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The hijacking of a new corporate form? Benefit corporations and corporate personhood

Jane L. Collins and Walker N. Kahn

Abstract

Benefit corporations are a new type of corporate entity developed to remedy anti-social corporate behaviour by enabling mission-driven investors, managers and entrepreneurs to prioritize social values and contest the idea that profits are the only and best measure of corporate performance. To resocialize the corporate entity, the benefit corporation movement built enabling discourses and evaluation practices into the dominant model of corporate governance, shareholder value ideology. These discourses and practices expand both the purpose of the corporate entity and shareholders' power to enforce that purpose. However, this paper argues that the effort to 're-embed' the corporate entity by making it subject to non-economic claims expands the scope of corporate personhood and that doing so within extant power relations of the firm opens the door to alternative projects that undermine the benefit corporation movement's goal of fostering corporate social responsibility.

Keywords: corporate governance; shareholder value; benefit corporations; corporate social responsibility.

Introduction

The benefit corporation is a product of the socially responsible business movement. Designed to enable mission-driven businesses to raise equity and increase

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scale without compromising social or environmental values, the new legal framework requires directors of benefit corporations to pursue ‘material, positive impact on society and the environment’ in addition to financial profits (Clark & Vranka, 2013). The laws enacting this new corporate structure are on pace to become the most rapidly adopted corporate entity statutes in US history (Cooney *et al.*, 2014; c.f. Ribstein, 1995). Despite the legislation’s history as a project of ‘social enterprise’ capitalism, it has found bipartisan support in the United States and been signed or endorsed by high-profile Republican politicians such as Bobby Jindal, Nikki Haley, Chris Christie, Jan Brewer and Rand Paul (Katz & Page, 2010; Kelley, 2009). However, the bipartisan support and legislative success of the benefit corporation represent not consensus, but a wide spectrum of divergent interpretations surrounding the project.

Debates about benefit corporations offer an opportunity to revisit seemingly settled questions about the social objectives of the corporation and its role in a societal division of labour. The movement has created new forms of knowledge, laws, rules and measures, support networks and institutions that suggest that another way of doing business is possible. It opens opportunities for managers to consider the interests of a range of stakeholders and to reflect on society-wide impact. In doing so, the founders argue that they are contesting the decades-long dominance of shareholder value models of corporate governance that have narrowed measures of corporate success to financial returns for shareholders. They claim to be re-embedding the firm in the kind of commitments to workers, communities and society-at-large more common in the mid-twentieth century. In constructing their alternative, however, promoters of benefit corporations do not seek to regulate the firm’s actions, constrain its behaviour or hold it to a predetermined set of commitments. Rather, in order to expand the firm’s prerogatives beyond the pursuit of shareholder value, they have deliberately created new forms of managerial and shareholder discretion that expand the scope of corporate personhood without fundamentally altering relations of power and authority within the firm.

The origins of benefit corporations date to 2006, when two ethically minded entrepreneurs who had started an athletic apparel company sold their business and saw it immediately stripped of its social responsibility practices. Jay Coen Gilbert and Bart Houlahan, together with their Stanford classmate Andrew Kassoy, started a non-profit to advance what they envisioned as a different type of corporation. While previous corporate social responsibility efforts – such as organic and Fair Trade certifications – focused on good *products*, they wanted to find a way to certify that a business’ full range of *practices* would benefit the general public, not just shareholders. They developed a model for what they came to call B Corporations (the B stood for beneficial) and founded a non-profit, B Lab, to promote them. Houlahan, Gilbert and Kassoy designed the B Corporation project around two obstacles they identified for mission-driven businesses: the lack of verifiable performance standards for measuring social and environmental impact, and the mandate embedded in

existing legal frameworks that corporate performance be evaluated exclusively by financial returns (DeBare, 2008).

To give certified businesses greater freedom to raise capital from new sources while maintaining the priority of their social mission, B Lab initially required that they write their non-financial goals into their corporate charter (DeBare, 2008). They quickly realized, however, that this goal did not conform to US corporate law. It could not be achieved through simply amending a corporate charter but would require a reformulation of corporate entity laws. In 2008, Gilbert and Houlahan began working with the Philadelphia law firm Drinker Biddle & Reath, LLP to develop a new corporate entity statute for what would be called the 'benefit corporation' (Clark & Babson, 2012). The new charter would require directors to consider the general public benefit of their actions as well as shareholder value. Further, benefit corporations would be required to produce an annual benefit report at a third-party standard, similar to the annual financial report, for shareholders (Clark & Vranka, 2013).

To complement and support the charter, in 2007 B Lab's founders developed a B Impact Rating System. Conceiving of the system as a tool to verify and measure the impact of a corporation's practices, they designed these ratings to be similar to those issued by Moody's or Standard and Poor's, except they would measure social and environmental performance. They planned for B Impact to be transparent, comparable and publicly available. The ratings measure the effects of businesses on a wide range of stakeholders, including employees, shareholders, suppliers, customers, the general public, the local community and communities where suppliers or subsidiaries are located; they also include measures of environmental stewardship. B Lab founders envisioned the new legal charter operating in tandem with B Lab: the non-profit would offer the kind of third-party certification the charter required while also promoting the legislation and providing support for individuals and groups interested in passing it in their state. The parts are separate but interrelated: a corporation can be chartered as a benefit corporation, but seek certification somewhere other than B Lab. And any corporation including those not chartered as benefit corporations can go through B Lab's certification procedure.

Benefit corporations have had unquestionable success. As of 2016, 31 US states had passed the legislation providing for new corporate charters. Over 1,800 firms in 50 countries and 130 industries had successfully completed B Lab's certification procedures. Internationally, while only Puerto Rico and Italy have passed new laws allowing incorporation as a benefit corporation, there has been strong international participation in certification, and several nations and regions developed their own non-profits to promote it – the most active is Sistema B in Latin America. In addition, B Lab United Kingdom has established an advisory group to address the special problems faced when assessing and verifying the performance of multinational corporations (Bcorporation.net, 2016).

