Benefit Corporations and Strategic Action Fields or (The Existential Failing of Delaware)

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This paper analyzes the creation and growth of benefit corporations from the perspective of strategic action field theory, in an attempt to shed some light upon both the subject and the methodology. It considers how the new legal field of benefit corporations responded to weaknesses in the existing fields of business corporations and non-profit corporations. Where major field participants such as directors, officers, employees, and shareholders or donors wish to pursue both financial and public-spirited goals that sometimes conflict without subordinating either type of goal to the other, both profit and non-profit corporations may be unsatisfactory. Benefit corporations attempt not only to allow entrepreneurs to seek goals other than profits, but also to commit to doing so while also making profits, so as to entice outside investors and employees to become involved.

In explaining how the new legal form arose out of the gap created by these weaknesses, the paper stresses the role of B Lab as what strategic action field theory calls an internal governance unit, both internally regulating the field and acting as an external champion through creating and lobbying for model benefit corporation legislation. This has so far succeeded in passing legislation in over half of the states, with around 2,000 companies adopting benefit corporation status as of this writing. The paper considers the possibility of successful further emergence of this field through widespread adoption, considering the role that B Lab, social networks and organization, transactional lawyers, and courts could play in responding to many major identified challenges. The paper concludes with some reflections about what this application has taught the author about the strengths and weaknesses of strategic action field theory. A focus on the social and endogenous nature of preferences, and on a mix of selfishness with a search for meaning and connection as motivating forces, are clearly improvements on the conceptual apparatus of the dominant corporate law paradigm, law and economics. However, it remains to be seen whether the theory provides strong and articulated enough methodological and normative tools to pose a strong challenge to that dominant paradigm.

I. Introduction

Benefit corporations are a new legal form of business association which has been rapidly adopted by over half of all states over the last few years.[1] They are meant as a vehicle for entrepreneurs and investors who want to be involved in social enterprises, that is, businesses which seek both a healthy financial return for their investors while also committing to other socially valuable goals. Social enterprises pursue what has been called a triple bottom line of

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[1] *See infra* note 65and accompanying text.

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people, planet, and profit.[2] This new legal and social form raises many questions. Who is attracted to this form of enterprise, and why? Who stands to gain from it? How does it both resemble and differ from other related forms of enterprise? How has it come to be so widely adopted by state legislatures over such a short period of time? What innovations in law, economic institutions, and social norms have occurred to make benefit corporations possible, and what further innovations are needed to help them grow? What are the prospects for economic and social success of benefit corporations?

In this essay, I use this new legal, economic, and social entity and the questions it raises as a case study for applying strategic action field theory. Neil Fligstein and Doug McAdam have recently developed the concept of strategic action fields as a generalization of ideas that have appeared in a variety of different sub-fields of sociology, and to some extent other disciplines as well.[3] For me, as a legal scholar with a background in economics, the origins and terminology of this theory are conceptually distant and rather forbidding. However, the theory also holds out some real promise, particularly with its understanding of preferences and social action which has enough common ground with my home turf of rational choice and game theory to be not completely alien while being broader and more flexible, allowing one to speak of phenomena that economic theory mostly ignores.

Is this sociological theory comprehensible and useful for legal scholars trying to analyze developments in corporate law? Perhaps the best way to find out is to simply try to use the theory to analyze a particular topic. And so that is what this paper does. The topic is of interest

[2] ELKINGTON, JOHN, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF TWENTY-FIRST CENTURY BUSINESS (1997).
[3] FLIGSTEIN, NEIL & DOUGLAS MCADAM, A THEORY OF FIELDS (2012) (hereafter "Theory"), Fligstein, Neil & Douglas McAdam, *Toward a General Theory of Strategic Action Fields*, 29 Soc. Th. 1 (2011) (hereafter "General Theory").

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to me personally, as I have both already written on benefit corporations[4] and was involved in the drafting of Minnesota's benefit corporation statute.[5] It also may provide an attractive case for applying strategic action field theory. As a formal, legal type of organization, the nature of the field is relatively clearly defined, and there are other well-known related fields to which one can compare it (namely, ordinary for-profit and non-profit corporations). Also, by definition social enterprises focus on a mix of more instrumental, self-centered goals and more other-oriented values, a mix which also occurs within the sociological theory. So, we shall see what we can learn about both strategic action fields and benefit corporations by applying the theory of the former to the story of the latter. Of course, as someone not at all trained in sociology, the exercise may merely reveal my lack of understanding, but since that lack is itself presumably quite common among corporate law scholars, perhaps my failings may themselves prove instructive.

The paper starts by briefly describing the theory of strategic action fields.[6] It then analyzes the forces which have led to the creation of benefit corporations as a new form of business association, using strategic action field theory (as I understand it) in telling the story.[7] The paper concludes with some reflections about what I have learned about the uses and the limits of the strategic action field concept in the process of going through this exercise.[8]

II. The Theory of Strategic Action Fields

Although I am a corporate law scholar with a background in economics, I like to think that I am relatively broad-minded for someone in that position. Thus, the idea of drawing upon sociological theory is not inherently dubious from my perspective. Indeed, there are some real

[4] McDonnell, Brett H., *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 Fordham J. Corp. & Fin. L. 19 (2014).
[5] Minn. Stat. Ann. Ch. 304C.
[6] *See infra*, Part II.
[7] *See infra* ,Parts III through V.
[8] *See infra*, Part VI.

attractions to that theory. The embeddedness of humans in social structures is a central part of social life and action that economics does not capture well outside of a few isolated elements. In particular, the social nature of individual preferences and norms, and the ways in which individual actions within society are both shaped by and help shape such preferences and norms is a crucial topic which has long interested me and which economics does not do a good job of addressing. I have tried in one unpublished paper to use economic theory to think formally about preferences as endogenous,[9] but despite some efforts by significant economists,[10] that theory is not well adapted to such ideas. In several papers with Claire Hill I have more informally considered how Delaware judges help shape corporate governance norms.[11] In one paper I have tried to think about deeper norms that shape, and are shaped by, the core structure of corporations and corporate law, and in particular the lack of a role for employees in governing corporations.[12] So I am very much in the hunt for a theoretical perspective that is better-suited for exploring such ideas than law and economics.

Another aspect of the concept of strategic action fields that appeals to me is its structural similarities to some elements of important parts of modern economic theory. A field, as Fligstein and McAdam use the term, is rather similar to the idea of a game in game theory. In both, actors try to achieve a preferred outcome while taking into account the interrelationship between their actions and those of others, with their actions grounded in underlying rules of the

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McDonnell, Brett, *Endogenous Preferences and Welfare Evaluations*, http://papers.ssrn.com/ abstract=933089.

[10] *See, e.g.*, Samuel Bowles, Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions, 36 J. ECON. LIT. 75 (1998); Herbert Gintis, Welfare Criteria with Endogenous Preferences: The Economics of Education, 15 INT'L ECON. REV. 415 (1974); GARY S. BECKER, ACCOUNTING FOR TASTES (1996); JON ELSTER, SOUR GRAPES (1983); Carl Christian von Weizsacker, Notes on Endogenous Change of Tastes, 3 J. ECON. THEORY 345, 356 (1971)

[11] Hill, Claire A. & Brett H. McDonnell, *Disney, Good Faith, and Structural Bias*, 32 J. CORP. L. 833, 862-63 (2007); Hill, Claire A. & Brett H. McDonnell, *Executive Compensation and the Optimal Penumbra of Delaware Corporation Law*, 4 VA. L. BUS. REV. 333, 349-57 (2009).

