering customer goodwill, arguing that these actions align with the corporations' ultimate profit-making interests. There is some evidence that these strategies are successful.[66] Recognizing the potential benefits to shareholders, courts have upheld corporate social actions with even the most tenuous of supposed business purposes.[67] For instance, courts have supported corporations'

[60] *See, e.g.*, Powell v. W. Ill. Elec. Coop., 536 N.E.2d 231, 233 (Ill. App. 1989) (citing Aronson v. Lewis, 473 A.2d 805 (Del. 1984)).

[61] Directors are much more constrained when the corporation is subject to a takeover. Revlon v. MacAndrews & Forbes Holdings 506 A.2d 173, 182 (Del. 1986) (noting that in a takeover situation "[t]he duty of the board had thus changed . . . to the maximization of the company's value at a sale for the stockholders' benefit").

[62] *Powell*, 536 N.E.2d at 233.

[63] Greenfield, *supra* note 53, at 8 (noting that "[t]hose who contest shareholder primacy usually argue that the business judgment rule gives management so much flexibility and power that in fact it owes no enforceable duty to shareholders"); Sneirson, *supra* note 54, at 1005 (suggesting "the business judgment rule affords corporate decision-makers so much latitude as to render such a [shareholder wealth maximization] duty unenforceable and meaningless").

[64] *Revlon*, 506 A.2d at 182 (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985)); *see also* William H. Simon, *What Difference Does It Make Whether Corporate Managers Have Public Responsibilities?*, 50 WASH. & LEE L. REV. 1697, 1698 (1993) ("I am unaware of a single modern case in which a managerial decision has been held wrongful because it put public interests above shareholder ones. Moreover, doctrine has long expressed general tolerance for a substantial range of public-regarding managerial decisions.").

[65] Leslie Berliant, *B Corporation, A New Way of Doing Business?*, SOLVE CLIMATE NEWS (July 13, 2009), http://solveclimatenews.com/news/20090713/b-corporation-new-way-doing-business (noting the sustainability efforts of Starbucks, GE, Walmart, Alcoa, and other corporations).

[66] *See, e.g.*, Joshua D. Margolis et al., *Does It Pay to Be Good? A Meta-Analysis and Redirection of Research on the Relationship Between Corporate Social and Financial Performance* 21 (2007), *available at* http://stakeholder.bu.edu/2007/Docs/Walsh,%20Jim%20Does%20It%20Pay%20to%20Be%20Good.pdf (finding that in 167 studies of the effect of socially responsible practice on financial performance, 27% found a positive relationship, 58% showed a statistically insignificant relationship, and only 2% found a negative relationship).

[67] *See*, *e.g.*, Alissa Mickels, Note, *Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe*, 32 HASTINGS INT'L & COMP. L. REV. 271, 284 (2009) ("Jurisprudence seems to suggest that the court will be especially deferential when directors claim to have altruistic purposes that benefit the company in the long run because of the possibility that shareholders will eventually receive a higher return on their investment."); Sneirson, *supra*

contributions to local colleges because it was in the shareholders' interests to improve the future employee base.[68] Also, the Delaware Court of Chancery in *Kelly v. Bell* upheld U.S. Steel's extensive gift payments to the local county government because the corporation had a self-interest in the development of the community and the industry therein.[69] By contrast, the court in *Rice v. Wheeling Dollar Sav. & Trust Co.* found that a charitable contribution made in the memory of the company president's mother was a "use of corporate funds not sanctioned by law" as it served no ultimate, even tenuous business end.[70]

Courts have taken a similarly permissive approach in assessing corporate action other than mere spending. For instance, the court in *Shlenksy v. Wrigley* upheld a board's decision to forgo likely higher short-term profits in favor of benefiting the local community and, with it, the corporation's long-term prospects.[71] There, a shareholder in the corporation that owned the Chicago Cubs baseball team brought suit against the directors for failing to schedule more profitable night games.[72] The directors defended their decision as a means of maintaining a safe, viable neighborhood around the stadium.[73] The court deferred to the directors under the business judgment rule, noting that the decision had a reasonable business purpose given the corporation's interest in continuing to attract customers and maintaining its own property values.[74]

Following the business judgment rule and the other principles espoused in the preceding cases, corporate directors are allowed great latitude in pursuing social ends. Indeed, in leading the corporation, they may even have the freedom to consider or directly serve the interests of employees, communities, and other stakeholders. But directors do not have carte blanche under the standard—their actions must have a legitimate business purpose.[75] The business judgment rule does not protect corporate actions that are considered "waste."[76] Likewise, it does not apply to "irrational" decisions, i.e. those that no reasonable business person would support.[77] Thus, it does allow ample flexibility, but perhaps not enough to cover the kind of prominent, recurring public service actions that are core to the mission of social enterprises. For this reason, social entrepreneurs have sought new, modified corporate forms that do not inhibit their consistent pursuit of nonfinancial ends.

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note 54, at 999 (noting that state jurisdictions are split on the question of corporate giving with seven states allowing donations regardless of corporate benefit, nineteen allowing donations with at least a tenuous corporate benefit, and twenty-four states, including Delaware, having no specified requirement).

[68] *See, e.g.*, Armstrong Cork Co. v. H.A. Meldrum Co., 285 F. 58 (D.C.N.Y. 1922); A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953); *see generally* von Stange, *supra* note 44, at 472–74 (reviewing the preceding cases and others).

[69] Kelly v. Bell, 254 A.2d 62 (Del. Ch. 1969).

[70] Rice v. Wheeling Dollar Sav. & Trust Co., 130 N.E.2d 442, 449 (Ohio Misc. 1954).

[71] Shlensky v. Wrigley, 237 N.E.2d 776, 776–81 (Ill. App. 1968).

[72] *Id.* at 777–78.

[73] *Id.* at 779.

[74] *Id.* at 780.

[75] WILLIAM MEADE FLETCHER, FLETCHER'S CYCLOPEDIA OF CORPORATIONS § 1040 (2010).

[76] *See, e.g.*, Patrick v. Allen, 355 F.Supp.2d 704 (S.D.N.Y. 2005) (finding waste where corporation leased a property, its lone asset, to a country club for a break-even rent).

[77] *See, e.g.*, *In re* Tower Air, Inc., 416 F.3d 229 (3d Cir. 2005) (applying Delaware law).

III. ADJUSTING THE CORPORATE FORM

Various entrepreneurs and scholars have proposed ways to pursue social enterprise within the constraints of the existing, traditional corporation. For instance, some have suggested that corporate directors must consider nonshareholder interests to fulfill their traditional fiduciary duties and that corporate case law should be re-oriented accordingly.[78] Also, some scholars have advocated that boards use shareholder agreements, financing arrangements, and other contracts to secure explicit, formal permission to pursue nonfinancial goals.[79] Others have worked to address the entities' capital restrictions through innovative multiple entity social enterprises including, for instance, nonprofits with for-profit subsidiaries or corporations with established corporate giving programs.[80] Yet none of these piecemeal approaches offers social entrepreneurs the simplicity, legitimacy, and legal certainty that they seek. Thus, these entrepreneurs have sought instead to modify the corporation for their purposes by using more elaborate, state-sanctioned devices.

