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

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ABSTRACT

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

In explaining how the new legal form arose out of the gap created by these weaknesses, this Article stresses the role of B Lab as what strategic action field theory calls an internal governance unit. B Lab both internally regulates the field and acts as an external champion through creating and lobbying for model benefit corporation legislation. So far, benefit corporation legislation has passed in over half of the states, and around 2,000 companies have adopted benefit corporation status.

This Article explores the possibility of the successful widespread adoption of this field by considering the role that B Lab, social networks and organizations, transactional lawyers, and courts could play in responding to many major identified challenges. This Article concludes with some reflections about what this application has taught the author about the strengths and weaknesses of strategic action field theory. A focus on the social and endogenous nature of preferences, and on a mix of selfishness with a search for meaning and connection as motivating

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forces, are clearly improvements on the conceptual apparatus of the dominant corporate law paradigm, law and economics. However, it remains to be seen whether the theory's methodological and normative tools are strong and articulated enough to pose a convincing challenge to that dominant paradigm.

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INTRODUCTION

Benefit corporations are a new legal form of business association which has been rapidly adopted by over half of all states over the last few years.[1] They are meant as a vehicle for entrepreneurs and investors who want to be involved in social enterprises, that is, businesses seeking both a healthy financial return for their investors while also committing to other socially valuable goals. Social enterprises pursue what has been called a triple bottom line: people, planet, and profit.[2] This new legal and social form raises many questions. Who is attracted to this form of enterprise, and why? Who stands to gain from it? How does it both resemble and differ from other related forms of enterprise? How has it come to be so widely adopted by state legislatures over such a short period of time? What innovations in law, economic institutions, and social norms have occurred to make benefit corporations possible, and what further innovations are needed to help them grow? What are the prospects for the economic and social success of benefit corporations?

In this Article, I use this new legal, economic, and social entity, as well as the questions it raises, as a case study for applying strategic action field theory. Neil Fligstein and Doug McAdam have recently devel-

1. *See infra* note 62 and accompanying text.

2. JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS 2 (1997).

oped the concept of strategic action fields as a generalization of ideas that have appeared in a variety of different subfields of sociology, as well as other disciplines.[3] For me, as a legal scholar with a background in economics, the origins and terminology of this theory are conceptually distant and rather forbidding. However, strategic action theory holds out some real promise, particularly given its understanding of preferences and social action, which has enough common ground with my home turf of rational choice and game theory to not be completely alien. The theory is also broad and flexible enough to permit discussion of certain economic phenomena that economic theory mostly ignores.

Is this sociological theory comprehensible and useful for legal scholars trying to analyze developments in corporate law? Perhaps the best way to find out is to simply try. Thus, this Article applies strategic action field theory to analyze benefit corporations. This topic is of particular interest to me personally, as I have both already written on benefit corporations[4] and was involved in the drafting of Minnesota's benefit corporation statute.[5] It also may provide an attractive case for applying strategic action field theory. As a formal, legal type of organization, the nature of the field is relatively clearly defined, and there are other well-known related fields to which one can compare it to—namely, ordinary for-profit and nonprofit corporations. Social enterprises, by definition, focus on a mix of more instrumental, self-centered goals, as well as more other-oriented values, which also occur within the sociological theory. So, we shall see what we can learn about both strategic action fields and benefit corporations by applying the theory of the former to the story of the latter. Of course, as someone not at all trained in sociology, the exercise may merely reveal my lack of understanding, but since that lack is itself presumably quite common among corporate law scholars, perhaps my failings may themselves prove instructive.

This Article starts by briefly describing the theory of strategic action fields.[6] It then analyzes the forces that have led to the creation of benefit corporations as a new form of business association, using strategic action field theory (as I understand it) in telling the story.[7] The Arti-

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3. NEIL FLIGSTEIN & DOUGLAS MCADAM, A THEORY OF FIELDS 8 (2012) [hereinafter FLIGSTEIN & MCADAM, THEORY]; *see also* Neil Fligstein & Douglas McAdam, *Toward a General Theory of Strategic Action Fields*, 29 SOC. THEORY 1 (2011) [hereinafter Fligstein & McAdam, *General Theory*].

4. *See* Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19 (2014).

5. *See* MINN. STAT. § 304A (2015).

6. *See infra* Part I.

7. *See infra* Parts II–IV.

cle concludes with some reflections about what I have learned about the uses and the limits of the strategic action field concept through the process of going through this exercise.[8]

I. THE THEORY OF STRATEGIC ACTION FIELDS

Although I am a corporate law scholar with a background in economics, I like to think that I am relatively broad-minded for someone in that position. Thus, the idea of drawing upon sociological theory is not inherently dubious from my perspective. Indeed, there are some real attractions to that theory. The embeddedness of humans in social structures is a central part of social life and action that economics does not capture well outside of a few isolated elements. In particular, the social nature of individual preferences and norms, and the ways in which they help shape and are shaped by individual actions within society, is a crucial topic that economics does not adequately address. I have tried to use economic theory to think formally about preferences as endogenous,[9] but despite some efforts by significant economists,[10] that theory is not well adapted to such ideas. In several papers with Claire Hill, I have informally considered how Delaware judges help shape corporate governance norms.[11] In one paper, I have tried to think about deeper norms that shape, and are shaped by, the core structure of corporations and corporate law, and in particular the lack of a role for employees in governing corporations.[12] Yet, I am still very much in the hunt for a theoretical perspective that is better suited for exploring such ideas than law and economics.

I am also interested in the structural similarities between strategic action fields and some of the elements of modern economic theory. A field, as Fligstein and McAdam use the term, is similar to the idea of a game in game theory. In both, actors try to achieve a preferred outcome

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8. *See infra* pp. 287–90.

9. *See* Brett H. McDonnell, *Endogenous Preferences and Welfare Evaluations* (Minn. Legal Studies Research Paper No. 06-50, 2006), *available at* http://papers.ssrn.com/ abstract=933089.

