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The Benefit Corporation and Corporate Social Responsibility

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Abstract In the wake of the most recent financial crisis, corporations have been criticized as being self-interested and unmindful of their relationship to society. Indeed, the blame is sometimes placed on the corporate legal form, which can exacerbate the tension between duties to shareholders and interests of stakeholders. In comparison, the Benefit Corporation (BC) is a new legal business entity that is obligated to pursue public benefit in addition to the responsibility to return profits to shareholders. It is legally a for-profit, socially obligated, corporate form of business, with all the traditional corporate characteristics combined with societal responsibilities. Considering the history and perception of shareholder primacy in United States law, it is argued that this new business structure is an ethical step toward empowering socially committed commercial entities. The contribution of this research is to provide a fundamental base of knowledge about the new legal form of business, the BC, upon which further study may rely. First, the legal history of the corporation is briefly reviewed in order to provide context to the relationship of the corporate form to society, including exploration of the premise that shareholder wealth maximization is its best and only purpose. Second, the BC is described in detail, and state statutes are compared. Third, the BC is placed within the context of corporate social responsibility. Finally, opportunities for future research are discussed.

Keywords Benefit Corporation · Business law · Corporate social responsibility · Director duties

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Abbreviations

BC	Benefit Corporation
BEP	Benefit enforcement proceeding
CSR	Corporate social responsibility

Introduction

In the wake of the most recent financial crisis, corporations have been criticized as being self-interested and unmindful of their relationship to society. The corporate form has been called an "ailing," or "broken," "social technology" (Metcalf and Benn 2012; Sovacool 2010) and an entity with "legal personality, but presumably no interest in humanity" (Munch 2012, p. 170). Indeed, the blame is sometimes placed on the legal form, to the extent that it has been argued that, "the corporate form now threatens human survival" (Metcalf and Benn 2012).

Although corporate law is but one element in the complex relationship between business and society, it is often overlooked and sometimes misunderstood. Because the business entity called a corporation is a creation of the law, not existing separately in nature, it can be modified to meet the needs of society; corporate law scholarship is therefore relevant to the debate of how the social responsibility of a business relates to corporate duties. The Benefit Corporation (BC) is a new legal entity, created by recent legislation in nine states. The primary distinction of a BC is that it is legally obligated to pursue a public benefit in addition to its responsibility to return profits to the shareholders. It is legally a for-profit, socially obligated, corporate form of business, with all of the traditional corporate characteristics but with required societal responsibilities.

The purpose of this article is to bring focus to the corporate law dimension of corporate responsibility. Considering the

history and perception of shareholder primacy in United States law, it is argued that this new business structure is an ethical step toward empowering socially committed commercial entities. The contribution of this research is to provide a fundamental base of knowledge about the new legal form of business, the BC, upon which further study may rely. First, the legal history of the corporation is briefly reviewed in order to provide context to the relationship of the corporate form to society, including exploration of the premise that shareholder wealth maximization is its best and only purpose. Second, the BC will be described in detail, and state statutes will be compared. Third, the BC will be placed within the context of corporate social responsibility (CSR). Finally, opportunities for future research will be discussed.

History and Evolution: The Corporate Form and its Relationship to a Social Purpose

The evolution and design of the BC is inextricably linked to, and responds to, an existing paradigm of maximization of profit as the legal purpose of a corporation, whether or not this legal limit is real or perceived. A brief review of the history of the corporate form and its evolution through stages of development until the BC statutes of today is essential to an understanding of how this new legal form relates to social responsibilities of the firm.

Early Connections Between Corporate Purpose and Society

A corporation is created under state law (versus federal). Although some of the elements of the corporation could be created privately without a statute, through a contract between owners and managers, the *sina qua non* of corporate existence, limited liability and separate existence, is purely a statutory construct. Today, every state has an incorporation statute; if a business follows the standardized requirements and files the proper paper work, it will automatically be granted corporate standing. It was not always so. In the late eighteenth and early nineteenth centuries, a corporation could exist only as a result of an individual state legislative act; that is, each and every business was required to individually petition the legislature for approval to act as a corporation. In addition, a corporation was granted existence and limited liability only in order to perform a stated public function (Deskins 2011; McBride 2011).

Based on individual petitions, legislatures granted state approval for independent corporate status in order that the entity might perform public functions such as building roads, providing water, and the like. There was a close connection between corporate purpose and societal purpose, and because the corporation was performing a quasi-governmental role, limited liability accompanied the corporate form (McBride 2011; Sprague 2010).

During industrialization, the number of incorporation petitions submitted to state legislatures escalated to an unmanageable number. In order to handle the increased requests for incorporation, the first general incorporation statute was passed by New York in 1811 (Deskins 2011). Yet at this point, the incorporation documents were still required to state with specificity the purpose of the corporation. Eventually, beginning with Delaware and New Jersey, states began liberalizing the incorporation purpose requirement until the statement of "any and all legal purposes" was sufficient to describe the relationship between the nascent corporation and society (Sprague 2010). While the administrative approval of corporate charters increased efficiency and was no longer subject to the decision of an elected legislature, the more uniform incorporation and approval process weakened the corporate-society link.

Shareholder Primacy and Wealth Maximization

A century after the first general incorporation statute, the Delaware court's decision in *Dodge v. Ford* provided the legal basis for a corporate metamorphosis; shareholder primacy and profit maximization as an explicitly recognized legal doctrine. The often-quoted decision stated;

> *A business corporation is organized and carried on primarily for the profit of the stockholders* [emphasis added]. 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 to the nondistribution of profits among stockholders in order to devote them to other purposes (Dodge v. Ford 1919)

While a review of cases since *Dodge v. Ford* is beyond the scope of this article, under today's corporate law, it is fair to say that the principles of *exclusive* shareholder primacy and *sole* profit maximization are limited; corporate decision makers have much greater latitude than *Dodge v. Ford* would suggest (Munch 2012; Schoenjahn 2012; Snierson 2011).

