NOTES & COMMENTS

BENEFIT CORPORATION LEGISLATION, VERSION 1.0—A BREAKTHROUGH IN STAKEHOLDER RIGHTS?

by
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U.S. corporations face increasing pressure from society to behave in more responsible ways. However, to date, the "maximize shareholder-profit" axiom has firmly held its ground. As a result, a reasoned business decision may benefit shareholders, but have an adverse impact on various outside stakeholders, including employees, the local community, and the environment. And while such negative effect is often anticipated, the legal mechanisms necessary to derail this outcome have arguably been nonexistent. To counteract this trend, Maryland enacted the United States' first benefit corporation legislation in April 2010.

The Maryland Benefit Corporation Act attempts to bridge the gap between the contemporary legal framework of U.S. corporations and the growing industry of hybrid social ventures. As a result, social entrepreneurs may choose to incorporate their entities under a new statutory scheme that mandates an enhanced focus on stakeholders. This Comment evaluates the Maryland statute in light of historical trends and contemporary expectations in order to determine its effectiveness. This Comment argues that while Maryland's legislation is indicative of an evolving social and cultural landscape that places higher expectations on "good" corporate behavior, the statute falls short of its goals for three reasons. First, the statute does not establish a fiduciary

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relationship between a board of directors and outside stakeholders. Second, too much ambiguity surrounds the application of the business judgment rule to a decision made by the board of directors of a benefit corporation. And third, the statute only prescribes an independent measurement structure; it does not install one. This Comment seeks to expose these shortcomings in order to assist future state legislators in drafting more effective benefit corporation legislation.

I. INTRODUCTION

I'm saddened and offended by the idea that companies exist to enrich their owners. . . . That is the very least of their roles; they are far more worthy, more honorable, and more important than that. Without the vital creative force of business, our world would be impoverished beyond reckoning.[1]

In April 2010, Maryland enacted the United States' first benefit corporation ("B Corp") legislation.[2] The legislation aspires to usher in a new corporate paradigm: one in which corporations can create benefit for both society at large and for corporate shareholders.[3] While legal scholars had historically advocated that a shareholder-profit-

[1] Dennis Hevesi, Obituary, *Michael Hammer, 60, Business Writer*, N.Y. TIMES, Sept. 5, 2008, at B6.

[2] John Tozzi, *Maryland Passes 'Benefit Corp.' Law for Social Entrepreneurs*, BLOOMBERG BUSINESSWEEK (Apr. 13, 2010), http://www.businessweek.com/smallbiz/running_small_business/archives/2010/04/benefit_corp_bi.html. This enactment is codified as MD. CODE ANN., CORPS. & ASS'NS tit. 5, subtit. 6C (LexisNexis Supp. 2010).

[3] Historically, a corporation has been viewed as serving one primary function: maximizing shareholder value. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("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, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.").

maximization approach was the most logical business model,[4] B Corp legislation embraces a utilitarian approach in which businesses can function morally. As such, B Corp legislation seeks to address two main issues. First, the legislation allows boards of directors to consider outside stakeholders as well as shareholders in the decision-making process.[5] Second, B Corp legislation seeks to impose standards on corporations that claim to be dedicated to a triple bottom line—positive economic, social, and environmental results.[6] With such ambitious motives, the predominate inquiry that arises is how, if at all, does the Maryland Benefit Corporation Act impact the treatment of outside stakeholders within the U.S. corporate legal framework?

Maryland State Senator Jamie Raskin, a sponsor of the enacted legislation, declared, "[t]his is a great moment in the evolution of commercial life in Maryland and America," and furthermore that this legislation allows "companies a way to do good and do well at the same time. The benefit corporations will tie public and private purposes together."[7] Senator Raskin's words illustrate the impact of the social entrepreneur movement on corporate law in the United States.[8] These avant-garde business entities are commonly referred to as hybrid social

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[4] *E.g.*, A.A. Berle, Jr., *For Whom Corporate Managers* Are *Trustees: A Note*, 45 HARV. L. REV. 1365, 1367–69 (1932). *See also* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423 (1993). *But see* Ian B. Lee, *Corporate Law, Profit Maximization, and the "Responsible" Shareholder*, 10 STAN. J.L. BUS. & FIN. 31, 32 (2005).

[5] *See Legal Framework*, B CORP., http://www.bcorporation.net/become/legal (last visited Dec. 4, 2011).

[6] *See* ANDREW W. SAVITZ & KARL WEBER, THE TRIPLE BOTTOM LINE: HOW TODAY'S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL, AND ENVIRONMENTAL SUCCESS—AND HOW YOU CAN TOO, at xiii (2006).

[7] Press Release, Sen. Jamie Raskin, Governor Signs Bill Making Maryland the First State in the Union to Recognize Benefit Corporations (May 11, 2010), http://dlcc.wiredforchange.com/o/6727/p/salsa/web/press_release/public/?press_release_KEY=620. Triple bottom line results may also be referred to as "blended value" results, which measure an enterprise's value and success in terms of economic and social benefit impact. *See, e.g.*, JED EMERSON & SHEILA BONINI, THE BLENDED VALUE MAP: TRACKING THE INTERSECTS AND OPPORTUNITIES OF ECONOMIC, SOCIAL AND ENVIRONMENTAL VALUE CREATION 15 (rev. ed. 2004), *available at* http://www.blendedvalue.org/media/pdf-bv-map.pdf.

[8] In 2006, social entrepreneurship was described as "one of the hottest movements" among young people in the United States. David Gergen, *The New Engines of Reform*, U.S. NEWS & WORLD REP., Feb. 20, 2006, at 48. In 2008, the New York Times ran an article comparing today's social entrepreneurs to the leaders of America's civil rights movement. Nicholas D. Kristof, Op-Ed., *The Age of Ambition*, N.Y. TIMES, Jan. 27, 2008, (Week in Review), at 18. *See also* ANDREW WOLK, ADVANCING SOCIAL ENTREPRENEURSHIP: RECOMMENDATIONS FOR POLICY MAKERS AND GOVERNMENT AGENCIES 2 (2008), *available at* http://www.rootcause.org/sites/rootcause.org/files/Advancing_Social_Entrepreneurship.pdf (quoting David Gergen as calling social entrepreneurship "the most important movement since the civil rights movement").

ventures.[9] Hybrid social ventures differentiate themselves from the status quo because they do not limit operations to acts of corporate philanthropy or corporate social responsibility (CSR).[10] Instead, hybrid social ventures contemplate blended value results as an inseparable component of the bottom line because the maximization of shareholder value is not necessarily the entity's driving purpose.[11]

While the Maryland Benefit Corporation Act attempts to build on this emerging trend, the framework still gives way to much ambiguity. This Comment seeks to clarify this uncertainty through an examination of the corporation's role in U.S. society in a historical context. By measuring the Maryland Benefit Corporation Act in light of this evolution, this Comment reflects on how the Act aligns with the transforming corporate structure in the United States. Ultimately, society must determine how to measure the success or failure of B Corp legislation. This Comment elucidates the strengths and weaknesses of the Act in order to assist society with that process.

I assert that the Maryland Benefit Corporation Act falls short because it does not resolve the predominant issue the general public wanted state legislators to address—increased corporate accountability to stakeholders.[12] Three major flaws exist. First, the Act does not resolve the issue

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[9] A hybrid social venture can be defined as a enterprise that "desires to make a profit but that is equally committed to a social bottom line." Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 346 (2009).

[10] *See* Dana Brakman Reiser, *For-Profit Philanthropy*, 77 FORDHAM L. REV. 2437, 2438, 2449 (2009) (claiming a hybrid venture such as Google.org "goes well beyond CSR's aims of awareness and consideration" of nonmonetary results).

[11] In addition to benefit corporations, generic LLCs and low profit limited liability companies (L3Cs) may also be included in the discussion of hybrid social enterprises. *See* Kelley, *supra* note 9, at 370–72.

[12] The corporate scandals exemplified by Enron and WorldCom in the early 2000s sparked public outcry and initiated a corporate reform movement across the United States, which placed corporate accountability at its forefront. *See generally* GEORGE BENSTON ET AL., FOLLOWING THE MONEY: THE ENRON FAILURE AND THE STATE OF CORPORATE DISCLOSURE (2003); WALTER PAVLO, JR. & NEIL WEINBERG, STOLEN WITHOUT A GUN: CONFESSIONS FROM INSIDE HISTORY'S BIGGEST ACCOUNTING FRAUD—THE COLLAPSE OF MCI WORLDCOM (2007). Society, disenchanted with corporate behavior, called on state and federal legislators to draft new legislation addressing these concerns. *See, e.g.*, Amiram Gill, *Corporate Governance as Social Responsibility: A Research Agenda*, 26 BERKELEY J. INT'L L. 452, 457 & n.22 (2008) ("In 2002, following the Enron crisis, President Bush announced his 'Ten-Point Plan to Improve Corporate Responsibility and Protect America's Shareholders' focusing on corporate governance reform."). For example, Congress enacted Sarbanes–Oxley in 2002. Sarbanes–Oxley Act of 2002 (SOX), Pub. L. No. 107-204, 116 Stat. 745. SOX introduced large accounting reform for public companies and harsh penalties for those who fail to comply in order to satisfy the demands of the general public. *See* Scott Harshbarger & Goutam U. Jois, *Looking Back and Looking Forward: Sarbanes-Oxley and the Future of Corporate Governance*, 40 AKRON L. REV. 1, 3–4 (2007) (discussing recent trends in corporate governance and the concept of "good" governance); Tara J. Radin, *Stakeholders and Sustainability: An Argument for Responsible Corporate Decision-Making*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 363, 364–66, 370 (2007)

of stakeholder consideration because the Act does not adopt a fiduciary relationship between stakeholders and a corporation's board of directors. As a result, stakeholders are left with the same lack-of-standing dilemma that they have always encountered. Second, by failing to enhance the consideration of stakeholders in the statutory language, Maryland legislators have made it problematic for courts to hold a board of directors accountable when it makes a decision contrary to stakeholder interests. Third, the Act does not install an actual third-party measurement, but instead simply states that one will exist. While exposing the shortcomings of the Maryland statute will help society measure the ultimate success of B Corp legislation, these problems may be more indicative of the flaws of the existing American corporate legal framework as a whole, which fails to recognize the value of outside stakeholders.

