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The Social Enterprise Law Market

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THE SOCIAL ENTERPRISE LAW MARKET

J. HASKELL MURRAY*

ABSTRACT

During the last seven years, over thirty states have passed at least one social enterprise statute. These social enterprise statutes allow the formation of a plethora of new entity types, including low-profit limited liability companies, benefit corporations, benefit limited liability companies, public benefit corporations, and social purpose corporations. Social enterprises have attracted increasing academic attention, but virtually nothing has been written on if and how states are competing for these entities. This Article attempts to fill that void, while also providing a history of the social enterprise forms, a comparative analysis, and recommendations for states that wish to engage in jurisdictional competition in the social enterprise law market.

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INTRODUCTION

In her iconic book *The Genius of American Corporate Law*, Professor Roberta Romano claims “federalism spurs innovation in public policy because of the incremental experimentation afforded by fifty laboratories of states competing for citizens and firms.”¹ The legal academy has given much attention to jurisdictional competition for traditional business associations such as corporations and limited liability companies (“LLCs”).² Delaware has long been recognized as the clear winner in the

1. ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 5 (1993) (first citing THOMAS R. DYE, *AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* (1990); then citing *COMPETITION AMONG STATES AND LOCAL GOVERNMENTS* (Daphne A. Kenyon & John Kincaid eds., 1991)).

2. See, e.g., Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992); Bruce H. Kobayashi & Larry E. Ribstein, *Delaware for Small Fry: Jurisdictional Competition for Limited Liability Companies*, 2011 U. ILL. L. REV. 91 (2011); Jeffry Netter & Annette Poulsen, *State Corporation Laws and Shareholders: The Recent Experience*, 18 FIN. MGMT. 29 (1989); Larry E. Ribstein & Erin Ann O’Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661 (2008); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985).

competition among the states for these traditional business associations, with some academics arguing that the competition has been a “race to the bottom” and others contending that the competition has been a “race to the top.”³ More recently, commentators have claimed other states do not now pose much of a threat to Delaware’s dominance, and that the federal government is the main check on Delaware’s power in the law market for traditional business associations.⁴ To date, the behavior surrounding emerging social enterprise forms, such as low-profit limited liability companies and benefit corporations, has not been thoroughly discussed or analyzed. Also, unlike the situation with the more traditional business associations, currently Delaware does not appear to be the dominant state in the social enterprise law market.

Part I of this Article provides an overview and brief history of social enterprise forms in the United States, along with discussion of the related, early academic literature. Part II describes many of the innovations in the social enterprise law area and the various iterations of these laws. Part III asks why states are passing social enterprise laws, and provides a new theory of jurisdictional positioning to describe states that are not engaged in full competition but wish to remain poised to compete if the stakes are raised. Part IV describes the various interest groups that are impacting the passage and shape of social enterprise laws, including activists, managers, politicians, and skeptics. Finally, Part V examines hand-collected data on social enterprise forms, providing a description of the current social enterprise landscape and offering advice to states that wish to compete for social enterprises in the future. This Article concludes by drawing on the Delaware experience to predict the characteristics of the winning state in any future jurisdictional competition that may arise over social enterprises.

I. OVERVIEW OF U.S. SOCIAL ENTERPRISE LAW AND LITERATURE

A. *Low-Profit Limited Liability Companies (“L3Cs”)*

The 2008 Vermont Low-Profit Limited Liability statute was both the first L3C statute and the first social enterprise statute in the United States. Since 2008, eight additional states and two federal tribal jurisdictions have

3. See, e.g., RALPH K. WINTER, *GOVERNMENT AND THE CORPORATION* 7–11 (1978) (race to the bottom); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 *YALE L.J.* 663 (1974) (race to the bottom); Frank H. Easterbrook, *Managers’ Discretion and Investors’ Welfare: Theories and Evidence*, 9 *DEL. J. CORP. L.* 540 (1984) (race to the top); Romano, *supra* note 2, at 265–73.

4. Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 *YALE L.J.* 553, 558, 604–05 (2002); Mark J. Roe, *Delaware’s Competition*, 117 *HARV. L. REV.* 588, 591 (2003).

passed L3C statutes.⁵ Effective January 1, 2014, North Carolina became the first of the nine original L3C states to repeal its L3C statute, though it allowed previously formed L3Cs to continue to exist in the state.⁶ The L3C concept is championed by Robert “Bob” Lang, the Chief Executive Officer of The Mary Elizabeth & Gordon B. Mannweiler Foundation.⁷ Mr. Lang worked with attorneys on the L3C concept but is not a lawyer himself.⁸

L3C statutes were drafted, primarily, to target Program Related Investments (“PRI”) from foundations, and thereby aid social enterprises in their attempts to raise capital.⁹ The statutes mirror, in many respects, the PRI regulations and often simply replace “investment” in the regulations with “company” in the L3C statutes.¹⁰ The L3C statutes require that the L3C “significantly furthers the accomplishment of one or more charitable or educational purposes” and require that the L3C “would not have been formed but for the company’s relationship to the accomplishment of charitable or educational purposes.”¹¹ The L3C statutes also require that “[n]o significant purpose of the company is the production of income or the appreciation of property” but the statutes make clear that the production of

5. Steven R. Chiodini & David A. Levitt, *Program-Related Investing in L3Cs: A Question-and-Answer Guide*, 118 J. TAX’N 41, 41, 43 n.10 (2013) (listing Illinois, Louisiana, Maine, Michigan, North Carolina, Rhode Island, Utah, Vermont, Wyoming, Oglala Sioux Tribe and the Crow Indian Nation of Montana); see also *Here’s the Latest L3C Tally*, INTERSECTOR PARTNERS, L3C (Sept. 3, 2015), http://www.intersectorl3c.com/l3c_tally.html (listing the month and year that each L3C statute was passed, the number of L3Cs formed in each jurisdiction, and the L3C company names).

6. Cass Brewer, *Hybrid Business Entities in 2014*, SOCENTLAWBLOG (Jan. 6, 2014), <http://socentlaw.com/2014/01/hybrid-business-entities-in-2014/>; Anne Field, *North Carolina Officially Abolishes the L3C*, FORBES (Jan. 11, 2014), <http://www.forbes.com/sites/annefield/2014/01/11/north-carolina-officially-abolishes-the-l3c/>.

7. Robert Lang & Elizabeth Carrott Minnigh, *The L3C, History, Basic Construct, and Legal Framework*, 35 VT. L. REV. 15, 15 (2010) (stating that Bob Lang conceived of the L3C form in 2005).

8. Robert Lang, LINKEDIN, <https://www.linkedin.com/pub/robert-lang/b/b0/aa2> (last visited Nov. 9, 2015).

9. Lang & Minnigh *supra* note 7, at 15–17; John A. Pearce II & Jamie Patrick Hopkins, *Regulation of L3Cs for Social Entrepreneurship: A Prerequisite to Increase Utilization*, 92 NEB. L. REV. 259, 272–73 (2013) (explaining that L3C proponents intended for the L3C to attract PRIs from foundations, but stating that L3C investments do not automatically qualify as PRIs and noting that at least one senior IRS agent has encouraged caution when attempting to invest in a L3C as a PRI). PRIs are investments that are not made for financial reasons, but to facilitate the exempt purpose of a private foundation. Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 355–56 (2009). In addition, the “IRS considers all moneys paid out as PRIs to be ‘qualifying distributions,’ which means they count toward the IRS’s requirement that private foundations spend five percent of their net worth in any given year.” *Id.* at 356.

10. Pearce II & Hopkins, *supra* note 9, at 261–62 (noting that the L3C statutes were intended to mirror the PRI requirements).