A. Constituency Statutes

Some scholars and entrepreneurs advocate using constituency statutes to pursue social enterprise within a traditional corporate structure. In general, these state laws allow corporate directors to circumvent an absolute standard of shareholder wealth maximization and instead, following Dodd, consider other stakeholders' interests in business decisions.[81]

Notably, what is now a potential corporate social responsibility device was first adopted as a defensive, anti-takeover measure.[82] During the 1980s, outside takeovers were seen as a disruptive and potentially harmful threat to a corporation's employees, customers, creditors, and community.[83] Nonetheless, there was little that a target's directors could do in the face of a bid, as they had a clear duty to maximize shareholder value by selling to the most generous suitor.[84] When state legislatures' first attempts at protecting takeover targets largely failed,[85] lawmakers devised constituency statutes as a

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[78] Judd F. Sneirson, *Doing Well by Doing Good: Leveraging Due Care for Better, More Socially Responsible Corporate Decisionmaking*, 3 CORP. GOVERNANCE L. REV. 438, 440 (2007) (concluding that "corporate boards and managers, as a matter of their fiduciary obligation to exercise due care, *must* at least assess and consider the interests of nonshareholder constituencies in reaching all their decisions.").

[79] *See, e.g.*, Allen R. Bromberger, *Social Enterprise: A Lawyer's Perspective*, PERLMAN & PERLMAN LLP (2008), *available at* http://www.perlmanandperlman.com/publications/articles/2008/socialenterprise.pdf.

[80] *See id.*; Kelley, *supra* note 24, at 365–66; Doeringer, *supra* note 27, at 305.

[81] Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 588 (1992). Some have questioned the actual necessity of adopting a constituency statute to pursue stakeholder interests. *See, e.g.*, Stephern M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 1024 (1992) ("Directors in fact routinely consider nonshareholder interests and are not held liable for doing so. The statutes thus merely bring the law's rhetoric into line with its reality.").

[82] Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 96 (1999).

[83] Von Stange, *supra* note 44, at 467.

[84] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

[85] *See* von Stange, *supra* note 44, at 468 ("Virtually all of the first generation of [anti-takeover] statutes . . . were held unconstitutional by the United States Supreme Court in *Edgar v. Mite Corp*.").

means of allowing directors to justify not selling the corporation.[86] Theoretically, in an attempted takeover, the directors could maintain control by showing that even if a sale was immediately beneficial to investors it was harmful to the corporation's other stakeholders.[87]

In 1983, Pennsylvania was the first state to pass a constituency statute.[88] Other states followed suit and now thirty-one have such a statute on their books.[89] There is great variety among the provisions.[90] But most statutes limit the reviewable "stakeholder interests" to those of customers, employees, creditors, and local communities.[91] The statutes, then, typically do not allow for the consideration of other broader interests such as the environment, the international community, or human rights.[92]

Nearly all of the states' constituency statutes are permissive, as they allow but do not *require* directors to consider stakeholder interests while administering the corporation.[93] Directors weigh interests, at their discretion, and they can freely disregard particular interests without fear of legal consequences at the hands of shareholders or any other group.[94] Even in Idaho and Arizona, where the constituency statutes *require* directors to consider both short- and long-term interests in a takeover context, state law includes no enforcement mechanism to ensure that they do so.[95] Without granting standing to stakeholders or shareholders, even these states' more stringent constituency statutes are arguably unenforceable.[96]

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[86] *See infra* notes 88–89 and accompanying text.
[87] Springer, *supra* note 82, at 96.
[88] *Id.* at 95.
[89] Clark Steiman, *supra* note 26.
[90] Springer, *supra* note 82, at 96 (attributing the variety in constituency statutes to the measure's absence from the American Bar Association's Revised Model Business Corporation Act).
[91] Mickels, *supra* note 67, at 292.
[92] *Id.*
[93] Springer, *supra* note 82, at 101; Bainbridge, *supra* note 81, at 987. For example, Illinois's constituency statute states:

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

ILL. COMP. STAT. ANN. ch. 805, 5/8.85 (West 2010) (italics added).
[94] No state constituency statute allows nonshareholders official recourse against directors. Anthony Bisconti, Note, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in* Revlon *Land?*, 42 LOY. L.A. L. REV. 765, 794 (2009).
[95] See IDAHO CODE ANN. § 30-1602 (2010), which specifies:

> [A] director, in considering the best interests of the corporation, shall consider the long-term as well as the short-term interests of the corporation and its shareholders including the possibility that these interests may be best served by the continued independence of the corporation. In addition, a director may consider the interests of Idaho employees, suppliers, customers and communities in discharging his duties.

See also ARIZ. REV. STAT. ANN. § 10-2702 (2010). Connecticut's constituency statute once read that directors "shall consider" stakeholder interests when corporate control may shift; however, it was amended in 2010 to read "may consider." CONN. GEN. STAT. ANN. § 33-756 (West 2010).
[96] Bainbridge, *supra* note 81, at 990 (suggesting that constituency statutes are effectively impotent because nonshareholders have no standing to enforce them).

Courts have not yet considered the statutes' intended use to elevate stakeholder interests.[97] Constituency statutes may yet withstand judicial scrutiny in particular limited contexts. However, as they now stand, they may be an unreliable and ineffective means of pursuing more focused, large-scale social enterprise.

B. Stronger Constituency Statutes

As constituency statutes are of more rhetorical than practical impact, some social entrepreneurs and policymakers have sought ways to improve upon their basic principle. Most notably, they have recently produced the benefit corporation, a business form in which entrepreneurs are explicitly required to not only consider stakeholders, but to actively and regularly work to benefit them as well.[98] Although the benefit corporation was only first instituted in 2010,[99] the ideas behind it have been in development for years.

To start, various scholars and reformers have proposed, in essence, giving teeth to constituency statutes. These proposals have focused on extending directors' fiduciary duties to include various specific stakeholder groups.[100] Some state lawmakers have proposed versions of this concept. For instance, in 2008, the California State Legislature passed a constituency statute amendment that would have allowed directors in each of the state's corporations to consider environmental effects in their decision making.[101] However, Governor Arnold Schwarzenegger, concerned about the "unknown ramifications" of the bill, vetoed it.[102] Oregon passed a more permissive amendment in 2007 that allowed corporations the option to modify their charters to authorize or direct "the corporation to conduct the business . . . in a manner that is environmentally and

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[97] *See* Lynda J. Oswald, *Shareholders v. Stakeholders: Evaluating Corporate Constituency Statutes Under the Takings Clause*, 24 J. CORP. L. 1, 7 (1997) ("Judicial interpretation of the constituency statutes to date has been sparse and uninformative, invariably referring to the constituency statutes in only a fleeting and tangential manner. No court has yet provided an analysis of the legality or constitutionality of constituency statutes, or even an explanation of how they should be implemented in specific contexts."); Bisconti, *supra* note 94, at 794 ("Because not all corporations have socially responsible agendas, the courts are rightfully hesitant to apply constituency statutes in a way that permits sacrificing profits for the public benefit."); *Benefit Corporation—Legal FAQs*, B LAB (2010), *available at* www.bcorporation.net/resources/bcorp/documents/Benefit%2520Corporation%2520-%2520Legal%2520FAQs.doc (noting that there is no constituency statute case law so it is unclear what a court would rule if a board actually failed to sell to the highest bidder).

