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PLURALISM IN CORPORATE FORM: CORPORATE LAW AND BENEFIT CORPS.

*Lyman Johnson**

INTRODUCTION

Social enterprise has generated widespread interest in recent years.¹ Sometimes called “social entrepreneurship,” social enterprise is a general term used to describe an approach to business that, while aiming to produce profits, also seeks in a significant way to advance one or more social or environmental goals—i.e., a so-called “dual mission.”² The social enterprise movement has spawned legal as well as business reform, and several states have enacted laws authorizing new forms of business entities to accommodate these emergent “hybrid” companies.³ These novel legal–business arrangements include low-profit limited liability companies (“L3Cs”),⁴ flexible purpose corporations,⁵ and benefit corporations (“Benefit Corps.”)⁶

* Robert O. Bentley Professor of Law, Washington and Lee University School of Law, LeJeune Distinguished Chair in Law, University of St. Thomas (Minneapolis) School of Law. The Frances Lewis Law Center at Washington and Lee University School of Law and the University of St. Thomas (Minneapolis) provided financial support for Professor Johnson. The author appreciates the comments and remarks by participants at the Emerging Issues in Social Enterprise Symposium, held at Regent University School of Law on October 6, 2012. The author especially thanks Professors Dana Brakman Reiser and Haskell Murray for their helpful comments. David Hurst provided excellent research assistance.

¹ Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 61–62 (2010).

² Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1361 (2011).

³ These laws are well summarized by Professor Haskell Murray. J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1 (2012).

⁴ As of this writing, nine states and two federal jurisdictions have adopted statutes permitting the creation of L3C limited liability companies. *Laws*, AMERICANS FOR COMMUNITY DEV., <http://www.americansforcommunitydevelopment.org/legislation.html> (last visited Mar. 4, 2013). For various critical treatments of L3Cs, see J. William Callison

Pioneered by Maryland in 2010,⁷ Benefit Corp. statutes subsequently sailed through the New York and New Jersey legislatures without a single dissenting vote.⁸ Later proposals, however, such as one currently stalled in Colorado, for example,⁹ have sometimes faced

& Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273 (2010); David S. Chernoff, *L3Cs: Less than Meets the Eye*, 22 TAX'N EXEMPTS, May–June 2010, at 3; Daniel S. Kleinberger & J. William Callison, *When the Law is Understood—L3C No* (William Mitchell Coll. of Law Legal Studies Research Paper Series, Working Paper No. 2010-07, 2010), available at <http://ssrn.com/abstract=1568373>; Rick Cohen, *L3C: Pot of Gold or Space Invader?*, BLUE AVOCADO (Sept. 30, 2009), <http://www.blueavocado.org/content/l3c-pot-gold-or-space-invader>. For more laudatory treatments, see CARYN CAPRICCIOSO ET AL., INTERSECTOR PARTNERS, L3C, WHO IS THE L3C ENTREPRENEUR? 24–26 (2012) (on file with Regent University Law Review); J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1, 51 (2011); Elizabeth Schmidt, *Vermont's Social Hybrid Pioneers: Early Observations and Questions to Ponder*, 35 VT. L. REV. 163, 167–68 (2010); Nancy Artz et al., *Low-Profit Limited Liability Companies (L3Cs)* 9 (Mar. 1, 2012) (unpublished paper), available at <http://ssrn.com/abstract=2022342>; Brett A. Seifried, *Mind the Gap: Using the History and Theory of Profit and Nonprofit Corporations to Remedy the Problems of Social Enterprise in Low-Profit Limited Liability Companies—A Theory and Practice Approach* 38–63 (June 13, 2012) (unpublished article), available at <http://ssrn.com/abstract=2083827>.

⁵ Only California has enacted a flexible purpose corporation statute. WILLIAM H. CLARK, JR. ET AL., THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC, app. c, at 5 (Benefit Corporation White Paper, Jan. 26, 2012), available at http://benefitcorp.net/storage/The_Need_and_Rationale_for_Benefit_Corporations_-_April_2012.pdf [hereinafter White Paper]; see also Corporate Flexibility Act of 2011, CAL. CORP. CODE §§ 2500–3503 (West Supp. 2013).

⁶ As of this writing, twelve states have enacted statutes authorizing benefit corporations: California, CAL. CORP. CODE §§ 14600–14631 (West Supp. 2013); Hawaii, HAW. REV. STAT. §§ 420D-1 to -13 (West Supp. 2011); Illinois, S. 2897, 98th Gen. Assemb., Reg. Sess. (Ill. 2012); Louisiana, LA. REV. STAT. ANN. §§ 12:1801 to :1832 (Supp. 2013); Maryland, MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01 to -08 (West Supp. 2012); Massachusetts, MASS. GEN. LAWS ch. 156E, §§ 1–16 (Supp. 2012); New Jersey, N.J. STAT. ANN. §§ 14A:18-1 to -11 (West Supp. 2012); New York, N.Y. BUS. CORP. LAW §§ 1701–1709 (McKinney Supp. 2013); Pennsylvania, H.R. 1616, 196th Gen. Assemb., Reg. Sess. (Pa. 2012); South Carolina, S.C. CODE ANN. §§ 33-38-110 to -600 (Supp. 2012); Vermont, VT. STAT. ANN. tit. 11A, §§ 21.01–14 (2010 & Supp. 2012); Virginia, VA. CODE ANN. §§ 13.1-782 to -791 (2011). Maryland also authorizes benefit LLCs. MD. CODE ANN., CORPS. & ASS'NS §§ 4A-1101 to -1108 (West Supp. 2012). For excellent descriptions, and some criticisms, of these statutes, see Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form Of Organization?*, 46 WAKE FOREST L. REV. 591, 593–95 (2011); Murray, *supra* note 3, at 22–24.

⁷ See MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (West Supp. 2012).

⁸ See Mark A. Underberg, *Benefit Corporations vs. “Regular” Corporations: A Harmful Dichotomy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 13, 2012, 8:31 AM), <http://blogs.law.harvard.edu/corpgov/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/>.

⁹ Compare S. 12-182, 68th Gen. Assemb., 2d Reg. Sess. (Colo. 2012) (introduced bill), with S. 12S-003, 68th Gen. Assemb., 1st Extraordinary Sess. (Colo. 2012)

tougher sledding.¹⁰ Moreover, legal commentators have leveled strong criticisms at all legal forms of hybrid companies, particularly L3Cs,¹¹ but also Benefit Corps.¹² These critiques are frequently of a business or financial nature and range, for example, from grave doubts about the prospects for meaningful capital formation to concerns over the likely success of the socially responsible “branding” strategy aimed at consumers.¹³ But thoughtful scholars have raised very pointed legal criticisms as well.¹⁴

For example, in April 2012, the ABA Business Law Section, on behalf of the Committee on Limited Liability Companies, Partnerships, and Unincorporated Entities and the Committee on Nonprofit Organizations, submitted a letter and attachment making a number of highly critical legal points about L3Cs, using such words as “misleading” and “serious risk” and “dangerously.”¹⁵ Clearly, for many, the legal jury is, at best, still out on the new hybrid forms, particularly the L3C version, while for others, the verdict already is in and a quick death is the suggested sentence.

This Article addresses selected issues raised by Benefit Corps. It begins critically, faulting Benefit Corp. legislation, like all hybrid form statutes, for misunderstanding that traditional for-profit corporations

(reengrossed bill). Benefit Corp. legislation has also been introduced into eleven other jurisdictions: Alabama, Arizona, Connecticut, Florida, Iowa, Montana, Nevada, New Mexico, North Carolina, Oregon, and the District of Columbia. For a current look at pending and approved legislation, visit *State by State Legislative Status*, BENEFIT CORP INFO. CENTER, <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited Mar. 4, 2013).

¹⁰ According to Colorado lawyer J. William Callison, the Colorado legislature has considered Benefit Corp. legislation for over two and one-half years and has not yet passed a statute as of July 2012. J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 92 n.20 (2012). Notwithstanding the stalled legislation in Colorado, Illinois, Massachusetts, and Pennsylvania enacted Benefit Corp. legislation in 2012. See MASS. GEN. LAWS ch. 156E, §§ 1–16 (Supp. 2012); S. 2897, 98th Gen. Assemb., Reg. Sess. (Ill. 2012); H.R. 1616, 196th Gen. Assemb., Reg. Sess. (Pa. 2012).

¹¹ See *supra* note 4.

¹² See, e.g., Brakman Reiser, *supra* note 6, at 617; Murray, *supra* note 3, at 27–33; Underberg, *supra* note 8; see also Ann E. Conaway, *The Global Use of the Delaware Limited Liability Company for Socially-Driven Purposes*, 38 WM. MITCHELL L. REV. 772, 801 (2012); Celia R. Taylor, *Carpe Crisis: Capitalizing on the Breakdown of Capitalism to Consider the Creation of Social Businesses*, 54 N.Y.L. SCH. L. REV. 743, 761 (2009–2010); *B Corps: Firms with Benefits*, ECONOMIST, Jan. 7, 2012, at 57, 58.

¹³ See, e.g., Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 366–70 (2009).

¹⁴ See generally Brakman Reiser, *supra* note 6; Murray, *supra* note 3, at 27–33.

¹⁵ Letter from Linda J. Rusch, Chair, ABA Bus. Law Section, to Steve Simon, Assistant Minority Leader, Minn. House of Representatives (Apr. 19, 2012), available at <http://ssrn.com/abstract=2055823>.

