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Introducing the Totally Unnecessary Benefit LLC

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INTRODUCING THE TOTALLY UNNECESSARY BENEFIT LLC*

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Unlike statutes authorizing benefit corporations, which have been recently enacted in over thirty states to accommodate social enterprises, no one has articulated a legal justification for benefit LLCs. Indeed, no plausible legal justification can be articulated. The expansive flexibility of conventional LLC law is already perfectly amenable to social enterprises. Instead, the advent of the benefit LLC, embraced most prominently by Delaware in 2018, plainly reveals what was arguably already apparent in the context of its corporate predecessor: that the aim of benefit entity statutes is not law reform. Rather, it is about branding.

But the creation of this legislatively endorsed brand should raise serious concerns. In the absence of meaningful accountability measures to ensure that businesses embracing the statutory "benefit" label actually deserve it, the state-sanctioned "benefit" designation may be exploited by entrepreneurs to mislead the public and compete unfairly with conventional for-profit businesses. Moreover, even if statutory benefit entities do live up to their "benefit" aspiration, they impose their own costs by adding needless complexity to the law and exacerbating the popular misperception that conventional for-profit businesses are purely profit driven. It is hard to see why legislatures should employ state power for private gain in this way, especially where nongovernmental certifications already exist for socially minded, purpose-driven businesses seeking to distinguish themselves in the marketplace. Accordingly, this Article makes the case that statutory benefit entities—both corporations and especially LLCs—are unnecessary as a legal matter and unwise as a policy matter.

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INTRODUCTION

The rapid proliferation of state statutes authorizing so-called "benefit" corporations—starting with Maryland in 2010 and expanding to thirty-four states by 2018[1]—has been premised in large

1. *See* B Lab, *State by State Status of Legislation*, BENEFIT CORP., http://benefitcorp.net/policymakers/state-by-state-status [https://perma.cc/NZ7K-7ENQ] [hereinafter B Lab, *State by State*].

part on the assertion that conventional corporate law mandates shareholder primacy.[2] Under this legal mandate, the board of directors of a for-profit corporation must manage the business solely for the benefit of its shareholders. With the aim of maximizing shareholder wealth as a board's singular focus, concerns for other, nonshareholding stakeholders, the public, and the environment are irrelevant except to the extent such concerns implicate the corporation's profits.

Citing conventional corporate law's mandate of shareholder primacy, advocates of benefit corporation legislation contend that the new statutory business form is a necessary and important addition to the existing legal landscape—one that accommodates for-profit businesses that are driven more by a social mission than a desire to maximize profits.[3] For these purpose-driven "social enterprises,"[4] the benefit corporation provides a legal framework that eschews conventional corporate law's narrow focus on shareholder welfare.

2. Shareholder primacy can be understood in two different ways: (1) that the sole or primary objective of a business corporation is to advance the interests of its shareholders (i.e., to maximize shareholder wealth), or (2) that shareholders wield ultimate power in the governance of the corporation. *See* David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 184 n.4 (2013) [hereinafter Yosifon, *Law of Corporate Purpose*] (articulating this distinction); *see also* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 7 n.20 (2012) [hereinafter Murray, *Choose Your Own Master*] (same). This Article uses "shareholder primacy" in the former sense (i.e., that "shareholder primacy" means shareholder wealth maximization) rather than the latter.

3. *See, e.g.*, FREDERICK H. ALEXANDER, BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE 1–6 (2017); WILLIAM H. CLARK, JR. ET AL., WHITE PAPER: THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION 7–8 (2013), http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf [https://perma.cc/FN9B-8FLC]; Bart Houlahan, Andrew Kassoy & Jay Coen Gilbert, *Berle VIII: Benefit Corporations and the* Firm Commitment *Universe*, 40 SEATTLE U. L. REV. 299, 301 (2017).

4. There is no single agreed-upon definition of a "social enterprise," and there are many different business models that might identify as such. *See* Alina S. Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. 919, 926–30 (2016) (surveying definitions of social enterprise); Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215, 223–32 (2013) (describing different models of social enterprise). Generally speaking, however, a "social enterprise" describes "an entity that uses commercial activity to drive revenue with the common good as its *primary* purpose." *See* J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 347–48 (2014) [hereinafter Murray, *Social Enterprise Innovation*]; *see also* Robert Katz & Anthony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 86 (2010) (defining "social enterprise" as a firm that seeks "to [produce and sell goods and services] in a manner that generates more public benefit or positive externalities than would a conventional for-profit firm [and] . . . expressly measures its success both in terms of its financial performance . . . and its success in advancing a social mission or addressing social concerns").

Using benefit corporations, social enterprises may promote the interests of various nonshareholding constituencies, the public, and the environment, thus pursuing corporate profits more responsibly and sustainably, without fear of shareholder lawsuits or director liability.[5]

However appealing this notion of corporate altruism might be, the legal justification for benefit corporations reflects a facile oversimplification of conventional corporate law. Conventional corporate law already enables purpose-driven businesses to pursue a social mission, even if doing so might curb a business's ultimate profits.[6]

But even if benefit corporations are legally unnecessary to accommodate social enterprises, the advent of benefit LLCs—the unincorporated analog to benefit corporations—proves that the question of legal necessity is ultimately irrelevant to the legislative movement that is spawning these new socially minded business forms. Benefit LLCs first emerged as a statutory business form in Maryland in 2010, at the same time as the first benefit corporation statute.[7] Unlike its corporate counterpart, however, the benefit LLC has languished in the intervening years,[8] largely ignored by other states,[9]

5. *See, e.g.*, William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 819, 848 (2012).

6. *See infra* Section I.C.

7. *See* J. Haskell Murray, *Beneficial Benefit LLCs?*, 85 CIN. L. REV. 437, 437–38 (2017) [hereinafter Murray, *Beneficial Benefit LLCs?*].

8. Prior to 2018, only three states had enacted statutes authorizing benefit LLCs: Maryland (2010), Oregon (2013), and Pennsylvania (2016). *See infra* notes 205–09 and accompanying text. In 2018, Utah followed by Delaware both adopted benefit LLC statutes. *See infra* notes 205–09 and accompanying text.

9. Instead of benefit LLCs, Vermont, followed by eight other states, enacted statutes authorizing low-profit limited liability companies, or "L3Cs." This novel statutory business form was intended to accommodate social enterprises by facilitating program-related investments from charitable foundations. *See* J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 543–46 (2016) [hereinafter Murray, *The Social Enterprise Law Market*]. The poorly conceived legislation, however, did not comport with the relevant law governing charitable foundations and, thus, failed to accomplish its intended purpose. Carter G. Bishop, *The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243, 246 (2010); J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273, 274 (2010); Daniel S. Kleinberger, *A Myth Deconstructed: The "Emperor's New Clothes" on the Low-Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879, 895–98 (2010). Once the shortcomings of the legislation were widely understood, state adoptions of L3C statutes ceased and one state—North Carolina—even repealed its authorizing legislation. Murray, *The Social Enterprise Law Market*, *supra*, at 544; *see also* DANA BRAKMAN REISER & STEVE A. DEAN, SOCIAL ENTERPRISE LAW: TRUST, PUBLIC

practitioners, and academics.[10] But 2018 marked a significant turning point for the fledgling business form due to Delaware's adoption of its own benefit LLC statute.[11] Given that state's unique importance in the business law world,[12] one can now reasonably expect legislation and attendant interest in benefit LLCs to likewise flourish.[13]

Yet, unlike benefit corporations, no one has attempted to articulate a plausible legal justification for benefit LLCs. No one has suggested that conventional LLC law mandates any form of "member primacy" or that conventional LLCs are somehow legally compelled to maximize profits. Instead, the unanimous consensus is that conventional LLC law already permits a business ample flexibility to commit itself to balancing or even subordinating profits against a social mission.[14] Put differently, as a legal matter, benefit LLCs are inarguably unnecessary.

Instead, the advent of benefit LLCs reveals that the animating force behind benefit entity legislation has never been a desire for legal reform. Rather it is about branding: the creation of a state-sponsored designation made available to private entrepreneurs to signal the virtue of their for-profit business to consumers, investors, and the broader public.[15]

But the creation of this state-sponsored brand should raise serious concerns about whether legislation authorizing benefit corporations and LLCs (collectively, "benefit entities") is an appropriate or worthwhile use of state power. In the absence of any meaningful accountability measures to ensure that businesses embracing the statutory "benefit" label are actually deserving of it, the state-sponsored "benefit" brand may be exploited by entrepreneurs to mislead the public and compete unfairly with

BENEFIT AND CAPITAL MARKETS 62–64 (2017). At present, the L3C form appears to be at a "dead end" and a cautionary tale for benefit entity legislation.

10. As of 2018, the only published scholarly article to focus specifically on benefit LLCs is a symposium piece. *See generally* Murray, *Beneficial Benefit LLCs?*, *supra* note 7.

11. *See* Act of July 23, 2018, ch. 357, 81 Del. Laws __ (codified at DEL. CODE ANN. tit. 6, §§ 18-1201 to -1208 (Supp. 2018)).

12. *See infra* text accompanying notes 59–62.

13. *See* REISER & DEAN, *supra* note 9, at 65 ("Delaware's dominance in the market for for-profit incorporations may not spill over into the hybrid form space, but one should certainly not underestimate its influence."); Michael B. Dorff, *Why Public Benefit Corporations?*, 42 DEL. J. CORP. L. 77, 83–84 (2017) [hereinafter Dorff, *Why Public Benefit Corporations?*] (noting the influence of Delaware's embrace of benefit corporations on other states).

14. *See infra* Section II.B.

15. *See infra* notes 248–57 and accompanying text.

conventional for-profit businesses.[16] It is hard to see why legislatures should employ state power for private gain in this way, especially where there already exist private certifications available to socially minded businesses seeking to distinguish themselves in the marketplace.[17]

Moreover, even if statutory benefit entities do, in fact, live up to their "benefit" aspiration, they impose their own costs by adding needless complexity to the law and exacerbating the popular misperception that conventional for-profit businesses are purely profit driven.[18] The unintended result may be that conventional for-profit businesses retreat from socially minded initiatives, resulting ironically in a net decrease in the public benefit arising from private enterprises.

Alas, state legislatures are unlikely to revisit their recently enacted benefit corporation statutes any time soon. The benefit LLC, however, presents a second opportunity to consider the rationale and need for a new statutory business form catering to social enterprises. A sober assessment suggests this seemingly innocuous legislation is both unnecessary as a legal matter and unwise as a policy matter.

The remainder of this Article proceeds in three parts. Part I describes statutory benefit corporations, the legal explanation offered to justify their existence, and the many frailties in that explanation. Part II then moves on to statutory benefit LLCs, highlighting the complete absence of a legal justification for them. Having demonstrated that both types of benefit entities are legally unnecessary to accommodate social enterprises, Part III makes the policy case against them, focusing on the lack of accountability and the costs associated with the state-created "benefit" designation as well as the availability of private branding as an alternative to state-sponsored branding.

I. BENEFIT CORPORATIONS

The hasty adoption of benefit corporation statutes by state legislatures can be largely credited to a single Philadelphia-based nonprofit, B Lab.[19] Before benefit corporations, B Lab was best

16. *See infra* Section III.A.
17. *See infra* Section III.C.
18. *See infra* Section III.B.
19. *See* Mark J. Loewenstein, *Benefit Corporation Law*, 85 CIN. L. REV. 381, 382 (2017) [hereinafter Loewenstein, *Benefit Corporation Law*] ("The widespread adoption of benefit corporation legislation and the influence of the Model [Benefit Corporation] Legislation on that legislation are testaments to the successful efforts of B Lab."); Murray,

known for its private "B Corporation" certification,[20] a designation the nonprofit awards to socially minded businesses that achieve a qualifying score on B Lab's proprietary B Impact Assessment.[21] Like LEED certification for buildings, "B Corporation" certification is intended to communicate certain virtuous attributes about a business to various internal and external constituencies.[22] Building upon its private B Corporation brand,[23] in 2010, B Lab promulgated the Model Benefit Corporation Legislation ("MBCL"),[24] which first conceived of the benefit corporation as a statutory business form.[25]

Section A describes statutory benefit corporations as envisioned under the MBCL and its primary competitor, the Delaware public

Social Enterprise Innovation, *supra* note 4, at 348, 369 ("The non-profit organization B Lab has been the major force behind the passing of these benefit corporation statutes. . . . B Lab has become a vocal, connected, persistent, and well-funded advocate for the Model [Benefit Corporation Legislation]."); *see also* Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1012–13 (2013) [hereinafter Loewenstein, *Benefit Corporations: A Challenge*] (providing background information on B Lab).

20. *See* Loewenstein, *Benefit Corporations: A Challenge*, *supra* note 19, at 1012–13; Murray, *Choose Your Own Master*, *supra* note 2, at 21–22.

21. *See* Michael B. Dorff, *Assessing the Assessment: B Lab's Effort to Measure Companies' Benevolence*, 40 SEATTLE U. L. REV. 515, 523–26 (2017) [hereinafter Dorff, *Assessing the Assessment*] (describing B Corporation certification using the B Impact Assessment); Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 149–51 (2016) (same). The B Impact Assessment measures a business along four dimensions: (1) the extent to which the business's prosocial commitment is engrained in its internal governance, (2) the business's treatment of its employees, (3) the business's impact upon the communities in which it operates, and (4) the business's environmental practices and policies. *See* Dorff, *Assessing the Assessment*, *supra*, at 523–25.

22. *See* B Lab, *About B Corps*, CERTIFIED B CORP., https://www.bcorporation.net/what-are-b-corps [https://perma.cc/9LFR-ZP6U]; *see also* Loewenstein, *Benefit Corporations: A Challenge*, *supra* note 19, at 1013; Tu, *supra* note 21, at 151.

23. In a recent interview, the founders of B Lab explained that, from the outset, their intent with B Corporation certification was to build a community of advocates in the business world to provide political support for benefit corporation statutes. Larry Hamermesh et al., *A Conversation with B Lab*, 40 SEATTLE U. L. REV. 321, 329–30 (2017).

24. MODEL BENEFIT CORP. LEGIS. (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS]. As Professor Loewenstein notes, unlike other widely adopted model legislation, the MBCL was drafted largely by one attorney, Bill Clark, for his client B Lab, and it did not benefit from vetting by informed groups like the American Law Institute. *See* Loewenstein, *Benefit Corporation Law*, *supra* note 19, at 383.

25. Because B Lab chose a moniker for the new statutory business form, "benefit corporation," that sounds confusingly similar to its private B Corporation certification, the statutory business form and the private certification are often conflated. *See* Tu, *supra* note 21, at 143 (noting the persistent confusion between certified B Corporations and statutory benefit corporations). Regrettably, both Certified B corporations and statutory benefit corporations are both sometimes referred to as "B Corps," which only exacerbates the confusion. *See* Murray, *Choose Your Own Master*, *supra* note 2, at 21.

benefit corporation statute. Section B then describes the legal justification asserted by B Lab and others for the new business form. Finally, Section C synthesizes a significant body of legal scholarship demonstrating that this asserted justification—premised on the notion that conventional corporate law mandates unflinching shareholder primacy—fails to withstand close scrutiny.

A. *Benefit Corporation Statutes*

Today's benefit corporation statutes can be roughly divided into two categories: those that follow B Lab's MBCL and those that follow Delaware's lead. Although the two statutes have some important differences, both share the same essential aim. Both statutes authorize a new type of for-profit business corporation whose purpose is not simply to maximize profits for the benefit of its shareholders but instead balances profit seeking with the advancement of "public benefit" or social good.[26]

1. B Lab Model

As drafted, the MBCL is designed to be embedded into a state's existing business corporation statute, adding provisions that authorize the creation and governance of a new type of corporate entity—a benefit corporation.[27] Because it is merely a subtype of corporation, a benefit corporation is subject to all other provisions of a state's existing corporation statute, except where those provisions are modified or supplanted by the MBCL.[28]

Under the MBCL, every "benefit corporation shall have a purpose of creating general public benefit."[29] "General public benefit" is, in turn, defined to mean "[a] material positive impact on society and the environment."[30] By mandating "[a] material positive impact on society and the environment," the MBCL statutorily

26. *See* MODEL BENEFIT CORP. LEGIS. § 101 cmt. (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS] ("This chapter authorizes the organization of a form of business corporation that offers entrepreneurs and investors the option to build, and invest in, a business that operates with a corporate purpose broader than maximizing shareholder value and that consciously undertakes a responsibility to maximize the benefits of its operations for all stakeholders, not just shareholders."); *see also* Act of July 23, 2018, ch. 357, 81 Del. Laws __ (codified at DEL. CODE ANN. tit. 6, §§ 18-1201 to -1208 (Supp. 2018)).

27. *See* MODEL BENEFIT CORP. LEGIS. §§ 101(a), 103 (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS].

28. *See id.* § 101(c).

29. *Id.* § 201(a).

30. *Id.* § 102.

enshrines the prosocial mission of every benefit corporation organized under the statute.

In addition to creating "general public benefit," a benefit corporation may, but is not required to, identify in its articles of incorporation an additional purpose of creating one or more "specific public benefits."[31] In contrast to the mandatory "general public benefit" purpose, the optional "specific public benefit" purpose provides an opportunity for each benefit corporation to articulate a more particularized prosocial mission that is focused and concrete.[32] But the MBCL also makes clear that any "specific public benefit" identified in a benefit corporation's articles does not displace the "general public benefit" purpose statutorily required of all benefit corporations.[33]

To operationalize the public benefit purpose of benefit corporations, the MBCL prescribes a standard of conduct applicable to the board of directors, who are charged with managing the business and affairs of the benefit corporation.[34] Specifically, the MBCL requires that the board of directors, in discharging its managerial duties, "shall consider the effects of any [corporate] action or inaction upon" a wide range of constituencies, including the corporation's shareholders, employees, suppliers, and customers, the communities in which the corporation operates, and even the local and global environment.[35]

This statutory mandate is considered the "heart" of the MBCL.[36] By requiring directors "to consider" the interests of not only shareholders but also of multiple nonshareholding constituencies, the MBCL expressly rejects any notion of shareholder primacy.[37] Instead, directors of a benefit corporation are statutorily required to place shareholder interests on equal footing with the interests of other corporate stakeholders, the broader public, and the environment,

31. *Id.* § 201(b); *see also id.* § 102 (defining "specific public benefit").

32. *See* ALEXANDER, *supra* note 3, at 74–75.

33. § 201(b).

34. *See id.* § 301(a); *see also id.* § 303(a) (applying the same standard of conduct to corporate officers).

35. *Id.* § 301(a).

36. *Id.* § 301 cmt. ("This section is at the heart of what it means to be a benefit corporation.").

37. *Id.* ("By requiring the consideration of interests of constituencies other than the shareholders, the [MBCL] rejects the holdings in *Dodge v. Ford* and *eBay* v. *Newmark* that directors must maximize the financial value of a corporation." (citations omitted)).

with an ultimate aim of creating public benefit from the corporation's for-profit activities.[38]

Importantly, however, nonshareholding stakeholders have no legal means of actually ensuring that the directors of a benefit corporation do any of this.[39] Nonshareholders have no say in who sits on a benefit corporation's board of directors.[40] Nor do they have standing to sue those directors to enforce the board's statutory duties.[41] Indeed, the MBCL is explicit that "[a] director [of a benefit corporation] *does not have a duty* to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of [the] benefit corporation."[42]

Instead, like the directors of a conventional corporation, the directors of a benefit corporation are accountable only to the shareholders of the business.[43] The MBCL does not alter the conventional corporate law framework that grants shareholders—and not any other constituency—the exclusive franchise to elect the corporation's board.[44] Moreover, under the MBCL, only shareholders

38. *See* ALEXANDER, *supra* note 3, at 70.

39. *See id.* at 94–95 (acknowledging that nonshareholders "have no voice" in benefit corporations); J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25, 44 (2015) [hereinafter Murray, *An Early Report on Benefit Reports*] ("[T]he vast majority of stakeholders that the benefit corporation statute requires directors to consider are relatively helpless in enforcing their rights."). The lack of stakeholder power in benefit corporations has been memorably described as creating a "separation of benefit and control." Emily Winston, *Benefit Corporations and the Separation of Benefit and Control*, 39 CARDOZO L. REV. 1783, 1788, 1820–21 (2018).

40. *See* MODEL BENEFIT CORP. LEGIS. § 101(c) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS] (providing that a state's conventional corporation law governs matters that are not otherwise addressed in the MBCL, like the election of directors by shareholder vote).

41. *See id.* § 305(c).

42. *Id.* § 301(d) (emphasis added).

43. *See* Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY'S L.J. 617, 639–40 (2013) ("[E]ven though it expressly disavows shareholder primacy . . . , the MBCL retains much of the existing corporate structure by leaving ultimate accountability in the hands of the shareholders . . . ."); Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 612 (2011) ("Shareholders of all benefit corporations retain the informational, voting, and litigation rights of ordinary shareholders."); Leo E. Strine, Jr., *Making It Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 245 (2014) [hereinafter Strine, *Making It Easier for Directors*] (describing this aspect of the benefit corporation movement as "incremental" and "inherently conservative").

44. § 101(c).

have the right to sue the directors for breach of their statutory duties via a lawsuit called a "benefit enforcement proceeding."[45]

Rather than accountability, the MBCL offers nonshareholding stakeholders a disclosure regime to ensure that benefit corporations fulfill their statutory purpose. Specifically, under the MBCL, every benefit corporation is required to prepare and make publicly available an annual benefit report.[46] In that report, the corporation must provide a narrative description of the ways it pursued and created general public benefit and any applicable specific public benefit during the preceding year.[47] In addition, the report must assess the corporation's overall environmental and social performance against the standards of an independent third party.[48] A cynical mind will be quick to remember that B Lab, the architect and chief advocate behind the MBCL, also provides such standards through its B Impact Assessment.[49] Indeed, the MBCL's definition of "third-party standard" is drafted in a way that "seems tailor-made for B Lab,"[50] although other third-party standards may also qualify under the statute.[51]

Through forceful lobbying,[52] and without organized political opposition, B Lab has been enormously successful in convincing

45. *See id.* § 102 (defining "benefit enforcement proceeding"); *id.* § 305(c) (identifying the benefit corporation and shareholders as the only parties with standing to bring a benefit enforcement proceeding). A shareholder's right to bring a benefit enforcement proceeding is further restricted by the statutory requirement that the shareholder must hold a sufficient percentage of the corporation's outstanding shares. *See id.* § 305(c)(2)(i)–(ii).