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

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

12. *See* Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334 (2008).

while taking into account the interrelationship between their actions and those of others, with their actions grounded in underlying rules of the game that define the outcomes and payoffs from the collective choices of all actors within the field/game. Field theory adds complexity by stressing that the rules of the field itself change as a result of prior actions by the actors in the field. This element is missing from ordinary game theory, but it is very much present in the version of game theory that Masahiko Aoki developed in his theory of comparative institutional analysis.[13] Field theory, with its stress on the macro-environment and the role of the state in helping to shape fields, also resembles public choice theory in some ways, although the motivations of both state and nonstate actors are broader in field theory than in public choice.

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

The heavy emphasis on power and on the distinction between incumbents and challengers within a field is another challenging characteristic for economists. Although Fligstein and McAdam grant that some fields can be cooperative rather than hierarchical, their preferred mode by far seems to see fields as struggles, where some are on top and some are subordinate. Economics probably underestimates the role of power and struggle, but as I shall discuss further below,[15] my sense is that the sociological literature errs in the other direction.

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13. *See generally* MASAHIKO AOKI, TOWARD A COMPARATIVE INSTITUTIONAL ANALYSIS (2001). It would be very interesting to analyze in some depth the parallel between Aoki's theory and that of Fligstein and McAdam.

14. FLIGSTEIN & MCADAM, THEORY, *supra* note 3, at 215.

15. *See infra* note 93 and accompanying text.

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

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

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

An understanding of human goals and values is closely related to the notion of social skill. Fligstein and McAdam state:

> [O]ur preferences themselves are generally rooted in the central sources of meaning and identi[t]y in our lives. . . . [F]or us collec-

16. Fligstein & McAdam, *General Theory*, *supra* note 3, at 3.

17. *Id.* at 5.

18. FLIGSTEIN & MCADAM, THEORY, *supra* note 3, at 17.

> tive strategic action is rooted at least as much in Weber's stress on meaning making and Mead's focus on empathy as on the naked instrumental orientation of Marx.[19]

This is a far cry from homo economicus (though, I suspect, most economists would not be pleased at being lumped with Marx).

This leads to Fligstein and McAdam's concept of the "existential function of the social." Our human ability to step outside ourselves can be profoundly disturbing, and we look to our social interactions with others to provide us with meaning and reassurance that we matter.

> Our daily lives are typically grounded in the unshakable conviction that no one's life is more important than our own and that the world is an inherently meaningful place. But one does not will this inner view into existence of his or her own accord. It is instead a collaborative product, both of the everyday reciprocal meaning making, identity conferring efforts we engage in with those around us. In this we function as existential "coconspirators," relentlessly—if generally unconsciously—exchanging affirmations that sustain our sense of our own significance and the world's inherent meaningfulness.[20]

Throughout, Fligstein and McAdam blend instrumental goals (particularly increasing one's personal power over others) with goals defined by collective purposes and understandings.

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

The second kind of important actor at a macro-level is internal governance units. These are "organizations or associations within the field whose sole job is to ensure the routine stability and order of the strategic

19. *Id.* at 18.
20. *Id.* at 42.
21. *Id.* at 57–80.
22. *Id.* at 70.

action field."[23] These fill both an external function, by lobbying state actors on behalf of incumbents within the field, as well as an internal function, such as providing information to actors within the field, regulating to ensure conformance with field rules, and certifying field membership.[24]

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

II. PRE-EXISTING FIELDS: FOR-PROFIT AND NONPROFIT CORPORATIONS

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

Business corporations are the leading legal form of business in the United States in terms of numbers employed and sales revenue generated. Most large businesses are corporations, as are many small ones (although limited liability companies now outstrip corporations in terms of number of new businesses started every year). In every state, corporate laws legally define businesses. For our purposes, it is useful to think of corporations in terms of several key constituent groups:

- *Shareholders*, widely thought of as the owners of corporations, contribute equity capital (or have purchased those

23. *Id.* at 77.

24. *Id.* at 78.

25. *Id.* at 114–61.

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

shares from those who did, if one tracks ownership far enough back). In return they receive limited voting rights, dividends (if the corporation chooses to pay), and the ability to sell their shares and realize capital gain. Shareholders elect the directors.

- *Directors*, elected by shareholders, sit on the board of directors. The board of directors, as a collective body, has general authority, except for the very limited decisions on which the shareholders get a vote. In larger businesses, the board delegates most decision to the officers, who the board appoints and supervises.
- *Officers* are responsible for making major decisions, and for hiring and monitoring others who work for the business (corporations are hierarchical organizations).
- *Employees* fall below officers in the hierarchy and do most of the daily work of the business.

All of these groups fall within the strategic action field of a corporation. Also highly relevant to the field, but less clearly a part of the field,[27] are *customers* who buy the corporation's goods or services, and *creditors* who provide debt capital in return for interest payments (and ultimately a return of their principal).

Fligstein and McAdam distinguish hierarchical and cooperative fields. Which are corporations? As previously noted, corporations are at least in part hierarchical. A defining feature of the hierarchical nature of corporations is that employees must follow the directions of their supervisors, within the limits of their employment contracts. Thus, the directors and officers are incumbents and employees are challengers. Indeed, the informational efficiency of such hierarchy in some circumstances is a core reason for the economic success of corporations.[28]

But what of the relationship between shareholders and directors? This relationship is not clearly hierarchical, and depends in part upon the type of corporation. While shareholders have the authority to elect and remove directors, in a large public corporation with thousands of shareholders and tradable shares, their authority often has limited practical effect—boards of large corporations are mostly self-perpetuating.[29] Shareholders who also serve as employees or officers are subject to the

27. FLIGSTEIN & MCADAM, THEORY, *supra* note 3, at 167.

28. KENNETH J. ARROW, THE LIMITS OF ORGANIZATION 54–55 (1974).

29. This problem was first brought into focus in ADOLF BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

board's authority for internal corporate matters. External shareholders look to the board to return profits and have very little power to control the directors if they are unhappy with their performance. The shareholder–director relationship thus often looks more cooperative than hierarchical. The same could be said for relationships between creditors or customers and whomever they deal with at the corporation.