(like LLCs) are legally free to pursue social or environmental goals and, except in limited circumstances in Delaware most notably, are not required to maximize corporate profits and/or shareholder wealth. But from there the Article, although making a number of critical points and suggestions for statutory change, takes a more positive stance on Benefit Corps. and argues that they usefully disrupt the current business landscape and shed instructive light on certain unexamined premises in corporate law. Consequently, for both legal and business reasons, it is premature to conclude that they will not play an important role, both culturally and intellectually. Moreover, Benefit Corps. closely resemble early American corporations that largely were formed to advance public-serving purposes, not private gain, and thus, historically, they represent a return to early practices as well as a seeming ultra-modern innovation in corporate form. In addition, they exemplify the growing phenomenon of institutional pluralism in which a diverse array of organizations serves to mediate between the individual and the state and to advance a variety of social goals, but without statist control. This pluralism is serving to overcome longstanding and overly stark dichotomies that simplistically categorize activity (and actors) as either profit *or* nonprofit, and as either public *or* private.

A further “benefit” of Benefit Corps. is that they usefully illuminate, but only partially meliorate, deep confusion within traditional corporate law over the relationship of three core concepts—fiduciary duties, corporate purpose, and the corporation’s best interests. Still, although conceptually Benefit Corps. move from a shareholder-centric toward a stakeholder-centric model of corporateness, they stop short of a truly new “corporate,” mission-centric model and theory of corporateness. Instead, reflecting doctrinal and theory failures in corporate law generally, they embody an alloy of shareholder and stakeholder elements. This is true at the organizational level of theory and the individual level of theory. As to the latter, Benefit Corps., following prevailing corporate law and theory generally, fail to move beyond an individualistic, self-interested anthropology of business participants to one where their role is to serve the larger, common good. And although Benefit Corps., for a variety of reasons, could set back efforts to bolster corporate responsibility in the traditional for-profit sector, as this Article acknowledges, there also are reasons to believe, at this stage, that they might enhance it. Or, at least, it is too early to tell whether Benefit Corps. will bring a net advance in corporate responsibility or simply lead to a migration of such efforts away from the traditional corporate sector and into the social enterprise segment.

This Article is organized into five parts. Part I describes the faulty but understandable premise of Benefit Corps. as a legal reform movement. Part II sets Benefit Corps. into the broader context of

evolving institutional pluralism in American society. Part III explains how Benefit Corps. provide a useful lens for spotlighting the continuing muddle in traditional corporate law over fiduciary duties and their relationship to corporate purpose and a corporation's best interests. Here, Benefit Corps. illuminate the problem but offer only a partial and less than satisfactory fix, one that reflects the current lack of a truly "corporate" theory of the corporation. Part IV considers various arguments as to why Benefit Corps. might or might not adversely affect corporate responsibility in the for-profit sector more generally. This Article ends with a brief conclusion.

I. THE LEGALLY FAULTY, BUT UNDERSTANDABLE AND COMMENDABLE,
PREMISE OF BENEFIT CORPS.

The foundational "White Paper" on Benefit Corps. states that a significant rationale for them is "the default position [within corporate law that] tends to favor the traditional fiduciary responsibility to maximize returns to shareholders over the company's social mission."¹⁶ Later, the White Paper summarily and sweepingly states that the U.S. legal system governing business corporations is not structured to address companies that solve social problems.¹⁷ This Part of this Article now briefly explains how the White Paper's first assertion is wrong, or at least highly debatable, as a positive law matter and how the second statement appears to be unmindful of corporate law history. Nonetheless, the positions in the White Paper are perfectly understandable given widespread beliefs about legal mandates on corporate purpose, and the White Paper commendably seeks to "work around" those widely held, if mistaken, perceptions.

A. *Current Law and Corporate Purpose*

This author and others have addressed the law of corporate purpose before,¹⁸ and this author currently is preparing more extensive articles on that specific subject.¹⁹ What is striking about various contemporary writings on corporate purpose is that so many commentators believe the

¹⁶ White Paper, *supra* note 5, at 6.

¹⁷ *Id.* at 7.

¹⁸ See Lyman Johnson, *A Role for Law and Lawyers in Educating (Christian) Business Managers About Corporate Purpose* (Univ. of St. Thomas Sch. of Law Legal Studies Research Paper Series, Working Paper No. 08-22, 2008), available at <http://papers.ssrn.com/abstract=1260979>. A newly published 2012 book treats this subject fully. LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012).

¹⁹ See, e.g., Lyman Johnson, *Unsettledness in Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP L. (forthcoming 2013). For a balanced treatment of the debate within the corporate law community over whether the law requires profit maximization, see Murray, *supra* note 3.

law does not clearly mandate shareholder wealth or profit maximization.²⁰ Instead, the better view is that the law is (and should be) agnostic on the subject of corporate purpose. After all, the positive law cited in support of a shareholder wealth maximization stricture is remarkably thin and highly ambiguous. The so-called “leading case” of *Dodge v. Ford Motor Co.* is from 1919 and in dictum expressed a shareholder-centric purpose, but the decision itself, although mandating payment of yet additional dividends, did nothing to alter Henry Ford’s avowed strategy of attending to the wellbeing of employees and consumers.²¹ Moreover, Ford had already paid returns to the plaintiffs of a magnitude that would make a modern hedge fund manager green with envy,²² thereby undercutting any suggestion that Ford was not taking excellent care of investors,²³ even as he sought to serve other worthy goals as well. In ordering additional dividends, the case provided the plaintiff-investors with a remedy of an even greater financial return but not a remedy of altering corporate purpose. And even there, in interfering with directorial business judgment regarding dividends, the case is an outlier.²⁴ The case is of dubious and lonely authority for other reasons as well.²⁵

In Delaware, the 2010 *eBay* decision²⁶ is touted by some, including the White Paper, as mandating shareholder primacy.²⁷ Yet, the opinion cited no authority for its assertions on that point and, as in *Dodge*, did

²⁰ See Murray *supra* note 3, at 5–8 (collecting commentary); Underberg, *supra* note 8 (“The problem is that its primary rationale rests on the mistaken, though widely-held, premise that existing law prevents boards of directors from considering the impact of corporate decisions on other stakeholders, the environment or society at large.”).

²¹ 170 N.W. 668, 684–85 (Mich. 1919).

²² The plaintiffs owned 10% of the outstanding stock of Ford Motor Company and contributed \$200,000 of the original \$2 million in invested capital. *Id.* at 669–70. From 1903 through 1915, the Ford Motor Company paid \$41 million in special dividends, plus a regular quarterly dividend. *Id.* at 670. Thus, the plaintiffs received \$4.1 million in special dividends alone, representing a stunning return of approximately twenty times their initial investment.

²³ *Id.* at 684 (referring to “incidental benefit of shareholders”).

²⁴ See FRANKLIN A. GEVURTZ, CORPORATION LAW § 2.3.1, at 154 (2d ed. 2010) (“[C]ourts have been hesitant to find an abuse of discretion [with respect to dividends] in the absence of fairly extraordinary facts.”).

²⁵ See Johnson, *supra* note 18, at 9–11.

²⁶ *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 35 (Del. Ch. 2010).

²⁷ See, e.g., Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 148–55 (2012); White Paper, *supra* note 5, at 11. Delaware itself is considering enactment of a Benefit Corp. statute in 2013. *Significant Proposed Amendments to the General Corporation Law of the State of Delaware in 2013: Ratification, Second-Step Mergers, Public Benefit Corporations and Other Matters*, RICHARDS, LAYTON & FINGER (Mar. 20, 2013), <http://www.rlf.com/knowledgecenter/ealertsnewsletters/4606#public>.

nothing to alter craigslist's business focus strategy.²⁸ In addition, it is remarkable that, lacking any statutory predicate for doing so, a public judge would order a business to pursue (or not pursue) a corporate strategy that was thoughtfully established by the company's own lawfully constituted governance body. Outside Delaware, moreover, over half of the states have expressly permitted consideration of non-shareholder constituencies in a way that blunts judicially prescribed shareholder primacy.²⁹

Some commentators, on the other hand, think the law does so mandate.³⁰ Thus, at best, unlike so many core subjects in corporate law that are utterly noncontroversial,³¹ the foundational issue of corporate purpose remains, in the year 2013, legally unsettled. Non-law factors, including business and educational lore, business conventions and norms, and faulty understandings of law, for example, are the chief influencers of today's thinking on corporate purpose.³²

If the law does not definitively require shareholder wealth or profit maximization—and certainly no statute does so—but there is nonetheless a widely held perception that the law does so dictate, then the White Paper assertion noted above³³ becomes more understandable, both legally and pragmatically. As does this statement about the legal effect of Benefit Corp. statutes: “[They] would ease or eliminate the risk of suit by shareholders for failure to maximize financial returns.”³⁴ And Etsy company's recent and highly illustrative statement as to why it had chosen to become a Benefit Corp. also becomes clear: “We believe that the best long-term stewards of Internet-based networks and marketplaces will focus on value creation for all participants instead of solely on shareholders. B corporations provide a legal foundation

²⁸ The opinion struck down certain anti-takeover measures as a remedy, but it did not mandate a change in the business strategy of craigslist. *eBay*, 16 A.3d at 41. The *eBay* opinion is more fully discussed in Johnson, *supra* note 19.

²⁹ See 1 JAMES D. COX & THOMAS LEE HAZEN, *THE LAW OF CORPORATIONS* § 4:10, at 245 (3d ed. 2010).

³⁰ See Murray, *supra* note 3, at 5–6 (citing commentary); see also Strine, *supra* note 27, at 155.

³¹ Countless topics could be noted. For example, shareholders elect directors, *e.g.*, DEL. CODE ANN. tit. 8, § 141(d) (2011), and the board of directors issues stock, *see, e.g., id.* § 152, both of which are fundamental matters clearly addressed by statute.

³² See Johnson, *supra* note 18, at 2; Murray, *supra* note 3, at 18 & n.76 (citing Loizos Heracleous & Luh Luh Lan, *The Myth of Shareholder Capitalism*, HARV. BUS. REV. (Apr. 2010), <http://hbr.org/2010/04/the-myth-of-shareholder-capitalism/ar/1> (citing a study that found directors believe they must maximize shareholder wealth)).