To determine whether a corporate director is liable for a decision that does not maximize shareholder wealth, a court will determine if the director breached his fiduciary duty, by applying the business judgment rule. The business judgment rule is a relatively easy standard for a director to meet for ordinary business decisions, requiring that he or she be informed and act in the good faith honest belief that the decision is in the best interest of the corporation (Clark and Babson 2012; Resor 2012). In a takeover or change of control decision, the business judgment rule is applied in a

more stringent manner. In the 1986 case of *Revlon v. McAndrews*, a Delaware court held that when a business sale is the topic of directors' decisions, the interests of stakeholders are not to be weighed against those factors in favor of the shareholder profit (Haymore 2011). The dilemma faced by the owners of Ben & Jerry's when selling their business is well known; they felt compelled to sell to the highest bidder, Unilever, rather than seek to sell to an entity who pledged to preserve their commitment to socially responsible practices. The owners stated that "corporate law made them do it" (Murray 2012, p. 14). This statement was never tested in court because the owners did sell to the highest bidder; whether the sale was necessary under the business judgment rule is challenged by Page and Katz (2012), who argue that it is not corporate law that is the most significant restraint on a corporation's social mission, but its leaders and financial limitations. However, online responses to the Page & Katz article (including an opinion from an attorney for Ben & Jerry's original owner) disagree with the idea that corporate law played an insignificant role in the decision to sell. The online debate offers evidence that in practice corporate law shareholder primacy matters; while it may not be the sole limitation to implementation of a social purpose, it does significantly affect decision making.

A recent Delaware case involving eBay and craigslist provides further insight into corporate law's emphasis on shareholder wealth creation. This case is particularly important because of the influence of Delaware corporate law on other states and because of the large number of corporations that are chartered in Delaware.

eBay invested in craigslist, becoming one of three shareholders; the other two owners were the two original founders. The three shareholders also constituted the three-member board of directors. A conflict emerged between the profit focus of eBay and the community focus of craigslist founders. As the pressure for profits by eBay became more acute, a complicated series of events led the two founding craigslist directors, as a majority, to adopt several corporate governance measures as defensive tactics to a takeover. One tactic was a poison pill designed to preserve the corporate culture of craigslist into future generations, and thwart the profit maximization approach of stockholders such as eBay. eBay sued, alleging that the majority directors violated their fiduciary duties by passing the anti-takeover provisions, in essence preferring community building over profit. The Delaware court applied an intermediate legal review of the anti-takeover provisions, using a standard that required the two board directors to prove that they acted in a "good faith pursuit of a proper *corporate* purpose." (eBay Domestic Holdings, Inc, v. Newmark 2010, p. 34) Although preservation of corporate culture had been judicially recognized as a proper purpose in previous cases, this court characterized the precedent as a "muted embrace," thereby diminishing the effect of those decisions (ebay, p. 32). The court pondered that "Perhaps the most mysterious thing about craigslist's continued success is the fact that craigslist does not expend any great effort seeking to maximize its profits or to monitor its competition or its market share" (eBay, p. 8). Thus, the Delaware court declined to uphold the craigslist poison pill because the preservation of perplexing (to the court) community building had no rational relationship to shareholder profits. Requiring some rational connection to profit, the court stated that "Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law" (eBay, p. 35). Thus, in at least specific circumstances under Delaware law, the duty to deliver wealth to shareholders is primary. (In contrast, BC legislation, as seen in later discussions, can rebalance the preference of profit over community, and may explicitly overrule the profit maximization principle.)

Constituency Statutes and Public Welfare

Although Delaware is not among them, 33 states have adopted what are known as "constituency statutes." These statutes allow directors, in the exercise of their fiduciary duties, to take into consideration broader interests than merely profit maximization for shareholders. The statutes vary, but most were passed in response to takeover situations such as the one faced by craigslist, and allow directors to consider the effects of the sale or merger on employees and communities, among other third parties (Conaway 2012; Gelter 2009; Lacovera 2011). It is important to note that constituency statutes *permit*, but *do not require*, that other interests be considered, and do not clearly provide for consideration of these interests *without regards to* those of shareholder wealth enhancement (Tyler 2010).

In addition to constituency statutes, some state corporate statutes explicitly provide that a corporation may use their resources, such as making a donation, for nonprofit or public good purposes. A standard that is recommended by the American Law Institute integrates the two concepts, profit and public good, by providing that while the purpose of a corporation should be "the conduct of business activities with a view to enhancing corporate profit and shareholder gain," that in any case a corporation "May devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes" (Clark and Babson 2012). Yet, this recommendation to allow reasonable resources to be used for public welfare does not specifically allow a corporation to choose a social purpose *above* the profit enhancing duty, and what is a reasonable amount is subject to dispute.

Summary

While constituency statutes allow the corporate consideration of broader factors than profit, and state statutes often specifically allow for charitable gifts, it is unclear how far a corporation may go to promote social goals, so that it has been said that "The traditional corporate model limits the way in which socially responsible entrepreneurs can use the corporate vehicle to advance social good" (Deskins 2011, p. 1061).

There are conflicting viewpoints as to whether, and to what extent, the business judgment rule allows extensive director flexibility to make decisions that diverge from wealth maximization for shareholders, or whether the corporate law maxim of shareholder primacy as illustrated in the Delaware courts is a significant restraint on corporate consideration of a social purpose (Tyler 2010). Variations of these viewpoints have been debated for decades and cannot be reprised in full here; what is important for the discussion of BCs is that shareholder primacy principles continue to populate corporate thinking in the United States, (Kelly 2009) legal support remains, and *perceptions* of the extent of corporate law doctrine have affected practice and the business environment. In sum,

> Although the vibrancy of shareholder primacy has at times been called into question as a matter of law, both boardrooms and courts have taken the normative call for shareholder wealth maximization increasingly to heart. There is little doubt that the revolution has not only substantially affected legal theory but also legislation, court decisions, and corporate behavior (Bodie 2012, pp. 1033–1034).

