

# COMMENT

## WHAT IS THE BENEFIT OF BENEFIT CORPORATIONS?\*

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### I. INTRODUCTION

In recent years, public support for companies that are socially

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and environmentally-conscious has increased.<sup>1</sup> However, because of corporate law's focus on shareholder primacy and profit maximization, some believe that companies cannot truly achieve socially and environmentally-conscious goals under existing law and traditional business forms. This has resulted in an increase in companies that choose to organize as new legal entities, known as social enterprises, which are legally allowed to pursue societal or environmental goals in addition to profit maximization—something they believe is not allowed when a company is organized as a traditional business form.<sup>2</sup> Supporters of social enterprises argue that they will have a more positive impact on the world than typical for-profit businesses,<sup>3</sup> and they will also do more good than nonprofits because for-profit financing and business methods make them more efficient and effective.<sup>4</sup> On the other hand, opponents of social enterprise legislation argue that it is difficult for businesses to achieve some social or environmental objectives while also generating financial return.<sup>5</sup>

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1. Melanie Curtin, *73 Percent of Millennials are Willing to Spend More Money on This 1 Type of Product*, INC. (Mar. 30, 2018), <https://www.inc.com/melanie-curtin/73-percent-of-millennials-are-willing-to-spend-more-money-on-this-1-type-of-product.html> (“66 percent of global consumers are willing to pay more for sustainable goods, [and] a full 73 percent of Millennials are.”).

2. Elizabeth K. Babson and Robert T. Esposito, *The Year in Social Enterprise: 2016 Legislative and Policy Review*, DRINKER BIDDLE (Feb. 7, 2017), <https://www.drinkerbiddle.com/insights/publications/2017/02/the-year-in-social-enterprise> (explaining the increasing implementation of social enterprise legislation in a variety of U.S. states and foreign countries, such as Greece, Australia, Brazil, United Kingdom, Bulgaria, Estonia, Malta and Slovakia, and Taiwan).

3. Dana Brakman Reiser, *Theorizing Forms of Social Enterprise*, 62 EMORY L.J. 681, 682 (2013); Gregory Dees & Beth Battle Anderson, *For-Profit Social Ventures*, in SOCIAL ENTREPRENEURSHIP 1, 5–6 (Marilyn L. Kourilsky & William B. Walstad eds., 2003) (describing the four categories of benefits of social entrepreneurship: (1) promoting efficiency and innovation; (2) leveraging scarce public and philanthropic resources; (3) responding quickly to demand; and (4) improving access to skilled personnel).

4. See Brakman Reiser, *supra* note 3, at 682 n.8 (quoting Charles R. Bronfman & Jeffrey R. Solomon, *Should Philanthropies Operate like Businesses? Yes: Good Intentions Aren't Enough*, WALL ST. J., Nov. 28, 2011, at R1 (“[T]o have a sustained and strategic impact, philanthropy must be conducted like business—with discipline, strategy and a strong focus on outcomes.”); then quoting Dan Pallotta, *Why Can't We Sell Charity like We Sell Perfume?*, WALL ST. J. (Sept. 14, 2012, 8:57 PM), <https://www.wsj.com/articles/SB10000872396390444017504577647502309260064> (“If we free the nonprofit sector to hire the best talent in the world, take fundraising risks, use marketing to build demand and invest capital for new revenue-generating efforts, we could bring private ingenuity to bear on [worldwide] problems and would not need to look to government to fill the gaps.”).

5. See Phil Buchanan, *What Capitalism Can't Fix*, HARV. BUS. REV. (Jan. 23, 2013), <https://hbr.org/2013/01/what-capitalism-cant-fix> (“Many crucial objectives simply cannot be accomplished while generating a financial return.”); Michael Edwards, *Should Philanthropies Operate like Businesses? No, the Poorest Will Suffer*, WALL ST. J. (Nov. 28,

One form of social enterprise, the benefit corporation, is a legal designation that is similar to the traditional corporate form and has gained support in many states, with over thirty states with enacted benefit corporation legislation and eight more considering it.<sup>6</sup> The benefit provided by the benefit corporation legislation is that companies may pursue public goals other than profit maximization. However, this designation is not as beneficial as proponents would like people to believe for two reasons: (1) the designation of a business as a benefit corporation serves mainly as a marketing tactic so that companies can tell the public about their social responsibility but eliminates much of the accountability that exists under the traditional corporate form; and (2) the ideas of shareholder primacy and profit maximization are not so potent that benefit corporation's initiatives could not already be accomplished with the existing corporate form.

This Comment will proceed in four parts. Part II provides a brief history of traditional corporate structure, including the prominent competing theories of corporate existence and how they gave rise to the creation of the benefit corporation. It goes on to

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2011), <https://www.wsj.com/articles/SB10001424052970204554204577024313200627678> (“Market mechanisms push resources toward their best uses for investors, few of whom want to transform a system that made them rich. Thus, the colonization of philanthropy by business could turn it into a much more conservative force and limit its potential to get at the really difficult problems.”). Additionally, some goals seem to be better achieved by the nonprofit form, as is shown by a decline in quality of care when hospital ownership changes from nonprofit to for-profit status. Buchanan, *supra* (“[Some] objectives can [be achieved while generating a financial return] but there is a price to be paid. In health care, for example, research indicates a decline in quality when non-profit hospitals switched to become profit making. . .while nonprofits can learn from companies and companies can learn from nonprofits, it is a mistake to deny differences.” (citing Gabriel Picone et al., *Are For-Profit Hospital Conversions Harmful to Patients and to Medicare?*, 33 RAND J. ECON. 507, 520–21 (2002)); Edwards, *supra* (noting that the reason we have philanthropy to begin with is “to support work that will never be funded or supported effectively by the market or government. By definition, then, too much business thinking will push resources away from the poorest people, the most difficult problems, and the most important solutions—which tend to be costly, complex and slow in coming.”)