[12] McDonnell, Brett H., *Employee Primacy, Or Economics Meets Civic Republicanism at Work*, 13 Stan. J. L. Bus. & Fin. 334 (2008).

game which define the outcomes and payoffs from the collective choices of all actors within the field/game. Field theory adds complexity by stressing that the rules of the field itself change as a result of prior actions by the actors in the field. That element is missing from ordinary game theory, but it is very much present in the version of game theory that Masahiko Aoki has developed in his theory of comparative institutional analysis.[13] Field theory, with its stress on the macroenvironment and particularly the role of the state in helping to shape fields, also resembles public choice theory in some ways, although the motivations of both state and non-state actors are broader in field theory than in public choice.

Along with these reasons to be interested in field theory, in my initial explorations I have also encountered elements which make me skeptical. One of these is simple (actually, not so simple) terminology. There is a lot of jargon, and it is not easy for a novitiate to catch up. This theory is mostly sociologists talking to other sociologists, and although Fligstein and McAdam do make some effort to draw in the uninitiated, it is far from easy. Moreover, a lot of the technical terms seem pretty vague and open-ended. Fligstein and McAdam themselves admit there is an issue with that—for instance, the core question of what constitutes a field is far from clear. In their list of seven fundamental questions field theory must answer to progress, the first is "How are we to understand field boundaries and the ways in which they change?"[14] This calls attention not only to how one tells whether a field exists, but also to the further complication as to who are the players in that field. Fields can be quite local and specific, or quite global, large, and vague.

Another characteristic with which the economist in me struggled is the heavy emphasis on power, and on the distinction between incumbents and challengers within a field. Although

[13] AOKI, MASAHIKO, TOWARD A COMPARATIVE INSTITUTIONAL ANALYSIS (2001). It would be very interesting to analyze in some depth the parallel between Aoki's theory and that of Fligstein and McAdam.
[14] Fligstein & McAdam, Theory, *supra* note 3, at 215.

Fligstein and McAdam grant that some fields can be cooperative rather than hierarchical, by far their preferred mode seems to be to see fields as struggles where some are on top and some are subordinate. There is much to that, and economics probably underestimates the role of power and struggle, but as I shall discuss further below,[15] my sense is that the sociological literature errs in the other direction.

And so, I have both reasons to be attracted to field theory, and reasons to be wary of it. To try to sort out those mixed reactions, an applied use of the theory to analyze the rise of benefit corporation statutes may help. Before turning to that story, let me briefly summarize some of the major elements of strategic action fields for those unfamiliar with the concept as developed by Fligstein and McAdam.

First, they define a strategic action field as "a meso-level social order where actors (who can be individual or collective) interact with knowledge of one another under a set of common understandings about the purposes of the field, the relationships in the field (including who has power and why), and the field's rules."[16] Although that "meso-level" term is an example of the kind of taken-for-granted sociological terminology that pervades paper and book (I googled it, and it refers to levels between micro and macro), if you replace "field" with "game", this comes pretty close to the definition used in game theory, although game theory speaks of preferences and outcomes rather than the purposes of the game, and economists would eschew that parenthetical about power. However, the theory puts a lot more emphasis on the "set of common understandings about the purposes of the field," and on how those understandings get changed both deliberately and non-deliberately through interactions over time.

[15] *See infra* note 95 and accompanying text.
[16] Fligstein & McAdam, General Theory, *supra* note 3, at 3.

Fligstein and McAdam see those interactions as involving a constant process of at least low-level contention between "incumbents" and "challengers," with the former being "those actors who wield disproportionate influence within a field and whose interests and views tend to be heavily reflected in the dominant organization of the SAF."[17] Individual incumbents and challengers have varying degrees of "social skill," which plays a major role in the theory. Actors with a high level of social skill are good at using their position within the field and their relationships with other actors in it to help shape matters to their advantage. High social skill requires the ability to read persons and situations well, and to use one's insight and resources to strategically mobilize persons to advance both one's personal position and one's broader values as understood within the purposes of the field.[18]

Related to this notion of social skill is an understanding of human goals and values. Fligstein and McAdam state "our preferences themselves are generally rooted in the central sources of meaning and identity in our lives. . . . for us collective strategic action is rooted at least as much in Weber's stress on meaning making and Mead's focus on empathy as on the naked instrumental orientation of Marx."[19] This is a long distance from homo economicus (though most economists would not be pleased at being lumped with Marx, I suspect).

This leads to their concept of the "existential function of the social." Our human ability to step outside ourselves can be profoundly disturbing, and we look to our social interactions with others to provide us with meaning and reassurance that we matter. "Our daily lives are typically grounded in the unshakable conviction that no one's life is more important than our own and that the world is an inherently meaningful place. But one does not will this inner view into existence of his or her own accord. It is instead a collaborative product, both of the

[17] *Id.* at 5.
[18] Fligstein & McAdam, Theory, *supra* note 3, at 17.
[19] *Id.* at 18.

everyday reciprocal meaning making, identity conferring efforts we engage in with those around us. In this we function as existential 'co-conspirators,' relentlessly—if generally unconsciously—exchanging affirmations that sustain our sense of our own significance and the world's inherent meaningfulness."[20] Throughout, they blend instrumental goals (particularly increasing one's personal power over others) with goals defined by collective purposes and understandings.

Fligstein and McAdam also stress that fields should not be studied individually, in isolation, focusing only on internal relations between actors within a field. Rather, fields are situated in a broader environment, which they help shape and which, more importantly, does much to shape them, and to trigger changes within fields. At the macro level, they discuss various ways in which fields can interact.[21] They focus particular attention on two kinds of actors which play a major role at the macro level. One is the state and various state institutions (courts, legislatures, agencies, etc.), which are themselves fields, and thus subject to analysis under the theory. The state is particularly important because it regulates the creation and expansion of new fields, most obviously so with fields that have a formal legal basis, such as business associations.[22]

The other kind of important actor at a macro level is internal governance units. These are "organizations or associations within the field whose sole job is to ensure the routine stability and order of the strategic action field."[23] These fill both an external function, by lobbying state actors on behalf of incumbents within the field, as well as internal functions, such as providing

[20] *Id.* at 42.
[21] *Id.* chapter 3.
[22] *Id.* at 70.
[23] *Id.* at 77.

information to actors within the field, regulating to ensure conformance with field rules, and certifying field membership.[24]

Using these elements, Fligstein and McAdam attempt to create a dynamic theory that helps explain the creation, maintenance, and occasional crises followed by death or reconstruction for fields of many kinds. Their book illustrates the range of topics they intend to cover by two extended illustrative applications of the theory, one analyzing U.S. race relations from 1932 to 1980 and the other analyzing the rise and fall of mortgage securitization from 1969 to 2011.[25] Thus, analysis of the rise of benefit corporations falls well within the ambitious range of strategic action field theory.