Evolution of the BC and Comparison with the BCorp

The distinction between a BCorp and a BC is fundamental, and is extraordinarily important to an understanding of the corporate law–CSR link. While the two types and their legal effect are unique, the close history and similar terminology can cause confusion, and potentially misplaced criticism. Therefore, the following section describes the BCorp before turning to a more detailed analysis of the BC.

BCorps

Founded in 2007, the BLab organization promotes socially aware business practices by providing an opportunity for a business to voluntarily adopt responsible standards of decision making. By voluntarily joining and meeting a certain level in socially responsible standards set by B Lab, a certification entity, a business (whether or not it is a corporation) can become a BCorp. How is B Lab different than other standard setting organizations, and why would an entity choose to become a BCorp? B Lab seeks "systemic change" (B Lab: The Nonprofit behind B Corps; http://www.bcorporation.net/The-Non-Profit-behind-B-Corps) in two ways: by differentiation of socially positive actions from marketing ploys, and by providing a solution for "existing corporate law that demands that business prioritize shareholder value maximization to the exclusion of the value created for all stakeholders." It acts in three ways: providing a certification for "good companies," encouraging responsible investment by providing ratings that can be used by investors, and promoting a new legal business entity that will be more socially purposeful, accountable, and transparent (B Lab: The Nonprofit behind B Corps; http://www.bcorporation.net/The-Non-Profit-behind-B-Corps).

To become a BCorp, a business must complete an assessment and submit supporting documents to BLab, revise articles of incorporation as necessary (depending on the state of incorporation), agree to the terms of membership (a term sheet), and pay fees based on size. In order to earn the designation, a company must earn 80 points out of approximately 200 in the assessment. The number and kind of assessment questions depends on the type of business and its size. For example, a manufacturing company would be required to answer more questions about their relationship with suppliers than a service firm. If a business earns the BCorp certification, it is subject to a random annual review. (http://www.bcorporation.net/Certification-Overview).

The process of certification generates a B Report that includes several broad categories: Governance, Workers, Community, and Environment. These categories contain further subcategories: Governance includes Transparency and Accountability; Workers includes Compensation Benefits and Training, Ownership, and Work Environment; Community includes Products and Services, and further enumerated Community Practices; and Environment includes Products and Services, and further enumerated Environmental Practices. If a business earns 60 % of the available points in a Category, then it is highlighted as an Area of Excellence for that business. The BCorp ratings and report are made publicly available on the website.

A business that is a BCorp is not a different legal entity, but a member of a voluntary association subject to an assessment and ratings standard that supports corporate responsibility in several key areas of business endeavors. The BCorp intersects with corporate law at the point that changes to articles of incorporation, or limited liability company, or partnership documents (for simplicity, further reference will be to incorporation) are required. Depending on the state and its relevant incorporation and statutory provisions, a company may need to amend its articles of

incorporation in unique ways; there are five differing variations that depend on the state statute. For example, the basic articles amendment for a corporation in a state with a constituency statute is the following:

> In discharging his or her duties, and in determining what is in the best interests of the Company and its shareholders, a Director shall consider such factors as the Director deems relevant, including, but not limited to, the long-term prospects and interests of the Company and its shareholders, and the social, economic, legal, or other effects of any action on the current and retired employees, the suppliers and customers of the Company or its subsidiaries, and the communities and society in which the Company or its subsidiaries operate, (collectively, with the shareholders, the "Stakeholders"), together with the short-term, as well as long-term, interests of its shareholders and the effect of the Company's operations (and its subsidiaries' operations) on society and the economy of the state, the region and the nation…
>
> Notwithstanding the foregoing, any Director is entitled to rely upon the definition of "best interests" as set forth above in enforcing his or her rights hereunder, and under state law and such reliance shall not, absent another breach, be construed as a breach of a Director's fiduciary duty of care, even in the context of a Change in Control Transaction where, as a result of weighing other Stakeholders' interests, a Director determines to accept an offer, between two competing offers, with a lower price per share. (http://www.bcorporation.net/index.cfm/fuseaction/content.page/nodeID/ee7101cb-575f-47b6-8771-6bff1ca4be01)

The key language in this required amendment is the inclusion of the consideration of stakeholders in the fiduciary duties of directors. In the 13 states without constituency statutes, the BLab declares;

> Since your state does NOT currently have a corporate statute that explicitly allows directors to consider the interests of stakeholders (often called a 'constituency statute'), the best we can do together is to build the language of the B Corp legal framework into your Term Sheet for B Corp certification.
> The Term Sheet commits your company to consider stakeholders to the extent possible within the current corporate laws of your state; to support BC legislation when we move forward in your state; and, once legislation becomes law, to adopt BC status by the end of your next 2-year certification term (http://www.bcorporation.net/index.cfm/fuseaction/content.page/nodeID/index.cfm/fuseaction/content.page/nodeID/a922196d-bd14-4b3d-a7bc-6a23e030e263).

In sum, by agreeing to the relevant term sheet provisions, the BCorp entity enters into a private contractual agreement to act as required to consider broader stakeholder interests. Note, however, the language in the preceding paragraph; the term sheet recognizes that state law may not allow stakeholders to be considered above or at par with shareholder profit, and that BC legislation would be necessary to legally change the corporate director's duties (Haymore 2011). B Lab has been the primary promoter of BC state statutes, and has encouraged Model BC legislation for adoption by state legislatures.

In comparison, if the business is incorporated as a BC under an applicable state statute, then no private agreement is needed because the stakeholder framework is included in the BC statute. Thus, although the genesis of the Business Corporation movement evolved from the nonprofit group, the legally created BC is independent from the Bcorp. A business may choose to be a BC *without* being a BCorp and *without* being certified by BLab.

The Benefit Corporation

At this time, nine states have adopted a BC statute: California, Hawaii (Hawaii's statute is called a Sustainable Business Corporation law), Louisiana, New Jersey, New York, South Carolina, Vermont, and Virginia. State adoption of a BC statute seeks to address head-on the shareholder primacy and profit maximization standards and to change the duties of directors and officers to include social and environmental considerations. In other words, a goal of the legislation is to create a new understanding of corporate identity by building consideration of social and environmental considerations "into the corporate DNA" (W. Clark, personal communication). State statutes are primarily based on the model law that is proposed by B Lab, therefore the following discussion will focus on the model act provisions first, then describe significant differences between the states.