Part II of this Comment will examine corporate evolution in the United States and how pertinent corporate doctrines came into being. Near the end of the nineteenth century, American corporate law underwent momentous change. Many foundational principles of U.S. corporate law were abandoned. At the same time, the concepts of corporate personhood and primacy of shareholder rights took root. These advances in corporate law will be discussed in detail in order to characterize the corporate landscape in the United States during the majority of the twentieth century. Additionally, this Part will analyze the rise of two interrelated concepts in corporate law—corporate social responsibility and the theory of stakeholder rights. These two concepts are precursors to the rise of the benefit corporation and represent the general sentiments of what a "good" corporation should look like.

Part III will discuss the backdrop surrounding the enactment of the Maryland Benefit Corporation Act in April 2010. This Part will highlight the goals of the Act and how these goals differ from the traditional corporate paradigm. Hybrid social enterprises have vitally influenced modern corporate law, and this Part details the new legal structure these entities seek. Additionally, this Part will explain what the Maryland legislation does and does not do. Discussion will be keyed to the expansion of stakeholder consideration, greater corporate executive accountability, and the prescription of a third-party standard of measurement. Furthermore, this Part will evaluate relevant legislative history of the Maryland Benefit Corporation Act. By scrutinizing the statutory language and its legislative history, this Part will attempt to uncover the reasons for implementing B Corp legislation and its position in the existing legal framework.

Part IV will offer a critique of the Maryland statute. This Part will determine whether or not the statute achieves the goals expressed by state legislators and desired by the public at large. This Part also will

(discussing the "flawed" legal system in the United States and the reasons for enacting SOX).

depict the potential success and shortcomings of the Act within the contemporary corporate legal framework, and will offer areas for improvement. This Part will conclude with an analysis of the general public's role in influencing state legislators. Notably, an emphasis for companies to become more "green" or "sustainable" currently exists in the United States. The impact of this push for more sustainable businesses will be compared to the legal realities of the Maryland Benefit Corporation Act.

II. CORPORATE EVOLUTION IN THE UNITED STATES

A. A Race from Accountability: How Business Entities Escaped the Founding Principles Governing Early Corporate America

Actors at the state level have largely facilitated the development of corporations in the United States.[13] As such, reviewing the historical development of corporate regulation by the state is fundamental to understanding the contemporary U.S. legal corporate framework. Up to the beginning of the nineteenth century, many limitations were placed on the formation of corporations. That is, the secretary of state did not issue articles of incorporation to individuals for a prescribed fee so long as a checklist of conditions was satisfied. In order to create a corporation, one had to petition the state legislature for a charter with the right to operate as a corporation.[14]

These special legislative acts created a particular corporation. The acts were not intended to serve as a general law allowing any person to form a corporation. Instead, states typically granted charters to a corporation that served a financial public function, such as the operation of banks, insurance companies, and public works.[15] States did not freely grant articles of incorporation due to the public perception that corporations might abuse this grant of private power.[16] At the same time,

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[13] ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 3 (1999). *See also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 511–31 (2d ed. 1985) (discussing the historical developments of American corporate law and the political and economic forces which influenced the development of the law).

[14] PINTO & BRANSON, *supra* note 13.

[15] JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS 32 (2d ed. 2003). The vast majority of incorporations were actually granted to churches, cities, burroughs, and charities. *See* FRIEDMAN, *supra* note 13, at 188–89.

[16] PINTO & BRANSON, *supra* note 13. Some commentators argue that upon their declaration of independence from England, American colonists also sought to prevent English corporations from extracting the colonies' wealth through the domination of trade. *See, e.g.*, Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century*, 26 LAW & SOC. INQUIRY 315, 337–38 (2001) (describing early English colonizers' ambition to exploit resources that they considered naturally bountiful). This mistrust of foreign corporate power likely influenced state actors to limit the roles of corporations even further.

states understood the service corporations could offer society because they could allocate private resources to accomplish public works.[17] Yet due to rampant distrust toward corporations, states held the power to dissolve a corporation that engaged in activities in violation of its charter.[18]

While early corporate charters in the United States may have been issued as mere financial tools,[19] "as the concept of private property became more and more a part of American society and jurisprudence, the corporation and its members were viewed less and less as simply instruments of the state," and obtaining a general corporate charter was viewed as more of a general right.[20] With the increasing pressures of industrialization, many state legislatures found themselves overwhelmed by the number of requests for legislation bestowing corporate status.[21] Although many previously had viewed corporations with much skepticism, U.S. society began to see that economic reality dictated the need to use corporations for more expanded purposes.[22] With the growth in U.S. industry came the need for large amounts of capital to expand business operations.[23] And with this demand for new capital came a revolutionary departure from the traditional treatment of corporations in the United States.

Ultimately, states adopted constitutional provisions establishing that legislatures need not prescribe special acts for the purpose of creating

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[17] *See* Christian C. Day, *Partner to Plutocrat: The Separation of Ownership from Management in Emerging Capital Markets—19th Century Industrial America*, 58 U. MIAMI L. REV. 525, 530 (2004) (claiming that the demand for better transportation, such as a canals and turnpikes, necessitated public works projects). *See also* Joseph S. Davis, *Charters for American Business Corporations in the Eighteenth Century*, 15 PUBLICATIONS AM. STAT. ASS'N. 426, 429 (1918); 2 JOSEPH STANCLIFFE DAVIS, *Eighteenth Century Business Corporations in the United States*, *in* ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 3–4 (1917) (presenting a general account of late eighteenth-century corporate law development in the United States).

[18] States were not afraid to use this power either. For example, in 1832, Pennsylvania revoked the charters of ten banks for operating contrary to the public interest. KALLE LASN, CULTURE JAM: THE UNCOOLING OF AMERICA 67 (1999).

[19] In comparison, today's corporation is allowed to participate in the political process, has a right to free speech, and can benefit from limited liability. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010) (holding corporate funding of independent political broadcasts in candidate elections cannot be limited under the First Amendment); First Nat'l Bank v. Bellotti, 435 U.S. 765, 777, 784 (1978) (holding that the First Amendment speech right applies to corporations); Bartle v. Home Owners Coop. Inc., 127 N.E.2d 832, 833 (N.Y. 1955) (citing Natelson v. A.B.L. Holding Co., 183 N.E. 373, 374 (N.Y. 1932)); Rapid Transit Subway Constr. Co. v. City of New York, 182 N.E. 145, 150 (N.Y. 1932) (explaining that the law permits the incorporation of a business for the very purpose of escaping personal liability).

[20] COX & HAZEN, *supra* note 15, at 32.

[21] *Id.*

[22] PINTO & BRANSON, *supra* note 13.

[23] *Id.*

corporations.[24] Not only had this become an inefficient means of processing the increased number of requests, but this method also generated the opportunity for favoritism and corruption.[25] So long as corporations complied with general corporation laws, these constitutional provisions permitted the formation of new corporations.[26] For example, in 1811, New York passed the nation's first general incorporation act, effectively allowing any entity to incorporate as long as it complied with the terms of the statute.[27] Soon after New York's enactment, other states passed their own general corporation acts, precipitating a trend throughout the country to use a general act that permitted incorporation, so long as a corporation signed and filed articles of incorporation.[28]

While states began to adopt their own general incorporation statutes, many commentators point to *Trustees of Dartmouth College v. Woodward* as the birth of the American business corporation.[29] The Court held that Dartmouth's corporate charter qualified as a contract between private parties: the King of England and the college's trustees.[30] As a result, that state legislature could not interfere with either party's right to contract.[31] Even though at the time of suit the United States was no longer a British colony, the Court held the contract valid because the United States Constitution proclaims that a state cannot pass laws to impair a contract.[32] Ultimately, *Trustees of Dartmouth College* found that corporations had the

[24] *See, e.g.*, PA. CONST. art. III, § 32; N.C. CONST. art. VIII, § 1; N.Y. CONST. art. X, § 1.

[25] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 195–96 (1977).

[26] *See* William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 664 (1974).

[27] Act of Mar. 22, 1811, ch. 67, 1811 N.Y. Laws 151 (relative to incorporations for manufacturing purposes). *See also*, W.C. Kessler, *A Statistical Study of the New York General Incorporation Act of 1811*, 48 J. POL. ECON. 877, 877 (1940).

[28] *See* E. Merrick Dodd, Jr., *American Business Association Law a Hundred Years Ago and Today*, *in* 3 LAW: A CENTURY OF PROGRESS, 1835-1935, at 254, 289 n.85 (Alison Reppy ed., 1937) (referring to general acts for manufacturing corporations in Pennsylvania (1836), North Carolina (1836), Michigan (1837), and Connecticut (1837)).

[29] *See, e.g.*, R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 301 (2001); David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887, 905–07 (1982) (explaining the impact of *Trustees of Dartmouth College*); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1447–49 (1987) (explaining the legacy of *Trustees of Dartmouth College*); Liam Séamus O'Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 206–16 (2006).