46. *See id.* §§ 401, 402(b).

47. *See id.* § 401(a)(1)(i)–(ii).

48. *See id.* § 401(a)(2); *see also id.* § 102 (defining "third-party standard").

49. Although B Lab's assessment tool is free to use by any benefit corporation, to earn B Lab's B Corporation certification, the corporation must earn a qualifying score on the assessment, be prepared to provide B Lab supporting documentation, and, of course, pay B Lab a fee, ranging from $500 to $50,000 annually based on the corporation's revenues. Dorff, *Assessing the Assessment*, *supra* note 21, at 518; B Lab, *Certification*, CERTIFIED B CORP., https://bcorporation.net/certification [https://perma.cc/X7Q5-66U5].

50. *See* Reiser, *supra* note 43, at 602.

51. *See* § 102 (defining "third-party standard" to be any "recognized standard for reporting overall social and environmental performance of a business that is" comprehensive, independent, credible, and transparent). Despite the fact that other third-party standards could qualify under the MBCL, in practice, B Lab's standards appear to be the most commonly used standards. *See* Winston, *supra* note 39, at 1804.

52. *See* Loewenstein, *Benefit Corporation Law*, *supra* note 19, at 382 n.7 (describing the author's experience with B Lab and its affiliates in the author's capacity as a member of the Colorado Bar Association Business Law Section while considering benefit corporation legislation); *see also* J. William Callison, *Benefit Corporations, Innovation, and Statutory Design*, 26 REGENT U. L. REV. 143, 159–63 (2013) [hereinafter Callison, *Benefit*

states to embrace its no-cost, feel-good legislation.[53] The first benefit corporation statute, based on the MBCL, was enacted by Maryland in 2010.[54] As of 2018, over thirty states have followed suit, adopting the MBCL,[55] although with some variations.[56] And more states are expected to join the bandwagon soon.[57]

2. Delaware Model

The chief alternative to the MBCL is Delaware's benefit corporation statute.[58] The central importance of Delaware to corporate law is well known.[59] Over sixty percent of the Fortune 500 are organized under Delaware law.[60] The state's courts—especially its Court of Chancery—have a national and international reputation for sophistication in business law.[61] And because so many businesses are organized under Delaware law, the state has an enormous and ever-growing body of judicial precedent, addressing a variety of novel factual and legal issues, giving the state's law the perception of certainty and predictability.[62]

Corporations] (describing the same and characterizing the experiences as "fairly acrimonious").

53. *See* Callison, *Benefit Corporations*, *supra* note 52, at 146 (describing B Lab's lobbying efforts as "well-financed and well-organized"); Brett McDonnell, *Benefit Corporations and Strategic Action Fields or (the Existential Failing of Delaware)*, 39 SEATTLE U. L. REV. 263, 282–83 (2016) (describing the political dynamics that have led to the widespread adoption of benefit corporation statutes); Murray, *The Social Enterprise Law Market*, *supra* note 9, at 580 (describing the political motivations for legislatures to adopt benefit corporation statutes).

54. Act of Apr. 13, 2010, ch. 97, 2010 Md. Laws 980 (codified as amended at MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01 to -08) (LEXIS through 2018 Reg. Sess.)).

55. *See* B Lab, *State by State*, *supra* note 1.

56. *See, e.g.*, Murray, *An Early Report on Benefit Reports*, *supra* note 39, at 31–32 (describing state law variation on provisions governing benefit reports).

57. *See* B Lab, *State by State*, *supra* note 1 (identifying several states in which benefit corporation legislation is in progress).

58. REISER & DEAN, *supra* note 9, at 66 (describing Delaware's statute as a "potent rival" to the MBCL).

59. *See, e.g.*, Brian J. Broughman, Jesse M. Fried & Darian M. Ibrahim, *Delaware Law as Lingua Franca: Theory and Evidence*, 57 J.L. & ECON. 865, 865 (2014); William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 2; Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1212 (2001).

60. Press Release, Jeffrey W. Bullock, Del. Sec'y of State, A Message from the Secretary of State, https://corp.delaware.gov/stats/ [https://perma.cc/MX5X-E3HM].

61. *See, e.g.*, Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 CIN. L. REV. 1061, 1077–78 (2000); William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 570.

62. *See, e.g.*, Kahan & Kamar, *supra* note 59, at 1212; Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy*, 52 B.C. L. REV. 189, 211–16 (2011) [hereinafter Manesh, *Delaware and the Market for LLC Law*].

When B Lab approached Delaware to adopt benefit corporation legislation, rather than simply embrace the MBCL, the state's lawmaking organs instead drafted their own legislation.[63] The resulting Delaware Public Benefit Corporation statute was adopted in 2013.[64] Given Delaware's influence in the business law world, it is unsurprising that other states—including Colorado, Kansas, Kentucky, Tennessee, and Minnesota—have since adopted some or all aspects of Delaware's statute.[65]

Despite some technical and terminological differences—for example, referring to benefit corporations as "*public* benefit corporation[s]"[66]—the Delaware statute is largely in accord with the MBCL. Similar to the MBCL, which provides that the purpose of a benefit corporation is to create "[a] material positive impact on society and the environment,"[67] the Delaware statute states that a public benefit corporation is one "that is intended to produce a public benefit . . . and to operate in a responsible and sustainable manner."[68] Likewise, the Delaware statute, in accord with the MBCL, requires the board of directors of a public benefit corporation to manage the business in a manner that accounts for the interests of not only the shareholders but also all nonshareholding constituencies materially affected by the corporation's activities.[69] Thus, like the MBCL, the Delaware statute contemplates a for-profit business that is also socially minded.

63. *See* ALEXANDER, *supra* note 3, at 2–3, 86 (describing the deliberation and drafting process in Delaware).

64. *See* Act of July 17, 2013, ch. 122, § 8, 79 Del. Laws 1, 2–4 (codified as amended at DEL. CODE ANN. tit. 8, §§ 361–368 (2016 & Supp. 2018)).

65. *See* ALEXANDER, *supra* note 3, at 87 (identifying Colorado, Kansas, Kentucky, and Tennessee as states following Delaware's approach); Murray, *The Social Enterprise Law Market*, *supra* note 9, at 553 (identifying Colorado and Minnesota as states following Delaware's approach).

66. *See* DEL. CODE ANN. tit. 8, § 362(a) (2016) (emphasis added).

67. MODEL BENEFIT CORP. LEGIS. § 201(a) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS] (prescribing the purpose of a benefit corporation); *id.* § 102 (defining "general public benefit").

68. *See* tit. 8, § 362(a). Although Delaware's statute does not use the expression "general public benefit," its open-ended mandate for benefit corporations to "operate in a responsible and sustainable manner" is analogous to the MBCL's mandate for benefit corporations to pursue "general public benefit," which the MBCL defines as "a material positive impact on society and the environment." § 102.

69. *See* DEL. CODE ANN. tit. 8, § 365(a) (2016) ("The board of directors shall manage . . . the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.").

The chief deviations of the Delaware statute from the MBCL relate to specific public benefits and the rules regarding benefit reports. First, unlike the MBCL, under which the pursuit of a specific public benefit is an optional purpose,[70] Delaware's statute mandates that each benefit corporation designate in its corporate charter a specific public benefit that the corporation will produce.[71] The requirement of a specific public benefit under the Delaware statute is intended to provide more focus and guidance and, perhaps, create more accountability for directors,[72] as compared to the requirement of general public benefit under the MBCL, which is defined so broadly as to be arguably meaningless and, therefore, unenforceable.[73]

Second, the Delaware statute deviates from the MBCL's rules regarding a corporation's benefit report. Under the Delaware statute, a benefit report may be prepared biennially (rather than annually)[74] and made available to the shareholders only (rather than made publicly available).[75] More importantly, the Delaware statute dispenses with the MBCL's requirement that a benefit report must assess the corporation's activities against the standards of a third

70. *See* MODEL BENEFIT CORP. LEGIS. § 201(b) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS].

71. *See* tit. 8, § 362(a) ("In the certificate of incorporation, a public benefit corporation shall . . . [i]dentify within its statement of business or purpose . . . 1 or more specific public benefits to be promoted by the corporation . . . ."); *id.* § 362(b) (defining "public benefit" to mean "a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders)").

72. *See* ALEXANDER, *supra* note 3, at 91 ("[T]he requirement of specificity was an acknowledgment that creating accountability with respect to broad public benefit was a difficult proposition . . . . Though the specific benefit requirement does not relax the general requirements, it does potentially supply a more meaningful opportunity to hold a corporation accountable for public benefit."); Murray, *Social Enterprise Innovation*, *supra* note 4, at 355–56 ("Delaware moved in the direction of more directorial guidance by requiring [benefit corporations] to choose a specific public benefit purpose . . . . [This] will likely aid directors in decision-making and may . . . create some level of accountability for directors.").

73. *See infra* notes 264–68 and accompanying text.

74. *Compare* DEL. CODE ANN. tit. 8, § 366(b) (2016) (requiring a benefit report "no less than biennially"), *with* MODEL BENEFIT CORP. LEGIS. § 401(a) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS] (requiring "an annual benefit report").

75. *Compare* tit. 8, § 366(b) (requiring a benefit report to be provided to stockholders), *with* MODEL BENEFIT CORP. LEGIS. § 402(a), (c) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS] (requiring a benefit report to be provided to shareholders and made available publicly).

party,[76] allowing a board to define its own standard by which to assess the business's creation of public benefit.[77] If a Delaware public benefit corporation wishes to provide a benefit report annually, to make that report available publicly, or to assess itself against third-party standards, the corporation is free to do so.[78] However, unlike the MBCL, none of these things are mandatory under Delaware's benefit corporation statute.

B. Legal Justification for Benefit Corporations

Advocates of benefit corporation legislation—whether pursuant to the MBCL or the Delaware statute—have strongly emphasized the legal need for the new statutory business form.[79] Conventional corporate law, B Lab and others have argued, requires the directors of a corporation to maximize profits for the sole benefit of its shareholders.[80] This legal constraint—to privilege the financial interests of the shareholders above all else—hinders socially minded entrepreneurs from operating a for-profit business responsibly and sustainably, in a manner that is attentive to the good of other stakeholders, society, and the environment.[81] This view of conventional corporate law, as mandating shareholder primacy, has been espoused not only by the advocates of benefit corporation legislation but by many corporate law scholars,[82] as well as some jurists.[83]

Of course, no one can point to a statutory provision that bluntly commands a conventional corporation to maximize the wealth of its shareholders or otherwise precludes corporate directors from considering or advancing the interests of nonshareholding

76. *Compare* DEL. CODE ANN. tit. 8, § 366(c)(3) (2016) (allowing for an optional assessment against the standards of a third party), *with* MODEL BENEFIT CORP. LEGIS. § 401(a)(2) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS] (requiring an assessment against the standards of a third party).

77. *See* tit. 8, § 366(b).

78. *See id.* tit. 8, § 366(c)(1), (3).

79. *See, e.g.*, CLARK ET AL., *supra* note 3, at 1; Clark & Babson, *supra* note 5, at 851.

80. *See, e.g.*, ALEXANDER, *supra* note 3, at 22–24, 26–29; CLARK ET AL., *supra* note 3, at 7–11; Clark & Babson, *supra* note 5, at 825–34.

81. *See, e.g.*, CLARK ET AL., *supra* note 3, at 14 (asserting that "[b]ased on the established . . . legal frameworks, directors face legal uncertainty").

82. *See, e.g.*, STEPHEN M. BAINBRIDGE, CORPORATE LAW 157 (3d ed. 2015); Yosifon, *Law of Corporate Purpose*, *supra* note 2, at 183.

83. *See infra* text accompanying notes 103–06.

constituencies. Indeed, no such statutory provision exists.[84] Instead, advocates of benefit corporation legislation commonly point to three judicial precedents interpreting and applying the fiduciary duties owed by the directors of a corporation.[85] Advocates assert these three precedents demonstrate that conventional corporate law commands directors to advance solely the interests of shareholders or otherwise face shareholder lawsuits and the threat of legal liability for breach of fiduciary duty.[86]

The first precedent is the 1919 decision of the Michigan Supreme Court, *Dodge v. Ford*,[87] involving a dispute between the controlling and minority shareholders of Ford Motor Company.[88] To justify withholding dividends from the minority shareholders, the controlling shareholder, Henry Ford, argued that his namesake company would rather use its surplus cash to benefit its employees and society more broadly.[89] In rejecting Ford's assertion, the Michigan Supreme Court announced:

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself . . . .[90]

The second commonly cited precedent is the 1984 case *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[91] Seeking to avoid a hostile takeover of the popular cosmetics company, Revlon's board of directors adopted various defensive measures, justifying them as protecting the interests of Revlon's creditors.[92] In enjoining the actions of Revlon's board, the Delaware Supreme Court observed that as a general matter, "[a] board may have regard for various [nonstockholder] constituencies in discharging its responsibilities,

84. *See* Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 939, 947–49 (2017) [hereinafter Heminway, *Shareholder Wealth Maximization*]; Yosifon, *Law of Corporate Purpose*, *supra* note 2, at 185–87.

85. *See, e.g.*, ALEXANDER, *supra* note 3, at 22–28 (discussing *Dodge*, *Revlon*, and *eBay*); CLARK ET AL., *supra* note 3, at 7–13 (same); Clark & Babson, *supra* note 5, at 825–38 (same).

86. *See* ALEXANDER, *supra* note 3, at 22.

87. 170 N.W. 668 (Mich. 1919).

88. *See id.* at 670–71.

89. *See id.* at 671.

90. *Id.* at 684.

91. 506 A.2d 173 (Del. 1986).

92. *See id.* at 180–82.

provided there are rationally related benefits accruing to the stockholders."[93] Thus, the Delaware Supreme Court recognized that corporate directors are not barred from considering the interests of nonshareholders (like debtholders), but those interests must be viewed through a prism of shareholder primacy—namely, whether advancing nonshareholder interests would ultimately benefit the shareholders of the corporation.[94] Even then, however, the court added that in the unique context involving a sale or change or control of the company, "such concern for non-stockholder interests is *inappropriate*."[95] In that unique context, the court held the board has a singular duty: "the maximization of the company's value at a sale for the stockholders' benefit."[96]

Finally, advocates commonly cite the 2010 decision of the Delaware Chancery Court in *eBay Domestic Holdings, Inc. v. Newmark*,[97] involving a dispute between the controlling and minority shareholders of the online classifieds company Craigslist.[98] The two controlling shareholders of Craigslist took various defensive measures to protect the company's community-oriented corporate culture from its profit-seeking minority shareholder eBay.[99] In *eBay*, the chancellor rejected the controlling shareholders' actions, reasoning that

> [t]he corporate form in which craigslist operates . . . is not an appropriate vehicle for purely philanthropic ends . . . . Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders.[100]

B Lab and others argue these three precedents evince the reality that it is a bedrock principle of conventional corporate law that a corporation, and the directors who manage it, must solely pursue the financial interests of the corporation's shareholders.[101] Any concern

93. *Id.* at 182 (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985)).
94. *See id.*
95. *Id.* (emphasis added).
96. *Id.*
97. 16 A.3d 1 (Del. Ch. 2010).
98. *See id.* at 6–7.
99. *See id.* at 6.
100. *Id.* at 34.
101. *See, e.g.*, ALEXANDER, *supra* note 3, at 26–31; CLARK ET AL., *supra* note 3, at 7, 11, 13; Clark & Babson, *supra* note 5, at 825–28, 834.

for nonshareholding constituencies must be "rationally related" to the ultimate corporate purpose of maximizing shareholder wealth.[102]

Beyond these three judicial precedents, advocates point to the academic writings of the Delaware Supreme Court Chief Justice, Leo Strine.[103] In his extrajudicial capacity, the outspoken chief judicial officer of the preeminent corporate law jurisdiction has made explicit his belief that conventional corporate law requires directors to manage a corporation solely for the benefit of its shareholders.[104] According to Chief Justice Strine,

> Despite attempts to muddy the doctrinal waters, a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare.[105]

In the same article, the chief justice adds that

> *Dodge v. Ford* and *eBay* are hornbook law because they make clear that if a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty.[106]

Taken together, advocates argue, the extrajudicial pronouncements of the Delaware Chief Justice coupled with the judicial precedents of *Dodge*, *Revlon*, and *eBay* palpably demonstrate that the central mandate of conventional corporate law is that a corporation must be managed solely for the benefit of its

102. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

103. *See* Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 769–81 (2015) [hereinafter Strine, *The Dangers of Denial*]; Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 135 (2012) [hereinafter Strine, *Our Continuing Struggle*].

104. *See, e.g.*, Strine, *Our Continuing Struggle*, *supra* note 103, at 151 ("[A]s a matter of corporate law, the object of the corporation is to produce profits for the stockholders. . . . [T]he social beliefs of the managers, no more than their own financial interests, cannot be their end in managing the corporation."); *id.* at 155 ("[C]orporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders.").

105. *See* Strine, *The Dangers of Denial*, *supra* note 103, at 768.

106. *Id.* at 776–77.

shareholders.[107] If the directors of a corporation fail to do this, they risk shareholder lawsuits and personal liability for breach of fiduciary duty.[108] It is this central mandate of conventional corporate law that advocates argue hinders socially minded entrepreneurs and necessitates benefit corporations.

C. Refuting the Legal Justification for Benefit Corporations

Despite the assertions advanced by B Lab and others, any casual observer might be immediately skeptical that a new statutory business form is, in fact, needed to accommodate social enterprises.[109] After all, even before the existence of benefit corporation statutes, one could readily cite examples of prominent for-profit businesses that ascribe to and pursue a social mission.[110] Consider the familiar buy-one-give-one businesses TOMS Shoes and Warby Parker.[111] The fact that these businesses—organized under conventional law—could pursue an explicitly prosocial agenda suggests that benefit corporations are unnecessary to accomplish this. Indeed, setting aside the contested normative question about whether private, for-profit corporations have a social responsibility,[112] it is plain that as a strictly legal matter, conventional corporate law already permits purpose-

107. *See, e.g.*, ALEXANDER, *supra* note 3, at 26–31; CLARK ET AL., *supra* note 3, at 7–14; Clark & Babson, *supra* note 5, at 825–38.

108. *See, e.g.*, CLARK ET AL., *supra* note 3, at 14 (asserting that "[b]ased on the established state legal frameworks, directors [of social enterprises] face legal uncertainty").

109. *See* Joan MacLeod Heminway, *Let's Not Give Up on Traditional For-Profit Corporations for Sustainable Social Enterprise*, 86 UMKC L. REV. 779, 800–01 (2018) [hereinafter Heminway, *Let's Not Give Up*] (concluding that "[u]nder existing corporate law doctrine, theory, and policy, sustainable social enterprises have been, are being, and may be properly and profitably formed, and may continue to exist, as [conventional corporations]—even with the relatively new introduction of benefit corporations and other social enterprise forms of entity"); Peter Molk, *Do We Need Specialized Business Forms for Social Enterprise?*, *in* THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW 241, 244 (Benjamin Means & Joseph W. Yockey eds., 2018) ("[M]any firms that have now converted to one of the new social enterprise forms first operated for many years as corporations. And they were able to do so because corporate law has long allowed corporations the flexibility to consider other constituents beyond investors.").

110. *See* Tu, *supra* note 21, at 169–70 (citing several examples of prominent for-profit businesses that ascribe to and pursue a social mission); *see also* Blount & Offei-Danso, *supra* note 43, at 660–62 (citing additional examples).

111. *See* Tu, *supra* note 21, at 169–70 (discussing TOMS Shoes and Warby Parker); Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 777 (2015) (same). It should be noted that TOMS Shoes is in fact organized as an LLC but is nonetheless mentioned here as a salient example of a conventionally organized business committed to a social mission.

112. *See* Tu, *supra* note 21, at 127–31 (summarizing the normative debate).

driven businesses to advance a social mission alongside or even ahead of profits.[113]

1. Shareholder Primacy Is Not Required by Law

To begin with, state corporation statutes, including Delaware's, allow for the formation of a corporation for "*any* lawful business."[114] Thus, rather than dictating the purpose of a corporation to be the pursuit of profits for the sole benefit of its shareholders, state statutes expressly defer on the question of corporate purpose, allowing for the possibility that a corporation might be formed for any sort of purpose, including the pursuit of a social mission that might curb or conflict with profit seeking.[115] Admittedly, as a practical matter, corporations must seek profit to survive.[116] But corporation statutes do not expressly contemplate the pursuit of profits or profit maximization as a corporation's sole or even ultimate purpose.

The commonly cited cases—*Dodge*, *Revlon*, and *eBay*—do not compel a different conclusion.[117] *Dodge* is an archaic decision that today has dubious precedential value.[118] Moreover, the decision's language regarding shareholder primacy is arguably dicta, and not part of the court's holding.[119] Further, *Dodge* and *eBay* are more appropriately understood as disputes between controlling and

113. *See* Judd F. Sneirson, *Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 1007 (2009) ("[C]orporate law contains no general requirement that directors and officers maximize shareholder profits and only departs from this view in rare instances that should not affect most green business decisions."); *see also* Blount & Offei-Danso, *supra* note 43, at 659–60 (arriving at the same conclusion); Heminway, *Let's Not Give Up*, *supra* note 109, at 780–87 (same); Tu, *supra* note 21, at 131–41, 169–70 at (same); Winston, *supra* note 39, at 1813 (same); Yockey, *supra* note 111, at 786–88 (same).