The BC must be founded as a C corporation under established state law. The entity must follow all incorporation steps, and the entity is subject to all other relevant statutes that relate to the formation and governance of a for-profit corporation. Therefore, a BC is legally a for-profit, corporate entity that has also voluntarily chosen to adopt a statement in its articles of incorporation that it is a BC; it is then subject to the additional specific duties and purposes set forth in the benefit statute.

The primary aspects of the statute may be divided into five areas: (1) the purpose of the corporation to provide a public benefit, (2) the independent third-party standard to annually review corporate public benefit, (3) the duties of directors to consider a broader spectrum of interests beyond shareholder profit, (4) transparency, and (5)

enforceability by means of a benefit enforcement proceeding (BEP).

Public Benefit

A BC must deliver a general public benefit (Model Act, §201a). A general public benefit is defined as, "A material positive impact on society and the environment, taken as a whole, assessed against a third-party standard" (Model Act, §102). It is significant that materiality and the holistic view of corporate operations are applied to determine whether a corporation provides a general public benefit. At times, corporations have been accused of "greenwashing," by emphasizing an action or product in public relations or advertising, rather than disclosing the total effect that the business or product has on the environment (Cotton and Lasprogota 2012; Clark and Babson 2012; Deskins 2011; Murray and Hwang 2011). The subversion of corporate responsibility, more broadly with societal issues as well as the environment, is addressed in part by the requirement that the BC report on the totality of its operations.

In addition to the general public benefit, a corporation may also adopt a specific public benefit (§201b). The core list of specific benefits in the model statute contains: the promotion of or preservation of the environment, health, arts, science, and knowledge, as well as providing jobs or products for low-income or underserved communities (Model Act, §102a). There is also a specific public benefit category for "any other particular benefit on society or the environment" (Model Act, §102(a)(7)).

State statutes are substantially similar to the model act; however, there are three states, Maryland, New Jersey and Vermont, that tie the general public benefit to the accomplishment of one or more of the specific public benefits. BCs in these states will be required to deliver not only a general public benefit, but also one or more of the specific public benefits. Louisiana, South Carolina, and Vermont add more explicit language describing environmental benefits, presumably to make clear that there are multiple avenues to preservation and improvement. An interesting, unique provision is South Carolina's inclusion of providing educational opportunities to low-income or underserved communities. Except for Louisiana, all states include the specific benefit category of "any other particular benefit."

Third-Party Standard

A BC must choose a recognized, independent, comprehensive, credible, and transparent third-party standard to make an annual report "defining, reporting and assessing corporate social and environmental performance" of the business in creating a general and (where applicable) specific public benefit (Model Act, §102(a)). The standard must be comprehensive by assessing the factors that are the subject of the annual benefit report. The third party must be independent, and not have any "material ties" to the BC or its subsidiaries or specified ties/interlocking relationships to industry standard groups. Having significant ties to the business is measured by current ties or ties within 3 years, and connections with family members. A 5 % stock owner is presumptively a material tie with the BC. The standard must be credible because it is designed by an expert and uses a "balanced multistakeholder approach" (Model Act, 102(a)) with a public comment period of at least 30 days. The standard setting must be transparent, therefore information about the criteria used, the relative weights given to those criteria and any development and revisions must be publicly available. In each of these areas related to the third-party standard, the Model Act contains further detail that serves to increase the objectivity of the process, procedure, and outcome.

The BC may choose *any* third-party standard that meets the requirements. The White Paper issued by the B Lab attorneys who crafted the model statute calls the third-party standard the "heart" of the model law (Clark and Vranka 2012, p. 18) yet perhaps the "most contentious and misunderstood." The White Paper notes that there is a list containing over 100 rating standards from which a business is free to choose and that Global Reporting Initiative, GreenSeal, Underwriters Laboratories, ISO2600, and GreenAmerica would fit the third-party standard requirement (Clark and Vranka 2012, p. 24). The description of the third-party standards body was written based on the "criteria used by international standards organizations" and by the Federal Trade Commission (Clark and Vranka 2012, p. 25).

While all states require a third-party standard, there is significant variation in the extent of the third-party statutory requirements (see Table 1); only South Carolina follows the Model Act precisely. Because the third-party standard is an integral definitional element of the statute, and is utilized by the benefit director and the corporation to make annual reports, the differences warrant further analysis.

Six states do not include the provision on credibility, or the details to determine independence (although independency is required). Five states do not require the standard to be comprehensive. Louisiana does not require the third-party standard to be transparent, although any financial conflict of interest must be disclosed. Interestingly Maryland, the first state to pass BC legislation, refers to the third-party assessment of "best practices" in corporate social and environmental performance.

The third-party standard that is used by a BC is the first step toward an objective review of performance, and the variations in states could affect the effectiveness of this review. It could also lead to a problem for investors and shareholders, who will need to look more closely at the state of the BC to determine the reliability of the report.

Director Duties

If the independent standards are the heart of the BC, then the duties of the directors and officers breath life into the entity, as they impose an *obligation* to consider the benefit purpose in decision making. An essential word is "must." The directors and officers are not merely allowed, but are obligated, to consider not only the shareholders but also the employees, suppliers, customers, community, and societal factors, the local and global environment, the short- and long-term interests, and the accomplishment of its general and any special public benefit in their operation of the company. The model provisions explicitly provide that consideration of these stakeholders is in the best interest of the BC, thereby broadening the traditional concept of directors' legal fiduciary duties beyond shareholders of the corporation.

Directors are also given authority to take into consideration other appropriate factors and interests that they find relevant. In weighing the interests, no interest (including shareholder profits) of a person or group takes precedence. None of the mandatory considerations takes precedence over any other, unless the articles of incorporation give priority to an element that will aid the accomplishment of a public benefit.