[30] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 643–44 (1819).

[31] *See id.* at 651–54.

[32] *Id.*; U.S. CONST. art. I, § 10, cl. 1. Chief Justice Marshall's opinion emphasized that the term "contract" referred to transactions involving individual property rights, not to "the political relations between the government and its citizens." *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 627.

right to contract at an entity level.[33] And even though a corporate entity may enter into a contract, these contracts must be honored in the same manner as contracts entered into by natural persons.[34]

While many skeptics expressed great unease toward the rise of corporations,[35] the once strong public reservation toward profit-driven corporations dissipated. When society realized the boundless functions a corporation could serve, society's general attitude toward corporations changed. State legislation toward corporations became more favorable, and before long corporate power in the United States had increased exponentially. One commentator describes the change in legal treatment toward corporations from 1819 to the 1920s as "a move from a circumstance in which a corporation could do only those things specifically allowed by its charter to one in which a corporation could do anything not specifically prohibited to it."[36]

Yet as Shakespeare so elegantly inquired, "can one desire too much of a good thing?"[37] Many point to *Santa Clara County v. Southern Pacific Railroad* as the moment in U.S. history when corporations achieved a status that crossed an acceptable threshold.[38] The case is frequently cited for the proposition that corporations enjoy the same rights under the Fourteenth Amendment as do natural persons under the Equal Protection Clause.[39] Essentially, *Santa Clara* led to "corporate personhood,"[40] the concept that a corporation, as an association of

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[33] *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 667–68.

[34] *Id.* at 699–700.

[35] Abraham Lincoln foresaw danger when he proclaimed, "I see in the near future a crisis approaching that . . . causes me to tremble for the safety of my country. . . . [C]orporations have been enthroned . . . and the money power of the country will endeavor to prolong its reign . . . until all wealth is aggregated in a few hands, and the Republic is destroyed." Letter from Abraham Lincoln to William F. Elkins (Nov. 21, 1864), *in* THE LINCOLN ENCYCLOPEDIA 40 (Archer H. Shaw ed., 1950).

[36] Mark, *supra* note 29, at 1455.

[37] WILLIAM SHAKESPEARE, AS YOU LIKE IT act 4, sc. 1.

[38] *See, e.g.*, Wheeling Steel Corp. v. Glander, 337 U.S. 562, 580 (1949) (Douglas, J. & Black, J., dissenting); Katie J. Thoennes, Comment, *Frankenstein Incorporated: The Rise of Corporate Power and Personhood in the United States*, 28 HAMLINE L. REV. 204, 204–05 (2004); Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 551 (2010).

[39] *See* Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121, 1123 (2000). Strangely, *Santa Clara County* is not typically cited for its holding, but rather for a statement made prior to oral argument. Chief Justice Waite declared, "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does." WILLIAM MEYERS, THE SANTA CLARA BLUES: CORPORATE PERSONHOOD VERSUS DEMOCRACY 7 (2000), *available at* http://www.iiipublishing.com/afd/SantaClara.pdf.

[40] *See, e.g.*, THOM HARTMANN, UNEQUAL PROTECTION: HOW CORPORATIONS BECAME "PEOPLE"—AND YOU CAN FIGHT BACK 11 (2010).

shareholders comprised of natural persons, should enjoy the same rights the shareholders would enjoy if they acted individually.[41]

These cases and laws demonstrate not only a historical background for contemporary corporate statutes, but also demonstrate how shifting social viewpoints and values can affect state legislation. Early corporate law in the United States was very restrictive because society did not trust corporations and the unchecked power that general incorporation acts presented. However, as the United States shifted away from its agrarian roots and transformed into an industrial giant, the value of corporations as a vehicle for unforeseen revenue generation and decreased liability became too dominant to suppress. What was once a bedrock principle of the U.S. legal system—that states should limit corporate power to the construction of public works—had been entirely abandoned.

B. Enough Is Enough—A Shift in Corporate Philosophy and the Emergence of Divergent Legal Thought

As the saying goes, "with great power there must also come—great responsibility[.]"[42] As corporate power in the United States has substantially increased, many have argued that corporations should take greater precautions against causing societal problems and begin to develop adequate solutions to these problems.[43] But when activist shareholders demanded corporations give a greater level of attention to social concerns, other shareholders who were not as invested in the general welfare of society resisted.[44] But then what social utility, if any, does the corporation serve?

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[41] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010) (holding a corporation's monetary contribution to political broadcasts to be protectable speech); Dow Chem. Co. v. United States, 476 U.S. 227, 236 (1986) (asserting a corporation's right to privacy); Nike, Inc. v. Kasky, 539 U.S. 654, 681 (2003) (Breyer, J., and O'Connor, J., dissenting) (claiming a corporation's right to free speech); Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 521 (W.D. Ky. 2010) (arguing for tobacco companies' rights to free speech and due process).

[42] 1 AMAZING FANTASY, no. 15, Sept. 1962, at 12 (Amazing Spiderman's debut issue).

[43] *See, e.g.*, Michael B. Runnels et al., *Corporate Social Responsibility and the New Governance: In Search of Epstein's Good Company in the Employment Context*, 43 AKRON L. REV. 501, 503–04 (2010); Gill, *supra* note 12, at 452–55 (explaining how corporate governance can be used as a means to better attune corporations to societal needs).

[44] *See* C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 U. KAN. L. REV. 77, 115–16 (2002) (describing how activist shareholders of General Motors (GM) unsuccessfully used shareholder proposals to campaign GM to change its charter documents to prevent any corporate purpose from "be[ing] implemented in a manner which is detrimental to the public health, safety, or welfare" (quoting Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 534 (1971)); Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 1008, 1010–11 (1984) (explaining how early movements by activist corporate shareholders

As famed economist Milton Friedman claimed, "[t]he social responsibility of [a] business is to increase its profits."[45] Friedman's logic is the exact depiction of what early American society feared. Whereas corporations were originally created to benefit the public at large through public works like the construction of roads, bridges, and canals,[46] many now viewed corporations as a vehicle for the sole purpose of maximizing shareholder value, even if it meant doing so at a cost to society.[47] Yet the notion that corporations can serve a public function was not entirely abandoned—legal scholars across the United States discussed the very issue.[48]

In the decades following *Dodge v. Ford Motor Co.*,[49] corporate social responsibility[50] developed as a means to address considerations outside the profit spectrum.[51] The CSR movement largely looks to balance shareholder goals with "the need to reduce externalities that impact . . . stakeholders."[52] CSR attempts to connect corporations with public needs. By encouraging corporations to view employees, consumers, and communities in a similar manner as they do stockholders, CSR seeks to expand the role that corporations play in society. CSR discussions also

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that promoted a social agenda for corporations "received virtually no support from shareholders").

45 Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32.

46 COX & HAZEN, *supra* note 15, at 32.

47 The argument that a corporation's sole purpose is to maximize shareholder profit can be traced back to legal commentary from the 1930s. *See* Berle, *supra* note 4, at 1367.

48 While Berle argued in favor of a profit-maximizing approach, a contemporary stressed that a corporation may serve two roles: a profit-making function and a social-service function. E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148–49 (1932). This debate is ongoing. *See, e.g.*, Bainbridge, *supra* note 4, at 1423; Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 631 (2009); Lee, *supra* note 4, at 40; Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189 (2002).

49 170 N.W. 668 (Mich. 1919).

50 For a detailed discussion of CSR, see generally WILLIAM B. WERTHER, JR. & DAVID CHANDLER, STRATEGIC CORPORATE SOCIAL RESPONSIBILITY: STAKEHOLDERS IN A GLOBAL ENVIRONMENT (2d ed. 2011); PHILIP KOTLER & NANCY LEE, CORPORATE SOCIAL RESPONSIBILITY: DOING THE MOST GOOD FOR YOUR COMPANY AND YOUR CAUSE (2005).

51 The major debate that surrounds CSR is whether or not a corporate board of directors can legally consider issues outside of maximizing shareholder profit. This topic has been heavily argued and is outside the scope of this Comment. However, for a discussion on both sides of the debate, see for example, Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533 (2006); Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649 (2004); Judd F. Sneirson, *Race to the Left: A Legislator's Guide to Greening a Corporate Code*, 88 OR. L. REV. 491 (2009). For the purposes of this Comment, the most important aspect of CSR is its discussion of stakeholder rights.

52 Gill, *supra* note 12, at 454.

extend to concerns involving the natural environment.[53] These discussions involve a further level of complexity because of the environment's congenitally complicated nature—external impacts on the environment exist outside the traditional legal framework.[54] Interestingly, CSR's divergent outlook is not necessarily in conflict with shareholder interests. Because CSR is not simply an act of philanthropy,[55] CSR allows corporations to develop a long-term solution to the enhanced concerns of the natural environment and external constituencies by regulating how profits are made.[56]

Coinciding with CSR is the emergence of the stakeholder theory paradigm. Shareholders are not the only constituency whose financial well-being is correlated to a corporation's success. Other stakeholders, such as employees, suppliers, and society,[57] are also greatly impacted by corporate practices. Yet without a platform to launch their concerns, these outside stakeholders are forced to simply rely on corporate boards of directors to make responsible decisions. Because the traditional mechanisms to exert influence on a board of directors are not available to outside stakeholders, as they are to shareholders, a board of directors does not have to consider the impact of its decision on outside stakeholders.[58] Considering that, traditionally, only shareholders have been protected by legislation, outside stakeholders have not been able to

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[53] *See* Radin, *supra* note 12, at 366.

[54] *Id.*

[55] Reiser, *supra* note 10, at 2449.