114. *See* DEL. CODE ANN. tit. 8, § 101(b) (2016) (emphasis added); *see also* MODEL BUS. CORP. ACT § 3.01(a) (AM. BAR ASS'N 2016) ("Every corporation incorporated under this Act has the purpose of engaging in any lawful business . . . .").

115. *See, e.g.*, Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1, 13–14 (2014).

116. *Id.* at 10.

117. *See* Heminway, *Shareholder Wealth Maximization*, *supra* note 84, at 955 (concluding, after an analysis of the relevant case law, that "it would be over-claiming to assert that U.S. state decisional law—any more than U.S. state statutory law—articulates a clear, legally enforceable shareholder wealth maximization norm as a matter of substantive corporate doctrine"); Johnson & Millon, *supra* note 115, at 10 ("State corporate law does not require corporations to prioritize profits over competing considerations.").

118. *See* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 167 (2008) (questioning the precedential value of *Dodge*); Winston, *supra* note 39, at 1812–13 (same); Yosifon, *Law of Corporate Purpose*, *supra* note 2, at 188 (conceding *Dodge* has limited precedential value).

119. *See* Johnson & Millon, *supra* note 115, at 12; Stout, *supra* note 118, at 167.

minority shareholders, and, therefore, the judicial assertions in both decisions as to the ultimate purpose of a corporation must be understood in that specific context and not as a broader judicial mandate that corporations must always maximize shareholder wealth.[120]

As to *Revlon*, that decision applies in only a narrow and specific circumstance: where the directors of the corporation have chosen to undertake a transaction that will result in a "sale or change of control."[121] Directors cannot be forced into a sale, however.[122] Consequently, the applicability of *Revlon*'s shareholder-wealth-maximization duty is, in the first instance, optional—a choice that must be made by a corporation's board[123]—and not an inexorable legal mandate.[124] Directors may always elect to keep a corporation independent to continue to pursue its social mission.[125]

120. *See* Brian Galle, *Social Enterprise: Who Needs It?*, 54 B.C. L. REV. 2025, 2039–40 (2013); Johnson & Millon, *supra* note 115, at 10–13; D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 315–20 (1998); Stout, *supra* note 118, at 167–68; Tu, *supra* note 21, at 135–36; Gordon Smith, eBay v. Newmark*: A Modern Version of* Dodge v. Ford Motor Company, CONGLOMERATE (Sept. 9, 2010), https://web.archive.org/web/20100912123758/http://www.theconglomerate.org/2010/09/ebay-v-newmark-a-modern-version-of-dodge-v-ford-motor-company.html [https://perma.cc/YYL3-B9Y6].

121. Although "sale or change of control" transactions are the most common types of transactions that trigger *Revlon* scrutiny, *Revlon* also applies to two other categories of end-stage "break-up" transactions. *See* Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1289–90 (Del. 1994) (delineating four specific transactional triggers for *Revlon* scrutiny).

122. *See* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 55 (Del. Ch. 2011) (holding that the power to defeat an unwanted acquisition proposal ultimately lies with a corporation's board).

123. *See* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242 (Del. 2009) (holding that *Revlon* applies only when a corporation's board has elected to pursue a potential sale and not when the board simply becomes aware of a prospective acquirer's interest in a potential transaction); *Air Prods. & Chems.*, 16 A.3d at 129 ("[A] board cannot be forced into *Revlon* mode any time a hostile bidder makes a tender offer that is at a premium to market value.").

124. *See Air Prods. & Chems.*, 16 A.3d at 112 ("When a company is not in *Revlon* mode, a board of directors 'is not under any *per se* duty to maximize shareholder value in the short term, even in the context of a takeover.'" (quoting Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989))).

125. As the Delaware Supreme Court has explained,

> The fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate goals. That duty may not be delegated to the stockholders . . . . Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy.

Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1154 (Del. 1989); *accord Air Prods. & Chems.*, 16 A.3d at 124 (quoting *Paramount*, 571 A.2d at 1154).

Moreover, even if decisions like *Dodge*, *Revlon*, and *eBay* are understood to mean that corporate directors must always prioritize shareholders' interests, that does not mean that directors must be solely concerned with profit maximization at the expense of all other considerations. That is because prioritizing the shareholders' interests is not per se the same thing as maximizing the corporation's profits. Shareholders of any given corporation will inevitably have interests that extend far beyond the profits of that corporation.[126] Like all humans, shareholders have a range of interests—some financial, some nonfinancial, some selfish, and some altruistic—in the broader economy, the environment, and their fellow humans.[127] These interests will, at times, necessarily compete with maximizing the corporation's profits. Therefore, if corporate law commands directors to prioritize the interests of shareholders, that command may be perfectly compatible with advancing the interests of nonshareholders, even where doing so might reduce the shareholders' financial return.

Finally, regarding the academic writing of Chief Justice Strine, those extrajudicial musings have no legal force, even if the chief justice's personal beliefs are provocative and influential. Indeed, it is not a coincidence that the chief justice has left it to academic articles, rather than written judicial opinions, to espouse his views on shareholder primacy. Because, as discussed next, even if cases like *Dodge*, *Revlon*, and *eBay* are interpreted to mean that conventional corporate law unequivocally mandates shareholder profit maximization, conventional corporate law does not translate that mandate into an enforceable legal duty.

2. Shareholder Primacy Is Not Enforced by Courts

Corporation statutes vest a corporation's board of directors with the power and authority to manage the business and affairs of the corporation.[128] In most cases, the board's exercise of this statutory power is protected from judicial or shareholder second-guessing by the judge-made doctrine of the business judgment rule.[129] Under the

126. *See* LYNN STOUT, THE SHAREHOLDER VALUE MYTH 86–89, 96–99 (2012); Paul Weitzel & Zachariah J. Rodgers, *Broad Shareholder Value and the Inevitable Role of Conscience*, 12 N.Y.U. J.L. & BUS. 35, 41–42, 49–55 (2015); Winston, *supra* note 39, at 1817.

127. *See* STOUT, *supra* note 126, at 86–89, 96–99; Winston, *supra* note 39, at 1817–18.

128. *See* DEL. CODE ANN. tit. 8, § 141(a) (2016); MODEL BUS. CORP. ACT § 8.01(b) (AM. BAR ASS'N 2016).

129. *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) ("Under Delaware law, the business judgment rule is the offspring of the fundamental principle . . . that the business and affairs of a Delaware corporation are managed by or under its board of

business judgment rule, in the absence of bad faith or a conflict of interest, courts will not entertain a shareholder lawsuit challenging a board decision that "can be attributed to any rational business purpose."[130]

As a consequence of the business judgment rule, in virtually all operational decisions, corporate directors are afforded significant discretion on how to manage the business and affairs of the corporation, without fearing a credible threat of judicial intervention or personal liability.[131] Applying the business judgment rule, courts routinely defer to board decisions that may demonstrably cost the corporation in the near term where there is *any* plausible explanation for how that decision will benefit the corporation, and thus its shareholders, over the longer term.[132] Of course, decisions that advance a corporation's social mission are precisely the type that would fall into such a category.[133]

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directors. . . . The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors."); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("The business judgment rule is an acknowledgment of the managerial prerogatives of Delaware directors under Section 141(a).").

130. *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971); *accord Aronson*, 473 A.2d at 812–13. *See generally* BAINBRIDGE, *supra* note 82, at 122–35 (explaining when the business judgment rule applies).

131. *See, e.g.*, STOUT, *supra* note 126, at 29–31; Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 770–76 (2005).

132. *See* Elhauge, *supra* note 131, at 772 ("[E]ven if profit-maximization were the nominal standard, business judgment review would still sustain any public-spirited activity without any inquiry into actual profitability or managers' actual purposes as long as it has some conceivable relationship, however tenuous, to long run profitability."); Stout, *supra* note 118, at 170–71 (observing that, under the business judgment rule, "courts regularly allow corporate directors to make business decisions that harm shareholders in order to benefit other corporate constituencies . . . so long as any plausible connection can be made between the directors' decision and some possible future benefit, however intangible and unlikely, to shareholders"); Strine, *Our Continuing Struggle*, *supra* note 103, at 147 n.34 ("It is, of course, accepted that a corporation may take steps, such as giving charitable contributions or paying higher wages, that do not maximize corporate profits currently. They may do so, however, because such activities are rationalized as producing greater profits over the long-term."); Tu, *supra* note 21, at 140 ("[T]he discretion granted under the business judgment rule effectively eviscerates the claim that corporation managers must be driven by the sole goal of shareholder profit maximization."); Yockey, *supra* note 111, at 787 (noting that because of the business judgment rule "no modern court has overturned an ordinary business decision on the basis that it impermissibly put social goals ahead of shareholder profits").

133. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010) ("When director decisions are reviewed under the business judgment rule, this Court will not question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value."); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 303 (1999) ("[C]ase law interpreting the business

To take one example, consider the decision of the pharmaceutical retailer CVS Caremark in 2014 to stop selling tobacco products in its stores[134]—a decision that predictably caused an immediate drop in CVS's retail sales.[135] The company's CEO justified the decision, in part, by invoking CVS's decidedly prosocial corporate mission: for a business "dedicated to helping people on their path to better health," the CEO explained, "the sale of tobacco products is inconsistent with our purpose" as a company.[136] But the CEO also justified the decision, in part, by invoking the potential for long-term financial returns: "[R]emoving tobacco products from our retail shelves further *distinguishes us* in how we are serving our patients, clients and health care providers and *better positions us for continued growth* in the evolving health care marketplace."[137]

No one doubts that corporate actions like CVS's decision to cease tobacco sales would be protected from judicial scrutiny by the business judgment rule.[138] Consequently, even those who insist that corporate law mandates shareholder wealth maximization concede that the business judgment rule makes it virtually impossible to enforce that mandate in court.[139] Instead, they argue that the ability of

judgment rule often explicitly authorizes directors to sacrifice shareholders' interests to protect other constituencies."); Elhauge, *supra* note 131, at 772 ("[I]t is hard to see what socially responsible conduct could not plausibly be justified under the commonly accepted rationalizations that it helps forestall possible adverse reactions from consumers, employees, the neighborhood, other businesses, or government regulators . . . ."); Johnson & Millon, *supra* note 115, at 11 ("[B]usiness corporations pursuing social missions at the expense of shareholder value are [likely] to justify such policies with reference to long-run shareholder financial interests . . . .").

134. CVS Caremark, *CVS Caremark to Stop Selling Tobacco at All CVS/Pharmacy Locations*, PR NEWSWIRE (Feb. 5, 2014), https://www.prnewswire.com/news-releases/cvs-caremark-to-stop-selling-tobacco-at-all-cvspharmacy-locations-243662651.html [https://perma.cc/JJQ4-SRKD].

135. Matt Egan, *CVS Banned Tobacco. Now Its Sales Are Hurting*, CNN BUS. (Aug. 4, 2015), https://money.cnn.com/2015/08/04/investing/cvs-earnings-cigarettes/ [https://perma.cc/Y5WP-2WX8].

136. CVS Caremark, *supra* note 134.

137. *Id.* (emphasis added).

138. *See* Joshua P. Fershee, *The End of Responsible Growth and Governance?: The Risks Posed by Social Enterprise Enabling Statutes and the Demise of Director Primacy*, 19 TRANSACTIONS: TENN. J. BUS. L. 361, 376–81 (2017) (arguing that CVS should be entitled to the deference of the business judgment rule even in the absence of any explanation as to its potential for realizing value in the long term).

139. *See, e.g.*, BAINBRIDGE, *supra* note 82, at 248 ("The court may hold forth on the primacy of shareholder interests, . . . [but] directors who consider nonshareholder interests in making corporate decisions . . . will be insulated from liability by the business judgment rule."); Strine, *The Dangers of Denial*, *supra* note 103, at 776 ("[T]he business judgment rule provides directors with wide discretion, and thus enables directors to justify—by reference to long-run stockholder interests—a number of decisions that may in fact be

directors to tacitly eschew shareholder primacy and advance nonshareholder concerns is an "unintended consequence of the business judgment rule."[140] But from a pragmatic perspective, there is little difference between a legal regime that openly rejects shareholder primacy and one that simply declines to enforce it.[141]

Nevertheless, one might point to cases like *Dodge* and *eBay* to argue that, despite the protections of the business judgment rule, courts do, in fact, sometimes enforce shareholder primacy.[142] Indeed, these cases do suggest an outer limit to the business judgment rule: when directors openly renounce shareholder interests in favor of any nonshareholding constituencies, they lose the presumption of good faith and, therefore, the protection of the business judgment rule.[143] But few, if any, business leaders would ever renounce their shareholders' interests because few, if any, actually believe that socially and environmentally conscious pursuits are zero-sum propositions that must come at the expense of shareholder returns.[144] Instead, social entrepreneurs tend to believe that a prosocial mission and for-profit activities create synergy—that socially and environmentally responsible policies boost shareholders' returns in the long run.[145] That is, after all, the social enterprise business

motivated more by a concern for a charity the CEO cares about, the community in which the corporate headquarters is located, or once in a while, even the company's ordinary workers, rather than long-run stockholder wealth."); Yosifon, *Law of Corporate Purpose*, *supra* note 2, at 223 (conceding that the business judgment rule gives directors "near total discretion" and, therefore, "it is nearly impossible to enforce the shareholder primacy norm"). *But see* CLARK ET AL., *supra* note 3, at 12 (asserting that even in cases where the business judgment rule applies, "resolution of litigation by a shareholder seeking maximized financial return against the directors . . . would be uncertain at best").

140. *See* Yosifon, *Law of Corporate Purpose*, *supra* note 2, at 222–26; Stephen Bainbridge, *The Relationship Between the Shareholder Wealth Maximization Norm and the Business Judgment Rule*, PROFESSORBAINBRIDGE.COM (May 5, 2012), http://www.professorbainbridge.com/professorbainbridgecom/2012/05/the-relationship-between-the-shareholder-wealth-maximization-norm-and-the-business-judgment-rule.html [https://perma.cc/FSK4-9WF8].

141. Arguably, this assertion conflates a standard of conduct (shareholder wealth maximization) with a standard of review (business judgment rule). *See* ALEXANDER, *supra* note 3, at 38–39. But from a pragmatic perspective, the standard of review is far more relevant to a director than a precatory, judicially unenforced standard of conduct.

142. *See* Murray, *Choose Your Own Master*, *supra* note 2, at 12; Yosifon, *Law of Corporate Purpose*, *supra* note 2, at 225.

143. *See* Strine, *Our Continuing Struggle*, *supra* note 103, at 147–48.

144. More cynically, one could argue that the reason socially minded business leaders seldom openly renounce shareholder interests is that "[a]fter *Dodge v. Ford*, most . . . have realized they need to tie altruistic motivations back to long-term shareholder value." Murray, *Choose Your Own Master*, *supra* note 2, at 13.

145. *See, e.g.*, YVON CHOUINARD, LET MY PEOPLE GO SURFING: THE EDUCATION OF A RELUCTANT BUSINESSMAN 3 (2006) ("[B]usiness can produce food, cure disease,

model.[146] Thus, even if one reads *Dodge* and *eBay* to place an outer limit on the protections of the business judgment rule, that limit is trivial for directors bent on pursuing social or environmental goals.

Although the business judgment rule affords directors significant discretion to advance nonshareholder interests, some have expressed concern that in circumstances where the courts have held the business judgment rule is inapplicable—especially upon the sale of the company—directors are legally obligated to focus solely on shareholder wealth.[147] After all, as already noted, *Revlon* holds unequivocally that where a board of directors seeks to sell a corporation, "concern for non-stockholder interests is *inappropriate*."[148] Instead, "[t]he duty of the board [is] the maximization of the company's value at a sale for the stockholders' benefit."[149]

But even this seemingly unequivocal duty is largely unenforceable.[150] To begin with, as already noted, a corporation's board cannot be forced into a sale and, therefore, is not inexorably subject to the *Revlon* duty to maximize shareholder wealth.[151] Even when directors do elect to pursue a sale and, consequently, become

control population, employ people, and generally enrich our lives. And it can do these good things and make a profit, without losing its soul."); Hamermesh et al., *supra* note 23, at 323 ("[O]ver the course of the 11 years [in business], over and over again, our commitment to social responsibility proved to be not only the right thing to do but also good business. We saw that show up in employee retention, relationships with our suppliers, [and] relationships with our retailers . . . ." (quoting a founder of B Lab)).

146. *See generally* Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623 (2007) (making the business case that socially and environmentally responsible policies can enhance shareholder value); Michael E. Porter & Mark R. Kramer, *Creating Shared Value: How to Reinvent Capitalism—and Unleash a Wave of Innovation and Growth*, HARV. BUS. REV., Jan.–Feb. 2011, at 2 (same).

147. *See, e.g.*, CLARK ET AL., *supra* note 3, at 13. Aside from the sale context, corporate boards do not enjoy the deference of the business judgment rule when undertaking defensive measures in the face of a hostile takeover bid. *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1372–74 (Del. 1995). However, in the hostile takeover context, relevant law already expressly enables boards to consider the interest of nonshareholding constituencies. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985). Moreover, courts afford boards significant discretion in resisting an unwanted acquisition proposal. *See supra* note 121–25 and accompanying text.

148. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (emphasis added).

149. *Id.*

150. *See* Lyman Johnson & Robert Ricca, *The Dwindling of Revlon*, 71 WASH. & LEE L. REV. 167, 217 (2014) (suggesting that *Revlon* is no longer "a legally enforceable directive" but instead "a customarily adhered to but ultimately nonenforceable norm or mere aspirational standard").

151. *See supra* notes 121–25 and accompanying text.

subject to *Revlon*, courts afford directors significant latitude in determining the process and ultimate terms of the sale.[152] Courts often repeat the mantra that "there is no single blueprint that a board must follow to fulfill its [*Revlon*] duties."[153] In practice, this mantra means that, in the absence of a conflict of interest, courts will require an "extreme set of facts" to hold directors monetarily liable under *Revlon* for breach of fiduciary duty.[154] More significantly, the requirements of *Revlon* are inoperative where the sale of a corporation has been approved by a majority vote of the corporation's shareholders[155]—even if it can be shown that the sale failed to maximize shareholder wealth. The upshot is that courts will almost never hold directors liable for damages under *Revlon*[156] and have little reason to even enjoin a proposed sale pending a shareholder vote based solely on the premise that the directors have failed to maximize shareholder value.[157]

152. *See, e.g.*, C & J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr., 107 A.3d 1049, 1053 (Del. 2014) ("*Revlon* and its progeny do not set out a specific route that a board must follow . . . , and an independent board is entitled to use its business judgment to decide to enter into a strategic transaction that promises great benefit, even when it creates certain risks."); *id.* at 1067 ("*Revlon* does not require a board to set aside its own view of what is best for the corporation's stockholders and run an auction whenever the board approves a change of control transaction."); Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242–43 (Del. 2009) ("No court can tell directors exactly how to accomplish th[e] goal [of maximizing shareholder value] . . . . [T]here are no legally prescribed steps that directors must follow to satisfy their *Revlon* duties.").

153. *See, e.g.*, *C & J Energy Servs.*, 107 A.3d at 1067 (quoting Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989)).

154. *See Lyondell Chem.*, 970 A.2d at 243 (quoting *In re* Lear Corp. S'holder Litig., 967 A.2d 640, 654 (Del. Ch. 2008)).

155. *See* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 308–09 (Del. 2015) (holding that the business judgment rule, rather than *Revlon*, applies where a transaction has been approved by an "uncoerced, informed stockholder vote").

156. *See id.* at 312 (noting that *Revlon* is "not [a] tool[] designed with post-closing money damages claims in mind"); Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 606 (2018) (noting that "deferential standards of judicial review" in cases like *Corwin* has "[t]he net effect of . . . limit[ing] substantially the availability of a post-closing suit for damages"); James D. Cox & Randall S. Thomas, *Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law*, 42 DEL. J. CORP. L. 323, 337 (2018) (observing that *Corwin* "appears to confine *Revlon* duties to equitable relief, except where there is egregious misconduct").

157. *See, e.g.*, *Corwin*, 125 A.3d at 312–13 ("[T]he long-standing policy of our law has been to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction for themselves."); *C & J Energy Servs.*, 107 A.3d at 1068, 1070–71 (explaining that an injunction based on *Revlon* is inappropriate where shareholders will have the opportunity to vote on the pending transaction at issue); Johnson & Ricca, *supra* note 150, at 211–15 ("In recent years, the chancery court consistently has refused to grant injunctive relief on *Revlon* claims in the pre-closing context.").

So, in summary, although courts might sometimes use the rhetoric of shareholder primacy, that rhetoric does not, absent unusual or extraordinary facts, translate into an enforceable legal duty. But even if conventional corporate law did mandate *and* enforce shareholder wealth maximization as a legal duty of a corporation's board, as described next, that duty is at most a default rule. It is not mandatory—not under Delaware law at least. Consequently, social enterprises seeking to advance a social mission alongside profits are already able to opt out of any perceived legal strictures imposed by shareholder primacy.

3. Shareholder Primacy Is Subject to Private Ordering

Delaware's general corporation statute, like the conventional corporation statutes of other jurisdictions, is broadly enabling, providing mostly default rules of corporate governance and permitting entrepreneurs and investors significant freedom to tailor those rules through the terms of a corporation's governing documents.[158] As already noted, the Delaware statute expressly authorizes a corporation to be organized for "any lawful business" specified in the corporation's certificate of incorporation.[159] The statute further provides that a corporation's certificate may include "[a]ny provision for the management of the business and for the conduct of the affairs of the corporation . . . if such provisions are not contrary to the laws of this State."[160] Pursuant to these statutory provisions, a purpose-driven business may stipulate in its corporate charter a social mission and elevate that mission on par with or above profit seeking.[161] Put differently, even if decisions like *Dodge*, *Revlon*, and *eBay* are interpreted to impose a mandate of shareholder

158. *See* Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845, 847–55 (2008).

159. *See* DEL. CODE ANN. tit. 8, § 101(b) (2016).