III. Pre-existing Fields: For-profit and Nonprofit Corporations

Benefit corporations are situated in between, and are a response to, two other legally-defined fields that have been around much longer, and which play a much larger role in the economy and society: for-profit business corporations and nonprofit corporations.[26] Benefit corporations are a reaction to perceived limitations in each, and they combine elements of both, although they are more closely related to the former. To understand both the legal properties of benefit corporations and their social origins, one must first look to these forms.

Business corporations are the leading legal form of business in the U.S., in terms of numbers employed and sales revenue generated.[27] Most large businesses are corporations, as are many small ones (although limited liability companies now outstrip corporations in terms of

[24] *Id.* at 78.
[25] *Id.* chapter 5.
[26] Is it accurate within the theory to label an abstract legal organizational form a field? Individual benefit corporations are certainly fields, but are benefit corporations collectively also a field? The term is quite protean and vague, but given the enormous breadth of the two fields analyzed at greatest depth in the Fligstein and McAdam book, namely U.S. race relations and the mortgage securitization industry (*Id.* ch. 5), it would certainly seem that benefit corporations count as well—indeed, they would seem to be a rather more precisely defined field than those in the book.
[27]

number of new businesses started every year). Business corporations are legally defined by corporation laws in every state. It is useful for our purposes to think of corporations in terms of several key constituent groups.

Shareholders, widely thought of as the owners of corporations, contribute equity capital (or have purchased those shares from those who did, if one tracks ownership far enough back). In return they receive limited voting rights, dividends (if the corporation chooses to pay), and the ability to sell their shares and realize capital gain. *Directors* sit on the board of directors, which as a collective body has overall authority over all but the very limited decisions on which shareholder get a vote, although in larger businesses the board delegates most decision to the officers, whom it appoints and supervises. Shareholders elect the directors. *Officers* are responsible for making major decisions, and for hiring and monitoring others who work for the business (corporations are a hierarchical organization). *Employees* fall below officers in the hierarchy, and do most of the daily work of the business. All of these groups fall within the strategic action field of a corporation. Also highly relevant to the field, but less clearly a part of the field[28], are *customers* who buy the good or services which the corporation makes, and *creditors* who provide debt capital in return for interest payments (and ultimately a return of their principal).

Fligstein and McAdam distinguish hierarchical and cooperative fields. Which are corporations? As just noted, they are at least in part hierarchical. A defining feature is that employees must follow the directions of their supervisors, within the limits of their employment contracts. Thus, the directors and officers are incumbents and employees are challengers. Indeed, the informational efficiency of such hierarchy in some circumstances is a core reason for

[28] Fligstein & McAdam, Field, *supra* note 3, at 167.

the economic success of corporations.[29] But what of the relationship between shareholders and directors? That is not so clearly hierarchical, and depends in part upon the type of corporation. Shareholders do have the authority to elect and remove directors. However, in a large public corporation, with thousands of shareholders and shares traded on a stock exchange, this authority is of limited practical effect the vast majority of the time—boards of such corporations are mostly self-perpetuating.[30] Shareholders who are also employees or officers are subject to the board's authority for internal corporate matters. External shareholders look to the board to return profits (and do whatever else they hope it to do), with very little power to direct the directors if they are unhappy with their performance. The shareholder-director relationship thus often looks more cooperative than hierarchical. The same could be said for relationships between creditors or customers and whomever they deal with at the corporation.

Why do the various constituent groups participate in a corporate field? Most of these actors receive financial gains from their participation. Shareholders receive dividends and/or capital gains. Employees receive wages. Directors and officers receive both salaries and, typically, equity-based compensation such as shares or stock options (some employees, especially higher-level ones, may receive such compensation as well). Creditors receive interest.

But many actors within a corporation may care about much more than financial returns. This is particularly true for those, including at least the officers and employees, for whom their role within a corporation is their job. Time working for the corporation thus is a large part of their life. Their compensation will usually be their main source of income, but their position will also be a leading source of social prestige and influence (or lack thereof).[31] Many of their

[29] ARROW, KENNETH J., THE LIMITS OF Organization (1974).
[30] A problem first brought into focus by ADOLF BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).
[31]

friendships may be formed within the corporation. If they are lucky, what they do in their work may be interesting and a major source of satisfaction and accomplishment. What they do in their work can affect others—fellow employees, customers, others in society, the surrounding environment, and so on, and they may feel satisfaction and pride if they think what they do at work is helping others, and the opposite if it is hurting others.[32] All of this very much matters, not just the financial returns, though those matter too. Economists tend to miss that, while Fligstein and McAdam stress it through "the existential function of the social."[33]

While corporations necessarily provide major financial and non-financial benefits to those who participate in them, many perceive a disturbing trend in many corporations, especially the large ones that dominate economic life. An increasing stress has been placed on financial returns, at the expense of the non-financial aspects of corporate life which play such a major role in their personal and social meaning. Employees in particular often feel disrespected, as if they are disposable cogs, as long-term tenure of employment has become less common, and loyalty between corporations and employees has diminished.[34] Officers and directors feel under increasing pressure to produce high profits to keep the stock market satisfied, both making their working life more stressful and constrained, and also limiting their ability to do what seems morally right and socially valuable if that interferes with making money.[35] This market pressure is meant to be for the good of shareholders, but some shareholders wish that the businesses in which they invested were more interested in doing some social good, not just making money.[36] Customers most of the time care mainly about the quality and price of the services or goods they

[32] *See* McDonnell, *supra* note 12, at 361-62 and scholarship cited there.
[33] *Supra* note 20 and accompanying text.
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[35] For a discussion of corporate short-termism and its relationship with social values, *see* Claire A. Hill & Brett H. McDonnell, *Short and Long Term Investors (and Other Stakeholders Too): Must (and Do) Their Interests Conflict?*, in CLAIRE A. HILL & STEVEN DAVIDOFF SOLOMON, EDS. RESEARCH HANDBOOK ON THE ECONOMICS OF MERGERS AND ACQUISITIONS (forthcoming).
[36] For an overview, *see* Meir Statman, *Socially Responsible Investing*, http://papers.ssrn.com/ abstract=995271.

buy, but sometimes when they become aware of some dubious corporate activity of a business from which they buy (child labor, extreme pollution, political corruption, and so on), are appalled, and may reconsider their spending habits.[37]

Corporate law has both reflected and helped encourage an increased focus on making profits to the exclusion of other social goals. Whether or not the fiduciary duty of directors and officers allows them to consider other interests where those conflict with profit maximization is a source of endless scholarly diversion.[38] At least in states with corporate constituency statutes, it would seem that directors and officers may consider other goals as well.[39] However, the meaning of those statutes remains legally untested, and the idea of a duty to maximize profit has if anything gained increasing dominance in recent decades. Especially in the leading state of incorporation, Delaware, which lacks a constituency statute, there has been an increasing tendency to use a rhetoric of shareholder primacy, although the law still retains some ambiguity.[40] However, a small but influential run of cases has moved towards an emphasis on return to shareholders as the focus of duty,[41] and the Chief Justice of the Delaware Supreme Court has in several recent articles made it quite clear that this is his understanding of the law.[42]

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[37] Mohr, Lois A. *et al., Do Consumers Expect Companies to be Socially Responsible? The Impact of Corporate Social Responsibility on Buying Behavior*, 35 J. Consumer Affairs 45 (2001).