[56] *See* Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability*, *in* THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 9 (Doreen McBarnet et al. eds., 2007); DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 19–24 (2005). CSR is not just a grass roots movement either. In 2004, all Fortune 500 companies introduced codes of conduct into their businesses. McBarnet, *supra* at 10. Additionally, fifty-nine of the top one hundred companies in the United States produced CSR reports in 2005–06. *Id.* Furthermore, in a survey in December 2005, a management consultant firm found that only one in six of the 4,238 executives surveyed worldwide concurred with Milton Friedman that the sole purposes of a corporation is to maximize profit for shareholders; eighty-four percent said that high returns should be balanced with contributions to the broader public good. *The McKinsey Global Survey of Business Executives: Business and Society*, MCKINSEY QUARTERLY, no. 2, 2006, at 33, 33–39.

[57] *See* R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 31–32 (1984). The term "stakeholder" was originally used at the Stanford Research Institute (now "SRI International, Inc.") in 1963 and it meant "those groups without whose support the organization would cease to exist." *Id.* at 31. Prior to the emergence of this theory, stakeholders had minimal, if any, influence in the corporations because they had not been given an arena to voice their concerns. *See* John C. Carter, *The Rights of Other Corporate Constituencies*, 22 MEMPHIS ST. U. L. REV. 491, 504 (1992).

[58] *See* GREGORY V. VARALLO ET AL., FUNDAMENTALS OF CORPORATE GOVERNANCE: A GUIDE FOR DIRECTORS AND CORPORATE COUNSEL 4–6 (2d ed. 2009).

rely on government regulation to promote responsible corporate behavior.[59]

Some critics do not trust corporate leaders to "regularly and earnestly" consider stakeholder interests.[60] Instead, commentators argue that the law needs to develop mechanisms that promote relations between corporations and stakeholders, and that these mechanisms must appropriately respond to corporations' substantial dominance over stakeholders.[61] Some argue that the best way to adopt these mechanisms is by dramatically departing from existing corporate law, which is a shareholder-centric universe.[62] The idea is that such a departure would encourage boards of directors to evaluate stakeholder considerations without imposing a legal duty on them to act in their interests.[63] If boards of directors are aware of how their decisions may affect stakeholders, and their incorporation documents allow for stakeholder consideration, such a framework would encourage corporate entities to act more thoughtfully and responsibly toward these constituencies.[64]

In accordance with the growing demands for stakeholder consideration, state legislators began to incorporate stakeholders' interests into the corporate decision-making process through "stakeholder statutes."[65] In fact, over one-half of U.S. states have adopted stakeholder statutes.[66] These statutes allow boards of directors to reflect on stakeholder interests in the decision-making process, thus enabling corporations to justify and possibly defend an action that they believe to be in the best interest of the corporation without violating the duties owed to shareholders.

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[59] *Id.*

[60] Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 826 (2003).

[61] *Id.* For a detailed discussion on the forces that have increased the size and influence of American corporations, see MARINA V.N. WHITMAN, NEW WORLD, NEW RULES: THE CHANGING ROLE OF THE AMERICAN CORPORATION 12 (1999) (claiming the three major components to be "global economic integration, domestic deregulation, and the evolution of information and telecommunications technology.").

[62] *See* Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 32 (1991).

[63] *See id.*

[64] *See* Hale, *supra* note 60, at 826–27.

[65] *See* Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 636–39 (2001) (discussing the development of "corporate constituency statutes," "nonshareholder constituency statutes," and a stakeholder approach to corporate law); Roberta S. Karmel, *Implications of the Stakeholder Model*, 61 GEO. WASH. L. REV. 1156, 1162–63 (1993). *See, e.g.*, MINN. STAT. ANN. § 302A.251(s5) (West 2011); 15 PA. CONS. STAT. ANN. §§ 1715–16 (West 1995); R.I. GEN. LAWS § 7-5.2-8 (1999); WIS. STAT. ANN. § 180.0827 (West 2002).

[66] *See* Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168, 1179–80 & n.37 (1999).

While proactive, stakeholder statutes fail to isolate the real problem at hand. These statutes do not alter "the physical and psychological distance existing between [corporate decision-makers] and stakeholders."[67] Thus, these statutes alone do not give stakeholder interests their due weight. However, state legislators, in response to society's increasing demand for CSR and stakeholder consideration, have developed a new strategy to solve the stakeholder dilemma. Boards of directors may now be required to consider stakeholder interests in their decision-making process through a new type of entity—the benefit corporation.[68]

III. THE RISE OF THE BENEFIT CORPORATION

The sale of Ben & Jerry's, a popular American ice cream company, in 2000[69] provides a valuable illustration of the failure to properly consider stakeholder interests in a board of directors decision. The case study also serves as a terrific launching point for a discussion of Maryland's B Corp legislation. Ben & Jerry's is a well-known, socially active corporation.[70] In the late 90s, Ben & Jerry's began attracting buyout interests, largely attributable to poor stock performance.[71] Dreyer's, a competing ice cream manufacturer, submitted an offer to purchase Ben & Jerry's in 1998.[72] However, due to their socially conscious business stance, founders Ben Cohen and Jerry Greenfield resisted the offer and, with other

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[67] Hale, *supra* note 60, at 827; *see also* Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085, 1085 (2000) (citation omitted) (noting that corporations create interdependencies with numerous stakeholders for whom the corporation holds a legitimate concern).

[68] Hannah Clark, *A New Kind of Company: B Corporations Worry About Stakeholders, Not Just Shareholders*, INC., July 2007, at 23, 24.

[69] *History*, BEN & JERRY'S ICE CREAM, http://www.benjerry.com/company/history (last visited Dec. 4, 2011).

[70] Ben & Jerry's website states that they are founded on and dedicated to a sustainable corporate concept consisting of interrelated social, economic, and product missions—and that underlying their mission is to develop new and creative ways of addressing these three parts, in addition to respecting individuals and the community at large. *Ben & Jerry's Mission Statement*, BEN & JERRY'S ICE CREAM, http://www.benjerry.com/activism/mission-statement (last visited Dec. 4, 2011).

[71] In 1992, it was estimated that stock purchased through Ben & Jerry's initial public offering was worth fifteen times the value of the IPO price. Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 224 (2010) (citing Allan Sloan, *The Selling of the Simple Life*, WORTH, Feb./Mar. 1992, at 76, 80). While shares reached a high of $33.75 in 1993, they had sharply declined to a low of $15 in a year's time. Mary Ellen Kuhn, *Ben & Jerry's Suffers Some Growing Pains*, FOOD PROCESSING, Sept. 1994, at 56. One securities analyst went so far as to state that "[Ben & Jerry's] stock had done nothing for the past 10 years." *Buyout Sweet Enough for Ben & Jerry's Founders: Ability to Pursue Social Causes Key Factor in Deal*, PANTAGRAPH (Bloomington, Ill.), May 12, 2000, at 4, *available at* 2000 WLNR 4343876 [hereinafter *Buyout Sweet Enough*].

[72] Page & Katz, *supra* note 71, at 225.

investors, put together a counter-offer, valuing their stock at $38 a share, almost double the amount at which the stock had been trading a few months earlier.[73] But when Unilever entered a bid of $43.60 a share, Ben & Jerry's board of directors announced that the offer had been accepted and signed a merger agreement.[74] The Ben & Jerry's case study demonstrates the difficulty socially responsible entrepreneurs face in ensuring that their enterprises can continue to operate under the principles upon which they were originally founded. While Cohen and Greenfield claimed they did not want to sell their company, U.S. corporate law presented a predicament: sell the company to the highest bidder or risk a shareholder derivate suit.[75]

The traditional corporate model limits the way in which socially responsible entrepreneurs can use the corporate vehicle to advance social good. To combat this limitation, a new trend has emerged in U.S. corporate law. At the forefront of this charge is the benefit corporation.[76] In contrast to the old corporate model seen in cases such as *Dodge v. Ford Motor Co.*, benefit corporations have taken stakeholder theory into account where it matters most—a corporation's articles of incorporation.[77] By drafting appropriate language into their articles of incorporation, incorporators can expand the responsibilities of the board of directors to mandate consideration of the interests of employees, consumers, the community, and the environment.[78]

A private, non-profit organization named B Lab proposed and promoted the catchy "B Corp" entity name.[79] Jay Coen Gilbert, the cofounder of B Lab, established the group to act as an independent certification system for benefit corporations.[80] The driving force behind B

[73] Jim Steiker & Michael Golden, *Hot Fudge Partners: Insiders Tell How Social Investors Tried to (but Couldn't) Buy Ben & Jerry's*, BUS. ETHICS, May/June 2000, at 7. *See also* Constance L. Hays, *Ben & Jerry's Is Reportedly Going Private*, N.Y. TIMES, Mar. 29, 2000, at C1 (reporting that a shareholder claims Ben & Jerry's board of directors had approved the sale of the company to a private investment company). However, it should be noted that Ben & Jerry's securities filings did not disclose such an acceptance. *See* Ben & Jerry's Homemade Inc., Current Report (Form 8-K) (May 16, 2000).

[74] *See Buyout Sweet Enough*, *supra* note 71.

[75] *See* April Dembosky, *Protecting Companies that Mix Profitability, Values*, NPR (Mar. 9, 2010), http://www.npr.org/templates/story/story.php?storyId=124468487 (quoting Cohen as stating: "The law[] required the board of directors . . . to sell the company despite the fact that they did not want to.").

[76] *See* Linda O. Smiddy, *Corporate Creativity: The Vermont L3C & Other Developments in Social Entrepreneurship*, 35 VT. L. REV. 3, 3–4 (2010).