Four state statutes are substantially the same as the Model Act. Hawaii, however, limits the required considerations to the shareholders and the accomplishment of general and specific public benefits, while four states edit the list of mandatory considerations in some way. An important distinction is that Hawaii and Maryland do not include a non-priority of considerations section. This calls into question whether profit maximization and shareholder primacy are still in effect in these two states, and how the stakeholders' interests will fare in the balance (Table 2).

Transparency

There are two annual reports that relate to the accomplishment of the public benefit and the directors' duties to

Table 1 Third-party standard

State	Statutory reference	Comparison with Model Act
California	§14601(g)	Similar except deletes "recognized" standard, inserts "overall" social and environmental performance.
Hawaii	§420D-12	Similar, except:
		inserts "overall" social and environmental performance
		Requires independence, but does not include specific factors
		Does not include "credibility" section
Louisiana	§1803(A)(12)	Similar, except:
		Deletes the transparency portion. Includes a subsection requiring disclosure of any financial connection between third party and corporation that would indicate a conflict of interest.
		Assessment applies to producing general and specific public benefit
Maryland	§5-6C-01(e)	Similar, except:
		Does not include "comprehensive" standard
		Assessment of "best practices" in corporate social and environmental performance.
		Does not include elements, but does state requirement of third-party independence
		Does not include the "credibility" section
New Jersey	§14A:18-1	Similar, except:
		Does not include "comprehensive" standard
		Does not include elements to determine independence, but does require independence of third party from the BC
		Does not include the "credibility" section
New York	§1702(g)	Similar, except:
		Assessment is of "general public benefit"
		Does not include "comprehensive" standard
		Does not include elements to determine independence, but does require independence from the BC
		Does not include the "credibility" section
South Carolina	§33-38-130(9)	Same as Model Act
Vermont	§21.03(a)(8)	Same as New Jersey
Virginia	§13.1-782	Same as New Jersey

consider stakeholder interests. First, the model act requires that a BC have a Benefit Director who is independent and who has the duty to make an annual benefit compliance report to the Board of Directors. This compliance report states whether the corporation "acted in accordance" with its public (and where applicable, specific) benefit purpose, and whether the directors met their duty to consider the interests of stakeholders. If there is a failure to meet these obligations, the report must contain an explanation of the circumstances. Second, the Benefit Director's compliance report is part of the broader Annual Benefit Report compiled by the corporation, sent to shareholders, and made publicly available. In addition, this report includes a description of how the corporation succeeded in the pursuit of a public benefit, any factors that hindered the accomplishment of the purposes, and an "assessment of the overall social and environmental performance" (Model Act, §401(a)(2)) using the third-party standard.

The Annual Benefit Report is sent directly to the shareholders (either at the same time as the annual report or within 120 days of the end of year), and all reports are posted on the corporate website. If there is no website, then upon a request, a copy of a current report must be furnished without charge. Furthermore, a copy of the benefit report must be filed at the appropriate state agency. The widespread distribution and public availability of the benefit report serves the purpose of transparency.

Four states differ significantly by not including the requirement of a Benefit Director. Five state statutes do not require the benefit report to be filed centrally in a state office, and five states require that only the most recent benefit report be posted on the corporation's website. Central filing of the reports, and the comprehensive posting of reports, serves the public by increasing the ease of access both in the short and long term. Without the model transparency provisions, past reports may be unavailable and comparisons between BCs will be more difficult (Table 3).

Enforcement

The Model Act creates a BEP that is the *only* means to bring a legal action to enforce the duty of the corporation to deliver a general and/or specific public benefit and to enforce a director's benefit duties (Model Act, §305a). With regards to standing to file a lawsuit, the BC can file suit directly, or a derivative suit may be filed either by a shareholder, director, 5 % equity owner of a parent company, and others who may be indicated in the articles of incorporation or the bylaws. No person who is the beneficiary of a public purpose has the right to bring an action (Model Act, §305b).

There is a split in state statutes on the subject of enforcement. Three states do not include a BEP. Presumptively, the duties can be enforced under existing state derivative action laws, however, only in one state is this explicitly stated. In some states, the BC cannot bring a direct action; only the shareholders and directors may institute the derivative suit (Table 4).

Table 2 Director standard of conduct

State	Statutory Reference	Comparison with Model Act
California	§14620	Substantially the same
Hawaii	§420D-6	Must consider:
		Shareholders
		General and specific public benefits
		May consider:
		Remainder of list that is mandatory & discretionary under Model Act
		Does not contain "no priority" statement
Louisiana	§1821	Same as Model Act
Maryland	§5-6C-06	Similar; does *not* contain mandatory consideration of:
		Short-term/long-term interests
		Ability to accomplish benefit purpose
		Does not include "no priority" statement
		Does not include discretionary considerations
New Jersey	§14A:18-6	Same, but does not include consideration of ability to accomplish benefit purpose
New York	§1707(a)	Same as Model Act
South Carolina	§33-38-400	Same, but does not include consideration of ability to accomplish benefit purpose
Vermont	§21.09(a)	Same, but does not include consideration of ability to accomplish benefit purpose
Virginia	§13.1-788A	Same as Model Act

Table 3 Annual Benefit Report

State	Statutory reference	Comparison with Model Act
California	14630(b)	Timing: same Posting/copies: same State filing: no
Hawaii	§420D-8	Timing: within 120 days of year end Posting/copies: same. Also, website posting of draft for public comment period. State filing: no
Louisiana	§1831(B)	Timing: same Posting/copies: same State filing: no
Maryland	§5-6C-08(2)	Timing: within 120 days of year end Posting/copies: same, except only most recent report. State filing: no
New Jersey	§14A:18-11(6)	Timing: same Posting/copies: same except only most recent, no copy provision. State Filing: yes
New York	§1708(b–e)	Timing: within 120 days of year end Posting/copies: same except only most recent, no copy provision State filing: yes
South Carolina	§33-38-500(B–E)	Timing: same Posting/copies: same State filing: same
Vermont	§21.14	Timing: same, except shareholders must have opportunity to review and approve/reject. Posting/copies: same except posting of only most recent report. State filing: no
Virginia	§13.1-793	Timing: same. Posting/copies: same except posting of only most recent report. State filing: yes

CSR and the BC

How should the BC be viewed through a CSR lens? Because there are multiple and diverse approaches to CSR (Aguinis and Glavas 2012), the six-factor integrated framework of CSR by Crane et al. (2008) is used to evaluate whether choosing the new benefit form of business can be considered under the umbrella of socially responsible corporate actions. The Crane factors to analyze whether actions are characterized under CSR include whether (1) actions are primarily voluntary, (2) externalities are addressed, (3) multiple stakeholders are considered, (4) environmental and social interests are integrated, (5) CSR is adopted into value systems, and (6) CSR is operationalized (more than merely charitable acts). As seen in Table 1, adopting the BC form clearly meets the six-prong vision for socially responsible corporate action (Table 5).

