

**PUTTING NEW SHEETS ON A PROCRUSTEAN BED:
HOW BENEFIT CORPORATIONS ADDRESS FIDUCIARY
DUTIES, THE DANGERS CREATED, AND SUGGESTIONS
FOR CHANGE**

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I. INTRODUCTION

In Greek myth, Procrustes, a bandit son of Poseidon, had a one-size-fits-all iron bed on which he invited passers-by to spend the night. Once his guests were asleep, he used his ironsmith's hammer to stretch them to fit the bed. If a guest proved too tall, Procrustes would use shears to amputate the excess in order that the body would fit the bed. Ultimately, Theseus, who killed the Minotaur and escaped the Maze using Ariadne's thread, killed Procrustes by compelling him to fit his own body to his bed.

In current parlance, a procrustean bed is an arbitrary standard to which exact conformity is enforced; that which does not fit the standard is either ignored or is stretched and cut until compliant. A procrustean law is canonical, formal, rigid, hard and fast, from which there can be no deviation. Procrustean laws have their place, and where uniformity is necessary or desired Procrustes should rear his head. However, procrustean laws have costs as well, since individual circumstances, choice and liberty are neglected at the expense of uniformity.

A fundamental and long-standing corporate law issue is whether, and the extent to which, a procrustean bed of unalterable rules should apply to business corporations, or whether shareholders should be able to select the bed of their own choosing when joining together in a business

¹ Partner, Faegre Baker Daniels LLP, Denver, Colorado. I dedicate this Article to an extraordinary group of Colorado corporate law practitioners and academics who have wrestled with benefit corporation concepts and legislation for the last three years and from whom I have learned much over the last several decades. They include Bob Keatinge, Tony van Westrum, Cathy Krendl, Prof. Mark Loewenstein, Mike Sabian, Allen Sparkman, Herrick Lidstone, John DeBruyn, Beat Steiner and Sarah Steinbeck. I also thank the participants in the American University Journal of Business Law's symposium on "Profit Plus Philanthropy: The Emerging Law of Social Enterprises", for their comments on an earlier version of this Article.

relationship in corporate form.² For example, one of corporate law's central mantras reflects a norm that American business corporations have the purpose creating financial benefit for their shareholders.³ In Dodge v. Ford Motor Co., the Michigan Supreme Court stated:

A business corporation is organized and carried on primarily for the benefit of the stockholders. The powers of the directors are to be employed for that end. 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

² Frank Easterbrook and Daniel Fischel have noted that the tension between the shareholder profit maximization norm and shareholder choice have "plagued" corporate law scholars for many years:

[W]hat is the goal of the corporation? Is it profit, and for whom? Social welfare more broadly defined? . . . Our response to such questions is: who cares? If the New York Times is formed to publish a newspaper first and make a profit second, no one should be allowed to object. Those who came in at the beginning consented, and those who came later bought stock the price of which reflected the corporation's tempered commitment to a profit objective. If a corporation is started with a promise to pay half the profits to the employees rather than the equity investors, that too is simply a term of the contract.

FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 35-36 (1991). Easterbrook and Fischel respect freedom of contract, and believe shareholders should be free to create corporations that respect their choices and values. Others express similar contractarian views. See, e.g., Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 577-83 (2003) (arguing that shareholder wealth maximization norm should be a default rule because parties would choose this rule in a hypothetical bargain, but leaving room for contracting away from the default rule); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1752 (2006) (arguing that flexibility to engage in "private ordering" is a goal in Delaware corporate law); Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177, 179 (2008) (arguing that shareholder profit maximization is only a default rule that shareholders can vary by agreement).

³ See Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2073 (2001) (stating that norms "emphasize the value, appropriateness, and indeed the justice of maximizing shareholder wealth"); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 290 (arguing that the effect of the wealth maximization norm is overstated.) See also Richard H. MacAdams, *The Origin, Development and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (defining norms as "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both.")

to the nondistribution of profits among shareholders in order to devote them to other purposes.⁴

In procrustean terms, this view of corporate essence would mean, first, that corporations do not have purposes and goals that do not involve shareholder profit-maximization and, second, that corporate agents, including directors, who pursue other purposes and goals can be liable to the corporation and its shareholders for breach of their fiduciary duty and for waste of corporate assets. Although modern corporate law may be more nuanced than that expressed in 1919 by Dodge,⁵ shareholder profit-

⁴ *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919). Of course, the question of what “primarily” means is left dangling. See Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008) (arguing that Dodge promotes a constipated view of corporate purposes). Some promoters of benefit corporation legislation argue that Dodge is “good law” and state that “many still maintain” that Dodge’s wealth maximization principles have been widely accepted by courts over an extended period of time. See William H. Clark, Jr. and Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817 (2012).

⁵ For example, under the business judgment rule courts almost always defer to the directors’ business judgment. If a course of action may lead to some potential shareholder benefit, board decisions generally survive judicial review. See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (“[The business judgment rule] is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”) Corporations generally can claim that their socially or environmentally beneficial activities help them to achieve short- or long-term financial goals. Issues arise on the fringes, where the social activities are significantly extreme that they connect to no financial purpose or where there are Revlon duties to maximize the shareholders’ immediate return when a break-up is inevitable or shareholders are selling controlling interests. See *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. However, such concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object is no longer to protect or maintain the corporate enterprise, but to sell it to the highest bidder.”) See also Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1386 (2008) (noting theoretical uncertainty on fundamental questions of corporate governance, including questions concerning for whose benefit corporations are run and corporate law’s relationship to the achievement of social good). Melvin A. Eisenberg, *Corporate Conduct That Does Not Maximize Shareholder Gain: Legal Conduct, Ethical Conduct, The Penumbra Effect, Reciprocity, The Prisoner’s Dilemma, Sheep’s Clothing, Social Conduct and Disclosure*, 28 STETSON L. REV. 1 (1998); Ian B. Lee, *Efficiency and Ethics*

maximization principles have been expressed in more recent cases and writings.⁶ Thus, corporate directors arguably continue to have a fiduciary duty requiring that they be motivated by their desire to increase the corporation's value for the shareholders' benefit.

Even if the legal effect of the shareholder profit-maximization norm might be overstated, the widely-held perception that corporations exist to maximize shareholder profit can operate on a prophylactic level to discourage directors from considering non-shareholder interests when making significant corporate decisions. For example, Ben & Jerry's Homemade Inc. ("Ben & Jerry's") was once a poster child for social enterprise and social entrepreneurship, pursuing a "double bottom line" by seeking to advance its founders' progressive social goals while yielding an acceptable financial return to its shareholders. In 2000, however, Ben & Jerry's was acquired by Unilever, an international conglomerate that may, over time, have a different focus from the Ben & Jerry's founders. Paradise lost, at least according to one story line. Some have argued that corporate law compelled the Ben & Jerry's – Unilever transaction by presenting the Ben & Jerry's board with two options when Unilever made its takeover bid: accept the offer with its

in the Debate About Shareholder Primacy, 31 DEL. J. CORP. L. 533 (2006); *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (a board considering a hostile takeover bid may consider the bid's effect on the corporate enterprise including constituencies other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally); *Shlensky v. Wrigley*, 237 N.E. 776, 780 (Ill. App. 1968) (corporate directors could consider effect of lights and night-time baseball games at Wrigley Field on surrounding property values and "the long run interest of the corporation in its property value at Wrigley Field might demand all efforts to keep the neighborhood from deteriorating.").