6. SOC. ENTERPRISE L. TRACKER, <http://socentlawtracker.org/#/map> (last visited Mar. 7, 2019) (noting that Alaska, New Mexico, Oklahoma, Missouri, Iowa, Michigan, Ohio, and Georgia are considering benefit corporation legislation); *State by State Status of Legislation*, BENEFIT CORP., <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Mar. 7, 2019) (noting six states are considering benefit corporation legislation); *An Introduction to The Delaware Public Benefit Corporation*, HARV. BUS. SERVS., <https://www.delawareinc.com/public-benefit-corporation/> (last visited Mar. 7, 2019). Maryland was the first state to enact a benefit corporation law in 2010. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (West 2012). Texas added to this trend when it recently passed its own benefit corporation legislation that became effective on September 1, 2017. TEX. BUS. ORGS. CODE ANN. § 21 (West 2017); Michael F. Meskill, *Public Benefit Corporations Have Arrived in Texas*, JACKSON WALKER (Sept. 27, 2017), <https://www.jw.com/news/public-benefit-corporations-have-arrived-in-texas/>.

describe history and development of benefit corporation legislation. Part III shows that the true benefit of benefit corporation legislation is to provide companies with the ability to market themselves as socially-conscious benefit corporations—not to actually produce a public good. It also shows that the purported benefits of the legislation, increased transparency and accountability, are not as beneficial as proponents would like people to believe and may end up doing more harm than good. Finally, it shows that the legislation arguably is not necessary given the latitude granted to directors of traditional corporate structures under the business judgment rule and existing constituency statutes.

## II. SOCIAL ENTERPRISES AND TRADITIONAL BUSINESS STRUCTURES

New legal structures that support social enterprises have developed in response to the belief that the goals of profit maximization and serving a public purpose cannot coexist under traditional legal forms. Section II.A describes the traditional corporate form and prevailing ideas about its purpose. Section II.B describes the newly-developed legal structures that support social enterprises, including benefit corporations.

### A. *Shareholder Primacy and Profit Maximization*

Traditionally, publicly-held corporations issue stock to investors who expect to benefit from the corporations' profit-making potential, but do not have the interest or abilities to become engaged in the corporations' business activities.<sup>7</sup> Control of publicly-held companies lies in the hands of boards of directors and executives rather than shareholders, which has resulted in a variety of schools of thought concerning the proper purpose of these corporations.<sup>8</sup>

At one time, corporations were chartered by state law only to accomplish public purposes, such as building roads and bridges or providing water.<sup>9</sup> While those corporations could earn profits, their legitimacy stemmed from their delegated public missions, and they only received the benefit of limited liability—one of the

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7. LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 24 (2012).

8. *Id.*

9. Janine S. Hiller, *The Benefit Corporation and Corporate Social Responsibility*, 118 J. BUS. ETHICS 287, 288 (2013).

tenets of the modern corporate form—to achieve the stated public purpose.<sup>10</sup> During industrialization, the volume of incorporation petitions submitted to state legislatures increased, and states began passing general incorporation statutes.<sup>11</sup> Eventually those statutes’ purpose requirements were liberalized to state that “any and all legal purposes” were sufficient for the existence of a corporation.<sup>12</sup> Today, all fifty states have general incorporation statutes that do not require a specific public purpose and simply grant a business corporate standing if the business follows the state’s standardized requirements.<sup>13</sup>

Although a public purpose is no longer a legal requirement for corporations, today there are various schools of thought concerning what is the purpose of a typical for-profit corporation. One school of thought is that corporations can have an element of serving a public purpose by serving the interests of multiple constituencies, such as stockholders and stakeholders, simultaneously.<sup>14</sup> First expressed in 1932 by Harvard professor and corporate law expert, Merrick Dodd, this view stated that the purpose of a public company expands beyond making money for shareholders to include providing employment opportunities, producing quality products for consumers, and making other

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10. Jamie Raskin, *The Rise of Benefit Corporations*, NATION (June 8, 2011), <https://www.thenation.com/article/rise-benefit-corporations/>; Hiller, *supra* note 9, at 288. Some argue that modern benefit corporations closely resemble the early American corporations that were formed to advance public purposes rather than private gain, and thus, although the rise of benefit corporations is a modern phenomenon, it is simultaneously a return to early practices. Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps*, 25 REGENT U.L. REV. 269, 272 (2012).

11. Hiller, *supra* note 9, at 288 (noting that the number of incorporation petitions had become unmanageable for state legislatures to review, which resulted in the first general incorporation statute being passed by New York in 1811).

12. *Id.*; see, e.g., DEL. CODE ANN. tit. 8, § 101(b) (West 2012) (“A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.”). Delaware’s incorporation laws are of particular significance because it is where over sixty-six percent of Fortune 500 companies are incorporated. *Division of Corporations: About Agency*, DEL. DEPT OF ST., <https://corp.delaware.gov/aboutagency.shtml> (last visited Mar. 7, 2019).

13. Hiller, *supra* note 9, at 288.

14. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (“[A] board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.”); Corporate Laws Committee of the ABA Business Law Section, *Benefit Corporation White Paper*, 68 BUS. LAW. 1083, 1083–84 (2013); STOUT, *supra* note 7 at 24 (describing a “managerialist” view of public corporations as legal entities “created by the state for public benefit and run by professional managers seeking to serve not only shareholders but also ‘stakeholders’ and the public interest”).

contributions to society as a whole.<sup>15</sup> Today this school of thought is often shunned in favor of another—the idea that shareholder primacy and profit maximization are required.<sup>16</sup> This view was famously espoused by economist Milton Friedman, who argued that corporations’ sole responsibility is to maximize profits,<sup>17</sup> and the chief example of this view is historically attributed to a Michigan Supreme Court case from 1919, *Dodge v. Ford Motor Co.*, where the court stated that the purpose of organizing a business corporation is to produce profits for shareholders.<sup>18</sup>

The idea of shareholder primacy and profit maximization, as expressed in *Dodge*, is frequently cited as a requirement of corporate law,<sup>19</sup> although whether this is actually required is

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15. E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932) (“[T]he business corporation [is] an economic institution which has a social service as well as a profit-making function. . . .”); STOUT, *supra* note 7, at 27 (describing early corporate purpose ideas).

16. See, e.g., Stephen Bainbridge, *A Duty to Shareholder Value*, N.Y. TIMES (Apr. 16, 2015), <https://www.nytimes.com/roomfordebate/2015/04/16/what-are-corporations-obligations-to-shareholders/a-duty-to-shareholder-value> (arguing that corporations are required to maximize shareholder wealth); Hiller, *supra* note 9 at 288–89 (describing the history of shareholder primacy and profit maximization in United States law).

17. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAGAZINE, Sept. 13, 1970, at 33 (arguing that because shareholders “own” the corporation, the only “social responsibility of business is to increase its profits”)

18. 170 N.W. 668, 684 (Mich. 1919) (“The discretion of directors is to be exercised in the choice of means to attain that end [of profit maximization], and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes”).