[98] *E.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (2010).

[99] *Maryland First State in Union to Pass Benefit Corporation Legislation*, THE CORP. SOC. RESP. NEWSWIRE (Apr. 14, 2010), http://www.csrwire.com/press_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation.

[100] *See, e.g.*, Sneirson, *supra* note 78, at 448 n.29 (highlighting various proposals for expanding fiduciary duties).

[101] Press Release, California State Assembly Democratic Caucus, Assemblyman Leno's Measure to Restore California's Competitve Edge in Attracting Innovative Businesses Approved by Legislature (Sept. 12, 2008) 2008 WLNR 17405227.

[102] Veto Message from Governor Arnold Schwarzenegger to Members of the California State Assembly (Sept. 30, 2008), *available at* ftp://leginfo.public.ca.gov/pub/07-08/bill/asm/ab_2901-2950/ab_2944_vt_20080930.html. In lobbying the governor for the veto, business organizations suggested that the new statute would cause economic harm to shareholders. *See, e.g.*, Letter from Greg Hines, Legislative Dir., California Manufacturers & Technology Ass'n, to Arnold Schwarzenegger, Governor, California (Sept. 11, 2008), *available at* www.cmta.net/pdfs/AB%202944.pdf.

socially responsible."[103] In this way, socially conscious corporations can choose to hold themselves to higher legal standards in decision making, even if their traditional peers do not. Thus they can impose requirements on their directors that constituency statutes cannot. This kind of permissive, opt-in approach has caught on elsewhere. Indeed, as detailed in Part IV, it has been the main focus of the organization B Lab's coordinated national effort to encourage and regulate social enterprise.

IV. THE BENEFIT CORPORATION

A. Voluntary Certification

B Lab has led the most concerted effort to promote the effective and legal pursuit of corporate social enterprise in recent years.[104] Founded in 2006 by three former corporate executives,[105] this nonprofit organization helps socially conscious corporations actively pursue their dual missions within the constraints of state laws.[106] B Lab's initial efforts in this area focused on retrofitting interested corporations to operate as social enterprises under already existing state laws.[107] In particular, B Lab encourages interested businesses to incorporate in one of the thirty-one states with constituency statutes in effect.[108] It then advises corporations on how to amend and approve their governing documents to allow their directors to consider the interests of all stakeholders.[109]

These newly anointed B Corporations are then subject to certification and social auditing by B Lab to ensure that they have fulfilled their self-imposed duties to stakeholders.[110] Despite some legal uncertainty around it,[111] this opt-in approach has still been relatively popular. At the start of 2011, B Lab counted 370 affiliated B Corporations in sixty industries and thirty-five states.[112]

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[103] OR. REV. STAT. § 60.047 (2010).
[104] In an attempt to avoid confusion, here "B Lab" refers to the nonprofit organization, "B Corporation" refers to the corporations that partner with that nonprofit, and "benefit corporation" refers to the special form entities that are now being allowed and recognized under various states' laws.
[105] Tamara Schweitzer, *How to Build a Values-Driven Business*, INC. (Magazine), Mar. 31, 2010, http://www.inc.com/guides/2010/03/social-enterprise.html.
[106] *Legal Framework*, B LAB, http://www.bcorporation.net/become/legal (last visited Oct. 24, 2010).
[107] *Id.*
[108] Susan Adams, *Capitalist Monkey Wrench*, FORBES, Mar. 25, 2010, http://www.forbes.com/forbes/2010/0412/rebuilding-b-lab-corporate-citizenship-green-incorporation-mixed-motives.html; *see generally* Doeringer, *supra* note 27, at 305–306 (noting that B Lab's suggested contractual duties are incompatible with the "conception of fiduciary duties" in Delaware, which does not have a constituency statute).
[109] *Legal Framework*, *supra* note 106.
[110] Robert R. Keatinge, *LLCs and Nonprofit Organizations—For-Profits, Non-Profits, and Hybrids*, SUFFOLK UNIV. LAW SCH. LEGAL STUDIES RESEARCH PAPER SERIES NO. 09-13, 2009, at 25–26, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352767.
[111] *See, e.g.*, Stephen M. Bainbridge, *Beneficial Corporations*, PROFESSORBAINBRIDGE.COM (May 25, 2009), http://www.professorbainbridge.com/professorbainbridgecom/2009/05/beneficial-corporations.html ("State law arguably does not permit corporate organic documents to redefine the directors' fiduciary duties. In general, a charter amendment may not derogate from common law if doing so conflicts with some settled public policy.").
[112] *2011 B Corporation Annual Report*, B LAB, 6–14 (2011), http://www.bcorporation.net/B-Media/2011-Annual-Report.

B. Benefit Corporation Statutes

In addition to facilitating corporate retrofitting, B Lab has also lobbied state legislatures to create a new benefit corporation form specifically for housing social enterprise efforts.[113] A new form would lend needed certainty and legitimacy to the benefit corporation project. Such special vehicles already exist in some European countries. Belgium created the for-profit/for-purpose Société à Finalité Sociale (SFS) in 1995, and the United Kingdom followed with the similar Community Interest Company (CIC) structure in 2004.[114] The idea of instituting an entirely new corporate form for social enterprise has also been considered in the United States before, with both Minnesota and Hawaii considering, but ultimately rejecting, different variations on the theme.[115] However, the idea has recently gained new currency with the organized, calculated support of B Lab.

With B Lab leading the way,[116] Maryland and then Vermont adopted benefit corporation laws in spring 2010, and New Jersey, Virginia, Hawaii, California, and New York followed in 2011 and 2012.[117] Under these statutes, an existing corporation can elect, upon the approval of two-thirds of shareholders, to identify and operate as a benefit corporation.[118] In the new form, the company has an affirmative duty to provide a "general public benefit,"[119] and various measures ensure that its directors facilitate progress in this area.[120]

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[113] *Benefit Corporation—Legal FAQs*, *supra* note 97.

[114] Doeringer, *supra* note 27, at 308–15. For a more detailed review of the CIC, see Page & Katz, *supra* note 49, at 1370–72. *See also* Dana Brakman Reiser, *Governing and Financing Blended Enterprise*, 85 CHI. KENT L. REV. 619, 630–37 (2010) (reviewing the U.K. Community Interest Company).

[115] Kelley, *supra* note 24, at 368.

[116] *See, e.g.*, Diane Mastrull, *Maryland Adopts New Socially Aware Corporation Law*, PHILA. INQUIRER, Apr. 15, 2010, at C01, *available at* http://www.sbnphiladelphia.org/images/uploads/Maryland%20adopts%20new%20socially%20aware%20corporation%20law.pdf (noting that Maryland lawmakers gave "substantial credit" to B Lab for the first successful benefit corporation legislation); Max Abelson, *The New Be Good Business: Albany Gives Birth to New York's Benefit Corporation*, THE N.Y. OBSERVER (June 22, 2010), http://www.observer.com/2010/wall-street/new-be-good-business-albany-gives-birth-new-yorks-benefit-corporation (indicating that B Lab assisted in the drafting of New York's benefit corporation legislation); Kirk Kardashian, *In Good Company?*, SEVEN DAYS (July 7, 2010), http://www.7dvt.com/2010vermont-businesses-for-social-responsibility (explaining that Vermont Businesses for Social Responsibility modeled the legal requirements of Vermont's benefit corporation law on B Lab's requirements for voluntary B Corporations).