⁶ See, e.g., *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010) ("Directors of a for-profit Delaware corporation cannot deploy a [corporate policy] ... to defend a business strategy that openly eschews stockholder wealth maximization – at least not consistently with the directors' fiduciary duties under Delaware law. ... Having chosen a for-profit corporation 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."); *Katz v. Oak Industries, Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986) ("it is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders). See Leo E. Strine, *Our Continuing Struggle With the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135 (2012); David A. Wishnick, *Corporate Purposes in a Free Enterprise System: A Comment on eBay v. Newmark*, 121 YALE L. J. 2405 (2012); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993).

rich rewards to existing shareholders (including the founders), or attempt to thwart it by using anti-takeover measures and other protective devices with the potential for fiduciary breach claims by shareholders who were deprived of maximum financial benefit. In Ben & Jerry's case, such anti-takeover devices had been put in place well before the Unilever bid, but the board chose not to deploy them due, perhaps, to personal sensitivity to liability risk. Instead, the profit-maximization route was taken and Ben & Jerry's became something else.⁷

The "social enterprise" movement has reacted to this perceived procrustean bed of corporate profit-maximization in several ways.⁸ First,

⁷ For a well-reasoned analysis of the Ben & Jerry's takeover that takes a more complex and nuanced approach, see Anthony Page & Robert Katz, *Freezing Out Ben & Jerry: Corporate Law and The Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211 (2010), (noting commentary, including from Ben Cohen and Jerry Greenfield, to the effect that corporate law required the board to take an offer that well exceeded the stock trading price despite the fact that they did not want to sell the company; noting that corporate law did not mandate the sale and therefore concluding that profit-maximization principles were a handy scapegoat; arguing that certain pro-social attributes of Ben & Jerry's continued unabated after its acquisition; and concluding that corporate law is sufficiently flexible to enable a double bottom line approach and that social enterprises need to consider structures that make the founders' initial social benefit preferences more robust and less malleable over time.) The Ben & Jerry's case may point out the danger of reliance on special founders, who can espouse negative social views, change their minds and seek profit, or "cash out" and admit minority shareholders who limit the founders' ability to maintain a personal vision after having taken other peoples' money. My observation on a recent failed attempt to pass benefit corporation legislation in the 2012 Colorado legislative session is that it was significantly motivated by one founder's attempt to incorporate her social motivations into her corporation, so that she could then sell shares to third parties and cash out of some or all her investment.

⁸ See Robert Katz & Anthony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 86 (2010) (defining "social enterprise" as entity having profit-making goals while embracing the duty to sometimes make decisions that will not maximize profit and sharing some of the social aims of a public benefit nonprofit corporation); Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337 (2009).

B Lab Corporation also operates a certification program through which qualifying entities, including corporations, limited liability companies, cooperatives and others, can license a "B Corp" trademark in order to hold themselves out as "B corporation" to investors and the public. This certification program and the "B Corp" mark are sometimes confused with the benefit corporation movement. They are very different, as the "B Corp" license involves branding only, and "benefit corporation" involves changes to state corporation laws. At present, "B Corp" does not need to be a "benefit corporation," and a "benefit corporation" does not need to license the "B Corp"

some promoters have pushed the concept of low-profit limited liability companies (L3Cs), and several state legislatures have adopted this limited liability company deviation. Proponents of L3Cs have argued that they help solve fiduciary duty problems by establishing that social benefit goals prevail over, or at least are balanced against, profit-maximization objectives when managerial authority is exercised.⁹ Allan Vestal and I, and others, have been critical of L3Cs, in part because we view existing limited liability company law as highly malleable and, therefore, L3Cs as irrelevant to fiduciary and other issues.¹⁰ I will not repeat those arguments in this Article.

Second, others, led by B Lab Corporation (“Blabs”) have encouraged state legislatures to adopt so-called “benefit corporation” legislation in order to “redefine the purpose of business organizations.”¹¹ It is argued that this redefinition is necessitated by existing obstacles to articulating and enforcing dual public good/private benefit concepts if corporations adopt traditional nonprofit or for profit organizational forms.¹² Nonprofit corporations do not allow profit distributions to members and therefore cannot attract investment capital, while, as discussed above, for profit corporations arguably are required to favor private benefit over public good. The promoters of benefit corporations state that distinctive features of such benefit corporations are: (1) in addition to for-profit objectives, they have a corporate purpose to create a material positive impact on society and the environment; (2) their directors’ duties are expanded to require consideration of public interests

label. I have heard anecdotally that, Blabs has stated it will not license its “B Corp” mark to Washington social purpose corporations and, if this is true one is left wondering about the future of the mark.

⁹ See John Tyler, *Negating the Legal Problem of Having “Two Masters”: A Framework for L3C Fiduciary Duties and Accountability*, 35 VT. L. REV. 115 (2010). See also Dana Brakman Reiser, *Blended Enterprise and the Dual Mission Dilemma*, 35 VT. L. REV. 105 (2010) (discussing “two masters” problem).

¹⁰ J. William Callison and 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, 286-88 (2010); Daniel S. Kleinberger, *A Myth Deconstructed: The “Emperor’s New Clothes” on the Low-Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879 (2010).

¹¹ See generally Clark & Babson, *supra* n. 4. At this time, __ states have adopted benefit corporation legislation that adheres generally to the Blabs model discussed below. In addition to benefit corporation legislation, California also adopted a flexible benefit corporation statute. Washington has adopted a social purposes corporation statute.

¹² See Dana Brakman Reiser, *Benefit Corporations – A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 591 (2011).

in addition to the shareholders' financial interests; and (3) they are required to report annually on overall social and environmental performance using an appropriate third-party standard.¹³ Assuming that the shareholder profit-maximization principles create a procrustean bed that cannot be varied by private agreement, the proponents of benefit corporations can be thought of as attempting by statute to allow at least some American corporations to choose to arise from that bed and smell the free-trade coffee of social and environmental good, thereby pleasing consumers, employees, investors and society.

In this Article, I make three overarching assumptions, each of which is highly contestable. First, I assume that American corporate law presently includes a shareholder profit-maximization principle to which all for-profit corporations must adhere and which allows insufficient deviation by shareholder agreement or otherwise. Second, I assume that corporate fiduciary duty law requires more-or-less uncompromising director and officer adherence to the profit-maximization principle in connection with their management of the corporation, both in establishing corporate policy and in corporate operations. In this regard, I also assume that there are settings in which the pursuit of public good is outside the parameters of the business judgment rule.¹⁴ Third, I assume that shareholders should be allowed to choose a different regime in which social and environmental goals are given their due, and in which corporate directors and officers are required to consider public goods in addition to private, monetary good when exercising their discretion in managing corporate affairs. In short, I assume, without significant reflection or analytical development of the myriad issues behind these assumptions, that we have arrived at the starting point to consider entities like benefit corporations. These assumptions allow a pragmatic focus on how benefit corporations should work, and the remainder of this Article considers the structure of benefit corporations, primarily by considering Blabs' "Model Benefit Corporation Act" (the "Model").¹⁵ It argues that the current model of benefit corporations as expressed by Blabs is itself too rigid and uncompromising, indeed that it fits all benefit corporations onto the Blabs promoters' own procrustean bed.¹⁶ It asserts that the

¹³ *Id.* at 819.

¹⁴ *See* note 5, *supra*.

¹⁵ *See* J. William Callison, *Pragmatic Reform: Lessons from the South African Experiment*, 91 KY. L. J. 841 (2002-2003) (arguing a pragmatic belief that "business organization law should not be a matter of orthodox ideology imbedded in an unchanging set of principles, but instead, like a coral reef, should grow by accretion over time and should be hospitable to living things.")

¹⁶ My views and comments concerning benefit corporations has been influenced by an approximately two and one-half year discussion of the benefit corporation structure, which has played out twice in the Colorado legislature. At least to me,

Blabs Model will ultimately discourage corporations from becoming benefit corporations, and will discourage outside investment in benefit corporations and consumer validation of benefit corporation status. It concludes with an examination of alternative structures, including an alternative to the orthodox benefit corporation structure, that operate under the same fundamental assumptions as those that guide the benefit corporation movement, that help resolve the problems with Blabs' Model, and that would be more hospitable for American business corporations that seek to promote values beyond shareholder profit-maximization. In short, this Article attempts to create a comfortable bed that fits all, rather than a device that chops arms and legs to fit the bed to passers-by who seek respite.¹⁷

II. OVERVIEW OF BENEFIT CORPORATION LEGISLATION

The states that have enacted benefit corporation legislation have modestly different variations on the theme.¹⁸ Rather than examine any particular state benefit corporation statute, this Article considers Blabs' "Model Benefit Corporation Legislation" (the "Model"), which at present is the foundation for all existing benefit corporation statutes.¹⁹ Under the Model:

it has become apparent that the proponents of the Blabs structure seek orthodoxy to the Model statute such that those who adhere to a rigid law can proclaim themselves as benefit corporations and capture whatever economic benefit can be derived therefrom. Others, principally lawyers who have labored over Colorado business entity statutes for many decades, seek a more open-ended approach whereby all corporations that seek to include socially and/or environmentally beneficial purposes, as defined by the shareholders, can obtain benefit corporation status without undue cost. Thus, the two positions share the end of allowing deviation from the wealth-maximization norm, but differ on the question of whether the statutory benefit should be exclusively held by a few or populistly available to many. I also note that the supporters of benefit corporation legislation appear to be, like me, from the progressive political left. This leads me to wonder whether the same support would be there for a statute that could or would be used by others who do not share the same outlooks. In my view, benefit corporation legislation should be drafted so that it is conducive to all who seek social good, however they define it.