160. *See id.*

161. *See, e.g.*, Blount & Offei-Danso, *supra* note 43, at 663 ("Placing a social mission in a corporation's articles of incorporation or bylaws to alert possible shareholders of the specific obligation the corporation has undertaken to society is permissible and would not offend corporate laws."); Molk, *supra* note 109, at 245 ("[C]orporations can always amend their charter to authorize management to include impact on non-shareholder interests in their decision making."); Reiser, *supra* note 43, at 608 ("At inception, it appears permissible to include charitable or social goals as part of a corporation's purposes."); Tu, *supra* note 21, at 168 ("A traditional for-profit corporation could organize for the express purpose of pursuing a specified purpose such as the pursuit or creation of a public benefit.").

primacy, that mandate is merely a default rule that may be altered by private ordering through the terms of a corporation's charter.[162]

Some advocates of benefit corporation legislation have questioned this conclusion,[163] pointing out that any private ordering in a Delaware corporation's certificate of incorporation is limited by the statutory proviso that such private ordering cannot be "*contrary to the laws of this State*."[164] The concern is that because shareholder primacy is, in their view, enshrined in Delaware common law, any provisions found in a corporation's charter that purport to opt out of shareholder primacy are "*contrary to the laws*" of Delaware.[165]

To be sure, the limitation on private ordering—that a charter provision may not be "contrary to the laws" of Delaware—encompasses not just the state's statutory law but also its common law.[166] Yet, as already noted, nothing in Delaware's statutory law mandates shareholder primacy.[167] And to the extent Delaware common law does establish a rule that a conventional corporation must be run solely for the benefit of its shareholders, the common law "neither states nor implies any public policy indicating that [such a] rule should be unalterable by charter provision."[168] Stated differently,

162. *See, e.g.*, Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 179 (2008) (arguing, from a contractarian perspective, that the shareholder wealth maximization norm is merely a default rule of corporate law that may be altered by private ordering); *see also* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 577–83 (2003) (same).

163. *See, e.g.*, ALEXANDER, *supra* note 3, at 150–51; CLARK ET AL., *supra* note 3, at 13.

164. *See* DEL. CODE ANN. tit. 8, § 102(b)(1) (2016) (emphasis added).

165. *See* ALEXANDER, *supra* note 3, at 150–51; CLARK ET AL., *supra* note 3, at 13; *see also* Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 985 (1992) ("[S]tate law arguably does not permit corporate organic documents to redefine the directors' fiduciary duties. In general, a charter amendment may not derogate from common law rules if doing so conflicts with some settled public policy. In light of the well-settled shareholder wealth maximization policy, nonmonetary factors charter amendments therefore appear vulnerable." (footnote omitted)).

166. *See* David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461, 477–80 (2017) [hereinafter Yosifon, *Opting Out of Shareholder Primacy*] (analyzing relevant Delaware precedents).

167. *See supra* text accompanying note 84.

168. Yosifon, *Opting Out of Shareholder Primacy*, *supra* note 166, at 479 (citing Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1985)); *cf.* Heminway, *Shareholder Wealth Maximization*, *supra* note 84, at 958–66 (arguing that Yosifon's assessment on the validity of private ordering "merits credit" even though "[t]he accumulated evidence is at best unclear about whether a [corporation] . . . can engage in private ordering" to opt out of shareholder primacy); Strine, *The Dangers of Denial*, *supra* note 103, at 782–83 ("It may well be the case that a certificate of incorporation that said that a for-profit corporation would put other constituencies' interests on par with

nothing in the common law indicates that shareholder primacy is a mandatory and unwaivable rule for Delaware corporations. A contrary reading of Delaware common law—as mandating an unwaivable requirement of shareholder primacy—would be plainly inconsistent with widely accepted characterization of Delaware general corporation law among academics,[169] practitioners,[170] and the state's courts[171] as broadly "enabling" and committed to "private ordering."[172] Such a reading would also arguably conflict with the express terms of Delaware's corporation statute, which contemplates

stockholders would, in view of § 101(b), be respected and supersede the corporate common law.").

169. *See* Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 379 (2018) ("By virtue of its largely enabling structure, Delaware corporate law is consistent with the private ordering approach."); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1783 (2006) ("There has been a strong tendency in Delaware corporate policymaking to broaden that room for private ordering.").

170. *See, e.g.*, Welch & Saunders, *supra* note 158, at 847 ("The [Delaware corporation statute] gives incorporators enormous freedom to adopt the terms they believe are most appropriate for the organization, finance, and governance of their particular enterprise."); *see also* E. Norman Veasey & Christine T. Di Guglielmo, *History Informs American Corporate Law: The Necessity of Maintaining A Delicate Balance in the Federal "Ecosystem"*, 1 VA. L. & BUS. REV. 201, 204 (2006) ("Corporate statutes, like the Delaware General Corporation Law, continue to take an enabling approach and allow wide latitude for private ordering.").

171. *See, e.g.*, Shintom Co. v. Audiovox Corp., 888 A.2d 225, 227 (Del. 2005) (describing Delaware's corporation statute as "an enabling statute that provides great flexibility for creating the capital structure of a Delaware corporation"); Jones Apparel Grp., Inc. v. Maxwell Shoe Co., 883 A.2d 837, 845 (Del. Ch. 2004) (Strine, V.C.) (noting that Delaware corporate law "is widely regarded as the most flexible in the nation because it leaves the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations, subject to relatively loose statutory constraints"); *id.* ("Sections 102(b)(1) and 141(a) are therefore logically read as important provisions that embody Delaware's commitment to private ordering in the charter. By their plain terms, they are sections of broad effect, which apply to a myriad of issues involving the exercise of corporate power."); Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1078 (Del. Ch. 2004) (Strine, V.C.) ("[Delaware's corporation statute] is intentionally designed to provide directors and stockholders with flexible authority, permitting great discretion for private ordering and adaptation."); *In re* Appraisal of Ford Holdings., Inc. Preferred Stock, 698 A.2d 973, 976 (Del. Ch. 1997) (Allen, C.) (explaining that "unlike the corporation law of the nineteenth century, modern corporation law contains few mandatory terms; it is largely enabling in character").

172. Leo E. Strine, Jr., *Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar's* Price Discrimination in the Market for Corporate Law, 86 CORNELL L. REV. 1257, 1260 (2001) (describing Delaware's approach to corporate law as one that is "largely enabling and provides a wide realm for private ordering"); *see also* E. Norman Veasey, *An Economic Rationale for Judicial Decisionmaking in Corporate Law*, 53 BUS. L. 681, 686 (1998) ("The Delaware General Corporation Law is an enabling act that provides wide discretion to fine-tune intra-corporate arrangements.").

the primacy of a corporation's charter in matters central to the governance and management of the business.[173]

Thus, to summarize, a purpose-driven business organized under Delaware's conventional corporation statute is already authorized to include in its corporate charter provisions that opt out of shareholder primacy and instead commit the business to a social mission alongside or even ahead of profit seeking. Benefit corporation legislation is not and was never necessary to accomplish this. Of course, the same analysis could also be applied to the corporation statutes of other states.[174] More importantly, however, as described below, most states outside of Delaware have affirmatively rejected shareholder primacy through the adoption of constituency statutes.

4. States Outside of Delaware Expressly Reject Shareholder Primacy

Even if shareholder primacy is an enforceable and unwaivable legal rule under the conventional corporate law of Delaware, Delaware is only one state. A business may incorporate under the laws of any state, regardless of where the business actually operates.[175] Under the internal affairs doctrine, the internal affairs of a corporation—including the fiduciary duties of directors as well as the permissible lawful purpose of the corporation—are governed by the state of incorporation.[176]

Although most large corporations choose to organize under Delaware law, all businesses have the option to incorporate elsewhere. Outside of Delaware, thirty-two states have adopted so-called constituency statutes.[177] These statutes explicitly authorize the directors of a corporation to consider a broad range of factors

173. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2016) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, *except as may be otherwise provided . . . in its certificate of incorporation*." (emphasis added)).

174. *See, e.g.*, MODEL BUS. CORP. ACT § 2.02(b)(2) (AM. BAR ASS'N 2016) (authorizing a corporation's charter to include provisions regarding "(i) the purpose or purposes for which the corporation is organized; (ii) managing the business and regulating the affairs of the corporation; [and] (iii) defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders").

175. *See* Kent Greenfield, *Democracy and Dominance of Delaware in Corporate Law*, 67 LAW & CONTEMP. PROBS. 135, 135–39 (2004).

176. *See* McDermott Inc. v. Lewis, 531 A.2d 206, 214 (Del. 1987) (explaining the internal affairs doctrine); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (AM. LAW INST. 1971).

177. *See* Anthony Bisconti, Note, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in* Revlon *Land?*, 42 LOY. L.A. L. REV. 765, 768 n.13 (2009).

affecting nonshareholding constituencies when discharging their statutory duty to manage the corporation.[178] Some states' constituency statutes limit a board's authority to consider nonshareholder concerns to situations involving the sale or takeover of the corporation.[179] Other states' constituency statutes are broader, allowing a board to consider the impact on nonshareholding constituencies in *all matters* brought before the board.[180] In either case, states that have adopted constituency statutes have affirmatively rejected the notion that a corporate board of directors must consider and pursue shareholder interests only.[181] Instead, such statutes expressly contemplate that, in appropriate circumstances, corporate directors may account for various nonshareholding constituencies.[182]

The existence of constituency statutes coupled with the internal affairs doctrine means socially minded businesses are not inexorably bound to shareholder primacy under Delaware law or the conventional corporate law of any other state that is perceived to mandate it.[183] Rather, to the extent that the state of incorporation is a choice, so too are any supposed legal strictures imposed by shareholder primacy.[184]

Some advocates of benefit corporation legislation have criticized state constituency statutes on the grounds that such statutes only authorize corporate directors to consider the impact of their decisions on nonshareholding constituencies, but do not compel directors to actually do so.[185] Put differently, constituency statutes permit, but do not mandate, a prosocial, multistakeholder approach to corporate

178. *See, e.g.*, *id.* at 782–83.

179. *See, e.g.*, OR. REV. STAT. ANN. § 60.357(5) (Westlaw through 2018 Reg. Sess. & Spec. Sess.).

180. *See, e.g.*, N.Y. BUS. CORP. LAW § 717(b) (McKinney Supp. 2019); 15 PA. CONS. STAT. ANN. § 516(a) (Westlaw through 2018 Reg. Sess. Act 164).

181. *See* Johnson & Millon, *supra* note 115, at 14 ("Either expressly or by clear implication, they reject the shareholder wealth maximization conception of management responsibility, conferring broad discretion to sacrifice profits for alternative objectives.").

182. *See, e.g.*, CLARK ET AL., *supra* note 3, at 9; Tu, *supra* note 21, at 137–38.

183. *See* Murray, *Choose Your Own Master*, *supra* note 2, at 19–20 ("[S]ome state [business corporation] statutes [citing the example of Oregon] already explicitly allow a social or environmental focus. Social entrepreneurs seeking to use the corporate form could simply incorporate in one of those states . . . .").

184. *See* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 556–58 (1990) (explaining how the "relatively low cost strategy of re-incorporating" enables a corporation "to avoid [corporate law] rules that are mandatory in state *A*, but optional in state *B*").

185. *See, e.g.*, ALEXANDER, *supra* note 3, at 136–37; CLARK ET AL., *supra* note 3, at 10–11.

governance.[186] Of course, nothing in benefit corporation statutes ensures that directors will actually consider the interests of any nonshareholding constituency either.[187] But putting that significant shortcoming aside momentarily, some states' conventional corporation laws do, in fact, permit a corporation to make prosocial, multistakeholder governance mandatory[188]—or at least as mandatory as made by benefit corporation statutes.

Consider Oregon's conventional corporation statute. Oregon's statute includes a typical constituency provision,[189] but it also includes a separate provision permitting a corporation's charter to include terms "authorizing or *directing* the corporation to conduct the business of the corporation in a manner that is environmentally and socially responsible."[190] By expressly permitting a corporate charter to not only "authorize" but also "direct" the corporation to conduct its business in a manner that is environmentally and socially responsible, Oregon's conventional corporation statute already enables a corporation, through private ordering, to adopt the basic governance framework of a benefit corporation.[191] Thus, if the justification for benefit corporation legislation is to enable socially minded businesses to opt into a *mandatory* system of prosocial, multistakeholder governance, that too is already available through the conventional corporate form without the need for a separate benefit corporation statute.[192]

186. *See* MODEL BENEFIT CORP. LEGIS. § 301 cmt. (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS] ("In a state that has adopted a 'constituency statute,' directors are authorized to consider the interests of corporate constituencies other than the shareholders, but the directors are not *required* to do so.").

187. *See infra* Section III.A.

188. For example, Pennsylvania's corporation statute allows companies to adopt by charter any corporate governance provision whatsoever. Black, *supra* note 184, at 555. Applying Pennsylvania law, the United States Supreme Court concluded that a for-profit corporation may pursue its owner's religious objectives, even if doing so may limit profits. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2770–71 (2014).

189. *See* OR. REV. STAT. ANN. § 60.357(1) (Westlaw through 2018 Reg. Sess. & Spec. Sess.).

190. *Id.* § 60.047(2)(e) (emphasis added); *see also* Jason C. Jones, *The Oregon Trail: A New Path to Environmentally Responsible Corporate Governance?*, 54 ST. LOUIS U. L.J. 335, 347–50 (2009).

191. *See* Murray, *Choose Your Own Master*, *supra* note 2, at 25 n.110 (noting "Oregon [corporation law] has already made . . . explicit in its corporate statute" the ability to opt out of shareholder primacy); Sneirson, *supra* note 113, at 1020 ("The 'directing' language literally mandates that the firm be run in an environmentally and socially responsible manner, like the B Corporation . . . .").

192. *See* Murray, *Beneficial Benefit LLCs?*, *supra* note 7, at 442 ("[T]he legal justification for . . . benefit corporation law [is] weak in states like Oregon that already

5. Shareholder Primacy Is a Norm and Not a Legal Mandate

Given the foregoing, many scholars have questioned the purpose of or need for benefit corporation statutes.[193] Conventional corporate law already enables the directors of a socially minded business to promote the interests of nonshareholding constituencies and advance public benefit. To the extent that the real-world behavior of directors appears fixated instead on shareholder-wealth maximization, and not advancing the interest of nonshareholders, nothing in conventional corporate law compels this behavior. Instead, adherence to a principle of shareholder primacy reflects a widely embraced, extralegal norm, rather than an enforceable legal obligation.[194]

Admittedly, conventional corporate law does facilitate this norm but not through any artificial restrictions on corporate purpose or through directors' fiduciary duties. Rather, it does so by affording shareholders a privileged position within the corporate form.[195] Only

allowed social and environmental purposes for its traditional corporations; technically social entrepreneurs should have been able to achieve their legal goals with a traditional Oregon corporation.").

193. *See, e.g.*, Murray, *Choose Your Own Master*, *supra* note 2, at 16 ("[C]ertain social enterprise proponents may have overstated the need for benefit corporation statutes, as existing corporate law—whether through the business judgment rule, constituency statutes, or express provisions in the corporate law of states outside of Delaware—already provides significant protection to directors who choose to favor or consider non-shareholder stakeholders in their decisions."); Tu, *supra* note 21, at 167 ("[T]he addition of Benefit Corporations creates an overlap with traditional for-profit corporations where both are capable of pursuing dual objectives of profit and public benefit."); Joan Heminway, *Benefit Corporations: What Am I Missing—Seriously?*, BUS. L. PROF BLOG (Feb. 23, 2015), http://lawprofessors.typepad.com/business_law/2015/02/benefit-corporations-what-am-i-missing-seriously.html [http://perma.cc/28XB-NTPU] [hereinafter Heminway, *What Am I Missing*] ("Social enterprise businesses form all the time as for-profit or non-profit business associations. The lack of a benefit corporation statute has not impeded social enterprise . . . and there is no proof a new statutory regime would encourage the formation of desirable social enterprises.").

194. *See* Heminway, *Shareholder Wealth Maximization*, *supra* note 84, at 950 (acknowledging that a norm of shareholder wealth maximization may exist "even if the evidence may not permit a form conclusion that the norm has been codified as legal doctrine"); Johnson & Millon, *supra* note 115, at 11 ("The profit maximization norm . . . is, descriptively, a product of deep-seated business lore and practices, market pressures, and professional education, not law."); Murray, *Choose Your Own Master*, *supra* note 2, at 17–18 (observing that the "persistent common perception . . . that directorial duties require placing shareholder wealth at the forefront . . . has arguably risen to the level of a widely recognized and influential norm"); Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1643–44 (2001) (describing shareholder wealth maximization as a nonlegal norm); Sneirson, *supra* note 113, at 1011 ("Perhaps more than the law or the market, norms instill in corporate fiduciaries a drive to maximize shareholder profit.").

195. *See* Strine, *The Dangers of Denial*, *supra* note 103, at 766, 784; *see also* Blair & Stout, *supra* note 133, at 288.

the shareholders of a corporation—and not any other corporate constituency—are enfranchised to elect the corporation's board.[196] Consequently, "directors cannot subordinate the . . . interests of [shareholders] to that of other corporate constituencies unless the [shareholders] themselves support that subordination."[197] If the shareholders, instead, prefer to maximize corporate profits, then directors will do so, not because corporate law requires them to do so but because directors owe their continued employment as directors to the shareholders who elect them.[198] In this respect, to quote Chief Justice Strine, "the power dynamics created by corporate law itself dictate the ends of corporate governance."[199]

Ironically, benefit corporation statutes do nothing to change these "power dynamics."[200] Shareholders of a benefit corporation enjoy the same privileged status as shareholders of a conventional corporation, being the sole constituency empowered to elect the corporation's board.[201] Rather than alter the franchise enjoyed exclusively by shareholders, benefit corporation statutes tinker with corporate purpose and directors' duties.[202] But, as demonstrated

196. *See, e.g.*, DEL. CODE ANN. tit. 8, § 211(b) (2016).

197. Leo E. Strine, Jr., *Corporate Power Is Corporate Purpose I: Evidence from My Hometown*, 33 OXFORD REV. ECON. POL'Y 176, 179 (2017) [hereinafter Strine, *Corporate Power Is Corporate Purpose I*].

198. *See id.*; *accord* Mohsen Manesh, *Nearing 30, Is* Revlon *Showing Its Age?*, 71 WASH. & LEE L. REV. ONLINE 107, 144 (2014) [hereinafter Manesh, *Nearing 30*] ("If directors myopically focus on the interests of shareholders, then it is not because corporate law requires it, but because shareholders demand it."); Rock & Wachter, *supra* note 194, at 1644 (identifying "the fact that . . . only shareholders get to vote" as a source of the shareholder primacy norm).

199. Leo E. Strine, Jr., *Corporate Power Is Corporate Purpose II: An Encouragement for Future Consideration from Professors Johnson and Millon*, 74 WASH. & LEE L. REV. 1165, 1174 (2017) [hereinafter Strine, *Corporate Power Is Corporate Purpose II*].

200. *See* ALEXANDER, *supra* note 3, at 94–95 (acknowledging that "a central theoretical underpinning of the benefit corporation [is that] shareholders have an interest in promoting the interest of all stakeholders and are adequate representatives for them"); Clark & Babson, *supra* note 5, at 850 (conceding that "the main policing mechanism for the performance of directors is the right of the shareholders to elect the directors").

201. *See* MODEL BENEFIT CORP. LEGIS. § 101(c) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS].

202. The MBCL does contemplate that a benefit corporation may elect to have an independent "benefit director," charged with evaluating whether the business fulfilled its statutory obligations under the MBCL to create public benefit and consider the interests of nonshareholding constituencies. *Id.* § 302. Earlier versions of the MBCL required all benefit corporations to have a benefit director; the current version makes the benefit director entirely optional. *See* Loewenstein, *Benefit Corporation Law*, *supra* note 19, at 389. But even in those corporations that choose to have a benefit director, that director—like all other directors of the corporation—is to be elected by the shareholders. *See* MODEL BENEFIT CORP. LEGIS. § 302(b) (2017), https://benefitcorp.net/sites/default/

above, neither the law of corporate purpose nor fiduciary duties compel unblinking shareholder wealth maximization. It is instead the "power dynamics created by corporate law itself,"[203] giving shareholders the exclusive franchise. Without changing this fundamental facet of the corporate structure, it is not clear that benefit corporation legislation actually achieves anything.[204] Despite this fundamental reality, the "benefit" concept is now poised to be unthinkingly exported into the world of LLCs.

II. THE ADVENT OF BENEFIT LLCS

The idea of expanding the benefit corporation construct to LLCs is not new. As already noted, when Maryland adopted its first-in-the-nation benefit corporation statute, based on B Lab's MBCL, it simultaneously adopted analogous amendments to its state LLC statute, authorizing the creation of the first benefit LLC.[205] Thereafter, however, only three other states embraced the idea of an unincorporated benefit entity before Delaware's move in 2018.[206] In 2013, Oregon, like Maryland, simultaneously enacted amendments to both its corporation and LLC statutes authorizing both types of benefit entities.[207] In 2016, Pennsylvania became the third state to

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files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS].

203. Strine, *Corporate Power Is Corporate Purpose II*, *supra* note 199, at 1174.

204. As explained by the ABA committee that considered benefit corporation legislation:

> [L]egislation allowing directors to consider the interests of constituencies other than shareholders does not, by itself, disempower shareholders. . . . The shareholders of a benefit corporation who feel that directors are not sufficiently attentive to the interests of shareholders would still have access to all of the traditional tools available to shareholders with respect to changing the management of the corporation.

Corp. Laws Comm., ABA Bus. Law Section, *Benefit Corporation White Paper*, 68 BUS. LAW. 1083, 1090 (2013); *see also* J. Haskell Murray, *Adopting Stakeholder Advisory Boards*, 54 AM. BUS. L.J. 61, 84 (2017) [hereinafter Murray, *Adopting Stakeholder Advisory Boards*] ("While benefit corporation shareholders may be more socially inclined than average, benefit corporation shareholders still have strong economic incentives . . . and may pressure boards with the corporate governance tools at their disposal (such as voting rights) to focus on the financial issues first.").