11. VT. STAT. ANN. tit. 11, §§ 4001(14), 4162(1) (2010). Other state L3C statutes largely follow Vermont’s lead. Cassady V. Brewer & Michael J. Rhim, *Using the ‘L3C’ for Program-Related Investments*, TAX’N EXEMPTS, Nov./Dec. 2009, at 11, 13 (noting that the Vermont L3C statute is similar to the L3C statutes in other states).

significant income or the appreciation property standing alone is not conclusive evidence of a statutory violation.¹² The L3C proponents believed that if the L3C statutes required of companies the same thing that the PRI regulations require of investments, an L3C would become a safe place for foundations to make PRIs, without need for costly written legal opinions from counsel or advanced private letter rulings by the Internal Revenue Service (“IRS”).¹³ To date, however, the IRS has not expressly endorsed the L3C as an unassailable safe harbor for PRIs.¹⁴ Lang promoted a tranching investment structure for L3Cs where foundations would provide high-risk, low-return capital, which would make it more likely that traditional investors would obtain a market return.¹⁵

Lang and his supporters have touted the L3C as aiding private foundations in the PRI process; a “for-profit with [a] nonprofit soul” that serves both profit and social purpose;¹⁶ a branding vehicle; and a way, through his proposed tranching investment structure, to provide each set of investors their desired social and financial returns.¹⁷ Professors and practitioners quickly launched significant criticism against the L3C. These skeptics claimed, among other things, that the statutes did not significantly protect or aid private foundations in the PRI process; LLCs could serve the same purpose as the L3C under the current tax law; the statutes were overhyped and the claims of L3C proponents were overly optimistic; the skeletal L3C statute was insufficient to deal with the complexities stemming from the conflicts between the “two masters” of profit and purpose; and the proposed tranching investments were impractical and could

12. VT. STAT. ANN. tit. 11, §§ 4001(14), 4162(2).

13. Robert M. Lang, Jr., *The L3C: The New Way to Organize Socially Responsible and Mission Driven Organizations*, 36 ALI-ABA CONTINUING LEGAL EDUC. 251, 253–56 (2007) (describing his view on how the L3C can cut costs for foundations looking to make a PRI); cf. John Tyler, *Negating the Legal Problem of Having “Two Masters”: A Framework for L3C Fiduciary Duties and Accountability*, 35 VT. L. REV. 117, 125–26 (2010) (noting that L3Cs do not have to attract PRIs and that there may be uses for the L3C form outside of the foundation and PRI contexts).

14. See Jamie Hopkins, *Low-Profit Limited Liability Companies: High-Risk Tax Fad or Legitimate Social Investment Planning Opportunity?*, 2014 CARDOZO L. REV. DE NOVO 35, 42–43, (2014) http://www.cardozolawreview.com/content/denovo/HOPKINS_2014_35.pdf (first citing IRS, Proposed Guidelines, Examples of Program Related Investments, 77 Fed. Reg. 23,429 (proposed Apr. 19, 2012) (codified at 26 C.F.R. pt. 53), <https://federalregister.gov/a/2012-9468>; then citing Carter G. Bishop, *The Low Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243, 250 (2010)) (noting that the IRS has proposed rules with examples of proper PRIs suggesting that L3Cs could be a proper recipient, but also noting that the IRS guidance does not provide a complete safe harbor for L3Cs and sufficient caution is recommended).

15. Lang & Minnigh, *supra* note 7, at 17–19 (explaining the proposed tranching L3C investment structure).

16. *Id.* at 17.

17. See generally Lang, Jr., *supra* note 13; Lang & Minnigh *supra* note 7; Arthur Wood, *Transcript: New Legal Structures to Address the Social Capital Famine*, 35 VT. L. REV. 45 (2010).

lead to private inurement that may jeopardize the investing foundations' tax exemptions.¹⁸ A few commentators largely agreed with the criticisms, but also suggested reforms for the L3C law. The suggested reforms for the L3C law included the following: amend the proposed tranching model by replacing traditional investors with social investors; require at least one tax-exempt investor; add reporting and registration requirements for certain L3Cs; require at least a partial asset lock for L3Cs engaged in mergers and acquisitions activity; and provide free transferability and withdrawal by any tax-exempt member of an L3C.¹⁹

Possibly in response to the academic and practitioner criticism, the passing of the L3C statutes has been at a relative standstill, with the last L3C statute passed in 2012.²⁰ From 2012 to present, over a dozen state social enterprise statutes, of types other than the L3C, were passed.²¹ The number of L3C statutes has actually decreased since 2012; as mentioned above, effective January 1, 2014, North Carolina repealed its L3C statute.²² Currently, there are reported to be approximately 1200 L3Cs and most are small, closely held entities.²³