¹⁷ See Reiser, *supra* at n. 9 (encouraging experimentation with hybrid forms). See generally Larry E. Ribstein & Bruce H. Kobayashi, *Uniform Laws, Model Laws and Limited Liability Companies*, 66 U. COLO. L. REV. 947 (1995) (stating the authors' early argument that uniformity is inefficient and is costly since it halts statutory evolution).

¹⁸ See Reiser, *supra* at n. 12 (discussing some of the variations).

¹⁹ Model Benefit Corporation Legislation (with Explanatory Comments (the "Model")), available at http://benefitcorp.net/storage/Model_Legislation.pdf.

1. A “benefit corporation” is a business corporation, formed pursuant to the state’s general business corporation law, which has elected to subject itself to the benefit corporation provisions of the Model.²⁰ The corporation’s articles of incorporation must state that it is a “benefit corporation,” thereby placing potential investors, creditors and others who inspect organizational documents on notice of the corporation’s status.²¹ There are no name requirements, either in the positive sense where benefit corporations must designate themselves as such or in the negative sense where corporations that are not benefit corporations cannot use a name implying benefit corporation status.

2. If an existing corporation seeks to become a benefit corporation, or if an existing corporation seeks to merge into a benefit corporation, shareholders owning at least two-thirds of the interests must approve the election.²² Similarly, a two-thirds shareholder vote is needed to terminate benefit corporation status.²³ Notably, the Model does not presently contain dissenters’ rights or other provisions to protect the interests of non-controlling shareholders who invested in what they believed to be a profit-maximizing business.²⁴

²⁰ Model §101(c) (“Except as otherwise provided . . . [the business corporation law] shall be generally applicable to all benefit corporations.”), §103 (formation of benefit corporation), §104 (election of benefit corporation status).

²¹ Model §103.

²² Model §104 (requiring “minimum status vote”), §102 (defining same as 2/3 vote). Here, I note that Model §101(d) states that the articles of incorporation or bylaws may not relax, be inconsistent with or supersede any other benefit corporation provisions. Thus, if the legislature adopts a 2/3 vote requirement, unlike other shareholder vote items the election cannot be reduced to, for example, majority vote or increased to, for example, unanimous vote. In addition, a “minimum status vote” requires the vote of 2/3 of the shareholders of every class or series, irrespective of their other voting powers.

²³ Model §105(a). Further, Model §105(b) requires that sales, leases or other dispositions of all or substantially all of the benefit corporation’s assets “shall not be effective” unless approved by at least a 2/3 vote. This 2/3 vote requirement cannot be reduced by the corporation’s articles of incorporation or bylaws. Model §101(d). In some situations this requirement may create business planning difficulties and these difficulties may be exacerbated by the fact that a 2/3 vote is required from the shareholders of each class or series of shares, irrespective of their participation in control of other corporate actions.

²⁴ The benefit corporation proponents’ position on the dissenters rights issue is unclear. Although the California benefit corporation statute and the Blabs-sponsored Colorado bill included dissenters’ rights provisions, Blabs generally has not promoted dissenters’ rights because electing corporations may not have liquid capital to pay dissenters and because any payment would deprive the corporation of operating capital for its business and social good. See William H. Clark & Larry Vranka, *White Paper: The Need and Rationale for the Benefit*

3. A benefit corporation must have the purpose of “creating general public benefit.”²⁵ In addition to, but not instead of, a general public benefit, the articles of incorporation may identify specific public benefits “that it is the purpose of the benefit corporation to create.”²⁶ Identification of a specific public benefit does not limit the obligation of a benefit corporation to create a general public benefit.²⁷ Thus, general public purpose is superior, and specificity is a subcategory of the general and is thereby rendered somewhat superfluous.

4. “General public benefit,” to be pursued by all benefit corporations, is defined very broadly as “a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.”²⁸ There is no clarification about the hierarchy of benefit purposes served by the corporation. The Model’s comments state, “By requiring that the impact of a business on society and the environment be looked at ‘as a whole,’ the concept of general public benefit requires consideration of all the effects of the business on society and the environment.”

A “third party standard” is a “recognized standard for defining, reporting and assessing corporate social and environmental performance.”²⁹ A third party standard is also developed by an

Corporation: Why it is the Legal Form That Best Addresses the Needs of Social Entrepreneurs, Investors, and Ultimately, the Public 26-27 (January 26, 2012), available at http://www.benefitcorp.net/storage/The_Need_And_Rationale_for_Benefit_Corporations_-_April_2012.pdf. Notwithstanding this liquidity issues state legislatures should include, and some have included dissenter provisions in their benefit corporation legislation. Alternatively, the election of benefit corporation status should require unanimous shareholder consent. However, this may make adoption of benefit corporation status impossible in many situations, and adoption of dissenters’ rights provisions seems more palatable. At a minimum, the lack of dissenters rights demonstrates that the Model is either badly drafted or unduly authoritarian in nature.

²⁵ Model §201(a). The use of the word “creating” seems odd and may exclude non-creative aspects such as “sustaining.”

²⁶ Model §201(b).

²⁷ *Id.*

²⁸ Model §102.

²⁹ Model §102. Note that the Model does not refer only to business operations, but requires the consideration of existential questions like the nature of the corporation’s business itself. Some corporations likely will shy away from benefit corporation status due to an ongoing need to consider whether, for example, making salad dressing or running a ski resort or brewing beer or

independent organization, credible, and transparent.³⁰ The Model spills much ink attempting to define each of these characteristics, but it does not prescribe any content for the standards and it fails to state how standards are applied or by whom. Neither the government nor the standard-setter is given any enforcement powers. Thus, it is conceivable that some third-party standard-setters will establish very low, but transparent, standards for benefit corporations and the whole concept of public good will go down the greenwash drain. There also is no indication in the Model concerning fees that can be charged by standard-setters for making their presumably useful and possibly valuable standards available.

5. The creation of general public benefit and any specific public benefit “is in the best interests of the benefit corporation.”³¹ Directors shall (*i.e.*, must), in discharging their duties and in considering the corporation’s best interests, consider the effects of any action or inaction on (a) shareholders, (b) the employees and workforce of the benefit corporation, its subsidiaries and its suppliers, (c) the interests of customers as beneficiaries of the general public benefit, (d) community and societal factors (including those of all communities in which the corporation, its subsidiaries and its suppliers have offices or facilities), (e) the local and global environment, (f) the corporation’s short-term and long-term interests, including benefits that may accrue from long-term plans and the possibility that those interests may be best served by the corporation’s continued independence,³² and (g) the corporation’s ability to accomplish its general public benefit purpose and any specific public benefit purpose.³³ There is no hierarchy to or prioritization of the interests that directors must consider.³⁴ In addition, under the Model, directors may consider “other pertinent factors or the interests of any

manufacturing high-fat ice cream has a material positive impact on society and the environment, taken as a whole.

³⁰ *Id.*

³¹ Model §201(c).

³² The breadth of this factor likely allows many forms of anti-takeover provisions based on the directors’ perception of the corporation’s long-term interests. It thereby may gut the shareholder protections contained in much recent corporate case law.

³³ Model §301(a)(1).

³⁴ Model §301(a)(3) (“[Directors] need not give priority to the interests of a particular person or group . . . over the interests of any other person or group, unless the benefit corporation has stated in its articles its intention to give priority to certain interests related to its accomplishment of its general public benefit purpose or of [any] specific public benefit purpose.”) It appears that a benefit corporation cannot indicate a priority for shareholder interests.

other group that they deem appropriate.”³⁵ Further, the Model provides that directors are not personally liable for monetary damages for any action taken as a director or the failure of the benefit corporation to create public benefit,³⁶ and that directors do not have liability to beneficiaries of the corporation’s general public benefit purpose or specific public benefit purpose arising from the person’s status as a beneficiary.³⁷

The standards of conduct set forth for directors establish, and are intended to establish, director fiduciary duties. They effect the essential nature of a benefit corporation in two ways: first, directors who consider the enumerated factors are insulated from shareholder claims that they breached their fiduciary duties by not acting to maximize shareholder benefit, and, second, they establish positive rules for director action. The first aspect is contained in the Model’s provision that the consideration of the enumerated interests and factors does not constitute a violation of fiduciary standards³⁸ and that directors are not monetarily liable for damages. The second aspect is emphasized through the Model’s creation of “benefit enforcement proceedings” against directors and officers who do not march to the benefit corporation tune.³⁹

6. “Benefit enforcement proceedings” may be brought directly by the benefit corporation or derivatively by (a) a shareholder, (b) a director, (c) a person or group owning 5% or more of equity interests in a benefit corporation’s parent corporation (subsidiaries/parent corporations are defined using a 50% ownership standard), or (d) other persons specified in the corporation’s articles of incorporation or bylaws.⁴⁰ Unless otherwise provided in articles or bylaws, benefit corporation directors do not have duties to mere beneficiaries of the public purpose who are not listed above.⁴¹ Thus, for example,

³⁵ Model §301(a)(2).