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

But many actors within a corporation may care about more than just financial returns. This is particularly true for individuals, at least officers and employees, whose role within a corporation is also their job; the time they spend working for the corporation encompasses a large part of their lives. Their compensation will usually be their main source of income, but their position will also be a leading source of social prestige and influence (or lack thereof). Many of their friendships may be formed within the corporation. If they are lucky, what they do in their work may be interesting and a major source of satisfaction and accomplishment. What they do in their work also can affect others—fellow employees, customers, others in society, the surrounding environment, and so on—and they may feel satisfaction and pride if they think what they do at work is helping others, and the opposite if it is hurting others.[30] All of this very much matters—not just the financial returns, though those matter too. Economists tend to miss this aspect, while Fligstein and McAdam stress it through "the existential function of the social."[31]

While corporations necessarily provide major financial and nonfinancial benefits to those who participate in them, many perceive a disturbing trend in many corporations, especially the large ones that dominate economic life. An increasing stress has been placed on financial returns at the expense of the nonfinancial aspects of corporate life, which play a major role in the employees' personal and social meaning. Employees in particular often feel disrespected, as if they are disposable cogs, as long-term tenure of employment has become less common and loyalty between corporations and employees has diminished. Officers and directors feel increasing pressure to produce high profits to keep the

30. *See* McDonnell, *supra* note 12, at 361–62 and scholarship cited therein.

31. *See supra* text accompanying note 20.

stock market satisfied, making their working life more stressful and constrained, and also limiting their ability to do what seems morally right and socially valuable if that interferes with making money.[32] This market pressure is meant to be for the good of shareholders, but some shareholders wish that the businesses in which they invested were more interested in doing some social good, not just making money.[33] Customers, most of the time, care mainly about the quality and price of the services or goods they buy. And yet, some may reconsider their spending habits when they become aware of some dubious corporate activity of a business from which they buy (child labor, extreme pollution, political corruption, and so on).[34]

Corporate law has both reflected and helped encourage an increased focus on making profits to the exclusion of other social goals. Whether or not the fiduciary duty of directors and officers allows them to consider other interests, where those conflict with profit maximization is a source of endless scholarly diversion.[35] At least in states with corporate constituency statutes, it would seem that directors and officers may consider other goals as well.[36] However, the meaning of those statutes remains legally untested, and the idea of a duty to maximize profit has, if anything, gained increasing dominance in recent decades. Especially in the leading state of incorporation, Delaware, which lacks a constituency statute, there has been an increasing tendency to use rhetoric of shareholder primacy, although the law still retains some ambiguity.[37] However, a small yet influential run of cases has moved the focus of duty towards an emphasis on return to shareholders.[38] The Chief Justice of the

32. *See* Claire A. Hill & Brett H. McDonnell, *Short and Long Term Investors (and Other Stakeholders Too): Must (and Do) Their Interests Conflict?*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF MERGERS AND ACQUISITIONS (Claire A. Hill & Steven Davidoff Solomon eds., forthcoming) (discussing corporate short-termism and its relationship with social values).

33. For an overview, see Meir Statman, Socially Responsible Investments (June 2007) (unpublished manuscript), *available at* http://papers.ssrn.com/ abstract=995271.

34. Lois A. Mohr, Deborah J. Webb & Katherine E. Harris, *Do Consumers Expect Companies to Be Socially Responsible? The Impact of Corporate Social Responsibility on Buying Behavior*, 35 J. CONSUMER AFF. 45, 64–65 (2001).

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

36. Brett H. McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1227, 1228 (2004).

37. Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1405–07 (2008).

38. *See e.g.,* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33–34 (Del. Ch. 2010).

Delaware Supreme Court has, in several recent articles, made it quite clear that this is his understanding of the law.[39]

Here, we start to see the existential failing of Delaware. The focus on shareholder value as a goal helps accentuate the sense that corporations are just about making money, ethics and the public good be damned. People need money, but they also want to lead meaningful lives and retain some sense of integrity while earning that money, if at all possible. And yet, corporate life, as defined by contemporary market and legal institutions, hardly seems noble.

Ironically, the shareholder value focus of corporate law does have a serious ethical foundation. This value serves as a way to harden the fiduciary duty of directors and officers. They are using shareholder money and are morally obliged not to use that money for their own personal benefit. Defining this fiduciary duty in terms of maximizing share price is often justified as providing a hard measure so that it is more difficult for directors and officers to justify self-serving behavior in reference to a vague corporate objective. But that is not the way that many perceive the shareholder value standard, particularly in a world where Wall Street is perceived to have become detached from any sense of personal and social responsibility.[40] The shareholder value maximization norm is also often justified as a way of maximizing overall social welfare, but it is quite unclear if that is correct.[41]

These issues play out rather differently in public versus closely held corporations. Public corporations, which are larger due to their publicly-traded shares, typically have thousands of shareholders, none of whom control the business. Most shareholders have no personal ties to the business, and institutional investors own a majority of the shares. Rather, control lies with the board, which nowadays is composed mostly of outside directors. More specifically, real control of the business lies mostly with the officers, predominately the CEO. Stock market pressure for high share prices is a major reality for officers of such corporations.[42]

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

40. Claire Hill & Richard Painter, *Berle's Vision Beyond Shareholder Interests: Why Investment Bankers Should Have (Some) Personal Responsibility*, 33 SEATTLE U. L. REV. 1173, 1178 (2010).

41. McDonnell, *supra* note 12, at 357–63.

42. Hill & McDonnell, *Short and Long Term Investors*, *supra* note 32.

As a result of the systemic forces involved in the corporate structure, employees find themselves a part of a large, often impersonal bureaucracy.

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

The other main relevant field that has influenced benefit corporations is the nonprofit corporation. These are corporations also defined by state law. Nonprofits also have directors, officers, and employees, but they do not have shareholders, because the defining difference from business corporations is that there are no shareholders with a claim to profits.[43] However, this is not to say that there are no profits. Nonprofit corporations have revenues, which in some cases come from the sale of goods and services. Employees, officers, and directors also receive wages. Beneficiaries of charitable nonprofits may receive donations from the nonprofits. Nonprofits may also have donors who contribute money but receive no financial returns from their contributions.