19. Stephen Bainbridge, professor of law at U.C.L.A. School of Law, states that “the law requires corporate directors and managers to pursue long-term, sustainable shareholder wealth maximization in preference to the interests of other stakeholders or society at large,” and positively cites both *Dodge v. Ford Motor Co.* and *eBay Domestic Holdings Inc. v. Newmark* in support of his view. Bainbridge, *supra* note 16 (citing *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919); then citing *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010) (holding that in order for business decisions to be considered rational, the directors and officers must seek shareholder wealth maximization)). Kevin Hassett, chairman of President Trump’s Council of Economic Advisers, expressed this view when discussing President Trump’s planned tax cuts, stating that if businesses did not increase investment in response to tax cuts, “[t]hen they wouldn’t be pursuing their fiduciary duty to maximize profits for their shareholders. It’d be totally irrational for them to do that. And firms that did act rationally in response to the tax code would put them out of business.” Joseph Lawler, *Trump Economist: Corporations Would Be ‘Totally Irrational’ Not to Boost Investment After Tax Cuts*, WASH. EXAMINER (Nov. 17, 2017), <http://www.washingtonexaminer.com/trump-economist-corporations-would-be-totally-irrational-not-to-boost-investment-after-tax-cuts/article/2641099>; see also Joe Nocera, *Who Could Blame GE?*, N.Y. TIMES (Apr. 4, 2011), <http://www.nytimes.com/2011/04/05/opinion/05nocera.html> (defending General Electric’s exploitation of corporate tax loopholes by saying “[t]he executives who run America’s corporations have a fiduciary duty to maximize profit for their shareholders. That’s what they’re programmed to do. One way to maximize profits is to minimize taxes. . . .”).

disputed by some scholars.<sup>20</sup> Whether shareholder primacy and profit maximization are legally required or not, the concepts are so engrained in modern corporate business practices that corporations generally adhere to the concepts, and this adherence is part of what led to the development of benefit corporations and other social enterprises.

### B. *Benefit Corporations*

Social entrepreneurship is a business approach that uses profit-seeking businesses,<sup>21</sup> known as social enterprises, to achieve social or environmental purposes.<sup>22</sup> Public support for social entrepreneurship has resulted in the development of a significant amount of “hybrid” companies that aim to produce profits while advancing other societal or environmental goals.<sup>23</sup> In order to accommodate these hybrid companies, new legal business forms, including the benefit corporation, have been created.<sup>24</sup> The

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20. A main critic of the shareholder primacy view was Lynn Stout, professor of corporate and business law at Cornell Law School, who argued that “[t]he notion that corporate law requires directors, executives, and employees to maximize shareholder wealth simply isn’t true. There is no solid legal support for the claim that directors and executives of U.S. public corporations have an enforceable legal duty to maximize shareholder wealth.” STOUT, *supra* note 7, at 35. Stout urged readers to consider the fact that over half of Fortune 500 companies are incorporated in Delaware, one reason for this being that Delaware judges are considered experts in corporate law, but these experts have only cited the so-called landmark case, *Dodge v. Ford Motor Co.*, one time in the past thirty years, and the court’s citation to the case was in reference to controlling shareholder’s duties to minority shareholders, not even to the question of corporate purpose. See *Blackwell v. Nixon*, No. Civ. A. No. 9041, 1991 WL 194725, at \*4 (Del. Ch. Sept. 26, 1991), *rev’d*, 626 A.2d 1366 (Del. 1993) (citing *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919)); STOUT, *supra* note 7, at 37; see also Johnson, *supra* note 10, at 273–74. Additionally, Lyman Johnson posits that *Dodge* is not the leading case it is often touted to be because it is outdated and only expressed a shareholder-centric purpose in dictum. In reality, defendant Henry Ford maintained a policy of attending to the wellbeing of employees and consumers while paying significant returns to the plaintiffs, which showed that he pursued profits while serving other goals. *Id.* (citing *Dodge*, 170 N.W. at 684). Johnson further argues that the remedy awarded to the plaintiffs was only greater financial return, leaving corporate purpose unchanged. *Id.* (citing *Dodge*, 170 N.W. at 669–70).

21. Social enterprises may also be nonprofit entities, but the typical method that is used to achieve a social enterprise’s social or environmental purpose is by operating as a profit-generating business. Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 59 (2010).

22. Johnson, *supra* note 10, at 269; Katz & Page, *supra* note 21, at 61–62.

23. Johnson, *supra* note 10, at 269.

24. *Id.* (“These novel legal-business arrangements include low-profit limited liability companies (‘L3Cs’), flexible purpose corporations, and benefit corporations (‘Benefit Corps.’)”; Brakman Reiser, *supra* note 3, at 683 (describing new legal forms that are meant to encompass social enterprises such as “the low-profit limited liability company, the benefit corporation, the benefit LLC, the flexible purpose corporation, and the social-purpose

popularity of these new forms can be seen by the steady increase of state legislatures enacting their own forms of social enterprise legislation.<sup>25</sup>

Benefit corporations are one of these new business forms that is a for-profit entity that has a business purpose that expands beyond profit maximization to include the pursuit of an identified public benefit.<sup>26</sup> Benefit corporations are required to consider and balance the impact of their decisions on both shareholders and other stakeholders who may be affected by their decisions.<sup>27</sup> Two major benefits argued by proponents of benefit corporation legislation are: (1) it allows companies to pursue goals other than profit maximization through the legislations' accountability and transparency requirements; and (2) the creation of legal standards will provide the public with reliable standards upon which to base the companies' claims, much like those that exist for traditional corporations. The former is discussed in Section II.B.1, and the latter is discussed in Section II.B.2.

1. *Benefit Corporations as a Way to Circumvent Shareholder Primacy Requirements.* The main reason that proponents of benefit corporation legislation argue for its enactment is because it enables companies to pursue social goals, other than profit maximization, by increasing transparency and accountability. This can be seen in the practices of the nonprofit that is often attributed as the creator of benefit corporations, B Lab.<sup>28</sup> B Lab facilitates the designation of businesses as "B Corps," which are

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corporation."); Stephanie Strom, *A Quest for Hybrid Companies That Profit, but Can Tap Charity*, N.Y. TIMES (Oct. 12, 2011), <http://www.nytimes.com/2011/10/13/business/a-quest-for-hybrid-companies-part-money-maker-part-nonprofit.html> (describing a variety of new business forms that have arisen).