³⁶ Model §301(c). Bill Clark and Elizabeth Babson state that the elimination of director monetary liability was “driven by twin desires to (1) eliminate such concern in the face of a lack of court precedent by which such liability could be quantified and (2) to focus courts on the exclusive remedy of awarding injunctive relief wherein the benefit corporation would be required to simply line up to the commitments it voluntarily undertook.” Clark & Babson, *supra* n.4 at 848-49. Enforcement problems are discussed later in this Article.

³⁷ Model §301(d).

³⁸ Model §301(b)(1) (consideration of general and specific public benefit interests does not constitute a violation of corporation laws concerning director fiduciary duties.)

³⁹ Model §305(a)(1).

⁴⁰ Model §305(b).

⁴¹ Model §301(d).

customers, employees of suppliers and representatives of impacted communities or the environment cannot sue.⁴²

A “benefit enforcement proceeding” is a claim or action for failure of a benefit corporation to pursue or create general public benefit (or a specific public benefit set forth in its articles), or for violation of any statutory obligation, duty or standard.⁴³ Thus, it is the clear intent of the Model to enable fiduciary duty litigation not only against directors who fail to meet their obligation to consider the effects of their action in the statutorily-listed ways but also against directors whose actions fail to create general public benefit. Other than in a benefit enforcement proceeding, no person can assert a claim against the benefit corporation and its directors for failure to pursue or create benefit or a violation of a standard of conduct under the Model.

7. The board of directors of a benefit corporation must include an independent “benefit director.”⁴⁴ The benefit director must prepare an annual opinion concerning (a) whether the benefit corporation acted in all material respects in accordance with its general public benefit purpose and any specific public benefit purpose; (b) whether directors and officers complied with their obligations to consider the best interests listed in the Model; and (c) a description of any ways in which the corporation or its directors or officers failed to comply.⁴⁵

8. Benefit corporations must prepare an “annual benefit report” meeting numerous requirements, including a narrative description of the ways the benefit corporation pursued general public benefit during the year and the extent to which it was created, circumstances hindering the creation of public benefit, and the process and rationale for choosing or changing the third-party standard used.⁴⁶ The narrative must also

⁴² This clearly tilts the playing field in favor of the set of interests represented by those who own (by issuance or acquisition) corporate stock and away from those representing other interests. *See* discussion of enforcement issues, *infra*.

⁴³ Model §305(b). The proceeding is direct when brought by the corporation and derivative when brought by directors or shareholders. Presumably all procedural aspects of derivative litigation, including a demand for corporate action and the potential for a special litigation committee to consider whether pursuing the litigation is in the corporation’s best interests, will be applicable. In my view, the derivative litigation issues will likely be complex, and thereby weaken the benefit corporation concept.

⁴⁴ Model §302(a). “Independent” is defined in Model §102.

⁴⁵ Model §302(c). My experience with the Colorado legislative process is that, when pushed, the Blabs proponents may be willing to jettison the benefit director requirement when politically opportune.

⁴⁶ Model §401(a)(1).

include an assessment of the corporation's overall social and environmental performance against a third-party standard, the name and address of the benefit director, the compensation paid to each director, the name of each 5% shareholder (including known beneficial shareholders), the benefit director's opinion, and a statement of certain relationships with the third-party standard provider.⁴⁷ The Model does not state how the benefit report should assess corporate performance, and one might expect some benefit corporations to provide very general, even minimalist, reports. The report (along with the benefit director opinion) must be provided to each shareholder, posted on the "public portion" of its Internet website (or made available to any person requesting it), and filed with the state's secretary of state or other filing official.⁴⁸

9. Various similar rules apply to officers.

It should be clear from the foregoing that benefit corporation status involves a large and complex superstructure that cannot be diminished by agreement among the shareholders or otherwise. Assuming that there are benefits to benefit corporation status, they come with large structural and other costs.

III. PROBLEMS AND DANGERS OF BENEFIT CORPORATION STATUS

In this Section I identify and discuss several large issues with the current, orthodox benefit corporation model. I refer to these as the "Illiberalism Problem," the "Bipolarity Problem," the "Fiduciary Uncabining Problem," and the "Greenwash/Greenmail Enforcement Problem." It should be noted that these criticisms focus solely on the orthodox Blabs Model legislation, and therefore on state benefit corporation statutes derived from the Blabs model. As noted throughout this Article, I generally support the concept of allowing corporate shareholders to elect deviation from the profit-maximization norm and I generally support a modified, flexible, elegant and consilient benefit corporation statute to enable corporations to do so.⁴⁹ In essence, the remainder of this Article represents one perspective on an intellectual debate about how benefit corporation legislation should work, not whether benefit corporations should exist in some form.

⁴⁷ Model §401(a)(2)-(7).

⁴⁸ Model §401(c)-(e). Director compensation and proprietary information can be eliminated from public reports. One wonders whether almost all information will be proprietary information. In Colorado, the Secretary of State balked at the public filing requirement and it was eliminated from proposed legislation.

⁴⁹ See section ____ of this Article.

1. The Illiberalism Problem of General Public Benefit.

Benefit corporations, as exemplified by the Model, deprive benefit corporations of choice, but instead attempt to fit all electing corporations to broad, state-authorized conceptions of the “good” as measured against a third-party standard. Thus, benefit corporations are illiberal and conformity-inducing.

Although there are many variations of liberal political theory, liberalism’s common theme is the paramount value of autonomy and freedom. Liberal theorists agree that a central goal of political society is to establish conditions for individuals, each of whom has a free and independent will that should not be dominated by others, to flourish. Therefore, liberalism historically has focused on rights and choice.⁵⁰

The concepts of “positive” and “negative” liberty form the mainstay of contemporary liberal political theory. Although the distinction is ancient⁵¹ and recurring,⁵² it received more modern treatment by Isaiah Berlin.⁵³ Berlin stated that positive liberty “derives from the wish on the part of the individual to be his own master,” to exercise one’s capacities to achieve one’s own ends.⁵⁴ Negative liberty, on the other hand, is measured by “the area within which the subject – a person or group of persons – is or should be left to do or be, what he is able to do or be, without interference by other persons.”⁵⁵

⁵⁰ See, e.g., T. HOBBS, *LEVIATHAN*, ch. 21 (defining liberty as “freedom . . . the absence of opposition (by opposition I mean external impediments of motion”).) Hobbes recognized both the existence of individual autonomy and the fact that equally autonomous individuals are vulnerable to interference by other persons’ pursuit of their own ends. His solution to the “war of all against all” was based on individual autonomy and contract, people choose to surrender some of their autonomy to the state in order to maintain their ability to establish and pursue individual goals while restricting others from interfering with those pursuits.

⁵¹ See ARISTOTLE, *POLITICS*, reprinted in *BASIC WORKS OF ARISTOTLE* 1113, 1265-66 (Richard McKeon, ed., 1941).

⁵² See Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns*, reprinted in _____.

⁵³ See Isaiah Berlin, *Two Concepts of Liberty* (1958), reprinted in I. BERLIN, *FOUR ESSAYS ON LIBERTY* 118-172 (1969).

⁵⁴ “The ‘positive’ sense of the word ‘liberty’ derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of any kind. I wish to be the instrument of my own, not of other men’s acts of will.” *Id.* at 131.

⁵⁵ *Id.* at 121-22 (“Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing

In liberalism's positive aspect, people exercise their free wills to advance their individual goals. Positive liberty is the freedom to be, and to do, anything the actor might wish to be or do.⁵⁶ In a liberal state, law's role is to facilitate individual choices and to ensure that each person, and group of persons, has as much freedom as possible to pursue goals of his or her own choosing, rather than to dictate how people should exercise choice or whether they succeed or fail upon exercising choice. Liberalism can thus be viewed to include the avoidance of unnecessary procrustean laws.