[77] Cal. Sec'y of State, Organization of California Nonprofit, Nonstock Corporations, *available at* http://www.sos.ca.gov/business/corp/pdf/articles/corp_artsnp.pdf (last rev. Apr. 2010). *See also* Vt. Sec'y of State, Articles of Incorporation Form: Nonprofits and Cooperatives, *available at* http://www.sec.state.vt.us/corps/forms/nparts.htm (last visited Dec. 4, 2011).

[78] *Legal Framework*, *supra* note 5.

[79] *See* Kelley, *supra* note 9, at 366–67.

[80] Clark, *supra* note 68, at 23–24.

Lab is to develop a new sector of the economy that "harnesses the power of business to solve social and environmental problems."[81] Through its promotion of benefit corporations, B Lab seeks to create economic opportunity, build strong communities, and preserve a healthy environment by ensuring that benefit corporations attain "higher standards of accountability, transparency, and social and environmental performance."[82] As of December 2010, B Lab had certified 476 benefit corporations, from over 60 industries, with over $2.2 billion in revenues under management.[83]

In order to become certified, a potential company must first take the B Impact Assessment, a management tool that analyzes an enterprise's impact on stakeholders and builds awareness of social and environmental performance.[84] Upon reviewing the results from the Impact Assessment with a B Lab staff member, the company will receive an initial certification so long as the results accurately reflect the company's dedication to social change through business.[85] At this time, the business must submit documentation to support roughly twenty percent of their answers.[86]

Once B Lab determines that a company meets its requirements,[87] the applicant may license the "certified B Corporation" trademark from B

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[81] Andrew Kassoy, *Benefit Corporations Exist in Maryland*, B CORP. BLOG (Apr. 19, 2010), http://blog.bcorporation.net/2010/04/benefit-corporations-exist-in-maryland.

[82] *Corporate Social Responsibility Profile of B Lab/B Corporation*, CSR WIRE, http://www.csrwire.com/members/9730-B-Lab-B-Corporation (last visited Dec. 4, 2011).

[83] B CORP., http://www.bcorporation.net/b-corporations (last visited Dec. 4, 2011).

[84] The B Impact Assessment is free and available to anyone. *The B Impact Rating System*, B CORP., http://www.bcorporation.net/become/BRS (last visited Dec. 4, 2011). In addition to certifying B Corps, B Lab also campaigns for the overall legal recognition of benefit corporations. *See Who Certifies?*, B CORP., http://www.bcorporation.net/index.cfm/fuseaction/content.page/nodeID/08c9dc4d-6064-48cb-af04-4fd9d4ced055/externalURL/ (last visited Dec. 4, 2011).

[85] *How Are Companies Certified and Audited as B Corporations?*, B CORP., http://www.bcorporation.net/index.cfm?fuseaction=modalContent.content&id=f7224b49-ed7f-4037-894c-31c6e3c32178 (last visited Dec. 4, 2011).

[86] *Id.* For compliance reasons, B Labs audits ten percent of all B Corps every year. During an audit, a B Corporation will have to validate and prove all of their answers on their assessment and their compliance with the B Corp legal framework. If during the audit a company's score falls below the requisite level, the company will have 90 days to cure the problems. However, if an audit reveals that a business has intentionally misrepresented aspects of their business, their certification will be publicly revoked. *See id.*

[87] *Id.* B certification applicants must submit to B Lab a scoring of their performance under the B Ratings System, and must consent to possible audits. This application process attempts to establish a standard for future B Corps so that they can "[m]eet comprehensive and transparent social and environmental performance standards." *About Certified B Corps*, B CORP., http://www.bcorporation.net/about (last visited Dec. 4, 2011). Part of the application includes a self-survey addressing an array of diverse issues, including the reasons for including social and environmental goals in an applicant's charter documents, tax history, board of director accountability,

Lab.[88] As a condition, B Lab requires a copy of the company's governing documents.[89] For pre-existing entities, B Lab allows a one-year period for certified benefit corporations to obtain approval from their board of directors and file amended articles with the secretary of state.[90]

Similar to the traditional corporate framework, benefit corporation legislation has escalated to debate at the state level.[91] On April 13, 2010, Maryland became the first state to adopt benefit corporations into its corporate statutes when Governor Martin O'Malley signed Senate Bill 690 into law.[92] The signing of SB 690[93] allows current and future Maryland corporations to pursue socially responsible purposes in addition to profits, effectively creating a "triple bottom line of 'people, planet, and profits.'"[94] Maryland's B Corp legislation took effect on October 1, 2010.[95] Additionally, as of December 2011, legislatures in five other states had passed similar bills, with an additional five discussing B Corp legislation.[96]

A. *What the Maryland Statute Does*

The Maryland statute provides that the purpose of a benefit corporation is "creating a general public benefit."[97]A general public benefit is defined as "a material, positive impact on society and the

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training for employees, industry health and safety awareness, involvement in the local community, and utility usage. *See, e.g.*, *Large Manufacturer Impact Assessment*, B CORP., http://www.bcorporation.net/resources/bcorp/documents/DM%20Manufacturing %20250+1.pdf (last visited Dec. 4, 2011). Applicants must score at least 80 out of 200 points on their surveys to become eligible to license the trademark. *The B Impact Rating System*, *supra* note 84.

[88] *About Certified B Corps*, *supra* note 87.

[89] *Term Sheet for Class of 2011 B Corporations*, B CORP., http://www.bcorporation.net/resources/bcorp/documents/2011_Term_Sheet_Constituency_States_LLCs_LLPs3.pdf (last visited Dec. 4, 2011).

[90] *How Are Companies Certified and Audited as B Corporations?*, *supra* note 85.

[91] *See* Dana Brakman Reiser, *Governing and Financing Blended Enterprise*, 85 CHI.-KENT L. REV. 619, 637 (2010).

[92] Emily Chan, *Maryland's Benefit Corporation*, NONPROFIT L. BLOG (May 26, 2010), http://www.nonprofitlawblog.com/home/2010/05/marylands-benefit-corporation.html.

[93] The bill was passed by the Maryland Senate (44–0) on March 26, 2009, and the House (125–13) on April 3, 2009. *Senate Bill 690: History by Legislative and Calendar Date*, MD. GEN. ASSEMB., http://mlis.state.md.us/2010rs/billfile/sb0690.htm (last visited Dec. 4, 2011).

[94] Chan, *supra* note 92 (quoting Andrea Cohen of Vermont Businesses for Social Responsibility).

[95] *Id.*

[96] The following states have passed B Corp legislation: California (Oct. 2011); Hawaii (July 2011); Virginia (March 2011); New Jersey (Jan. 2011); and Vermont (May 2010). Colorado, Michigan, New York, North Carolina, and Pennsylvania are considering B Corp bills. *See B Corp Legislation*, B CORP., http://www.bcorporation.net/publicpolicy (last visited Dec. 4, 2011).

[97] MD. CODE ANN., CORPS. & ASS'NS § 5-6C-06 (LexisNexis Supp. 2010).

environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits."[98] A third-party standard is the standard for defining, reporting, and assessing best practices in the corporate social and environmental performance that:

> (1) Is developed by a person or entity that is independent of the benefit corporation; and
>
> (2) Is transparent because the following information about the standard is publicly available or accessible:
>
> (i) The factors considered when measuring the performance of a business;
>
> (ii) The relative weightings of those factors; and
>
> (iii) The identity of the persons who developed and control changes to the standard and the process by which those changes were made.[99]

A benefit corporation may also identify in its charter documents the creation of a specific public benefit as one of its purposes.[100] However, adopting a *specific* benefit purpose does not remove the obligation to create a *general* public benefit.[101] Hence, companies seeking to benefit a specific demographic must also benefit the public at large. A specific public benefit may include:

> (1) Providing individuals or communities with beneficial products or services;
>
> (2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
>
> (3) Preserving the environment;
>
> (4) Improving human health;
>
> (5) Promoting the arts, sciences, or advancement of knowledge;
>
> (6) Increasing the flow of capital to entities with a public benefit purpose; or
>
> (7) The accomplishment of any other particular benefit for society or the environment.[102]

The creation of a public benefit must be in the best interest of the corporation.[103] However, the term "best interest" is not about acquiescing to the profit-maximization model. The profit-maximization model equates a corporation's best interest with the financial interests of

[98] *Id.* § 5-6C-01(c).
[99] *Id.* § 5-6C-01(e).
[100] *Id.* § 5-6C-06(b)(1).
[101] *Id.* § 5-6C-06(b)(2).
[102] *Id.* § 5-6C-01(d).
[103] *Id.* § 5-6C-06(c).

shareholders.[104] Thus, any decision by a board of directors must relate to those financial interests. The language in the Maryland Benefit Corporation Act allows the board of directors of a B Corp to define best interest in both a financial and non-financial manner.[105]

Both new and existing corporations may obtain benefit corporation status under the Maryland statute.[106] For an existing entity to become a benefit corporation, it must amend the corporation's charter to include a statement that the corporation is a benefit corporation.[107] This amendment would then have to be approved by stockholders in accordance with the Maryland Corporation and Association Code governing amendments.[108] A corporation seeking B Corp status must include a statement in its articles of incorporation that states the corporation is a "benefit corporation."[109] This phrase is required to appear prominently in the following three places:

> (1) At the head of the charter document in which the election to be a benefit corporation is made;
>
> (2) At the head of each subsequent charter document of the benefit corporation; and
>
> (3) On each certificate representing outstanding stock of the benefit corporation.[110]

The board of directors may terminate a company's B Corp status at a later date if the corporation amends its articles of incorporation to delete the "benefit corporation" declaration in accordance with Title 2, Subtitle 6 of the Maryland Corporations and Associations Code.[111] By choosing to file or amend a company as a B Corp, the incorporators can ensure a safe harbor to the company's board of directors when they consider the best interests of the corporation's employees, community, and environment, even in liquidity scenarios.

