

Foreword

Berle VIII: Benefit Corporations and the *Firm Commitment* Universe

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In 2010, the state of Maryland became the first jurisdiction in the world to adopt legislation authorizing a new form of corporate governance—the benefit corporation. Six years later, the form has been adopted in thirty-two U.S. jurisdictions and one country (Italy), has been introduced into the legislatures of two additional countries, and is being considered in many others. More than 4,500 benefit corporations have been formed in the U.S. and have raised hundreds of millions of dollars. One benefit corporation has already filed an S-1 with the SEC to go public. Why has corporate governance suddenly taken this new turn, after traditional corporations dominated the legal and financial structure of capitalism for more than 100 years?

On June 27 and 28, 2016, legal scholars assembled in Seattle for the eighth annual Berle Symposium to discuss and debate this question. The Symposium was put together by Chuck O’Kelley, Director of the Adolf Berle Center. B Lab, the nonprofit organization that the three of us founded was proud to be a co-sponsor. We were all honored by Colin Mayer’s willingness to allow us to center the conference around his work on the role of commitment to stakeholders in creating a successful corporate enterprise. While views on the effects and merits of the new form were broad, the conference made it clear that many of the unspoken assumptions surrounding corporate law must be re-examined, and the creation of this new corporate form provides an excellent opportunity to do so.

During the twentieth century, economies across the globe moved toward corporate capitalism, as large corporations with disparate shareholders began to control significant amounts of private capital. In order to address this development, the legal and financial sectors

developed the idea of “shareholder primacy,” which posits that corporations and similar organizations should be operated primarily for the benefit of shareholders. Legally, this structure was intended to protect investors from mismanagement of their capital. Economically, primacy was viewed as efficient, because it focused management on creating profits, which were thought to represent economic efficiency: Milton Friedman famously said that the social responsibility of corporations was the creation of profits.

While corporate law differs from jurisdiction to jurisdiction, the law generally requires, encourages, or permits shareholder primacy. This state of the law is demonstrated by a series of papers recently drafted by experts in more than thirty countries in response to a 2015 questionnaire prepared by Professor Robert Eccles of the Harvard Business School. (But see Carol Liao’s contribution to this issue, contrasting the Canadian view.) The questionnaire was answered for the U.S. by the American Bar Association’s Task Force on Sustainable Development. That response concluded that:

The United States is a “shareholder primacy” jurisdiction, meaning that the primary focus of corporations is to return profit to shareholders. If stakeholder needs are considered, they are a secondary concern.

B Lab was created nine years ago to address the challenges created by a financial system focused only on shareholder value. We seek to create an infrastructure that will enable business to be a force for good, but believe that shareholder primacy leads to the misapplication of resources and limits the ability of corporations to raise money in mainstream capital markets while operating in a responsible and sustainable manner. For this reason, we asked Bill Clark (whose contribution to this Symposium discusses the basis for society to demand stakeholder governance) to draft legislation addressing this concern. His model was the one adopted in Maryland in 2010 and in most other jurisdictions that have authorized benefit corporations. Two other contributors to the issue (Larry Hamermesh and Rick Alexander) were involved in the drafting of another model, which has been adopted in Delaware. But all jurisdictions adopting benefit corporation legislation, whatever model they use, allow corporations to reject shareholder primacy, and to place the interests of stakeholders (including employees, the community, and the environment) on par with the interests of shareholders.

We promoted this legislation because we want all stakeholders to be able to distinguish good companies from good marketing. We have developed a certification for corporations that demonstrate a positive impact on all of

their stakeholders (Certified B Corps), but we do not want those certified entities to experience mission drift due to legal pressure to produce short term profits for shareholders. The benefit corporation is a way to resist this pressure. Indeed, where the form is available, we now require that corporations become benefit corporations. Mike Dorff's article addresses some of the more subtle issues raised by our certification, and we greatly appreciate his insights.

By rejecting shareholder primacy, the benefit corporation endeavors to create a solid foundation for long-term mission alignment and value creation. It protects mission through capital raises and leadership changes, creates more flexibility when evaluating potential sale and liquidity options, and prepares closely held businesses to lead a mission-driven life post-IPO. Most importantly, this legal form changes the purpose of business from one focused on the creation of *shareholder* value to one that creates *shared* value.

Benefit corporation statutes differ from current corporate law by (1) providing for a broad corporate purpose to create a material positive impact on society and the environment; (2) creating accountability that gives shareholders the ability to hold directors responsible for pursuing the public purpose; and (3) requiring transparent reporting of overall social and environmental performance in order to allow both shareholders and other stakeholders to know what the company is doing to achieve its purpose. This model creates better governance, mitigates risk, and allows business to create value for society and shareholders.

Benefit corporation law is a critical tool to allow private capital to be invested in a manner that creates shared and durable value for everyone. But a tool is only as good as the person who uses it. As highlighted in Rick Alexander's essay, shareholders must understand the value of firm commitment, and, more importantly, the ultimate source of wealth for universal investors, which is thriving financial markets and a healthy, peaceful, and prosperous planet. These goals can only be attained and maintained for the long term if private capital is allocated and invested in a manner that creates value for everyone. So investors must learn to use benefit corporation law as a tool to require the companies they own to create value in a responsible and sustainable manner.

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The need for this new corporate form has never been more urgent.

There is a populist movement against the establishment. Brexit, recent U.S. elections, and political developments across Europe and beyond suggest a populace that believes the system is rigged against them.

Global events, including financial crises, increasing inequality, and climate and food injustices, indicate that the fundamental dissatisfaction with the status quo stems from economic circumstance. Led by Colin Mayer's work on corporate betrayal of the stakeholders corporations should be serving, the conference addressed how this "rigging" may be as much a result of the structure of our financial system as of our political institutions. The work reflected in this symposium issue will contribute to this important discussion, and highlight the leadership opportunities and responsibilities of the business and financial communities. Their leadership can help to create a more inclusive economy that works for everyone.

We believe business needs a new operating system, a set of normative and institutional changes that allow capitalism to equal its promise. The evolution of capitalism requires an evolution in corporate law, one that allows company directors to serve all stakeholders and creates mechanisms so that investors can hold them accountable. Business, as one of the most powerful forces in society, has an historic opportunity and obligation to drive a positive culture shift to use business as a force for good. If business has had a role in leading us to our current point, then it must have a role in forging the path forward.