

# **TO B OR NOT TO B: WHY OHIO SHOULD ENACT BENEFIT CORPORATION LEGISLATION TO PROTECT SMALL BUSINESSES IN OHIO WHO WISH TO MAKE A PROFIT WHILE MAKING A DIFFERENCE**

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*“I know it sounds crazy, but every time I have made a decision that is best for the planet, I have made money. Our customers know that—and they want to be part of that environmental commitment.”<sup>1</sup>*

## **I. INTRODUCTION**

Over the past few years, there has been a vast global movement in favor of social entrepreneurship, or supporting businesses that promise some sort of social benefit. Consumers, founders and investors are more interested in companies claiming goals that rise above a focus on profits. Consumers flock to stores like Whole Foods, buy shoes like Toms and support collaborative efforts from groups like Product Red.<sup>2</sup> Consumers even went out of their way to purchase jackets from Patagonia after the company urged consumers to buy less.<sup>3</sup> According to a 2007 study conducted by investment banking firm Goldman Sachs, fifty-two percent of American consumers actively seek information about the corporate social responsibility of the businesses they plan to support.<sup>4</sup>

The trend has continued to grow since then, with even the largest initial public offering (IPO) of the year jumping on board. When Twitter went public on November 7, 2013, they could have had any individual ring

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<sup>1</sup> Liz Welch, *The Way I Work: Yvon Chouinard, Patagonia, INC.* (Mar. 12, 2013), <http://www.inc.com/magazine/201303/liz-welch/the-way-i-work-yvon-chouinard-patagonia.html> (statement of Yvon Chouinard, Founder and Owner, Patagonia).

<sup>2</sup> See RED, <http://www.red.org/en/learn/manifesto> (last visited Apr. 4, 2014); TOMS SHOES, <http://www.toms.com/our-movement/1> (last visited Apr. 4, 2014); WHOLE FOODS MARKET, <http://www.wholefoodsmarket.com/mission-values> (last visited Apr. 4, 2014).

<sup>3</sup> Kyle Stock, *Patagonia's 'Buy Less' Plea Spurs More Buying*, BLOOMBERGBUSINESSWEEK (Aug. 28, 2013), <http://www.businessweek.com/articles/2013-08-28/patagonias-buy-less-plea-spurs-more-buying>.

<sup>4</sup> GLOBAL INV. RESEARCH, GOLDMAN SACHS, INTRODUCING GS SUSTAIN 22 (2007).

the bell.<sup>5</sup> However, they chose Vivienne Harr, a young girl who helped found a socially responsible small business called Make A Stand, a lemonade distributor giving a portion of its profits to help end child slavery.<sup>6</sup> Make A Stand is also a certified B Corporation, a certification that demonstrates the company's commitment to a social goal beyond making a profit. A cynic may see this as Twitter taking advantage of this socially conscious investment "trend," looking to capitalize on the emotional appeal to consumers.<sup>7</sup> Whether cynical or optimistic, Twitter's choice is demonstrative of a growing desire, for companies of all sizes, to be associated with these socially beneficial endeavors.

While many large, traditional corporations have proposed initiatives that support social goals, this is often problematic. Because the primary motive of these institutions is to create wealth for shareholders, any decision that is beneficial to society, but not economically sound for the company, can be challenged by shareholders.<sup>8</sup> For example, altering production methods to create zero pollution output when it would not be required by current regulations would be better for society, but if it costs more than production at the mandated levels, shareholders could sue over lost profit margins.<sup>9</sup> This dichotomy famously led to serious problems for the owners of Ben & Jerry's, who were forced to forfeit much of their ideology to acquire capital which ultimately led to the sale of their business.<sup>10</sup> Accordingly, this has led to a growing need for legal protection of socially conscious entrepreneurship over the past decade or so. Because shareholders often pose a problem—more shareholders typically means more disagreement—one may assume that small businesses would be better suited to adopt social goals. However, because small businesses often need

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<sup>5</sup> Olivia Oran & Gerry Shih, *Twitter Shares Soar in Frenzied NYSE Debut*, REUTERS (Nov. 7, 2013, 6:24 PM), <http://www.reuters.com/article/2013/11/07/us-twitter-ipo-idUSBRE99N1AE20131107>; Samantha Sharf, *Seeking the Next Big Tech IPO? There's Plenty in the Pipeline*, FORBES (Dec. 12, 2013, 4:37 PM), <http://www.forbes.com/sites/samanthasharf/2013/12/12/seeking-the-next-big-tech-ipo/>.

<sup>6</sup> *Meet the 9-Year-Old Who Rang the Twitter IPO Bell*, BLOOMBERGBUSINESSWEEK (Nov. 15, 2013), <http://www.businessweek.com/videos/2013-11-15/meet-the-9-year-old-who-rang-the-twitter-ipo-bell>; see also *About Us*, MAKE A STAND, <http://makeastand.com/pages/about-us> (last visited Apr. 4, 2014).

<sup>7</sup> See generally Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-existent Problem*, 44 ST. MARY'S L.J. 617 (2013).

<sup>8</sup> See Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 839 (2008).

<sup>9</sup> See *id.*

<sup>10</sup> *Ben & Jerry's Joins the B Corp Movement!*, BEN & JERRY'S HOMEMADE ICE CREAM, <http://www.benjerry.com/company/b-corp> (last visited Apr. 4, 2014); *Ben & Jerry's*, B LAB, <http://www.bcorporation.net/community/ben-jerrys> (last visited Apr. 4, 2014).

cash from outside investors, or face sale to a larger company, the same problems arise in small businesses as those in large corporations.<sup>11</sup>

The overarching goal of this Note is to discuss the arising dichotomy between the rigid fiduciary duties of large corporations and the more flexible goals of social entrepreneurship. Further, this Note will highlight the latter's unique opportunity to take advantage of emerging legal structures for more holistic protection. Section II will discuss B Corps versus benefit corporations, their place in corporate governance law and how they have arrived at this point. Section III will demonstrate the lack of legal security provided by the current status of the laws in most states and will illuminate the consequences of this lack of legislative protection. Section IV will offer a solution in the form of state legislation, surveying laws enacted in Maryland, Delaware, California and also the Model Benefit Corporation Legislation. The section will end with a recommendation to the Ohio legislature based on the successes and failures of other states. Section V will conclude by weighing positive and negative effects the legislation may have and offer suggestions on what subsequent legislation could mean.

## II. B CORPS VS. BENEFIT CORPORATIONS AND A BRIEF HISTORY OF SOCIAL ENTREPRENEURSHIP

### A. *Brief History of the B Corp Movement*

B Lab, a nonprofit founded in 2006, had a mission to assist companies that wanted to act in the best interest of not only shareholders, but the community and world at large.<sup>12</sup> It wanted to encourage the formation of companies that made profits, while still promoting social welfare objectives.<sup>13</sup> B Lab's solution was the "B Corp" designation, a title conveyed by B Lab indicating a business's dedication to social goals aside from wealth creation.<sup>14</sup> This designation, however, did not confer any legal benefit or duty, until the first Benefit Corporation legislation was introduced in the United States in 2010.<sup>15</sup> Maryland became the first state to pass such a bill in April 23, 2010, and when the legislation went into effect July 1 of that year, eleven companies lined up outside the office to

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<sup>11</sup> It is worth noting here that the Small Business Administration (SBA) has rather large thresholds for what makes a business a "small business" in a variety of industries. Popular opinion routinely supports a term meaning a "mom-and-pop shop" that actually encompasses much larger companies. See U.S. SMALL BUS. ADMIN., TABLE OF SMALL BUSINESS SIZE STANDARDS MATCHED TO NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODES (2013).

<sup>12</sup> *The Non-profit Behind B Corps*, B LAB, <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> (last visited Apr. 4, 2014).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Our History*, B LAB, <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/our-history> (last visited Apr. 4, 2014).

register.<sup>16</sup> Since then, eighteen additional states and the District of Columbia have passed similar legislation.<sup>17</sup> B Lab has certified 935 B Corps since its founding seven years ago.<sup>18</sup> Hopefully, Ohio will soon join the states making a commitment to social entrepreneurship. One of the most recent additions to the B Corp family, Jeni's Splendid Ice Creams, founded in Columbus, Ohio, said, "We are proud to be a company that is more than just a business, we are a community."<sup>19</sup>

### B. B Corps as Non-legal Entities

While Benefit Corporations convey a legal status like that of an LLC or other corporate structure, "B Corp" status is like Leadership in Energy and Environmental Design (LEED) certification: a status conveyed by a third party to demonstrate a commitment to some beneficial enterprise.<sup>20</sup> The third party in this situation is B Lab.<sup>21</sup> "Unlike with C and S corporations, B Lab's B Corporations are not a legal distinction, and have no official tax status."<sup>22</sup> Any for-profit entity can seek B Corporation certification, as long as it can comply with B Lab's two primary certification requirements.<sup>23</sup> First, the "company must 'meet comprehensive and transparent social and environmental performance standards' set by B Lab."<sup>24</sup> "Second, it must amend its governing documents to incorporate consideration of the interests of employees, the community and the environment, among others."<sup>25</sup>

There are three main steps a corporation must take to be certified by B Lab.<sup>26</sup> First, B Lab performs a comprehensive survey of the company and its practices in four areas: governance, labor, community and environment.<sup>27</sup> The sum of these scores must total a minimum of eighty out

<sup>16</sup> See MD. CODE ANN., Corporations & Associations § 5-6C-01 (West 2013); Lorraine Mirabella, *Businesses Sign Up to Do Good While Doing Well: Businesses Register as Benefit Corporations Under First-of-its-kind Law*, BALTIMORE SUN (Oct. 4, 2010), [http://articles.baltimoresun.com/2010-10-04/business/bal-bz-legal-scene-bcorp-1004\\_1\\_benefit-corporations-maryland-businesses-brian-j-feldman](http://articles.baltimoresun.com/2010-10-04/business/bal-bz-legal-scene-bcorp-1004_1_benefit-corporations-maryland-businesses-brian-j-feldman).