Benefit corporations began to take off in the United States after the 2008 recession. In the words of Jamie Raskin, the state legislator who sponsored the bill establishing benefit corporations in the state of Maryland,

Economically speaking, this was a dark period ... We were buffeted by corporate disasters everywhere we turned. We had the collapsing coalmines in West Virginia where 29 people were killed because of the recklessness and indifference and impunity of the Massey Corporation. Then there was the BP oil spill, which wrecked an entire ecosystem – the Deepwater Horizon. And of course we were still reeling from the subprime mortgage meltdown, which created trillion dollar losses in stock equity and real estate values and the bank accounts of Americans across the country. (Jamie Raskin, personal communication, 6 June 2014)

These circumstances motivated the search for a business model that reflected, in Raskin's words, 'that there should be ways for people to enter commerce and business where [they] don't have to surrender all of their other moral and ethical commitments'.

As voices around the United States demanded new measures to rein in the antisocial behaviour of Wall Street and other corporate actors, proponents of benefit corporations hailed the new form as a solution to the problem. Jay Coen Gilbert argued that: 'with public trust in business at an all-time low, this represents the first systemic response to the underlying problems that created the financial crisis' (Csrwire.com, 2010). Members of the business press agreed, proclaiming: 'The B Corp represents the only legal innovation in the past decade that addresses and improves the fundamental cracks in our economic system' (Saksa, 2014). Nevertheless, the new assemblage of economic practices that advocates developed to solve these problems increased corporate prerogatives and personhood within a framework that did not fundamentally alter the power relations of the firm.

The account provided here is based on interviews with key individuals promoting (and in some cases, opposing) benefit corporations, as well as with managers of benefit corporations in diverse sectors. We conducted extended in-person interviews in 2014 and 2015 in New York City, Chicago, Annapolis, Philadelphia and Wayne, Pennsylvania. We supplemented these with phone or Skype interviews with protagonists in Colorado, Michigan, North Carolina and other locations. We also conducted a comprehensive review of legislative documents, case law, white papers and news media coverage of benefit corporations.

Antisocial corporate activity and the shareholder value theory of corporate governance

Critics have complained about 'anti-egalitarian, monopolistic, and scandalous' business practices since the early days of the United States (Cary, 1974, pp. 663–664), but, since the 2000s, much criticism of corporate behaviour has focused on shareholder value. Shareholder value thinking, or shareholder primacy, is the idea that directors and managers have not only a moral but a

185 *legal* mandate to maximize stock price, even if doing so involves unethical
behavior or harms employees, the environment and society at large (Stout,
2015). While some scholars continue to challenge the legal legitimacy of
shareholder primacy,¹ others suggest that the ideology has become entrenched
as a principle of corporate governance among companies in the United States
and Britain as well as being widely recognized in other parts of the world
(Lazonick & O'Sullivan, 2000, p. 13). Corporate law scholars Henry Hansmann
and Reinier Kraakman argue that, by the dawn of the twenty-first century,
190 society had reached a near-absolute agreement that the best means of corporate
governance 'is to make corporate managers strongly accountable to shareholder
interests, and (at least in direct terms) only to those interests' (2000, p. 10).

That the corporation should be governed in such a way as to maximize the
financial return to shareholders is a historically specific valuation project,
rather than an inherent goal of the corporate entity. Corporations may be
195 formed to pursue 'any legal business' (American Bar Association, 2016), and
while the economic theories that ground shareholder value thinking assume
that shareholders either own the corporate entity as private property (see
Alchian & Demsetz, 1972; Jensen & Meckling, 1976) or are 'sole residual claim-
ants' entitled to revenue remaining after contracted expenses (Fama, 1980),
200 this is an ideological effort rather than a legal fact. However, while US courts
have protected the right of directors to run the company as they see fit in
day-to-day operation under the business judgment rule, they have simultane-
ously supported the premises that the corporation is the private property
of shareholders, and that stock price reflects all possible information and
205 accurately captures the value of the corporate entity. The Delaware Chancery
Court, perhaps the most influential corporate law tribunal in the world,
embraces these premises explicitly. In the words of Chancellor William
T. Allen, 'the legitimacy of the corporation as shareholder property is not
premised on the conclusion that shareholders do "own" the corporation in
210 any ultimate sense, only on the view that it can be better for all of us if we
act as if they do' (1992, p. 261).

Critics of shareholder value thinking have argued that it has 'anti-social'
effects, privileging the interests of certain corporate actors over those of
others who make contributions to the firm and to the economy as a whole.
215 Anthropologist Karen Ho writes that the adoption of shareholder value
models has led to:

the complete divorce of what is perceived as the best interests of the corporation
from the interests of most employees. Only 25 years ago, the public corporation
220 in the U.S. was mainly viewed as a stable social institution involved in the steady
provision of goods and services, responsible for negotiating multiple constituen-
cies from employees to shareholders, and judged according to a longer-term time
frame ... Today, in contrast, the primary mission of corporations is understood
to be the increase of their stock prices for the benefit of their 'true owners', the
225 shareholders. (Ho, 2009, p. 3)

Like Ho, Lazonick and O'Sullivan see shareholder value thinking as motivating managers to offload broader social responsibilities as they shift from a 'retain and reinvest' model – where companies used earnings to train and retain employees, enhance physical infrastructure and engage in research and development – to a 'downsize and distribute' approach in which they divest themselves of poorly performing units and cut expenditures in order to increase return on equity (2000, p. 18). Marin (2013) describes the changes wrought by the primacy of the shareholder value model as a 'disembedding' of corporations from their economic, political and social context.