This positive liberty is limited by others' freedom to pursue their own goals, and liberal theory recognizes a need to protect individual boundaries so that each person's enjoyment of freedom does not unduly restrict others' abilities to exercise their freedom. In this sense, liberalism has a "negative aspect" in that it involves restrictions protecting people from external coercion or restraint. The negative aspect considers freedom to include the absence of, or limitations on, governmental regulation. There are several strands to negative liberal theories based on where the theory is located on a continuum defining the frontier between private life and public authority, and thus the permissible scope of governmental power. First, at one extreme, there are those who believe that government's sole role is to protect personal and property rights.⁵⁷ Second, there are those who argue that government should not only protect personal and property rights, but that it should also remedy collective action problems left unresolved by the free market, but no more.⁵⁸ Third, there are those who argue that government should be restrained from limiting individual actions that do not harm others, but that governmental action is appropriate when

what I could otherwise do, I am to that degree unfree; and if this area is contracted by other men beyond a certain minimum, I can be described as being coerced, or, as it may be, enslaved.")

⁵⁶ Berlin also notes risks of positive liberty; including that "the real self may be conceived of as something wider than the individual, as a social 'whole' of which the individual is an element or aspect. . . . [An] entity [that] is then identified as being the 'true' self which, by imposing its collective, or 'organic' single will upon its recalcitrant 'members,' achieves its own, and therefore their, 'higher' freedom." *Id.*

⁵⁷ See R. NOZICK, ANARCHY, STATE AND UTOPIA 26 (1974) (describing the appropriate role of the state as "limited to the functions of protecting all its citizens against violence, theft, and fraud, and to the enforcement of contracts.") Nozick later characterized this position as "seriously inadequate." R. NOZICK, THE EXAMINED LIFE 286 (1989).

⁵⁸ See R. POSNER, ECONOMIC ANALYSIS OF LAW 367-86 (4th ed. 1992). See also M. FRIEDMAN, CAPITALISM AND FREEDOM 25 (1962).

individual actions cause harm to others.⁵⁹ Finally, there are those who allow a broader conception of the state's police power, including the power to enact legislation relating to the general public welfare.

Some have referred to liberalism's "voluntarist conception of freedom" as having a core thesis and three corresponding elements.⁶⁰ The core thesis is that society, being composed of a plurality of persons having their own aims, interests and conceptions of the good, is best arranged when it is governed by principles that do not themselves presuppose any particular conception of the good. The corresponding elements are: first, state power to coerce individuals should be limited to those situations where collective action to implement collective norms can be justified, otherwise individuals should be free to pursue their private objectives; second, the scope of market and other contract-based institutions should be correspondingly maximized; and, third, the state should maintain neutrality as among different conceptions of the good out of respect to individuals' freedom and autonomy to choose their own ends.⁶¹

The "communitarian" critique of liberalism begins with this notion of voluntarism, and focuses on the philosophical difficulty inherent in the liberal conception of persons as freely choosing, independent selves, unencumbered by moral or civic ties existing prior to their choice.⁶² In the communitarian view, the liberal vision cannot account for a wide range of commonly recognized moral and political obligations, and liberalism's failure rests with its inability to recognize that we can be claimed by ends we have not chosen, such as those given by our identities as members of families, cultures, traditions and society. Communitarian theorists note that when the political world brackets morality too completely, it generates disenchantment. The resulting yearning for a public life of larger meaning ultimately finds expression in some form, much of it negative and undesirable.⁶³ Similarly, communitarian analysis notes that the triumph of the voluntarist conception of freedom has coincided with a growing sense of

⁵⁹ See J.S. MILL, ON LIBERTY 28 (Penguin, ed., 1985) ("The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.")

⁶⁰ See M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 1 (____).

⁶¹ See NOZICK supra n. 57 at 30-33.

⁶² M. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 322 (1776).

⁶³ *Id.*

disempowerment, in which the freely choosing, independent self confronts a world governed by impersonal power structures that defy individual understanding and control.⁶⁴

Benefit corporations can be seen as a communitarian reaction to what some perceive to be an illiberal corporation law structure that is perceived to create little or no meaning beyond financial enhancement of individual shareholders, who then participate, if at all, in social life as individuals. Thus the benefit corporation movement can be viewed as having both liberal and communitarian aspects. The liberal aspect emphasizes choice – corporate shareholders should be allowed to exercise their own free will to choose ends to be sought by the corporation. The communitarian aspect considers corporations, which harbor enormous power and in which much of the nation’s economic life takes place, to remain insufficiently encumbered by non-wealth maximizing societal, moral and environmental obligations.⁶⁵ By electing benefit corporation status, shareholders allow their corporations to become responsible to a “general public purpose” an idea mildly redolent of “general will” concepts in Rousseau’s social contract.⁶⁶ In a sense, since benefit corporation legislation implies an aggregate conception of

⁶⁴ Id. at 323.

⁶⁵ This all begs questions concerning the nature of corporations, beginning with aggregate-entity questions. See David Millon, *Theories of the Corporation*, 1990 DUKE L. J. 201 (1990). This Article does not discuss this critical question.

⁶⁶ See J.J. ROUSSEAU, *THE SOCIAL CONTRACT, OR PRINCIPLES OF POLITICAL RIGHT* (1762). Rousseau argued that each individual may have a particular will which is different from the people’s general will, but that the individual’s particular will may be forced to submit to the general will because of the obligations that have been defined for all individuals by the terms of the social contract. The general will is not some combination of individual wills, but is concerned with the public interest rather than private interests. Rousseau also argued that the general will may not always be able to choose correctly between what is advantageous or disadvantageous for the public interest because it may be influenced by groups of individuals who are concerned with promoting their private interests. Thus, the general will may need to be guided by the judgment of a person who is concerned only with the public interest. This “legislateur” (law-giver) is a person whose enlightened judgment can determine the justice principles and common good requirements that are best suited to society.

At a superficial level, benefit corporation legislation seems Rousseauvian. However, a significant distinction that prevents implication of Rousseau’s social contract theory in the benefit corporation arena is that Rousseau’s concept of the general will applies to all persons in society, and not just to those who exercise their particular will and elect in.

corporations in which shareholders select the nature of the entity, the shareholders also become personally responsible to a general purpose.⁶⁷

Whether or not one accepts the notion that a corporation is a “person,” some corporations are personal and associational in nature; that is, they are formed and owned by a single individual or by people who have decided to act in concert to undertake a trade or business. It is likely that most “associational corporations” are closely-held, and it is likely that corporations that embrace conceptions of public benefit beyond shareholder profit-maximization will come largely from this group of “associational corporations.” It seems relatively unlikely that larger corporations, in which shareholders do not share familial or personal connection, will comprise a large proportion of the corporations seeking to enable values other than shareholder profit-maximization, due in part to an inability to have widely dispersed and heterogeneous shareholders reach agreement on the pursuit of public good and due to various other costs of benefit corporation status. However, allowing limited, special public values to be adopted might also permit shareholders in more widely-held corporations to agree to sacrifice some profit for some public benefit.

Focusing on closely-held corporations, as noted above the existing benefit corporation conception is insufficiently liberal. It starts down the right path by facilitating choice and allowing people who associate together in business corporation form to agree to pursue a good other than profit-maximization. In this sense, benefit corporations are creatures of positive liberty and allow an escape from one procrustean bed. However, the cost of such escape is being strapped into yet another procrustean bed. Rather than allowing shareholders the autonomy and freedom to pursue their own, self-defined ends and their own conception of the good, the Model benefit corporation legislation forces all electing corporations to adhere to broad communitarian conceptions of “good” assessed against an independent organization’s third party standard

⁶⁷ The social enterprise movement also allows a feeling of community with like-feeling believers, and provides a sense not only of doing the right thing, but also moving in the direction of history. Thus, the feeling of sadness and betrayal expressed by L3C supporters when the Colorado legislature voted against L3C legislation, and the “true believer” approach of some benefit corporation supporters. The individual is placed at the center of not only a historical project, but a collective process. See T. JUDT, *THINKING THE TWENTIETH CENTURY* 97-98 (2012) (describing the story of the Soviet Union for those had faith in it). See also Usha Rodrigues, *Entity and Identity*, 59 *EMORY L. J.* 1257, 1314-18 (2011) (discussing identity theory of nonprofit organizations and noting linkage to social enterprise).

which has been legislatively endorsed.⁶⁸ Thus, the positive liberty of the election is stunted, and the negative liberty of avoiding external constraints is not obtained. In my opinion, there are insufficient reasons for applying external constraints, particularly since the state is not providing any particular benefit to corporations that elect benefit corporation status.⁶⁹ If shareholders desire that the corporation that they own benefit a particular low-income community or a particular river watershed, they may do so only by also adhering to a broader general public benefit purpose of having a “material positive impact on society and the environment, taken as a whole.” Not only must low-income jobs be created or a sustainable watershed maintained, but beneficial employee health benefits, effects of corporate actions and inactions on the communities in which suppliers reside, and effects of actions and inactions on global warming (or perhaps even the benefits of global warming if all views are taken into account) must be considered. A “general public purpose” and third party standards become the uncontrolled, impersonal moral force that is balanced against the uncontrolled, impersonal power structure of the contemporary corporation.⁷⁰

⁶⁸ In addition, the violation of negative liberty conceptions is increased by forum electing benefit corporations to incur the cost of benefit directors, annual benefit reports, and other constraints that have little to do with the public benefit choice.