<sup>17</sup> *Our History*, *supra* note 15.

<sup>18</sup> See *The Non-profit Behind B Corps*, *supra* note 12.

<sup>19</sup> *Jeni's Splendid Ice Creams Is Now a Certified B Corporation*, CSRWIRE (Jan. 27, 2014, 8:44 AM), [http://www.csrwire.com/press\\_releases/36637-Jeni-s-Splendid-Ice-Creams-Is-Now-a-Certified-B-Corporation](http://www.csrwire.com/press_releases/36637-Jeni-s-Splendid-Ice-Creams-Is-Now-a-Certified-B-Corporation).

<sup>20</sup> Steven J. Haymore, *Publicly Oriented Companies: B Corporations and the Delaware Stakeholder Provision Dilemma*, 64 VAND. L. REV. 1311, 1313 (2011); LEED, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/leed/why-leed> (last visited Apr., 2014).

<sup>21</sup> *The Non-profit Behind B Corps*, *supra* note 12.

<sup>22</sup> Haymore, *supra* note 20, at 1314.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *How to Become a B Corp*, B LAB, <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp> (last visited Apr. 4, 2014).

of 200.<sup>28</sup> Second, if the company passes this step, it must amend its articles of incorporation to comply with the standards set by B Lab.<sup>29</sup> Third, the company signs a term sheet, signifying the newly designated B Corp agrees to continuously prove its dedication to shareholders and stakeholders, as well as pay a certification fee to B Lab.<sup>30</sup>

### C. *Benefit Corporations: An Enforceable Alternative to B Corps*

Unlike B Corps, which are designated by the independent third party B Lab, Benefit Corporations are legally-registered entities by the state of their incorporation. In July of 2013, Delaware enacted legislation recognizing the need for socially beneficial corporate governance.<sup>31</sup> Delaware refers to these entities as “public benefit corporations” (PBCs or PBC).<sup>32</sup> Per the legislation, PBCs are formed in the same manner as any other corporation formed under the Delaware General Corporation Law.<sup>33</sup> Passed July 17, 2013, effective August 1, 2013, section 362 defines PBCs and outlines some requirements.<sup>34</sup> A PBC must be a “for-profit corporation . . . that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner.”<sup>35</sup> The Code subsequently defines the term “[p]ublic benefit” to mean “a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders).”<sup>36</sup> However, in order to be a PBC, the corporation’s certificate of incorporation must identify one or more specific public benefits and must have a name that clearly identifies its status as a PBC.<sup>37</sup> A non-exhaustive list of potential public benefits includes those that are of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technical nature.<sup>38</sup> This list is broad enough to allow many goals deemed worthwhile by society to be protected.

Additionally, in Delaware as well as other states, the corporation formed adopts a different suffix from its traditional counterpart. “The name of the public benefit corporation shall, without exception, contain the words ‘public benefit corporation,’ or the abbreviation ‘P.B.C.,’ or the designation

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; Haymore, *supra* note 20.

<sup>31</sup> *Governor Markell Signs Public Benefit Corporation Legislation*, STATE OF DELAWARE (July 17, 2013), <http://news.delaware.gov/2013/07/17/governor-markell-signs-public-benefit-corporation-legislation/>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> DEL. CODE ANN. tit. 8, § 362 (West 2013).

<sup>35</sup> *Id.* § 362(a) (alteration in original).

<sup>36</sup> *Id.* § 362(b).

<sup>37</sup> *Id.* § 362(c).

<sup>38</sup> *Cf.* MD. CODE ANN., Corporations & Associations § 5-6C-01(d) (West 2013).

‘PBC.’<sup>39</sup> This is to inform all potential investors, shareholders and the public that the corporation with which they are transacting has a differing set of corporate duties than that of a traditional corporation.<sup>40</sup> This is also laid out in the Code, which states: “[A] public benefit corporation shall be managed in a manner that balances the stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct, and the public benefit or public benefits identified in its certificate of incorporation.”<sup>41</sup>

### III. THE CONSEQUENCES TO SOCIAL ENTREPRENEURS CAUSED BY A LACK OF LEGAL PROTECTION

B Corps, as previously described, carry no significant legal rights to shareholder and stakeholder recourse for violation of the company’s pledge to be socially beneficial.<sup>42</sup> Instead, as general corporations, they have a duty to shareholders only in regards to creating long-term economic wealth, unless acting on behalf of a social prerogative “bears some reasonable relation to general shareholder interests.”<sup>43</sup> While it is worth noting that thirty-one of fifty states do have constituency statutes, which allow corporations to take into account the effects of their business on various stakeholders, these do not erase shareholder primacy, the notion that the primary motive of the corporation must be to generate wealth for shareholders.<sup>44</sup> A mere mitigation of shareholder primacy does not create an ideal situation for a social entrepreneur to work toward a socially beneficial goal.<sup>45</sup>

The fear that socially responsible entrepreneurship will be lost as small companies are acquired by larger ones is not based on theory or irrational thought, but history. Ben & Jerry’s, a famous producer of ice cream, well known for its fun flavors and anti-corporate traditions, suffered some growing pains when it was purchased by a conglomerate roughly a decade ago.<sup>46</sup> Before the transaction, Ben & Jerry’s was involved in many socially conscious endeavors: the company gave 7.5% of profits to charity,

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<sup>39</sup> DEL. CODE ANN. tit. 8, § 362(c).

<sup>40</sup> *See id.*

<sup>41</sup> *Id.* § 362(a).

<sup>42</sup> *See generally* Haymore, *supra* note 20.

<sup>43</sup> *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1282 n.29 (Del. 1989); *see also* *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919); *see* CHARLES R.T. O’KELLEY & ROBERT B. THOMPSON, *CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS* 271–77 (Vicki Been et al. eds., 6th ed. 2010).

<sup>44</sup> Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NORTHWESTERN J.L. & SOC. POL’Y 170, 176–77, 181 (2012).

<sup>45</sup> *Id.* at 181.

<sup>46</sup> Paula Caligiuri, *When Unilever Bought Ben & Jerry’s: A Story of CEO Adaptability*, FASTCOMPANY (Aug. 14, 2012, 6:58 AM), <http://www.fastcompany.com/3000398/when-unilever-bought-ben-jerrys-story-ceo-adaptability>.

had in-store voter registration and purchased from suppliers who employed disadvantaged workers.<sup>47</sup> When Unilever purchased Ben & Jerry's in 2000, the new parent company made a nod to the sustainable and socially responsible values cherished at Ben & Jerry's.<sup>48</sup> The incoming CEO dressed casually, volunteered at various events and reassured employees that Unilever would not dissolve its small-town feel.<sup>49</sup> However, this dynamic changed when Unilever closed plants, laid off employees and curtailed donations to various charitable organizations in order to increase revenue streams from Ben & Jerry's to the parent company.<sup>50</sup> This transaction serves as a cautionary tale to other small firms like Ben & Jerry's who worry about losing the ability to make decisions based on social factors, despite the wishes of their social-entrepreneur founders. Because so many looked to Ben & Jerry's as a beacon of socially conscious commerce, a new way to approach the problem of sale faced by the founders is essential to the future of social entrepreneurship.<sup>51</sup>

A similar fate befell Craigslist, a community-based classifieds listing service. However, this time the Delaware Court of Chancery became involved in the transfer of ownership. Craig Newmark, founder of Craigslist, transferred twenty-five percent of the equity of his company to an employee to proactively create checks and balances within the organization.<sup>52</sup> This was Newmark's way of preventing himself from making a decision that could potentially be detrimental to the goals he had for Craigslist.<sup>53</sup> However, despite the noble intentions of the transfer, the employee, Philip Knowlton, decided to sell his twenty-five percent stake in Craigslist to eBay, Inc. At the time of the transaction (2004), eBay agreed to keep Craigslist as it was.<sup>54</sup> Yet, over the next four years, eBay became privy to insider information explaining how Craigslist operated.<sup>55</sup> Subsequently, eBay launched its own classified-style site in direct competition with Craigslist, called Kijiji.<sup>56</sup> Tensions continued to increase as eBay sought to increase the profitability of its share of Craigslist, eventually leading to a lawsuit by eBay in response to various anti-takeover measures used by Craigslist.<sup>57</sup> The Delaware Court of Chancery evaluated this claim based on the two-pronged *Unocal* test.<sup>58</sup> The *Unocal* test

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<sup>47</sup> Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 211 (2010).