25. See Strom, *supra* note 24 (detailing the increased popularity of social enterprise legislation); SOCIAL ENTERPRISE LAW TRACKER, *supra* note 6 (highlighting the rise of social enterprise legislation since 2008).

26. *Benefit Corporation Frequently Asked Questions*, BENEFIT CORP., <http://benefitcorp.net/faq>, (last visited Mar. 7, 2019).

27. *Id.*; Justin Blount and Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY'S L.J. 617, 620 (2013).

28. See Mark J. Loewenstein, *Benefit Corporation Law*, 85 U. CIN. L. REV. 381, 381 (2017) ("[Benefit corporation] legislation is based, to a greater or lesser extent, on Model Legislation . . . drafted [by] B Lab Company[,] . . . a Pennsylvania nonprofit corporation that has been the driving force behind the adoption of benefit corporation legislation across the country."). The founders of B Lab were "entrepreneurs, operators, and investors" who formed the nonprofit in June of 2006 in order to promote a new type of corporation that uses business to address social and environmental issues. Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1010–11 (2013).

for-profit companies certified by the nonprofit B Lab to meet rigorous standards of social and environmental performance, accountability, and transparency.<sup>29</sup> In addition to being the creator of the B Corp designation, B Lab is also the organization responsible for the creation of the model benefit corporation legislation, upon which many states have based their benefit corporation legislation.<sup>30</sup>

Proponents of benefit corporation legislation cite benefits of accountability and transparency for consumers, investors, and entrepreneurs alike so that socially-conscious businesses do not have to sacrifice social and environmental goals in order to pursue profits, something that they believe traditional corporations do have to sacrifice. Jay Coen Gilbert, one of B Lab's founders, spoke with Pennsylvania senators<sup>31</sup> and described the positive impact

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29. *What are B Corps?*, B CORPS. <https://www.bcorporation.net/what-are-b-corps> (last visited Dec. 20, 2017). It is important to note that while they are similar, a benefit corporation is not the same as a B Corp because B Corp is a voluntary association facilitated by the nonprofit, B Lab, but not a legal designation. Hiller, *supra* note 9 at 290–91. A common analogy that highlights the fact that being a B Corp is not a legal designation is that “B Corp is to business what Fair Trade certification is to coffee or USDA Organic certification is to milk.” ILLINOIS B CORPS, <http://illinoisbcorps.org/> (last visited Apr. 5, 2019).

30. MODEL BENEFIT CORPORATION LEGISLATION (Apr. 17, 2017), [http://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20\\_4\\_17\\_17.pdf](http://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf); *The Model Legislation*, BENEFIT CORP., <http://benefitcorp.net/attorneys/model-legislation> (last visited Jan. 7, 2018); States that have not used the model legislation have still been influenced by it. See Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out. Who's Opting In?*, 14 U.C. DAVIS BUS. L. J. 247, 253 (2014) (“The statutory provisions of benefit corporations vary slightly from state to state, but are each based on the model . . . legislation . . .”). Delaware has opted to not follow the model legislation and has adopted a middle-ground statute that is less extreme than the one suggested by B Lab. *Benefit Corporation White Paper*, *supra* note 14 at 1092. For example, the Model Legislation requires a benefit corporation to have a purpose of “creating a general public benefit,” MODEL BENEFIT CORPORATION LEGISLATION § 201(a), and “public benefit” is defined as “[a] material positive impact on society and the environment,” *id.* § 102. However, creating “a material positive impact on society and the environment” is not an easy task for even the most socially and environmentally conscious businesses. In contrast, Delaware allows for a “public benefit” to include a reduction of a negative effect on society or the environment, not just a material positive effect. DEL. CODE ANN. tit. 8, § 362(b) (West 2015).

31. Senator Mary Jo White, Pennsylvania's benefit corporation bill's co-sponsor, agreed with Jay Coen Gilbert's sentiments, stating that she hoped to work with Pennsylvania businesses and, “[w]ith their input, Pennsylvania can establish a new voluntary class of corporation that would be appealing to those investors looking for information that goes beyond the traditional bottom line to include a host of community interests. Additionally, in times of government belt-tightening, this could be a tool for the private sector to provide assistance to local communities.” Daylin Leach, *Leach Unveils Legislation to Change Business Structures in PA, Creates New Class of Corporation*, Senator Leach (Feb. 7, 2011), <http://www.senatorleach.com/leach-unveils-legislation-to-change-business-structures-in-pa-creates-new-class-of-corporation>.

that a legal benefit corporation classification would have by increasing transparency and allowing consumers to tell the difference between “a ‘good company’ and just good marketing.”<sup>32</sup> The model legislation purports to provide accountability in the form of a benefit enforcement proceeding, defined as a “claim, action, or proceeding for: (1) failure of a benefit corporation to pursue or create general public benefit or a specific public benefit purpose set forth in its articles; or (2) violation of any obligation, duty, or standard of conduct under this [*chapter*].”<sup>33</sup> Further, the legislation attempts to provide transparency by requiring benefit corporations to prepare an annual “benefit report” that details how the company pursued its stated public benefit and the extent to which the public benefit was created.<sup>34</sup> However, as discussed further in Section III.B, the benefit enforcement proceeding and benefit report may not provide the benefits that proponents would like you to believe.

2. *Benefit Corporations as a Way to Provide Reliable Standards.* Proponents of benefit corporation legislation often cite market demands from consumers, investors, and entrepreneurs as a reason that such legislation is necessary.<sup>35</sup> A growing number of American consumers make purchasing decisions based on their view of a company’s social and environmental responsibility and use their purchasing power to punish or reward companies based on their evaluations.<sup>36</sup> As consumers demand more socially conscious products and companies, marketers begin using buzzwords like “green,” “responsible,” “sustainable,” “charitable,” and others to describe their companies.<sup>37</sup> However, consumers do not have any standards by which to judge these claims.<sup>38</sup>

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32. *Id.* (“B Corporations’ performance standards enable consumers to support businesses that align with their values, investors to drive capital to higher impact investments, and governments and multinational corporations to implement sustainable procurement policies.”); Jay Coen Gilbert, *Can I Get a Witness?! The Evolution of Capitalism*, HUFFINGTON POST (Sept. 27, 2011), [https://www.huffingtonpost.com/jay-coen-gilbert/benefit-corporation-legislation-\\_b\\_976650.html](https://www.huffingtonpost.com/jay-coen-gilbert/benefit-corporation-legislation-_b_976650.html).