205. *See* Act of May 19, 2011, ch. 500, 2011 Md. Laws 2955 (codified as amended at MD. CODE ANN., CORPS. & ASS'NS §§ 4A-1201 to -1208 (LEXIS through 2018 Reg. Sess.)).

206. A bill authorizing benefit LLCs was also introduced in the Illinois state senate, but the bill was never enacted. *See* S.B. 2358, 98th Gen. Assemb., Reg. Sess. (Ill. 2013).

207. *See* Act of June 4, 2013, ch. 269, 2013 Or. Laws 682 (codified at OR. REV. STAT. ANN. §§ 60.750–.770 (Westlaw through 2018 Reg. Sess. & Spec. Sess.)).

authorize benefit LLCs.[208] And in 2018, months before Delaware, Utah became the fourth state to enact benefit LLC legislation.[209]

The fact that more states have not embraced benefit LLCs with the same vigor as they have benefit corporations is, in one sense, puzzling. In many respects, the more informal and tax-advantaged LLC form is better suited for socially minded entrepreneurs and purpose-driven start-ups than the more burdensome corporate form.[210] One explanation for the failure of benefit LLC legislation to be adopted more broadly may be the fact that B Lab has not openly lobbied for it—at least not up until this point.[211] A second explanation may be that, in contrast to benefit corporations, no one has articulated a plausible legal case to justify the existence of benefit LLCs. Whatever the reason, with Delaware's embrace of the benefit LLC, 2018 will likely mark an inflection point, accelerating the spread of this new unincorporated statutory entity.

Section A describes the extant benefit LLC statutes, including Delaware's. Section B then explains that, given the inherent flexibility of conventional LLCs, as a legal matter, statutory benefit LLCs are a needless novelty.

A. Benefit LLC Statutes

With Delaware's new statute, there are now two competing models of benefit LLC legislation: an unofficial B Lab-based model and Delaware's. The differences between the two models closely track those highlighted above in the context of statutory benefit corporations.[212]

208. *See* Act of Nov. 21, 2016, No. 2016–170, 2016 Pa. Laws __ (codified at 15 PA. CONS. STAT. ANN. §§ 8891–8898 (Westlaw through 2018 Reg. Sess. Act 164)).

209. *See* Act of Mar. 19, 2018, ch. 201, 2018 Utah Laws __ (codified at UTAH CODE ANN. §§ 48-4-101 to -402 (LEXIS through 2018 3d Spec. Sess.)).

210. *See* Murray, *Beneficial Benefit LLCs?*, *supra* note 7, at 442 (observing that "most social enterprises appear to be relatively small" and attracted to the "simplicity and tax advantages of the [LLC] form"). Indeed, as Professor Ball notes, in Oregon, where both benefit LLCs and corporations are authorized, there are more benefit LLCs than corporations, which suggests the LLC form is better for small businesses. Ball, *supra* note 4, at 943 n.107.

211. *See* Murray, *Beneficial Benefit LLCs?*, *supra* note 7, at 444 (citing B Lab's lack of lobbying as the "main reason" benefit LLC statutes have not yet been widely adopted). More recently, Professor Murray reports that Bill Clark, the primary drafter of the MBCL and a B Lab affiliate, has commented positively on the expansion of the "benefit" concept to LLCs in Pennsylvania. *See id.* at 439.

212. *See supra* Section II.A.

1. B Lab-Based Model

Although B Lab has not promulgated an official model benefit LLC legislation, that did not stop Maryland, Oregon, Pennsylvania, and Utah from creating their own by borrowing liberally from B Lab's MBCL and adapting it to LLCs.[213] Thus, these states' statutes represent an unofficial B Lab model for benefit LLCs.

Each state's benefit LLC statute largely parrots the language of the MBCL, including the statutorily required purpose of creating general public benefit[214] and the optional purpose of creating a specific public benefit.[215] Likewise, consistent with the MBCL, each state's statute requires that those vested with the power to manage an LLC—members in a member-managed LLC and managers in a manager-managed LLC[216]—to "consider" the interests of not just the LLC's members but the same list of various nonmember constituencies that may be affected by the company's activities.[217] Finally, each state's statute requires a benefit LLC to prepare and make publicly available an annual benefit report, assessing the performance of the LLC against the standards of an independent third party.[218]

213. *See* Murray, *Beneficial Benefit LLCs?*, *supra* note 7, at 439 (observing that the Oregon and Maryland benefit LLC statutes "largely follow" the MBCL as adopted by each state).

214. *Compare* MD. CODE ANN., CORPS. & ASS'NS § 4A-1206(a) (LEXIS through 2018 Reg. Sess.), *and* OR. REV. STAT. ANN. § 60.758(1) (Westlaw through 2018 Reg. Sess. & Spec. Sess.), *and* 15 PA. CONS. STAT. ANN. § 8894(a) (Westlaw through 2018 Reg. Sess. Act 164), *and* UTAH CODE ANN. § 48-4-201(1) (LEXIS through 2018 3d Spec. Sess.), *with* MODEL BENEFIT CORP. LEGIS. § 201(a) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS].

215. *Compare* MD. CODE ANN., CORPS. & ASS'NS § 4A-1206(b) (LEXIS through 2018 Reg. Sess.), *and* OR. REV. STAT. ANN. § 60.758(2)(a) (Westlaw through 2018 Reg. Sess. & Spec. Sess.), *and* 15 PA. CONS. STAT. ANN. § 8894(b) (Westlaw through 2018 Reg. Sess. Act 164), *and* UTAH CODE ANN. § 48-4-201(2)(a) (LEXIS through 2018 3d Spec. Sess.), *with* MODEL BENEFIT CORP. LEGIS. § 201(b) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS].

216. *See* REVISED UNIF. LTD. LIAB. CO. ACT § 407 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2006).

217. *Compare* MD. CODE ANN., CORPS. & ASS'NS § 4A-1207(a) (LEXIS through 2018 Reg. Sess.), *and* OR. REV. STAT. ANN. § 60.760(1) (Westlaw through 2018 Reg. Sess. & Spec. Sess.), *and* 15 PA. CONS. STAT. ANN. §§ 8895(a), 8896(a) (Westlaw through 2018 Reg. Sess. Act 164), *and* UTAH CODE ANN. § 48-4-301 (LEXIS through 2018 3d Spec. Sess.), *with* MODEL BENEFIT CORP. LEGIS. § 301(a) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS].

218. *Compare* MD. CODE ANN., CORPS. & ASS'NS § 4A-1208 (LEXIS through 2018 Reg. Sess.), *and* OR. REV. STAT. ANN. §§ 60.768, 60.770 (Westlaw through 2018 Reg. Sess.

2. Delaware Model

Unsurprisingly, Delaware's new benefit LLC statute is based on its own benefit corporation statute rather than on B Lab's MBCL. Thus, the differences between Delaware's benefit LLC statute and the unofficial B Lab model are largely the same as those described earlier in the context of benefit corporations.[219]

In particular, unlike the B Lab model and consistent with Delaware's statute governing benefit corporations, Delaware's new benefit LLC statute requires a benefit LLC to designate in its formation document a specific public benefit to be promoted by the LLC.[220] Thus, like a Delaware benefit corporation, a Delaware benefit LLC must pursue both general public benefit[221] and whatever specific public benefit that has been identified by the LLC.[222]

Moreover, unlike the B Lab model, the Delaware benefit LLC statute requires a benefit LLC to produce a benefit report only biennially (and not annually)[223] and to make that report available only to its members (and not publicly).[224] Finally, like Delaware's benefit

& Spec. Sess.), *and* 15 PA. CONS. STAT. ANN. § 8898 (Westlaw through 2018 Reg. Sess. Act 164), *and* UTAH CODE ANN. § 48-4-401 (LEXIS through 2018 3d Spec. Sess.), *with* MODEL BENEFIT CORP. LEGIS. §§ 401, 402 (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS].

219. *See supra* notes 70–78 and accompanying text.

220. *Compare* DEL. CODE ANN. tit. 6, § 18-1202(a) (Supp. 2018) (requiring a benefit LLC to identify at least one specific public benefit in its certificate of formation), *and id.* tit. 8, § 362(a)(1) (2016) (requiring the same of a benefit corporation), *with* MODEL BENEFIT CORP. LEGIS. § 201(b) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS] (providing that a specific public benefit is optional).

221. *Compare* tit. 6, § 18-1202(a) (requiring a benefit LLC "to operate in a responsible and sustainable manner"), *with id.* tit. 8, § 362(a) (2016) (requiring the same of a benefit corporation). As already noted, the mandate "to operate in a responsible and sustainable manner" is analogous to the "general public benefit" mandate under the MBCL. *See supra* note 68 and accompanying text.

222. *See* DEL. CODE ANN. tit. 6, § 18-1202(a), (b) (Supp. 2018) (requiring a benefit LLC "produce public benefit" and defining "public benefit" to mean "a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than members in their capacities as members)").

223. *Compare* tit. 6, § 18-1205 (requiring a benefit report biennially), *with* MODEL BENEFIT CORP. LEGIS. § 401(a) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS] (requiring an annual benefit report).

224. *Compare* tit. 6, § 18-1205 (requiring a benefit report to be provided to the members), *with* MODEL BENEFIT CORP. LEGIS. § 402 (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS] (requiring a benefit report to be provided to shareholders and made available publicly).

corporation statute, the state's new benefit LLC statute does not require a benefit report to assess the LLC's activities against the standards of an independent third party.[225]

Although no other state has yet followed the Delaware benefit LLC model, with Delaware's imprimatur, interest in the new unincorporated statutory form is likely to spread. And especially in those states that have already followed Delaware's public benefit corporation statute, one might reasonably expect to see the adoption of statutes authorizing analogous benefit LLCs modeled on Delaware's new statute. Yet, as the discussion below shows, there is no credible legal case to justify the existence of this new socially minded statutory business entity.

B. Nonexistent Legal Justification for Benefit LLCs

As already explained, the legal case for benefit corporations is quite thin.[226] It is premised upon the dubious assertion that conventional corporate law inexorably mandates shareholder primacy, thus precluding purpose-driven social enterprises from utilizing the conventional corporate form to pursue a social agenda that might curb profits.

Even if one accepts this dubious assertion, however, there is no similar justification that can be made in support of benefit LLCs.[227] No one has suggested that conventional LLC law mandates any form of "member primacy." No one believes that conventional LLCs are legally committed to maximizing profits for the sole benefit of an LLC's members.

Instead, conventional LLC law allows for virtually unlimited flexibility as to the purpose and governance of the entity and, thus, is perfectly suitable for social enterprises.[228] For example, conventional

225. *Compare* tit. 6, § 18-1205 (omitting any requirement for a benefit LLC to assess itself against the standards of a third party), *with id.* tit. 8, § 366(b) (2016) (omitting the same requirement in the benefit corporation context).

226. *See supra* Section I.C.

227. Murray, *Beneficial Benefit LLCs?*, *supra* note 7, at 448–49 ("[T]he legal justification for the benefit LLC is even weaker than the legal justification for the benefit corporation . . . .").

228. *See* ALEXANDER, *supra* note 3, at 154–55 (acknowledging that because "the LLC structure is sufficiently flexible to create a benefit corporation-like arrangement through private ordering," statutory benefit LLCs "might not be necessary"); Cassady V. Brewer, *A Novel Approach to Using LLCs for Quasi-Charitable Endeavors (A/K/A "Social Enterprise")*, 38 WM. MITCHELL L. REV. 678, 680 (2012) ("Because of their inherent contract-like flexibility, liability protection, and malleable tax treatment, limited liability companies are increasingly being used for social enterprise."); Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20

LLC statutes, including Delaware's, provide that an LLC "may carry on any lawful business, purpose or activity, *whether or not for profit*,"[229] thereby expressly contemplating that the pursuit of profits may not even be a goal of an LLC. Indeed, the use of conventional LLCs for purely philanthropic purposes is growing in popularity,[230] and there is no question a conventional LLC could also be structured to accommodate a for-profit social enterprise.[231]

It is true that the individuals who manage the business and affairs of an LLC are bound by traditional fiduciary duties,[232] and those duties largely mirror the fiduciary duties of corporate directors.[233]

FORDHAM J. CORP. & FIN. L. 19, 26–27 (2014) (observing that the flexibility of the LLC form "provide[s] a viable alternative for social enterprises"); Molk, *supra* note 109, at 248 ("LLCs certainly appear capable of providing the legal framework to pursue social enterprise . . . ."); Murray, *Beneficial Benefit LLCs?*, *supra* note 7, at 441–42 ("By design, LLCs are extremely flexible, contract-based, and already perfectly able to mold to a social entrepreneur's desires. The availability of the traditional LLC form renders the addition of the benefit LLC largely superfluous."); Murray, *Choose Your Own Master*, *supra* note 2, at 19 ("[LLCs] are famously flexible, and operating agreements can be altered to meet the needs of social entrepreneurs."); Reiser, *supra* note 43, at 608 ("Typically, LLC law will be flexible enough to allow adoption of both profit and social purposes . . . ."); *see also* Ann E. Conaway, *The Global Use of the Delaware Limited Liability Company for Socially-Driven Purposes*, 38 WM. MITCHELL L. REV. 772, 816 (2012) (arguing that Delaware LLCs are the best statutory business entity for social enterprises).

229. DEL. CODE ANN. tit. 6, § 18-106(a) (2016) (emphasis added); *accord* REVISED UNIF. LTD. LIAB. CO. ACT § 104(b) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2006) ("A limited liability company may have any lawful purpose, regardless of whether for profit.").

230. *See* Cassady V. Brewer, Lisa A. Runquist & Elizabeth Carrott Minnigh, *Nonprofit LLCs*, BUS. L. TODAY, Mar. 2017, at 1, 3. Most famously, Mark Zuckerberg, the founder and CEO of Facebook, Inc., and his spouse, a medical doctor, launched the philanthropic Chan-Zuckerberg Initiative, which is organized as a conventional Delaware LLC. *See* Natasha Singer & Mike Isaac, *Zuckerberg's Philanthropy Uses L.L.C. for More Control*, N.Y. TIMES, Dec. 3, 2015, at B1. The Initiative describes itself as "a new kind of philanthropic organization that brings together world-class engineering, grant-making, impact investing, policy, and advocacy work" with a focus on "supporting science through basic biomedical research and education through personalized learning" and "equal opportunity including access to affordable housing and criminal justice reform." *See About*, CHAN ZUCKERBERG INITIATIVE, https://www.chanzuckerberg.com/about [https://perma.cc/879B-W9H7].

231. *See, e.g.*, Molk, *supra* note 109, at 247 ("LLCs enjoy almost limitless freedom to craft their operating agreements; language that requires adherence to social enterprise objectives should not be a problem.").

232. *See, e.g.*, REVISED UNIF. LTD. LIAB. CO. ACT § 409 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2006) (codifying fiduciary duties under LLC law); Mohsen Manesh, *Equity in LLC Law?*, 44 FLA. ST. U. L. REV. 93, 101 (2016) [hereinafter Manesh, *Equity in LLC Law?*] (summarizing fiduciary duties under Delaware LLC law).

233. *See, e.g.*, Auriga Capital Corp. v. Gatz Props., LLC, 40 A.3d 839, 850–51, 855 n.65 (Del. Ch. 2012) (Strine, C.), *aff'd*, 59 A.3d 1206 (Del. 2012) (analogizing the fiduciary duties owed in the corporate context to the fiduciary duties owed in a manager-managed LLC); REVISED UNIF. LTD. LIAB. CO. ACT § 409(b)–(c) (NAT'L CONFERENCE OF

Thus, in theory, one might be concerned that courts, borrowing from corporate law, will import analogous concepts of "member primacy" and "member wealth maximization" into LLCs.[234] Unlike corporation statutes, however, LLC statutes are quite explicit that fiduciary duties may be contractually modified or even eliminated.[235] Indeed, every matter of internal governance—from the purpose of an LLC to who can make decisions and take actions on behalf of the entity, to the process that must be undertaken, and the constituencies to be considered in making any decision on behalf of an LLC—may be contractually specified in the terms of an LLC's operating agreement.[236] To emphasize this point, Delaware's LLC statute famously proclaims as its guiding policy "to give the maximum effect to the principle of freedom of contract and to the enforceability of [LLC] agreements."[237]

Nonetheless, one might be concerned that the contractual flexibility afforded under LLC law works in both directions: that the terms in an LLC's operating agreement committing the entity to pursue public benefit may be later amended by the members of the LLC. Thus, unlike the mandatory rules set forth in a benefit LLC statute, the terms of an operating agreement cannot credibly commit a conventional LLC to a prosocial agenda. But this concern is groundless. First, a business formed as a benefit LLC can already, with the approval of a requisite majority of its members, convert itself into a conventional LLC, thus abandoning the statutory mandate to pursue public benefit.[238] Second, conventional LLC law affords members the flexibility to stipulate certain terms of an operating agreement (for example, those committing the LLC to pursue public

COMM'RS ON UNIF. STATE LAWS 2006) (codifying fiduciary duties of loyalty and care under LLC law).

234. *See* Murray, *Beneficial Benefit LLCs?*, *supra* note 7, at 438 (stating that some drafters of Oregon's benefit LLC statute were motivated, in part, "to combat any future common law creep from the corporation-focused case of *eBay* into the LLC area").

235. *See* DEL. CODE ANN. tit. 6, § 18-1101(c) (Supp. 2018) ("To the extent that, at law or in equity, a member or manager . . . has duties (including fiduciary duties) . . . the member's or manager's . . . duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement . . . ."); REVISED UNIF. LTD. LIAB. CO. ACT § 110(d) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2006) (authorizing an LLC operating agreement to restrict, alter, or event eliminate fiduciary duties, except where doing so would be "manifestly unreasonable").

236. *See, e.g.*, Manesh, *Equity in LLC Law?*, *supra* note 232, at 102–06 (describing the contractual freedom afforded under LLC law); *see also* Manesh, *Delaware and the Market for LLC Law*, *supra* note 62, at 225–34 (same); Peter Molk, *How Do LLC Owners Contract Around Default Statutory Protections?*, 42 J. CORP. L. 503, 508–13 (2017) (same).

237. DEL. CODE ANN. tit. 6, § 18-1101(b) (Supp. 2018).

238. *See, e.g.*, *id.* § 18-1203(b).

benefit and account for the interests of nonmember constituencies) cannot be amended without the unanimous consent of the members,[239] making the entity's commitment to pursue public benefit even stronger than the commitment created by merely organizing as a benefit LLC.[240]

Indeed, given the inherent flexibility of conventional LLC law, every scholar and practitioner who has ever considered the issue has concluded that benefit LLC legislation is unnecessary.[241] In the words of one leading scholar of social enterprises, "virtually all legal experts agree that [conventional] LLC statutes are flexible enough to accommodate social entrepreneurs."[242] Even B Lab acknowledges this reality.[243] In fact, B Lab has long offered model contract language that can be incorporated into an LLC's operating agreement,[244] thus providing a readymade, "off-the-rack" framework to translate benefit corporation principles in the context of an LLC.[245]

In this respect, Delaware's new benefit LLC legislation is particularly extraordinary because it represents a fundamental departure from the flexibility traditionally associated with the LLC form.[246] The provisions of the state's benefit LLC statute purport to be mandatory for benefit LLCs, inalterable and not subject to the

239. *See id.* § 18-302(e) ("If a limited liability company agreement provides for the manner in which it may be amended . . . it may be amended only in that manner . . . ."); *see also* REVISED UNIF. LTD. LIAB. CO. ACT § 110(a)(4) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2006) ("[T]he operating agreement governs . . . the means and conditions for amending the operating agreement.").

240. *See* Molk, *supra* note 109, at 246–47.

241. *See supra* note 228 and accompanying text.

242. Murray, *Beneficial Benefit LLCs?*, *supra* note 7, at 445.

243. *See* ALEXANDER, *supra* note 3, at 65 ("For [LLCs], a more flexible form of business entity, B Lab determined that binding commitments to stakeholders *could* be made in the operating agreement, the primary constitutional document of an LLC."); *see also* Murray, *Choose Your Own Master*, *supra* note 2, at 23 n.101 (reporting that the primary drafter of the MBCL and B Lab's outside counsel agrees that "LLC law is generally flexible enough to accomplish social enterprise purposes").

244. *See* B Lab, *LLC Legal Roadmap*, CERTIFIED B CORP., https://web.archive.org/web/20180227082442/https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/legal-roadmap/llc-legal-roadmap [https://perma.cc/6RQX-8AUK].

245. One might argue that benefit LLC statutes provide a useful "off-the-rack" solution for social enterprises that prefer the LLC form, "sav[ing] cash-strapped start-ups the need to have legal counsel draft bespoke provisions." *See* ALEXANDER, *supra* note 3, at 155; *accord* Murray, *Beneficial Benefit LLCs?*, *supra* note 7, at 442 (articulating a similar argument). But B Lab's model language for LLC operating agreements demonstrates that a readymade solution is already freely available, without the need for a new statutory business form.

246. *See* Murray, *Beneficial Benefit LLCs?*, *supra* note 7, at 443 (noting the disconnect between the mandatory rules of benefit LLC statutes and the "intentional flexibility of the traditional LLC form").

freedom-of-contract principle that undergirds all other aspects of LLCs.[247] Undoubtedly, the mandatory nature of the benefit LLC statute reflects a desire to ensure a degree of uniformity—in purpose, governance, rights, and obligations—of all Delaware benefit LLCs. But every single feature, right, or obligation mandated by Delaware's new benefit LLC statute could have already been achieved by a conventional LLC through private ordering. From that perspective, not only is the statutory benefit LLC totally unnecessary but it is also in conflict with the contractual flexibility that has historically made the LLC such a popular form of business.

III. THE POLICY CASE AGAINST STATUTORY BENEFIT ENTITIES

Without a plausible legal justification for its existence, the benefit LLC plainly reveals what was arguably already apparent in the context of its corporate predecessor: the aim of benefit entity statutes is not law reform. The purpose of benefit entity legislation has never really been to address some perceived shortcoming in the existing legal frameworks governing conventional business entities.