Some critics have gone beyond arguing that shareholder value thinking motivates corporate behaviour that is disconnected from the greater good, suggesting that it incentivizes actions that are for all practical purposes amoral and deranged. In a speech to the Academy of Management in 2002, Thomas Kochan argued that although most in the field 'danced around' the issue, the root cause of modern corporate scandals such as the Enron and Worldcom debacles was 'the overemphasis American corporations have been forced to give in recent years to maximizing shareholder value without regard for the effects of their actions on other stakeholders' (2002, p. 139). Legal Scholar Joel Bakan, in perhaps the most scathing analysis of this sort, writes that the corporation in its standard form is a psychopathic entity that 'can neither recognize nor act upon moral reasons to refrain from harming others' (2005, p. 60). While Bakan's analysis verges on the hyperbolic, a 2007 study by business scholar Jacob M. Rose demonstrated the consequences of operating with a shareholder value rubric that rules out moral considerations. In a decision-making experiment, researchers randomly assigned 34 directors of Fortune 200 firms to act either as directors of publicly traded firms or as partners in private partnerships, and presented them with ethically dubious business opportunities that would cause significant damage to the environment or the health of consumers. Rose found that the subjects acting as corporate directors

favor shareholder value over personal ethical beliefs and social good because they believe that current corporate law requires them to pursue legal courses of action that maximize shareholder value [and that] corporate leaders make decisions that emphasize legal defensibility, rather than ethics or social responsibility. (Rose, 2007, p. 320)

Many researchers have documented the processes by which shareholder value logic generates antisocial outcomes. Goldstein (2012) offers a succinct overview of how shareholder value was enacted through a programme of computerization, mergers, lay-offs and efforts to de-unionize workforces. He argues that while rhetoric and academic theory surrounding shareholder value were uniquely anti-managerial, the proportion of managers and their average compensation increased as it was enacted. Running sectorial-level statistical analysis, he concluded that this was because managers pursued shareholder value

through ‘low-road’ labour strategies that required managerial intensification and resulted in income being transferred from labour to management, rather than to shareholders (Goldstein, 2012; see also Boyer, 2005). Research by sociologists confirms that shareholder value strategies have led to union busting and layoffs (Appelbaum & Batt, 2014; Fligstein & Shin, 2007). Many studies have also implicated shareholder primacy in the 2008 economic crisis, demonstrating the role played by reduced corporate diversification, incentives to pursue short-term gains and increased debt levels (Dobbin & Jung, 2010; Lazonick, 2013).

Given its association with corporate scandals and malfeasance – and its role in economic crises – it is not surprising that by the early twenty-first century the shine had begun to come off shareholder value governance. In 2005, Fligstein argued that the era of shareholder value ‘had come to a close’ since its methods had ‘reached an endpoint in their ability to make corporations more profitable’ (p. 223). Meanwhile, academic economists began to move on from the efficient market hypothesis and efficient principal-agent contracting models that legitimated this governance model, albeit at the proverbial rate of ‘one funeral at a time’. Michael Jensen expressed significant doubts about the model of executive compensation and corporate governance that his theory inspired (Jensen & Fuller, 2003; Jensen & Murphy, 1990). The 2016 Business Roundtable white paper on corporate governance replaced earlier language about a ‘paramount duty’ to maximize shareholder returns with a recommendation to consult and serve a range of stakeholders (Business Roundtable, 2016). The business press has expressed similar qualms – *Forbes Magazine* in 2013 published an article about shareholder value titled ‘The Origin of the World’s Dumbest Idea’ (Denning, 2013). Shareholder primacy, nonetheless, has demonstrated remarkable endurance as the normative form of corporate governance. In 2010, Dobbin and Jung complained that globally the paradigm seemed to be ‘winning more converts, not facing the sort of challenge one might expect for a theory that contributed importantly to two major recessions within a decade’ (2010, p. 59). Further, the Delaware Chancery Court has continued to enforce the legal foundations of shareholder value by holding that actions by directors that do not maximize shareholder wealth violate fiduciary standards (Strine, 2012, p. 149).

How benefit corporations try to ‘resocialize’ the corporation

Senator Jamie Raskin introduced the first US benefit corporation legislation to the Maryland State Senate on 26 March 2010. The law, as he saw it, allowed corporations to pursue social and environmental goals without the spectre of litigation and offered an escape from the straitjacket of profit maximization that had led to recent corporate disasters. He anticipated that the bill could spark a serious legislative battle. To avoid this, he worked ‘to make it sound boring and blasé as possible’. Only at the end, according to Raskin, did other lawmakers realize the significance of what they were considering. ‘As we got

towards the floor vote, people began to realize this is a really big deal. People came up and said, “Wait, you’re basically trying to transform the whole nature of capitalism”. And I said, “yeah, that’s basically right” (Jamie Raskin, personal communication, 6 June 2014).

To understand the degree to which the movement constituted such a transformation, it is important to comprehend how benefit corporations were built in dialogue with the dominant mode of corporate governance. The lawyers who designed the new legislation laid out a tripartite mission. To be chartered as a benefit corporation a company must have: a corporate purpose to create a material positive impact on society and the environment; expanded fiduciary duties of directors requiring consideration of non-financial interests; and an obligation to report on overall social and environmental performance assessed against a comprehensive, credible, independent and transparent third-party standard (Clark & Vranka, 2013, p. 15). The radical potential of the benefit corporation was implicit while it remained a static piece of legislation, but as it became meaningfully connected to other elements of the socially responsible business movement, it became a potential threat to the status quo of shareholder value ideology.

The benefit corporation project, by creating a legal mandate for businesses positively to impact the general public, reintroduces the question of how to measure corporate productivity – the very question that shareholder value ideology foreclosed. This reflects the foundational premise of the movement that companies can and should be used to achieve the non-conflicting goals of social impact *and* financial profit. Proponents of the movement introduced new metrics for gauging the impacts of corporate practices on a wide range of stakeholders and implemented new transparency norms to make these measurements publicly accessible. The movement creates a community of like-minded managers who share information about best practices and promote the model. To many in the corporate world, these efforts represent a ‘re-embedding’ of the corporate form in its multiple constituencies and a ‘resocialization’ of its goals.

Benefit corporation advocates challenge the hegemony of shareholder value doctrine by creating new kinds of equivalence and new practices of calculation. In the parlance of the business world, ‘you manage what you measure’ – which means that transformations in business practice require ways of tracking impacts, setting goals for remediation or improvement and measuring progress towards them. These measures are not part of normal accounting procedures and are rarely taught in business schools – or only in elective courses on ethics. According to Clark and Babson, consumers and investors previously lacked ‘the comprehensive tools to understand the complete picture of a company’s performance across the full range of social and environmental measures’ (2012, p. 819). In Eric Trojian’s words, the challenge is to ‘quantify the qualitative activities of companies’ (Eric Trojian, personal communication, 19 March 2014).