The Maryland Benefit Corporation Act also provides guidance on what directors may consider in their decision-making processes. While carrying out his or her duties, a director may contemplate any pertinent

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[104] Steven J. Haymore, Note, *Public(ly Oriented) Companies: B Corporations and the Delaware Stakeholder Provision Dilemma*, 64 VAND. L. REV. 1311, 1336 n.141 (2011).

[105] CORPS. & ASS'NS § 5-6C-07.

[106] *Id.* §§ 5-6C-01, 5-6C-03.

[107] *Id.* § 5-6C-03(a).

[108] *See id.* § 5-6C-03(a)–(b). While the Maryland Benefit Corporation Act does not explicitly explain the details of stockholder approval, where no specific provision of the Act applies, the provisions of the Maryland General Corporation Law apply. *See, e.g.*, *id.* § 2-604(e) (requiring a two-thirds affirmative vote to amendments if there are stockholders).

[109] *Id.* § 5-6C-03(a).

[110] *Id.* § 5-6C-05.

[111] *Id.* § 5-6C-04. Title two, Subtitle six of the Maryland Corporations and Associations Code provides the rules for adding an amendment or restatement to the charter document. MD. CODE ANN., CORPS. & ASS'NS tit. 2, subtit. 6 (LexisNexis 2007).

factors and the interests of any group that the director deems appropriate to consider.[112] At a minimum, the Act requires directors to consider the effects of any action or decision not to act on five different constituent groups.[113] The primary focus of this consideration is on whether the director believes the action in question will impact the best interests of the following:

> (1) The stockholders of the benefit corporation;
>
> (2) The employees and workforce of the benefit corporation and the subsidiaries and suppliers of the benefit corporation;
>
> (3) The interests of customers as beneficiaries of the general or specific public benefit purposes of the benefit corporation;
>
> (4) Community and societal considerations, including those of any community in which offices or facilities of the benefit corporation or the subsidiaries or suppliers of the benefit corporation are located; and
>
> (5) The local and global environment.[114]

Additionally, in performing duties as a director, the statute details that a director "does not have any duty to a person that is a beneficiary of the public benefit purposes of the benefit corporation"[115] and "shall have the [same] immunity from liability"[116] as directors of corporations generally.[117] Hence, the Maryland statute preserves the traditional limited liability nature of a corporation and does not grant standing to beneficiaries of the corporation's public benefit purpose.

Benefit corporations are also responsible for creating an annual benefit report under the Maryland statute. This report must include a description of:

> (1) The ways in which the benefit corporation pursued a general public benefit during the year and the extent to which the general public benefit was created;
>
> (2) The ways in which the benefit corporation pursued any specific public benefit that its charter states is the purpose of the benefit corporation to create and the extent to which that specific public benefit was created; and
>
> (3) Any circumstances that have hindered the creation by the benefit corporation of the public benefit.[118]

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112 CORPS. & ASS'NS § 5-6C-07(a)(2).

113 *Id.* § 5-6C-07(a)(1).

114 *Id.*

115 *Id.* § 5-6C-07(b).

116 *Id.* § 5-6C-07(c).

117 *See* MD. CODE ANN., CTS. & JUD. PROC. § 5-417 (LexisNexis 2006).

118 CORPS. & ASS'NS § 5-6C-08(a)(1).

The report must also include "[a]n assessment of the societal and environmental performance of the benefit corporation prepared in accordance with a third-party standard applied consistently with the prior year's benefit report or accompanied by an explanation of the reasons for any inconsistent application."[119] Thus, B Corps are responsible for adopting a third-party standard to audit their business practices on an annual basis. This annual benefit report must be delivered to each stockholder within 120 days of the end of the benefit corporation's fiscal year.[120] Lastly, if the B Corp has a website (which, as a practical matter, all of them should), the corporation must post its most recent benefit report on the public portion of its website, if one exists.[121] In the case that a benefit corporation does not have a public website, the corporation must provide a copy of its most recent benefit report, "on demand and without charge" to anyone who requests a copy.[122]

B. What the Maryland Statute Does Not Do

While the Maryland statute provides entrepreneurs with a new choice of entity, many of the provisions still represent a business-as-usual model. Seeing that benefit corporations are supposed to help entrepreneurs that are concerned with issues outside of the traditional profit spectrum, it is a little surprising that so much deference is given to a business model—the "C corporation"—that primarily, if not exclusively, is concerned with profit maximization. These concerns are most apparent in the area of the board of directors' duties to shareholders.

1. Stakeholder Consideration

The Maryland statute fails to cure the issue of stakeholder neglect in corporate decision-making. The Maryland statute explains that in performing his or her duties, a director of a benefit corporation "does not have any duty to a person that is a beneficiary of the public benefit purposes of the benefit corporation."[123] Furthermore, directors of benefit corporations will share the same limited liability as directors of standard corporations.[124] While a board of directors must consider the stakeholders included in the corporation's formation articles, the board does not appear to owe these outside stakeholders a fiduciary duty.[125] As a

[119] *Id.* § 5-6C-08(a)(2).

[120] *Id.* § 5-6C-08(b).

[121] *Id.* § 5-6C-08(c)(1).

[122] *Id.* § 5-6C-08(c)(2).

[123] *Id.* § 5-6C-07(b).

[124] *See id.* § 5-6C-07(c); CTS. & JUD. PROC. § 5-417.

[125] A fiduciary can be defined as "one who owes to another the duties of good faith, trust, confidence, and candor." BLACK'S LAW DICTIONARY 702 (9th ed. 2009). Cardozo famously characterized a fiduciary relationship as "[n]ot honesty alone, but the punctilio of an honor the most sensitive." Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). Boards of directors are thought to share a fiduciary relationship with shareholders. *See, e.g.*, Lien v. Lien, 674 N.W.2d 816, 824 (S.D. 2004) ("'Directors of a

result, stakeholders will not likely have standing to initiate a derivative lawsuit against a director of a benefit corporation.[126] In fact, the Maryland statute explicitly states as much.[127]

2. *Board of Director Accountability*

Since stakeholders will not be able to hold directors liable for their decisions, the question that really mandates an answer is: are shareholders even able to hold the board of directors in a benefit corporation accountable? Unfortunately, it appears that shareholders may not be much better off than stakeholders. Under the Maryland statute, benefit corporation boards of directors do not face any additional threats of personal liability because the methods and evaluations of accountability are those that existed prior to B Corp legislation, principally defined by a board of directors' fiduciary duties and evaluated under the common law.[128]

The business judgment rule provides that "directors of the . . . corporation are clothed with [the] presumption which the law accords to them of being [compelled] in their conduct by a *bona fide* regard for the interests of the corporation whose affairs the stockholders have committed to their charge."[129] To challenge the decisions of a

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corporation occupy a fiduciary position in respect to the corporation and its shareholders, and are required to exercise the utmost good faith in all transactions touching a director's duty.'") (quoting Case v. Murdock, 488 N.W. 2d 885, 890 (S.D. 1992)); QVC Network, Inc. v. Paramount Commc'ns Inc., 635 A.2d 1245, 1266, 1272 (Del. Ch. 1993) (holding that the board of directors had breached their fiduciary duty to shareholders by failing to become fully informed during control negotiations); Lewis v. Honeywell, Inc., C.A. No. 8651, 1987 WL 14747 at *2 (Del. Ch. July 28, 1987) ("By reason of the director defendants' positions with the Company, they are in fiduciary relationships with plaintiff and [shareholders] and owe to them the highest obligations of good faith and fair dealing.").

[126] Derivative standing has historically been conferred on shareholders based on the idea that shareholders are the owners of a corporation. *See* Lawrence E. Mitchell, *The Fairness Rights of Corporate Bondholders*, 65 N.Y.U. L. REV. 1165, 1192–93 (1990); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 603–04 (1992). As outside stakeholders do not own the corporation, they lack standing. For a discussion on the fallacy that shareholders actually own property, see Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime that Recognizes Non-Shareholder Interests*, 30 COLUM. J.L. & SOC. PROBS. 587, 591–92 (1997).

[127] CORPS. & ASS'NS § 5-6C-07(b)–(c).

[128] *Id.* § 5-6C-07; CTS. & JUD. PROC. § 5-417.