[117] *Benefit Corporation Legislation*, B LAB, http://www.bcorporation.net/publicpolicy (last visited Jan. 12, 2012).

[118] *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (2010); VT. STAT. ANN. tit. 11A, § 21.03 (2010). The statutes do not afford any official recourse to those shareholders that might not support the company's reorganization as a benefit corporation. Assuming that the vote is legitimate, those minority holders cannot challenge the corporation's new framework or the actions that it takes in accordance with it. Those shareholders do not have formal dissenters' rights. However, like any others, they can still act on their displeasure by selling their stock and thus dissociating from the firm.

[119] Under the statutes, "'general public benefit' means a material positive impact on society and the environment by the operations of a benefit corporation through activities that promote some combination of specific public benefits." *See, e.g.*, CORPS. & ASS'NS § 5-6C-01. In turn, acceptable "specific public benefits" may include those related to serving low-income individuals, promoting economic opportunity beyond the normal creation of jobs, protecting the environment, improving health, and advancing the arts and sciences. *See, e.g.*, S. 2170, 214th Leg., Reg. Sess. (N.J. 2010). By these terms, a benefit corporation

While the legislation only first took effect in October 2010,[121] it has already met some success.[122] Among the early adopters of the form was Blessed Coffee. This coffee wholesaler returns half of its profits to its Ethiopian co-operative supplier for use on clinics, schools, and other local development projects.[123] Another pioneering benefit corporation was The Big Bad Woof, a pet food retailer that contributes significant company resources to animal welfare and rescue efforts.[124] More recently, Patagonia, the environmentally conscious outdoor-clothing company, was among the first firms to adopt the benefit corporation form in California.[125]

In the wake of this early success and B Lab's continued lobbying, similar legislation is now being actively considered in at least five other states.[126] The creation of a benefit corporation form in any one state could be significant.[127] The fact that it is

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can—but is not required to—meet its "general" obligation simply through service to its employees, local community, or other stakeholders.

[120] *See, e.g.*, CORPS. & ASS'NS § 5-6C-01; tit. 11A, § 21.03.

[121] Angus Loten, *With New Law, Profits Take a Back Seat*, WALL ST. J. (Jan. 19, 2012), http://online.wsj.com/article/SB10001424052970203735304577168591470161630.html (noting that benefit corporation legislation took effect in Maryland in October 2010; New Jersey in March 2011; Vermont, Virginia, and Hawaii in July 2011; and California and New York in early 2012).

[122] Just how much success may be unclear. In Maryland, for example, where the benefit corporation legislation first passed and took effect, it is difficult to discern how many businesses have taken advantage of the new form, because, under the statute, the Maryland State Department of Assessment and Taxation is not required to track such shifts. Informal estimates from state government clerks suggest that no more than fifty businesses became benefit corporations in the first six months of the statute's existence. Gus Sentementes, *Loophole? Maryland Not Tracking Formation of "Benefit Corporations,"* BALT. SUN (Mar. 23, 2011), http://weblogs.baltimoresun.com/news/technology/2011/03/loophole_maryland_cant_track_f.html.

[123] Lorraine Mirabella, *Businesses Sign Up to Do Good While Doing Well*, BALT. SUN, Oct. 4, 2010, at 1C, *available at* http://articles.baltimoresun.com/2010-10-04/business/bal-bz-legal-scene-bcorp-1004_1_benefit-corporations-maryland-businesses-brian-j-feldman.

[124] Jamie Raskin, *Maryland, the Delaware of Benefit Corporations, Creates a Different Path for Socially Responsible Business*, LAW FOR CHANGE, http://www.lawforchange.org/lfc/NewsBot.asp?MODE=VIEW&ID=3908&SnID=1237807164 (last visited Jan. 17, 2011).

[125] *Firms with Benefits,* ECONOMIST, Jan. 7, 2012, http://www.economist.com/node/21542432 (noting that Patagonia was one of California's first twelve benefit corporations).

[126] *See Benefit Corporation Legislation*, *supra* note 117 (noting that, as of January 18, 2012, benefit corporation bills have been introduced in the legislatures of Colorado, Michigan, North Carolina, and Pennsylvania); *cf.* Grant Williams, *Congress Could Create New Kind of Group*, THE CHRON. OF PHILANTHROPY, May 2, 2010, http://philanthropy.com/article/Congress-Could-Create-New-Kind/65307/ (noting that Russell Sullivan, Senate Finance Committee finance director, said, "'[The federal government] might see the emergence of some proposals to establish what I'll call . . . a for-benefit corporation,' something in between companies and charities.").

[127] In the United States, a corporation's internal affairs, including the relations among its directors, officers, and shareholders, are controlled by the law of the state in which it is incorporated. This doctrine applies regardless of where the corporation's assets and operations are located. Peter V. Letsou, *The Changing Face of Corporate Governance Regulation in the United States: The Evolving Roles of the Federal and State Governments*, 46 WILLAMETTE L. REV. 149, 150–51 (2009). By some estimates, 63% of Fortune 500 companies and more than 50% of all U.S. companies are incorporated in Delaware to take advantage of the state's favorable corporate law and sophisticated legal institutions. Leila Janah, *The Many Bottom Lines of Businesses*, TECHCRUNCH (July 18, 2010), http://techcrunch.com/2010/07/18/the-many-bottom-lines-of-businesses/. The sponsor of Maryland's benefit corporation legislation has expressed a hope to make the state a similar kind of destination for social enterprise. And, indeed, one of the first businesses to adopt

approved or pending in a fifth of the country makes the benefit corporation arguably the most ascendant innovation in social enterprise organizations today, and one that is likely to alter the nature of mission-driven corporations in the United States.

C. Advantages of the Benefit Corporation

The benefit corporation, as now instituted in Maryland, Vermont, Virginia, New Jersey, Hawaii, California, and New York has several advantages that make it an attractive vehicle for social enterprise in those states and elsewhere. First, as its name suggests, it offers socially conscious businesses a real opportunity to benefit additional parties beyond shareholders. In fact, these businesses have an affirmative duty to pursue a "general public benefit," i.e., a "material positive impact on society and the environment."[128] Additionally, they have the flexibility to amend their charters in order to pursue "specific public benefits," including, for instance, the enhancement of the arts and sciences, human health, or economic opportunity.[129] Also, benefit corporation directors are required to consider a decision's effect on its various stakeholders when determining the corporation's "best interests."[130] Thus, the new form requires none of the tenuous argumentation necessary under the business judgment rule, nor any of the uncertain legal conflicts that arise under constituency statutes. Instead, it allows—indeed, *requires*—entrepreneurs to pursue both profits and socially beneficial purpose, to weigh the interests of both shareholders and stakeholders. And, the form ensures that directors and officers are protected in these pursuits.