Forming a BC is a voluntary action; a business chooses to operate as this legal form, either at incorporation or later by the action of the board of directors and shareholders. It is not a government regulation or mandate. Management of externalities is explicit in the definition of a general public benefit as the purpose of the corporation. Externalities are addressed by the requirement that the corporation provide net positive benefit to society. The directors' fiduciary duties include the requirement to consider stakeholders; the employees, customers as beneficiaries of a benefit, community, and societal factors. The BC is also required to consider the local and global environment. It is not required, however, that stakeholders, have direct input. Being a BC means that these statements are included in the Articles of Incorporation, showing that these are fundamental values. CSR is integrated into the fabric of the BC by annual reporting and the existence of the benefit director, thereby meeting the elements of value adoption and operationalization. Clearly, according to these factors, the BC is a form of business that implements and supports CSR.

The goal of this research is to define, explain, and compare the types of BC statutes so that the corporate law aspect of CSR is understood and included in future

Table 4 Enforceability: standing and the BEP

State	Statutory reference	Comparison with Model Act
California	§14623(b)	Standing: same as Model Act
	§14623(a)	BEP: substantially same as Model Act, except includes reasonable plaintiff expenses in certain cases
Hawaii	§420D-10	Standing: Shareholders and Directors only
		No BEP: may bring direct and derivative action to enforce public benefit and directors duties
Louisiana	§1825(B)	Standing: direct action included, only shareholders and Benefit Director have derivative standing
	§1825(A)	BEP: substantially same as Model Act
Maryland		No specific provisions addressing standing
		No BEP
New Jersey	§14A:18-10(b)	Standing: substantially same as Model Act
	§14A:18-10(a)	BEP: substantially same as Model Act
New York		Standing: no provision
		No BEP
South Carolina	§33-38-440(C)	Standing: same as Model Act
	§33-38-440(A)	BEP: substantially similar to Model Act
Vermont	§21.13(b) &(c)	Standing: only shareholder/director (not BC), otherwise substantially similar to Model Act
	§21.13(a)	BEP: substantially similar
Virginia	§13.1-793(B)	Standing: substantially same as Model Act
	§13.1-793(A)	BEP: Same as Model Act

Table 5 Crane CSR and BCs

Crane CSR model	Benefit corporation
Voluntary	Choice of entity, no legal mandate
Externalities	Net benefit to society takes into account broad impacts
Stakeholders	Fiduciary duty to consider affect on stakeholders, but no direct input/review by stakeholders required
Environment/social	Fiduciary duty to consider environment and community, but no direct input/review required
Value systems	In the articles of incorporation, appointment of benefit director/officer
Operationalization	Annual report is required and available

research. Applying Crane's integrative approach clearly shows that the BC meets a baseline test for inclusion in CSR research. While a complete review of the differing CSR theories is beyond the scope of this paper, a few possibilities for further comparison and discussion can be noted.

The moral and ethical case for CSR has been described the "pure" case for business acting responsibly; it is the right thing to do as a member of society (Osuji 2011). In comparison, the "business case" for CSR, also called the instrumental view of CSR (Osuji 2011), includes consideration of the effect that CSR has on business profitability. In addition to ethical reasons, CSR can be used as a strategy to increase reputation and therefore financial gains (Bondy et al. 2012; Metcalf and Benn 2012; Osuji 2011). Recent examples of efforts to bridge the gap between these two viewpoints include the Shared Value approach suggested by Porter and Kramer (2011) and the Impartial Spectator Test suggested by Szmigin and Rutherford (2012). The theory of Shared Value argues that businesses should consider profit more broadly than the financial bottom line, and includes societal benefits as value creation, recognizing that a business is affected by, and can contribute to solving, social challenges (Porter and Kramer 2011). The Impartial Spectator Test proposes that CSR actions be viewed through an objective, third-party lens in order to further align profit and social benefits (Szmigin and Rutherford 2012). The BC may be viewed as a hybrid form (Reiser 2011) that promotes the integration of profit and social purpose in the way similar to a shared value framework. It includes an objective third-party standard that is similar to the Impartial Spectator approach. Because the BC form in its model version does not require that the profit motive be primary and allows for flexibility in considering stakeholder, societal, and environmental interests, it could be considered to be supporting the ethical approach to CSR. However, because it is a for-profit entity, it could support the business case for CSR. How the BC flexibility

and dual mission fits within a theory of CSR requires further study and analysis.

Criticisms of BCs and CSR

Skepticism about whether the BC can deliver on its potential for socially responsible behavior exists, despite the newness of the legal form. Criticism is voiced around three main issues: a concern about the BC as a for-profit perversion of CSR, whether BCs are undermining public functions without accountability, and the risk that a private entity (BLab and BCorp) is promoting the adoption of the statutes for private self-interest.