[129] Gimbel v. Signal Cos., 316 A.2d 599, 608 (Del. Ch. 1974) (quoting Robinson v. Pittsburgh Oil Ref. Corp. 126 A. 46, 48 (Del. Ch. 1924). Maryland is one of many jurisdictions that follows the common law doctrine of the business judgment rule. *See, e.g.*, Shenker v. Laureate Educ., Inc., 983 A.2d 408, 424 (Md. 2009) (explaining Maryland courts have held "the business judgment rule applies to all decisions regarding the corporation's management" (citing NAACP v. Golding, 679 A.2d 554, 559 (Md. 1996)); Devereux v. Berger, 284 A.2d 605, 612 (Md. 1971) (proclaiming it is "well established that [Maryland] courts generally will not interfere with the internal management of a corporation" and the "conduct of the corporation's affairs are placed in the hands of the board of directors and if the majority of the board

corporation's board of directors, one would have "the burden of providing evidence that directors, in reaching their challenged decision, breached any one of the *triads* of their fiduciary duty—good faith, loyalty, or due care."[130] If unable to prove such a breach, the plaintiff has no remedy unless the transaction constitutes waste; that is, the "exchange . . . was so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration."[131]

The business judgment rule effectively establishes a strong presumption in favor of the board of directors of a corporation, freeing its members from personal liability for decisions that may have resulted in harm to the corporation.[132] The presumption is that "in making business decisions not involving direct self-interest or self-dealing, corporate directors act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation's best interest."[133] In brief, the rule exists to protect a corporation's board of directors from a bad decision. As such, a court "will not substitute its own notions of what is or is not sound business judgment."[134] Seeing that the business judgment rule is difficult to overcome, courts will not typically interfere with directors unless it is quite apparent that they may be guilty of a crime, such as fraud or misappropriation of corporation funds.[135]

While no cases have yet arisen in such a context due to the infancy of the Maryland statute, case law and existing statutory language make it seem doubtful that Maryland courts are likely to look more closely at the decisions of a benefit corporation's board of directors than they typically would in the case of a traditional C corporation. Hence, boards of directors of benefit corporations do not likely face an increased threat of personal liability, as there is no significant framework of accountability. So long as the board of directors believes its actions to be in the best interest of the benefit corporation, they will not be subject to personal

properly exercises its business judgment, the directors are not ordinarily liable" (quoting Parish v. Md. & Va. Milk Producers Ass'n., 242 A.2d 512, 540 (Md. 1968)); Mona v. Mona Electric Grp., Inc., 934 A.2d 450, 464 (Md. Ct. Spec. App. 2007) ("'[T]he business judgment rule [is] a presumption that corporate directors acted in accordance with' the standard of care imposed upon them.") (quoting Yost v. Early, 589 A.2d 1291, 1298 (Md. Ct. Spec. App. 1991)). *See also* MD. CODE ANN., CORPS. & ASS'NS § 2-405.1(e) (LexisNexis 2007).

130 Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993).

131 President & Fellows of Harvard Coll. v. Glancy, C.A. No. 18790, 2003 WL 21026784 at *23 (Del. Ch. Mar. 21, 2003) (quoting Glazer v. Zapata Corp., 658 A.2d 176, 183 (Del. Ch. 1993)).

132 Shlensky v. Wrigley, 237 N.E.2d 776, 778–79 (Ill. App. Ct. 1968).

133 BLACK'S LAW DICTIONARY, *supra* note 125, at 226.

134 Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

135 *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Puma v. Marriott, 283 A.2d 693, 695 (Del. Ch. 1971).

liability.[136] There is no way for Maryland courts to quantify the degree of interest that a board must give to stakeholders, as it is not prescribed in the statute. Thus, so long as the directors of a benefit corporation perform their duties in good faith, with care and loyalty, and in a manner that they believe is best for the corporation, a court is not likely to review their decisions or subject them to personal liability.

3. A Third-Party Standard

The legislative history behind the Maryland statute may provide a better understanding of how Maryland plans to answer the issues of stakeholder consideration, board of director accountability, and adoption of a third-party standard. Maryland Senate Bill 690 (House Bill 1009) sought to "authoriz[e] a [Maryland] corporation to elect to be a certain benefit corporation," provided that "every benefit corporation shall have the purpose of creating a certain general public benefit."[137] The bill defined "general public benefit" as "a material, positive impact on society and the environment . . . through activities that promote a combination of specific public benefits."[138] These activities are to be measured in accordance with a "third-party standard."[139] This language appears to suggest that Maryland benefit corporations must submit to an annual quantified examination of its social and environmental impact by a third-party organization offering certification.[140] However, the statute does not define or provide specific guidance on a third-party standard.[141]

Looking at the legislative history of SB 690, two components of possible measurement stand out and may reflect what Maryland legislators intended. First, the evaluation must be independent of the benefit corporation, in terms of source, development, and application.[142] Second, the documentation must be transparent in providing the general public with available and accessible information about the standard.[143] This evaluation would likely provide the criteria used for measuring corporate performance, the weight of various factors in the assessment and evaluation stages, and the organization that is responsible for this process. While it is unclear exactly what "third-party standard" will meet the requirements under the statute, hopefully greater clarity will arise as benefit corporation filings increase. However, the quality and credibility of the reporting procedures should largely reflect the reasons for

[136] MD. CODE ANN., CORPS. & ASS'NS § 2-405.1(a)(2), 2-405.1(c); MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07(c) (LexisNexis Supp. 2010).

[137] S. 690, 2010 Gen. Assemb., 427th Sess. (Md. 2010).

[138] *Id.*

[139] *Id.*

[140] *See supra* text accompanying notes 84–90.

[141] Md. S. 690; CORPS. & ASS'NS § 5-6C-01(e).

[142] Md. S. 690.

[143] *Id.*

requiring the report in the first place. An outside entity, such as B Lab, may provide an adequate solution.[144]

While many questions still remain, the general reason for implementing the statute and its position in the existing legal framework seem to be straightforward: to create a hybrid enterprise that gives rise to previously unenforceable legal consequences.[145] In large part, as demonstrated by the legislative history, the call for this shift in the law likely came from the general public itself, as the focus of the reporting mechanisms is on public access.[146] The fact that B Corp legislation has come to fruition in the first place reflects society's adverse attitude toward the contemporary corporate structure in the United States. Similar to early corporate law in America, B Corp legislation reflects the sentiments of the general public and its desire to use corporations for the public good.

IV. AN ANSWER OR A STOPGAP?

While the passage of the Maryland Benefit Corporation Act immediately set off waves of glowing reviews, the focus of commentators was not on the legal framework of the statute, but on the social and cultural change that this legislation represented.[147] Against this backdrop, some important legal issues appear to have been overlooked. How much does this legislation actually affect the existing corporate framework? For how long must boards of directors deliberate stakeholder interests before reaching a decision? And who is to monitor this process? Disappointingly, the answers to these questions remain elusive.

As discussed in the preceding Parts, the legal framework of the benefit corporation differs from that of the standard corporation in three main areas: (1) the consideration given to stakeholders; (2) the additional rights granted to shareholders to hold directors and officers accountable to the corporation's goal; and (3) the limitations placed on these newly granted rights.[148] Through this different legal structure, social entrepreneurs attempt to use benefit corporations to expand corporate accountability and enable investors to appreciate a return while sticking to their mission.[149] By choosing a benefit corporation, owners are essentially incorporating their values into the charter documents of the

[144] *See* discussion *supra* notes 79–90.

[145] *See supra* Part II.

[146] Md. S. 690.

[147] *See, e.g.*, John H. Richardson, *Saving Capitalism from Itself, Greener Pastures Edition*, ESQUIRE POL. BLOG (Aug. 25, 2010, 4:17 PM), http://www.esquire.com/blogs/politics/benefit-corporation-law-082510; John Tozzi, *New Legal Protections for Social Entrepreneurs*, BLOOMBERG BUSINESSWEEK (Apr. 22, 2010, 5:00 PM), http://www.businessweek.com/smallbiz/content/apr2010/sb20100421_414362.htm.

[148] *Legal Framework*, *supra* note 5.

[149] *See Why B Corps Matter*, B CORP., http://www.bcorporation.net/why (last visited December 4, 2011).

company so that the corporation can better survive new management, investors, and owners, all of whom may develop opposing views.

Overall, the Maryland legislation falls short in three critical areas. First, the Maryland statute does not cure the issue of stakeholder neglect in corporate decision-making. Second, proper mechanisms for accountability are not in place. Third, no substantial third-party auditor exists. However, to say that nothing has changed may be going a little too far. After all, many benefit corporations and their boards of directors are likely to place a tremendous amount of value in their relations with stakeholders. Yet when it comes down to it, stakeholders still have no way to legally enforce their concerns.

While Maryland's statute may not provide the perfect solution for social entrepreneurs,[150] this model can be improved upon by other states in the future. Even given the short time between the passing of the Maryland and Vermont benefit corporation statutes, it is interesting to note that large differences exist between the two acts. Vermont's statute provides a little more guidance in terms of the role shareholders play in the election process. The Vermont statute requires that shareholders be given notice of any meeting involving an amendment to a benefit corporation's articles of incorporation.[151] This notice must include a statement from the board of directors describing the reasons for proposing the amendment and the effect on the shareholders from such an election.[152] The amendments must then be approved by the higher of the vote specified in the articles of incorporation for amending or a two-thirds vote.[153] Additionally, if there is a class of shares entitled to vote as a group, approval requires an affirmative vote of at least two-thirds of the outstanding shares in this group.[154]

Vermont's statute explicitly details what types of lawsuits may be brought against a benefit corporation and how a board of directors' decision can be contested. The duties of directors and officers and the general and specific purpose of a B Corp may only be enforced in a "benefit enforcement proceeding."[155] A benefit enforcement proceeding can be brought when a director or an officer "fail[s] to pursue the general public benefit purpose of the benefit corporation or any specific public benefit purpose set forth in its articles of incorporation," or violates a duty or standard of conduct.[156] A shareholder, director, owner of at least ten-percent equity interest in which the benefit corporation is a

[150] *C.f.* Tozzi, *supra* note 147 (weighing the social benefits of B Corp legislation against the attendant difficulties in corporate governance).

[151] VT. STAT. ANN. tit. 11A, § 21.05 (2010).

[152] *Id.* § 21.05(1).

[153] *Id.* § 21.05(2).

[154] *Id.* § 21.05(2)(B).

[155] *Id.* § 21.13(a).