The benefit corporation law also ensures some accountability in undertaking a social mission. It does so in several notable ways. To start, the new laws require the corporation to issue an "annual benefit report," to outline its specific beneficial goals and detail its recent progress towards them.[131] In this report, the benefit corporation must include a review of its social and environmental performance prepared "in accordance with a third party standard."[132] These provisions are meant to provide shareholders, stakeholders, and even outsiders with accurate, unadorned information on the corporation's actual adherence to its stated social objectives. If the benefit corporation is found lacking in some way in its social performance, its directors may be subject to suit.[133] Unlike existing constituency statutes, the new benefit corporation laws grant shareholders the right to state a claim against directors for failure to pursue the

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benefit corporation status under the law there was attracted from out of state. Gary Haber, *Md. 'Becoming the Delaware of Benefit Corporations,'* WASH. BUS. J., Oct. 6, 2010, http://www.bizjournals.com/washington/stories/2010/10/04/daily21.html?page=all.

[128] *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (2010); VT. STAT. ANN. tit. 11A, § 21.03 (2010).

[129] *See, e.g.*, CORPS. & ASS'NS § 5-6C-01; tit. 11A, § 21.03.

[130] Considerable interests under the statutes include those of shareholders, employees, suppliers, customers, the community, the environment, and the benefit corporation itself. *See, e.g.*, CORPS. & ASS'NS § 5-6C-01; tit. 11A, § 21.03.

[131] *See, e.g.*, CORPS. & ASS'NS § 5-6C-01. Vermont's law makes the preparation of this report the responsibility of the corporation's independent "benefit director." tit. 11A, § 21.03.

[132] *See, e.g.*, CORPS. & ASS'NS § 5-6C-01; tit. 11A, § 21.03. A third party intermediary would create and administer the third party standard in much the same way, for instance, that firms like Moody's use their private, proprietary credit ratings to assess different corporations and institutions.

[133] *See, e.g.*, CORPS. & ASS'NS § 5-6C-01; tit. 11A, § 21.03.

corporation's general or specific public purpose.[134] Directors, then, cannot act strictly at their own discretion in guiding the benefit corporation.

Such well-defined accountability measures allow the new benefit corporations a third significant advantage—branding. More investors and consumers are using nonfinancial considerations to frame their decisions and shape their behavior.[135] Social enterprises should be among the greatest beneficiaries of this sea change. Unfortunately, they may be missed in the cacophony of corporations claiming socially conscious practices or products. The stringent benefit corporation form allows actual socially oriented businesses to clearly differentiate themselves from the so-called "greenwashers,"[136] who seek market advantage by misrepresenting their environmental or social efforts.[137] Because of its explicit accountability measures, the benefit corporation is better able to attract and assure socially conscious investors,[138] consumers, and even employees. As B Lab notes, the form can "help us tell the difference between a 'good company' and just good marketing."[139]

It is clear that the benefit corporation allows businesses a number of significant advantages in pursuing social enterprise. The form carries stringent requirements, not mere opportunities, for directors to consider stakeholder interests. It reorients the entity's mission and decision making instead of just tweaking tax and capital constraints. And, notably, it is designed to harness the power and structure of the traditional corporate form for social pursuits. In this, the benefit corporation arguably has the most potential of any current approach to social enterprise. However, the form, as currently conceived by its early adopters and B Lab, is not without weaknesses.

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[134] The laws notably do not allow nonshareholders standing to file a claim. *See, e.g.*, CORPS. & ASS'NS § 5-6C-01; tit. 11A, § 21.03.

[135] *See, e.g.*, John Tozzi, *New Legal Protections for Social Entrepreneurs*, BLOOMBERG BUSINESSWEEK, Apr. 22, 2010, http://www.businessweek.com/smallbiz/content/apr2010/sb20100421_414362.htm (citing Bloomberg data that shows that in 2007, 11% of all assets under management in the United States were in some form of socially responsible investment).

[136] *FAQs*, B LAB, http://www.bcorporation.net/faq (last visited Oct. 24, 2010). *But see* Schmidt, *supra* note 37, at 186 (finding that "for the most part, the L3C business form has not provided a branding or fundraising advantage to [Vermont] entrepreneurs").

[137] Thomas P. Lyon & John W. Maxwell, *Greenwash: Corporate Environmental Disclosure Under Threat of Audit*, 20 J. ECON. & MGMT. STRATEGY 3, 7–10 (2011) (discussing the concept and definition of "greenwash").

[138] As established, legitimate social enterprises, the benefit corporation may better attract likeminded investors and the so-called "patient," long-term capital that often alludes socially conscious business. This in turn may insulate companies from the adverse, short-term pressures that direct contemporary public equity markets. According to B Lab's founders, it was these same pressures that proximately caused the recent financial crisis and environmental disasters. *See* Emily Holbrook, *Rise of the B Corp*, RISK MGMT., Sept. 1, 2010, at 12, *available at* http://www.rmmag.com/Magazine/PrintTemplate.cfm?AID=4164 ("If BP were a B Corp, they would have looked beyond short-term profit and considered the environmental and community impact of their decisions."); THE CORP. SOC. RESP. NEWSWIRE, *supra* note 99 ("[Maryland's approval of the benefit corporation form] represents the first systemic response to the underlying problems that created the financial crisis . . . ."); Abelson, *supra* note 116 (suggesting "the strategy of short-term value maximization eroded a couple trillion dollars of value over the past two years . . . ").

[139] *FAQs*, *supra* note 136.

D. Disadvantages of the Benefit Corporation

The benefit corporation has garnered strong support from policymakers and entrepreneurs alike.[140] Yet by its very nature, it carries with it certain, basic disadvantages. By imposing additional social duties and potential liabilities, the form arguably limits a business' pursuit of profit. Since, however, this voluntarily adopted form exists in part to promote a particular cause rather than just to make a profit, this cannot be considered a disadvantage in itself. Any shareholders who approve the use of the benefit corporation, endorse the additional duties and limits that it imposes as well.[141]

Some may argue that because the benefit corporation is subject to higher levels of service, duty, and liability, it should be entitled to some financial advantages. For instance, some evidence from the social enterprise efforts in Belgium and the United Kingdom suggests that new entity forms must have special financial benefits that outweigh their unique restrictions.[142] But this approach has spurred mixed reactions in the United States. For instance, Philadelphia offers a tax credit to local corporations certified by B Lab,[143] and similar proposals have received interest in the towns of Yonkers, New York, and Media, Pennsylvania.[144] However, such efforts have proven politically unpopular elsewhere. In Hawaii, the governor vetoed a bill creating a benefit corporation-like entity in part because it allowed these new enterprises relief from the state corporate income tax.[145]

Financial considerations aside, for social enterprise, the real disadvantage of the benefit corporation may be that it does not do enough. This new form has yet to endure tests in practical use or challenges in legal suits. But as currently conceived, it lacks the kind of governance devices and procedures (detailed in Part V) that could better facilitate its dual-mission success. While the benefit corporation legislation to date provides a strong, basic framework for social enterprise, it may not do enough to encourage mission fulfillment, to guide directors and officers, or to assist prospective investors. Thus, in time, the benefit corporation may emerge as an imperfect solution.