³³ See *supra* text accompanying note 16.

³⁴ Kelley, *supra* note 13, at 369.

perfectly supporting this much more comprehensive outlook.”³⁵ Surely, behind that statement lurks the ghost of Chancellor Chandler’s statement about the errant ways of “Internet-based” craigslist in the 2010 *eBay* decision.³⁶

As this author has earlier noted, the above statements about the need for Benefit Corp. legislation result from “the perception . . . that for-profit corporations must/should serve shareholder interests exclusively or primarily.”³⁷ And consequently, these perceptions, which stem from “conventional wisdom,” however faulty or ill-founded that wisdom may be, “are the key for law reform.”³⁸ Law reform, after all, typically takes place against a perception of need for corrective action, whether grounded rightly or wrongly.³⁹

B. History and Corporate Purpose

Whatever one believes the purpose of corporate endeavor is (or should be) today, it is helpful to remember that social expectations of U.S. corporations are fluid, and that they can and have changed.⁴⁰ Prior to the nineteenth century, for example, many corporations were charged with carrying out public-serving functions.⁴¹ “Thus, colleges, guilds, and municipalities were often organized as corporations, as were such public-serving transportation ventures as canals or turnpikes.”⁴² During the colonial period, colonial legislatures had chartered a mere seven

³⁵ Michelle Traub, *Etsy Joins the B Corporation Movement*, ETSY NEWS BLOG (May 9, 2012), <http://www.etsy.com/blog/news/2012/etsy-joins-the-b-corporation-movement/>. Professor Murray’s post rightly notes Etsy’s initial confusion about being a Benefit Corp. and being a “certified” B corporation. See Haskell Murray, *Etsy Becomes a Certified B Corporation*, CONGLOMERATE (May 9, 2012), <http://www.theconglomerate.org/2012/05/etsy-becomes-a-certified-b-corporation.html>.

³⁶ *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (“[T]he craigslist directors are bound . . . to promote the value of the corporation for the benefit of its stockholders.”).

³⁷ Johnsonlp, Comment to *Benefit Corporations: Traditional Paradigm*, CONGLOMERATE (May 3, 2012), <http://www.theconglomerate.org/2012/05/benefit-corporations-corporate-purpose.html> [hereinafter Johnson Blog Comment]; accord Murray, *supra* note 3, at 10.

³⁸ Johnson Blog Comment, *supra* note 37; accord Murray, *supra* note 3, at 17–19.

³⁹ See L.H. LaRue, *Statutory Interpretation: Lord Coke Revisited*, 48 U. PITT. L. REV. 733, 745–46 (1987) (describing an approach to statutory interpretation that begins with legislative identification of a defect needing correction).

⁴⁰ As succinctly stated by Holmes, “The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.” O.W. HOLMES, JR., *THE COMMON LAW* 41 (London, MacMillan & Co. 1887).

⁴¹ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 112 (1992); see also Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1144–45 (2012) (describing early history).

⁴² Johnson, *supra* note 41, at 1145.

business corporations.⁴³ By 1800, only about 335 business corporations had been chartered, and most were organized in just the last few years of the eighteenth century.⁴⁴ In short, the business corporation formed primarily for private gain—as we know it today—was *not* a predominant figure in this country’s early social landscape. Moreover, during this period, there appears to have been a special correlating of corporateness with public-oriented service of a sort that did not exist with business activity more generally. An illustrative statement of the early “public-serving” belief about the legal quality of corporateness can be seen in an 1809 Supreme Court of Appeals of Virginia opinion affirming the legislative chartering of an insurance company. Referring specifically to acts of incorporation, the court noted the following:

[T]hey ought never to be passed, but in consideration of services to be rendered to the public. . . . It may be often convenient for a set of associated individuals, to have the privileges of a corporation bestowed upon them; but if their object is merely *private* or selfish; if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privilege.⁴⁵

In this portion of the opinion, the court referred twice to the privileges of corporate status and twice to the element of public service. This judicial opinion exemplifies the belief that, in the early nineteenth century, there was no inherent legal right (or settled expectation) to carry on business in the corporate form for the chief purpose of private financial gain.

Thus, Benefit Corps. in one sense represent a twenty-first century return to early U.S. expectations of corporate activity, as leavened by a long period from the early nineteenth century to the present when corporations organized for private gain became predominant due to undoubted overall social utility. And this turn toward the “private” corporation was because the corporation was an ideal social as well as business and legal vehicle for propelling industrial growth in a society that organized the bulk of its economic activity in the private sector.⁴⁶ Thus, the pure “for profit” corporation never has been legally mandated

⁴³ LESLIE A. WHITE, MODERN CAPITALIST CULTURE 355 (Burton J. Brown et al. eds., 2008).

⁴⁴ *Id.*

⁴⁵ *Currie’s Adm’rs v. Mut. Assurance Soc’y*, 14 Va. (4 Hen. & M.) 315, 347–48 (1809) (emphasis added); see also Johnson, *supra* note 41, at 1146. Interestingly, while the Virginia Supreme Court referred to “associated individuals,” it still insisted that such a notion of corporateness supports a public-serving function. The Virginia Bill of Rights of 1776 explicitly stated that “no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services.” VA. CONST. art. 1, § 4. The Virginia Supreme Court applied this provision to corporations in its 1809 decision. See *Currie’s Adm’rs*, 14 Va. (4 Hen. & M.) at 347.

⁴⁶ See Johnson, *supra* note 41, at 1153–54 (describing corporate features undergirding nineteenth-century business growth).

but rather evolved as a permitted (and desired) legal form to efficiently serve social and economic functions. Historically, then, the for-profit corporate form stands between early corporations, most of which chiefly advanced public-serving purposes, and Benefit Corp. statutes, which likewise expressly permit (but do not require) the pursuit of profits while mandating the advancement of purposes other than pure profit maximization.

The White Paper, therefore, may have forgotten corporate history, just as it may have misjudged today's law of corporate purpose. But the position it advances—to legally enable beneficial corporations to serve mixed purposes—reconnects twenty-first century corporation law to early American law and permits corporations that are not nonprofit in nature to seek profits without having to maximize those profits. In this way, Benefit Corps. introduce a greater measure of institutional pluralism into law and business, the subject of the next Part.

II. INSTITUTIONAL PLURALISM AND BENEFIT CORPS.

Over the last two decades, there has been a seeming proliferation of new forms of business association. We have witnessed the rise of the limited liability company (“LLC”),⁴⁷ the limited liability partnership (“LLP”),⁴⁸ the limited liability limited partnership (“LLLPP”),⁴⁹ and the statutory trust.⁵⁰ Consequently, few business persons, lawyers, scholars, and judges—not to mention law students—are likely to desire yet one more type of business entity to contend with.

But in reality, the only truly revolutionary breakthrough was the LLC. To be sure, the LLP and LLLPP reversed a longstanding personal liability rule for general partners,⁵¹ but that rule change took place within an existing, if admittedly evolving, form of business-entity framework.⁵² And all of those types of business associations are noncorporate in form. In the corporate arena, although certain features of the law have changed over time,⁵³ no dramatically new forms have emerged. In fact, the Model Close Corporation Supplement was

⁴⁷ See, e.g., DEL. CODE ANN. tit. 6, §§ 18-101 to -1109 (Supp. 2012).

⁴⁸ See, e.g., *id.* §§ 15-1001 to -1105 (2005 & Supp. 2012).

⁴⁹ See, e.g., *id.* § 17-214.

⁵⁰ See, e.g., *id.* tit. 12, §§ 3801–3863 (2007 & Supp. 2012).

⁵¹ See, e.g., *id.* tit. 6, §§ 15-307(c), 17-403(d) (Supp. 2012).

⁵² For example, both the Uniform Partnership Act and the Uniform Limited Partnership Act were revised. See UNIF. P'SHIP ACT (1997); UNIF. LTD. P'SHIP ACT (2001).

⁵³ For example, changes of various kinds have been made to the Model Business Corporation Act and to Delaware's Corporate Code over the years. See, e.g., MODEL BUS. CORP. ACT, at xi–xxvii (2010).

withdrawn.⁵⁴ Thus, the addition of Benefit Corp. statutes does not exactly overpopulate the menu of corporate business forms but, rather, adds just one entree to the prior slim pickings. Furthermore, the Benefit Corp. statutory provisions, although separate, are melded with the general incorporation statute,⁵⁵ and that statute applies except where specifically displaced by the Benefit Corp. sections.⁵⁶ Thus, Benefit Corp. legislation is built on a standard corporate law platform even as it legally reengineers it in novel ways. As aptly observed by the Supreme Court of Delaware: “[I]t is hardly absurd for the General Assembly to design a system promoting maximum business entity diversity.”⁵⁷

At a more general and theoretical level than business organizational form, the addition of the Benefit Corp. option represents an example of what Professor Stephen Monsma has called “structural pluralism.”⁵⁸ Writing in the specific context of faith-based organizations, Monsma notes how, today, these organizations provide an array of social services of a type the government might typically supply, thereby blurring somewhat an overly dichotomous understanding of the “public” and “private” spheres of action.⁵⁹ Similarly, certain traditional for-profit entities deliver government-like prison, foster care, and welfare services.⁶⁰ In a parallel way, given that Benefit Corps., although “private” corporations, must seek to provide a “public” benefit,⁶¹ we see a similar blurring and converging of the “public” and “private” character in what might be called “benefit-based” organizations. The result is greater pluralism in corporate form and law.

Structural pluralism, Monsma observes, insists on the unavoidable existence and crucial importance in all human societies of a diversity of social institutions and structures. Human beings do not exist purely as autonomous, [discrete] individuals nor as individuals united only by belonging to a national political community. All human

⁵⁴ See ROBERT W. HAMILTON ET AL., *CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES* 391 (11th ed. 2010) (describing withdrawal of the supplement due to belief that few corporations elected close corporation status).