Some of the formal control mechanisms in nonprofit corporations remain similar to business corporations; boards appoint and supervise officers, who in turn employ and supervise employees. But the boards of nonprofits are legally self-perpetuating, with no shareholders to elect them. Their relationship with donors is more explicitly legally-cooperative than the shareholder-director relationship, since donors have no formal authority over directors at all. Still, the success of many nonprofits depends upon attracting money from donors.

There is still a mix of pecuniary and nonpecuniary motivations, but the mix is quite different from business corporations. The wages of some officers and employees at nonprofit corporations can be quite large. However, officers and employees will generally earn less than they could at a for-profit business. They are willing to work for less money because they derive more satisfactory social meanings from working for a

43. MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 158–59 (2004).

nonprofit focused on achieving specified social goods. The previous sentence is easier for a sociologist to process than for an economist.[44]

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

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

III. THE RISE OF SOCIAL ENTERPRISES AND BENEFIT CORPORATIONS

Social enterprises are located in the gap between for-profits and nonprofits. They pursue a triple bottom line of profits, people, and planets.[45] That is, they seek financial returns for investors, but financial goals are not meant to overwhelm other important social goals of the business. Social enterprises are typically dedicated to one or a few specific social goals, and have an overarching goal to help, or at least not harm, the various groups and interests affected by their business. Several new legal forms, most importantly the benefit corporation, have sprung up to attempt to address the special needs of social enterprises. To better understand those needs it is important to consider the goals of the actors and how they might approach the possibility of participating in a social enterprise. What are their hopes and fears?

Consider first an entrepreneur or small group of entrepreneurs who have an idea for an enterprise that they would like to set up and run. They will be the officers and at least some of the directors of the new business (assuming a corporate form of some type).[46] They think their

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

45. ELKINGTON, *supra* note 2.

46. An LLC is a leading alternative type of form. For simplicity and space reasons, I ignore LLCs in this paper. A standard LLC does not have officers and directors, but they may have managers who play a role much like officers. The standard form LLC does not have a board (although a board-managed LLC is one standardized option in the new Minnesota LLC statute, *see* MINN. STAT.

idea has the potential to generate significant financial returns. They want to share in those returns, and although in a nonprofit they could do so with their salaries, that does not give them as strong of a stake in the possible long-run high profits that share ownership provides. Alternatively, they could become a corporation; however, they would likely be concerned about the possible pressure to maximize profits, which could force them to take actions that would ultimately violate their social commitments. That is particularly true insofar as they anticipate bringing in a number of outside shareholder-investors over time as a way of raising money. The entrepreneurs want their business to remain committed to their social goals for the long term, and they also want to convince outside investors, employees, and customers who care about such things that their commitment is serious and not mere greenwashing (i.e., mouthing social or environmental goals with no real commitment to following them, as a way of inducing others to participate).[47] Many such businesses will indeed need early investments from outside sources of capital, and the entrepreneurs must consider how to attract such investment.

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

However, some potential investors may fall in between those two possibilities. They do want to earn some financial returns, but they also want to accomplish some social good with their money. They are attracted by the business plan of our group of entrepreneurs because they find

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ANN. § 322C.subdiv. 4 (2015), however LLCs may create a board structure through private contract. At least one state has adopted a benefit LLC statute, *see* MD. ANN. CODE §§ 4A-1201 to 4A-1303 (2015), which may be an attractive option, insofar as most social enterprises are small and closely held, and LLCs are now the leading legal associational choice for such businesses. The LLC form is more contractually open than the corporate form so that fiduciary duty rules can be more easily waived or adapted, which may make benefit LLCs less necessary than benefit corporations. However, insofar as I argue that the leading reason for becoming a benefit corporation is the potential signaling and precommitment effect that comes with adopting its fiduciary duties, similar justifications could apply to a benefit LLC legal form.

47. Jacob Vos, *Actions Speak Louder than Words: Greenwashing in Corporate America*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 673, 673–74 (2009).

its social goal(s) attractive. Such investors are more willing to wait longer to achieve financial returns, take a larger risk of no returns, or receive somewhat lower returns than purely money-motivated investors. Nonetheless, these investors will similarly be concerned about whether the business will actually work out as advertised.

In addition to the common concerns of outside investors (Are the entrepreneurs competent? Are they honest, or will they use the money to advantage themselves at the expense of the business if given a chance?), the investors may also wonder whether the social commitment of the entrepreneurs is genuine or cheap talk used to attract capital at lower cost. And even if the commitment is genuine, there can be hard decisionmaking questions when there are conflicts between competing goals (Can the outside investors trust the insiders to make the decisions they would prefer, even assuming good faith?). All sorts of hard decisions may arise over time (How can the entrepreneurs and investors enter into a relationship where the latter trust the former to make those decisions in ways that acceptably balance competing values?).

Entrepreneurs and potential investors are the two core groups of incumbents in the founding and early years of a social enterprise. Their relationship seems more cooperative than hierarchical, although the exact nature of that relationship will depend upon the control structure of the enterprise, which will arise from the interaction of the default rules of the legal form of association they choose, combined with the particularized structural rules they adopt in their organizational documents. But as noted in the previous Part,[48] they will also need to think about how other actors will react to the organizational form they choose.

Employees, the leading challengers within a corporation, will care about both their own place within the business and about the goals of that business. As to their own place, employees would often prefer to have some degree of control over decisions that affect them. Failing that, they would at least like some commitment from the business that it will take their interests into account. The corporate form is not a good fit for providing employees a role in decisionmaking, although the form can be particularized to provide a role for some or all employees.[49] Insofar as the for-profit form pushes directors and officers to focus on shareholder wealth maximization as the exclusive or leading goal, employees may distrust the decisionmaking of their superiors. Some degree of commitment to considering employees in decisionmaking may make potential employees more willing to work for a business or to work for it at a low-

48. *See supra* notes 32–34 and accompanying text.