B. Benefit Corporations and Benefit LLCs

In 2010, Maryland passed the first benefit corporation statute.²⁴ Currently, over two dozen states have passed benefit corporation statutes, a few of which are "public benefit corporation" statutes, discussed below in a

18. Bishop, *supra* note 14, at 243–46 (claiming that the L3C does not protect foundations making a PRI and challenging the proposed L3C tranche investment plan); 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, 274–75 (2010) (challenging the optimism of the L3C proponents); David S. Chernoff, *L3Cs: Less than Meets the Eye*, 21 TAX'N EXEMPTS, May/June 2010, at 3, 4–5 (dispelling six myths about the L3C); Daniel S. Kleinberger, *A Myth Deconstructed: The "Emperor's New Clothes" on the Low-Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879, 879 (2010) (claiming that a number of "glowing characterizations [of the L3C] are each flatly wrong").

19. See generally Cassady V. ("Cass") Brewer, *Seven Ways to Strengthen and Improve the L3C*, 25 REGENT U. L. REV. 329 (2013); 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 (2011).

20. *Here's the Latest L3C Tally*, *supra* note 5. Rhode Island passed the most recent L3C statute. See R.I. GEN. LAWS § 7-16-76 (1999 & Supp. 2014) (effective July 1, 2012).

21. See *infra* Appendix A.

22. See Brewer, *supra* note 6.

23. A review of the L3C list compiled by interSector Partners, L3C reveals almost no recognizable companies and a number of companies that are not even large enough to afford or desire a website. *Here's the Latest L3C Tally*, *supra* note 5.

24. Act effective October 1, 2010, 2010 Md. Laws Ch. 97, § 1 (S.B. 690) (current version at MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (West 2014)).

separate Section.²⁵ B Lab, a non-profit organization, which has been privately certifying companies as “certified B corporations” since June of 2007, has been a major force behind the passing of benefit corporation statutes.²⁶ Many proponents of the benefit corporation form have authored or contributed to a white paper entitled *The Need and Rationale for the Benefit Corporation* (“Proponent White Paper”).²⁷ Major arguments made in the Proponent White Paper and the responses by skeptics are summarized in this Section.

The authors of the Proponent White Paper claim that the market (including consumers, investors, and social entrepreneurs) is demanding a society-focused, for-profit entity form like the benefit corporation.²⁸ Skeptics note that relatively few people have taken advantage of the existing social enterprise forms, such as benefit corporations.²⁹ Only approximately 1000 benefit corporations were formed in the first four years of the statute’s existence, suggesting the market demand may be less than was claimed.³⁰ For comparison, Delaware is home to over one million entities, and in 2007 an average of 430 LLCs were formed every weekday in Delaware.³¹ In 2014 alone, over 169,000 total entities were formed in Delaware, so approximately 1000 benefit corporations (spread over many

25. *State by State Legislative Status*, BENEFIT CORP. INFO. CTR., <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Sept. 20, 2015); *see infra* Part I.D.

26. *Our History*, B CORPORATION.NET, <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/our-history> (last visited Nov. 18, 2015) (stating that the first full-time work at B Lab commenced on July 5, 2006 and the first B Corps were certified on June 8, 2007).

27. William H. Clark, Jr. & Larry Vranka, *White Paper: The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form That Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public*, BENEFIT CORP. (Jan. 18, 2013), <http://benefitcorp.net/sites/default/files/documents/Benefit%20Corporation%20White%20Paper.pdf>.

28. *Id.* at 2–6.

29. J. William Callison, *Benefit Corporations, Innovation, and Statutory Design*, 26 REGENT U. L. REV. 143, 165 (2013); Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 623 (2011).