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[140] For example, the Maryland Senate and Assembly approved the benefit corporation bill by votes of 44–0 and 135–5, respectively. THE CORP. SOC. RESP. NEWSWIRE, *supra* note 99. A precursor to the form failed twice to pass the Minnesota state legislature, but that bill appears to have died for lack of action, not by a negative vote. *See S.F. 1153 Status in Senate for Legislative Session 85*, MINN. STATE LEG. https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=Senate&f=SF1153&ssn=0&y=2007 (last visited Jan. 19, 2011).

[141] Under existing benefit corporation statutes, only two-thirds of shareholders need to approve use of the new form. *See, e.g.*, S.B. 298, 26th Leg., Reg. Sess. (Haw. 2011). Some shareholders, then, may disapprove of the corporation's assumption of new duties and limits. These individuals have no official recourse. They have no formal dissenters' rights. However, like any disgruntled shareholders in the minority at a traditional corporation, they are still free to dissociate from the enterprise by selling their stock.

[142] Doeringer, *supra* note 27, at 321–22 (noting that social enterprises in those countries have special access to government capital and subsidies).

[143] *The B Corporation: A Business Model for the New Economy*, THE IMPACT INVESTOR, http://www.theimpactinvestor.com/b-corp-model-rewrites-the-c.html (last visited Oct. 24, 2010).

[144] Tecco, *supra* note 12.

[145] Kelley, *supra* note 24, at 368.

V. IMPROVING THE BENEFIT CORPORATION

As noted, the benefit corporation offers a variety of distinct advantages. The form does much to ensure that honest, socially conscious businesspeople are protected in their pursuit of both financial and social missions. In featuring an affirmative duty to do good, the form goes further than any social enterprise vehicle seriously considered in the United States. Still, this may not be enough. The statutes, as now drafted, do little to ensure that a benefit corporation fulfills its social obligations and that its self-selection and identification as a dual-mission enterprise is more than mere puffery. They leave the new form open to abuse, to unnecessary conflicts of interest and other general challenges that mark traditional corporate governance, all of which might affect its credibility among investors and consumers.[146] This Part reviews those potential problems and suggests how different mechanisms, including duties, internal structures, and intermediaries, can be used to address them.

A. Enforceability Problems

The benefit corporation has been heralded as a viable means of advancing social business.[147] However, it needs modifications if social entrepreneurs are to effectively and legally pursue dual purposes within its constraints.[148] In particular, the law needs to go further to ensure that benefit corporation officers and directors consistently meet their social obligations.[149]

Under the recently enacted benefit corporation laws, although directors have a duty to consider each of their various stakeholder groups, they are only legally accountable to one: shareholders.[150] As under traditional corporate law and recent constituency statutes,[151] shareholders and directors are the only individuals that can file a claim against leadership for mismanagement of the benefit corporation's public mission and other interests.[152] Employees, customers, community members, and all other stakeholders lack the necessary standing to legally challenge directors' actions.[153] On its face, this is a

[146] MacDonald, *supra* note 19 ("If companies can't be held accountable to named stakeholders, then their professions to be new kinds of corporations amount to little more than baseless public relations, according to Charlie Cray, director of the Center for Corporate Policy, a think tank in Washington, D.C., with a focus on corporate accountability.").

[147] *See, e.g.*, THE CORP. SOC. RESP. NEWSWIRE, *supra* note 99 (quoting B Lab co-founder Jay Coen Gilbert's reaction to the passage of the Maryland benefit corporation law: "Today marks an inflection point in the evolution of capitalism."); Tozzi, *supra* note 135.

[148] Yet note that to date no business operating as a B Corporation under a modified charter or as a benefit corporation under new state law has faced a legal challenge to its organization. *See* MacDonald, *supra* note 19.

[149] This Note does not explicitly address benefit corporations' potential capital limitations, but other recent work has. *See, e.g.*, Kelley, *supra* note 24, at 369 ("[H]ybrid entities must have the capacity to attract investment capital from all sources including government, private foundations, market-oriented venture capitalists, and financial institutions. Corporations, even those with the salutary features of B Corporations and SRCs, are simply too inflexible to accommodate that diversity of financial actors. From the point of view of the universe of potential investors, they include the unattractive features of both the for-profit and nonprofit forms.").

[150] *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (2010); VT. STAT. ANN. tit. 11A, § 21.03 (2010).

[151] Mitchell, *supra* note 81, at 581–82.

[152] *Benefit Corporation—Legal FAQs*, *supra* note 97.

[153] *See, e.g.*, CORPS. & ASS'NS § 5-6C-01; tit. 11A, § 21.03.

sensible and necessary provision. It would be unwise to grant blanket standing, allowing any individual with tenuous interest in the benefit corporation's operation to file suit. If allowed, one can easily imagine the endless, non-meritorious stream of litigation that the corporations might encounter. And, in theory, benefit corporation investors, as socially conscious supporters of the enterprise,[154] can be trusted to keep directors accountable in their pursuit of both purpose and profit.[155]

However, the benefit corporation form may have limited effectiveness if it does not include broader legal enforcement mechanisms. At minimum, without stricter standards, benefit corporation directors may have no reliable means to frame and then defend their decisions. The laws' limited provisions regarding legal standing provide no easily discernible rules on which stakeholder group's interests are paramount.[156] While directors know they are required to serve the company's stakeholders, they may be inhibited in doing so if they are only legally accountable to shareholders.[157] Thus, for example, corporate directors, faced with a decision to outsource a project to another country or incur short-term losses, may in the end be compelled to do the former if local community members or employees can in no way check their decision.[158]

Adjusting the benefit corporation law could preclude such challenges. In the similar context of constituency statutes, scholars have suggested giving stakeholder groups access to legal remedies as a check on corporate action.[159] Using such a reform for benefit corporations would not necessarily expose them to frivolous litigation or extensive liability. For instance, adopting Lawrence Mitchell's suggestion for reforming constituency statutes, standing could be conferred only on those stakeholders who can show injury to a "legitimate interest."[160] The board would then have the burden of showing it made the harmful decision in pursuit of a legitimate benefit corporation purpose.[161] If the board met this burden, the plaintiff could still enjoin the decision by showing the directors had available less injurious means of reaching the same

[154] It may help that many stakeholders (e.g., employees) may already be, or may choose to become, shareholders. *See* Sneirson, *supra* note 78, at 480.

[155] *See id.* ("Would shareholders . . . really prosecute the interests of other corporate stakeholders, to their own possible disadvantage? If other instances of shareholder activism in corporate law are any indication, the answer is yes."). This may be especially true in closely held corporations, where investors are often personally familiar with the business and supportive of its stated objectives.

[156] *See, e.g.*, CORPS. & ASS'NS § 5-6C-01 (2010); tit. 11A, § 21.03 (2010).

[157] Directors are also electorally accountable only to shareholders. *But see* Fairfax, *supra* note 55, at 226 ("[T]raditional shareholders do not use voting as a mechanism for influencing corporate conduct.").

[158] The directors should decide which course of action is preferable. But their assessment may be tainted if they face formal pressure (or the threat of such pressure) from only the shareholders, not the stakeholders.

[159] *E.g.*, von Stange, *supra* note 44, at 490; Bisconti, *supra* note 94.