33. MODEL BENEFIT CORPORATION LEGISLATION § 102.

34. *Id.* § 401.

35. 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* 2 (Jan. 18, 2013), [http://benefitcorp.net/sites/default/files/Benefit\\_Corporation\\_White\\_Paper.pdf](http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf).

36. *Id.* at 2–3.

37. *Id.*

38. *Id.*; Kyle Westaway & Dirk Sampsele, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999,

Proponents argue that benefit corporation legislation provides reliable legal standards that allow companies to pursue public benefits and be held accountable for their claims to do so, much like the reliable standards that exist for the traditional corporate form.<sup>39</sup> Similarly, without benefit corporation legislation, socially-conscious investors and entrepreneurs do not have dependable legal standards upon which to rely.<sup>40</sup>

### III. THE LACK OF BENEFITS FROM BENEFIT CORPORATIONS

Benefit corporation legislation has gained traction and popularity in many states, and while well-intentioned, the reality is that this new legal designation does not change much in terms of business operations. Section III.A shows that companies have historically responded to market demand for socially conscious business practices, and benefit corporation legislation simply serves as another way for companies to market to consumers and investors. Section III.B shows that the model legislation does not present the benefits argued by supporters and how with less accountability for failing to maximize profits, benefit corporation legislation may result in more abuses than anticipated by legislatures. Section III.C describes how the business judgment rule and existing constituency statutes undermines the main assumption relied on by benefit corporation proponents: that traditional corporations cannot pursue any goals that do not maximize profits.

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1008 (2013) (“[T]he shareholder wealth maximization norm forces directors of traditional corporations to question whether and to what extent they are allowed to consider stakeholder interests . . . . Moreover, the absence of an affirmative requirement to consider the general public benefit while operating their businesses leaves investors and consumers ill equipped to differentiate between corporations that are accountable for their claims of good-doing and those that simply have good marketing . . . .”).

39. Westaway & Sampelle, *supra* note 38, at 1008. Traditional incorporation in jurisdictions such as Delaware creates reliable legal standards while providing significant benefits to companies: (1) its corporate law is advanced and is constantly being amended pursuant to recommendations from the Delaware bar; (2) the state’s Secretary of State and Division of Corporations are effective and efficient; (3) the Delaware Court of Chancery is well versed in corporate law and has a well-established body of caselaw, which provides predictability for businesses to rely on; and (4) Delaware provides beneficial legal treatments for board determinations and policies, the liability of directors and officers, and appraisal rights. *Id.*

40. Clark, *supra* note 35, at 4 (“Like consumers, investors lack the comprehensive tools to understand the complete picture of a company’s performance across the full range of social and environmental measures. Likewise, businesses may have a hard time attracting investors by distinguishing themselves among the sea of companies that claim to be ‘socially responsible.’”)

A. *Benefit Corporations are a Response to Market Support for Companies that Do Good*

Benefit corporation legislation is simply another instance of companies responding to market demands for socially-conscious businesses. The market has shown support for companies that consider their impact on the world and try to use their positions to better it and can be seen through the prevalence of companies that engage in Corporate Social Responsibility (CSR) practices.<sup>41</sup> CSR is engaged in “with the aim to embrace responsibility for the company’s actions and encourage a positive impact through its activities on the environment, consumers, employees, communities, stakeholders and all other members of the public sphere who may also be considered stakeholders.”<sup>42</sup> While CSR certainly has its detractors,<sup>43</sup> that has not stopped countless companies from engaging in the practice.<sup>44</sup> For example, Starbucks has an initiative called Coffee and Farmer Equity Practices (C.A.F.E.), which describes the ethical buying guidelines to which it adheres to ensure that its coffee is sustainably grown, the workers who harvest its coffee are provided with safe and humane working conditions, and its farmers are adequately compensated.<sup>45</sup>

Public support for companies that are cause-focused is growing.<sup>46</sup> Nearly half of U.S. consumers say that a company’s

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41. Calls for enterprises to exercise social responsibility is nothing new and can be traced back to the Industrial Revolution and earlier. Archie B. Carroll, *A History of Corporate Social Responsibility Concepts and Practices*, in OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 20 (2008) (noting that the concept that we now consider Corporate Social Responsibility can be traced to the Industrial Revolution). Although then, like today, it is sometimes hard to distinguish what organizations are were doing for business reasons, like making workers more productive, and social reasons, like making their businesses contribute positively to society.).

42. Fang-Mei Tai & Shu-Hao Chuang, *Corporate Social Responsibility*, 6 IBUSINESS 117, 118 (2014).

43. See Friedman, *supra* note 17, at 33 (arguing that because shareholders “own” the corporation, the only “social responsibility of business is to increase its profits”).

44. See Idries Al-Bender, *10 Examples of Exemplary CSR Initiatives*, PREZLY, <https://www.prezly.com/academy/relationships/csr/10-examples-of-exemplary-csr-initiatives> (last visited Feb. 27, 2018). Some examples of CSR initiatives include XEROX’s Community Involvement Program, which “provides the means to channel funds to local teams of employees to select and work on specific community projects that they identify in their communities,” and Chipotle’s and Intermarche’s “The Inglorious Fruit and Vegetable” Campaign, which sought to reduce waste of food with slight aesthetic defects by heavily publicizing the initiative and selling the food for a 30% discount. *Id.*

45. *Responsibly Grown Coffee*, STARBUCKS <https://www.starbucks.ie/responsibility/sourcing/coffee> (last visited Feb. 27, 2018).