⁶⁹ Berlin notes that drawing the line between private life and public authority is a “matter of argument, indeed of haggling.” Berlin, *supra* n. 53 at 124. My argument is that when government does not provide benefit to the business entity, such as limited liability, but only facilitates owner choice, government should not impose limitations on choice or costs for choice. See J. William Callison, *Federalism, Regulatory Competition, and the Limited Liability Movement: The Coyote Howled and the Herd Stampeded*, 26 J. CORP. L. 951, 980-81 (2001) (noting that legislative extension of limited liability protection could have come with related costs); Allan W. Vestal, *Disappointing Diogenes: The LLC Debate That Never Was*, 51 ST. L. L. REV. 53 (2006) (discussing legislative adoption of limited liability protection without discussion of costs and trade-offs). Benefit corporation status changes the private character of the electing corporation and affects the directors’ actions with respect to the corporation, and there is no role for government to limiting the shareholders’ ability to choose or to impose costs on the choice.

⁷⁰ A prominent supporter of benefit corporations makes this attribute clear:

One of the main purposes of benefit corporation legislation is to create a voluntary new corporate form that has the corporate purpose to create benefits for society and the environment generally, as well as for the shareholders. The entrepreneurs, investors, consumers, and policymakers interested in new corporate form legislation are not interested in, for example, reducing waste while increasing carbon emissions, or reducing both while remaining indifferent to the creation

Further, by mandating assessment of public good against a recognized third-party standard, certain points of view may be excluded. For example, if the shareholders wish for their corporation to act in a manner consistent with tenets of Trotskyism, certain Austrian economists, Herbert Spencer's "Social Statistics," or any number of belief structures, whether on the left or on the right, it may be difficult for them to find an enabling "third party standard" promulgated by some credible independent organization under whose umbrella public good is to be measured. One man's global warming is another's agricultural crop enhancement – who is to say where "public benefit" definitively lies. Since liberalism is inherently nonpartisan, and maintains both that everyone benefits from everyone's freedom and that society has no way to evaluate opinions other than by letting everyone freely express them and try them out, any third-party imposed limitations on "public good" are undesirable.⁷¹

2. The Bipolarity Problem and Negative Inferences. The illiberalism problem that prevents shareholders from choosing their own corporate ends is compounded by the legislative inference that corporations that are not benefit corporations can act only in ways that maximize shareholder profit.⁷² This bipolarity problem has two aspects

of economic opportunity for low-income individuals or underserved communities. They are interested in creating a new corporate form that gives entrepreneurs and investors the flexibility and protection to pursue all of these or other public benefit purposes. The best way to give them what they need is to create a corporate form with a general public benefit purpose. A company may also designate a specific public benefit, in addition to its general public benefit purpose. This ensures that a benefit corporation can pursue any specific mission, but that the company as a whole is also working toward general public benefit.

Clark & Babson, *supra* n. 4 at 841. One might note the use of "they" – benefit corporations are not designed for use by corporation that might actually find the form useful to their business, but rather for some "they" who happens to be interested in a particular corporate ethos.

⁷¹ See F. HAYEK, THE CONSTITUTION OF LIBERTY 30 (1960) ("All institutions of freedom are adaptations to this fundamental fact of ignorance, adapted to deal with chances and probabilities, not certainty. Certainty we cannot achieve in human affairs.")

⁷² Although Model §101(b) provides that "[t]he existence of a provision of this [statute] shall not of itself create an implication that a contrary or different rule of law is applicable to a business corporation that is not a benefit corporation," this does not change the existential question of whether a legislature's adoption of a benefit corporation statute entails recognition of the profit maximization norm as a starting place for all corporations.

– the broad and the narrow. Viewed from a broad corporate governance perspective, the benefit corporation’s primary rationale is based on the premise that existing law prevents corporate directors from considering the social and environmental impact of corporate decisions. One might argue that this view perpetuates the misconception that current corporate law requires directors to focus solely on immediate profit and share price maximization, and thereby undermines the promotion of socially responsible decision-making by corporate boards.⁷³ However, even under the restraints of current corporate law, for most corporate decisions there are no legal restrictions on the directors’ ability to take non-shareholder interests into account, and there is little or no case law where directors have been held liable for considering such interests. Therefore, the benefit corporation movement arguably harms the broader interests of 21st Century corporate governance by creating a bipolar world of regular corporations that maximize private profits and other corporations that consider social and environmental sustainability and other public goods. Benefit corporation legislation, particularly in the Model form proposed by Blabs, overstates the limitations of existing law on corporate decision-making, and might have unintended consequences in future judicial decisions that consider the scope of directors’ fiduciary duties. This problem could be exacerbated by intemperate legislative language, such as that contained in the New York State Senate memorandum introducing benefit corporations: “[The bill] removes legal impediments preventing businesses and investors from making their own decisions to use sustainability and social innovation as a competitive advantage.”⁷⁴ Loose lips sink ships, and one might be excused for thinking that the business judgment rule eliminates this issue, at least when “competitive advantage” is involved.

Notwithstanding the broad argument, which indicates a need to limit some of the rhetoric of the benefit corporation movement, benefit corporation status does allow directors to consider public goods that are completely unrelated to corporate business purposes and are essentially personal to the corporation’s shareholders, thereby moving them beyond the business judgment rule’s protections. In my view, this is where benefit corporations may add value. However, under the orthodox Blabs Model, this is available only for corporations that elect to pursue “general public benefit,” and not corporations that, while pursuing public benefit, want a more limited scope of public benefit. To the extent that benefit corporation legislation implies that directors cannot implement shareholders’ narrower public benefit goals, or that they have liability if they do so, the orthodox model is harmful.

⁷³ See n. 5, *supra*.

⁷⁴ See <http://open.nysenate.gov/legislation/bill/579-2011>.

For example, assume that all shareholders of “Peachblossom Orchard,” a close corporation that manufactures and sells clothing items from Delta, Colorado recognize the connection of their corporation and themselves to the Delta community, and they desire that their corporation shall invest in and otherwise diminish private profit by providing benefit to the community. Assume that the shareholders do not wish to subscribe to more general standards of “material positive impact” on society and environment, do not wish to assess their corporation against a third party standard, see no need in their closely-held corporation for benefit directors, do not want the risk of benefit enforcement proceedings, and do not want the expense and privacy loss of annual benefit reporting – they only seek to invest in their community. Thus, Peachblossom Orchard should not become a “benefit corporation,” at least as defined in the orthodox Model. Assume that the directors substantially reduce potential profit from their very successful clothing business by creating benefit to the Delta community, just as the shareholders want. A shareholder dies and her son inherits the stock. The son notes the “waste” of corporate assets on nonpecuniary, community-enhancing activities, demands that the waste stop, and sues the directors for breach of their fiduciary duty to act in the corporation’s best interests. The directors refer to the shareholders’ wishes for Delta, Colorado. A likely response would be that the legislature enacted benefit corporation legislation as a response to the shareholder wealth-maximization principle, that providing mandatory general and precatory specific public benefit is in the “best interests” only of electing benefit corporations, that directors of benefit corporations alone may consider the effects of their actions on public good, but that Peachblossom Orchard is not a benefit corporation and therefore directors cannot consider public good in making their decisions and that corporate expenditures on the community exceed those that can be made under the penumbra of the business judgment rule. Thus, potential liability (and certainly risk and settlement fodder) for corporate waste and breach of fiduciary duty follows, as well as a likely forward-looking director focus on profit and not on Delta. If one accepts the premise that shareholders should be allowed to choose corporate ends beyond profit maximization, this is an unfortunate result. Benefit corporations should be enabling, not disabling. They should not be used to draw lines between corporations that pursue good whose directors are protected and corporations who pursue good whose directors are unprotected. Further, they should not be used in a way that implies director liability for public good-seeking corporations that do not wish to toe an undesirable and expensive orthodox Blabs line.