<sup>48</sup> *Id.* at 227–28.

<sup>49</sup> Caligiuri, *supra* note 46.

<sup>50</sup> *Id.* at 243.

<sup>51</sup> *Id.* at 213.

<sup>52</sup> David A. Wishnick, Comment, *Corporate Purposes in a Free Enterprise System: A Comment on eBay v. Newmark*, 121 YALE L.J. 2405, 2406 (2012).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 2407.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

examines whether an anti-takeover measure is in response to a reasonably perceived threat and whether that response is proportional to that threat.<sup>59</sup> At trial, eBay won, because the threat that the social mission of Craigslist would be replaced by eBay's more traditional profit-maximization model did not, in the Court's opinion, meet the reasonable threat prong of the *Unocal* test.<sup>60</sup> Because the community-based model that Craigslist cherished was not institutionalized in its articles of incorporation, eBay's takeover meant the demise of Craigslist as Newmark envisioned it.<sup>61</sup> Once again, this served as a cautionary tale to other entrepreneurs who hoped to keep a socially beneficial enterprise in place by injecting capital from a sale of stock.<sup>62</sup>

General corporate law, especially in Delaware, has evolved to give all parties in a corporate structure confidence as to what rights and obligations they possess.<sup>63</sup> These laws, however, have changed in time as investors seek to participate in different ways and for different reasons.<sup>64</sup> When states began offering corporate charters, they had limited terms and specific charters; as time went on and the corporate form evolved, these charters became easier to obtain as well as essentially infinite in duration.<sup>65</sup> There has been an evolution within corporations as well, which can be exemplified by examining proxy contests. These show what shareholders seek to achieve with corporate resources, that is, their capital investment. Proxy contests now regularly involve social issues, ranging from environmental sustainability to increasing labor pay.<sup>66</sup> According to Proxy Monitor, an organization that studies trends and dates regarding proxy contests, the number of shareholder proposals related to social policies is on the rise.<sup>67</sup>

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<sup>59</sup> *Id.* at 954–55.

<sup>60</sup> *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 35–36 (Del. Ch. 2010).

<sup>61</sup> Wishnick, *supra* note 52, at 2407–08.

<sup>62</sup> *See generally id.*

<sup>63</sup> *See generally* Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767 (2005).

<sup>64</sup> *See generally id.*

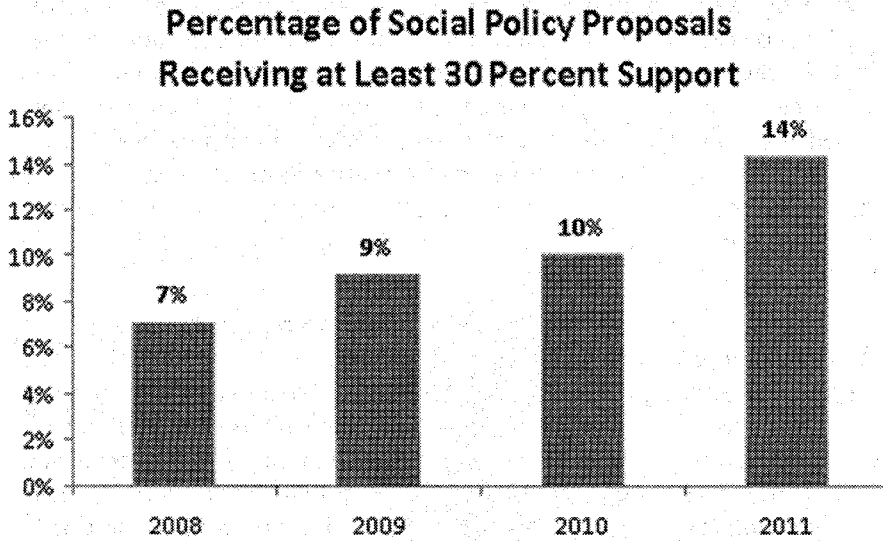
<sup>65</sup> *Id.* at 783–85.

<sup>66</sup> *2011 Proxy Season Review: Database Reveals Decline in Successful Shareholder Proposals*, PROXY MONITOR [hereinafter *2011 Proxy Season Review*], <http://www.proxymonitor.org/forms/Finding7.aspx> (last visited Apr. 4, 2014).

<sup>67</sup> *Id.*

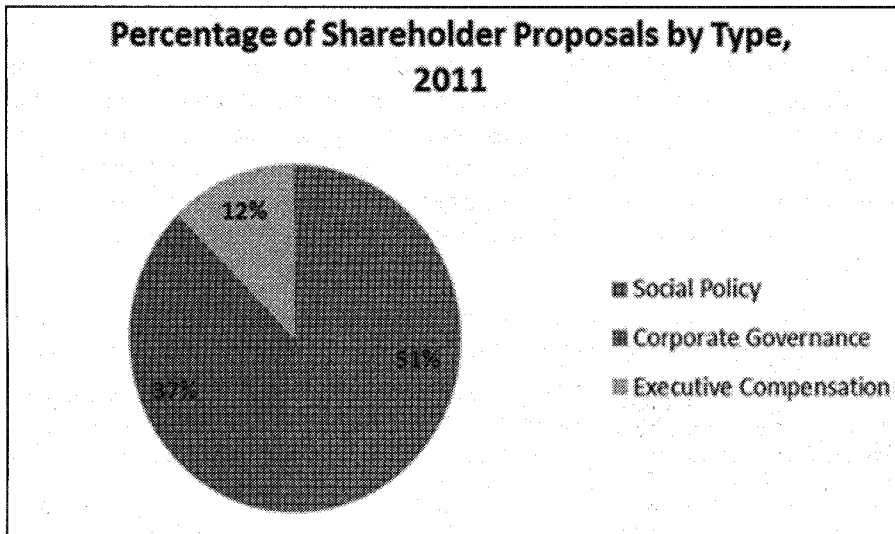


Chart 1<sup>68</sup>



The above chart clearly shows that support for socially driven proxy contests is on the rise, with support percentages doubling in just three years.<sup>69</sup>

Chart 2<sup>70</sup>



<sup>68</sup> *Id.*

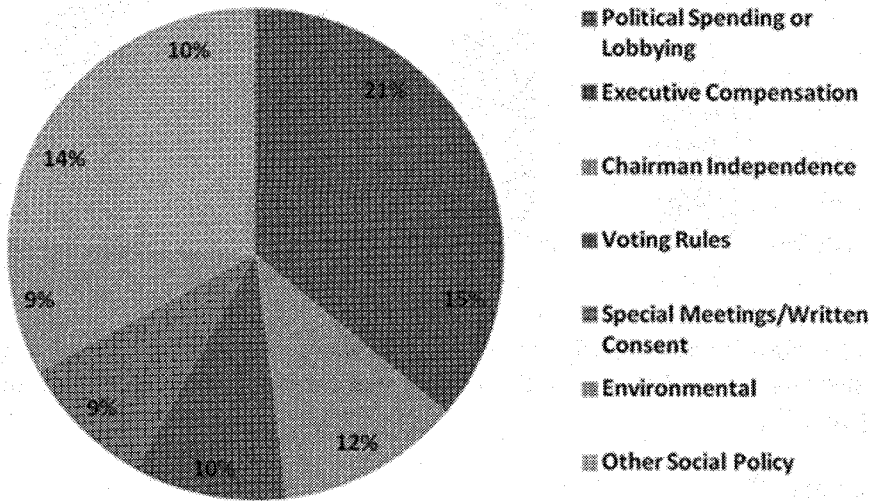
<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

The above chart shows that more than fifty percent of the proxy proposals now involve social matters, which is a change from the majority being governance and compensation matters.<sup>71</sup>

Chart 3<sup>72</sup>

Percentage of Shareholder Proposals Introduced in  
2012 by Type, Fortune 200



This last chart shows that even when lobbying and political concerns are removed from the category of “social,” there still is a significant presence of other social issues being raised and supported by shareholders in large corporations, comprising almost one-fourth of all proxy contests in 2012.<sup>73</sup> These charts offer rather apparent proof that investors of all sorts, even in the largest corporations, are looking to use their capital to improve various social programs and general public wellbeing.

As more and more investors become interested in placing their capital within socially responsible enterprises, they will seek legal protection of that capital. “[S]ocially responsible investors” (SRIs or SRI) are a large force in the market now.<sup>74</sup> While a third-party certification by B Lab may increase the likelihood that the enterprise will receive public

<sup>71</sup> *Id.*

<sup>72</sup> James R. Copland, *Shareholder Activism Focused on Political Spending and Lobbying*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 10, 2012, 3:52 PM), <http://blogs.law.harvard.edu/corpgov/2012/06/10/shareholder-activism-focused-on-political-spending-and-lobbying/>.