[38] For a book-length discussion that opposes the notion that corporations must and should concentrate only on shareholder value, *see* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012).

[39] McDonnell, Brett H., *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1227 (2004).

[40] Bruner, Christopher M., *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385 (2008).

[41] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33-34 (Del. Ch. 2010).

[42] Strine, Leo E. Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 Wake Forest L. Rev. 135, 145-46 (2012) ("my point is that managers in stockholder-financed corporations are inevitably answerable to the stockholders, whatever the "community values" articulated by the corporation's ***146**founders or others"); Leo E. Strine, Jr., *Making It Easier for Directors to "Do the Right Thing"?*, 4 Harv. Bus. L. Rev. 235, 235 (2014) *("*in the current corporate accountability structure, stockholders are the only constituency given any enforceable rights, and thus are the only one with substantial influence over managers").

Here we start to see the existential failing of Delaware. The focus on shareholder value as a goal helps accentuate the sense that corporations are just about making money, ethics and the public good be damned. People need money, but they want to lead meaningful lives and retain some sense of integrity while earning that money, if at all possible, and corporate life as defined by contemporary market and legal institutions hardly seems noble. Ironically, the shareholder value focus of corporate law does have a serious ethical foundation. It serves as a way to harden the fiduciary duty of directors and officers. They are using shareholder money, and are morally obliged to not use that money for their own personal benefit. Defining this fiduciary duty in terms of maximizing share price is often justified as providing a hard measure, so that it is more difficult for directors and officers to justify self-serving behavior in reference to a vague corporate objective. But that is not the way that many perceive the shareholder value standard, particularly in a world where Wall Street is perceived to have become detached from any sense of personal and social responsibility.[43] The shareholder value maximization norm is also often justified as a way of maximizing overall social welfare, but it is quite unclear if that is correct.[44]

These issues play out rather differently in public versus closely held corporations. Public corporations, larger with publicly-traded shares, typically have many thousands of shareholders, none of whom controls the business. Control lies with the board, which nowadays is composed mostly of outside directors. Real control of the business lies mostly with the officers, above all the CEO. Most shareholders have no personal tie to the business, and a majority of shares are owned by institutional investors. Stock market pressure for high share prices is a major reality

[43] Hill, Claire & Richard Painter, *Berle's Vision Beyond Shareholder Interests: Why Investment Bankers Should Have (Some) Personal Responsibility*, 33 Seattle U. L. Rev. 1173 (2010).
[44] McDonnell, *supra* note 12, at 357-63.

for officers of such corporations.[45] Employees find themselves a part of a large, often impersonal bureaucracy.

By contrast, in closely held corporations there are few shareholders, with one person or family generally controlling the business. Those shareholders are often also directors and officers. There may or may not be minority shareholders, but there is no stock market pressure, and the relationship with minority shareholders (if any) is quite different, and more personal, than in public corporations. In small closely held corporations, there are few employees, and the relationships of employees and officers are less bureaucratic. Here the pressures for share price maximization are less pronounced. However, especially where there are significant outside shareholder investors, some pressure remains, and the legal norms of public corporations may filter down to all corporations.

The other main relevant field which has influenced benefit corporations is the nonprofit corporation. These are corporations too, also defined legally by state law. They also have directors, officers, and employees. But they do not have shareholders, because the defining difference from business corporations is that there are no shareholders with a claim to profits.[46] Which is not to say that there are no profits. Nonprofit corporations have revenues, which in some cases come from the sale of goods and services. Employees, officers, and directors receive wages. Beneficiaries of charitable nonprofits may receive donations from the nonprofits. Nonprofits may also have donors, who contribute money but receive no financial returns from their contributions.

Some of the formal control mechanisms remain similar to business corporations: boards appoint and supervise officers, who in turn employ and supervise employees. But the boards are

[45] Hill & McDonnell, *supra* note 35.
[46] FREMONT-SMITH, MARION R., GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 158-59 (2004).

now legally self-perpetuating, with no shareholders to elect them. Their relationship with donors is more explicitly legally cooperative than the shareholder-director relationship, since donors have no formal authority over directors at all. Still, the success of many nonprofits depends upon attracting money from donors.

There is still a mix of pecuniary and nonpecuniary motivations, but the mix is quite different from business corporations. The wages of some officers and employees can be quite large. However, in general officers and employees will earn less than they could at a for-profit business. They are willing to do so because they derive more satisfactory social meanings from working for a non-profit whose focus is on achieving specified social goods. The previous sentence is easier for a sociologist to process than for an economist.[47]

The limitations of non-profits are the mirror image of the concerns surrounding for-profit business corporations. Although officers and employees are paid, the pay is often low enough that it tests the moral commitments of even some very hardy moralists. More importantly for our purposes, although Americans are generous donors to charities, people with money to invest are typically not willing to give all of it away—they want to earn some financial returns on at least some of their capital. Donors to non-profits can receive no financial returns, thus shutting off huge potential sources of capital to such corporations.

Is it possible to combine the non-pecuniary attractions of non-profits with greater financial returns, approaching if not necessarily equaling those of for-profits? Many think (or at least hope) that the answer is yes, leading to the rise of social enterprises.

IV. The Rise of Social Enterprises and Benefit Corporations

[47] Economists will protest that economic theory is agnostic as to the nature of preferences. Yes, at some levels, but not at all at other levels. The most abstract and general theory indeed allows for all sorts of preferences. But much common theorizing assumes a focus on personal returns, and often personal financial returns.

Social enterprises are located in the gap between for-profits and non-profits. They pursue a triple bottom line of profits, people, and planets.[48] That is, they seek financial returns for investors, but financial goals are not meant to overwhelm other important social goals the business pursues. Social enterprises typically have one or a few specific social goals to which they are dedicated, as well as an overarching goal to help, or at least not harm, the various groups and interests affected by their business. Several new legal forms, most importantly the benefit corporation, have sprung up to attempt to address the special needs of social enterprises. To better understand those needs, let us consider the goals of the actors we introduced in the previous section, and consider how they might approach the possibility of participating in a social enterprise. What are their hopes and fears?

Consider first an entrepreneur or small group of entrepreneurs who have an idea for an enterprise which they would like to set up and run. They will be the officers and at least some of the directors of the new business (assuming a corporate form of some type).[49] They think their idea has the potential to generate significant financial returns. They want to share in those returns, and although in a non-profit they could do so with their salaries, that does not give them as strong a stake in possible long run high profits as share ownership provides. They could become a corporation, however they have some concern about the possible pressure to maximize profits, which could force them to take actions which violate their social commitments. That is

[48] Elkington, *supra* note 2.