365 These innovative calculative devices allow corporations to acknowledge and value contributions from constituencies that the current mode of economic reasoning makes invisible. The list of formerly invisible elements includes: the contributions of workers to productivity; the value of workers' skills and knowledge; the ways businesses draw from and contribute to places; the advantages of a long-term, sustainable business presence; the benefits of reliable, stable jobs; the strength of transparent and multi-stranded relationships with suppliers; the firm's role in contributing to the survival and well-being of the current generation of workers and to the reproduction of the next generation; 370 and the subsidy from natural resources and endowments.

In implementing these new measures, the founders designed the benefit corporation's structure and practices to track and take responsibility for 'externalities' — the unmeasured costs (and sometimes benefits) of business decisions. 375 The new accounting measures require managers to assess and document the social and environmental good or harm they do and to make that information available to the public. While traditional corporations seek to improve profits by externalizing many of the costs of their operations, the benefit corporation model encourages them to internalize some of these costs. As the owner of a certified B Corporation explained:

380 One of the things that we as a society are terrible at is measuring negative externalities. And so CISCO lays off 4000 people and the stock goes up three points. Nobody thinks about the 4000 mortgages that aren't going to get paid ... Because what we have taught business leaders to do is to privatize profits and 385 socialize costs. (Kevin Trapani, personal communication, 20 July 2015)

390 These new accounting activities are not quarantined in a separate office of 'corporate responsibility', but integrated into the firm's overall mission and day-to-day decision-making. By making hidden costs and impacts visible, and arguing that they should be taken into account in corporate decisions, proponents of benefit corporations see themselves as working to change understandings of how economic value is created and where it resides.

395 By providing a way for a small number of corporations to enact a more complex and multivalent set of valuation practices, and a different set of relationships to its stakeholders, the promoters of benefit corporations seek to prove it is possible for businesses that behave this way to survive and thrive. While participants represent an extremely small segment of business — a 'piece of the pie of the system' as one manager put it — their efforts are intended to be a demonstration project: to show that a company that chooses a social 400 mission and considers the well-being of multiple constituencies can be successful. Matt Stinchcomb, of the benefit corporation Etsy, articulated this view:

405 I hope that we can be financially successful and return value to our investors and shareholders and live up to these values and do business in a very honest direct transparent way. And say: 'look this is what we do, and we still make money' ...

and they would be like ‘hey, so we can do that too’. (Matt Stinchcomb, personal communication, 20 March 2014)

410 William Clark similarly expressed his hope that ‘the more this spreads and the more people come to admire businesses that behave this way, the more there will be pressure on others to move this way’ (William Clark, personal communication, 5 June 2014).

415 For firms that opt in, the benefit corporation movement’s approach to changing corporate behaviour is more carrot than stick. It does not involve new codes of conduct or obligatory standards, but increases the discretion of managers and corporate boards, allowing them to establish their own vision of socially desirable outcomes as the company’s mandated ‘material positive impact’. Many movement leaders suggest that this approach is not so much about ‘reining in’ shareholder value thinking, as about expanding and redefining the concept. They argue that the purpose of the new corporate entity is to return value to shareholders, but that current corporate governance structures limit the ability of shareholders to pursue their *desired types* of value.

420 Testifying before the Nevada Assembly’s Committee on Judiciary, Susan Clark, CEO of the Nevada Venture Accelerator, emphasized the need to return value to investors, albeit within a broadly constructed notion of value, arguing: ‘we are attracting a number of investors who are not ... only looking for a return on investment, but a return on community’ (State of Nevada, 2013). Lobbyists for B Lab also made this point. Holly Ensign-Barstow, testifying before the Kansas House Commerce, Labor and Economic Development Committee emphasized that the new corporate entity allowed business owners to pursue social, as well as economic returns:

430 This new form gives freedom to entrepreneurs and business owners to consider other factors in addition to profit. For example, if a company wishes to combine the quest for profit with the desire to consider additional purposes, such as faith, community safety or simply to prioritize Kansas-produced goods and services — they can without worrying about legal implications. (Ensign-Barstow, 2014, p. 1)

440 Erik Trojjan, chief lobbyist for B Lab, noted that traditional corporate entity legislation limits the ability of shareholders to seek social or environmental returns through their for-profit business activity. He continued:

445 We believe that business is the greatest source of solutions for the issues we face as a society and that the free market can address many problems quickly and efficiently without having to resort to government handouts. However ... the free market is not truly free and is prevented from fully solving these issues due to current corporate law ... If a company wishes to combine the quest for profit with the desire to consider additional purposes ... the traditional corporate form acts as a roadblock. (Erik Trojjan, personal communication, 19 March 2014)

For Trojan, the flaw in the dominant corporate paradigm is the shareholder value model:

455 If the fact is that I can do one thing and one alone, and that's maximize profit, I'm overly regulated. It's not a free market where we can allow the entrepreneur to use their freedom and artistic values to come up with new innovative ways to start businesses and to operate businesses. (Erik Trojan, personal communication, 19 March 2014)

460 Similarly, benefit corporation advocates express faith in the ability of equity markets to value corporate activity effectively but they argue that current corporate governance norms prevent proper market function. The legal team behind benefit corporation legislation has referenced the eagerness of market participants to 'price' the multidimensional value produced by benefit corporations and argues that managers are limited in their ability to do so by current corporate law. Bill Clark and Elizabeth Babson stress that '[a]ccelerating consumer and investor demand has resulted in the formation of a substantial marketplace for companies that are using the power of business to solve social problems' (2012, p. 819). They note that 'J.P. Morgan ... estimates the size of this market opportunity to be between \$400 billion and \$1 trillion [and that] the ten-year profit potential from these opportunities alone ranged between \$183 billion and \$667 billion' (2012, p. 823). Benefit corporations, they stressed,

475 address not only the need for a new corporate form that changes the paradigm of shareholder primacy, but also respond to the demand from the marketplace for a corporate form that meets the needs and expectations of increasingly socially and environmentally conscious consumers, investors, and entrepreneurs. (Clark & Babson, 2012, p. 819)

480 The intellectual apparatus used by many (although not all) advocates of benefit corporations to promote and justify the new corporate form emphasizes that form's compatibility with shareholder value thinking. Jay Coen Gilbert offered the most direct articulation of this view:

485 I think that most people would say ... they are creating more shareholder value as a result of the fact that they're managing the impact on all their stakeholders, so they create strong relationship with the stakeholders which serves them well in good and bad economic times to create more shareholder value, not less. ... There is an opportunity for these companies to create enhanced value on both fronts: both superior financial returns over the long term as well as superior impact over the short and long-term. ... It's an expanded definition of value. (Jay Coen Gilbert, personal communication, 3 June 2014)

495 This engagement with shareholder value ideology extends beyond rhetoric and into the technical/legal structure of the benefit corporation model. The

legislation's designers adopted wholesale the framework of standard C corporations. Benefit corporation law simply embeds into the pre-existing structure new mandates and practices that enable measurement of social and environmental impacts. The way the new model challenges – and replicates – elements of the shareholder value form of corporate governance is illustrated in Table 1.