<sup>73</sup> *Id.*

<sup>74</sup> Haymore, *supra* note 20, at 1314.

attention and financial support from an SRI, taking it to the next level as a legally recognized Benefit Corporation will provide even more security.<sup>75</sup> Investors, as rational thinkers, want to know how their money will be treated in the case of any dispute.<sup>76</sup> Clear rules are not only helpful to the investors, but to directors as well, who need to know exactly what they can and cannot do with corporate resources.<sup>77</sup> “Becoming a B Corporation may also help corporate directors reconcile their duties to shareholders with their desires to help non-shareholder constituencies, such as employees and the greater community.”<sup>78</sup>

Considering how important this protection of social enterprise is to investors in Fortune 200 companies, one can easily see how social entrepreneurs in startups and small businesses may feel.<sup>79</sup> These are individuals who are attempting to make a living by creating a socially beneficial enterprise, not simply push for a company in which they invest to make more beneficial decisions. Raising capital for a social entrepreneur is much more complicated, as he or she cannot—without Benefit Corporation legislation—ensure that the mission of the company will remain after the addition of new investors or sale of the company.<sup>80</sup> For the social entrepreneur, selling one’s company should not necessarily mean selling out; there should be protections in place to preserve the original purposes of the enterprise. This is the dichotomy that legislation in Ohio needs to address.

#### IV. BY ENACTING STATUTES PROTECTING THE LEGAL STATUS OF BENEFIT CORPORATIONS, STATES ENSURE THE SURVIVAL OF SOCIALLY BENEFICIAL COMPANIES

Founders and entrepreneurs seek stability for their enterprises—stability that can be offered by Benefit Corporation legislation. Yvon Chouinard, founder and owner of Patagonia, said: “Benefit Corporation legislation creates the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises, and even changes in ownership, by institutionalizing the values, culture, processes, and high standards put in place by founding entrepreneurs.”<sup>81</sup> As Chouinard stated, the *institutionalization* of the values and culture is important because it ensures the continuation of the business as imagined

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<sup>75</sup> *Id.*

<sup>76</sup> See O’KELLEY & THOMPSON, *supra* note 43, at 271–78, 472–77.

<sup>77</sup> Haymore, *supra* note 20, at 1314.

<sup>78</sup> *Id.*

<sup>79</sup> 2011 Proxy Season Review, *supra* note 66; Copland, *supra* note 72.

<sup>80</sup> See Wishnick, *supra* note 52, at 2418 n.67 (citation omitted).

<sup>81</sup> Sue Anne Reed, *Patagonia Registers as First California Benefit Corporation*, CARE2 (Jan. 3, 2012, 10:31 AM), <http://www.care2.com/care2blog/patagonia-registers-as-first-california-benefit-corporation.html#ixzz211aUTx31> (internal quotations omitted).

by the founder.<sup>82</sup> The endless life of a corporation makes it an entity requiring structure in order to survive.<sup>83</sup> Short-term planning can only go so far as the company changes, grows and is sold or bought. Socially conscious entrepreneurs must find a way to secure the future of the business they have created in order to run their businesses without constant fear of a loss of control.

Because setting in stone the values held by a corporation is crucial to an organization facing a sale or similar transaction, Benefit Corporation status is much more useful and practical to smaller, closely held corporations.<sup>84</sup> The continuity of an organization's social goal is likely much more important to the founder and first investors in a small socially conscious startup, as opposed to shareholders in a large public corporation who buy and sell based more on share prices.<sup>85</sup> Additionally, smaller firms are better equipped to adapt to this more unusual and flexible method of doing business.<sup>86</sup> However, small firms still need legal protection for their corporate governance, especially when that governance structure deviates from the norms established over time in traditional corporate law.<sup>87</sup> Ohio should follow the example set by Maryland and pass legislation protecting the dual duties of Benefit Corporations. Allowing corporations, especially smaller firms, the freedom to pursue goals other than the bottom line has long-term value for the companies and their respective communities.

#### A. *How Benefit Corporation Legislation Actually Operates*

In those states that have statutorily authorized Benefit Corporations, new companies can become Benefit Corporations by designating a special purpose in their incorporation documents.<sup>88</sup> Existing companies may also elect to become Benefit Corporations; however, this transition requires the approval of ninety percent of shareholders, making it quite difficult.<sup>89</sup> Because the designation is part of the articles of incorporation, the social goal of the corporation is much more protected from new investors or any entity seeking a takeover.<sup>90</sup> If this law works as planned, it would allow smaller businesses to sell all or part of their company without fear that their original vision will be immediately washed

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<sup>82</sup> *Id.*

<sup>83</sup> See generally Avi-Yonah, *supra* note 63.

<sup>84</sup> Daniel Fisher, *Delaware 'Public Benefit Corporation' Lets Directors Serve Three Masters Instead of One*, FORBES (July 16, 2013, 2:06 PM), <http://www.forbes.com/sites/danielfisher/2013/07/16/delaware-public-benefit-corporation-lets-directors-serve-three-masters-instead-of-one/>.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*; DEL. CODE ANN. tit. 8, § 362 (West 2013).

<sup>89</sup> Fisher, *supra* note 84.

<sup>90</sup> *Id.*

away and replaced with a more profitable but less socially conscious objective, as tragically befell Ben & Jerry's.<sup>91</sup>

The most significant objective of Benefit Corporation legislation is to allow corporations to deviate from the shareholder wealth maximization norms. Set forth in various cases, these norms repeatedly assert the need for shareholder primacy.<sup>92</sup> Opponents of B Corps may point to the holding in *eBay Domestic Holdings, Inc. v. Newmark* to show that Chancellor Chandler believes a social commitment to be too "amorphous" to have a visible, quantifiable method of protection.<sup>93</sup> However, as proponents of the Benefit Corporation point out, "Craigslis's commitment to stakeholder interests was 'amorphous,' whereas B Corporation certification is strong evidence that a company's commitment to stakeholders is a clearly defined part of the corporation's long-term strategy."<sup>94</sup> *Dodge v. Ford Motor Co.* requires that those companies that able to pay dividends are not entitled to withhold simply for arbitrary reasons.<sup>95</sup> With legal protection of the corporation's goals other than profits, the board of directors could withhold dividend payments when doing so was a means to the end outlined in the Benefit Corporation's incorporation documents.

There is also the landmark case *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, which changed the way directors must look at selling their company, particularly in a hostile takeover.<sup>96</sup> The holding in *Revlon* requires that once a company is for sale, the directors must make obtaining the highest sale price on behalf of the shareholders their primary goal without considering the effects on third-party stakeholders.<sup>97</sup> "[W]hile concern for various corporate constituencies is proper when addressing a takeover threat, that principle is limited by the requirement that there be some rationally related benefit accruing to the stockholders."<sup>98</sup> This again is critical to small businesses, that may for financial reasons need to take on additional investors or sell part of their company to a larger firm. With

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<sup>91</sup> *Ben & Jerry's Joins the B Corp Movement!*, *supra* note 10; Caligiuri, *supra* note 46; Page & Katz, *supra* note 47.

<sup>92</sup> *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010). J. Haskell Murray, *Defending Patagonia: Mergers & Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 489 (2013).

<sup>93</sup> *Newmark*, 16 A.3d at 32; Haymore, *supra* note 20, at 1332 n.123.

<sup>94</sup> Haymore, *supra* note 20, at 1332 n.123.

<sup>95</sup> *See generally* 170 N.W. 668 (Mich. 1919) (Here, the Michigan Supreme Court held that Henry Ford, as director, was arbitrarily squeezing out minority shareholders he suspected of creating a competing business. By ruling that the purpose of a corporation is to create wealth for shareholders, the Court was able to force Ford to pay a dividend, regardless of how the recipient shareholders would use it. However, the Court did say that Ford was to be given the discretion to decide when to expand and what price to charge for products.).

<sup>96</sup> *See generally* 506 A.2d 175.

<sup>97</sup> *Id.* at 184.

<sup>98</sup> *Id.* at 176; *see also* *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

*Revlon* duty in place, the socially conscious entrepreneur cannot consider whether his or her goals will be maintained by a potential buyer, but rather what buyer will yield the most wealth for his shareholders.<sup>99</sup> Thus, the primary mission of a socially conscious enterprise may have to be sacrificed in the name of capital.