[160] Mitchell, *supra* note 81, at 635–36. The court would assess the legitimacy of the plaintiff's interest based on his or her "express or implied contracts with the corporation, legitimate expectations, and the like." *Id.* By this standard, employees, suppliers, customers, and others in contractual privity with the corporation would be perhaps more likely to establish a "legitimate expectation" and, with it, an interest. However, community partners, local officials, and others may be able to do the same if, for instance, they had substantive, ongoing relationships with the corporation or they relied on the corporation's espoused commitment to particular social projects or goals. *Id.*

[161] *Id.* A legitimate benefit corporation objective may be socially oriented. However, it could easily be strictly business-related. For example, a benefit corporation could rebuff a community partner's complaint by showing it took the relevant action to avoid defaulting on loans or to comply with federal trade regulations or to ensure the continued growth—or simply existence—of the business.

objective.[162] This approach would insulate benefit corporation boards from extensive liability by limiting the pool of potential plaintiffs and by privileging director decisions. Yet it would also provide stakeholders with enough opportunity for recourse to ensure that their interests are not categorically ignored.

To be sure, such reform, while making the benefit corporation more accountable on its social mission, may also carry certain costs with it. For instance, this reform may chill or complicate directors' decision making. They may be reluctant to make any significant deviation from the norm, fearing the possible legal consequences. Alternatively, directors may seek more detailed information on the range of options available to them for each decision. And, such prudence may require enlisting expensive consultants or experts, or incurring other additional expenses. However, these additional complications would likely be absent from all but the most significant of benefit corporation decisions. Additionally, uncertainty in the process would dissipate as courts provided more guidance on what kind of matters are actionable, and as corporations themselves instituted processes to streamline the well-informed, fully considered decision-making process.

B. Internal Regulation

An expansion of standing, as noted, may be disadvantageous in some instances and even unnecessary in others.[163] But benefit corporation directors should not simply be trusted to adequately perform their new dual-mission job. Rather, they need either incentives or requirements to keep pressure on them and to help ensure that they do not fall back to using traditional, profit-focused frames in their decision making. While this may be achieved by expanding legal rights, it can also be done by instituting new internal policies, procedures, and structures.

1. Policies & Procedures

Existing benefit corporation laws require companies to identify benefit objectives in their charters and annual reports and to measure their annual progress against a third-party standard.[164] These mission standards are more stringent than any yet included in a social enterprise vehicle.[165] Still, without clear benchmarks and measurable objectives, these standards may not encourage corporate leaders to pursue public benefit to the full extent of their abilities.

The law could further focus directors on the benefit corporation's social performance by reducing their interest in its financial performance. Benefit corporations should seek profit. But absent limits on this goal, the corporation's directors may still be subject to the real or imagined pressures of the market, and may thus occasionally privilege shareholder interests to the detriment of stakeholder positions. The benefit corporation could follow its European equivalents in preventing this scenario by

[162] *Id.*
[163] In some benefit corporations, depending on the availability of stock, various stakeholders may have the opportunity to become shareholders and thus enforcers in their own right. *See* Sneirson, *supra* 78, at 480.
[164] *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (2010); VT. STAT. ANN. tit. 11A, § 21.03 (2010).
[165] Mickels, *supra* note 67 (detailing duties within social enterprise entities).

imposing dividend caps.[166] Alternatively, the law could require that issuing any real financial return is contingent upon first producing a clear, measurable social return.[167] In this way, directors could not consider an action's financial implications without also weighing its benefit impacts.

Absent explicit financial controls, benefit corporations could enact other policies to better focus and guide directors' decision making. To start, each should identify in its bylaws the particular stakeholder group(s) which it strives to serve.[168] This would give directors a better sense of what weight they should afford each of the various stakeholder interests at issue in their decisions.[169] Such a move may spur conflict among warring factions of shareholders, dividing investors based on which public purpose or stakeholder interest should control in a particular context. But even so, it is likely better to meet this challenge early in a benefit corporation's life when the number of shareholders is more limited, and when the issue is divorced from an actual, substantive operations decision.

In addition, each benefit corporation, in its bylaws or elsewhere, should identify when, how, and to what extent, its social purpose is considered in business decisions. For instance, is the social purpose weighed in all decisions or only in specific cases like profit distributions, workforce decisions, or supply chain development? Also, what level of diligence is due in these decisions? Some scholars have advocated the commission of "stakeholder assessments" to assist boards in weighing the social impact of their decisions.[170] Is this level of assessment necessary, or do directors only need to conduct a reasonable investigation into the pros and cons of different decisions? The courts and legislatures may eventually provide more guidance here, telling benefit corporation directors how they need to perform their new duties. But the more that benefit corporations can weigh these issues themselves early, in their own unique business and

[166] Doeringer, *supra* note 27, at 309–12 (noting that Belgium's SFS and the United Kingdom's CIC forms both allow investors only a limited annual rate of return). But, such an approach may be of little consequence in the United States where an increasing number of traditional corporations do not issue annual dividends anyway. *See, e.g.*, Eugene F. Fama & Kenneth R. French, *Disappearing Dividends: Changing Firm Characteristics or Lower Propensity to Pay?*, 60 J. FIN. ECON. 3 (2001) (finding that the proportion of firms issuing cash dividends dropped dramatically between 1978 and 1999). Practical effect aside, a traditional investor may find the idea of investing in a capped stock irrational or even abhorrent. Still, a benefit corporation investor is likely to be more interested in having a social impact than in maximizing corporate distributions. Indeed, it is possible that some individuals may think of their expenditures not as under-performing stock investments but as potentially profitable charitable donations.

[167] Here, again, the United Kingdom has provided guidance. There, investors in "social impact bonds" only receive a return when the entity issuing them first produces certain social outcomes. ECONOMIST, *supra* note 2. Such a requirement may further limit the pool of potential benefit corporation investors.

[168] Such identification of priorities is already explicitly allowed under the benefit corporation statutes in Vermont, Virginia, New Jersey, and Hawaii, for example, and, presumably, may also be pursued through company bylaw amendments elsewhere.

[169] This may also prevent self-serving directors from seeking shelter in the multiple purposes of the benefit corporation. Some scholars have argued that earlier constituency statutes allowed directors to benefit by playing different groups against each other. *See* von Stange, *supra* note 44, at 463 ("A serious risk exists that unscrupulous management will use constituency statutes as a shield to protect their personal interests"); Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 433 (2002) ("[I]t will be easier to pretend their actions were designed to benefit one of several groups even when they were motivated by more self-centered concerns."); Bainbridge, *supra* note 81, at 1013.

[170] Sneirson, *supra* note 78, at 474–76.

mission context, the more effective and efficient their decision making and operations will be.

2. Structures

The law could also improve internal regulation in benefit corporations by instituting new governance structures. Socially conscious work is a significant component of a benefit corporation's overall mission. It can be a complex, challenging pursuit, especially in a corporation that serves or impacts many different interests. It should be the general concern of the benefit corporation's full leadership, but such public work should also be the sole focus of a smaller group of independent and sophisticated directors. The benefit corporation laws in Vermont, New Jersey, and Hawaii hint at this principle by requiring an independent director to act as the designated "benefit director."[171] This individual is responsible for overseeing the corporation's benefit work, including the production of the annual benefit report.[172] While one such director may be sufficient for a smaller, closely held corporation, one alone likely cannot effectively monitor the benefit work of a larger operation.