Instead, the real aim of benefit entity statutes is to facilitate branding.[248] Benefit entity legislation is about creating a state-sponsored brand for for-profit businesses to use to signal their virtue to consumers, investors, and the broader public.[249]

Indeed, B Lab has not been coy about the importance of its legislation to facilitate such branding.[250] Alongside the facile legal

247. *See* DEL. CODE ANN. tit. 6, § 18-1201 (Supp. 2018).

248. *See* Molk, *supra* note 109, at 248 (arguing that the principal motivation of advocates for benefit corporation statutes "appears to be the marketing value that organizing as a social enterprise-specific organizational form brings"); Murray, *Choose Your Own Master*, *supra* note 2, at 44 ("One of the most talked about benefits that social enterprise offers to its owners is branding."); Murray, *The Social Enterprise Law Market*, *supra* note 9, at 559 ("One of the often-cited benefits of social enterprise legislation is the branding or signaling aspect . . . .").

249. *See* Murray, *Beneficial Benefit LLCs?*, *supra* note 7, at 447–48 (observing that "[t]he main benefit of the benefit LLC form is the signaling provided by choosing the form" and that for many entrepreneurs the signaling function is the most important consideration in selecting an appropriate business form); Reiser, *supra* note 43, at 621 ("Social entrepreneurs wish to market their enterprises and their products to consumers, partners, and employees as meaningfully different from either traditional nonprofits or for-profits and view a hybrid form [like a benefit corporation or benefit LLC] as one route to accomplish this goal.").

250. *See* ALEXANDER, *supra* note 3, at 154–55 (arguing that although benefit LLCs "might not be necessary" given the inherent flexibility of conventional LLCs, a conventional LLC "does not allow companies to differentiate themselves from the competition with a recognizable entity form," whereas a benefit LLC "provides a measure of uniformity, so that investors, workers, customers, and other[s] . . . can recognize the

argument made in support of benefit corporation legislation, B Lab has emphasized the value of creating an easily recognizable signal for socially minded consumers, workers, and investors.[251] Benefit entity statutes facilitate this signaling function by providing socially minded businesses the statutory "benefit" moniker to distinguish themselves from businesses organized as conventional corporations and LLCs, which are presumably less virtuous or altruistic.[252]

The central importance of branding to B Lab is reflected in its dogged insistence that all states considering benefit corporation legislation adhere closely to B Lab's model statute.[253] Uniformity in state statutes helps build and reinforce the brand—what it means to be a statutory "benefit corporation."[254] Where a state charts its own

benefit 'brand'"); CLARK ET AL., *supra* note 3, at 1 (emphasizing the "clear market differentiation" offered by benefit corporations); Houlahan et al., *supra* note 3, at 300 ("We promoted [benefit corporations] because [we] want all stakeholders to be able to distinguish good companies from good marketing.").

251. *See* CLARK ET AL., *supra* note 3, at 2–6 (justifying benefit corporations based upon the market demand for socially responsible businesses).

252. *See* ALEXANDER, *supra* note 3, at 155 ("In a marketplace where 'greenwashing' is common, a legal change of structure . . . to [a] benefit corporation can signal the company's commitment to its core values."); Dorff, *Assessing the Assessment*, *supra* note 21, at 516 ("Benefit corporations advertise themselves as different from ordinary, for-profit companies. They are better, more responsible, and kinder, and should therefore be treated differently."); Dorff, *Why Public Benefit Corporations?*, *supra* note 13, at 104 ("[B]eing a [benefit corporation] may generate enhanced credibility for a company's assertion that it is helping the world in a meaningful way."); Molk, *supra* note 109, at 248 ("Organizing as a benefit [entity] sends a clear signal to the socially conscious public that the organization prioritizes social good; organizing as [a conventional entity] sends no signal . . . ."); Murray, *Beneficial Benefit LLCs?*, *supra* note 7, at 446 (noting that organizing as a benefit entity "signals a commitment to 'benefit' society and the environment" in contrast to a conventional entity "that provides no such signal—or maybe even a signal that profit is paramount"); Murray, *Choose Your Own Master*, *supra* note 2, at 44 ("Branding is . . . beneficial because it can help customers and investors quickly identify socially and environmentally responsible companies."); Tu, *supra* note 21, at 160 ("Benefit Corporation status can serve a signaling function that gives interested parties a meaningful method of[] differentiation.").

253. *See* Callison, *Benefit Corporations*, *supra* note 52, at 161–63 (describing the aggressive opposition of B Lab and its affiliates to the efforts of the Colorado Bar Association Business Law Section to propose legislation that deviated from the MBCL); Loewenstein, *Benefit Corporations: A Challenge*, *supra* note 19, at 1034 (noting, based on the author's personal experiences with B Lab, that "unless proposed state benefit corporation legislation substantially conforms to the [MBCL], [B Lab] will actively oppose it and lobby for the Model Legislation").

254. *See* Loewenstein, *Benefit Corporation Law*, *supra* note 19, at 382 (explaining that uniformity in benefit corporation statutes allows investors, consumers, and others to assume certain core features irrespective of where the benefit corporation is organized); *see also* Loewenstein, *Benefit Corporations: A Challenge*, *supra* note 19, at 1034 ("[T]he branding effect [of benefit corporations] would be lost, or at least significantly diminished, if more flexible benefit corporation statutes, varying widely from state to state, were to be

path and creates a new socially minded statutory business form that eschews the MBCL template, B Lab bitterly disowns the state's statute.[255]

The significance of branding is likewise reflected in the mandatory nature of many of the statutory rules governing benefit entities under both the B Lab and Delaware models.[256] Rather than supplying merely default rules of governance and allowing each business to tailor those rules through private ordering, as is common for conventional business entity statutes, both the B Lab and Delaware benefit entity statutes impose several mandatory rules. These unwaivable, inalterable rules—regarding, among other things, a business's public benefit purpose, the requirement that the business's managers consider the interests of all who may be affected by the business's activities, and requirements concerning benefit reporting—ensure consistency among all businesses organized as a benefit entity, again reinforcing the "benefit" brand.[257]

But if the sole, or even primary, justification for benefit entity legislation is to create a state-endorsed designation and make that designation available to private, for-profit businesses to signal their altruism and virtue, then one should be sharply skeptical that such legislation is an appropriate or worthwhile use of state power. As detailed in Section A, existing benefit entity statutes offer no accountability—no means to ensure that businesses that organize as a benefit corporation or LLC are in any way deserving of the "benefit"

adopted."); Murray, *Social Enterprise Innovation*, *supra* note 4, at 357 ("[T]ension often exists between branding and private ordering. Maintenance of a useful brand associated with a group of companies generally requires a fair level of consistency, often achieved through mandatory rules.").

255. *See* Callison, *Benefit Corporations*, *supra* note 52, at 163 ("[W]hat [B Lab] really cares about is the name 'benefit corporation' . . . ."); Loewenstein, *Benefit Corporation Law*, *supra* note 19, at 382 ("B Lab and its supporters have been insistent that jurisdictions considering benefit corporation legislation adhere to the principles of the Model Legislation or eschew the term benefit corporation, even though B Lab does not own any rights to the term."). Although B Lab has embraced Delaware's benefit corporation statute despite its deviations from the MBCL, B Lab has been critical of other alternatives to the MBCL. *See, e.g.*, CLARK ET AL., *supra* note 3, app. C.

256. *See* MODEL BENEFIT CORP. LEGIS. § 101(d) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS] ("A provision of the articles of incorporation or bylaws of a benefit corporation may not limit, be inconsistent with, or supersede a provision of [the MBCL]."); *accord* DEL. CODE ANN. tit. 6, § 18-1201 (Supp. 2018).

257. *Cf.* Welch & Saunders, *supra* note 158, at 865–66 (observing that mandatory rules in Delaware's conventional corporate law facilitate branding for Delaware corporations). Of course, in addition to facilitating branding, advocates of benefit corporations might argue that the mandatory statutory provisions are necessary to ensure a firm's prosocial commitment.

moniker that is bestowed upon them with the state's imprimatur. Worse yet, as described in Section B, benefit entity legislation imposes its own costs, creating needless complexity in the legal system and fostering misimpressions about conventional for-profit businesses. Moreover, as noted in Section C, state-sponsored legislation is altogether unnecessary to enable socially minded businesses to distinguish themselves; private certifications awarded by nongovernmental organizations, like B Lab, already accomplish this function. Given these considerations, the cost-benefit analysis easily tips against statutory benefit entities—both benefit corporations and, especially, LLCs.

A. State-Sponsored Branding Without Accountability

If the principal aim of benefit entity legislation is to create a state-sanctioned designation for for-profit businesses that are distinctly purpose driven and socially minded, then such legislation should presumably provide some means of accountability.[258] Specifically, the legislation should include some measures to ensure that any business that is organized as a benefit corporation or LLC is deserving of the "benefit" label. Otherwise, the state-sponsored label risks misleading unsuspecting customers, investors, and the public into believing that self-proclaimed "benefit" businesses are in fact more virtuous or altruistic than businesses organized as conventional corporations or LLCs.[259]

The problem is that existing benefit entity statutes offer no accountability—no means for the public to ensure that a benefit entity will pursue or produce public benefit any more or differently

258. *See* Loewenstein, *Benefit Corporations: A Challenge*, *supra* note 19, at 1016 ("Presumably, the benefit corporation should be accountable to the public and its stakeholders if it is organized as a 'benefit corporation.'").

259. *See* Kennan El Khatib, Comment, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 185 (2015) ("The creation of the benefit corporation has created a false dichotomy between traditional corporations and benefit corporations . . . , foster[ing] the illusion that benefit corporations are automatically more socially and environmentally conscious than traditional corporations."); *see also* Murray, *The Social Enterprise Law Market*, *supra* note 9, at 560–61 ("'[B]enefit corporation[]' . . . connote[s] a focus on the society at large. The public does not generally take the time to dive into the nuances of corporate law, therefore, the name of the entity form may be important in the initial shaping of the public's view of the entity."). *But see* Molk, *supra* note 109, at 254 (arguing that, in light of the weaknesses in the statutory benefit corporation framework, "the signal of being a 'benefit corporation' . . . as one pursuing social enterprise will not be particularly credible").

than a business organized as a conventional corporation or LLC.[260] Like conventional corporation and LLC law, benefit entity statutes leave the owners of the business—corporate shareholders and LLC members—in the same privileged position of being the sole constituency empowered to (directly or indirectly) control the business.[261] And nothing in benefit entity statutes meaningfully restricts those owners in deciding how and to what extent, if at all, to pursue public good.[262]

Instead, as described below, benefit entity statutes are larded with unenforceable, illusory commitments, a farcical enforcement mechanism for those commitments, and an unserious, self-serving disclosure mandate. Consequently, self-proclaimed benefit entities are, as a practical matter, indistinguishable from conventional for-profit entities: they will only pursue public benefit if, and only to the extent that, their owners choose to do so.[263]

1. Illusory Commitments

The legal commitments made by a business embracing the state-sponsored designation of a benefit entity are astonishingly vague and entirely illusory. As already explained, benefit entity statutes merely require a business to, in the language of the MBCL, create a "material positive impact on society and the environment"[264] or, in

260. *See* J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 110 (2012) [hereinafter Callison, *Putting New Sheets on a Procrustean Bed*] ("[T]here is no enforcement mechanism to ensure that corporations which fail to seek general public benefit do not latch on to the benefit corporation moniker and the developing marketplace for social enterprises."); Dorff, *Assessing the Assessment*, *supra* note 21, at 516–17 (describing the statutory safeguards against misuse of the benefit corporation as "toothless"); Dorff, *Why Public Benefit Corporations?*, *supra* note 13, at 109 (observing, in the context of Delaware public benefit corporations, that "the legal form does very little to prevent founders from adopting the appearance of a prosocial organization while abandoning the substance"); Reiser, *supra* note 43, at 611 ("At the moment, benefit corporations require only formal articulation of a dual mission, and oversight over the genuineness of these statements is lacking.").

261. *See* Strine, *Making It Easier for Directors*, *supra* note 43, at 245 ("[The] ultimate success [of the benefit corporation model] depend[s] on . . . investors who not only mouth the belief that corporations should be managed for the best interests of all . . . but in fact act on that belief [in] real world investing and voting decisions . . . .").

262. *See id.* at 246 ("[B]ecause only stockholders are given rights under [benefit corporation statutes] . . . [t]here is a legitimate concern that the [stockholders] will simply abandon their principles and demand [a corporation's board to maximize profits].").

263. *See supra* notes 195–204 and accompanying text.

264. MODEL BENEFIT CORP. LEGIS. § 102 (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS] (defining "general public benefit"); *see id.* at § 201(a).

the language of Delaware's statutes, "produce a public benefit or public benefits and to operate in a responsible and sustainable manner."[265] Of course, one does not need a law degree to recognize that these standards are so vague as to be meaningless and, therefore, unenforceable.[266] A business might plausibly assert that its production of a good or service for which there exists public demand, its use of carbon-saving LED bulbs rather than incandescent bulbs, or its employment of workers who might otherwise be unemployed or employed in less desirable positions are all a "public benefit."[267] Put differently, any business could characterize its existing practices or policies as creating a "material positive impact on society and the environment."[268]

265. *See* DEL. CODE ANN. tit. 8, § 362(a) (2016) (governing benefit corporations); *id.* tit. 6, § 18-1202(a) (Supp. 2018) (governing benefit LLCs).

266. *See* Callison, *Benefit Corporations*, *supra* note 52, at 153 ("'General public benefit' is a mish-mash that lacks any . . . fiduciary duty limits and contains few restrictions to hamper the freedom of self-interested directors . . . . The door is opened for directors who act in self-interested fashion to point to some nebulous public benefit justification."); Dorff, *Why Public Benefit Corporations?*, *supra* note 13, at 109–10 (observing, in the context of Delaware's public benefit corporation statute, that the meaning of "responsible," "sustainable," and "public benefit" is "extremely broad" and "less than clear"); Loewenstein, *Benefit Corporations: A Challenge*, *supra* note 19, at 1025 ("[T]he general public purpose does not delineate specific covenants or undertakings of the benefit corporation that a third party could match up against the actions taken by the corporation; rather, it sets forth a vague and general aspiration."); Loewenstein, *Benefit Corporation Law*, *supra* note 19, at 390 ("The general public benefit is, in essence, an aspiration of the benefit corporation; having a positive effect on society and the environment is unmeasurable and, therefore, not amenable to an opinion that the benefit corporation 'acted in accordance' with that aspiration 'in all material respects.'" (quoting MODEL BENEFIT CORP. LEGIS. § 302(c)(1) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS])); Murray, *Choose Your Own Master*, *supra* note 2, at 30 (criticizing the mandatory "general public benefit purpose" as "too vague because it does not provide a practical way for directors to make decisions"); Yockey, *supra* note 111, at 794 ("The ability to justify decisions by citing vague public benefit requirements or stakeholder interests could give managers 'broad cover' . . . . [T]he wide range of interests that directors must consider arguably makes them answerable to none." (quoting Liam Pleven, *When Doing Good Meets Investing*, WALL ST. J. (July 12, 2013, 6:05 PM), https://www.wsj.com/articles/SB10001424127887324694904578598231690128560 [http://perma.cc/9GNW-9U98 (dark archive)])).

267. To be sure, under the MBCL (but not under Delaware law), a business's public benefit must be assessed against a "third-party standard." *See* § 102. But as explained below, there are several reasons to be dubious about the accountability created by the "third-party standard" requirements. *See infra* Section III.A.3.

268. § 102 (defining "general public benefit"); *see* Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247, 265 (2014) (observing that under Delaware's statute "companies in the technology, healthcare, and education sectors easily meet the minimal requirements of the public benefit corporation form, because positive 'educational,' 'medical,' and 'technological'

The statutory mandate that the managers of a benefit entity "consider" or "balance" the interests of constituencies beyond the owners of the business is likewise precatory and, thus, unenforceable. To merely "consider" such interests, as is required by the MBCL,[269] is a trivial burden[270]—one that it would be impossible to show that a business's managers failed to meet.[271] Indeed, to "consider" various stakeholder interests does not mean that the managers of a self-proclaimed benefit business will make decisions any differently than if there were no such statutory mandate.[272] After all, even a business operating strictly on a profit-maximizing paradigm would need to "consider" the impact of its actions on various nonowner constituencies in order to operate most profitably.[273]

The obligation to "balance" such interests, as is required under Delaware's benefit entity statutes,[274] is no different and, therefore,

effects are each considered a 'public benefit' by the Delaware statutory provisions governing public benefit corporations").

269. *See* MODEL BENEFIT CORP. LEGIS. § 301(a) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS].

270. *See* Loewenstein, *Benefit Corporations: A Challenge*, *supra* note 19, at 1026 (observing that the statutory obligation to "consider" could be easily satisfied by "each board decision on whatever matter [being] accompanied by a pro forma preamble reciting that, in making a certain decision, the board considered the effect of that decision on the listed constituencies").

271. *See* Callison, *Putting New Sheets on a Procrustean Bed*, *supra* note 260, at 108–09 (criticizing the MBCL for freeing directors of accountability to any one constituency or goal); *see also* Loewenstein, *Benefit Corporations: A Challenge*, *supra* note 19, at 1026–27 (same); Murray, *Choose Your Own Master*, *supra* note 2, at 28, 33–34 (same); Yockey, *supra* note 111, at 794 (same).

272. *See* Clark & Babson, *supra* note 5, at 850 (conceding that the statutory mandate to consider various constituencies "does not require a particular *outcome* of directors' decision-making"); Reiser, *supra* note 43, at 599–600 ("The broad discretion benefit corporation statutes accord to directors can . . . be faulted for giving directors unbridled discretion . . . ."); Regina Robson, *A New Look at Benefit Corporations: Game Theory and Game Changer*, 52 AM. BUS. L.J. 501, 546 (2015) ("There is nothing in the MBCL that prohibits [benefit corporation directors]—after giving due consideration to multiple stakeholder interests—from choosing to give priority to shareholder interests.").

273. *See, e.g.*, Stefan J. Padfield, *The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization*, 19 TRANSACTIONS: TENN. J. BUS. L. 415, 443 (2017) ("[I]t is incorrect to say that 'regular corporations . . . cannot take into consideration social factors' because social factors impact the shareholder wealth analysis, and not always negatively. In fact, in determining the best path to maximizing shareholder value, corporations arguably must consider social factors in order to satisfy their duty of care to become informed of all material information reasonably available.").

274. *See* DEL. CODE ANN. tit. 8, § 365(a) (2016) (governing benefit corporations); *id.* tit. 6, § 18-1202(a) (Supp. 2018) (governing benefit LLCs).

subject to the same criticisms.[275] To "balance" means that managers must merely give *some* weight to the interests of stakeholders, not that stakeholder interests should bear *equal* weight as the owners' interests.[276] "Balancing" can thus result in giving the interests of stakeholders so little weight as to allow the owners' interests to predominate.[277] Consequently, like the statutory obligation to "consider," the obligation to "balance" is an illusory commitment that leaves an entity's manager with essentially unfettered discretion.[278]

2. Farcical Enforcement

The sole legal vehicle aimed at ensuring that a self-proclaimed benefit entity actually fulfills its otherwise illusory statutory commitments is the benefit enforcement proceeding.[279] But as an accountability mechanism, the benefit enforcement proceeding is farcical.

To begin with, standing to bring such a proceeding is limited to a benefit entity's owners.[280] But the owners suffer from an obvious conflict of interest: the owners stand to gain financially from the business's profits and, therefore, have a disincentive to bring a benefit enforcement action that might potentially interfere with the business's profit making.[281] In contrast to the entity's owners,

275. *See* Murray, *Social Enterprise Innovation*, *supra* note 4, at 355 n.64 (reporting that one drafter of Delaware's benefit corporation statute viewed the difference between "balance" and "consider" as minor and unimportant).

276. *See id.*

277. *See id.*

278. *See* ALEXANDER, *supra* note 3, at 92 ("Though the statute mandates . . . balancing . . . it does not mandate any particular outcome . . . .").

279. *See* DEL. CODE ANN. tit. 8, § 367 (2016) (governing Delaware benefit corporations); *id.* tit. 6, § 18-1206 (Supp. 2018) (governing Delaware benefit LLCs); MODEL BENEFIT CORP. LEGIS. § 305(a) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS].

280. *See* tit. 8, § 367 (governing Delaware benefit corporations); *id.* tit. 6, § 18-1206 (Supp. 2018) (governing Delaware benefit LLCs); MODEL BENEFIT CORP. LEGIS. § 305(c) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS]. The MBCL also authorizes the corporation to bring such a proceeding, but it is implausible that directors would authorize a corporation to do so. *See* Loewenstein, *Benefit Corporation Law*, *supra* note 19, at 387.