The BC form builds corporate responsibility into the lifeblood of the organization, seeking to create a business that both makes a profit, and considers social and environmental impacts. Despite this positive approach, concern exists more broadly that institutionalization of CSR in multinational entities, and the blurring of profit and non-profit purposes, may result in the co-opting of CSR for profit generating, strategic business purposes rather than for the realization of stakeholder interests (Baur and Schmitz 2012; Bondy et al. 2012). Rather than a choice between profit or societal interests, the balance could be viewed as a continuing dynamic searching for equilibrium and meaning (Sabadoz 2011). In the United States that dynamic has been thwarted by the premise of shareholder and profit primacy, in comparison to other countries where consideration of stakeholders' interests is integrated by law into corporate duties (Mickels 2009). The legal and organizational point of the BC is to free a US corporation from the strictures of the shareholder primacy, profit maximization paradigm. The concern that the BC might gain public acceptance, and perhaps even "undermine the very free-market economy that their advocates suggest they embody" (André 2012, p. 15) is unfounded. The goal in creating the new legal form is to, "mak[e] it easier for the next generation of entrepreneurs and investors to build businesses that seek to create value for both shareholders and society." (Clark and Vranka 2012, p. 6)

Second, the BC has been criticized as a "corporate centric" organization that will "control the process of CSR for themselves and not for the citizenry as a whole," so that they may be held "accountable to each other rather than to society" while performing governmental functions. (André 2012, p. 15). But rather than taking on a governmental function, the BC is created within the concept of a market-driven business entity. It is for profit, and it is designed with this and a public benefit purpose. A public benefit does not refer to a governmental function but to the footprint of a corporation being a positive value to society. While one may disagree with the wisdom or effectiveness of the approach, it would be erroneous to attempt to fit the BC into a public function for which it was not designed. Operation as a BC is totally voluntary, and there is no public financial support for, or against, this for-profit entity. There are no state or federal proposals to grant BCs a tax-exempt status, and it is highly unlikely that any will emerge. Although there has been some discussion that tax benefits might be granted, at this point any such development is highly speculative.

While the corporation does not have the same duty to stakeholders as a government would have to its citizens, the lack of explicit stakeholder input is accurate and deserves further study; however, the BC is *obligated* to consider stakeholder interests. The avenues for considering stakeholder interests may be varied and dependent on the entity; it is probable that some corporations will do this better than others. It is incorrect, though, to presumptively conclude that the BC form is a sham for the purely self-seeking corporation.

Finally, André (2012) has criticized BCs because BCorp members gain financially by their association, and because the uniformity of state legislation indicates a subtext for self-interest. These arguments miss the mark on several levels. A BC is distinct from a BCorp, and the third-party standard required under BC legislation is not limited to the BCorp standard. There are many types of third-party standards and evaluators that can be used. If a corporation uses the BCorp standard, the financial benefit is derived from the networking and support between like-minded, socially responsible businesses and is part of the business case for CSR. From a purely ethical CSR viewpoint, then, this would be worth investigating as a motivating factor. However, it is a goal of the BC legislation to prevent self-interested greenwashing, by requiring the company to provide a general public benefit, defined as a "material positive impact" on society, and by the reporting and transparency requirements (Clark and Vranka 2012). With these provisions in effect, it is *less* likely that a business could market itself as socially responsible in one area or project and yet fail to deliver more broadly in its relationship to its stakeholders. Whether this framework is effective is a concern that bears further monitoring and research. It is important to also note the way in which corporate law is promulgated in the United States, in order to counter the implication that there is something sinister about the significant conformity between states' legislation. Uniformity of state law is not unusual with regards to corporate entities; in fact it is a common occurrence. For example, the American Bar Association proposes uniform corporate laws in the Model Business Corporation Act, and the National Conference of Commissioners on State Laws writes proposed uniform laws for partnerships and limited liability companies. States often consider and adopt substantially similar business entity laws. The same is true for the BC, although at this early stage of adoption there are significant variations between state statutes.

Summary: BCs and CSR

In summary, as a review of legal history shows, corporate directors are impacted by the wealth maximization principle and may be unwilling to consider wider social impacts in their decisions because of the potential legal liability of meeting this standard. BC legislation provides at least a partial solution to this situation by allowing corporations to legally choose to consider a broader stakeholder view. The BC fits into an integrated framework of CSR because it is voluntary, takes externalities into account in assessing affects on society, considers stakeholders, social and environmental concerns, is part of a corporation's value system as part of the articles of incorporation, and is operationalized by annual assessment and reporting requirements. The BC will need to be further analyzed with regards to CSR theories. While the lack of direct stakeholder input deserves further study, a corporate duty to consider these interests and provide an overall materially positive impact on society mitigates against greenwashing.

Discussion and Future Research Questions

The potential impact of the new form, the BC, is unknown. It could revolutionize the corporation–society link, or it could have little to no effect on the operation of large and complex corporate entities that dominate commerce. The evolution and adoption of the BC should be closely monitored and its effect on CSR should be studied. This discussion provides two brief examples, and suggests future research questions.

Information about the type of business that chooses to operate in the BC form will help us understand what effect this legal change might bring to the relationship between business and society. Because the data on BCs are sparse at this point in time, BCorp data are used as a proxy about what type of business might choose to operate in the corporate benefit form. Next, a comparison is drawn between two leading adopters of the new BC form.

BCorp Review

A snapshot of BCorp adopters can shed light on what type of business may decide to incorporate as a BC. Information was collected about 78 companies in the manufacturing industry listed as members by the BCorp website. Data were collected about the legal entity, type of business (product), and whether the business is privately or publicly held. The initial results show that companies are almost exclusively privately held. Only one company could be confirmed as a subsidiary of a firm that is publicly traded in Australia. While there were Limited Liability Partnerships (1 %), Sole Proprietorships (1 %), and a BC (1 %), Limited Liability Companies (22 %) and traditional Corporations (66 %), predominated (8 % were undetermined). Figure 1 shows the comparison. From these observations, we may ask future questions about whether a BC form is a realistic choice for a larger, publicly held company.

Among the manufacturing companies studied, the Food and Beverage category was the largest (37 %); however, non-consumer goods (14 %), building materials (16 %), and health and beauty (13 %) were represented in significant numbers. The diversity of products manufactured by BCorps was striking. It leads to the theory, which should be tested by future study, that the Business Corporation form can be utilized by entities in virtually any industry (Fig. 2).