Similarly, it is unknown what the effect of Benefit Corporation legislation would be on board discretion as outlined by the Delaware Court in *Unocal Corp. v. Mesa Petroleum Co.* The broader discretion granted to defend against takeovers in order to protect its stakeholders could remain, but a Delaware Court would likely need to decide a case under the circumstances before anyone can know for sure.<sup>100</sup> *Unocal* requires heightened review of the decisions made by the board members rather than simply deferring via the business judgment rule. Now that Delaware General Corporate Law section 362 is in effect, could shareholders sue if the board acted to prevent a takeover that could potentially increase share price but would injure the social benefit outlined in the formation documents of the corporation?<sup>101</sup>

It is crucial to remember, however, that much of corporate law, especially in Delaware, has been created through the Court of Chancery's interpretation of the Delaware General Corporate Law. Thus, any ambiguity resulting from new legislation would ultimately end up in that court, which could truly decide either way.<sup>102</sup> Such a court case will essentially result in one of two opposing outcomes.<sup>103</sup> The first is that Benefit Corporation status in the incorporation documents will be protected by the law, creating a common law duty of officers to act both for the financial constituents and the Benefit constituents.<sup>104</sup> The alternative is that the Court will find that the fiduciary duties of the directors to shareholders trump the social responsibility in certain circumstances.<sup>105</sup> The latter would obviously be extremely detrimental to Benefit Corporation status, hence the push for legislation addressing this concern in many states.<sup>106</sup> In Delaware, corporations have to disclose how they have acted in the interest of their designated benefit constituents at least every other year with a report to shareholders and some states have more strict rules.<sup>107</sup>

"Either way, the real point is to give directors the obligation—or freedom, if you like—to pursue what Clark [the drafter of the Model Benefit Corporation Legislation] calls 'the triple bottom line: Profits, people and

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<sup>99</sup> *Revlon*, 506 A.2d at 184.

<sup>100</sup> *Unocal*, 493 A.2d; Haymore, *supra* note 20, at 1329.

<sup>101</sup> Haymore, *supra* note 20, at 1330.

<sup>102</sup> *Id.* at 1323.

<sup>103</sup> *See id.*

<sup>104</sup> *Id.* at 1323–30.

<sup>105</sup> *See id.*

<sup>106</sup> *Id.*

<sup>107</sup> DEL. CODE ANN. tit. 8, § 362 (West 2013); Fisher, *supra* note 84.

the planet.”<sup>108</sup> This means that “directors can’t be sued for pursuing objectives that advance ‘artistic, charitable, cultural . . . scientific or technological’ goals.”<sup>109</sup> Legislative attempts to broaden corporate fiduciary duties are not a novel concept: thirty-one of the fifty states already have constituency statutes, which allow or require constituents to be considered in various types of corporate decisions.<sup>110</sup> The fact that non-shareholder constituents can be considered in decision-making implies that lawmakers want corporate directors to see the bigger picture when stakeholders are affected.<sup>111</sup> This would imply a legislature’s predisposition to the idea behind Benefit Corporations, even if the idea of changing the status quo of corporate law were more daunting.

Logistically, conversion of a smaller, closely held corporation will be less involved.<sup>112</sup> Regardless of whether it is a C or S corporation, the process is similar.<sup>113</sup> The issues will arise much more in larger corporations. For public corporations in particular, this will be complicated, as ninety percent of shareholders have to agree.<sup>114</sup> For this reason, Benefit Corporation legislation again is a tool much more useful to small businesses.<sup>115</sup> These smaller organizations are much more adaptable to change in general, but fewer shareholders will mean fewer obstacles to the consent required for conversion.<sup>116</sup> States, as the gatekeepers of corporate law, will be able to create their own procedure for conversion; however, in any state, it seems likely that small companies, especially those still run by their founding social entrepreneur, will have a much easier time transitioning to a Benefit Corporation.<sup>117</sup>

## B. *Potential Benefits*

Value is clearly created by corporate benevolence, as seen with consumer appreciation for programs that may reduce profit margins but provide some social utility.<sup>118</sup> A prime example is Starbucks, which engages in a variety of business practices with a social benefit at the cost of

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<sup>108</sup> Fisher, *supra* note 84.

<sup>109</sup> *Id.*

<sup>110</sup> MODEL BUS. CORP. ACT ANN. § 8 (2007); Christopher Lacovara, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 2011 COLUM. BUS. L. REV. 815, 838 (2011).

<sup>111</sup> Lacovara, *supra* note 110.

<sup>112</sup> Fisher, *supra* note 84.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See Haymore, *supra* note 20, at 1340–41 (discussing the various interests of C corporation shareholders and the difficulties that directors face in meeting all shareholders’ desires).

<sup>116</sup> *Id.*

<sup>117</sup> Fisher, *supra* note 84.

<sup>118</sup> See GLOBAL INV. RESEARCH, *supra* note 4.

a smaller profit margin.<sup>119</sup> These include selling fair trade coffee beans and using recycled paper products, both of which surely cost the company more than it would otherwise pay.<sup>120</sup> Thus, some corporate benefit must be received by using these socially conscious products. The Starbucks website contains a list of ways the company seeks to promote values beyond profit maximization, including: Community, Ethical Sourcing, Environment and a Global Responsibility Report (Report).<sup>121</sup> This last component, the Report, has been published by Starbucks since 2001 as a way to show investors and customers how the company sets and measures its non-pecuniary goals.<sup>122</sup> Benefit Corporation legislation would allow Starbucks to legally preserve these goals rather than having them as secondary to the pursuit of profits.<sup>123</sup> Currently, these goals could be removed should they interfere too much with the bottom line of the company.<sup>124</sup> It is also important to note that Benefit Corporation legislation would not require companies to alter their status, but would allow them, if they so choose, to become Benefit Corporations and thereby protect differing corporate goals.<sup>125</sup>

SRI, like those targeted by Starbucks' Corporate Responsibility Initiative, are a large force in the market now.<sup>126</sup> Third-party certification may increase the likelihood that the B Corp will receive interest and financial support from an SRI.<sup>127</sup> "Becoming a B Corporation may also help corporate directors reconcile their duties to shareholders and their desires to help non-shareholder constituencies, such as employees and the greater community."<sup>128</sup> But again, B Corp certification cannot do much more than attract SRIs and offer low-level protection.<sup>129</sup> In order to truly protect these social goals, the company needs some legal method for ensuring that dissenting shareholders cannot sue to remove the goals in favor of more profitable endeavors. "[I]ncorporating social and environmental values into their governing documents may better position companies to ensure that those values survive new investors, new management, and new owners."<sup>130</sup>

Many people believe that entrepreneurs are flocking to these new corporate structures for tax benefits, but as of now, Benefit Corporation status does not grant any preferential tax treatment, at least at the federal

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<sup>119</sup> Joseph M. Binder, *A Tax Analysis of the Emerging Class of Hybrid Entities*, 78 BROOKLYN L. REV. 625, 632–33 (2013).

<sup>120</sup> *Id.* at 632.

<sup>121</sup> *Being a Responsible Company*, STARBUCKS, <http://www.starbucks.com/responsibility> (last visited Jan. 20, 2014).

<sup>122</sup> *Global Responsibility Report Goals & Progress 2013*, STARBUCKS, <http://www.starbucks.com/responsibility/global-report> (last visited Apr. 4, 2014).

<sup>123</sup> See generally Fisher, *supra* note 84.

<sup>124</sup> *Id.*; see also Wishnick, *supra* note 52, at 2410.

<sup>125</sup> See Lacovara, *supra* note 110, at 820, 825.

<sup>126</sup> See GLOBAL INV. RESEARCH, *supra* note 4.

<sup>127</sup> Haymore, *supra* note 20, at 1320.

<sup>128</sup> *Id.* at 1314.

<sup>129</sup> *Id.* at 1313–15.

<sup>130</sup> *Id.* at 1314.



level.<sup>131</sup> However, states are free to alter taxation of their corporate forms at their discretion.<sup>132</sup> Corporations are, after all, formed by the states, so should a state choose to encourage Benefit Corporations, that state would be free to select the tax treatment for corporations that chose to be such.<sup>133</sup> Perhaps in the future, Benefit Corporations could be taxed more like non-profits or L3Cs.<sup>134</sup>

Another benefit of the new corporate status is simply the promotional value of being a Benefit Corporation, a company with a legal ability to pursue two goals. This distinguishes the company from competitors either by recognition as a B Corp by B Lab or potentially an even greater recognition of a legally cognizable status. Benefit Corporations can advertise as one of few companies chasing identifiable and recognized social goals. Just like LEED certification leads purchasers interested in property meeting certain environmental criteria, buyers of other goods and services can use Benefit Corporation status to determine which companies are involved with a social program they wish to financially support.<sup>135</sup> Benefit Corporation status creates value for the business similar to the way any social program creates good will, except this creates a legal status requiring a duty to promote the social good.

### C. *The Potential Defects*

The most cited reason by opponents of Benefit corporation legislation is that allowing any additional duties will disturb the relatively well-settled doctrines of corporate governance.<sup>136</sup> This is especially important in Delaware, whose laws tend to be the choice law for corporate governance. However, reluctance to change, or an uncertainty of what a new policy will bring, should not prevent corporate law from adapting to emerging trends.

Many critics worry the addition of a new duty to stakeholders will lead to the discretionary nature of the business judgment rule being effectively reduced in power.<sup>137</sup> Some worry directors will be powerless against external factors if their discretion can be questioned by both shareholders (as it is now) as well as other constituencies.<sup>138</sup> The business judgment rule is rather-settled corporate law in Delaware, and altering the

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<sup>131</sup> See generally Binder, *supra* note 119.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*; J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-raising and Capital-locking in Low-profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1, 22 (2011). L3Cs, or Low-Profit Limited Liability Companies, are those LLCs which earn a profit but are geared more towards the goals of a non-profit. *Id.* at 3.