3. The Fiduciary Uncabining Problem and the Loss of Fiduciary Restraints.

Two leading approaches to fiduciary duty have emerged – contractarian and fiduciarian – and benefit corporations satisfy neither.⁷⁵ In each case, there is recognition that the internal structures of business entities create relationships of power and dependency, and that the law has attempted to provide a principled set of rules to ensure that those with power are accountable to those that depend on its appropriate exercise. The question becomes the foundation of (and limitations on) the power and dependency relationship.

Contractarians argue that fiduciary duties should be confined to relationships involving the contractual delegation of broad and open-ended power over one's property.⁷⁶ Thus, the existence of fiduciary duties (specifically, duties of care and loyalty) depends on the structure of the parties' relationship, as expressed by their actual or implied contract. Contractarians further argue that fiduciary duties are a response to the impossibility of writing contracts that completely specify the parties' obligations. Thus, contractarians conclude that the "fiduciary" relationship is a contract gap-filler, characterized by high costs of specification and monitoring, in which the courts prescribe the actions that the parties, presumed to be rational and benefit-maximizing persons, would have preferred if bargaining were cheap and promises fully enforced.

Fiduciarian legal scholars consider fiduciary duties through a different, morally-based lens, and begin by contemplating thick state-imposed restrictions that substantially hamper the freedom to act of a person whose performance involves the risk of injury to others.⁷⁷ Fiduciarians accept that values other than wealth-maximization, including trust values, are served by the visions of human relationships underlying fiduciary concepts and that the fiduciary relationship serves functions not addressed by mere contract.

From either perspective, orthodox Blabs benefit corporations permit directors and officers to take an enormous number of

⁷⁵ See J. William Callison, *Why a Fiduciary Duty Shift to Creditors of Insolvent Business Entities is Incorrect as a Matter of Theory and Practice*, 1 J. BUS. & TECH. L. 432, 444-49 (2007).

⁷⁶ See Frank H. Easterbrook and Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. L. & ECON. 425, 427 (1993).

⁷⁷ See Melvin A. Eisenberg, *The Duty of Care of Corporate Officers and Directors*, 51 U. PITT. L. REV. 945, 945-48 (1990); Victor A. Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 597-98 (1997).

interests and factors into account, many of which are unspecified by the shareholders who adopt the benefit corporation posture. General public benefit is a mish-mash and directors, all of whom have personal interests and some of whom may have personal agendas, are simply tossed into the middle of the mess. The directors concluding that electric car promotion is a social good, Teslas are acquired for all corporate executives. The directors thinking that polar bear preservation is good, the corporation spends large fortunes to maintain ice in Greenland. From the contractarian perspective, further specification of fiduciary duties by contract is not contemplated and the gap-fillers are not sufficiently robust. From the fiduciarian perspective, there are fundamentally no restrictions that hamper the freedom of directors whose actions involve the risk of injury to others. Benefit corporations open the door for irresponsible directors to justify their actions (including self-interested actions) by pointing to some public benefit justification (or alternatively when public benefit is involved, to some private shareholder benefit justification). Managerial accountability has proven difficult in for-profit enterprises,⁷⁸ and it is difficult to conceptualize accountability in a hybrid entity with broad general public purposes and narrow private purposes.⁷⁹

⁷⁸ It is likely that the shareholder wealth maximization norm has increased salience because it provides clearer corporate objectives than other alternatives, and thereby both gives guidance to directors and allows sharper judicial focus on directorial actions. See Leo E. Strine, Jr., *The Social Responsibility of boards of Directors and Stockholders in Change of Control Transactions: Is There Any "There" There*, 75 S. CAL. L. REV. 1169, 1173 (2002) (arguing that permitting directors to justify their actions by reference to more "diffuse" concerns than those of shareholders, the judicial job of judging fiduciary compliance becomes impossible").

⁷⁹ See Adolf A. Berle, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1365, 1367 (1932). ("When the fiduciary obligation of the corporate management and 'control' to shareholders is weakened or eliminated, the management and 'control' become for all practical purposes absolute.") Berle was not against a regime in which corporate managers could consider non-shareholder interests, but argued that until a sensible system emerged to constrain managers who consider broader interests, the status quo should remain. *Id.* at 1367 ("Unchecked by present legal balances, a social-economic absolutism of corporate administrators, even if benevolent, might be unsafe; and in any case it hardly affords the soundest base on which to construct the economic commonwealth which industrialism seems to require. Meanwhile, as lawyers, we had best be protecting the interests we know, being no less swift to provide for the new interests as they successively appear." See also Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1445 (1993) (arguing that displacing the wealth maximization norm would create the "very real risk that some corporate directors and officers will use nonshareholder interests as a cloak for actions to advance their own interests."))

On the other hand, it is arguable that, despite the rhetoric of public benefit contained in the orthodox benefit corporation model, the directors of a benefit corporation will follow the power – they are elected by shareholders – and ultimately serve the private interests of the shareholders rather than some broad social good. When faced with a conflict between shareholder interests and social goods, directors likely will align with the shareholders, since only the shareholders vote for directors. Thus, the social aspects of benefit corporation legislation may be illusory whenever they conflict with private interests.⁸⁰ In addition, it seems difficult to coordinate benefit corporation status with director fiduciary obligations to creditors in insolvency settings.⁸¹

4. The Greenwash/Greenmail Enforcement Problem.

(a) Greenwash Possibilities. To the extent a “benefit corporation” election is intended to confer special branding status in the marketplace, the unregulated nature of the election, and the possibility of greenwashing for-profit activities under the benefit corporation label, is a significant problem.⁸² All that is necessary for a corporation to be a benefit corporation is for the corporation, at formation or through shareholder election, to elect the status and include two words in its articles of incorporation. A benefit corporation then assesses its “material positive impact on society and the environment” against some third party standard, has a benefit director, and prepares (or does not, who’s to say) annual benefit reports. Other than potential, derivative benefit enforcement proceedings, in which standing is limited

⁸⁰ See Strine, *supra* n. 78 at 150-51 (“Equally unrealistic is the idea that corporations authorized to consider other interests will be able to do so at the expense of stockholder profits if voting control of the corporation remains in the stock market. Just how long will hedge funds and mutual funds subordinate their desire for returns to a desire of a founder to do good.”) I think the problem goes beyond publicly held stock to all situations in which directors are elected by shareholders that they do not control.

⁸¹ This uncertainty may impede the ability of benefit corporations to borrow money or otherwise operate on credit and, at a minimum, should require complex covenant restrictions on benefit corporations that borrow money. Without such restrictions, creditors could watch corporate assets disappear into the public realm, and would run the risk of director irresponsibility.

⁸² Bill Clark and Elizabeth Babson give considerable attention to the market demand for benefit corporations by consumers and investors. Clark & Babson, *supra* n. 4 at 819-22 (“For-profit social entrepreneurship, social investing and the sustainable business movement have reached critical mass and are now at an inflection point. Accelerating consumer and investor demand has resulted in a substantial marketplace for companies that are using the power of business to solve social problems.”)

to shareholders and directors and in which damages are not a remedy, there is no enforcement mechanism to ensure that corporations which fail to seek general public benefit do not latch on to the benefit corporation moniker and the developing marketplace for social enterprises. In addition, the benefit corporation legislation contains no naming requirements keeping traditional for-profit corporations from calling themselves benefit corporations, or forcing nonconforming corporations to stop designating themselves as benefit corporations and obtaining branding benefits.