46. *Nielsen: 50% Of Global Consumers Surveyed Willing To Pay More For Goods*,

environmental record influences their purchasing decisions and over half are willing to pay more for products that are environmentally-friendly.<sup>47</sup> And this support does not stop at companies that are environmentally-conscious; fifty percent of consumers globally say that they would pay more for goods and services that come from companies that have programs in place to give back to society.<sup>48</sup> The market for businesses that are cause-focused continues to increase, and there is still room for growth.<sup>49</sup> Accordingly, many businesses have picked up on this growing market and have adjusted their business practices and marketing tactics.<sup>50</sup> Beer company Stella Artois has jumped on-board the cause-focused business train with its recent campaign to combat the global water crisis by selling limited edition chalices to provide water for those in the developing world.<sup>51</sup> Stella Artois's sister company, Budweiser, has a similar initiative where it sends cans of drinking water to people affected by natural disasters.<sup>52</sup> Clothing company Patagonia bases much of its business practices and marketing techniques on its sustainable and environmentally and socially-conscious business model.<sup>53</sup>

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*Services From Socially Responsible Companies, Up From 2011*, NIELSEN (Aug. 6, 2013) <https://www.nielsen.com/us/en/press-room/2013/nielsen-50-percent-of-global-consumers-surveyed-willing-to-pay-more-fo.html>. Nic Covey, vice president of corporate social responsibility at Nielsen noted, "Today, the question is not whether consumers care about social impact, but which ones, how much and how to appeal to them. . . . The answer isn't necessarily a traditional cause-marketing campaign—general responsibility, sustainable innovation and purpose messaging might also engage these consumers."

47. David Stanton, *In US, Willingness to Pay More for Environment-Friendly Products Grows*, GROWTH FROM KNOWLEDGE (Apr. 17, 2017), <http://www.gfk.com/en-us/insights/press-release/in-us-willingness-to-pay-more-for-environment-friendly-products-grows/> ("According to the latest GfK MRI research, 49% [of consumers] agree at least partly with the statement, 'A company's environmental record is important to me in my purchasing decisions.'").

48. Nielsen, *supra* note 46 (noting that "more than two-thirds of [survey] respondents in the Philippines, Thailand and Indonesia—and three-quarters of respondents in India—say they would pay more for goods and services from socially responsible companies," and 36% of European respondents agree).

49. *Id.* (noting that while half of consumers say that they are *willing* to pay more for goods and services from socially-responsible companies, only about forty-three percent say that they have actually done so).

50. *Id.* (describing how "savvy brands" have adjusted their marketing campaigns to accommodate various cause-focused initiatives).

51. STELLA ARTOIS, [http://www.stellaartois.com/en\\_us/water.html](http://www.stellaartois.com/en_us/water.html) (last visited Feb. 27, 2018) (Stella Artois will donate to Water.org \$3.13 for every limited-edition Stella Artois chalice sold).

52. BUDWEISER, <http://www.budweiser.com/en/stand-by-you.html> (last visited Feb. 27, 2018) (stating that Budweiser's Cartersville brewery community donated 2.9 million cans of water to victims of natural disasters in 2017).

53. PATAGONIA, *1% for the Planet*, <http://www.patagonia.com/one-percent-for-the->

While it is likely that many of these businesses that engage in socially and environmentally conscious practices are motivated to better the world around them, it is hard to ignore the fact that much of these initiatives are done for marketing purposes. Consider when Budweiser donated a significant amount of water to victims of natural disasters and then spent millions of dollars to tell the world about what it had done in an advertisement during the 2018 Super Bowl.<sup>54</sup> Budweiser is free to advertise as it pleases, but it is clear that it is responding to market demands for do-gooder companies; if this was just about doing good, they would not need to advertise it. Similarly, benefit corporations attempt to reap the same kinds of marketing benefits.

Proponents of benefit corporation legislation, including Representative Hinojosa of the Texas House of Representatives, highlight the fact that there have been several high profile and successful benefit corporations to support their position that such legislation is beneficial and useful.<sup>55</sup> However, the success of the businesses seems to be attributed more to the fact that the businesses were able to tell the public and investors about their legal designation than any effect of the legal designation itself.

One example of this kind of success is the company Kickstarter, which became a benefit corporation in 2015.<sup>56</sup> Upon this designation, the company amended its corporate charter to lay out specific goals and commitments to arts and culture, and it made its values of fighting inequality and helping creative projects come to life by making these values core to its operations.<sup>57</sup> Since its designation as a benefit corporation,

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planet.html (last visited Feb. 27, 2018) (detailing Patagonia's membership in 1% for the Planet, an alliance of businesses through which "Patagonia has pledged 1% of sales to the preservation and restoration of the natural environment.")

54. See Budweiser, *Budweiser 2018 Super Bowl Commercial | "Stand By You"*, YOUTUBE (Jan. 26, 2018), <https://www.youtube.com/watch?v=c68drZD5Jyo>; Richard Janvrin, *Super Bowl Commercials 2018: Ad Costs Review, Value Before Eagles vs. Patriots*, BLEACHER REPORT (Feb. 4, 2018), <http://bleacherreport.com/articles/2757247-super-bowl-commercials-2018-ad-costs-review-value-before-eagles-vs-patriots> (noting that a thirty second commercial in the 2018 Super Bowl cost more than five million dollars).

55. Gina Hinojosa, *Texas Should Welcome Public Benefit Corporations* (April 13, 2017), <http://www.dailytexanonline.com/2017/04/13/texas-should-welcome-public-benefit-corporations> ("Several high profile companies, such as Patagonia, Kickstarter and This American Life, have formed as B Corps."); see also Meskill, *supra* note 6, (noting that Patagonia, Kickstarter, and Method have utilized Benefit Corporation legislation).

56. *Hello*, KICKSTARTER, <https://www.kickstarter.com/about?ref=footer> (last visited Nov. 10, 2017).

57. *Id.* (describing how these values were central to Kickstarter's beliefs, but the benefit corporation designation allowed it to pursue the values more actively as legitimate business purposes).

Kickstarter states that it has already experienced notable returns, the most noticeable of which is “the significant increase in people applying to work for them.”<sup>58</sup>

Benefit corporation legislation also allows companies to further their goals by facilitating investments from socially conscious investors. Beta Bionics, a drug development startup, used benefit corporation legislation to achieve its objective of “developing a bionic pancreas: a wearable device that can autonomously monitor and control type 1 diabetes by delivering insulin and glucagon.”<sup>59</sup> While traditional investors urged Beta Bionics to license Beta Bionics’ technology rather than keeping it in-house for patients, executives did not want to sacrifice patient care at the expense of wealth creation and decided to register as a benefit corporation in order to control the company’s mission.<sup>60</sup>

While these examples may appear compelling, the difference that was made by the businesses being benefit corporations rather than traditional corporations is not entirely clear. In fact, it seems that the biggest benefit to these companies was the ability to *tell the public that they are a benefit corporation*, which does not sound like a legal effect; it sounds like a marketing tactic. Kickstarter benefitted by having more people apply to work for them and Beta Bionics was able to crowdfund a large amount of donations, but did either need the legal designation of a benefit corporation to reap these benefits?