<sup>135</sup> Haymore, *supra* note 20, at 1328; see *LEED*, *supra* note 20.

<sup>136</sup> See generally Blount & Offei-Danso, *supra* note 7.

<sup>137</sup> *Id.*; Haymore, *supra* note 20, at 1326.

<sup>138</sup> See generally Haymore, *supra* note 20.

rules surrounding decision-making makes some observers uneasy.<sup>139</sup> They worry that allowing director action other than profit maximization, which is easily construed as objective and reasonable, will destroy the reasonable person standard on which the business judgment rule depends.<sup>140</sup> Steven Haymore offers a solution: courts could set a new standard by inquiring as to whether the supermajority supports a socially responsible policy.<sup>141</sup> This would allow the rule to remain as a majority-based standard, allowing for diversity in views concerning corporate decisions.<sup>142</sup> This also reinforces the principle that Benefit Corporation status is more suited for smaller corporations, as they have fewer shareholders who are more likely to have similar views.<sup>143</sup>

Some critics also worry that introduction of Benefit Corporation statutes, especially more unique laws, will lead to forum shopping.<sup>144</sup> However, corporate law is no stranger to forum shopping, as many companies choose to incorporate in jurisdictions other than their home state. Delaware, most prominently, hosts companies from a large number of states in the country.<sup>145</sup> These companies flock to Delaware for its robust corporate law jurisprudence and its favorable laws, particularly for larger, publicly traded corporations.<sup>146</sup> Yet, few consider this problematic forum shopping. The practice of incorporating in Delaware has become more of a status symbol, where investors see it as preparation for growth and dominance.<sup>147</sup>

Critics have also targeted the provisions in various states' Benefit Corporation legislation that allow companies to cease being Benefit Corporations.<sup>148</sup> Many claim this is indicative of a lack of faith in, or commitment to, the continuity of these types of enterprises.<sup>149</sup> This is also common in other forms of corporations, as privately held corporations are permitted to go public, publicly traded companies are taken private, and various other transformations occur. Few would say that permitting public companies to be taken private is demonstrative of a state's lack of faith in publicly traded companies. The fact that several states have included

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<sup>139</sup> *Id.* at 1326–38.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1338.

<sup>142</sup> *See generally id.*

<sup>143</sup> Fisher, *supra* note 84.

<sup>144</sup> Jack B. Siegel, *B Corporations (Benefit Corporations): A New Form of Business Entity, or Just an Exercise in Branding?*, EMERGING ISSUES ( July 27, 2011 11:47 AM),

<http://www.lexisnexis.com/legalnewsroom/corporate/b/blog/archive/2011/07/27/b-corporations-benefit-corporations-a-new-form-of-business-entity-or-just-an-exercise-in-branding.aspx>.

<sup>145</sup> Brian Broughman et al., *Delaware Law as Lingua Franca: Theory in Evidence* 2 (Harvard Pub. L., Working Paper No. 12-38, 2012).

<sup>146</sup> *Id.*

<sup>147</sup> *See generally id.*

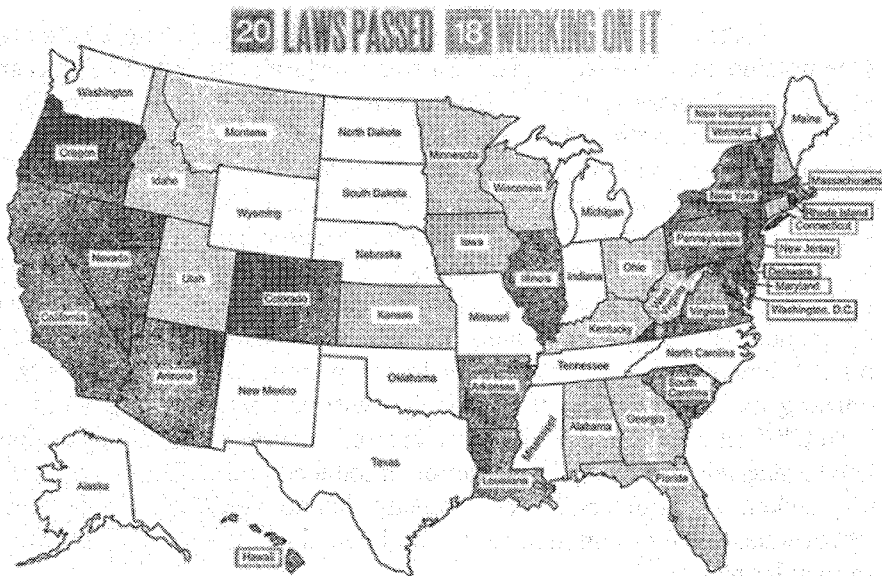
<sup>148</sup> Siegel, *supra* note 144.

<sup>149</sup> *Id.*

provisions for Benefit Corporations to go public should not mean the company is less dedicated to its goals. Rather, the company has grown to a point where raising capital via an IPO is better for its financial health. A more reasonable interpretation is that states want the companies incorporated therein to have the freedom to run themselves the way they see fit within certain parameters.

*D. Examples from Other States*

**Chart 4**<sup>150</sup>



The above map shows the twenty states (including Washington D.C.) that have to date passed Benefit Corporation legislation.<sup>151</sup>

Maryland, the first state to pass legislation, based its legislation on the Model Benefit Corporation Legislation as drafted by Bill Clark, a partner at Drinker Biddle & Reath LLP.<sup>152</sup> According to the new law, Benefit Corporations in Maryland have an additional duty on top of their regular corporate duties.<sup>153</sup> “In addition to its purposes under § 2-101 . . . the charter of a benefit corporation may identify as one of the purposes of the benefit corporation the creation of one or more specific public

<sup>150</sup> *State by State Status*, B LAB, <http://www.benefitcorp.net> (last visited Apr. 4, 2014).

<sup>151</sup> *Id.*

<sup>152</sup> *William H. Clark, Jr., Partner*, DRINKERBIDDLE, <http://www.drinkerbiddle.com/people/attorneys/clark-william-h> (last visited Apr. 4, 2014); *Our History*, *supra* note 15.

<sup>153</sup> MD. CODE ANN., CORPORATIONS & ASSOCIATIONS § 5-6C (West 2013).

benefits.”<sup>154</sup> “The identification in its charter of a specific public benefit purpose under paragraph (1) of this subsection does not limit the obligation of a benefit corporation to create a general public benefit.”<sup>155</sup> The Maryland model can clearly be replicated as eighteen states (and Washington D.C.) have passed similar legislation since Maryland enacted its Benefit Corporation legislation in 2010.<sup>156</sup> While changes have been made, the goal of each state’s laws have been to offer legal protection to Benefit Corporations as a new corporate entity.<sup>157</sup> Additionally, the model legislation written by Bill Clark has been used in most states passing Benefit Corporation legislation, with Delaware being the most notable exception.<sup>158</sup>

Within three years, many other states followed Maryland’s lead. One notable state to enact legislation was California; its legislation became effective on January 1, 2012.<sup>159</sup> Not surprisingly, California was early in the list to enact, the sixth state to do so.<sup>160</sup> Many states look to California as a progressive jurisdiction, joining a list of others like Vermont and Hawaii who had already enacted such statutes.<sup>161</sup> Once California enacted the statute, Patagonia, one of the best-known B Corps, sought reincorporation as a Benefit Corporation.<sup>162</sup> Patagonia is a rather large enterprise as well, with \$575 million in revenue in 2012.<sup>163</sup> Strangely, despite or maybe even on account of rising sales, Patagonia’s marketing urges customers to buy less.<sup>164</sup> Patagonia very publicly endorses a buy less attitude, famously opening its holiday marketing campaign with the slogan: “Don’t buy this jacket.”<sup>165</sup> In addition, the company created a system for buying second-hand Patagonia coats in good condition at reduced prices, rather than selling new jackets to customers.<sup>166</sup> The company also donates a full one percent of its revenues to environmental causes and gets the majority of its electricity from solar panels.<sup>167</sup>

Also worth noting is the fact that eleven other businesses followed Patagonia’s lead and went to the capital to register the first day Benefit

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<sup>154</sup> *Id.* § 5-6C-06(b)(1).

<sup>155</sup> *Id.* § 5-6C-06(b)(2).

<sup>156</sup> See generally *State by State Status*, *supra* note 150.

<sup>157</sup> *Model Legislation*, B LAB, <http://benefitcorp.net/attorneys/model-legislation> (last visited Apr. 4, 2014).

<sup>158</sup> *Id.*

<sup>159</sup> CAL. CORP. CODE § 14600 (West 2011).

<sup>160</sup> *Firms with Benefits*, *ECONOMIST* (Jan. 7, 2012), <http://www.economist.com/node/21542432>.

<sup>161</sup> See *Our History*, *supra* note 15.

<sup>162</sup> *Firms with Benefits*, *supra* note 160; Reed, *supra* note 81.