⁵⁵ See, e.g., VA. CODE ANN. §§ 13.1-782 to -791 (2011).

⁵⁶ See *id.* § 13.1-783; Brakman Reiser, *supra* note 6, at 595–96 & n.25.

⁵⁷ *CML V, LLC v. Bax*, 28 A.3d 1037, 1043 (Del. 2011). Delaware currently lacks a Benefit Corp. statute. See *State by State Legislative Status*, *supra* note 9. As noted in *supra* note 27, that may change in 2013.

⁵⁸ STEPHEN V. MONSMA, *PLURALISM AND FREEDOM: FAITH-BASED ORGANIZATIONS IN A DEMOCRATIC SOCIETY* 117 (2012).

⁵⁹ *Id.* at 42–43.

⁶⁰ See Lisa M. Fairfax, *Achieving the Double Bottom Line: A Framework for Corporations Seeking To Deliver Profits and Public Services*, 9 STAN. J.L. BUS. & FIN. 199, 200, 207 (2004).

⁶¹ See *infra* Part III.

societies are marked by a multiplicity of intermediate social structures that lie between individuals and the national political community: families, religious congregations, neighborhood groups, social clubs, nonprofit social service organizations, universities, businesses, labor unions, athletic leagues, and a host of other such social structures.⁶²

A variety of scholars, including John Dewey, Robert Nisbet, and several communitarian thinkers, have noted that numerous and quite diverse social groups and forms of voluntary association “mediate” between the individual and the state.⁶³ In essence, structural pluralism places great “weight on the social nature of human beings”⁶⁴ and “emphasizes the existence of a plurality of social structures in society.”⁶⁵ And there is no reason why, with respect to business corporations, there cannot be a pluralism of market-oriented entities designed to advance different purposes. Here, it is useful to recall conservative sociologist Robert Nisbet’s emphasis on how mediating social structures grow out of shared “communities of purpose,” and how the free market itself is dependent on such social structures and has never “rested upon purely individualistic drives.”⁶⁶

There seems to be no good reason to have only an organizational bi-culture in which, on the one hand, no profit may inure to private persons in a nonprofit corporation and, on the other hand, the singular purpose in a for-profit corporation must be to zealously maximize profits. On a spectrum where those two institutional objectives occupy polar ends, there lies an intermediate range of possible business purposes that combine some level of return to “private” investors with the simultaneous pursuit of more “public” or “social” benefits. As noted in a 2009 report, as corporations become increasingly active in the social sphere, we will likely witness a “wider array of structural options and a greater willingness to experiment.”⁶⁷ The law should facilitate, not impede, the design of ever more refined firm structures.

Pluralism is important at the individual level as well as the institutional level. Many persons—whether out of philosophical or

⁶² MONSMA, *supra* note 58, at 124. There are others as well, of course, such as producer and consumer co-operatives and private schools.

⁶³ *Id.* at 125–27.

⁶⁴ *Id.* at 123.

⁶⁵ *Id.* at 127.

⁶⁶ *Id.* at 126–27.

⁶⁷ Heather Gowdy et al., *Convergence—How Five Trends Will Reshape the Social Sector*, JAMES IRVINE FOUND., 5 (Nov. 2009), <http://www.irvine.org/images/stories/pdf/eval/convergencereport.pdf>. For a penetrating review of current organizational design and a conclusion that, currently, firm ownership typically remains in the hands of persons “with highly homogeneous interests,” see Henry Hansmann, *Ownership and Organizational Form*, in *THE HANDBOOK OF ORGANIZATIONAL ECONOMICS* 891, 915 (Robert Gibbons & John Roberts eds., 2013).

religious convictions or other beliefs—seek work (and a workplace) where meaning beyond material gain for investors can be pursued and where vocation puts principle into practice.⁶⁸ Work can be a way to serve fellow humans, worship one's God, and derive personal fulfillment, as well as gain a livelihood. Creating different sorts of institutional "space" for these endeavors would seem as socially (and personally) useful as providing a statutory vehicle designed to maximize returns to capital providers. And as to capital providers themselves, law should acknowledge the possible heterogeneity of preferences rather than assume a shared taste for "maximizing" at all costs.

Consequently, although the new Benefit Corp. form of business organization is a standard, ready-made *legal* arrangement, it is to be expected that there will be a vast array of different Benefit Corp. *businesses* serving myriad *purposes*. Thus, Benefit Corp. statutes do not simply create one additional way of doing business; they facilitate a host of possible ways to creatively pursue, in varying degrees no doubt, both private gain and public benefit. That is the pluralism of institutional pluralism.⁶⁹ The Benefit Corp., in other words, is a legal genre in which various "species" of social enterprise may experiment and operate. This not only helps dissolve simplistic, categorical thinking about profit/nonprofit and public/private organizational forms, it enriches the available ecology of business ventures. That state legislatures would act to enable such enhanced pluralism is, as the Delaware Supreme Court noted, "hardly absurd."⁷⁰

III. ILLUMINATING THE CONFUSION OVER THE CORPORATION'S BEST INTERESTS, CORPORATE PURPOSE, AND FIDUCIARY DUTIES

Besides enhancing corporate pluralism, Benefit Corps. illuminate, and partially meliorate, the continuing confusion over three related subjects in corporate law: the corporation's best interests, corporate purpose, and fiduciary duties. This Part will begin with a brief description of general corporate law's disjointed treatment of these subjects and then turn to how Benefit Corp. statutes handle them in an improved but still unsatisfactory manner. This stems from Benefit Corp. statutes adopting a somewhat more "corporate-centric" than shareholder-centric focus, while also confusingly including elements of a multi-stakeholder approach. This reflects, and perpetuates, a continued

⁶⁸ See Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1, 35–37 (2006).

⁶⁹ MONSMA, *supra* note 58, at 124.

⁷⁰ CML V, LLC v. Bax, 28 A.3d 1037, 1043 (Del. 2011) ("[I]t is hardly absurd for the General Assembly to design a system promoting maximum business entity diversity.").

theoretical and doctrinal failure in corporate law to articulate a truly “corporate” theory of the business corporation.

A. Traditional Corporate Law

Corporate law doctrine frequently refers to the “best interests of the corporation” and to fiduciary duties,⁷¹ but only infrequently to corporate purpose. Cases like *Dodge* and *eBay* are, after all, few and far between.⁷² And no corporate statute states that a corporation must maximize profits or shareholder wealth.⁷³ Rather, all corporate statutes are silent and agnostic on purpose,⁷⁴ speaking to “purpose” only by way of permitting a corporation to conduct “any lawful business or purposes.”⁷⁵

The issue of how corporate purpose relates to the legal mainstays of fiduciary duties and a corporation’s best interests arises because the corporation is a legal person distinct from its various constituencies.⁷⁶ Being a distinctive person, but not human, the corporation does not govern itself. It is governed by a board of directors,⁷⁷ the body charged with directing the corporation’s business and affairs. Given that this governing body must oversee the business and affairs of the “corporation,” not those of the shareholders, it is routinely stated that the “best interests of the corporation” should be the directors’ focus.⁷⁸ The Model Business Corporation Act states this explicitly,⁷⁹ and Delaware, in lacking a statutory standard of care, states this through its formulation of the duty of loyalty and the business judgment rule.⁸⁰

But that invites this question: As these governing officials navigate the corporate entity, where are they headed with it? What is the

⁷¹ There are countless such cases in Delaware. *See, e.g.*, *Stone v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006); *Brehm v. Eisner*, 746 A.2d 244, 264 & n.66 (Del. 2000); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm*, 746 A.2d. 244.

⁷² *See eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 35 (Del. Ch. 2010); *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684–85 (Mich. 1919). For other cases, see William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 825 n.33 (2012).

⁷³ Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738 (2005).

⁷⁴ *See Lyman Johnson et al., Teaching the Purpose of Business in Catholic Business Education*, J. CATH. HIGHER EDUC. (forthcoming 2013).

⁷⁵ *See, e.g.*, DEL. CODE ANN. tit. 8, § 101(b) (2011).

⁷⁶ *See generally Lyman Johnson, Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135 (2012).

⁷⁷ *See, e.g.*, § 141(a).

⁷⁸ *See supra* note 71 and accompanying text; *see also* E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004?: A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1431 (2005).

⁷⁹ MODEL BUS. CORP. ACT § 8.30(a) (2010).

⁸⁰ *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

“direction” in which the company is to be steered as they “direct” its affairs? In other words, what goal or purpose(s) are directors striving to attain for the corporation? One possible answer is that these officials should advance and “maximize” the interests of the corporation *qua* corporation, that is, as a business enterprise that should succeed and flourish as an enterprise.⁸¹ Another possible answer is that a corporation’s best interests, and so too its purpose, are to proficiently serve the consumers of the products and/or services produced by the company. Some support for this interpretation of corporate purpose is found in the statutory provision permitting a corporation to pursue “any lawful business or purposes.”⁸² Designed to combat ultra vires concerns if a company’s charter did not expressly permit entry into a particular line of business,⁸³ the provision suggests “purpose” means type of business. Thus, the best interests and purpose of an automobile company, organized to manufacture and sell automobiles, are to serve well the interests of auto consumers. Only by succeeding (and surviving) in that endeavor can the auto company itself, as a consequence, flourish, as well as provide returns to all who contribute to its corporate success. And with many firms in many industries in many markets, different corporations, by serving different consumers, have very particularized “best interests” and purposes.