49. McDonnell, *supra* note 12, at 334–40.

er wage level. Also, potential employees, like entrepreneurs and potential investors, may want to be involved in businesses they think are doing good in the world. Thus, while a social enterprise may attract employees for multiple reasons, employees—like outside investors—may worry about the possibility of greenwashing.

Customers may or may not be actors situated within the corporate field, but either way, entrepreneurs must care deeply about attracting them; no customers means no revenue and ultimately no business. Some customers may prefer to buy from businesses that they believe behave ethically in how they treat workers, the environment, and so on.[50] Thus, being perceived as ethical may help businesses attract more customers, who may be willing to pay higher prices. But here too there is a greenwashing concern: would-be customers may fear that a business that proclaims its ethical commitments is engaging in cheap talk. After all, customers are generally not well-placed to examine the actual practices of most businesses. For this reason, to attract customers with ethical commitments, the entrepreneurs will need to find ways to credibly commit to behaving ethically.

With all of these concerns of various groups, a space has opened up for actors to innovate and create new fields in which entrepreneurs can find ways to establish and run a business that allows them to pursue both profit and social values, and to attract credible investors, employees, and customers interested in participating in such a business. A variety of innovative new practices have been tried, including having a third-party organization certify that a particular business was behaving in specified ethical ways. In the next Part, I discuss the most important of these for our purposes: B Lab.[51] Eventually, one began to see new legal forms of business associations emerge. Perhaps the first form to emerge was the low-profit limited liability corporation, or L3C. The L3C was developed to help provide vehicles for investments in program-related investments by charitable organizations. It has been heavily criticized for not fulfilling this purpose.[52] After an initial spurt of interest, it now seems that perhaps L3Cs are giving way to another new form: the benefit corporation.

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50. *See supra* note 34 and accompanying text.

51. *See infra* notes 65–69 and accompanying text.

52. *See generally* Carter G. Bishop, *The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243 (2010); J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273 (2010); Daniel S. Kleinberger, *A Myth Deconstructed: The "Emperor's New Clothes" on the Low-Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879 (2010).

State statutes legally define benefit corporations. These statutes sit atop the basic business corporation statute. That is, benefit corporations *are* business corporations, subject to all of the rules of the business corporation statute, except insofar as the benefit corporation statute provides different or additional rules. The statutes add just a few new rules. Benefit corporations must state what they are in their certificate or articles of incorporation and certify their purpose of pursuing "general public benefit." General public benefit is very broadly defined to include, in the most influential version of the statutes, "a material positive impact on society and the environment, taken as a whole."[53] A benefit corporation may also specify in its charter a "specific public benefit" it will choose to pursue.[54] They must file regular reports (annual in most statutes) that detail what they have done to pursue general public benefit and any specific public benefit they may have chosen.[55] The directors and officers have a fiduciary duty to consider the general and (if any) specific public benefit,[56] and shareholders may sue if they believe that duty has been violated.[57] Thus, not only are benefit corporations *allowed* to pursue social goals other than profit maximization (which is questionable in Delaware and still has a hint of a question mark even in states with constituency statutes), they are *required* to do so (which is not true even in states with constituency statutes). This requirement is backed by a right to sue if a corporation ignores its social goals, and by a forced disclosure rule that allows investors and others to observe and evaluate a business' claims about how it is helping society.[58]

I focus on benefit corporations, but it is worth noting a close variant: social or flexible purpose corporations.[59] Unlike benefit corporations, social or flexible purpose corporations do not have the broad general public benefit purpose backed by a duty. Rather, a social purpose corporation must specify one or more specific goals, and it is then bound by a legal duty to pursue (or at least consider) that goal(s). Thus, social or flexible purpose corporations are not required to pursue general public benefits beyond their stated specific goal(s). Minnesota's benefit corpo-

53. MODEL BENEFIT CORP. LEGISLATION § 102 (2013) [hereinafter MODEL LEGISLATION], *reprinted in* WILLIAM H. CLARK, JR. ET AL., THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEED OF SOCIAL ENTREPRENEURS, INVESTORS, AND ULTIMATELY, THE PUBLIC app. A, at 3 (2013).

54. *Id.* § 201(b).

55. *Id.* § 401.

56. *Id.* §§ 301, 303.

57. *Id.* § 305.

58. McDonnell, *supra* note 4, at 32–35.

59. *See generally* Dana Brakman Reiser, *The Next Big Thing: Flexible Purpose Corporations*, 2 AM. U. BUS. L. REV. 55 (2012).

ration statute includes both options, with "general benefit corporations" committed to the broad general public benefit and "specific benefit corporations" committed only to a more focused, individualized goal.[60] The more specifically focused businesses avoid the extremely wide scope of the general public benefit definition, which requires a business to take into account every material effect that each decision it makes has on anyone—a somewhat daunting prospect.[61] On the other hand, outsiders cannot necessarily trust a specific benefit corporation to behave more ethically than any other business outside of its specified social goal.

IV. PASSAGE OF STATUTES AND PROSPECTS

As of March 16, 2015, thirty-three states had enacted a version of benefit corporation legislation.[62] Since Maryland became the first state to enact such legislation in April 2010,[63] this is quite a rapid adoption rate. This is particularly striking because, according to one study, as of July 2014, there were 998 benefit corporations in the United States.[64] That is not bad for a form that has been around for just half a decade, but it is not a large number. How have so many states gotten on the bandwagon so quickly given the relatively limited number of businesses taking up the form so far?

Two important elements in field theory come into play here. One is the idea of an internal governance unit (IGU).[65] As noted above,[66] IGUs act as internal regulators of a field by, among other things, certifying membership. IGUs also serve as external champions, above all, by pushing the state for helpful legal reforms. The benefit corporation has an IGU that does both: B Lab. B Lab was founded in 2006[67] by entrepreneurs who had formerly founded a basketball shoe company.[68] B Lab certifies businesses as sustainable, using a variety of metrics to measure

60. MINN. STAT. § 304A.021 subdiv. 2, 8 (2015).

61. *Id.* (based on "specific" versus "general" statutory language).