[49] An LLC is a leading alternative type of form. For simplicity and space reasons, I shall ignore LLCs in this paper. A standard LLC does not have officers and directors, but they may have managers who play a role much like officers. The standard form LLC does not have a board (although a board-managed LLC is one standardized option in the new Minnesota LLC statute), although LLCs may create a board structure through private contract. At least one state has adopted a benefit LLC statute, which may be an attractive option, insofar as most social enterprises are small and closely held, and LLCs are now the leading legal associational choice for such businesses. The LLC form is more contractually open than the corporate form, so that fiduciary duty rules can be more easily waived or adapted, which may make benefit LLCs less necessary than benefit corporations. However, insofar as I shall argue that the leading reason for becoming a benefit corporation is the potential signaling and pre-commitment effect that comes with adopting its fiduciary duties, similar justifications could apply to a benefit LLC legal form.

particularly true insofar as they anticipate bringing in a number of outside shareholder investors over time as a way of raising money. They want their business to remain committed to their social goals for the long term, and they also want to convince outside investors, employees, and customers who care about such things that their commitment is serious, not mere greenwashing (i.e., mouthing social or environmental goals with no real commitment to following them, as a way of inducing others to participate).[50] Many such businesses will indeed need early investments by outside sources of capital, and the entrepreneurs must consider how to attract such investment.

Consider next potential investors. There are a variety of possibilities. Some investors may simply be looking for a good financial return. An enterprise committed to social goals as well as profits may concern them because they fear that in some circumstances that business may make decisions that lower profits in order to pursue their social values. Other investors may not care to receive any financial return, and simply want to give money to enterprises that are doing good in the world. They will be wary of investing in social enterprises for the opposite reason, because they fear the business will sometimes pursue profits at the expense of its social goals, and also because investing in a social enterprise will be less tax-advantaged than investing in a nonprofit.

But some potential investors may fall in between those two possibilities. They do want to earn some financial returns, but they also want to accomplish some social good with their money. They are attracted by the business plan of our group of entrepreneurs. Because they find its social goal(s) attractive, they are willing to wait longer to achieve financial returns, or take a larger risk of no returns, or receive somewhat lower returns, than purely money-motivated

[50] Vos, Jacob, *Actions Speak Louder than Words: Greenwashing in Corporate America*, 23 Notre Dame J. L. Ethics & Pub. Pol'y 673 (2009).

investors would be willing to bear. But, they are concerned about whether this business will actually work out as advertised. In addition to the sort of concerns that outside investors always have (Are the entrepeneurs competent? Are they honest, or will they use the money to advantage themselves at the expense of the business if given a chance?), the investors may wonder whether the social commitment of the entrepreneurs is genuine, or cheap talk used to attract capital at lower cost. And even if the commitment is genuine, there can be hard questions as to how to make decisions where there are conflicts between competing goals—can the outside investors trust the insiders to make the decisions they would prefer, even assuming good faith? All sorts of hard decisions may arise over time—how can the entrepreneurs and investors enter into a relationship where the latter trust the former to make those decisions in ways that acceptably balance competing values?

These are the two core groups of incumbents in the founding and early years of a social enterprise. Their relationship seems more cooperative than hierarchical, although the exact nature of that relationship will depend upon the control structure of the enterprise, which will arise from the interaction of the default rules of the legal form of association they choose combined with the particularized structural rules they adopt in their organizational documents. But as noted in the previous Part,[51] they will also need to think about how other actors will react to the organizational form they choose. Employees, the leading challengers within a corporation, will care about both their own place within the business and about the goals of that business. As to their own place, they would often prefer to have some degree of control over decisions that affect them. Failing that, they would at least like some commitment from the business that it will take their interests into account. The corporate form is not a good fit for providing them a role in decisionmaking, although the form can be particularized to provide a role for some or all

[51] *See supra* notes 34 through 37 and accompanying text.

employees.[52] Insofar as the for-profit form pushes directors and officers to focus on shareholder wealth maximization as the exclusive or leading goal, employees may distrust the decisionmaking of their superiors. Some degree of commitment to considering employees in making decisions may make potential employees more willing to work for a business, or to work for it at a lower wage level. Also, potential employees, like the entrepreneurs and potential investors, may want to be involved in businesses that they think are doing good in the world. So a social enterprise may attract employees for multiple reasons, but like outside investors, they may worry about the possibility of greeenwashing.

Customers may or may not be actors situated within the corporate field, but either way, the entrepreneurs must care deeply about attracting them—no customers, no revenue, and ultimately no business. Some customers may prefer to buy from businesses that they believe behave ethically in how they treat workers, the environment, and so on.[53] Thus, being perceived as ethical may help businesses attract more customers, who may be willing to pay higher prices. But here too there is a greenwashing concern: would-be customers may fear that a business which proclaims its ethical commitments is engaging in cheap talk. After all, customers are generally not well-placed to examine the actual practices of most businesses with which they deal. Thus, to attract customers with ethical commitments, the entrepreneurs will need to find ways to credibly commit to behaving ethically.

With all of these concerns by various groups, a space has opened up for actors to innovate and create new fields in which entrepreneurs can find ways to establish and run a business that allows them to commit to pursuing both profit and social values, while making those commitments credible to investors, employees, and customers interested in participating in

[52] McDonnell, *supra* note 12.
[53] *See supra* note 37 and accompanying text.

such a business. A variety of innovative new practices have been tried. Some involved having a third party organization certify that a particular business was behaving in specified ethical ways. In the next Part we shall discuss the most important of these for our purposes, B Lab.[54] Eventually, one began to see new legal forms of business association emerge. Perhaps the first of these was the low-profit limited liability corporation, or L3C. The L3C was developed to help provide vehicles for investments in program-related investments by charitable organizations. It has been criticized pretty heavily as not fulfilling this purpose, and after an initial spurt of interest, it now seems that perhaps L3Cs are giving way to another new form, the benefit corporation.[55]

Benefit corporations are defined legally by state statutes. These statutes sit atop the basic business corporation statute. That is, benefit corporations <u>are</u> business corporations, subject to all of the rules of the business corporation statute except insofar as the benefit corporation statute provides different or additional rules. The statutes add just a few new rules. Benefit corporations must state that they are such in their certificate or articles of incorporation, and provide that they have a purpose of pursuing "general public benefit," which is very broadly defined indeed, to include "a material positive impact on society and the environment, taken as a whole" in the most influential version of the statutes.[56] A benefit corporation may also specify in its charter a "specific public benefit" which it will choose to pursue.[57] They must file regular reports (annual in most statutes) that detail what they have done to pursue general public benefit,

[54] *See infra* notes 70 through 74 and accompanying text.
[55] Kleinberger, Daniel S., *A Myth Deconstructed: The "Emperor's New Clothes" and the Low-Profit Liability Company*, 35 DEL. J. CORP. L. 879 (2010); Carter G. Bishop, *The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243 (2010); J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profitr Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273 (2010).
[56] Model Benefit Corp. Legislation § 102 (2013) (hereafter Model Act), *reprinted in* William H. Clark, Jr. *et al.*, *White Paper: The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form that Best Addresses the Need of Social Entrepreneurs, Investors, and Ultimately, The Public*, at Appendix A.
[57] *Id.* § 201(b) (**define**).