In these views, corporate profits and wealth for shareholders are an outcome, or an “effect,” not the initial, essential purpose of the business. And they are a pre-condition for continued long-term enterprise success, but not, as such, the purpose pursued by the corporation, nor are they equivalent to the corporation’s best interests. This point was captured by Mark Zuckerberg, the Facebook founder, in his letter to shareholders accompanying the filing of Facebook’s registration statement with the Securities and Exchange Commission. There, he stated that Facebook did not “build services to make money; we make money to build better services.”⁸⁴ Today, there may be no mandatory corporate purpose under corporate law or even a clearly delineated default purpose. The law, it seems, is rightly agnostic on corporate purpose, permitting anything

⁸¹ For example, the Official Comment to § 8.30(a) of the Model Business Corporation Act states that in “[t]he phrase ‘best interests of the corporation’ . . . [t]he term ‘corporation’ is a surrogate for the business enterprise as well as a frame of reference encompassing the shareholder body.” § 8.30(a) cmt.

This concept of “entity maximization” as the appropriate governance focus is developed by British corporate scholar Andrew Keay. *See* ANDREW KEAY, *THE CORPORATE OBJECTIVE* 173–275 (2011).

⁸² *See, e.g.*, DEL. CODE ANN. tit. 8, § 101(b) (2011); *see also supra* text accompanying note 75.

⁸³ § 124; *see, e.g.*, *Jacksonville, Mayport, Pablo Ry. & Navigation Co. v. Hooper*, 160 U.S. 514, 523 (1896).

⁸⁴ Facebook, Inc., Registration Statement (Form S-1) 68 (Feb. 1, 2012).

“lawful.” It might be preferable, as a matter of statutory drafting, to specify a default purpose—likely profit maximization, given current business norms—coupled with language clearly permitting pursuit of some other purpose or combination of purposes. Oregon, for example, currently allows a provision in a corporation’s articles of incorporation that authorizes or directs the conducting of the business in an environmentally and socially responsible manner.⁸⁵ The American Law Institute’s *Principles of Corporate Governance* states that such a limitation on a pure profit-making objective would be permissible.⁸⁶

Former Chancellor William Chandler, in the *eBay* decision,⁸⁷ however, and current Chancellor Leo Strine, in defending the *eBay* opinion,⁸⁸ take a different approach. According to them, the fiduciary duties of those who are, statutorily,⁸⁹ required by law to direct and advance the best interests of the “corporation,” not shareholders, are said to obligate directors, as a matter of “corporate” purpose, to promote the interests of just one stakeholder, i.e., the “stockholders.”⁹⁰ As former Chancellor Chandler stated: “Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form,” including “acting to promote the value of the corporation for the benefit of its stockholders.”⁹¹ And Chancellor Strine states bluntly, if matter of factly, that “the corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders.”⁹² Strine does not even

⁸⁵ OR. REV. STAT. § 60.047(2)(e) (2011).

⁸⁶ PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS & RECOMMENDATIONS § 2.01 reporter’s n.6 (1994). The American Law Institute’s reporter’s note indicates that “all” of the shareholders would have to agree to such a provision, but it is hard to see why that would be necessary given a state’s reserved power to amend its corporate statute. The election should then be by the usual required statutory vote to amend the articles or certificate of incorporation.

⁸⁷ See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 35 (Del. Ch. 2010). *eBay* is more fully assessed in Johnson, *supra* note 19.

⁸⁸ Strine, *supra* note 27.

⁸⁹ See DEL. CODE ANN. tit. 8, § 141(a) (2011).

⁹⁰ See sources cited *supra* notes 87–88. By way of contrast, in Canada, the fiduciary duty of loyalty is owed to the corporation. Canada Business Corporations Act, R.S.C. 1985, c. C-44, § 122(1)(a). In discharging that duty, directors may consider the impact of decisions on shareholders or other stakeholders. *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, paras. 81–84 (Can.).

⁹¹ *eBay*, 16 A.3d at 34. He goes on to state that “[d]irectors of a for-profit Delaware corporation cannot . . . defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors’ fiduciary duties under Delaware law.” *Id.* at 35.

⁹² Strine, *supra* note 27, at 155. He also states that, “as a matter of corporate law, the object of the corporation is to produce profits for the stockholders.” *Id.* at 151 (emphasis added).

mention the corporation in this sentence or explain the shift from a “corporate” focus to one centered on “shareholders.” Like Chandler, he leapfrogs from fiduciary duties over the corporation and its best interests to reach shareholders as the ultimate recipient of those duties. The “corporation,” despite being a separate legal entity and meaningful institutional body, and despite the legal touchstone of its “best interests,”⁹³ becomes, as to purpose, a mere cipher or semantic stand-in for shareholders. This stands in contrast to Canada, for example, where the duty of loyalty runs to the corporation itself, not directly to the shareholders.⁹⁴

Neither Chandler nor Strine—following *Dodge* here⁹⁵—cite any persuasive authority for their assertions. And it is odd, given statutory agnosticism on corporate purpose,⁹⁶ that judges could mandate a singular objective for all businesses, even one not chosen by the company’s governing officials. Moreover, to fault directors for failing to do what Chandler and Strine state they must do also would seem to revive the ghost of ultra vires—the widely thought dead, but apparently only slumbering, doctrine that a corporation has acted outside its permitted scope,⁹⁷ a doctrine put to rest statutorily.⁹⁸ In other words, in Chancellor Chandler’s view, craigslist’s directors charted craigslist toward a prohibited destination, a sort of legal “no fly” zone.⁹⁹ Yet no court actually has ordered a company’s directors to abandon the business strategy it criticizes; a lesser remedy is imposed.¹⁰⁰ In part, this reflects the nature of the judicial function. Judges address only the particular claims and desired relief that are brought before them. They cannot and do not mandate that governing officials maximize shareholder wealth. They can only prohibit them from taking particularized actions. In *Dodge*, the plaintiffs sought more dividends.¹⁰¹ In *eBay*, the plaintiffs sought the nullification of certain anti-takeover measures.¹⁰² Neither plaintiff sought an injunction or other remedy that would have prohibited directors from pursuing the criticized business strategy, and

⁹³ See *supra* text accompanying notes 78–80.

⁹⁴ See *supra* note 90.

⁹⁵ *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

⁹⁶ See Elhauge, *supra* note 73, at 738; see also *supra* text accompanying notes 74–75.

⁹⁷ See *supra* note 83 and accompanying text.

⁹⁸ See DEL. CODE ANN. tit. 8, § 124 (2011); MODEL BUS. CORP. ACT § 3.04 (2010).

⁹⁹ See *supra* note 91 and accompanying text.

¹⁰⁰ The *Dodge* court ordered Ford Motor Company to distribute additional dividends, and the *eBay* court nullified certain anti-takeover defensive measures adopted by craigslist. See *supra* notes 23–28 and accompanying text.

¹⁰¹ *Dodge v. Ford Motor Co.*, 170 N.W.668, 673 (Mich. 1919).

¹⁰² *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 6–7 (Del. Ch. 2010).

neither the *Dodge* nor the *eBay* court altered corporate strategy. For judges who routinely recite the vaunted business judgment rule,¹⁰³ moreover, one core rationale for which is that directors, not judges, govern corporations,¹⁰⁴ the granting of such extraordinary and meddlesome relief would seem quite unlikely. Judges may be expressing their views about a corporate purpose as they fashion remedial relief, but they leave that purpose intact.

Moreover, the unelected judges in Delaware have been, historically speaking, very reluctant to equate corporate purpose with stockholder wealth, as the turbulent takeover era of the 1980s revealed.¹⁰⁵ In fact, only when the demise of the corporation is at hand or control over its direction shifts away from dispersed shareholders does stockholder wealth become the sole purpose.¹⁰⁶ But those scenarios are essentially either a corporate dissolution setting, where assets always are supposed to be liquidated for the best price and claimants are all paid accordingly, or a setting where control over the direction of the enterprise is fundamentally changing. Those are very different contexts than an ongoing business pursuing an identified corporate purpose.

The key point here is simply to show how, in those few cases where corporate purpose is even addressed, certain judges transmute the statutory mandate (and the corresponding fiduciary duties of directors) to direct and advance the best interests of the corporation—whatever its line of business and business products or services may be—into the singular goal of advancing one stakeholder’s interests, that of stockholders.¹⁰⁷ In this way, the corporation, as a distinct legal form of

¹⁰³ See, e.g., *Brehm v. Eisner*, 746 A.2d 244, 264 & n.66 (Del. 2000); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm*, 746 A.2d 244.

¹⁰⁴ DEL. CODE ANN. tit. 8, § 141(a) (2011). See generally Lyman Johnson, *The Modest Business Judgment Rule*, 55 BUS. LAW. 625 (2000) (describing rationales for the business judgment rule).

¹⁰⁵ See Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 934 (1990) (noting Delaware’s “doctrinal expression of ambivalent social expectations of corporate behavior”).

¹⁰⁶ *Paramount Comm’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 50 (Del. 1994); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

¹⁰⁷ Professor Stephen Bainbridge makes a similar move in stating he does not think “it’s useful to ask the question of ‘what purpose does the law mandate the corporation pursue?’” Stephen Bainbridge, *Is It Useful to Think About Corporations as Having a “Purpose?”*, PROFESSORBAINBRIDGE.COM (May 6, 2012, 1:56 PM), <http://www.professorbainbridge.com/professorbainbridge.com/2012/05/is-it-useful-to-think-about-corporations-as-having-a-purpose.html>. Bainbridge goes on to say that “it is far more preferable to operationalize this discussion as a question of the fiduciary duties of corporate officers and directors rather than as a corporate purpose.” *Id.* A recent article on Benefit Corps. similarly collapses corporate purpose into the separate issue of fiduciary duties. See Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-existent Problem*, 44 ST. MARY’S L.J. (forthcoming 2013).

organization and as a meaningful social-economic institution distinguishable from its constituencies, is disregarded. And the corporation's role as a social institution aiming to serve, as Peter Drucker observed it must,¹⁰⁸ some purpose outside itself also remains unacknowledged. It also confuses the fiduciary duties of directors—i.e., an admonition to be careful and loyal in how they act—with the more fundamental issue of what their job even is as they direct and navigate corporate affairs.