<sup>163</sup> See Stock, *supra* note 3.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

Corporation registration was available.<sup>168</sup> The fact that companies strove for B Corp status Benefit Corporation before legislation passed, when no legal benefit existed, demonstrates some intrinsic value in the title, even if that value is a cynical belief that consumers will pay more for a product or service believing that the company serves some social purpose.<sup>169</sup> Granted, the California consumer may be more liberal or socially conscious, but it is a large state and produces goods consumed throughout the United States, including goods purchase by Ohio consumers. Similar sentiments were shared by Congressman Jared Huffman: “This is California at its best, showing there is a way to create jobs and grow the economy while raising the bar for social and environmental responsibility.”<sup>170</sup> Hopefully an Ohio legislator will be able to make the same remarks in the near future.

As the crown jewel of corporate law, Delaware’s passing of section 362 was a triumph for B Lab and the Benefit Corporation movement in general.<sup>171</sup> Unlike most states, which adapted the Model Business Corporation Act drafted by Bill Clark, Delaware created its own unique legislation.<sup>172</sup> This may be for two reasons: first, Delaware prefers its laws to be slightly more favorable to management, as it is the overwhelming first choice for publicly traded and large corporations to incorporate;<sup>173</sup> second, Delaware simply wanted to be more unique, as it tends to be in all aspects of corporate law.<sup>174</sup> Much to the amazement of critics, an incredible seventeen companies registered as Benefit Corporations in Delaware in the first week the legislation was in effect, breaking the record of any other state.<sup>175</sup>

While there has been vast support for Benefit Corporation legislation in the states where it has been proposed, there have been a few states where legislation failed to pass. In Florida, the bill never emerged from the Business and Affairs Committee of the Florida House.<sup>176</sup> House Bill 757 died in committee on March 9, 2012.<sup>177</sup> The legislation was then reintroduced in the Florida Senate in 2013 as Senate Bill 1274. Again, it failed to emerge from a committee, dying in the Committee on Governmental Oversight and Accountability.<sup>178</sup>

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<sup>168</sup> *Firms with Benefits*, *supra* note 160; Reed, *supra* note 81.

<sup>169</sup> *Firms with Benefits*, *supra* note 160.

<sup>170</sup> Reed, *supra* note 81.

<sup>171</sup> *Our History*, *supra* note 15.

<sup>172</sup> *Id.*; Aaron Nathans, *B Corporations See Growth During First Year in Del.*, DEL. ONLINE (Nov. 22, 2013, 7:13 PM),

<http://www.delawareonline.com/article/20131124/BUSINESS/311240026/>.

<sup>173</sup> *See generally* Broughman et al., *supra* note 145.

<sup>174</sup> *Id.*

<sup>175</sup> Nathans, *supra* note 172; *see also* Mike Hower, *Record 17 Companies Register as Delaware’s First Benefit Corporations*, TRIPLEPUNDIT (Aug. 5, 2013), <http://www.triplepundit.com/2013/08/delaware-benefit-corporations/>.

<sup>176</sup> H.B. 757, 2012 Leg., Reg. Sess. (Fla. 2012).

<sup>177</sup> *Id.*

<sup>178</sup> S.B. 1274, 2013 Leg., Reg. Sess. (Fla. 2013).

In Wisconsin, the Benefit Corporation legislation, Assembly Bill 742, failed to pass the state's senate.<sup>179</sup> It was first referred to the Senate Committee on Jobs, Economy and Small Business on March 15, 2012.<sup>180</sup> Unfortunately, eight days later, there were not enough votes in the Senate to pass the bill.<sup>181</sup> However, B Lab has already registered four Wisconsin companies as B Corps, so public support for the initiative will hopefully lead to the bill being reintroduced in the future.<sup>182</sup>

### *E. Recommendation for Ohio: Expand Constituency Protection by Enacting Benefit Corporation Legislation*

While Ohio has yet to pass legislation protecting Benefit Corporations, the state is no stranger to B Corps. In fact, the trend towards social entrepreneurship is gaining a great deal of momentum in Ohio, as Jeni's Splendid Ice Creams, a beloved Columbus, Ohio small business was awarded the coveted B Corp designation on January 27, 2014.<sup>183</sup> As a small business that not only employs members of the community, but also gives thirty percent of its net profits to local charities, Jeni's is considered a pivotal part of its local community.<sup>184</sup> Jeni's joins an already diverse group of existing Ohio B Corps. As of today, seven companies in Ohio have earned the title of B Corporation from B Lab.<sup>185</sup> Aside from Jeni's, these include a solar energy company, a tee-shirt manufacturer and even a law firm.<sup>186</sup> Because Ohio already has several businesses that have sought the title of B Corp without the promise of any legislative protection of their commitment to their social goals, it seems likely that many other companies would follow suit if they could receive the added benefits of legal protection with Benefit Corporation status. Enacting legislation that allows a company to pursue financial and social goals may even persuade those not yet interested in entrepreneurship to go that route. Perhaps those more inclined to pursue social work would ultimately form small businesses if their "double bottom line" could be protected legally.

While Ohio has not yet officially considered Benefit Corporation legislation, it has, along with thirty other states, enacted a constituency

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<sup>179</sup> Assemb. B. 742, 2012 Leg., Reg. Sess. (Wis. 2012).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Mike Ivey, *Madison Ad Firm Becomes First in City to Receive National Certification for Business Ethics*, CAP TIMES (Mar. 1, 2010, 6:00 AM), [http://host.madison.com/business/madison-ad-firm-becomes-first-in-city-to-receive-national/article\\_d3609095-ee9c-595f-bb56-91174c27f9a3.html](http://host.madison.com/business/madison-ad-firm-becomes-first-in-city-to-receive-national/article_d3609095-ee9c-595f-bb56-91174c27f9a3.html).

<sup>183</sup> *Jeni's Splendid Ice Creams Is Now a Certified B Corporation*, *supra* note 19.

<sup>184</sup> *Id.*

<sup>185</sup> *Find a B Corp*, B LAB, <http://www.bcorporation.net/community/find-a-b-corp> (select "Ohio" from the "State" drop-down menu, then follow "Search Companies" hyperlink).

<sup>186</sup> *Id.*

statute.<sup>187</sup> This permits the directors of a corporation to take various interests other than financial concerns into consideration when making business decisions.<sup>188</sup> In Ohio, the constituency statute, section 1701.59 of the Ohio Revised Code, reads as follows:

- (F) For purposes of this section, a director, in determining what the director reasonably believes to be in the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in the director's discretion, may consider any of the following:
- (1) The interests of the corporation's employees, suppliers, creditors, and customers;
  - (2) The economy of the state and nation;
  - (3) Community and societal considerations;
  - (4) The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.<sup>189</sup>

The third category, “community and societal considerations,” alludes to an intent on the part of legislators to allow business owners and managers to make decisions that benefit someone or something outside the corporation.<sup>190</sup> This is the goal of the Benefit Corporation: to make sure these types of decisions are protected legally.<sup>191</sup> While this constituency statute does broaden a director's discretion, statutory language allowing a corporation to promote a social objective would more strongly protect the social goals of these directors.<sup>192</sup> Shareholder primacy can still prevail in a suit against a director, even if the constituency statute broadens his or her discretion.<sup>193</sup> Case law interpreting constituency statutes also tends to be mixed and inconsistent, often leaving all parties in the dark as to their true rights.<sup>194</sup> Additionally, Delaware courts, generally considered to be much more director friendly, did not recognize a general social goal as a valid reason to not seek a profit maximizing strategy in the *eBay* case.<sup>195</sup> If a Delaware court refused to recognize an “amorphous” social goal, a lawsuit

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<sup>187</sup> OHIO REV. CODE ANN. § 1701.59 (West 2013); Munch, *supra* note 44.

<sup>188</sup> OHIO REV. CODE ANN. § 1701.59.

<sup>189</sup> *Id.* § 1701.59(F).

<sup>190</sup> *Id.*

<sup>191</sup> See generally *Why B Corps Matter*, B LAB, <http://www.bcorporation.net/what-are-b-corps/why-b-corps-matter> (last visited Apr. 4, 2014).

<sup>192</sup> Haymore, *supra* note 20, at 1314.

<sup>193</sup> *Id.*

<sup>194</sup> Lacovara, *supra* note 110, 836–38.

<sup>195</sup> See generally *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

challenging a similar strategy in Ohio could very likely lead to the demise of the corporation's social goals.<sup>196</sup>

The Model Benefit Corporation Legislation seeks to eliminate much of this ambiguity by not simply giving the director discretion to consider additional factors, but requiring such a consideration.<sup>197</sup> The drafted legislation makes this abundantly clear, stating the director "shall" rather than "may" consider the effects of decisions on various constituents.<sup>198</sup> Section 301 of the statute reads:

(a) Consideration of interests. – In discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the board of directors, committees of the board, and individual directors of a benefit corporation:

(1) shall consider the effects of any action or inaction upon:

- (i) the shareholders of the benefit corporation;
- (ii) the employees and work force of the benefit corporation, its subsidiaries, and its suppliers;
- (iii) the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation;
- (iv) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located;
- (v) the local and global environment;
- (vi) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and
- (vii) the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose.<sup>199</sup>

Aside from a clearly more robust list of stakeholders a director is to consider, the above legislation differs from a constituency statute in three important ways, all of which provide much more structure and power to the

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<sup>196</sup> *Id.* at 32.