The law should expand on this provision. It should require benefit corporations to enlist additional benefit directors as they grow and, once they reach a certain size, to organize full benefit committees as part of their boards.[173] Many traditional corporations have already voluntarily instituted social responsibility committees,[174] and scholars have previously considered such a requirement for social enterprise-like entities.[175] This new committee could be composed of independent directors who are familiar with the benefit corporation's stated social objectives.[176] It could then be responsible for monitoring the corporation's nonfinancial performance, reporting its findings, and advising other board members and officers on courses of action.[177] As participants in regular decision making and operation, these dedicated, sophisticated directors could help better ensure that the corporation consistently pursues its social goals and serves its various stakeholders.

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[171] *See, e.g.*, VT. STAT. ANN. tit. 11A, § 21.03 (2010). The benefit corporation laws in Maryland and Virginia contain no similar governance requirement. *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (2010).

[172] Tit. 11A, § 21.03.

[173] Such provisions could be triggered upon a benefit corporation surpassing particular levels of annual revenues or numbers of shareholders.

[174] *See, e.g.*, Guy Morgan, Kwang Ryu & Phillip Mirvis, *Leading Corporate Citizenship: Governance, Structure, Systems*, 9 CORP. GOVERNANCE 39 (2009).

[175] *See, e.g.*, Fairfax, *supra* note 55, at 201–02 (recommending that "double bottom line entities," like healthcare companies and for-profit schools, be required to maintain independent, disinterested, monitoring committees as parts of their boards).

[176] Mainstream corporations may be challenged in finding qualified individuals to serve as social responsibility directors. However, benefit corporations may have an advantage in finding and recruiting these people to their boards. By their very nature, many of these businesses are well-embedded in their communities as well as various social enterprise networks, and are thus familiar with a population that is likely to share their values and objectives.

[177] This model has analogues in traditional corporate governance. For instance, in corporations subject to the Sarbanes-Oxley Act of 2002, the board's audit committee is expected to include financial experts who are qualified to assess the corporation's affairs. Sarbanes-Oxley Act, 15 U.S.C. § 7265 (2010).

C. Intermediary Involvement

1. Reporting

The law could also reorient the external regulation of benefit corporations to ensure that they pursue their benefit objectives. Currently, statutes require these corporations to disclose, in an annual report, information on their "beneficial performance," prepared in accordance with a third-party standard.[178] This approach, while one step toward increasing transparency and disclosure, still presents fundamental flaws. Most notably, it allows a benefit corporation's officers and directors to conduct all nonfinancial reporting, as long as they follow an outside standard in doing so.[179] This presents a clear opportunity for selective reporting, if not outright misconduct.

To guard against this, the benefit corporation statutes should, at minimum, outline explicit penalties for directors and other corporate actors who provide false or misleading information on the company's social performance to investors or the public at large. Like the equivalent financial data-focused federal and state laws already in effect, such a provision would not eliminate all misconduct. However, it could make fraudulent self-reporting a far less attractive or viable option for those within under-performing benefit corporations.

Additionally, the new state laws could also require that each benefit corporation employ "social auditors," i.e. external professionals of some kind, to review nonfinancial performance reports to ensure that the data therein is full and accurate.[180] This is not a perfect solution either, as the auditors would still be dependent on the corporation for compliance and performance information.[181] Also, similar arrangements failed to catch gross misconduct at Enron, Lehman Brothers, and elsewhere in recent years. The employment of external professionals, however, would add another layer of accountability and credibility to the benefit corporation form.[182]

2. Ratings

Allowing the benefit corporation itself to select the third-party standard by which to measure its performance may also be problematic. In recent years, there have been a number of attempts, some questionable and some admirable, at developing a comprehensive system to measure a firm's social and environmental impacts.[183] In fact, by one estimate, there are now over twenty-five different such systems in place.[184] Different benefit corporations require different standards to match their unique missions, but there should be limits to this choice. Otherwise, a corporation could easily employ

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[178] *See, e.g*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (2010); VT. STAT. ANN. tit. 11A, § 21.03 (2010).
[179] *E.g.*, CORPS. & ASS'NS § 5-6C-01; tit. 11A § 21.03.
[180] *But see The B Corporation: A Business Model for the New Economy*, *supra* note 143 (noting the conflicts of interest inherent in paying an external firm to assess the benefit corporation).
[181] Fairfax, *supra* note 55, at 245.
[182] Notably, companies that undergo certification as B Corporations with B Lab have a 10% chance of being audited by that organization every year. *Audits*, B LAB, http://bcorporation.net/audits (last visited Oct. 24, 2010).
[183] *See, e.g.*, Adams, *supra* note 108; Clark Steiman, *supra* note 26.
[184] Janah, *supra* note 127.

only that standard which it knows to be weak or favorable, thus compromising any value disclosure might have had in the first place.[185]

Advocates of this flexible, permissive approach to corporate reporting may suggest that, in time, the most reliable standards will be identified by the market and the courts.[186] At the least, as a more expedient alternative, the benefit corporation law could institute a kind of oversight board that could regulate the reviewers, by verifying the stringency and integrity of their measures.[187] Some states may balk at the additional cost of such regulation. However, a government's minimal investment here could in turn improve benefit corporations' performance and social service in the state.

CONCLUSION

The recent advent of the state-recognized benefit corporation improves upon earlier constituency statutes and social enterprise vehicles. It provides social entrepreneurs with an attractive organizational vehicle in which they can bypass longstanding corporate law and debate to pursue both purpose and profits. Still, this new form may not operate for social purpose quite as effectively as some have suggested. Without additional provisions for legal enforceability, internal governance, and external regulation, benefit corporations might be misused or abused. The new laws must not only protect these businesses' pursuit of a dual missions; they must keep them accountable in both as well. The integrity of the new form may depend on it.

Policymakers must be careful in proceeding. If they seek to encourage social enterprise, they cannot impose inordinate costs and liabilities on interested businesses. Nor can they legislate details of mission and structure for unique organizations with special purposes and dynamic existence. But if policymakers worked to reduce the potential for gridlock, confusion, and dishonesty in the benefit corporation boardroom, they could ensure that this new form would remain attractive and legally viable. In this way, they can help entrepreneurs help others.

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[185] Of course, it may not even be enough for a corporation to employ a rating agency that is perceived as credible and stringent. In recent years, traditional credit rating agencies have been criticized for operating with overwhelming conflicts of interest as they are paid by—and thus perhaps beholden to—the same entities they are responsible for objectively assessing. *See, e.g.*, Rupert Neate, *Ratings Agencies Suffer 'Conflict of Interest,' Says Former Moody's Boss*, THE GUARDIAN (Aug. 22, 2011), http://www.guardian.co.uk/business/2011/aug/22/ratings-agencies-conflict-of-interest.

[186] *Benefit Corporation—Legal FAQs*, *supra* note 97.

[187] Such a regulator could adopt, in part, the approach of the Public Company Accounting Oversight Board, which oversees the auditors of public companies. PCAOB, http://pcaobus.org/ (last visited Oct. 26, 2010).