There is much in 2013 that remains legally murky and conceptually odd about all this in modern corporate law and theory, and more can and should be said.¹⁰⁹ What is instructive from a comparative organizational-form vantage point, however, is to shift attention to Benefit Corp. statutes to see how they handle the interrelationship of fiduciary duties, best interests of the corporation, and corporate purpose.

B. Benefit Corps.

Concerned about what they believe to be a legal requirement for corporations to maximize shareholder wealth as a matter of corporate purpose—and regarding it as a fiduciary duty—proponents of social enterprise crafted Benefit Corp. statutes to avoid that supposed mandate.¹¹⁰ As to corporate purpose, the statutes require that one purpose of a Benefit Corp. must be to advance a “general public benefit.” That phrase typically means a “material positive impact on society and the environment, taken as a whole.”¹¹¹ Noticeably, the corporate purpose has a general “external” focus rather than a particular stakeholder focus. It would seem an improvement in this regard to permit a focus on society “or” the environment, rather than both, to allow the pursuit of socially useful benefits having no particular benefit to the environment or vice versa.¹¹² The statutes also permit the pursuit of one or more “specific

The issue is not, however, the second-order issue of fiduciary duties; it is a first-order question of what the directors' *job* is. How can directors or the governing officials of any institution know what they are supposed to do—and hence the quest to which they must be loyal—if they have no idea what the institution's overall purpose is?

¹⁰⁸ Peter Drucker stated that “[i]f we want to know what a business is we have to start with its *purpose*. And its purpose must lie outside of the business itself. In fact, it must lie in society since a business enterprise is an organ of society.” PETER F. DRUCKER, *THE PRACTICE OF MANAGEMENT* 37 (HarperCollins 2006) (1954).

¹⁰⁹ See sources cited *supra* note 19.

¹¹⁰ See White Paper, *supra* note 5, at 7–14; Clark & Babson, *supra* note 72, at 825.

¹¹¹ See, e.g., CAL. CORP. CODE § 14601(c) (West Supp. 2013). *But see* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(c) (West Supp. 2012) (omitting the “taken as a whole” language).

¹¹² Haskell Murray, *Benefit Corporations: “General Public Benefit,”* CONGLOMERATE (May 10, 2012), <http://www.theconglomerate.org/2012/05/benefit-corporations-general-public-benefit.html>. In this regard and others, California's flexible purpose statute may

public benefits.”¹¹³ Thus, a general public benefit is a required corporate purpose, and one or more specific public benefits are permitted corporate purposes. The statutes do not preclude pursuit of additional corporate purposes, such as making profits and paying dividends to shareholders. Consequently, as a theoretical matter at least, a Benefit Corp. that pursued a public benefit could also seek to enhance corporate profits and shareholder wealth, perhaps to a considerable degree. The difference is both that Benefit Corps. need not maximize profits and must advance a public benefit.

Turning from corporate purpose to the issue of the “best interests of the corporation,” Benefit Corp. statutes generally link that issue to corporate purpose in a coherent and ingenious way. They typically provide that the creation of a general public benefit or a specific public benefit *is* deemed to be in the best interests of the corporation.¹¹⁴ This alignment of corporate purpose with corporate best interests does more than simply reject traditional corporate law’s not-so-subtle leap from a directorial obligation to serve the corporation’s best interests to shareholder wealth maximization as a corporate purpose. Having initially rejected shareholder wealth maximization as a required corporate purpose in favor of advancing general/specific public benefits, Benefit Corp. statutes then go on to posit a legal congruence between the corporation’s best interests and its public benefit corporate purpose.¹¹⁵ Consistently, and keeping the focus on the corporation rather than on one stakeholder within the corporation, the statutes thus coherently

accord more “flexibility” with respect to corporate purpose. CAL. CORP. CODE § 2602(b)(2)(A)–(B) (West Supp. 2013). Such corporations may advance the interests of specified stakeholders and/or the community and society and/or the environment. *Id.*; see also Brakman Reiser, *supra* note 6, at 595 n.22; Murray, *supra* note 3, at 24.

¹¹³ See CAL. CORP. CODE § 14610(b) (West Supp. 2013). These “specific public benefits” include, among other benefits, “[p]roviding low-income or underserved individuals or communities with beneficial products or services,” “[p]reserving the environment,” “[i]mproving human health,” and “[t]he accomplishment of any other particular benefit for society or the environment.” CAL. CORP. CODE § 14601(e) (West Supp. 2013). Note that in the last phrase the benefit can be to society “or” the environment, unlike the “and” in the general public benefit requirement.

¹¹⁴ See, e.g., MD. CODE ANN., CORPS. & ASS’NS § 5-6C-06(c) (West Supp. 2012); VA. CODE ANN. § 13.1-787(B) (2011).

¹¹⁵ This equating of the corporation’s best interests with the corporation’s public benefit purpose(s) does, however, mean that other corporate purposes, such as pursuing profits or shareholder wealth, are not likewise equated with the corporation’s best interests in the statute. Thus, to create financial benefits of whatever magnitude for investors without creating a public benefit would not fall within the statutory definition of the corporation’s best interests. In this way, although a Benefit Corp. can pursue financial purposes along with public benefit purposes, only the latter are equated with the corporation’s best interests.

align the *corporation's* best interests with the ongoing pursuit of the purpose(s) for which the *corporation* was formed.¹¹⁶

So far, this linkage avoids the category shift from a corporate focus to a shareholder focus seen in such cases like *Dodge* and *eBay* that address corporate purpose.¹¹⁷ As to fiduciary duties, then, one might think they also would be aligned accordingly in Benefit Corp. statutes. That is, the fiduciary duties of directors should be to carefully and loyally advance the best interests of the corporation, and, since the best interests of the corporation relate to its public benefit, the duties would be to pursue the avowed public benefits—i.e., to advance the corporation's purpose(s). This would deftly harmonize fiduciary duties, corporate purpose, and the best interests of the corporation.

Instead, with respect to director duties, most Benefit Corp. statutes take an odd turn. The statutes typically require directors, in considering the best interests of the corporation, to consider the effects of any action (or decision not to act) on a number of stakeholders.¹¹⁸ Thus, in contrast to the constituency statutes embedded in many traditional corporate statutes, which simply permit consideration of stakeholder interests,¹¹⁹ Benefit Corp. statutes mandate it.¹²⁰ In doing so, however, these laws seem to formulate fiduciary duties in stakeholder terms, not in terms of the *corporation's* best interests or furthering *corporate* purposes.

To be sure, most statutes include in the list of factors that directors must consider the interest of the Benefit Corp. itself and its ability to accomplish its general/specific public benefit.¹²¹ Indeed, Hawaii coherently focuses only on the latter, along with shareholders, and dispenses with mandatory consideration of any other stakeholders.¹²²

¹¹⁶ See statutes cited *supra* note 114.

¹¹⁷ See *supra* Part III.A.

¹¹⁸ See, e.g., MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07(a)(1) (West Supp. 2012); VA. CODE ANN. § 13.1-788(A)(1) (2011).

¹¹⁹ See *supra* note 29 and accompanying text.

¹²⁰ See statutes cited *supra* note 118. This faulty move is only heightened in the recent amendments to the Model Benefit Corporation legislation. There, a business judgment rule is codified for directors and officers. MODEL BENEFIT CORP. LEGISLATION §§ 301(a), 303(a) (Bill Clark Jan. 26, 2012). Each group is to act in the "best interests of the benefit corporation." *Id.* Yet, in comments to those sections, it is stated that a determination of the corporation's best interests requires consideration of stakeholder interests. *Id.* §§ 301 cmt, 303 cmt. This undermines the correlation between corporate purpose and corporate best interests noted earlier. See *supra* notes 114–16 and accompanying text. Moreover, for officers, who are agents of the corporation itself, their duty is to the entity. It is not clear what the theoretical rationale is for requiring them to consider interests other than those of their principal, as agency principles require.

¹²¹ See, e.g., VT. STAT. ANN. tit. 11A, § 21.09(a)(1) (2010); VA. CODE ANN. § 13.1-788(A)(1) (2011). Oddly, Maryland does not include these. See MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07(a)(1) (West Supp. 2012).

¹²² See HAW. REV. STAT. § 420D-6(a)(1) (West Supp. 2011).

After all, if the statutory policy goal were mandatory consideration of stakeholders, one could simply make existing constituency statutes mandatory and state that maximizing stakeholder wellbeing of some sort is the corporate purpose,¹²³ or a Benefit Corp. could make the wellbeing of one or more particular stakeholder groups an avowed “specific” benefit. Maryland, by contrast, does not even include within enumerated factors the ability to accomplish the corporation’s avowed public benefits.¹²⁴ In Maryland, consequently, directors must consider various stakeholders but need not consider the company’s ability to accomplish its very purpose, a purpose defined as being in the company’s best interests.¹²⁵

The upshot is a missed opportunity to bring conceptual and doctrinal harmony to the interrelationship of corporate purpose, a corporation’s best interests, and fiduciary duties that has long been missing in corporate law. Instead, Benefit Corps. usefully equate the first two, but most do not then go on—as, notably, Hawaii does¹²⁶—to synchronize them with the third. Instead, most seem to adopt a multi-stakeholder focus, not a truly “corporate” focus. And this illuminates the root problem with those theoretical proposals (and now laws) that seek to displace a shareholder-centric view of fiduciary duties with a stakeholder-centric view. Doing so simply adds to the number of individual interests clamoring for the attention and duties of directors. Instead of attending solely to stockholder wellbeing, directors are required to consider the wellbeing of multiple interests, whereas they should attend exclusively to the corporation’s best interests and to advancing its avowed institutional purposes.