<sup>197</sup> Lacovara, *supra* note 110.

<sup>198</sup> MODEL BENEFIT CORP. LEGISLATION § 301 (Proposed Draft 2013).

<sup>199</sup> *Id.*



Benefit Corporation director.<sup>200</sup> First, as previously noted, the legislation mandates director consideration of the company's effects on various stakeholders.<sup>201</sup> This not only frees directors from blame should a decision not necessarily maximize profits, but also allows small businesses to make decisions specifically beneficial to the communities they support.<sup>202</sup> Such a provision, if enacted in Ohio, would protect a company like Jeni's from being forced to stop buying local ingredients should comparable ingredients from abroad increase profits for shareholders.<sup>203</sup>

The second difference is that the model legislation creates a duty for all sorts of business decisions, while constituency statutes were created to avoid hostile takeovers.<sup>204</sup> Of course protection from takeovers is necessary for small businesses, but stopping there means a small business engaged in social entrepreneurship only has protection once a company has made an attempt to acquire it.<sup>205</sup> This would offer no protection if the same small business wanted to bring on investors in exchange for shares.

The third difference is that any corporation can take advantage of constituency statutes without affecting its underlying governance structure, while Benefit Corporations would, in their governing documents, select a general and specific public benefit and have a duty to their stakeholders.<sup>206</sup> Unlike a constituency statute then, Benefit Corporations would be profit-making entities required to act on behalf of the community, not simply permitted to do so when it conveniences them.<sup>207</sup> Yet, Benefit Corporations *choose* to be designated as such, thus the legislation inflicts no additional duty on those that do not wish it.<sup>208</sup> This also means that Benefit Corporations do not displace constituency statutes, but provide a higher level of duty and protection for corporations that choose the designation. As shown by Jeni's and others, Ohio has businesses ready and willing to be held to this elevated standard of business, making decisions that require the consideration of all the corporation's stakeholders.<sup>209</sup>

Delaware law may be the corporate gold standard, but other states, as shown above, have sought to protect Benefit Corporations in other ways. Ohio may be best served then by modeling after a different state, one more in line with the current corporate law of Ohio. Basing the legislation for

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<sup>200</sup> Lacovara, *supra* note 110, at 838–40.

<sup>201</sup> *Id.* at 838.

<sup>202</sup> *Id.*

<sup>203</sup> See generally *Jeni's Splendid Ice Creams Is Now a Certified B Corporation*, *supra* note 19.

<sup>204</sup> Lacovara, *supra* note 110, at 839.

<sup>205</sup> *Id.* See generally *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (showing that companies must look to financial benefits over social benefits).

<sup>206</sup> Lacovara, *supra* note 110, at 838–40.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 840.

<sup>209</sup> See generally *Find a B Corp*, *supra* note 185; *Jeni's Splendid Ice Creams Is Now a Certified B Corporation*, *supra* note 19.

Ohio on Delaware's may lead to legislation more applicable to larger corporations, as Delaware is where most public companies are incorporated. Additionally, the vast body of jurisprudence in Delaware makes incorporation in Delaware attractive to many firms, but because Ohio would want to encourage companies to incorporate here, making the laws different in some way would likely attract other businesses. Delaware corporate law also tends to be distinct, especially with regard to corporate governance, so Ohio, if it seeks to create new small businesses with social consciousness, would likely not need many of the provisions contained within the Delaware Benefit Corporation provisions. Furthermore, both B Corps and their legally significant counterpart Benefit Corporations tend to choose local suppliers and employees, therefore creating stronger local economies, something any state covets.<sup>210</sup>

Maryland may be a good choice on which to base the Ohio legislation, as it is home to many corporations but not nearly on the scale that Delaware is. Maryland also is moderate in terms of corporate law, not too liberal or conservative, claiming the goal of the Benefit Corporation legislation is to assist directors by "establish[ing] legal protection for their decision-making."<sup>211</sup> Additionally, the Maryland legislation is modeled very closely on the Model Benefit Corporation Legislation, which is less state specific.<sup>212</sup> In fact, most states have used this basic framework for their codes, which may lead to future efficiency. For example, if Ohio Benefit Corporation law is the same as that of Maryland, an Ohio court evaluating any issue with the legislation would be able to use similar case law from other states as useful persuasive authority.

Additionally, the Model Legislation provides a useful foundation that Ohio could amend if needed in the future, but would be at minimum a launch pad for Benefit Corporations in the state. The four main provisions are the definitions of the benefits, the corporate purposes, the transparency requirements and the accountability requirements.<sup>213</sup> Not to mention, B Lab offers a wide range of resources to lobbyists and other individuals seeking to pass Benefit Corporation legislation.<sup>214</sup> Not only is the Model Legislation available right on its website, but B Lab also has resources for businesses, attorneys, directors and other individuals on how to comply with the laws once they are enacted.<sup>215</sup> Ohio could simply replicate the process undertaken by eighteen other states and the District of Columbia, and would have all the resources it needs in addition to businesses ready to participate.

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<sup>210</sup> *Our History*, *supra* note 15.

<sup>211</sup> Lacovara, *supra* note 110, at 840 n.106 (citation omitted); Press Release, Jamie Raskin, Md. State Senator, Historic Benefit Corporation Law Takes Effect in Maryland (Oct. 1, 2010),

[http://jamieraskin.com/p/salsa/web/press\\_release/public/?press\\_release\\_KEY=575](http://jamieraskin.com/p/salsa/web/press_release/public/?press_release_KEY=575).

<sup>212</sup> MD. CODE ANN., Corporations. & Associations § 5-6C (West 2013).

<sup>213</sup> MODEL BENEFIT CORP. LEGISLATION § 301 (Proposed Draft 2013).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

## V. CONCLUSION

SRI, social entrepreneurship and various other sorts of new, socially conscious consumer trends have emerged in recent years.<sup>216</sup> These trends show no sign of stopping, gaining momentum in all sectors of consumer products, from coffee and lemonade to apparel and shoes, even legal services and energy providers. As claimed by Sandra Stewart, a principal of Thinkshift Communications, one of the twelve companies who lined up the first day to become Benefit Corporations in California, “It’s what people are demanding. It’s not just a trend — ingraining values into a legal corporate structure is key to a sustainable future.”<sup>217</sup> Ohio is very much a part of this trend, with a notable small business, Jeni’s Splendid Ice Creams, declaring its desire to operate in a way that is best for society and become a certified B Corp just last month.<sup>218</sup>

It is vital to remember that legislation can only go so far; court decisions have done much to shape corporate law, especially in Delaware. The interpretation of these new laws will be as relevant to the survival of Benefit Corporations as the Delaware Chancery Court decisions have been to traditional corporate governance roles. As Leo Strine, Jr., the Chancellor of the Delaware Court, said: “The well-intentioned efforts of many entrepreneurs and company managers, who have a duty to their investors to deliver a profit, to be responsible employers and corporate citizens is undoubtedly socially valuable. But it is no adequate substitute for a sound legally determined baseline.”<sup>219</sup> Law tends to move more slowly than social views, but progressive states are pushing ahead and creating legal duties for corporations that wish to be bound to social goals.<sup>220</sup> While Ohio no longer has the power to be a pioneer for this new and exciting type of business endeavor, it still retains the power to avoid being left behind.

While the enactment of Benefit Corporation legislation will likely not have the same magnitude as the enactment of statutes authorizing LLCs, this should serve as a reminder that a new corporate form can be a very welcome change in the world of contemporary corporate governance. Allowing new businesses to emerge with a social goal in mind is likely to spur a wave of small business development in Ohio, combining an entrepreneurial spirit with a desire to contribute in some way. Many entrepreneurs around the country are starting businesses with some sort of social benefit in mind already, hoping to make a difference and make a profit. Enacting legislation in Ohio to protect these goals will lead to strong small businesses providing a variety of public benefits. If Ohio wants to be

<sup>216</sup> See generally Haymore, *supra* note 20.

<sup>217</sup> Reed, *supra* note 81.

<sup>218</sup> *Jeni’s Splendid Ice Creams Is Now a Certified B Corporation*, *supra* note 19.

<sup>219</sup> Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012).

<sup>220</sup> See generally Reed, *supra* note 81.

able to capitalize on the surge of capital and growth being ushered in by entrepreneurs with social vision, it needs to offer them legal protection. Enacting Benefit Corporation legislation is the vehicle for that protection, allowing Ohio corporations to be a part of a movement bigger than just profits, a movement that, according to some “might turn out [to be like] civil rights for blacks or voting rights for women—eccentric, unpopular ideas that took hold and changed the world.”<sup>221</sup>

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<sup>221</sup> John H. Richardson, *Saving Capitalism from Itself, Greener Pastures Edition*, ESQUIRE (Aug. 25, 2010), <http://www.esquire.com/blogs/politics/benefit-corporation-law-082510>.