Early BC Adopter Comparison

Two companies were identified in the press as first adopters of the BC form: Greyston Bakery and Patagonia. Greyston was first in line to register as a BC in New York, and Patagonia did so on the first day the option existed in California. While both are manufacturing companies, the profiles of the two businesses are quite distinct. Patagonia sells outdoor clothing and equipment, and has led efforts in environmental issues and corporate responsibility for many years, seeking to use environmentally friendly materials and donating 1 % of its profit to environmental causes. Patagonia's owner stated

> Benefit corporation legislation creates the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises and even changes in ownership by institutionalizing the values, culture, processes and high standards put in place by founding entrepreneurs (Lifsher 2012)

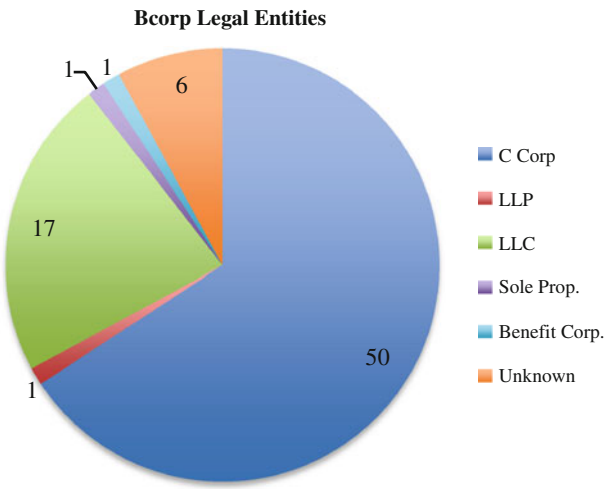

Fig. 1 BCorp legal entities

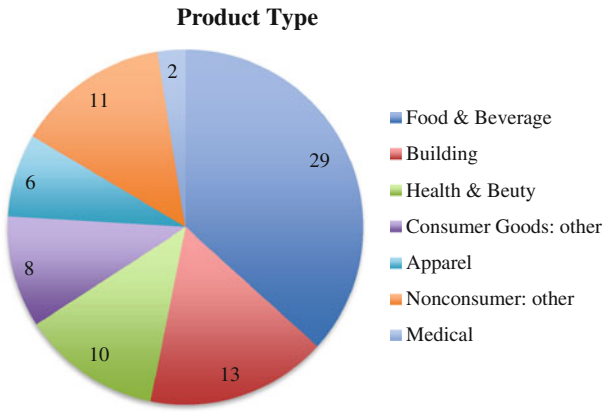

Fig. 2 BCorp product lines

While Pategonia is committed to social responsibility and the environment, it is a for-profit corporation that sells consumer goods. It does not perform a public function at its core, but nevertheless seeks to operate in a way that adds value to society.

In comparison, Greyston Bakery focuses on development of employees and the community, and is owned by a non-profit foundation. While it produces a product, brownies, and its largest customer is Ben and Jerry's, Greyston's mission is community based, training and then hiring members of the community to be bakers. Its motto is "We don't hire people to bake brownies. We bake brownies to hire people" (Lieber et al. 2011). This motto supports its core purpose of "empowering low-income people," rather than the production of the product itself. (Lieber et al. 2011)

While both Pategonia and Greyston Bakery act in socially responsible ways, Pategonia is focused on delivering the best product possible in the most environmentally sustainable manner (Pategonia, BCorp.), while Greyston's mission is to be a leading social entrepreneur (Greyston, Social Mission). Strikingly, there is room within the umbrella of the BC status for both entities. In future research, it will be important to achieve a more fine-grained understanding of the types of businesses that succeed in the role of a socially responsible business entity by means of operating as a BC, and whether commonalities and distinctions can be identified.

Further Research Questions

The BC is an innovative and new legal form of business that modifies the profit maximization and shareholder primacy corporate law paradigm. There are now new and exciting opportunities to study the impact of this effort to integrate interests of business and society.

Some basic questions include: What is the most significant motivating factor for an existing business to adopt the BC form, and how does individual leadership impact the decision? Is the BC form utilized by the traditional corporation, or is it primarily used to promote access to capital for entities that would previously have operated as non-profit entities? Can a publicly traded company successfully adopt the BC status and what affect would it have on corporate governance? How are fiduciary duties impacted? How are daily corporate decisions affected? How do investors respond to a BC form, and is it compatible with raising capital?

The differences in state statues will create a laboratory within which different approaches to transparency, reporting standards, accountability, and director/officer fiduciary duties to stakeholders can be studied and compared. For example, Hawaii and Maryland do not include a specific provision stating that no consideration (including profit) takes consideration over another. Will BCs in these states weigh stakeholder interests as strongly as BCs in the other states? And, three states do not include a BEP: is a specific method of enforcement important for BCs to take the weighing of interests seriously, or will greenwashing occur more often in these states? As new states consider adopting BC statutes, information from this research can inform and shape future statutes and strengthen attempts to link for-profit business with socially and environmentally sustainable practices.

While a BC addresses the real or perceived legal duty to increase shareholder wealth above all else, the form also has the potential to impact business strategy, ethical decision-making, and the very face of for-profit business. Managers and directors in a BC will be required to internalize and institutionalize a commitment to monitor the impact of its business on society, consider the import of their actions more broadly, and make tough ethical decisions between conflicting interests (Page and Katz 2011; Taylor 2011). The lessons learned from future study of the BC form of business can be used to compare and weigh actions of and decisions in the traditional business corporation.

Conclusion

Whether the BC form will change the face of commerce and the relationship between business and society, and whether it will effectively promote corporate responsibility, is yet to be seen. However, corporate law has stymied full consideration of social and environmental considerations because of shareholder primacy and wealth maximization duties. BC statutes free directors from the limiting effect of this paradigm, and furthermore obligate them to consider stakeholder interests. The legal integration of profit and responsibility within the BC links it with CSR theories, and future study will elucidate these particular

connections. Clearly, BC statutes provide the possibility for a unique kind of socially responsible business with great potential for sustainable practices. While state laws have significant similarities, statutory differences will provide a laboratory to study the interplay between assessment, transparency, and process, with socially responsible corporate purpose.

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