and any specific public benefit which they may have chosen.[58] The directors and officers have a fiduciary duty to consider the general and (if any) specific public benefit,[59] and shareholders may sue if they believe that duty has been violated.[60] Thus, not only are benefit corporations allowed to pursue social goals other than profit maximization (which is questionable in Delaware, and still has a hint of a question mark even in states with constituency statutes), they are required to do so (which is not true even in states with constituency statutes). This requirement is backed by a right to sue if a corporation ignores its social goals, and by a forced disclosure rule that allows investors and others to observe and evaluate a business's claims about how it is helping society.[61]

I shall focus on benefit corporations, but it is worth noting a close variant. A few states have experimented with social or flexible purpose corporations.[62] These do not have the broad general public benefit purpose backed by a duty, but rather a social purpose corporation must specify one or more specific goals, and it is then bound by a legal duty to pursue (or at least consider) that goal. Thus, benefit corporations must pursue public good generally, as broadly defined by "general public benefit," and they may or may not separate out a specific goal that they will particularly focus one, while social/flexible purpose corporations must state a specific goal and are not required to pursue general public benefits beyond that specific goal. Minnesota's benefit corporation statute includes both options, with "general benefit corporations" committed to the broad general public benefit, and "specific benefit corporations" committed to a more focused, individualized goal.[63] Such more specifically-focused businesses avoid the extremely wide scope of the general public benefit definition, which pushed to its limits would require a business to take into account every material effect every decision it makes

[58] *Id.* § 401.
[59] *Id.* §§ 301, 303.
[60] *Id.* 305.
[61] McDonnell, *supra* note 4, at 32-35.
[62] Reiser, Dana Brakman, *The Next Big Thing: Flexible Purpose Corporations*, 2 AM. U. BUS. L. REV. 55 (2012).
[63] Minn. Stat. Ann. § 304A .021 Subd. 2 & 8.

has on anyone—a somewhat daunting prospect.[64] On the other hand, outsiders cannot necessarily trust a specific benefit corporation to behave more ethically than any other business outside of its specified social goal.

V. Passage of Statutes and Prospects

As of March 16, 2015, thirty-three states had enacted a version of benefit corporation legislation.[65] Since Maryland became the first state to enact such legislation in April 2010,[66] this is quite a rapid adoption rate. This is particularly striking since according to one study, as of July 2014 there were **998 (?)** benefit corporations in the U.S.[67] That is not bad for a form that has been around for just half a decade, but it is not a large number. How have so many states gotten on the bandwagon so quickly given a pretty limited number of businesses taking up the form so far?

Two important elements in field theory come into play here. One is the idea of an internal governance unit ("IGU").[68] As noted above,[69] internal governance units act both as internal regulators of a field, among other things by certifying membership, and also as external champions, above all by pushing the state for helpful legal reforms. The benefit corporation has an IGU that does both: B Lab. B Lab was founded in 2006,.[70] created by entrepreneurs who had founded a basketball shoe company.[71] B Lab certifies businesses as sustainable, using a variety of metrics to measure social and environmental performance, accountability, and transparency.[72] It also provides analytic tools for companies, investors, and others who want to analyze the

[64] Figures on specific v. general in Minn?
[65] http://socentlaw.com/wp-content/uploads/2015/03/Social-Enterprise-Hybrids-Map-Mar-16-2015.pdf
[66] http://www.ssireview.org/blog/entry/benefit_corporation_and_l3c_adoption_a_survey
[67] *Id.*
[68] Fligstein & McAdam, Theory, *supra* note 3, at 77.
[69] *See supra* notes 23 through 24 and accompanying text.
[70] https://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/our-history
[71] http://www.triplepundit.com/2014/08/fascinating-look-history-b-corp-movement/.
[72] https://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps

social performance of a business.[73] Thus, B Lab addresses a critical problem we have seen socially-conscious entrepreneurs face: how to credibly convey that they are truly pursuing social goals, not merely mouthing nice-sounding platitudes (at least, assuming one trusts the B Lab analytics and certification process—an in depth, careful analysis should not, of course, automatically trust this). Here we see a quite explicit and formal version of the internal, certification feature of an IGU.

B Lab also drafted the Model Benefit Corporation Legislation that has become the basis for most, though not all, state statutes **(when, where first?)**.[74] That takes us to the external role of an IGU, acting as lobbyist with the state. The record of state adoptions mentioned above suggests that B Lab has been quite successful. The Model Legislation presents legislators with a relatively short and straight-forward statute ready to be adopted, thus simplifying the task considerably. By making the benefit corporation an add-on on top of the basic business corporation, B Lab avoided having to re-invent the wheel—corporate law is quite complex, and trying to write rules for all elements of business association law is a daunting task, one likely to raise questions at many points.

But one still might well wonder how so many states have adopted legislation so quickly, given the relatively small number of businesses that have chosen to adopt either benefit corporation or B Lab certification status[75] so far, particularly within our current polarized political climate, where most significant legislation is extremely hard to enact. A standard public choice interest group model[76] would note that there is at least one organization strongly pushing for benefit corporation legislation (B Lab itself), and in each state presumably a few businesses

[73] http://b-analytics.net/
[74] White Paper, *supra* note 56.
[75] B Lab's web site states that there are "over 1,000" B Lab certified corporations to date.
[76] Olson, Eskridge/Frickey/Garrett

or interested would-be entrepreneurs who support the legislation. Meanwhile, there is little to no organized opposition. Existing business corporations are not hurt, after all—no one is forced to become a benefit corporation. There may be plenty of skeptics about the value of or need for benefit corporation status, but those skeptics can simply ignore the form, and predict that few businesses will adopt it. The one significant source of opposition of which I am aware is some state bar associations.[77] Transactional lawyers are skeptical of benefit corporations—they do not think they are needed to allow businesses to pursue social goals, at least in states with constituency statutes, and they fear the costs of annual reporting and the risk of duty suits, so that benefit corporation status could become a trap for well-meaning entrepreneurs. In my own state, Minnesota, proposed legislation was blocked for several years until the state bar decided that the bandwagon was making the legislation inevitable, and it was time to draft legislation that would be as palatable as possible.

But the public choice explanation only goes so far. Yes, there may be little organized opposition (besides the bar), but the organized support is quite limited. Legislating is hard, even with little opposition, so why has it been so successful with such modest support? The availability of model legislation based on existing corporate law statutes, reducing the costs of drafting, is a part of the answer. But I think another answer lies with the ideology of our two parties. Benefit corporations appeal to Democrats because many of them are skeptical of for-profit corporations, and they like social responsibility and sustainability. Benefit corporations are a way to advance those worthy goals. As for Republicans, they would be very unhappy about forcing social responsibility on businesses. However, remember that no business is forced to become a benefit corporation. The new form simply makes a new option available. We will

[77] J. William Callison, *Benefit Corporations, Innovation, and Statutory Design*, 26 Regent U. L. Rev. 143, 161-63 (2013-2014).

then let the marketplace decide whether there is any significant demand for such businesses or not. Benefit corporation can thus be promoted as a free market solution to perceived social problems. Republicans like free markets. And thus, each party can see benefit corporation legislation as fitting quite nicely with a core ideological commitment. B Lab and other promoters of benefit corporations may have shown much social skill in finding this sweet spot that appeals to both parties.[78]

So, benefit corporation legislation is spreading rapidly, and one can easily foresee a day not far away where all states have adopted such legislation. As Fligstein and McAdam note, state action to legitimate and facilitate a new field is quite significant. But, state action alone is not enough to guarantee the success of a new form of business (at least not state action of the enabling kind we see here—I suppose if all businesses were forced to abide by the duty rules of benefit corporations, the story would be different). Although we are observing some businesses adopting the new legal status, the numbers are still quite modest. What are the prospects for widespread creation of benefit corporations, and what source of actions and innovations by actors within (or outside) the field might help spread the form more widely?