While shareholder value ideology creates a single goal for traditional corporate entities – the maximization of profit – benefit corporations operate under a more complex mandate. As for-profit entities they pursue a financial return, but they do so simultaneously with the goal of creating a material positive impact on society and the environment – what the model legislation refers to as a 'general public benefit' (benefitcorp.net, 2016, p. 8). Benefit corporations may also elect to pursue, in addition to the general public benefit, one or more 'specific public benefits'. For these new entities, then, the financial interests of the company do not automatically supersede the mandate to create other kinds of impact, and their governance structures are specifically designed to ensure that they can pursue both.

In both models, corporate directors are the lynchpin of governance. They have broad oversight and advisory responsibilities including selecting and supervising senior management, approving and monitoring corporate strategy and overseeing and certifying corporate reporting (Larcker & Tayan, 2011). Despite these commonalities, the governance powers and fiduciary duties of directors are quite distinct for directors of benefit corporations and directors of corporations governed by shareholder value ideology. While in both instances, directors owe shareholders fiduciary duties of loyalty (requiring that they act in the best interest of the corporation at all times) and care (requiring that they exercise sound judgment and prudence in business decisions), non-benefit corporations may pursue social and environmental goals only in so far as it

Table 1. Models of corporate governance

	Shareholder Value Ideology	Benefit Corporation Paradigm
Purpose of corporate entity	-Maximize shareholder wealth	-Create material positive impact on society and environment -Return value to shareholders
Duties of corporate directors	-Fiduciary duty of care -Fiduciary duty of loyalty	-Fiduciary duty of care -Fiduciary duty of loyalty -Fiduciary duty to consider all stakeholders
Disciplinary devices	-Derivative suit -Takeover market	-Derivative suit -Benefit enforcement action
Measurement apparatus	-Share price -Quarterly/annual corporate reporting	-Share price -Quarterly/annual corporate reporting -Annual benefit report

promotes their singular mission of creating shareholder value (Clark & Vranka, 2013, p. 8; Larcker & Tayan, 2011).

545 In contrast, directors of benefit corporations are legally held to an expanded standard of fiduciary duty that reflects their overarching mandate to produce a positive social and environmental impact (Clark, 2011; Clark & Vranka, 2013). In addition to duties of loyalty and care, the Model Benefit Corporation Act adds the duty to *consider* all stakeholders in the corporate entity, including society at large (benefitcorp.net, 2016, p. 8). According to one of the lead drafters of the Act,

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555 Directors may need to consider primarily the financial stability of the organization in some instances. In other instances they may consciously decide that it fits their purposes to basically prefer the interests of employees or of the community. But at the end of the day when they issue their yearly report on how they did, they're supposed to have managed the business in way that maximizes its return to all three measures of the triple bottom line. (Clark, personal communication, 5 June 2014)

560 The benefit corporation's expanded corporate purpose is reflected in the new reporting duties imposed by the model statute. Corporate managers use financial reporting, such as that mandated by the Securities and Exchange Commission, to share information with directors and shareholders about operations, finances and business plans. They use Generally Accepted Accounting Principles (GAAP) guidelines and methods to standardize and disclose 'all information an investor, lender, or private individual might need to assess the current financial state of the business' (Lohrey, 2015). In addition to producing financial reports, however, benefit corporations must report on their progress in pursuing a general public benefit. This report must meet a third-party standard as determined by an independent director and must be distributed to shareholders and available to the public via the corporate website (Clark & Vranka, 2013, p. 18). As stated in the annotated version of the benefit corporation model legislation:

575 The performance of a regular business corporation is measured by the financial statements that the corporation prepares. But the performance of a benefit corporation in creating general or specific public benefit will not be readily apparent from those financial statements. The annual benefit report is intended to permit an evaluation of that performance so that the shareholders can judge how the directors have discharged their responsibility to manage the corporation and thus whether they should be retained in office. (benefitcorp.net, 2016, p. 7)

585 For benefit corporation managers, owners and investors, the annual benefit report represents a new tool for evaluating firm performance. The founder of a web design firm explained:

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Essentially, the idea is that we look at our score in each section, and every time we recertify ... we look at 'how can we improve this? How can we be more environmentally focused company? How can we treat our employees better?' ... It's all data-driven and it's all really based on empirical scores, but it's great because it's a good tool for benchmarking ... (Thomas Fricke personal communication, 16 July 2015)

He continued:

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The assessment gave us an opportunity to look at sustainability of the web in general. And pixels require electricity. We started looking into the carbon footprint of the Internet, and lo-and-behold, it's 830 tons of carbon emitted each year by the Internet — that thing we create for living. So suddenly we're like, 'we're more of a problem than we thought we were. The things that we create emit more greenhouse gases than the airline industry'. (Thomas Fricke personal communication, 16 July 2015)

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The Vice President of an Internet marketplace argued that the benefit-reporting process made his company's impacts more tangible:

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So the certification process showed where we had a lot of shortcomings. And a lot of times it wasn't that we were doing something bad, it's just that we weren't measuring or really understanding our ecological impacts. We've done a lot since then to raise the score, but really more to build programs, measures, [and] really try to take direct action to improve not just our score but the impact we have in these various areas. (Matt Stinchcomb, personal communication, 20 March 2014)

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Jay Coen Gilbert, of B Lab, argued that these new valuation practices give