281. *See* Reiser, *supra* note 43, at 613 ("If a benefit corporation begins veering away from its dual mission to achieve greater profits, shareholders stand to gain financially from this decision."); *see also* Murray, *An Early Report on Benefit Reports*, *supra* note 39, at 45 ("While the shareholders might be adequate guardians of their own interests, it does not seem likely that shareholders will do an adequate job defending the interests of the general public."); Murray, *The Social Enterprise Law Market*, *supra* note 9, at 550 ("Shareholders may not have significant incentives to keep directors accountable to *other* stakeholders, especially when doing so reduces the shareholders' financial returns.").

nonowners—those who might benefit from the business's purported public benefit purpose and otherwise do not suffer from the same financial conflict of interest—are expressly denied standing to bring a benefit enforcement proceeding.[282] Likewise, no governmental regulator has standing to bring a benefit enforcement proceeding, despite the "benefit" designation that is generously granted with the state's imprimatur.[283]

Setting aside the stark conflict of interest problem, there are other reasons to be skeptical about the benefit enforcement proceeding as a viable accountability mechanism. To name one, virtually all benefit entities are closely held businesses[284] in which there is typically substantial, if not complete, overlap between the business's owners and the individuals who serve as its managers. In that context, it is absurd to expect the owners to sue themselves in their managerial capacity to enforce the business's statutory commitment to create public benefit.[285]

Even when owners do not themselves serve as managers of a benefit entity, as already noted, the owners—and not any other nonowner constituency—have the sole right to appoint the entity's managers, whether it is through the election of corporate directors by shareholder vote or the appointment of an LLC's managers pursuant

282. *See* Loewenstein, *Benefit Corporation Law*, *supra* note 19, at 388 ("[T]he persons with the greatest incentive to sue the benefit corporation—the beneficiaries of its specific public benefit—are expressly denied standing [to bring a benefit enforcement proceeding]."); *see also* Loewenstein, *Benefit Corporations: A Challenge*, *supra* note 19, at 1021 ("Perhaps the best judges of the effectiveness of [a benefit] corporation's efforts are the supposed beneficiaries of its benefit purposes [but those beneficiaries] are denied standing under the [MBCL]."); Murray, *Social Enterprise Innovation*, *supra* note 4, at 362 ("The fact that other stakeholders cannot bring a claim creates some doubt that the benefit enforcement proceedings alone will give third parties confidence in the social value created by benefit corporations.").

283. *See* Loewenstein, *Benefit Corporations: A Challenge*, *supra* note 19, at 1021–22; Reiser, *supra* note 43, at 613 (observing that, in contrast to nonprofits, "[t]here is no regulatory role for any public official in the benefit corporation").

284. *See* Loewenstein, *Benefit Corporation Law*, *supra* note 19, at 386 (observing that "almost all benefit corporations [are] privately held businesses"); Winston, *supra* note 39, at 1829 ("[M]ost benefit corporations are currently small companies that are privately owned . . . .").

285. *See* Dorff, *Why Public Benefit Corporations?*, *supra* note 13, at 104–05 ("Only shareholders have standing to sue to enforce the [directors' statutory duties], and in closely held [benefit corporations], the shareholders are likely to be the same people as the directors. Barring a rift among the shareholders, then, there seems little chance of a lawsuit."); Winston, *supra* note 39, at 1829 ("In a small, privately owned benefit corporation [where] there is substantial overlap among the officers, directors, and shareholders[,] . . . the shareholders cannot be effective enforcers of mission because they are the same people as the management they are supposed to be monitoring.").

to the terms of an LLC agreement. Naturally, where owners get to select the managers, the managers will do the owners' bidding—which may or may not involve creating public benefit.[286] In that context, it is again absurd to expect the owners to bring a benefit enforcement proceeding against the managers they have selected (and have the power to remove) in order to enforce the business's statutory commitments.[287]

Even where there is a dissenting owner, as might be the case in a publicly traded benefit entity, it is doubtful that the owner would ever succeed in a benefit enforcement proceeding. First, a benefit enforcement proceeding brought against the entity's managers is considered a derivative, rather than direct, lawsuit.[288] As such, the lawsuit will be subject to various procedural barriers associated with all derivative actions, including the obligation to first make a demand on the entity's managers or otherwise demonstrate the futility of such a demand.[289]

Second, assuming the dissenting owner's claims can survive these procedural barriers, as already noted, the statutory standards of what qualifies as a "public benefit" and the conduct required of managers are so vague as to be meaningless and, therefore, not susceptible to judicial enforcement.[290] Rather than second-guess the judgment of an entity's managers as to how to create public benefit, courts are likely to defer to the managers' judgment,[291] applying the business judgment

286. *See* Callison, *Benefit Corporations*, *supra* note 52, at 153 ("[S]hareholders hire and fire directors, and it is likely that when private shareholder benefit and broader public benefit collide, many directors will 'follow the money' and align with shareholder interests."); Strine, *Corporate Power Is Corporate Purpose I*, *supra* note 197, at 179 ("[W]hen a conflict emerges between the interests of corporate constituencies without power within the corporate polity—which is all of them other than stockholders—and the one with power—the stockholders—those elected by the stockholders bend to the will of their citizenry [i.e., the stockholders].").

287. *See* Dorff, *Assessing the Assessment*, *supra* note 21, at 517 ("In closely held companies, none [of those who have standing to bring a benefit enforcement proceeding] are likely to have an incentive to enforce the company's social mission with a lawsuit, barring unusual circumstances.").

288. *See* DEL. CODE ANN. tit. 8, § 367 (2016) (governing Delaware benefit corporations); *id.* tit. 6, § 18-1206 (Supp. 2018) (governing Delaware benefit LLCs); MODEL BENEFIT CORP. LEGIS. § 305(c)(2) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS].

289. *See* Loewenstein, *Benefit Corporation Law*, *supra* note 19, at 387–88.

290. *See supra* Section III.A.1.

291. *See* CLARK ET AL., *supra* note 3, at 28 ("If the corporation could show a meaningful good faith effort to pursue such positive impacts, then a judge would likely be reticent to interpose his or her judgment for the corporation's."); Murray, *Social Enterprise Innovation*, *supra* note 4, at 365–66 ("Without clarity on priority or weight of

rule or a "purpose judgment rule" variant,[292] in the absence of evidence suggesting a conflict of interest or subjective bad faith.[293] Finally, even if the dissenting owner can convince a court that the entity's managers failed to meet their ill-defined statutory commitments, the best a prevailing owner can hope for is some form of nonmonetary remedy, because money damages are statutorily prohibited.[294]

Given these many limitations, it is improbable that a dissenting owner would ever elect to bring a benefit enforcement proceeding.[295] Indeed, after nearly a decade since the first benefit corporation statute, there are no reported cases involving a benefit enforcement

the factors that [benefit corporation] directors must balance, significant accountability imposed by the courts becomes highly unlikely."); Reiser, *supra* note 43, at 612 ("[Benefit corporation statutes] impose no clear framework for directorial decision making. Without one, it is difficult to identify a metric by which shareholders might enforce fiduciaries' compliance with dual mission."); Yockey, *supra* note 111, at 797 ("Even if shareholders litigate issues bearing on a benefit corporation's social pursuits, courts confronting this new and unique space will likely resist substituting their judgment for that of management so long as managers appear to be making a good faith effort.").

292. *See* Murray, *Choose Your Own Master*, *supra* note 2, at 41–42.

293. *See* DEL. CODE ANN. tit. 8, § 365(b) (2016) (providing that a director's statutory obligation to "balance" the interests of owners with those of nonowners "will be deemed . . . satisf[ied] . . . if [her] decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve"); MODEL BENEFIT CORP. LEGIS. § 301(e) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS] (providing that a director's statutory obligation to "consider" the interests of various constituencies is fulfilled if the director is disinterested, informed, and "rationally believes that the business judgment is in the best interests of the benefit corporation").

294. *See* DEL. CODE ANN. tit. 6, § 18-1204(a) (Supp. 2018) (governing Delaware benefit LLCs); MODEL BENEFIT CORP. LEGIS. §§ 301(c), 305(b) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS] Delaware's benefit corporation statute contemplates money damages but allows a corporation's charter to exculpate those damages. DEL. CODE ANN. tit. 8, § 365(c) (2016). In practice, such exculpation clauses are standard. *See* J. Robert Brown, Jr. & Sandeep Gopalan, *Opting Only In: Contractarians, Waiver of Liability Provision, and the Race to the Bottom*, 42 IND. L. REV. 285, 285 (2009) (finding that all but one corporation in the Fortune 100 have exculpation provisions); J. Travis Laster, Revlon *Is A Standard of Review: Why It's True and What It Means*, 19 FORDHAM J. CORP. & FIN. L. 5, 52 (2013) (describing "corporations without exculpatory provisions in their charters" as "rare").

295. *See* Loewenstein, *Benefit Corporation Law*, *supra* note 19, at 388 (concluding, in light of the many limitations to a benefit enforcement proceeding, "there is little incentive to bring such a claim"); Murray, *Social Enterprise Innovation*, *supra* note 4, at 362 ("With monetary damages unavailable, plaintiffs and their attorneys have less incentive to bring benefit enforcement proceedings [and] directors have less reason to fear the proceedings . . . .").

proceeding.[296] And there is no reason to believe such proceedings will be brought any more frequently in the analogous context of benefit LLCs. All of this has led one typically measured business law scholar to conclude the benefit enforcement proceeding is "an ephemeral remedy [and] at best[] an illusion"[297]—one that masks the true unenforceability of the statutory commitments made by businesses embracing the state-sponsored "benefit" designation.

3. Feckless Reporting Mandate

The statutorily mandated benefit report does little to address the lack of accountability. In theory, the benefit report provides transparency and, thus, a measure of accountability by allowing the public to decide for itself whether a self-proclaimed benefit entity is living up to its public benefit commitment.[298] In practice, however, benefit reports merely provide businesses with an opportunity to engage in self-congratulatory propagandizing.[299]

Although a business's benefit report must provide a narrative description of the ways the business pursued and created public benefit and any hindrances the business faced in doing so,[300] this overly vague statutory mandate gives a benefit entity "an extreme amount of freedom in deciding what to report" and what to omit.[301] Moreover, a benefit report is not required to be audited or certified by a third party,[302] and there is no express penalty against a benefit

296. Loewenstein, *Benefit Corporation Law*, *supra* note 19, at 388; Murray, *Social Enterprise Innovation*, *supra* note 4, at 366 n.117.

297. Loewenstein, *Benefit Corporation Law*, *supra* note 19, at 388–89; *accord* Yockey, *supra* note 111, at 797 (concluding that "the benefit enforcement proceeding is fairly toothless").

298. Of course, even this theory is highly dubious because it relies on the "fanciful" assumption that consumers will take the time to retrieve, review, and then intelligently assess such reports. *See* Loewenstein, *Benefit Corporation Law*, *supra* note 19, at 386–87.

299. *See* Ball, *supra* note 4, at 968 ("[T]he benefit report is characterized as a marketing and branding tool for social enterprises not a corporate governance mechanism."); Murray, *Social Enterprise Innovation*, *supra* note 4, at 360 ("Many of the few annual [benefit] reports that are currently available are self-promotional and do not provide much value to a reader looking for a full, fair evaluation of the business.").

300. *See* MODEL BENEFIT CORP. LEGIS. § 401(a)(1) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS].

301. Murray, *An Early Report on Benefit Reports*, *supra* note 39, at 46; *accord* Murray, *Social Enterprise Innovation*, *supra* note 4, at 359–60.

302. *See* MODEL BENEFIT CORP. LEGIS. § 401(c) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS].

entity for false or misleading reporting.[303] Under this feckless framework, because a benefit entity, its managers, and owners all have a financial and reputational interest in portraying the business most positively, benefit reports are destined to be nothing more than self-promoting puffery.[304]

To temper the potential for such abuse, the MBCL also requires a business embracing the "benefit" brand to include in its benefit report an assessment of its overall social and environmental performance against a "third-party standard."[305] As already noted, B Lab's proprietary B Impact Assessment qualifies as a "third-party standard," but that only raises questions about B Lab's apparent self-interest in promoting benefit entity legislation.[306] To the extent benefit entity legislation channels socially minded businesses to measure themselves against B Lab's standards, such legislation only

303. *See* Ball, *supra* note 4, at 963; Dorff, *Assessing the Assessment*, *supra* note 21, at 539–40; Murray, *Social Enterprise Innovation*, *supra* note 4, at 359. State fraud laws may provide a safeguard against false or misleading assessments, but a plaintiff claiming fraud would need to show scienter and harm caused by the fraud. *See* Dorff, *Assessing the Assessment*, *supra* note 21, at 539–40.

304. *See* Murray, *Social Enterprise Innovation*, *supra* note 4, at 359 (noting that the "vague" statutory requirements for a benefit report under the MBCL "allow[] for significant puffery"); *see also* Callison, *Putting New Sheets on a Procrustean Bed*, *supra* note 260, at 111 (concluding the MBCL permits a business to produce a benefit report that is "sketchy, forward-looking, vague, non-analytical or fabricated, and no one will know the difference"); Yockey, *supra* note 111, at 796 (noting that the MBCL enables "firms with negative or hard-to-express information [to] simply withhold disclosure or release only partial information").

305. *See* MODEL BENEFIT CORP. LEGIS. § 401(a)(2) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS].

306. *See* Loewenstein, *Benefit Corporation Law*, *supra* note 19, at 386 ("[I]nasmuch B Lab meets the statutory requirement of providing a third-party standard, [it] smacks of self-interest."); *id.* at 391 n.42 (observing, based on the author's personal experience, that B Lab opposes benefit corporation legislation that does not require an annual assessment based on a third-party standard); *see also* Heminway, *What Am I Missing*, *supra* note 193 ("B Lab, which supports or is behind the benefit corporation legislative proposals . . . is essentially the only [third-party standard] that meets the statutory standards. This smells of conflicting interests . . . ."); Murray, *Social Enterprise Innovation*, *supra* note 4, at 352 n.41 ("B Lab serves as both a driving force behind the lobbying efforts and a provider of the dominant third-party standard. This dual role seems to suggest a conflict of interest . . . ."); Yockey, *supra* note 111, at 798 ("A cynic might note that B Lab [who lobbied for the Model Act] also happens to be in a position to gain reputational benefits by providing firms with the assessment standards that the Model Act requires."). As already noted, although B Lab provides benefit corporations complimentary access to B Lab's B Impact Assessment tool, B Lab offers businesses that earn a qualifying score on its proprietary assessment the opportunity to be certified as a "B Corporation" for a fee. *See supra* note 49 and accompanying text.

empowers and aggrandizes the reach of one private nonprofit to impose onto others its idiosyncratic vision of public good.[307]

To be sure, as an alternative to B Lab's standards, a benefit entity is free to select another set of third-party standards, so long as those standards meet the statutory definition set forth in the MBCL. But the MBCL defines "third-party standard" in only general terms,[308] leaving private standard-setters largely unregulated and free to prescribe their own conception of what constitutes public benefit.[309] The only statutory restrictions are that the standard-setter is independent of the benefit entity and that its standards are comprehensive, transparent, and credible.[310] As observed by one scholar, "[i]f a standard-setter clearly and transparently sets low standards, it may qualify [as a 'third-party standard' under the MBCL] . . . just as a standard setter with higher standards, leaving the door open to greenwashing or even fraud."[311]

Of course, benefit entities may have little need to shop for a particularly lenient third-party standard, because the MBCL does not statutorily require a business to obtain any particular level of achievement against those standards in order to retain its state-bestowed "benefit" status.[312] Whatever third-party standard a benefit entity chooses, the business and its managers, and not the third-party standard-setter, get to assess the business's performance against those

307. *See* Dorff, *Why Public Benefit Corporations?*, *supra* note 13, at 111 (observing that one disadvantage of B Lab's dominance as a third-party standard-setter is "that by imposing a particular vision of how companies should behave, it impedes entrepreneurs from experimenting with a variety of different approaches"); *see also* Callison, *Putting New Sheets on a Procrustean Bed*, *supra* note 260, at 98 (criticizing this aspect of the [MBCL] as "illiberal and conformity-inducing").

308. *See* MODEL BENEFIT CORP. LEGIS. § 102 (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/-SPDS] (defining "third-party standard").

309. *See* Murray, *An Early Report on Benefit Reports*, *supra* note 39, at 46 ("There is . . . little to no oversight or assurance of quality with regards to the third-party standards."); Reiser, *supra* note 43, at 611 (observing that standard-setters are left "unregulated . . . bounded by neither standards nor oversight").

310. *See* § 102 (defining "third-party standard").

311. Reiser, *supra* note 43, at 611; *see also id.* at 617 ("[T]he delegation to third-party standard-setters to vet . . . public benefit and the lack of a statutory floor for what counts as public benefit make low standards and greenwashing particular concerns for the benefit corporation."); Murray, *Social Enterprise Innovation*, *supra* note 4, at 361–62 ("A benefit corporation that does not see the value in using a third-party standard may choose to use the weakest standard available, provide little to no useful information to the market, and waste company resources in the process. Under the [MBCL], this sort of activity by opportunistic benefit corporations would be difficult to punish . . . .").

312. *See* Dorff, *Assessing the Assessment*, *supra* note 21, at 551.

standards.[313] The third-party standard-setter has no say in that assessment, the business need not provide any supporting documentation,[314] and, as already noted, there is no express penalty for false or misleading reporting.[315]

Add to these concerns the fact that under the MBCL there is no apparent enforcement mechanism to ensure a "benefit" business even prepares and publishes the statutorily required benefit report.[316] Although the MBCL requires a benefit entity to file its benefit report with the state in which it is organized,[317] the legislation provides for no consequences if a business fails to do so.[318] Perhaps the owners of a benefit entity can bring a benefit enforcement proceeding to compel the noncomplying business to perform its reporting obligation,[319] but, as already noted, there are numerous reasons to be skeptical that the owners would ever elect to do so.[320] What is clear is that neither members of the public nor any governmental authority—those who otherwise have no way to confirm a self-proclaimed benefit entity is deserving of its state-sanctioned "benefit" label—have standing to compel a business to actually prepare and publish a benefit report.[321]

Given the fecklessness of the MBCL legal framework, it is unsurprising that an empirical study showed compliance with the statutory benefit reporting mandate is "abysmal," at less than ten

313. *See id.* at 551–52.

314. *See id.*

315. *See supra* note 303 and accompanying text.

316. *See* Ball, *supra* note 4, at 963; Murray, *Social Enterprise Innovation*, *supra* note 4, at 359.

317. *See* MODEL BENEFIT CORP. LEGIS. § 402(d) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS]. Although the MBCL requires a benefit corporation's annual benefit report to be filed with the state, most of the states that have adopted the MBCL have omitted this particular provision in their state statutes. *See* Murray, *An Early Report on Benefit Reports*, *supra* note 39, at 31–32, 47.

318. The MBCL includes no express penalty for a benefit corporation's failure to file its annual benefit report with the state, and most state benefit corporation statutes have followed MBCL in this regard. *See* § 402(d).

319. The MBCL does not expressly provide that a benefit enforcement proceeding may be brought to compel the production of a benefit report. *See id.* § 305(a). But presumably a shareholder may bring such a proceeding by alleging that the failure to produce a benefit report is a "violation of [a statutory] obligation," which is an appropriate ground for such a proceeding. *See id.*; Murray, *An Early Report on Benefit Reports*, *supra* note 39, at 44.

320. *See supra* Section III.A.2.

321. *See* MODEL BENEFIT CORP. LEGIS. § 305(c) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS] (identifying the parties who have standing to bring a benefit enforcement proceeding).

percent in the sample surveyed.[322] Of the very few businesses that did produce a benefit report, the study showed that the contents of a majority of reports failed to comply with the statutory requirements of the MBCL.[323] To take a particularly risible example from the study, the benefit report of one company identified, without elaboration, an otherwise obscure individual, "John Franco," as its third-party standard.[324] Who is John Franco? What are his standards? And do those standards meet the letter or spirit of the MBCL? It is impossible to tell because, under the MBCL, neither the public nor any governmental authority has the means to answer any of these questions.[325] In all, the study's findings seem to only confirm that the nominally required benefit report is, in fact, optional and offers no accountability.[326]

Perhaps in recognition of the many flaws in the MBCL, Delaware's benefit entity statutes abandon much of the pretense surrounding benefit reports. Under Delaware statutes, the benefit report need not include an assessment against a third-party standard and need not be made publicly available to constituencies other than the business's owners.[327] In effect, Delaware's statutes seem to concede that self-proclaimed benefit entities are, like conventional corporations and LLCs, accountable only to their owners and no one else.

B. Costs of Benefit Entity Statutes

By creating a state-sanctioned "benefit" designation and making it available to private, for-profit enterprises without accountability, benefit entity statutes invite misuse and exploitation.[328] Absent-minded entrepreneurs may, with the best of intentions, embrace the "benefit" mantle but abjectly fail to comply with the statute's letter or spirit. Worse yet, outright charlatans may cynically flaunt the state-

322. *See* Murray, *An Early Report on Benefit Reports*, *supra* note 39, at 26.

323. *See id.* at 56–57 (depicting in tabular format the statutorily required elements missing from the benefit reports surveyed).

324. *See id.* at 46.

325. *See id.* at 47 n.116.

326. *See id.* at 44 (identifying the "[l]ack of effective statutory enforcement mechanisms" as one explanation for "widespread benefit report noncompliance").

327. *See* DEL. CODE ANN. tit. 8, § 366(a) (2016) (governing benefit corporations); *id.* tit. 6, § 18-1205 (Supp. 2018) (governing benefit LLCs).

328. *See* Callison, *Putting New Sheets on a Procrustean Bed*, *supra* note 260, at 109 ("To the extent a 'benefit corporation' election is intended to confer special branding status in the marketplace, the unregulated nature of the election, and the possibility of greenwashing for-profit activities under the benefit corporation label, is a significant problem.").

endorsed "benefit" designation to lure gullible, uninformed customers, investors, or employees. In either case, because benefit entity statutes offer no accountability to the public, there will be no consequences for well-meaning entrepreneurs or mendacious hucksters using the "benefit" moniker to gain an unfair advantage over businesses organized as conventional corporations and LLCs.[329]

This risk of misuse and exploitation should be enough to counsel against benefit entity statutes—especially when conventional corporate and LLC statutes already enable social enterprises to pursue a social mission alongside profits. But even if this risk does not materialize—even if statutory benefit corporations and LLCs do largely live up to their "benefit" aspiration—benefit entity statutes impose their own costs, adding needless complexity to an already complex legal system and exacerbating misimpressions about conventional for-profit businesses.

1. Needless Complexity

Business law is already awash in a bewildering array of statutory business forms. There are corporations, LLCs, and partnerships of all types, including general partnerships, limited partnerships, limited liability partnerships, and limited liability limited partnerships.[330] Within some forms, there are subforms. For example, LLCs may be member managed or manager managed, and corporations may, for tax purposes, elect between S-corporations versus C-corporations. Some states have also authorized other types of statutory business forms to accommodate social enterprises in addition to or in lieu of benefit corporations and LLCs.[331] Thus, even before the advent of benefit corporations and LLCs, it was easy for anyone without specialized legal training to be overwhelmed by the number of choices and distinctions between each.