We have seen why benefit corporation status may be attractive to socially motivated entrepreneurs: it clearly allows them to pursue goals other than profit while still earning financial returns, and may prove a useful commitment device to attract investors, employees, and customers who want to be involved in such a business but fear greenwashing. The reporting requirement, and especially the new fiduciary duty, act as a precommitment device: if a business says it is dedicated to pursing social good, but then fails to do so, it can be sued, providing

[78] On the importance of social skill in strategic action field theory, *see* Fligstein & McAdam, Theory, *supra* note 3, at 45.

significant incentive to not make such a claim unless one means it.[79] But there is a cost attached to this: a fear of suits even where the directors and officers are acting in good faith. The law can reduce that fear through various mechanisms that reduce the chances of liability, as indeed benefit corporation statutes do through limitations on personal liability, incorporation of the business judgment rule, and limits on standing to sue (only shareholders can sue to enforce the duty).[80]

But such limitations on suits in turn have a cost. Remember, the point of the duty and threat of suits is to provide a credible commitment device. If the law imposes too many limitations on suits, the commitment may fail to be credible. Investors, employees, and customers may look to benefit corporation status as proof that a business is not merely engaged in greenwashing, but if the space starts being occupied by businesses with little real commitment to social goals, and they face no consequences for such deception, then benefit corporation status will have failed to do its job.[81]

Note that in this analysis, our actors blend idealism with hard-headed pursuit of their own interests. Entrepreneurs and investors each want to improve the world, but not only do they want to make money as well, they also want to retain as much control as possible over the business. The new fiduciary duties have a mixed effect, protecting directors and officers somewhat from suits claiming that they dishonestly or incompently failed to achieve shareholder returns, but exposing them newly to suits claiming that they ignored their social goals. Shareholders, who are the plaintiffs in those suits, have their own power shifted accordingly. And neither entrepreneurs nor shareholders are ceding any authority to the challengers in this field, as neither

[79] McDonnell, *supra* note 4, at 62-64; Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 Ala. L. Rev. 767, 798-813 (2015).
[80] McDonnell, *supra* note 4, at 59-62.
[81] *Id*. at 62-64.

employees nor customers gain any control rights under benefit corporation statutes. Indeed, although they now have a fiduciary duty protecting their interests, they have no rights under the statutes to sue to enforce those rights—only shareholders have standing to sue (although individual benefit corporations may choose to extend standing).[82]

Moreover, it remains quite unclear just what we expect social enterprises to do anyway. How are they supposed to balance seeking profits with seeking good? Much of the time doing good is consistent with long term profit, but in the short term they may conflict, and sometimes in the long term as well. What then? And how much effort is one supposed to put into figuring out the potential effect of major decisions on everyone and everything that might be affected, as pursuit of "general public benefit" seems to require? One could spend massive amounts of time studying the effects, then trying to weigh and balance them to come to a final decision. Different persons may well have different ideas about how this should be done, with disagreements both between and among officers, directors, shareholders, employees, and customers.

Who wants to wade into that mess, once you put it like that? Benefit corporations will grow in number and thrive only if there are enough persons in the various constituent groups who really care about pursuing a triple bottom line and if ways can be found to reduce the complexities and uncertainties surrounding the new status and the legal, economic, and social imperatives impinging on such corporations.

I suspect there are plenty of people with at least some interest in participating in social enterprises. Moreover, if and when such businesses become more common, preferences will shift, and more will become interested in being involved as the option becomes more socially salient and celebrated (again, a sentence probably more appealing to a sociologist than an economist, as the latter usually treats preferences as fixed and exogenous).

[82] Model Act § 305(b).

But what can be done about the multiple uncertainties surrounding benefit corporations, which are probably stopping many entrepreneurs with some interest from adopting this new form? To some extent, adoption of new legal forms is a path dependent process—as more adopt the form, uncertainties are gradually reduced, leading to further adoptions, and so on.[83] But what can be done to facilitate the process in its early stages, beyond adoption of the new statutes?

B Lab, in its role as internal IGU regulator, is a part of the answer. Its advocacy is helping spread awareness. Its certification and publication of analytic metrics is helping to spread fairly detailed best practices. B Lab also acts as a focal point to help create a community of persons interested in the form, who can find each other to establish new benefit corporations and share experiences about what works and does not work.[84]

The availability of finance is also crucial, and so the development of a network of financial professionals with interest in benefit corporations would be extremely helpful. Most basically, this would make it easier for interested entrepreneurs to find interested investors. Beyond that, such a network is another way to spread experience and best practices. A network of entrepreneurs could perform a similar function. This is happening to some extent, with the Social Enterprise Alliance being a leading force.[85]

Transactional lawyers are another possible set of actors who could play a major role. Lawyers may help spread awareness of the new legal form. More deeply, they may help develop corporate governance structures and practices which respond to the practical and legal challenges facing benefit corporations.[86] Lawyers advising benefit corporations can help craft the statement of a business's specific goals (if any), create structural provisions that address decisionmaking

[83] MCDONNELL, BRETT H., LABOR-MANAGED FIRMS AND BANKS (1995).
[84] https://www.bcorporation.net/b-corp-community
[85] https://www.se-alliance.org/about
[86] Plerhoples, Alicia E., *Representing Social Enterprise*, 20 CLINICAL L. REV. 2015 (2013).

(e.g, the creation of a public benefit director specifically focused on the social mission of a business), create checklists for items to consider in making major decisions, and create programs for shareholder outreach which may both improve decisionmaking and ward off potential legal conflicts. Other possibilities will probably occur to experienced transactional lawyers.

Down the road, another state actor besides the legislature, namely courts, may play a role. If the number of benefit corporations grows enough, we will presumably eventually start seeing fiduciary duty suits claiming a failure to consider public benefits or securities or consumer fraud suits claiming that benefit reports are misleading. Courts will need to walk a fine line between making liability too likely, so that the form becomes unattractive to entrepreneurs, and too unlikely, so that the form involves no credible commitment to investors and others.[87] Beyond this, legal analysis in such suits may help spread, clarify, and harden emerging norms and best practices. Even if courts do not find defendants liable, they may discuss dubious behavior and practices in a way that both shames the defendants and helps tell others what they should be doing if they want to avoid the risk of landing in court. That is a key way in which Delaware fiduciary duty works even where it imposes little real risk of liability,[88] and one hopes litigation could ultimately perform a similar function for benefit corporations.[89]

VI. Conclusion: What Have We Learned?

Has telling the story of benefit corporations through the lens of strategic action fields taught me anything about the usefulness of that sociological theory? I will conclude with a few tentative, speculative thoughts on that question. Let us start with a few points where I find the theory clearly helpful and in some ways superior to my home turf, law and economics.