The point here is not simply that this is troubling on the grounds that to serve many interests directors really serve none, as many argue,¹²⁷ a typical critique of stakeholder theories dating back to Adolf Berle.¹²⁸ The point instead is that in renouncing shareholder primacy, and having invoked the “corporation” and its public benefits as the apparent organizational and legal focus, Benefit Corp. statutes then

¹²³ Confusingly, some proponents apparently do believe the objective of Benefit Corps. is to maximize stakeholder value. See Murray, *supra* note 3, at 30 (citing example).

¹²⁴ See MD. CODE ANN., CORPS. & ASS’NS § 5-6C-07(a)(1).

¹²⁵ *Id.*

¹²⁶ HAW. REV. STAT. § 420D-6(a)(1); see also *supra* text accompanying note 122.

¹²⁷ See, e.g., Murray, *supra* note 3, at 27–29; Briana Cummings, Note, *Benefit Corporations: How To Enforce a Mandate To Promote the Public Interest*, 112 COLUM. L. REV. 578 (2012).

¹²⁸ See Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 1012 (1992); A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932). For an extensive consideration of various concerns raised by multi-stakeholder approaches to fiduciary duties, see KEAY, *supra* note 81, at 173–230.

seemingly abandon that larger institutional objective on the fiduciary duties issue.¹²⁹ These statutes, in other words, renounced shareholder primacy as to corporate purpose but did not carry through on a fully corporate-centered, mission-oriented focus on fiduciary duties. There is no necessary reason why a corporation cannot usefully advance a public benefit without also requiring the board to consider a range of individual stakeholders. They can be linked of course, but they are conceptual horses of a different color. If certain stakeholder interests were truly deemed to be “corporately” important, they should be included in the definition of public benefit (general or specific), and thereby they would be an element of the corporate purpose.

Benefit Corp. laws thus fail to fully advance a new institutional model of the corporation as representing a larger common good of shared values and mutual commitments—with no mandatory consideration of any interest not identified as advancing that particular corporate purpose—as opposed to an association of a now larger but still fragmented group of stakeholding individuals.¹³⁰ Beyond failing at the level of firm theory, these statutes also fail to move us beyond the individualistic, self-interested anthropological understanding of constituencies we see in traditional corporate law and its neoclassical premises.¹³¹ Lacking is a conception of business participants as motivated by, and playing the role of serving, the larger, common good of the institution. This may stem from the nebulous nature of “public benefit,” and so corporate purpose in these statutes simply leaves an array of stakeholders as a somewhat more tangible directorial focus. Nonetheless, it obscures the manner in which all stakeholder interests should be secondary to overall corporate purpose. Benefit Corps. would be well advised to articulate more fully what their corporate mission/purpose really is, in a way going beyond the statutory bare bones.

The lack of a fully conceptualized theory of corporateness or of an anthropology of corporate constituencies in Benefit Corp. statutes is seen as well in the liability and remedial provisions of those laws. Most statutes—New York and Maryland being exceptions¹³²—provide for a

¹²⁹ In Canada, the fiduciary duty of loyalty is owed to the corporation itself. See *supra* note 90.

¹³⁰ The theoretical distinction between conceiving of corporations as an “association of individuals” and as a mission-centered “corporate community” is elaborated on in Johnson et al., *supra* note 74.

¹³¹ *Id.*

¹³² These statutes do not provide for such an enforcement proceeding, unlike the laws of the other states. See Christopher Lacovara, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 2011 COLUM. BUS. L. REV. 815, 831 (2011).

“benefit enforcement proceeding” cause of action,¹³³ the exclusive remedy.¹³⁴ California specially provides for no director, officer, or corporate liability for monetary damages.¹³⁵ Hawaii, Maryland, and Virginia, by contrast, absolve directors of monetary liability so long as they comply with the generally applicable standards for directors of all corporations.¹³⁶ Moreover, no duty is owed to beneficiaries of the public benefit purpose of the Benefit Corp.,¹³⁷ and, notwithstanding that directors must consider many stakeholder interests,¹³⁸ apparently no duty is owed to them.¹³⁹ This latter point, that there is no correlative ability of stakeholders to claim a breach of a duty owed to them that would mirror the directors’ duty to consider their interests, reveals the conceptual muddle.

A benefit enforcement proceeding may be brought only by persons specified in the statute, typically the corporation itself, directors, and shareholders.¹⁴⁰ No statute confers standing to bring such an action on those stakeholders—except shareholders—whose interests must be considered by directors. Thus, nonshareholder stakeholders neither are said to be owed a fiduciary duty—even though their interests must be considered by directors¹⁴¹—nor do they have standing to begin an enforcement proceeding. A shareholder, however, may bring an enforcement proceeding on the ground, among others, that directors failed to consider stakeholder interests.¹⁴² Shareholders alone, therefore, are the policing mechanism in this regard, not any other stakeholders.¹⁴³ Consequently, Benefit Corps. are only partially, but not fully, predicated on a multi-stakeholder conception of the corporate firm even with

¹³³ See, e.g., VA. CODE ANN. § 13.1-790 (2011).

¹³⁴ *Id.*

¹³⁵ CAL. CORP. CODE §§ 14620(f), 14622(c), 14623(c) (West Supp. 2013).

¹³⁶ HAW. REV. STAT. § 420D-6(b) (West Supp. 2011); MD. CODE ANN., CORPS. & ASS’NS § 5-6C-07(c) (West Supp. 2012); VA. CODE ANN. § 13.1-788(C) (2011).

¹³⁷ MD. CODE ANN., CORPS. & ASS’NS § 5-6C-07(b) (West Supp. 2012); VT. STAT. ANN. tit. 11A, § 21.11(e) (2010).

¹³⁸ See *supra* note 118 and accompanying text.

¹³⁹ See, e.g., VT. STAT. ANN. tit. 11A, § 21.09(e) (2010) (creating a director duty only to those persons who are entitled to bring an enforcement proceeding).

¹⁴⁰ E.g., HAW. REV. STAT. § 420D-10 (West Supp. 2011); VT. STAT. ANN. tit. 11A, § 21.13(b) (2010).

¹⁴¹ See *supra* note 118 and accompanying text.

¹⁴² N.J. STAT. ANN. § 14A:18-10(b)(2)(a) (West Supp. 2012); VT. STAT. ANN. tit. 11A, § 21.13(b)(1).

¹⁴³ Shareholders of Benefit Corps. can also, presumably, bring an action for director failure to comply with duties owed to shareholders, as in all corporations. And of course, shareholders alone vote for directors and can remove directors, usually with or without cause. Contrary to a suggestion made by Blount and Offei-Danso, Blount & Offei-Danso, *supra* note 107, it is extremely unlikely that the shareholders’ right to elect and remove directors would be impeded by a court order mandating that a director be reinstated.

respect to fiduciary duties and enforcement actions. They truly are hybrid vehicles, combining a novel mandatory consideration of stakeholders with the more traditional enforcement rights of directors and shareholders. Thus, Benefit Corp. statutes neither adopt a full-fledged, exclusively corporation-focused model that aligns corporate purpose, best interests, and fiduciary duties, nor do they adopt a fully rendered stakeholder model.

Benefit Corp. statutes reflect a deep clash between an exclusively “external” focus with respect to corporate purpose and public benefit, on the one hand, and a partially “internal” multi-stakeholder focus, on the other hand. This clash is not unexpected given current corporate theory’s failure to reconcile a theory of the corporation as a firm with the corporation’s overarching purpose in the larger society. To be somewhat more faithful to a true “corporate” and mission-centered approach to fiduciary duties, however, Benefit Corp. statutes could follow the example of Hawaii. Hawaii provides that directors and shareholders may bring direct or derivative actions to enforce the corporate purposes and to enforce the public benefit purposes as well as the director standard of conduct.¹⁴⁴ Given that in Hawaii the directors must consider only how an action affects shareholders and the avowed public benefits¹⁴⁵—not any other stakeholders—this adopts a truer “corporate” conception of a firm that more sensibly aligns fiduciary duties with corporate purpose and the best interests of the corporation. All three of these in Hawaii have a coherent corporate, mission-centered thrust. To be sure, shareholder interests must still be considered and shareholders may bring enforcement proceedings,¹⁴⁶ but that is because Benefit Corps. also have a corporate purpose of helping shareholders, in addition to advancing a public benefit purpose.

IV. ARE BENEFIT CORPS. GOOD FOR OTHER CORPORATIONS’ SOCIAL RESPONSIBILITY?

Numerous points have been made in the debate over whether social enterprise generally—and Benefit Corps. in particular—will enhance

¹⁴⁴ HAW. REV. STAT. § 420D-10 (West Supp. 2011). Every other state similarly appears to permit an enforcement proceeding on the ground of not creating a public benefit but couples that with mandatory consideration of various stakeholders, even though nonshareholder stakeholders are said not to be owed duties and cannot bring enforcement proceedings. *See, e.g.*, N.J. STAT. ANN. § 14A:18-10 (West Supp. 2012); VA. CODE ANN. § 13.1-790 (2011). New Jersey and Virginia also provide that directors do not have personal monetary liability for failure to actually create a public benefit. N.J. STAT. ANN. § 14A:18-6(d) (West Supp. 2012); VA. CODE ANN. § 13.1-788(C)(2) (2011).

¹⁴⁵ HAW. REV. STAT. § 420D-6(a)(1) (West Supp. 2011).