Even proponents of benefit corporation legislation argue that these new legal forms are not sufficient to ensure the success of social enterprises, but they argue that they are valuable because they can be used in conjunction with other methods, such as traditional marketing tactics and voluntary designations like B Lab’s B Corp designation.<sup>61</sup> This highlights the fact that benefit

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58. Hinojosa, *supra* note 55.

59. Arran Froot, *Mission Control: Drug Developers Test the “Benefit Corporation” Business Model*, 23 NATURE MED. 1117, 1117 (2017).

60. *Id.* Beta Bionics claims that the choice to become a benefit corporation has not prevented it from attracting large investments from big names because it received a ten-million-dollar investment from pharmaceutical giants Eli Lilly and Novo Nordisk. *Id.* at 1118.

61. Brakman Reiser, *supra* note 3, at 737–38. (“The fact that even powerful specialized forms are not alone sufficient to secure success does not detract from the value they can offer to social enterprise. Legal forms rarely serve as the single indicator of worth to all of the markets and stakeholders with whom an entity will interact. Social enterprises have many other available avenues to further distinguish themselves. They can use traditional marketing levers and novel advertising approaches to inform investors, consumers, and the public about what makes their social mission particularly compelling. To shore up these claims, they can invest in obtaining voluntary certifications of overall

corporation legislation is just a marketing tactic; it is only valuable when combined with *other marketing tactics*. If the only benefit that is provided by the benefit corporation designation is the ability for a company to market itself as a benefit corporation, it is hard to see why it was necessary for the law to step in. As evidence by traditional corporations' CSR practices, companies have long been free to market themselves as socially and environmentally responsible. Corporations and benefit corporations alike are free to market as they please, but companies that want to be known for doing good did not need a new legal form—they could have continued using existing marketing techniques.

*B. The Lack of Benefits Provided by Benefit Corporation Legislation*

Proponents of the model legislation argue that benefit corporation legislation provides accountability in the form of benefit enforcement proceedings and transparency for consumers and investors in the form of benefit reports. However, the model legislation and the legislation of many states still have a lot of the qualities of a corporate structure.<sup>62</sup> For example, the model legislation leaves accountability in the hands of the shareholders in the form of voting rights and the benefit enforcement proceeding, which makes it hard to understand what difference, if any, the benefit corporation legislation will have on the corporate landscape.<sup>63</sup> For shareholders, the benefit corporation designation potentially strips them of the certainty of their rights under the traditional corporation structure.<sup>64</sup> But for non-shareholder stakeholders, the alleged ultimate beneficiaries of benefit corporations, there is not necessarily a benefit either because they have no enforceable rights.<sup>65</sup> One of the biggest reasons for

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quality, like that offered by B Lab, or those available in their individual industry or geographic location.”)

62. Blount & Offei-Danso, *supra* note 27, at 640 (“[T]he MBCL retains much of the existing corporate structure by leaving ultimate accountability in the hands of the shareholders . . . .”)

63. *Id.* (discussing ways in which benefit corporation legislation leaves power in the hands of shareholders in the form of voting rights and the benefit enforcement proceeding).

64. *Id.* at 644 (noting that benefit corporation’s requirement to consider interests of those who are not shareholders rejects the typical notion that directors must maximize profits for shareholders).

65. *Id.* at 648–49 (“[T]he benefit corporation structure avoids the difficult and inefficient judicial problem that would develop if the benefit corporation were subject to suit by any of the stakeholders whose interests they are required to consider. However, in doing so, it falls short of being a true stakeholder-centric model and leaves the benefit

supporting benefit corporations that is touted by its proponents is that a company can consider the interests of others besides stakeholders.<sup>66</sup> This is yet another example of benefit corporation legislation being government subsidized marketing; these companies get to tell the public that they are benefit corporations and vow to further social and environmental goals without providing any actual benefit to the public in terms of enforceable rights.<sup>67</sup>

Benefit corporation's benefit of transparency is also not as strong as proponents argue because while, in theory, benefit corporations are legally bound to file benefit reports that explain what they have done to pursue their professed purpose,<sup>68</sup> in reality some of these benefit corporations are not doing so, and non-shareholders have no legal right to compel production of these reports.<sup>69</sup> Therefore, benefit corporations' limitation on shareholder rights may have a negative impact on the accountability of benefit corporations because there is less incentive to act in the best interests of both shareholders and stakeholders. Without any real accountability for benefit corporations, stakeholders are forced to rely on the alleged altruism of the founders of benefit corporations.<sup>70</sup>

*C. The Business Judgment Rule: Existing Corporate Structures Could Have Achieved the Goals of Benefit Corporation Legislation*

As discussed in Section II.B, one of the often-argued flaws of the traditional corporate structure is that corporations are forced to pursue shareholder primacy and profit maximization at the expense of all other initiatives. It is this perspective in conjunction with market demands that has led to the development of benefit corporations and other similar social enterprises.<sup>71</sup> However, it is

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corporation with no effective accountability to the stakeholders for the mission it is to carry out on their behalf.”). While

66. See *supra* text accompanying notes 31–34. **Error! Bookmark not defined.**

67. See Blount & Offei-Danso, *supra* note 27, at 648–49 (detailing the fact that stakeholders of benefit corporations lack any enforceable rights).

68. See Model Benefit Corporation Legislation § 402(b) (“A benefit corporation shall post all of its benefit reports on the public portion of its Internet website, if any; but the compensation paid to directors and financial or proprietary information included in the benefit reports may be omitted from the benefit reports as posted.”)

69. Daryl Koehn, *How Beneficial Are Benefit Corporations?*, February 21, 2017, [blogs.lse.ac.uk/businessreview/2017/02/21/how-beneficial-are-benefit-corporations/](https://blogs.lse.ac.uk/businessreview/2017/02/21/how-beneficial-are-benefit-corporations/).