Enacting benefit corporation and, now, benefit LLC legislation creates even more statutory business entities to reckon with. The

329. *Cf.* Murray, *Choose Your Own Master*, *supra* note 2, at 44 (observing that "[t]he benefits of a social enterprise brand have potential to be significant").

330. In addition to these familiar entities, there are others, like nonprofit corporations and statutory trusts. *See generally* Brewer, *supra* note 228, at 691–708 (discussing nonprofit corporations as social enterprises); Robert H. Sitkoff, *Trust As "Uncorporation": A Research Agenda*, 2005 U. ILL. L. REV. 31 (discussing statutory business trusts generally).

331. *See* Murray, *The Social Enterprise Law Market*, *supra* note 9, at 543–55 (identifying various types of newly enacted statutory business associations catering to social enterprises).

costs of this added complexity will be borne by many.[332] Law students, for example, will be forced to spend time understanding these new business forms. In a standard three- or four-credit law school course on business associations, only so much time may be devoted to each type of statutory business entity. Covering benefit corporations and LLCs will necessarily come at the expense of existing statutory forms, which already enable what benefit entity legislation purports to. Less versed in conventional corporations and LLCs, graduating law students will be less prepared for legal practice.

Already out of law school, legal practitioners will likewise need to devote unbillable time educating themselves to understand these new statutory business entities in order to competently advise their clients, as is their professional responsibility.[333] Their clients, too, will suffer from the added complexity. Entrepreneurs launching a new business already face a dizzying set of options, and the benefit corporation and LLC only further complicate the process of selecting an appropriate statutory entity.[334]

Like new businesses, the owners of existing businesses will also be forced to reassess their current legal structure and consider whether it makes sense to reorganize as a benefit entity.[335] The need to reassess will become particularly acute if competitors embrace the state-sponsored "benefit" mantle and, thereby, gain an edge in the market for customers, investment dollars, and employees. In such cases, owners of existing businesses may feel compelled to reorganize as a benefit entity, not to pursue social good per se but instead to simply rebalance the competitive playing field made uneven by benefit entity legislation.

For both new businesses and established ventures alike, the task of understanding these new statutory business forms, and their differences from other, more established forms of statutory business associations, will likely require the aid of legal counsel, which is typically expensive. Thus, for all businesses—whether or not they avail themselves of benefit entity legislation—grappling with these new statutory business forms will increase costs, while achieving nothing in terms of legal capability.

332. *See* Loewenstein, *Benefit Corporations: A Challenge*, *supra* note 19, at 1035 ("The proliferation of business organizations is confusing to the public and the bar.").

333. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016).

334. *See* Tu, *supra* note 21, at 172.

335. *See id.*

2. Fostering Misperceptions

Unfortunately, the task of understanding benefit entities—and their purpose and function within the broader landscape of statutory business associations—is made no simpler by the convoluted rationale given for their existence. On one hand, B Lab and other advocates have asserted that the new statutory business form offers an antidote to conventional corporate law's restrictive mandate of shareholder primacy. And it is easy to have this impression of conventional corporate law reading the excerpts from *Dodge*, *Revlon*, and *eBay* out of context.[336]

It is harder to understand these precedents in the larger legal framework that governs corporations and other statutory business associations. It takes prolix law review articles, like this one, to explain that conventional corporate and LLC law does not inexorably compel a business or its managers to mercilessly pursue profits at the expense of other considerations. As this Article has demonstrated, nothing in conventional corporate or, especially, LLC law precludes a social entrepreneur from forming and operating a business that is committed to balancing profits against a public mission. Indeed, as already noted, there are several examples of prominent businesses organized as conventional corporations or LLCs that do so successfully.[337]

But when legislatures enact statutes that explicitly authorize certain businesses to advance public benefit, it naturally leads to the negative inference that existing law somehow prohibits conventional corporations and LLCs from doing the same.[338] Benefit entity statutes

336. *Cf.* Khatib, *supra* note 259, at 174 ("The theory that the benefit corporation emerged as a result of legal necessity is misleading. . . . [A]dvocates of the benefit corporation have preyed on the fears of social entrepreneurs to help solidify the new corporate form.").

337. *See supra* notes 110–11 and accompanying text.

338. *See, e.g.*, Callison, *Benefit Corporations*, *supra* note 52, at 153 (warning that the existence of statutory benefit corporations implicitly suggests "all other corporations that do not elect benefit corporation status and impliedly must act only in ways that relate to shareholder profit maximization"); Callison, *Putting New Sheets on A Procrustean Bed*, *supra* note 260, at 104–05 (warning that statutory benefit corporations create a "legislative inference that corporations that are not benefit corporations can act only in ways that maximize shareholder profit"); Joshua P. Fershee, *supra* note 138, at 362–63 ("Now that many states have alternative social enterprise entity structures, there is an increased risk that traditional entities will be viewed (by both courts and directors) as pure profit vehicles, eliminating directors' ability to make choices with the public benefit in mind . . . ."); Manesh, *Nearing 30*, *supra* note 198, at 144 ("The very existence of an alternative legal regime rejecting the primacy of shareholders may serve as a counterpoint for corporate law, ossifying the already pervasive norm within traditional, for-profit corporations that boards must mercilessly pursue shareholder wealth maximization under

thus perpetuate the misperception that conventional corporations and LLCs are legally compelled to seek profits solely for the benefit of their owners[339]—that such businesses cannot, do not, or should not seek to benefit the public.[340]

Fomenting this misperception will have pernicious consequences. The managers and owners of businesses organized as conventional corporations or LLCs (not to mention the lawyers who advise them), may interpret the advent of statutory benefit entities to mean that conventional businesses are somehow legally precluded from pursuing initiatives that might advance social welfare at the expense of profits.[341] Worse yet, to the extent law shapes normative

all circumstances."); Tu, *supra* note 21, at 174 ("[T]he existence of Benefit Corporation statutes may have the unintended consequence of being construed as a legislative mandate that, under corporate law, considering broader stakeholder interest and creating a public benefit is wholly prohibited unless a business has opted to organize or reincorporate as a Benefit Corporation.").

339. *See, e.g.*, Callison, *Putting New Sheets on a Procrustean Bed*, *supra* note 260, at 88 ("Even if the legal effect of the shareholder profit-maximization norm might be overstated, the widely-held perception that corporations exist to maximize shareholder profit can operate on a prophylactic level to discourage directors from considering non-shareholder interests when making significant corporate decisions."); Fershee, *supra* note 138, at 363 ("There is an increasing sense, with the general public and in the courts, that anything else a [conventional] business does must be secondary to, and must not at all interfere with, profit seeking."); Reiser, *supra* note 43, at 609 ("Whatever the correct answer is on the state of the law, fiduciaries rightly or wrongly are often wedded to the idea that in a for-profit entity their foremost goal should be maximizing the entity's value to its owners.").

340. The MBCL attempts to mitigate this misperception by stipulating that the statute "shall not of itself create an implication that a contrary or different rule of law is applicable to a business corporation that is not a benefit corporation." *See* MODEL BENEFIT CORP. LEGIS. § 101(b) (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/W55T-SPDS]. But this provision "does not change the existential question of whether a legislature's adoption of a benefit corporation statute entails recognition of the profit maximization norm as a starting place for all corporations." Callison, *Putting New Sheets on a Procrustean Bed*, *supra* note 260, at 105 n.83.

341. *See, e.g.*, Blount & Offei-Danso, *supra* note 43, at 659 ("The development of entities like the benefit corporation creates the perception in the minds of entrepreneurs that they cannot carry out a social mission through a traditional business corporation."); Callison, *Putting New Sheets on a Procrustean Bed*, *supra* note 260, at 105 (warning that benefit corporation statutes "perpetuate[] the misconception that current corporate law requires directors to focus solely on immediate profit and share price maximization"); Tu, *supra* note 21, at 173 ("Even though [conventional] corporate law is flexible enough to accommodate the pursuit of both profit and public benefit, the public, corporate managers [and] shareholders . . . may construe Benefit Corporations as the only proper (or at least lowest risk) legal entity for pursuing a hybrid corporate purpose.").

opinions,[342] owners and managers of conventional businesses may come to believe that they in fact have no social responsibility, that the sole purpose of their business is to maximize profits, and that the promotion of social welfare is instead the province of benefit businesses, philanthropies, or the public sector.[343]

Customers, investors, and society more broadly may become similarly deluded. Believing that conventional businesses are legally compelled to maximize profits, society will expect less of conventional businesses and excuse their socially or environmentally irresponsible misdeeds.[344]

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342. *See* Robson, *supra* note 272, at 503 ("Law can cause the behavior of market participants to coalesce around a particular strategy and provide affirmation that other participants are acting in a similar manner.").

343. *See, e.g.*, Justin Blount & Patricia Nunley, *What Is A "Social" Business and Why Does the Answer Matter?*, 8 BROOK. J. CORP. FIN. & COM. L. 278, 312 (2014) ("The creation of [benefit corporations] tacitly gives credence to the widely held but inaccurate view that standard, for-profit corporations can legally justify misconduct or unethical decision-making as the relentless pursuit of profits required by corporate law."); Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 295 (2013) ("[T]o the extent Benefit Corps. represent a segmenting of the market, some traditional firms might be glad to abandon at least some of their social responsibility initiatives . . . on the rationale that now those 'are for Benefit Corps. to do.'"); Robson, *supra* note 272, at 552–53 ("[T]he creation of a specialized entity, with a statutorily defined purpose of creating a general public benefit . . . undermines the notion . . . that the obligation to consider the interests of stakeholders should be an integral part of all business entities." (emphasis omitted) (footnotes omitted)); Tu, *supra* note 21, at 177 ("[T]he existence of Benefit Corporations statutes could also be used to justify the lack of social initiatives by traditional for-profit corporations. . . . For-profit corporations facing pressure for their lack of social initiatives could point to Benefit Corporation statutes as a justification for their laser focus on profit maximization . . . .").

344. As others have observed,

> [The Model Benefit Corporation Legislation] . . . create[s] the perception in the minds of consumers, investors, and society as a whole that they should not expect much from typical corporations or should excuse their poor behavior as legally required under the shareholder wealth maximization norm—when it is in fact not—and that only these specially designated entities can or should be expected to pursue any social goals.

See Blount & Offei-Danso, *supra* note 43, at 659; *see also* Callison, *Putting New Sheets on a Procrustean Bed*, *supra* note 260, at 105 ("[T]he benefit corporation movement arguably harms the broader interests of 21st century corporate governance by creating a bipolar world of regular corporations that maximize private profits and other corporations that consider social and environmental sustainability and other public goods."); Jessica Chu, Note, *Filling a Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization*, 22 S. CAL. INTERDISC. L.J. 155, 186–87 (2012) ("[B]enefit corporations further reinforce the assumption that corporations exist only to make money for their shareholders. . . . Their creation establishes a legal dichotomy that only strengthens the shareholder primacy norm and furthers the unwarranted belief that 'regular' corporations are unable to do social good.").

Finally, courts, too, might arrive at the same conclusions.[345] Historically, courts have wisely avoided second-guessing decisions made by business managers to advance social welfare at the expense of profits.[346] Applying the business judgment rule, courts have instead deferred to the managers of a given company on the complex question of what is in the best interest of that company.[347] But the advent of benefit entities might naturally lead courts to make the negative inference that conventional corporations and LLCs may not sacrifice profits for public benefit.[348] Judicial movement in this direction would erode the protection of the business judgment rule[349] and create a strong disincentive for business managers to undertake prosocial initiatives, lest they be subsequently enjoined or, worse yet, face personal liability in a shareholder lawsuit alleging breach of fiduciary duty.[350]

Whatever the case—whether it is owners, managers, judges, or society more broadly that conclude that conventional corporations and LLCs may not pursue public benefit at the expense of profits—the result will be the same: businesses organized as conventional

345. *See* Fershee, *supra* note 138, at 384 ("With the addition of social benefit entities, courts are even more likely to question the business purpose of traditional entities."); Yosifon, *Opting Out of Shareholder Primacy*, *supra* note 166, at 483 ("It is quite possible that Chancery would now say that the implied public policy of [Delaware corporate law] is that deviation from shareholder primacy has to be done in the way prescribed by the [benefit corporation provisions], or not at all.").

346. *See supra* notes 129–38 and accompanying text.

347. As explained by the Delaware Supreme Court,

> [A] core rationale of the business judgment rule . . . is that judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information (in the case of directors) or an actual economic stake in the outcome (in the case of informed, disinterested stockholders).

Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 313–14 (Del. 2015); *see also* Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 N.Y.U. J.L. & BUS. 27, 46 (2017) (rationalizing the business judgment rule on the basis that "[j]udges need to respect Board decision-making for the simple reason that they are inferior to the Board in terms of determining what is the best corporate decision").

348. *See* Fershee, *supra* note 138, at 386.

349. *See id.* at 384–87.

350. *See* Callison, *Benefit Corporations*, *supra* note 52, at 153 ("For non-electing corporations, the existence of the benefit corporation alternative may weaken the promotion of socially responsible decision-making by corporate boards, the directors of which do not want to be brought into litigation or test the protections of the business judgment rule."); Tu, *supra* note 21, at 174–77 (warning that "[m]anagers of a traditional for-profit corporation might decide to reduce or eliminate broader social endeavors to mitigate the risk of an increasingly unpredictable legal environment [created by benefit corporation statutes]").

corporations or LLCs will retreat from socially minded programs and initiatives, and society will suffer a net decrease in public benefit arising from private enterprises.[351] This is an ironic result for a legislative movement that is ostensibly intended to harness the power of for-profit businesses to advance social welfare.

C. Availability of Private Branding

Given the risk that benefit entity statutes may be readily exploited to mislead the public and compete unfairly with conventional corporations and LLCs, and the attendant costs such statutes create by adding needless complexity and stoking misperceptions about conventional corporations and LLCs, it is hard to justify the enactment of such statutes—especially where, as has been demonstrated, from a legal perspective such statutes accomplish nothing.

But the case against benefit entity statutes is even stronger. If the purpose of benefit entity legislation is to facilitate an easily recognizable brand for socially minded businesses to distinguish themselves in the market, then there already exists an obvious alternative to state-enacted legislation. Private certifications, like B Lab's very own B Corporation certification, achieve the same signaling function and do so more effectively than benefit entity statutes.[352] In contrast to the statutory "benefit" moniker, which can

351. *See* Callison, *Putting New Sheets on a Procrustean Bed*, *supra* note 260, at 105 (warning that by "perpetuat[ing] the misconception that current corporate law requires directors to focus solely on . . . share price maximization," benefit corporation statutes will "undermine[] the promotion of socially responsible decision-making by corporate boards"); Robson, *supra* note 272, at 552–53 (warning that the advent of benefit corporations might lead socially conscious conventional businesses to "do less, constraining what has been a steady, if unspectacular, acknowledgment of social responsibility by traditional for-profits"); Tu, *supra* note 21, at 174 (warning that "added complexity and reinforcement of the profit maximization norm [created by benefit corporation statutes] may collectively lead to an overall reduction in the advancement of social missions by [conventional] corporations").

352. *See* Blount & Nunley, *supra* note 343, at 311 ("[T]here is no added transparency or branding benefit to consumers or investors created by [benefit corporations] that cannot be gained by any other [conventional entity] through simply engaging in annual social responsibility reporting audited by an established third party."); Molk, *supra* note 109, at 249 ("Clearly . . . , there is potential for certification systems to work without the existence of organizational forms designed specifically for social enterprise."); Murray, *Beneficial Benefit LLCs?*, *supra* note 7, at 448 ("[M]uch of the signaling benefit [that comes from organizing as a benefit entity] can be achieved through mere B certification from B Lab, while the legal issues can be dealt with in traditional LLC operating-agreement language."); Murray, *Choose Your Own Master*, *supra* note 2, at 45 ("A flexible corporate code, coupled with a meaningful private brand (such as, perhaps, B Lab's B

be claimed by any business without accountability for that claim, a private certification will typically entail some degree of verification or auditing by the certifying organization.[353] For example, B Corporation certification requires a business to not only earn a qualifying score on B Lab's proprietary B Impact Assessment but also to provide B Lab confirming documentation and to submit to a site visit.[354] In this respect, a private certification like B Corporation sends a more credible signal about a business's public benefit than the business's own, self-serving claims.[355]

Indeed, a cynic might surmise that B Lab's advocacy for benefit corporation legislation has been motivated, at least in part, by its desire to channel more businesses to its proprietary B Corporation certification.[356] Although B Lab is a nonprofit, the more businesses ascribe to its certification system, the greater influence B Lab and its principals enjoy to dictate their own particular vision of social good onto others. But if the aim, or even the effect, of benefit entity legislation is to channel more businesses to the private certification of a Philadelphia-based nonprofit, then that is surely not an appropriate use of state power. Socially minded businesses hoping to distinguish themselves in the marketplace can seek B Lab's certification without the state's imprimatur.

CONCLUSION

Perhaps the best argument that can be made for benefit LLCs is that unincorporated businesses should not be excluded from competitive advantages offered by the state-sponsored "benefit" label that has already been made available to their corporate counterparts. And given the widespread adoption of benefit corporation statutes, it is simply too late to take the statutory "benefit" designation away from corporations, so it may as well be made available to LLCs.[357]

Corp certification), could meet and exceed the stated goals of the benefit corporation statute.").

353. *See* Molk, *supra* note 109, at 250–51 (describing the incentives of a third-party certifier to ensure the accuracy of its certification); Murray, *Choose Your Own Master*, *supra* note 2, at 45 ("Private organizations are better equipped than state governments to build nuanced brands and to police them."); Murray, *Social Enterprise Innovation*, *supra* note 4, at 363 ("[P]rivate organizations like B Lab are better equipped than the government to successfully brand social enterprises.").

354. *See* Dorff, *Assessing the Assessment*, *supra* note 21, at 525 (describing the documentation and auditing requirements of B Corporation certification).

355. *See* Molk, *supra* note 109, at 250–51.

356. *See supra* notes 306–07 and accompanying text.

357. *See* Murray, *Beneficial Benefit LLCs?*, *supra* note 7, at 442 (articulating a version of this argument).

This argument is pragmatic, but also defeatist. It concedes that the unneeded and ill-advised innovation of statutory benefit corporations is irreversible and, therefore, should be allowed to metastasize into the LLC realm.

When legislatures enact statutes that explicitly authorize certain businesses to advance public benefit and grant those businesses the "benefit" label, it creates a false dichotomy.[358] It suggests that conventional corporations and LLCs do not benefit the public, that such businesses are "detriment" entities. Of course, that is wrong. All statutory business forms, including conventional corporations and LLCs, must ultimately benefit the public.[359] Otherwise, legislators—elected representatives of the public—would not have enacted (or would now amend or repeal) the statutes authorizing their creation. This fundamental reality is masked by benefit entity legislation.

But if the repeal of existing benefit corporation statutes is improbable, and if the spread of benefit LLCs is predestined, then it is the responsibility of legislators to draft or amend these statutes to create true accountability for businesses that claim the state-sponsored "benefit" moniker. Most fundamentally, benefit entity statutes must give stakeholders other than an entity's owners say in the business and its governance.[360]

Recently, several scholars have made various thoughtful proposals along these lines. For example, Haskell Murray has proposed requiring every benefit corporation to adopt a stakeholder advisory board composed of representatives of various stakeholders and vested with limited, but enforceable, rights in the governance of the business.[361] Similarly, Alicia Plerhoples has suggested granting nonshareholder stakeholders enforceable legal rights in the form of a veto power over certain business decisions as well as standing to bring benefit enforcement proceedings against a benefit corporation's

358. *See* Blount & Offei-Danso, *supra* note 43, at 659.

359. *See* Stephen M. Bainbridge, *SEC Commissioner Hester Price Says Corporate Law Is Public Interest Law, Which Is True, but I Said It First!*, PROFESSORBAINBRIDGE.COM (Oct. 2, 2018), http://www.professorbainbridge.com/professorbainbridgecom/2018/10/sec-commissioner-hester-pierce-says-corporate-law-is-public-interest-law-which-is-true-but-i-said-it.html [https://perma.cc/5KKD-3EW5].

360. *See* Strine, *The Dangers of Denial*, *supra* note 103, at 792 ("If we believe that other constituencies should be given more protection within corporation law itself, then statutes should be adopted giving them enforceable rights that they can wield.").

361. *See* Murray, *Adopting Stakeholder Advisory Boards*, *supra* 204, at 94–105. Importantly, Professor Murray limits his proposal, recommending that stakeholder advisory boards be mandatory only for large or publicly traded social enterprises. *Id.* at 105–06.

board.[362] Taking a different approach, Emily Winston has proposed every benefit corporation be required to work with nonshareholding stakeholders to coauthor a concrete public benefit plan that those stakeholders could later seek to enforce against the business.[363] Building on these various proposals, Brett McDonnell has also emphasized that no one approach will be suitable for all social enterprises and that stakeholder empowerment must be tailored to an individual business's unique circumstances and needs.[364]

The upshot of all these proposals is that for benefit entity statutes to accomplish their intended purpose, the law must empower stakeholders in a way that current benefit entity statutes abjectly fail to. Otherwise, benefit entities are no different than conventional entities: beholden to the desires of their owners, which desires may or may not involve the pursuit of public benefit, whatever that concept might mean to the owners. In the absence of legislative initiative to reform benefit entity statutes, the onus is on academics and other neutrals to pierce through the feel-good rhetoric and educate the public about the emptiness of the state-created "benefit" designation and its potential for misuse and abuse.

362. *See* Alicia E. Plerhoples, *Social Enterprise as Commitment: A Roadmap*, 48 WASH. U. J.L. & POL'Y 89, 127–31 (2015).

363. *See* Winston, *supra* note 39, at 1832–40.

364. *See* Brett H. McDonnell, *From Duty and Disclosure to Power and Participation in Social Enterprise*, 70 ALA. L. REV. 77, 84 (2018).