¹⁴⁶ *Id.* § 420D-10.

corporate responsibility.¹⁴⁷ Concerns include whether investors will fund hybrid ventures that afford them neither a tax deduction, as do charitable contributions to certain nonprofit entities, nor a market rate of return.¹⁴⁸ The supposed considerable size of the market for socially responsible investing—disputed by Professor Benjamin Richardson¹⁴⁹—leads some to argue that many investors will “blend the desire for profits with the desire for social good.”¹⁵⁰ Tranches of debt or equity offering returns ranging from a market rate for one or more layers of debt/equity, but below market rates to other senior and less risky layers provided by more mission-driven “social” investors, might aid in capital formation.¹⁵¹ Certainly, providing ex ante an option to exit at some point would facilitate attracting capital, either via a market for the securities or contractually bargained for liquidity rights. More generally, the entire social investment phenomenon must address whether such investing is a business-driven strategy to make profits or is grounded on broader social and ethical criteria.¹⁵²

Concerns also have been raised about the size of the consumer market for Benefit Corp. goods and services.¹⁵³ Many people, responding to surveys or polls, report that a purveyor’s social responsibility matters to them,¹⁵⁴ but whether they actually behave in accordance with their responses is less clear.¹⁵⁵ David Vogel, a professor at Haas School of Business (Berkeley), concludes that what he calls the “market for virtue” is “best understood as a niche rather than a generic strategy.”¹⁵⁶ And he believes that “few consumers, investors, and employees are actually willing to ‘vote’ for [corporate social responsibility] in the marketplace.”¹⁵⁷

¹⁴⁷ See generally Brakman Reiser, *supra* note 6; Murray, *supra* note 3.

¹⁴⁸ Kelley, *supra* note 13, at 354–55.

¹⁴⁹ Benjamin I. Richardson, *Are Social Investors Influential?*, 9 EUR. COMPANY L. 133, 134 (2012) (arguing the social investment market is much smaller than many report).

¹⁵⁰ Dana Brakman Reiser, *Charity Law’s Essentials*, 86 NOTRE DAME L. REV. 1, 39 (2011). *But see* Steven J. Haymore, Note, *Public(ly Oriented) Companies: B Corporations and the Delaware Stakeholder Provision Dilemma*, 64 VAND. L. REV. 1311, 1337, 1343 (2011) (observing that social responsibility-related shareholder proposals draw little support and that institutional investors shy away from alternative entities).

¹⁵¹ See Katz & Page, *supra* note 1, at 93.

¹⁵² This is very ably described by Professor Benjamin I. Richardson. See generally Richardson, *supra* note 149.

¹⁵³ Katz & Page, *supra* note 1, at 81–82.

¹⁵⁴ See Cummings, *supra* note 127, at 583 n.35; see also Katz & Page, *supra* note 1, at 93.

¹⁵⁵ See generally DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (2006).

¹⁵⁶ *Id.* at 3.

¹⁵⁷ *Id.* at 14.

As with activity in the capital markets, at this stage we do not have sufficient experience and empirical data on consumer behavior in the Benefit Corp. market segment to know whether mission-customer loyalty, “branding,” or other features of Benefit Corp. marketing strategy will succeed.¹⁵⁸ It also may be challenging for legitimate Benefit Corps. to truly and convincingly distinguish themselves from traditional companies making similar claims, whether or not those companies actually behave in that manner.¹⁵⁹ At the start-up stage, moreover, a Benefit Corp. is going to be limited in geographic distribution and, within that area, in consumer segments. Thus, a Benefit Corp. must be fairly certain it can succeed in its niche, probably more so than the average corporation, because there is a decided potential for consumer confusion/misinformation. But when a company does succeed in a niche, it may gain a snowballing edge with consumers who wish to be *au courant* in their purchases, as they acquire status along with a good or service. And if consumers generally begin to associate corporate social responsibility with Benefit Corps., and social irresponsibility with more traditional corporations, that may have spillover benefits for using the Benefit Corp. form of business.

These and related concerns about the viability of social enterprise and Benefit Corps., given market realities, all focus on their ability to directly influence corporate responsibility through their own behavior. But another slant on the larger corporate responsibility issue is to ask whether and how entry of Benefit Corps. into the marketplace will influence corporate responsibility as engaged in by traditional for-profit firms. Will such behavior be negatively affected, actually increase, or not be altered at all?

Ultimately, this too is an empirical question as to which greater longitudinal data is needed. There are some reasons at this stage to conjecture that the impact will be adverse. For example, to the extent Benefit Corps. represent a segmenting of the market, some traditional firms might be glad to abandon at least some of their social responsibility initiatives—if not the rhetoric—on the rationale that now those “are for Benefit Corps. to do.” This view might be accompanied by the legal argument that legislation authorizing special vehicles for social enterprise—i.e., Benefit Corps.—implies that traditional corporations should maintain, if not heighten, their predominant focus on profits and shareholder wealth.¹⁶⁰ Corporate responsibility that does not harm

¹⁵⁸ See Brakman Reiser, *supra* note 6, at 621–24.

¹⁵⁹ Cf. White Paper, *supra* note 5, at 3–5 (making an argument for Benefit Corps. in this regard).

¹⁶⁰ See Callison, *supra* note 10 (arguing that Benefit Corp. legislative history could have negative and unintended consequences for understandings of what traditional

profits would therefore be fine, but not such activity as might reduce profits. Social responsibility activity would then become a niche in the larger market rather than exist pervasively, if modestly, in many businesses. Also, if Benefit Corps. flounder, or simply fail to be real game changers, management at traditional corporations might interpret that as a signal from the consuming and investing public that social enterprise is more honored in those markets by the breach than the observance.¹⁶¹

These and other arguments suggest Benefit Corps. might set back traditional corporate responsibility. But at this early stage there also are reasons to think Benefit Corps. will have a positive effect on social responsibility in the traditional sector. For example, whatever their time horizon, savvy investors in Benefit Corps. likely will, *ex ante*, contemplate their “exit strategy.” Some might see the Benefit Corp. simply as an incubator for the social enterprise strategy. If and when the company demonstrates the existence of a significant market, the Benefit Corp. might be sold to a traditional company seeking to enter that market, possibly growing it through leveraging certain economies of scale.¹⁶²

In this absorption strategy, some Benefit Corps. at least would vie to demonstrate profitability along with public benefit. Admittedly, these purposes may clash. But they currently clash in all Benefit Corps. whether or not they sell because Benefit Corps. are multipurpose ventures that seek profits and public benefit.

It is possible that acquisition-minded companies will tend to purchase those Benefit Corps. whose strategy is somewhat skewed toward earning profits over advancing a public benefit. If that strategy by the acquired Benefit Corp. found a favorable market reception, however, there would be no rational reason to abandon it. It would simply reveal a range of strategies within the social enterprise sector itself, the “pluralism” noted earlier.¹⁶³ Moreover, there remains an overall net increase in socially responsible behavior.

And if post-acquisition a somewhat “less responsible” but more profitable Benefit Corp. target proves nonetheless to be a bad fit, the company could be restructured along more responsible lines or divested

corporations must do); Underberg, *supra* note 8 (same). This interpretation of what Benefit Corp. legislation means for traditional for-profit corporations seems dubious, but given the role of perception, as noted earlier in *supra* Part I, this interpretation cannot be ruled out.

¹⁶¹ See WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 4.

¹⁶² Professors Katz and Page report that, after purchasing Ben and Jerry’s, Unilever continued certain socially responsible business practices of that company. Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 211–12, 214 (2010).

¹⁶³ See *supra* Part II.

to someone who could refocus the business. In both the success and failure settings, at least a traditional company has entered social enterprise and sought to grow the activity. And the acquirer, in communicating that it has entered this area, may find it experiences a “halo effect” in which consumers form a positive impression of the acquirer that will extend to its other products and services.

For the “purist” Benefit Corps. and their investors who eschew the sale exit option, success by the Benefit Corp. will nonetheless demonstrate to traditional corporations that a viable market exists. The traditional company may then enter the market and compete against the Benefit Corp. To the extent it delivers the same kind of product or service, albeit to generate meaningful profits, it has advanced the same consumer goal as the pathbreaking Benefit Corp. Benefit Corps. here, then, will have produced a positive “externality” in this market segment.

Moreover, Benefit Corps. that do not sell, but later find themselves competing with larger for-profit companies, must innovate to maintain (or increase) their market share. Their smaller size and sharper, local focus may permit quicker adaptation, thereby outmaneuvering larger but slower-footed organizations.

Finally, the existence of Benefit Corps. might encourage traditional companies to increase their level of contributions to “quasi-philanthropic” organizations. Currently, for-profit corporations make various contributions to charity or other social service organizations, typically formed as nonprofit organizations.¹⁶⁴ Benefit Corps. might afford an additional outlet where companies, without reducing contributions to nonprofits, could invest to support the Benefit Corps.’ social missions while also expecting some sort of positive financial return. Moreover, news of the traditional company’s support of social enterprise might once again garner it a useful “halo effect” for its other products or services.

CONCLUSION

Benefit Corp. legislation may stem from faulty and debatable understandings of corporate law and history, but it usefully advances pluralism in corporate forms of organization. These statutes facilitate, but do not mandate, the formation of for-profit companies to promote a larger societal objective. Neither corporate governance itself nor the essential architecture of corporation statutes is significantly altered in this reform. These statutes, by linking corporate activity to a larger, external purpose, can help legitimate corporate power in the broader society at a time of widespread disenchantment with most things

¹⁶⁴ See Steve Lohr, *First, Make Money. Also, Do Good.*, N.Y. TIMES, Aug. 14, 2011, § BU (Sunday Business), at 3.

corporate. Whether Benefit Corps. make real inroads with capital providers and consumers, and alter the overall type and amount of corporate responsibility, remains to be seen.

At the doctrinal and theory level, Benefit Corp. statutes illuminate the unresolved muddle in corporate law doctrine and theory concerning the inter-relationship among corporate purpose, a corporation's best interests, and fiduciary duties. Benefit Corp. statutes harmonize the first two areas, but, reflecting persistent failures to articulate a truly compelling corporate theory, they confusingly and half-heartedly invoke elements of stakeholder theory instead of fully promoting an overarching, corporate-centric approach that makes neither shareholders nor a medley of stakeholders the ultimate focal point of corporate endeavor.