62. *Social Enterprise Hybrids Across the U.S.*, SOCENT LAW, http://socentlaw.com/wp-content/uploads/2015/03/Social-Enterprise-Hybrids-Map-Mar-16-2015.pdf (last visited Nov. 2, 2015).

63. Kate Cooney et al., *Benefit Corporation and L3C Adoption: A Survey*, STAN. SOC. INNOVATION REVIEW (Dec. 5, 2014), http://www.ssireview.org/blog/entry/benefit_corporation_and_l3c_adoption_a_survey.

64. *Id.*

65. FLIGSTEIN & MCADAM, THEORY, *supra* note 3, at 77.

66. *See supra* notes 23–24 and accompanying text.

67. *Our History*, B CORP., http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/our-history (last visited Nov. 2, 2015).

68. Ryan Honeyman, *A Look at the History of the B Corp Movement*, TRIPLE PUNDIT (Aug. 19, 2014), http://www.triplepundit.com/2014/08/fascinating-look-history-b-corp-movement.

social and environmental performance, accountability, and transparency.[69] It also provides analytic tools for companies, investors, and others who want to analyze the social performance of a business.[70] Thus, B Lab addresses a critical problem that socially conscious entrepreneurs face: how to credibly convey that they are truly pursuing social goals, not merely mouthing nice-sounding platitudes (at least, assuming one trusts the B Lab analytics and certification process—an in-depth analysis should not automatically trust this). Here, we see an explicit and formal version of the internal, certification feature of an IGU.

B Lab also drafted the Model Benefit Corporation Legislation that has become the basis for most, though not all, state statutes.[71] That takes us to the external role of an IGU, which acts as a lobbyist with the state. The record of state adoptions mentioned above suggests that B Lab has been quite successful. The Model Legislation presents legislators with a relatively short and straightforward statute ready to be adopted, which considerably simplifies the task. By making the benefit corporation an add-on to the basic business corporation, B Lab avoided having to reinvent the wheel. Corporate law is quite complex, and trying to write rules for all elements of business association law is a daunting task, likely to raise questions at many points.

But how have so many states adopted legislation so quickly, given the relatively small number of businesses that have adopted benefit corporation or B Lab certification status,[72] particularly within our current polarized political climate, where most significant legislation is extremely hard to enact? A standard public choice interest group model[73] may provide the answer, suggesting that there is at least one organization strongly pushing for benefit corporation legislation (B Lab itself), and in each state presumably a few businesses or interested would-be entrepreneurs who support the legislation. Meanwhile, there is little to no organized opposition to this type of legislation. Existing business corporations are not harmed by the added legislation—no one is forced to become a benefit corporation. Plenty of people are possibly skeptical about the value of or need for benefit corporation status, but those skeptics can simply ignore the form and predict that few businesses will adopt it.

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69. *About B Lab*, B CORP., http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps (last visited Nov. 2, 2015).

70. B-ANALYTICS, http://b-analytics.net/ (last visited Nov. 2, 2015).

71. *See* MODEL LEGISLATION, *supra* note 53.

72. B Lab's web site states that there are over 1,000 B Lab certified corporations to date. *Welcome*, B CORP., https://www.bcorporation.net (last visited Nov. 2, 2015).

73. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIAL ON STATUTORY INTERPRETATION 56–61 (2012).

The one significant source of opposition of which I am aware is some state bar associations.[74] Transactional lawyers are skeptical of benefit corporations—they do not think they are needed to allow businesses to pursue social goals—at least in states with constituency statutes. They also fear the costs of annual reporting and the risk of duty suits that could make benefit corporation status become a trap for well-meaning entrepreneurs. In my own state, Minnesota, proposed legislation was blocked for several years until the state bar decided that the bandwagon was making the legislation inevitable.

But the public choice explanation only goes so far. Yes, there may be little organized opposition (besides the bar), but the organized support is quite limited. Legislating is hard, even with little opposition, so why has it been so successful with such modest support? The availability of model legislation based on existing corporate law statutes, which reduces the costs of drafting, is a part of the answer. However, I think another answer lies with the ideology of our two parties. B Lab and other promoters of benefit corporations may have shown much social skill in finding this sweet spot that appeals to both parties.[75] Benefit corporations appeal to Democrats because many of them are skeptical of for-profit corporations, and they like social responsibility and sustainability. Benefit corporations are a way to advance those worthy goals. On the other hand, Republicans would be very unhappy about forcing social responsibility on businesses. However, remember that no business is forced to become a benefit corporation. The new form simply makes a new option available. We will then let the marketplace decide whether there is any significant demand for such businesses or not. Benefit corporations can thus be promoted as a free market solution to perceived social problems. Republicans like free markets. And thus, each party can see benefit corporation legislation as fitting quite nicely with a core ideological commitment.

So, benefit corporation legislation is spreading rapidly and one can easily foresee a day not far away where all states have adopted such legislation. As Fligstein and McAdam note, state action to legitimate and facilitate a new field is quite significant.[76] But, state action alone is not enough to guarantee the success of a new form of business (at least not state action of the enabling kind we see here—I suppose if all businesses

74. J. William Callison, *Benefit Corporations, Innovation, and Statutory Design*, 26 REGENT U. L. REV. 143, 161–63 (2013).

75. On the importance of social skill in strategic action field theory, see FLIGSTEIN & MCADAM, THEORY, *supra* note 3, at 45.

76. *See supra* text accompanying note 22.

were forced to abide by the duty rules of benefit corporations, the story would be different). Although we are observing some businesses adopting the new legal status, the numbers are still quite modest. What are the prospects for widespread creation of benefit corporations, and what source of actions and innovations by actors inside (or outside) the field might help spread the form more widely?