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much more clear visibility to the nonfinancial impact, the social and environmental impact of the investments they are making or creating. And also giving them more legal tools to hold management accountable to create the impact they say they'd like to have ... And being transparent about it allows the entire marketplace to react accordingly. And if the marketplace values stakeholder value creation, then those companies will be rewarded with enhanced shareholder value, and if the market doesn't value that, then it won't. The beauty of it is that we get to decide in a free-market economy, we get to decide the kind of value that we want to create. (Jay Coen Gilbert, personal communication, 3 June 2014)

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The significance of the benefit corporation's expanded fiduciary duty is most recognizable in change-of-control situations, such as mergers and acquisitions. While directors in the shareholder value governance context have a bright-line requirement to maximize shareholder wealth when a corporation is sold (Bainbridge, 1992), directors of benefit corporations cannot simply decide to sell to

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635 the highest bidder. Instead, the board must choose the best sale partner based on consideration of all corporate constituencies. Thus, in a situation involving sale of a public benefit corporation where two bidders are both offering a substantial premium to the company's stockholders that is within a fair range, the board could — and in fact, would have to — prefer a bidder at \$44 per share who has a track record of social responsibility and is willing to make a binding commitment to manage in manner fair to all of the corporation's constituencies, over a bidder at \$46 per share with a record of poor treatment of workers, consumers and the environment (Strine, 2014, p. 246).

640 The disciplinary devices to which the board of directors is exposed are also distinctly different for benefit corporations and entities governed by the shareholder value model. Both models of corporate governance reserve for shareholders exclusively the right to file derivative lawsuits on behalf of the corporate entity in the case of malfeasance by managers or directors, but other devices are starkly different. Shareholder value ideology holds the hostile corporate takeover, wherein the firm is acquired against the will of current management, as the ultimate mechanism for disciplining corporate management. Hostile takeovers are believed to discipline management and align their incentives with shareholders, because if managers cause share price to be lower than it otherwise could be, other market participants can purchase a controlling interest of voting shares, take over the company, replace current management and 'unlock' potential value. In the context of benefit corporations, however, hostile takeovers are much more difficult. Such takeovers can be blocked by a minority group of shareholders (generally they must amount to one-third, although some states have set even lower thresholds). Further, a supermajority in favour of approving the hostile takeover must be achieved within every separate stock class: for example, a group of founders holding an issue of preferred stock could block a hostile takeover by a non-benefit corporation entity even if every holder of common stock supported it (benefitcorp.net, 2016, pp. 3–4).

650 Shareholders in benefit corporations are afforded disciplinary powers unthinkable in the context of shareholder value ideology. The disciplinary mechanisms offered through the latter — the derivative suit and the hostile takeover — can only be brought to bear on corporate failures that result in financial underperformance or losses. There is no mechanism available to discipline the corporate entity or board of directors for behaviour that negatively affects other stakeholders or the environment. Shareholders in benefit corporations, in contrast, have the unique right to bring a Benefit Enforcement Proceeding against members of the board of directors in the event that the corporate entity is not adequately or effectively pursuing the general public benefit (benefitcorp.net, 2016).

660 But shareholders alone have this disciplinary power. In response to critics who argue that other constituencies should have more opportunity to shape the benefit corporation's behaviour, William Clark explained:

There have been people who've written articles already advancing the notion that if we were serious about all this, then we should give [all] stakeholders standing to bring lawsuits. There are two answers as to why we didn't do that ... The practical political reason is that if we were to open people up to lawsuits by their employees, labor unions, and the Sierra Club, no one would ever do this. The theoretical answer looks to the overall structure of the corporation and recognizes that what makes the corporation go is the capital that's provided ... The theory is that the providers of the capital really have the most at stake in all this. If they, in fact, have agreed to be a benefit corporation and are committed to these other constituencies and interests, then they are more likely, if there's a problem, to be willing to address the issue than shareholders in a regular corporation. (William Clark, personal communication, 5 June 2014)

Comparing the two corporate forms side-by-side, it becomes clear that benefit corporation governance strips no powers from directors or shareholders. While directors of benefit corporations must *consider* and *pursue* the interests of all stakeholders and the general public, they are free to prioritize those interests as they see fit after such consideration has been made. If directors do not achieve the social or environmental goals ends established by shareholders, unless they are found to have violated their fiduciary duties they are held just as blameless as the corporate officer who pursues a failed business strategy. Further, while directors of benefit corporations are protected from personal liability if they choose not to prioritize financial returns, it remains unlikely that 'entities in which only capital has a vote will somehow be able to deny the stockholders their desires' (Strine, 2012, p. 136). Shareholders of benefit corporations still hold ultimate leverage over directors, and if the board is faced with a zero-sum game, it is likely that shareholders' interests will prevail. Simultaneously, the right to opt in or out of benefit corporation status guarantees that shareholders lose none of the rights or privileges associated with traditional entity structures and governance norms. In the words of Delaware corporate lawyer Jacob Hasler, 'benefit corporations do not abandon the shareholder value norm; they merely redefine what it means to maximize shareholder wealth' (2014, p. 1301).

How benefit corporations expand corporate personhood

Some who promote benefit corporations suggest that they create a new version of moral economy (Speth, 2012). But the concept of moral economy rests on an assumption that all parties agree on what is fair and desirable. As the previous section demonstrates, benefit corporation governance does not give workers, consumers or community members a voice in corporate governance. Should these groups perceive their interests to be ill-served by corporate decisions, the benefit corporation framework offers them no mechanisms to be heard. Some features of the new corporate model, such as certification practices and

transparency measures, could bring their imputed interests into the discussion, but directors and shareholders continue to be the firm's privileged agents.

725 Because only directors and shareholders can create and enforce the benefit corporation's moral vision, corporate decisions are not democratically made. While there is an implicit assumption among most advocates that pursuing social benefit entails adhering to certain progressive principles, such as labour rights or environmental stewardship, this assumption came under intense public scrutiny in 2014 when Supreme Court Justice Samuel Alito claimed that the benefit corporation's mechanisms could protect business leaders who wished to impose religious principles on employees. Savvy conservative proponents of the legislation had made this point even before the decision. But for many in the movement, Alito's interpretation was both a surprise and a cause for alarm.