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[87] McDonnell, *supra* note 4, at 65-70.
[88] Hill & McDonnell, *supra* note 11; Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997); Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847.
[89] McDonnell, *supra* note 4, at 67-68.

The concept of the existential function of the social[90] is quite natural and helpful in thinking about what may be motivating various actors to become involved in benefit corporations. Although economic theory allows for non-selfish motivations, selfishness is pretty deep in the DNA of economics. Even where economics allows for other sorts of motivations, it says little about them. My sub-title speaks of the existential failure of Delaware, but it could instead refer to the existential failure of law and economics. Businesses are a central part of the life of their officers and employees, and sometimes of their shareholders as well. Those persons need financial returns from their livelihood, but as human beings they look to other forms of meaning and purpose as well in such a central part of their lives. The potential allure of social enterprise becomes much more clear and powerful in that light.

Which is not to say that the theory and analysis are all starry-eyed about the idealism underlying social enterprise. More selfish motivations play a major role as well. That includes not only the seeking of financial gain, but also seeking control over decisionmaking, so that one can influence the corporation in one's preferred direction as much as possible.[91] The theory's mix of selfishness and meaning in understanding human motivations strikes me as quite attractive and plausible, a clear improvement over an economic framework.

The emphasis on internal governance units and the role of the state is also helpful. B Lab clearly serves many of the functions of an IGU in social action field theory.[92] I am somewhat less convinced that the theory adds a lot to economic reasoning here, though. Economics has plenty to tell us about the role of certification as a way of overcoming asymmetric information, and about the importance of lobbying associations as a way of overcoming collective action problems in politics. I want to see more about what the theory can add here.

[90] *See supra* note 20 and accompanying text.
[91] *See supra* notes 49 through 52 and accompanying text.
[92] *See supra* notes 68 through 74 and accompanying text.

The theory's focus on the role of the state in enabling and legitimating new fields[93] clearly fits with the story of benefit corporations. Here too I remain open-minded but not yet completely convinced about what the theory adds to already common public choice and political theories. Perhaps, though, the role of ideology in making benefit corporations attractive to politicians from both parties is an insight that law and economics would be less open to.[94]

One element of the theory to which I am rather more resistant is a strong emphasis on power struggles between incumbents and challengers, reflecting perhaps its origins partially in social movement theory. This may be a useful corrective to the blindness of economics to power in many ways, and within benefit corporations there is a real power dynamic. Employees have little power in ordinary business corporations, and that carries over to the new form, perhaps most strikingly in the unwillingness to extend standing to sue even though duties clearly extend to persons other than shareholders.[95] But in forming new social enterprises, the focus is on the relationship between an entrepreneur (or small group of entrepreneurs) and potential investors. While that relationship is not devoid of power elements, to say the least, it is also an attempt to find a cooperative arrangement in which both can get out of the business what they want, while getting the participation they need from the other party.

Which leads me to a main area where I would grade this exercise as incomplete. The final portion of Part V considered various ways in which different actors may try to build institutions and practices that help benefit corporations thrive.[96] How much does and could social action theory help us understand these processes? On the one hand, the focus on the

[93] *See supra* notes 21 through 22 and accompanying text.
[94] *See supra* note 78 and accompanying text.
[95] *See supra* note 82 and accompanying text. Although there are very good reasons to limit the standing to sue. Given the breadth and vagueness of the duty in benefit corporations, giving standing to all beneficiaries of that duty might allow just about anyone to sue any benefit corporation. That would be a might strong disincentive to forming such a business.
[96] *See supra* notes 83 through 89 and accompanying text.

creation of shared understandings and norms within a field is quite useful—at a high level of abstraction, that is what I am attempting to describe and analyze there. But the devil is in the details. How do actors within an emerging field help create and spread new practices that will support this new institution? How do they persuade others that this is a good thing, and worth becoming a part of? Of particular interest to me as a law professor, what role do transactional lawyers play in this process? What concrete, detailed conceptual tools does the theory have to offer in trying to understand this? Having read just a book and an article, I do not yet feel capable of answering that question.

This leads to the question of methodology. Fligstein and McAdam maintain a neutral and inclusive approach to various forms of empirical methodologies. They think that existing types of quantitative and qualitative methods can be usefully deployed within their framework.[97] On the one hand, this is a breath of fresh air to someone immersed in law and economics, where a highly quantitative focus on regressions has come to dominate the field. I suspect that for the kinds of questions I have discussed in this essay, qualitative methods such as in-depth interviews with actors in the field would be at least as useful (really, much more useful) than trying to find variables to measure so that one could run a regression.[98] On the other hand, at least as far as the book goes, their very agnosticism yields little guidance as to how to do good empirical work within this theoretical approach. It is not much more than a suggestion to go forth and commit anthropology (though that is a useful suggestion). Again, further reading of more applied field theory may well give more guidance, but that's where I stand at the moment.

A final point concerns the normative implications of field theory. I have not dealt much with the normative question of whether we should be encouraging the development of benefit

[97] Fligstein & McAdam, Theory, *supra* note 3, 184.
[98] And run it, and run it, until it yields the result that you expected in the first place.

corporations and social enterprises. One can probably detect an approving tone in this paper, but I would say that I am currently intrigued but have lots of questions about the attractiveness and viability of the form. Within law and economics scholarship, there is a large literature on the desirability of focusing director and officer duty solely on maximizing shareholder wealth. I have not confronted that literature here.[99] In part, that's because this is a short essay and my main goal is on understanding the early stages of the emergence of benefit corporations. The normative case for and against the form is a huge topic in its own right.

But another reason why I have done little to engage the normative literature is because I am not at all sure what field theory has to say on the point. The emphasis on incumbents and challengers seems to carry a vague whiff of support for social change and disempowered groups, but I see little in the Fligstein and McAdam book that makes such a position explicit, or develops conceptual tools to help analyze what fields may be more or less socially attractive, and how we should be modifying fields to improve them.

Perhaps that is because the authors do not see taking normative positions as a central part of their task. That is perfectly fine, and in keeping with the self-understanding of social scientists as scientists. But if so, I think that when it comes to legal scholarship, the lack of normative tools may put field theory at a distinct disadvantage in the competition for influence with law and economics. Though economists also stress their standing as scientists (sometimes obsessively so, and to my mind quite unconvincingly), economic theory has a strong normative component, explicit and implicit. That component has, I believe, played a major role in its spread through legal academe. Law is an inherently normative discipline. Law is a series of deliberate policy choices which plays a big role in shaping our society (as indeed Fligstein and McAdam emphasize). Lawyers play a major role in that process, and law professors try both to

[99] I do in *Employee Primacy*, *see supra* note 12.

shape their students and to directly persuade policymakers. It is not clear we often succeed, but we try. Any regular participant in law school workshops has heard this question more times than they could possibly count: "What are the practical implications for legal change?". Does strategic action theory have new or plausible things to say about what the law should do in shaping fields? That, too, is a very major topic about which I am interested in learning more.