We have seen why benefit corporation status may be attractive to socially motivated entrepreneurs: it clearly allows them to pursue goals other than profit while still earning financial returns, and may prove a useful commitment device to attract investors, employees, and customers who want to be involved in a socially beneficial business but fear greenwashing. The reporting requirement and especially the new fiduciary duty act as precommitment devices. If a business says it is dedicated to pursing social good but fails to do so, it can be sued, providing significant incentive to not make such a claim unless one means it.[77] But there is a cost attached to this: a fear of suits even where the directors and officers are acting in good faith. The law can reduce that fear through various mechanisms that limit liability. Benefit corporation statutes do this by imposing limitations on personal liability, incorporating the business judgment rule, and limiting standing to sue (only shareholders can sue to enforce the duty).[78]

But such limitations on suits in turn have a cost. Remember, the point of the duty and threat of suits is to provide a credible commitment device. If the law imposes too many limitations on suits, the commitment may fail to be credible. Investors, employees, and customers may look to benefit corporation status as proof that a business is not merely engaged in greenwashing. But, if the space starts being occupied by businesses with little real commitment to social goals, and they face no consequences for such deception, then benefit corporation status will have failed to do its job.[79]

Note that in this analysis, our actors blend idealism with a hard-headed pursuit of their own interests. Entrepreneurs and investors each want to improve the world, but they want to make money and want to retain as much control as possible over the business as well. The new fiduciary duties have a mixed effect. On one hand, they protect directors and officers somewhat from suits claiming that they dishonestly or incompetently failed to achieve shareholder returns. On the other hand, this

77. McDonnell, *supra* note 4, at 62–64; Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 798–813 (2015).

78. McDonnell, *supra* note 4, at 59–62.

79. *Id.* at 62–64.

also exposes directors and officers to new suits claiming that they ignored their social goals. Shareholders, who are the plaintiffs in those suits, have their own power shifted accordingly. Neither entrepreneurs nor shareholders cede any authority to the challengers in this field, as neither employees nor customers gain any control rights under benefit corporation statutes. Indeed, although they now have a fiduciary duty protecting their interests, employees and customers have no rights under the statutes to sue to enforce those rights—only shareholders have standing to sue (although individual benefit corporations may choose to extend standing).[80]

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

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

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

But what can be done about the uncertainties surrounding benefit corporations that are likely deterring many otherwise interested entrepreneurs from adopting this new form? To some extent, adoption of new

80. MODEL LEGISLATION, *supra* note 53, at § 305(b).

legal forms is a path dependent process—as more adopt the form, uncertainties are gradually reduced, leading to further adoptions, and so on.[81]

But what can be done to facilitate the process in its early stages, beyond adoption of the new statutes? B Lab, in its role as an IGU, is a part of the answer. Its advocacy is helping spread awareness. Its certification and publication of analytic metrics is helping to spread fairly detailed best practices. B Lab also acts as a focal point to help create a community of persons interested in the form. This allows actors to find each other to establish new benefit corporations through sharing experiences about what works and does not work.[82]

The availability of financing is also crucial, and so the development of a network of financial professionals with interest in benefit corporations would be extremely helpful. Most basically, this kind of network would make it easier for interested entrepreneurs to find interested investors. Beyond that, such a network is another way to spread experience and best practices. A network of entrepreneurs could perform a similar function. This is happening to some extent with the Social Enterprise Alliance being a leading force.[83]

Transactional lawyers are another possible set of actors who could play a major role. Lawyers may help spread awareness of the new legal form. More deeply, they may help develop corporate governance structures and practices that respond to the practical and legal challenges facing benefit corporations.[84] Lawyers advising benefit corporations can help craft the statement of a business's specific goals (if any), create structural provisions that address decisionmaking (e.g., the creation of a public benefit director specifically focused on the social mission of a business), create checklists for items to consider in making major decisions, and create programs for shareholder outreach—which may both improve decisionmaking and ward off potential legal conflicts. Other possibilities will probably occur to experienced transactional lawyers.

Down the road, courts may also play a role. If the number of benefit corporations grows enough, we will presumably begin to see fiduciary duty suits claiming a failure to consider public benefits or securities, or consumer fraud suits claiming that benefit reports are misleading. Courts

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81. Brett H. McDonnell, Labor Managed Firms and Banks (1995) (unpublished Ph.D. dissertation, Stanford University) (on file with author).

82. *B Corp Community*, B CORP., http://www.bcorporation.net/b-corp-community (last visited Nov. 2, 2015).

83. *About*, SOC. ENTERPRISE ALLIANCE, https://www.se-alliance.org/about (last visited Nov. 2, 2015).

84. Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215, 234 (2013).

will need to walk a fine line between making liability too likely, so that the form becomes unattractive to entrepreneurs, and too unlikely, so that the form involves no credible commitment to investors and others.[85] Beyond this, legal analysis in such suits may help spread, clarify, and harden emerging norms and best practices. Even if courts do not find defendants liable, they may discuss dubious behavior and practices in a way that both shames the defendants and helps tell others what they should be doing if they want to avoid the risk of landing in court. This is a key way in which Delaware fiduciary duty works, even where it imposes little real risk of liability.[86] Litigation could ultimately perform a similar function for benefit corporations.[87]

CONCLUSION: WHAT HAVE WE LEARNED?

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

First, the concept of the existential function of the social[88] is quite natural and helpful in thinking about what motivates various actors to become involved in benefit corporations. Although economic theory allows for nonselfish motivations, selfishness sits deep within the DNA of economics. Even where economics allows for other sorts of motivations, it says little about them. My subtitle speaks of the existential failure of Delaware, but it could instead refer to the existential failure of law and economics. Businesses are a central part of the life of their officers and employees, and sometimes of their shareholders. Those persons need financial returns from their livelihood, but as human beings, they look to other forms of meaning and purpose as well in such a central part of their lives. Thus, the potential allure of social enterprise becomes much more clear and powerful in that light.

Which is not to say that the theory and analysis are all starry-eyed about the idealism underlying social enterprise; more selfish motivations play a major role as well. These include not only the pursuit of financial

85. McDonnell, *supra* note 4, at 65–70.

86. Hill & McDonnell, *Optimal Penumbra*, *supra* note 11; Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847, 848–49 (2009); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1039 (1997).