730 In making his point, Alito was taking sides in a debate within the movement about the meaning of 'public benefit'. As noted, the model legislation for benefit corporations requires companies to document that they are producing a 'general public benefit', but also permits them to choose to pursue one or more specific public benefits. Framers of the legislation argued it was not sufficient for a company to pursue specific benefits alone because they wanted to insure a holistic assessment of the firm's impact on stakeholders. They wanted to guarantee, in other words, that the firm could not reduce waste while increasing carbon emissions or reduce both while paying their workers a poverty wage (Clark & Vranka, 2013). Elizabeth Babson noted: 'You shouldn't be able to dump toxic waste out the window but get a gold star because you built a school' (Elizabeth Babson, personal communication, 24 March 2014).

735 But some state legislatures did not adopt the model legislation as originally written, opting instead to allow firms to elect *only* a specific public benefit. The 2013 legislative debate over adoption of benefit corporations in Colorado demonstrated how crucial the general public benefit clause was in drawing a red line between attempts to insure corporate responsibility in the broadest sense and a simple expansion of corporate prerogatives. In an interview, Herrick Lidstone, a Colorado attorney opposing that state's adoption of a general public benefit noted:

755 People who elect this form should have the ability to balance and pick and choose, and maybe general public benefit is not what they want to choose. Whether they wanted to do something specific or not they had to worry about the ice cap in the Arctic, the dolphins in the Pacific ... when maybe what they wanted to do was build an elementary school or a ballpark. ... We wanted them to be able to choose a specific public benefit and not be tied to a general public benefit. (Herrick Lidstone, personal communication, 14 August 2014)

760 Lidstone acknowledged that he was interested in the leeway a 'specific public benefit' — perhaps to promote a religious cause — might provide for a business that wanted to opt out of the US Affordable Care Act's requirement to provide

access to birth control. Of his conservative colleagues who opposed the benefit corporation law, he said: ‘They only see it from the left. They don’t see the benefits it can provide to the right as well. That’s the beauty of it. It goes both directions’ (Herrick Lidstone, personal communication, 14 August 2014). In the end, Colorado was one of only a few states² to date to adopt legislation that did not require a benefit corporation to provide a general public benefit.

The importance of the ‘general public benefit’ became abundantly clear during the 2014 Hobby Lobby case (US Supreme Court, 2014), which resulted in a decision allowing corporations a religious belief exemption from birth control provisions of the US Affordable Care Act. In his majority opinion in this case, Supreme Court Justice Alito referenced the benefit corporation to bolster his claim that companies should be allowed to pursue religious goals. He wrote:

Recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, states have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the ‘benefit corporation’, a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners. (US Supreme Court, 2014, p. 24)

To many observers, Alito’s enthusiasm appeared confused, since Hobby Lobby had not applied for or received the status of benefit corporation. Furthermore, Alito overlooked the ‘obligation to pursue a “general public benefit”, which acts as a check on the pursuit of any specific benefit’ (Esposito & Pelsinger, 2014). Given the way most benefit corporation statutes are written, the pursuit of a specific public benefit, such as promoting religion, would not absolve a corporation from the obligation to, say, provide its employees with health insurance.

Alito’s comments in the case fed into an on-going public debate in the United States about the issue of corporate personhood. Governments in Anglo-American and many other legal traditions have granted corporations certain rights for hundreds of years, allowing them to own property, to enter into contracts and to sue in court. Many dimensions of corporate personhood are non-controversial. Most people believe that a corporation with limited liability and a long life is ‘an attractive vehicle for numerous investors to pool their individual capitals’ and that it makes possible ‘large, long-term investments that can achieve economies of scale and scope in the production of goods and services that are beyond the capabilities of sole proprietorships and partnership’ (Gomory & Sylla 2013, p. 103). Nevertheless, after the 2008 recession, in a context where growing corporate power went hand-in-hand with worsening inequality, corporate personhood was a contentious issue.

The US Supreme Court first acknowledged corporate personhood in a headline, or preface, in the turn-of-the-century case *Santa Clara County v. Southern*



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Pacific Railroad, 1886. Written by a court reporter, the headnote stated: ‘Corporations are persons within the meaning of the Fourteenth Amendment to the Constitution’ (US Supreme Court, 1886). The **F**ourteenth Amendment was adopted in 1868 to grant emancipated slaves full citizenship and says: ‘No state shall ... deprive any person of life, liberty, or property without due process of law, nor deny to any person ... the equal protection of the laws’. While the intent of the amendment was to protect the human rights of individuals who had just won freedom, the headnote to the Santa Clara case applied those same rights to corporations. The Supreme Court declared two decades later that headnotes do not have legal force (Nace, 2003, p. 129), but by that time the ‘ruling’ in Santa Clara had acquired the status of precedent (Pollman, 2011; Torres-Spelliscy, 2014). Between 1890 and 1910, 19 of the Fourteenth Amendment cases brought before the Supreme Court dealt with the rights of African-American citizens, and 288 dealt with those of corporations. Corporations won more than 200 of these cases (Edwards, 2002a; Zinn, 2005). Over the next century, the Supreme Court gave corporations a range of new rights and protections under the First, Fourth, Fifth, Sixth and Seventh Amendments, including rights to due process and jury trials, search and seizure protections and protections against ‘takings’ of property (Edwards, 2002b).

The debate over corporate personhood was reopened by the US Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission*, a judgment that many saw as vastly expanding corporate prerogatives. In the midst of the 2008 presidential campaign, the Federal Elections Commission blocked the conservative non-profit Citizens United from releasing a film about Hillary Clinton on the grounds that corporations could not use funds for election-related communications within 30 days of a primary or 60 days of a general election. Citizens United sued, claiming that since the Supreme Court had found campaign donations to be a protected form of speech in *Buckley v. Valeo*, and since corporations had the same protected right to speech as other citizens, there was no basis for limiting a corporation’s political donations. The Supreme Court agreed. Opponents of the decision predicted an uncontrollable flood of corporate money into elections. *The New York Times* (2010) called the measure ‘a blow to democracy’, while politicians as widely separated in their views as Barack Obama and John McCain expressed concern. A loose coalition of organizations opposing the measure, called Move to Amend, mobilized to seek a constitutional amendment that would ‘unequivocally state that inalienable rights belong to human beings only, and that money is not a form of protected free speech under the First Amendment’ (Move to Amend, 2016).