For example, assume a dog kennel business (dog lovers being a socially and environmentally conscious breed) that wants to distinguish itself from its competitors and capture greater market share. Its sole shareholder elects benefit corporation status, amends the articles of incorporation to state that “Dudley Dooright Kennels” is a benefit corporation and to change the corporate name to “Dudley Dooright Kennels Benefit Corporation.” The corporation now “shall have a purpose of creating general public benefit,” but, unless a specific public benefit purpose is also elected the articles do not need to say anything about benefit purpose, only that the corporation is a benefit corporation. Dudley Dooright, originally the sole director and still the sole shareholder, elects an “independent” benefit director. “Independent” is defined in the Blabs Model as a person “having no material relationship with a benefit corporation,” and states that employees, immediate family members, and 5% owners are conclusively presumed not independent. Not knowing what an “immediate family member” is (and not really caring) Dudley appoints his brother as the independent director and pays him an annual stipend for his services.⁸³ Dudley then advertises and otherwise holds the corporation out as a benefit corporation and, since dog boarders board dogs and do not investigate truth-in-marketing, the corporation captures market share and does exceedingly well. Dudley never gives any consideration to social or environmental factors when making board decisions, just profit. At year end, the corporation is supposed to prepare an annual benefit report, deliver it to Dudley, and either post it on the public portion of its Internet website or provide as copy to any person requesting a copy. The Model also requires that the corporation deliver a copy of the benefit report to the Secretary of State for filing, but assuming that the state statute maintains this requirement (and the resulting governmental cost), there is no review component. If Dudley’s benefit corporation fails to prepare an annual benefit report there is no enforcement mechanism. Similarly, Dudley’s corporation can

⁸³ If the brother does not pan out, for example by being too independent or by threatening benefit enforcement proceedings, he can be removed and replaced by Dudley, the sole shareholder.

comply in a pro forma manner with the report requirements and state certain ways the general public benefit was pursued and the extent to which it was created, the process and rationale for selecting or changing the third party standard, an assessment of performance against the third party standard, and other required matters. The report can be sketchy, forward looking, vague, nonanalytical or fabricated, and no one will know the difference.

(b) Greenmail. As noted above, benefit corporation shareholders and directors can bring “benefit enforcement proceedings”, and thereby allege that the benefit corporation failed to adequately pursue a general public benefit. For example, if a benefit corporation produces widgets but could theoretically do so with less social or environmental harm (or with some greater social or environmental benefit), shareholders and directors can sue for the harm (or for the failure to benefit), and presumably a court would determine whether directors failed to adequately consider the harm when deciding to produce widgets in an efficient and cost effective manner. At one level, this empowers shareholders and directors as eternal nags and reduces the efficiency of corporate boards (and increases the cost of obtaining board members), which face litigation whenever some portion of the company is unhappy with its direction.⁸⁴ At a higher extreme, it fosters a greenmail scenario where shareholders can seek to be bought off through higher profit distributions or through adherence to their idiosyncratic conception of the good. In any case, the enabling of open-ended shareholder litigation without focus is an obvious problem of the current Model.

4. Summary.

IV. WHAT CAN BE DONE?

1. Forget Corporations and Use Limited Liability Companies

One possible solution to the hybrid entity conundrum is to allow corporations to be corporations, with attendant possible shareholder wealth maximization norms intact, and to encourage “social enterprise entities” to organize as limited liability companies, which permit contractually tailored for-profit and non-profit purposes.⁸⁵

⁸⁴ Consideration needs to be given to the availability and extent of director and officer (“D&O”) insurance in the benefit corporation context.

⁸⁵ For example, the Delaware limited liability company act allows LLCs to have nonprofit purposes. *See* DEL. CODE ANN., tit. 6, §18-106(a)(2005) (“A limited

Although this might simplify choice of entity decisions and reduce information costs to investors and others who transact business with business entities, since they would know what “Inc.” signifies, in my view this is an insufficient basis for shifting the focus from benefit corporations to limited liability companies. First, the fact that some newly formed business enterprises choose the benefit corporation form indicates that, at least in some cases, there is perceived tax or business benefit to the corporate form. Second, with respect to existing corporations the conversion into limited liability company form could be costly and difficult.⁸⁶ Third, because investors and others undertake (or should undertake) due diligence prior to investment, the information cost rationale may not withstand scrutiny since it would not be costly for investors to learn of non-profit maximizing purposes prior to investing in a corporation. Such purposes would, in the case of benefit corporations, be set forth in the articles of incorporation. Finally, a move to an LLC regime is intellectually unappetizing since it fails to attempt resolution of the historical tension over what it means to incorporate – intractable wealth maximization, default rules, or something else. The question being posed, sometimes it is best to address it. Thus, in my view, the fact that LLCs offer a generally acceptable alternative to benefit corporations does not mean that there should not be benefit corporations or that we should not attempt to get benefit corporation legislation right.

liability company may carry on any lawful business, purpose or activity, whether or not for profit.”) A number of other state LLC statutes contain similar language. Further, the whole concept and history of LLCs demonstrates that they are predominately contractual entities, in which statutory and common law provisions and arrangements can be varied by the members’ operating agreement. See Ann E. Conway, *The Global Use of the Delaware Limited Liability Company for Socially-Driven Purposes*, 38 WM. MITCHELL L. REV. 772, 780 (2012) (arguing that “presently, the Delaware LLC provides global investors maximum internal efficiency, as well as asset protection at decreased agency cost, for businesses operating solely within or outside the United States for socially-driven enterprises,” and the benefit corporations create unnecessary legal nightmare[s];”). One of the arguments against low-profit LLCs (“L3Cs”) has been that a statutory non-profit scheme is unnecessary since LLCs already can be contractually structured with nonprofit purposes in mind. See Callison & Vestal, *supra* n. _____. The same argument applies to “benefit LLCs” as enacted in Maryland.

⁸⁶ At a minimum, the change would entail drafting an operating agreement setting forth numerous provisions that are otherwise presumed by corporate law. Second, although tax costs of conversion could be alleviated by using an LLC that elects to be taxed as a corporation and then using a tax-free reorganization, the conversion of a corporation into an LLC is not without risk of significant tax cost.

In my view, the “illiberalism problem,” the “bipolarity problem,” the “fiduciary uncabining problem” and the “greenwash/greenmail enforcement problem” are obvious drawbacks to the orthodox benefit corporation legislation. Assuming that corporations, other than single shareholder corporations that are dictatorial by nature, want to enable public-good-enhancing activities, in my view rational shareholders will not adopt the benefit corporation form, thereby creating greater risk and cost when choosing to forego personal profit. The equation is wrong. Further, in my view this is tragic, since there is presently a focus on legislative responses to the profit maximization norm and since creation of an unworkable statute is a wasted opportunity for corporate law reform. In the next section, I discuss alternative methods for success.

2. Adopt a much simpler, contract-based structure for benefit corporations.

Another approach to benefit corporation legislation would be to accept the primacy of shareholder choice, and to allow shareholders to specify the general or specific public benefits they want their corporation to seek. Thus, the shareholders of my hypothetical “Peachblossom Orchard” could specify that their corporation’s public purpose is to benefit the Delta, Colorado community, in general or specific fashion. Further, the shareholders could elect whether they want accoutrements of the orthodox Model, such as benefit directors and annual public reporting. If they seek a third-party brand, the third party may insist on these things, but otherwise the shareholders’ agreement should govern. Adoption of this flexible approach would allow public-good-providing corporations the externality benefits of the “benefit corporation” brand, while avoiding the negative effects of the orthodox Model. First, since shareholder choice would be available, the liberalism problem would be avoided. Second, since narrower purposes than a vague “general public benefit” could be chosen, there would not be a separation of benefit-providing corporations into different categories, and the bipolarity problem would be avoided. Third, since shareholders would be able to establish boundaries, director fiduciary duties would be fenced within those boundaries and directors would not be free to choose general public benefits that suit them. Finally, although enforcement problems may still exist, and need to be addressed, their scope would be significantly reduced. Benefit corporations arise from shareholder choice concepts, and expansive shareholder choice may make them work.

CONCLUSION

Benefit corporation legislation can be useful for corporations in which the shareholders want to encourage public good activities beyond shareholder profit maximization, and such legislation should be embraced. However, the Model legislation proposed by Blabs and adopted in several states is fraught with conceptual and practical hazards that likely will suboptimally limit the use of benefit corporations to single shareholder corporations and the ill-advised. Although limited liability companies presently allow most or all of the desired features of benefit corporations, there seems to be a significant desire to allow public benefit considerations to play out in corporate form. Thus, to solve the problems of the orthodox benefit corporation Model, it is necessary to look to corporate law. Fortunately, the problems can be readily solved by building flexibility and shareholder choice into the Model. This would make benefit corporation status potentially useful for many corporations, rather than the relatively few corporations that easily fit the orthodox Model. If it is desired that the shareholder profit-maximization sheets on the existing procrustean bed of corporate law be turned down, then contractual flexibility should be sought and new procrustean laws should be avoided.

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