87. McDonnell, *supra* note 4, at 67–68.

88. *See supra* note 20 and accompanying text.

gain, but also the ability to control decisionmaking and influence the corporation.[89] The theory's mix of selfishness and meaning in understanding human motivations strikes me as quite attractive and plausible—a clear improvement over an economic framework.

Second, the emphasis on internal governance units and the role of the state is also helpful. B Lab clearly serves many of the functions of an IGU in strategic action field theory.[90] I am somewhat less convinced that the theory adds a lot to economic reasoning here, though. Economics has plenty to tell us about the role of certification as a way of overcoming asymmetric information, and about the importance of lobbying associations as a way of overcoming collective action problems in politics. I want to see more about what the theory can add here.

The theory's focus on the role of the state in enabling and legitimating new fields[91] clearly fits with the story of benefit corporations. Here too, I remain open-minded but not yet completely convinced about what the theory adds to already common public choice and political theories. Perhaps, though, the role of ideology in making benefit corporations attractive to politicians from both parties is an insight that would not fit as well in the theory of law and economics.[92]

One element of the theory to which I am rather more resistant is the strong emphasis on power struggles between incumbents and challengers, reflecting perhaps its partial origins in social movement theory. This may be a useful corrective to the blindness of economics to power in many ways, and within benefit corporations there is a real power dynamic. Employees have little power in ordinary business corporations, which carries over to the new form. This is perhaps most strikingly expressed in the unwillingness to extend standing to sue.[93] But in forming new social enterprises, the focus is on the relationship between an entrepreneur—or small group of entrepreneurs—and potential investors. While that relationship is not devoid of power elements, to say the least, it is also an attempt to find a cooperative arrangement for both entrepreneurs and investors to benefit from the business while simultaneously getting the participation they need from the other party.

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89. *See supra* notes 46–49 and accompanying text.

90. *See supra* notes 65–71 and accompanying text.

91. *See supra* notes 21–22 and accompanying text.

92. *See supra* note 75 and accompanying text.

93. *See supra* note 80 and accompanying text. I believe, however, that there are very good reasons to limit the standing to sue. Given the breadth and vagueness of the duty in benefit corporations, giving standing to all beneficiaries of that duty might allow just about anyone to sue any benefit corporation. That would be a mighty strong disincentive to forming such a business.

Which leads me to a main area where I would grade this exercise as incomplete. The final portion of Part IV considered various ways in which different actors may try to build institutions and practices that help benefit corporations thrive.[94] How much does and could strategic action field theory help us understand these processes? On the one hand, the focus on the creation of shared understandings and norms within a field is quite useful—at a high level of abstraction, which is what I am attempting to describe and analyze there. But the devil is in the details. *How* do actors within an emerging field help create and spread new practices that will support this new institution? How do they persuade others that this is a good thing, and worth becoming a part of? Of particular interest to me, as a law professor, is what role do transactional lawyers play in this process? What concrete, detailed conceptual tools does the theory have to offer in trying to understand this? Having read just a book and an article, I do not yet feel capable of answering that question.

This leads to the question of methodology. Fligstein and McAdam maintain a neutral and inclusive approach to various forms of empirical methodologies. They think that existing types of quantitative and qualitative methods can be usefully deployed within their framework.[95] On the one hand, this is a breath of fresh air to someone immersed in law and economics, where a highly quantitative focus on regressions has come to dominate the field. I suspect that for the kinds of questions I have discussed in this Article, qualitative methods, such as in-depth interviews with actors in the field, would be at least as useful (really, much more useful) than trying to find variables to measure so that one could run a regression.[96]

On the other hand, at least as far as the book goes, Fligstein and McAdams's very agnosticism yields little guidance as to how to do good empirical work within this theoretical approach. It is not much more than a suggestion to go forth and commit anthropology (though that is a useful suggestion). Again, further reading of more applied field theory may provide more guidance, but this is where I stand at the moment.

My third and final point concerns the normative implications of field theory. I have not dealt much with the normative question of whether we *should* be encouraging the development of benefit corporations and social enterprises. One can probably detect an approving tone in this Article. I would say that I am currently intrigued, but have a lot of questions about the attractiveness and viability of the form. Within law

94. *See supra* notes 81–87 and accompanying text.

95. FLIGSTEIN & MCADAM, THEORY, *supra* note 3, at 184.

96. And run it, and run it, until it yields the result that you expected in the first place.

and economics scholarship, there is a large amount of literature on the desirability of focusing director and officer duty solely on maximizing shareholder wealth. I have not confronted that literature here.[97] In part, that's because this is a short article, and my main goal is to understand the early stages of the emergence of benefit corporations. The normative case for and against the form is a huge topic in its own right.

Another reason why I have done little to engage the normative literature is because I am not at all sure what field theory has to say on the point. The emphasis on incumbents and challengers seems to carry a vague whiff of support for social change and disempowered groups, but I see little in the Fligstein and McAdam book that makes such a position explicit, or develops conceptual tools to help analyze what fields may be more or less socially attractive, and how we should be modifying fields to improve them. Perhaps that is because the authors do not see taking normative positions as a central part of their task. That is perfectly fine, and it aligns with the self-understanding of social scientists as scientists. But if so, I think that when it comes to legal scholarship, the lack of normative tools may put field theory at a distinct disadvantage in the competition for influence with law and economics. Though economists also stress their standing as scientists (sometimes obsessively so, and to my mind quite unconvincingly), economic theory has a strong explicit and implicit normative component. That component has, I believe, played a major role in its spread throughout legal academe.

Law is an inherently normative discipline. Law is a series of deliberate policy choices that plays a big role in shaping our society (as indeed Fligstein and McAdam emphasize). Lawyers play a major role in that process, and law professors try both to shape their students and to directly persuade policymakers. It is not clear how often we succeed, but we try. Any regular participant in law school workshops has heard this question more times than they could possibly count: "What are the practical implications for legal change?" Does strategic action field theory have new or plausible things to say about what the law should do in shaping fields? That, too, is a very major topic about which I am interested in learning more.

97. I do confront the issue in *Employee Primacy*. S*ee generally* McDonnell, *supra* note 12.