Like *Citizens United*, the Hobby Lobby case stirred public debate about the benefits and drawbacks of corporate personhood. Hobby Lobby, a chain of craft stores based in Oklahoma, sued the federal government in 2012, claiming that the Affordable Care Act’s requirement that the company provide contraceptive coverage for its employees violated its constitutional rights to religious freedom. The Supreme Court ruled in favour of Hobby Lobby’s claims, asserting for the first time that corporations have a right to religious freedom. Justice Ruth Bader

Ginsburg's dissent in the case summed up the views of many who disagreed. First she pointed to the rights that individual citizens would lose as a result of the corporation's free exercise of religion. Noting that 'the ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives', she argued that the decision would deny women contraceptive coverage and quipped: 'with respect to free exercise claims no less than free speech claims, "[y]our

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right to swing your arms ends just where the other man's nose begins". But more to the point of the larger debate over corporate personhood, Gins-

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Until this litigation, no decision of the Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the free exercise clause or the RFRA [Religious Freedom Restoration Act]. The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation 'is an artificial being, invisible, intangible, and existing only in contemplation of law'. ... 'Corporations,' Justice Stevens more recently reminded, 'have no consciences, no beliefs, no feelings, no thoughts, no desires'. (US Supreme Court, 2014, pp. 2, 8,

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It was in light of this counter-argument that Justice Alito suggested that benefit corporations might offer precedent to the expansion of corporate personhood that the Citizens United and Hobby Lobby decisions entailed. If a corporation could desire to improve environmental conditions and treat its workers fairly, why could it not also desire to spread religious faith? If it could value fairness and sustainability, why could it not also support specific political principles? Recognizing the door left ajar by the legislation's failure to specify what constituted public benefits, Alito argued that the benefit corporation could be a vehicle for the expansion of corporate rights. And because the new corporate entity's enabling legislation left the power of the director and shareholders largely intact, it was their vision alone — and not a broader consensus of stakeholders or the general public — that determined how public benefit would be defined and enacted. While most proponents of benefit corporations sought to re-embed the corporation in obligations to a wider range of stakeholders, some corporate actors saw the new form as an opportunity to attain new rights without new responsibilities.

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Conclusion

For critics of the shareholder value model and those who believed corporations had grown too powerful, the emergence of benefit corporations was a hopeful development. For them, it provided an opportunity to reassess not just the

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905 form of corporations but also their relationship to broader social objectives and their place in a societal division of labour. The movement facilitated public conversation about the social impacts of corporate behaviour on a wide range of stakeholders. While it did not ultimately make corporations accountable to those constituencies (but only to shareholders) it opened their practices to new scrutiny and challenged them to comply with new norms.

910 The young entrepreneurs who started the benefit corporation movement were motivated by their desire to create a corporate form that would allow them fully to express their progressive values. As they worked with lawyers to craft new legislation, and created B Lab to foster enabling discourses, certification practices, knowledge repositories and support networks, they felt they were building a model that could challenge the shareholder value concept of the firm. They opted to build this model on the infrastructure of shareholder value in order to make it more easily comprehensible, and perhaps less threatening, to corporate actors. The goal throughout the project was to give directors and shareholders the discretion to behave in what they believed was a socially responsible way, although what constituted social responsibility was never defined. At a moment when everyone from the Occupy Movement to populist Republicans called for reining in the power of corporations, the benefit corporation model did not curtail, but rather expanded, the discretion of corporate directors and shareholders.

920 The movement did this by instantiating the values and desires of directors and shareholders as the corporation's 'social benefit' – turning their vision of what was good for society into the mandated operating principles of the firm. No longer chained to the enhancement of shareholder value as a singular goal, firms were allowed by the law to develop legally enforceable moral and ethical goals. In states where a general public benefit was adopted, the need for a holistic assessment of benefits and harms tempered the new discretion this offered. But in those few states that allowed firms to pursue only specific public benefits, the law created opportunities for firms to engage in non-pecuniary projects of almost any type. Shareholders could still weigh in about these decisions, but as in the case of the shareholder value model, other stakeholders remained on the sidelines.

935 Only time will tell whether the use of the language of specific public benefit to create grounds for non-compliance with birth control mandates constituted a hijacking of the benefit corporation, or a simple bump in the road *en route* to a robust alternative to the shareholder value model. What this case clarifies, however, is that attempts to create something new do not make it out of whole cloth, but are shaped by the acceptable range of political thought at a particular historical juncture. In creating what was to be a contestatory form, proponents of benefit corporations borrowed from the past and made creative use of existing templates. Retaining the discretion and authority of directors and shareholders undoubtedly contributed to the model's popularity and rapid spread. But in failing to consider the implications of leaving these relations of power and authority intact, even as they expanded directors' discretion, activists
945 left the new form vulnerable to those who would use it for unintended ends.

As the benefit corporation model spreads to new countries and contexts, the possible expressions of its legal form and innovations to corporate practice will vary with the political landscape. The US version of the benefit corporation developed in a context where a dominant neoliberal political rationality intent on the preservation of shareholder value metrics foreclosed many other options. In regions of the world where the state has a stronger mandate to regulate corporate behaviour, there may be less incentive for firms to define and pursue public benefits. And when benefit corporations are adopted in contexts where shareholder value doctrines hold less sway, new, less imitative, ways of imagining the proper relationship between economic and social goals inside the corporate entity may emerge.

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Notes

1 Legal scholar Lynn Stout notes that the business judgment rule gives directors the legal protection to manage day-to-day operations of a company as they see fit and that the mandate to maximize shareholder returns only becomes enforceable when a company is up for sale. She holds that the language in *Dodge v. Ford*, frequently cited as establishing shareholder primacy as a legal obligation, is not part of the legal judgment in that case, but a tangential aside known as *dicta* that does not set precedent (Stout, 2012, pp. 24–31).

2 As of 2015, Colorado, Delaware and South Carolina; California allowed firms to choose either a general public benefit *or* a specific public benefit *or* both.

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