[156] *Id.* § 21.13(c).

subsidiary, or an individual specified in the articles of incorporation may commence or maintain such an action.[157]

The Vermont Benefit Corporation Act explains what happens in the case of a merger or acquisition. If such a merger or share exchange would result in the termination of a corporation's status as a benefit corporation, the board of directors must provide notice of the scheduled meeting to the shareholders and detail why the board is proposing that the surviving entity should no longer be a benefit corporation, as well as the effect of this cessation on the shareholders.[158] The plan must then be approved by the higher of the vote specified by the articles of incorporation or an affirmative vote by two-thirds of the outstanding shares.[159] In the case that the surviving entity will continue on as a benefit corporation, the same process must be invoked, except that the board will detail why the surviving corporation should continue on as a benefit corporation and the effect this will have on shareholders.[160] Thus, the Vermont statute may demonstrate that, as time progresses, state legislators will be better equipped to deal with the confounding issues of stakeholder consideration, board of director accountability, and a specified third-party standard.

However, seeing that the Maryland statute may not be the exact answer that social entrepreneurs sought, why was the statute even enacted? A strong possibility is that the current push for sustainability[161] has outpaced the legal groundwork necessary for social enterprises like benefit corporations to flourish. As it does in so many other facets of life and the law, social perception of corporations largely dictates the evolution of corporate legislation. A review of social perceptions of corporations may provide a better understanding of how culture can influence the law, particularly the rapid emergence of B Corp legislation.

Since corporations have many of the same legal rights as individuals, public perception of corporate versus individual wrongdoing is both theoretically and practically intriguing. In a more practical sense, potential plaintiffs need to consider public attitude in deciding whether or not to file a lawsuit. Theoretically, analyzing differences in public opinion toward corporations and individuals can demonstrate how

157 *Id.* § 21.13(b).

158 *Id.* § 21.06(a)(1).

159 *Id.* § 21.06(a)(2).

160 *Id.* § 21.06(b).

161 While there is no one, all-encompassing definition of sustainability, most at least address the interrelation of environmental, economic, and social problems, as well as the efficient use of resources. *See* OR. REV. STAT. § 184.421 (2009) (defining sustainability as "using, developing and protecting resources in a manner that enables people to meet current needs and provides that future generations can also meet future needs, from the joint perspective of environmental, economic and community objectives").

society apportions responsibility among different actors.[162] These potential plaintiffs may base this decision on their "definitions of wrongdoing, their attitudes toward corporations, and their perceived likelihood of success."[163] Since juries are supposed to reflect community sentiments when reaching a verdict, this determination is vital to anyone entertaining the idea of litigation.

Some commentators argue that social perceptions of corporations are too favorable and fail to punish offending entities appropriately.[164] Others argue the opposite, claiming that a strong public outcry toward businesses has led to public condemnation for corporate misdeeds.[165] Regardless of an individual's subjective opinion regarding the spectrum of appropriate corporate behavior, as a whole, society does not view corporations with much confidence.[166]

Corporations are under increasing pressure to behave more responsibly.[167] But the legal mechanisms necessary to enforce society's expectations for the modern corporation are underdeveloped. State legislators, then, face a difficult problem. How are they supposed to appease the general public and provide a viable option for profit-seeking entrepreneurs?

Perhaps the most obvious strategy is to enact new legislation because it provides policymakers a forum to address the desires of social entrepreneurs while simultaneously attracting public attention. Yet this approach seems considerably reactive, and as some argue, does little to predict and prevent future instances of corporate wrongdoing.[168]

As discussed in the previous paragraphs, the Maryland Benefit Corporation Act does not transform the existing legal framework into a new creature.[169] Rather, the Act attempts to build on top of a complex U.S. corporate legal framework with which so many have become

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[162] *See generally* KELLY G. SHAVER, THE ATTRIBUTION OF BLAME: CAUSALITY, RESPONSIBILITY, AND BLAMEWORTHINESS 87–101 (1985).

[163] Valerie P. Hans & M. David Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 L. & HUM. BEHAV. 151, 153 (1989).

[164] *See, e.g.*, Gilbert Geis, *Deterring Corporate Crime*, *in* CORPORATE POWER IN AMERICA 182, 182–97 (Ralph Nader & Mark J. Green eds., 1973); EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION 227–28 (1983).

[165] *See, e.g.*, Francis T. Cullen et al., *Public Support for Punishing White-Collar Crime: Blaming the Victim Revisited?*, 11 J. CRIM. JUST. 481, 482, 485–86 (1983); Albert E. McCormick, Jr., *Rule Enforcement and Moral Indignation: Some Observations on the Effects of Criminal Antitrust Convictions Upon Societal Reaction Processes*, 25 SOC. PROBS. 30, 37–38 (1977).

[166] According to a recent Gallup poll (July 2010), the public has less confidence in big business than in other institutions such as the military, the police, the U.S. Supreme Court, and small business. The only institution ranking lower in consumer confidence was Congress. *Confidence in Institutions*, GALLUP, http://www.gallup.com/poll/1597/Confidence-Institutions.aspx (last updated December 4, 2010).

[167] *See* Radin, *supra* note 12, at 363–66.

[168] *See id.* at 364.

[169] *See* discussion *supra* Part III.

disenfranchised.[170] Maryland's statute assumes that the deep-rooted issues of stakeholder neglect and director unaccountability can be mitigated without significantly changing the existing legal framework and accepted corporate norms. A similar and equally doomed philosophy is frequently debated in the realm of environmental law.[171]

Unfortunately, legislation does not always correct the problem it was enacted to solve. Tara J. Radin writes: "Society's inclination when addressing common problems—particularly those related to perceived threats—is to legislate solutions. While this provides the consolation of doing something rather than nothing, it does not always bring about optimal solutions."[172] The Maryland statute appears to be such a consolation.

Perhaps U.S. society has simply become overly infatuated with sustainability and, in the process, fallen victim to "greenwashing."[173] Under this theory, if a company projects itself as a "green" company, consumers are more likely to purchase from it.[174] B Corp legislation may provide the perfect tool for doing so. After all, for a business to impact the purchasing decisions of consumers concerned with sustainability, consumers must first "become aware of a [business's] level of social responsibility."[175] Understandably so, lack of awareness is one of the largest inhibitors of consumer responsiveness.[176]

In the end, the decisive inquiry that emerges not only from the Maryland Benefit Corporation Act, but also from future B Corp legislation, encompasses the effectiveness of the U.S. legal system in general. While this Comment has argued that the Maryland Benefit

170 *See id.*

171 *See* David R. Boyd, *Sustainability Law: Respecting the Laws of Nature*, MCGILL INT'L REV., Spring 2005, at 57, 58 ("Environmental law is 'based on the assumption that environmental problems can be managed without significant changes in existing production technologies and consumption patterns.'") (quoting Norman J. Vig & Michael E. Kraft, *Towards Sustainable Development?*, *in* ENVIRONMENTAL POLICY: NEW DIRECTIONS FOR THE TWENTY-FIRST CENTURY 391, 399 (Norman J. Vig & Michael E. Kraft eds., 5th ed. 2003)).

172 Radin, *supra* note 12, at 369.

173 Greenwashing is defined as "misleading information disseminated by an organization so as to present an environmentally responsible public image." CONCISE OXFORD ENGLISH DICTIONARY 625 (Catherine Soanes & Angus Stevenson eds., 11th ed. 2004). For a discussion of greenwashing in corporate America, see Jacob Vos, *Actions Speak Louder than Words: Greenwashing in Corporate America*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 673, 674 (2009) (explaining that greenwashing typically stems from corporations publicly taking an environmental stance on an issue "without walking the walk"). *See also* Ajay Menon & Anil Menon, *Enviropreneurial Marketing Strategy: The Emergence of Corporate Environmentalism as Market Strategy*, J. MARKETING, Jan. 1997, at 51, 52.

174 Vos, *supra* note 173, at 674.

175 Lois A. Mohr et al., *Do Consumers Expect Companies to be Socially Responsible? The Impact of Corporate Social Responsibility on Buying Behavior*, 35 J. CONSUMER AFF. 45, 47 (2001).

176 *See id.* at 48.

Corporation Act is not likely to spawn a legal revolution in stakeholder rights, it has not discounted the social and cultural impact that such legislation could have. Even if this generation of B Corp legislation stops short of full stakeholder empowerment, it may signal a social awakening that could propel future—and more substantial—legislative reforms. And for some, incorporating as a benefit corporation under the current regime may be nothing more than a thinly veiled (though ambitious) cause-related marketing campaign.[177] But if a cause-related marketing campaign can accomplish what the law could not—sustainable relationships amongst business, society, and the environment—that would not be a bad thing. And if these are the ends that B Corp legislation seeks to achieve, do the means really matter?

V. CONCLUSION

While the passage of the Maryland statute represents a legal victory for many, the cultural context in which benefit corporations emerged suggests the difficulty policymakers had in acting against cultural mandates. While exposing the shortcomings of the Maryland statute will inevitably assist future state legislators in drafting more effective B Corp legislation, these problems may be more indicative of the shortcomings of the existing American corporate legal framework as a whole, which fails to recognize the value of outside stakeholders. If corporations are to do "well" and do "good" at the same time, thus presenting social entrepreneurs with a legitimate solution, perhaps less time should be spent drafting new legislation, and more time given to overhauling a sinuous corporate structure that frustrates society's expectations. In this instance, society would be better off altering the existing legal corporate structure in the United States at the ground level, or completely working outside of it, to allow greater incorporation of stakeholder interests in corporate decision-making.

[177] *See* Michael J. Barone et al., *The Influence of Cause-Related Marketing on Consumer Choice: Does One Good Turn Deserve Another?*, 28 J. ACAD. MARKETING SCI. 248, 248 (2000).