70. *Id.*

71. See *supra* Part III (describing benefit corporations and the evolution of their

not entirely clear that this is necessary, and some scholars believe that corporate law does not require profit maximization over all else.<sup>72</sup> While the language in *Dodge v. Ford Motor Co.* may seem absolute,<sup>73</sup> the progression of caselaw since the decision shows that while shareholder primacy and profit maximization are important, directors and officers have a good bit of latitude in their decision-making abilities.<sup>74</sup> For example, courts determine whether a director is liable for a breach of fiduciary duty for an action that does not maximize profits by applying the business judgment rule, which requires that a director act in the good faith belief that the decision she made is in the best interest of the corporation.<sup>75</sup> Some scholars argue that however often the idea of shareholder primacy and profit maximization is touted as law—whether by judges, scholars, or the public—in reality, the business judgment rule rules out shareholder primacy because, based on the rule, courts do not hold directors and officers of corporations legally accountable for failing to maximize shareholder wealth.<sup>76</sup> In *Unocal Corp. v. Mesa Petroleum Co.*, the Delaware Supreme Court stated that directors may make business decisions based not just on profit maximization, but also on consideration of “the impact on ‘constituencies’ other than shareholders (i.e., creditors, customers,

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popularity).

72. See *supra* note 20.

73. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“The powers of the directors are to be employed for that end [of maximizing shareholder profits]. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.”).

74. See *Miller v. Magline, Inc.*, 256 N.W.2d 761, 775 (1977) (noting that “courts are . . . most reluctant to interfere with the business judgment and discretion of the directors in the conduct of corporate affairs.”); *In re Think3, Inc.*, 529 B.R. 147, 181 (Bankr. W.D. Tex. 2015) (discussing the application of the business judgment rule, which grants directors leeway in decision-making by creating the presumption during litigation “that a company’s directors and officers acted on an ‘informed basis, in good faith, and in the honest belief’ that the alleged wrongdoings were taken in the best interest of the company” (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds* by *Brehm v. Eisner*, 746 A.2d 244, 253–54 (Del. 2000)); *Hiller, supra* note 9, at 288 (describing the limitations of shareholder primacy and sole profit maximization).

75. *Hiller, supra* note 9, at 288 (“The business judgment rule is a relatively easy standard for a director to meet for ordinary business decisions, requiring that he or she be informed and act in the good faith honest belief that the decision is in the best interest of the corporation.”).

76. STOUT, *supra* note 7, at 39; Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 453–54 (2005) (describing the popularity of the business judgment rule in the legal field. “Courts have addressed the business judgment rule on countless occasions. Practicing lawyers frequently assess the business judgment rule’s elements and reach, and scholars regularly analyze its underpinnings.”).

employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange.”<sup>77</sup>

The business judgment rule grants directors and officers a good amount of discretion in their decision making, and this has caused many scholars to argue that it is possible for profit-driven corporations to serve a public purpose while also maximizing shareholder wealth.<sup>78</sup> The business judgment rule allows directors and officers to make rational business decisions without being second guessed.<sup>79</sup> Those rational business decisions could be as simply as “we wanted to market ourselves as a socially responsible company because we thought it would be good for business.” Consider the Budweiser example discussed above, the company was able to donate to a social cause and was not second guessed, even when it spent additional sums to advertise about the donation, likely because it could be viewed as a rational business decision intended to create positive publicity.

Furthermore, the idea that directors can pursue other business goals aside from profit maximization was already codified in many states before the development of social enterprise legislation with state constituency statutes. Constituency statutes allow directors to consider broader interests than those of

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77. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

78. See Mark A. Underberg, *Benefit Corporations vs. ‘Regular’ Corporations: A Harmful Dichotomy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG., (May 13, 2012), <http://blogs.law.harvard.edu/corpgov/2012/05/13/benefit-corporations-vs-regularcorporations-a-harmful-dichotomy/>. Underberg argues that the benefit corporation initiative’s primary rationale relies on “the mistaken, though widely held” idea that the law as it stands prevents boards of directors from considering the effect their decisions will have on other stakeholders, the environment, or society. *Id.* He states that in reality, current law does not require companies to solely focus on profit maximization and that the values of corporate governance are promotion of “responsible, sustainable corporate decision-making by companies of any stripe.” *Id.*; see also Johnson, *supra* note 10, at 272 (arguing that the idea that shareholder wealth maximization is the ultimate corporate purpose is often supported by flimsy and ambiguous law and that the law is agnostic to corporate purpose entirely); STOUT, *supra* note 7, at 39 (“There is no solid legal support for the claim that directors and executives in U.S. public corporations have an enforceable legal duty to maximize shareholder wealth. The idea is fable.”).

79. Although some cases have held that for business decisions to be considered rational, the directors and officers must seek shareholder wealth maximization, see *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010), there are just as many examples of courts allowing directors of corporate entities significant leeway in using their discretion to make business decisions. See, e.g., *Miller*, 256 N.W.2d at 775 (highlighting courts’ reluctance to interfere with corporate directors’ business judgment and discretion); *In re Think3, Inc.*, 529 B.R. at 181 (allowing for an application of the business judgment rule).

shareholders' profit.<sup>80</sup> Therefore, the recent push for social enterprise statutes arguably comes from a place of misunderstanding of corporate law and ignores the benefits of doctrines like the business judgment rule because, "so long as a board of directors is not tainted by personal conflicts of interest and make[s] a reasonable effort to become informed, courts will not second-guess the board's decisions about what is best for the company—even when those decisions seem to harm shareholder value."<sup>81</sup>

#### IV. CONCLUSION

The creators and proponents of B Corps, benefit corporation legislation, and other forms of social enterprise legislation have good intentions and desires to cause meaningful change in the world. Their arguments for enacting such legislation have been convincing, with thirty-three states enacting benefit corporation legislation.<sup>82</sup> However, this Comment has shown that the true benefit of benefit corporation legislation is the ability for a company to market itself as a benefit corporation rather than promoting a social good. The market has shown a desire for companies who pursue social and environmental purposes in addition to their normal business practices, and smart businesses should respond accordingly; but the law should not be the medium for these initiatives, and legislatures should not have to subsidize businesses' marketing initiatives.

Further, it is not clear that these new legal forms are even necessary to achieve these goals based on existing doctrines like the business judgment rule. While it is possible that the law can work in conjunction with these other schemes to promote the ideals of the legislation's supporters, it still comes with other potential risks of abuses. Benefit corporations are a noble idea, but they seem to work better in theory than in practice and result in legislatures overstepping into realms where they have no business being.

*Sarah Dunn*

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80. WILLIAM T. ALLEN & REINER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 289–91 (5th ed. 2016).

81. STOUT, *supra* note 7, at 39. An example of this kind of discretion involves when the owner of the Chicago Cubs chose not to hold night games at Wrigley field because he believed that baseball should be a "daytime sport," regardless of the fact that "night games would likely have increased attendance and profits." *Id.*

82. *State by State Status of Legislation*, *supra* note 6.