30. Kate Cooney, Justin Koushyar, Matthew Lee & J. Haskell Murray, *Benefit Corporation and L3C Adoption: A Survey*, STAN. SOC. INNOVATION REV. (Dec. 5, 2014), http://ssir.org/articles/entry/benefit_corporation_and_l3c_adoption_a_survey. Currently, there are roughly 1400 “certified B corporations” in existence, but benefit corporations are not required to be certified, and the certified B corporations, oddly, include partnerships, LLCs, and traditional corporations, in addition to benefit corporations. *Certified B Corporations*, B CORPORATION.NET, <http://www.bcorporation.net/> (last visited Jan. 15, 2015). During the publication process, the number of benefit corporations has risen significantly though this new total number is still insignificant in face of the total number of businesses in Delaware and elsewhere in the United States. Appendix A.

31. Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy*, 52 B.C. L. REV. 189, 201 (2011) (discussing how formation of LLCs significantly outpaced incorporations in Delaware).

states) is a small drop in a big bucket.³² Proponents of the benefit corporation form counter by noting that the first statute was passed just a few years ago, that awareness of the benefit corporation is still spreading, and that the number of benefit corporations is growing.³³

The Proponent White Paper's authors also argue that existing case law hinders socially focused for-profit entities, citing iconic corporate law cases like *Dodge v. Ford Motor Co.*,³⁴ *Unocal Corp. v. Mesa Petroleum Co.*,³⁵ *Revlon Inc., v. MacAndrews & Forbes Holdings, Inc.*,³⁶ and *eBay Domestic Holdings v. Newmark*.³⁷ The benefit corporation movement has been spurred, in part, by statements by the current Chief Justice of the Delaware Supreme Court, Leo Strine, including the statement that "as a matter of corporate law, the object of the corporation is to produce profits for the stockholders[;] . . . the social beliefs of the managers, no more than their own financial interests, cannot be their end in managing the corporation."³⁸ Also, former Delaware Chancellor William Chandler wrote in *eBay v. Newmark* that "[h]aving chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders."³⁹ Some critical commentators have noted that existing law already provides potential solutions for social entrepreneurs, including (1) using the flexible, contract-based LLC form, (2) incorporating in one of the more than thirty states with a constituency statute, and (3) incorporating in a state like Oregon, which

32. Jeff Mordock, *Delaware Sets Record for New Businesses*, DELAWAREONLINE (Jan. 6, 2015), <http://www.delawareonline.com/story/money/business/2015/01/06/delaware-sets-record-new-businesses/21366135/> (noting that the roughly 169,000 new businesses formed in Delaware in 2014 set a new record, breaking the 162,000 mark set in 2007).

33. See, e.g., Interview with William H. Clark, Jr., Corporate & Securities Partner at Drinker Biddle & Reath LLP and Drafter of the Model Benefit Corporation Legislation, in Seattle, WA at Seattle Pacific University (Oct. 8, 2014); see also E-mail from William H. Clark, Jr., to J. Haskell Murray, Assistant Professor at Belmont University (Jan. 23, 2015, 11:46 AM) (on file with author) (confirming the conversation and agreeing with the statement attached to this footnote); *FAQ: General Questions*, BENEFIT CORP., <http://benefitcorp.net/faq> (last visited Nov. 19, 2015) (noting that the first benefit corporation law was passed in 2010 and citing "Method, Plum Organics, King Arthur Flour, Patagonia, Solberg Manufacturing, and Rasmussen Colleges" as some well-known benefit corporations).

34. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

35. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 956 (Del. 1985).

36. *Revlon Inc., v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

37. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010); Clark & Vranka, *supra* note 27, at 7–13.

38. Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 151 (2012).

39. *eBay Domestic Holdings, Inc.*, 16 A.3d at 34. Professor Lyman Johnson has questioned the *eBay* decision and noted the lack of citation to authority for the court's statement about the need to focus on shareholder profits. Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 274–75 (2013).

expressly allows corporations to adopt a social or environmental purpose.⁴⁰ Certain academics have argued that social entrepreneurs could avoid the holdings of the cases cited in the Proponent White Paper by incorporating in more stakeholder-friendly states, and even in the states where the cited cases control the business judgment rule provides significant protection for social entrepreneurs.⁴¹ Other commentators contend that even if benefit corporations are not technically *needed*, this new entity form might serve as a useful signaling device.⁴²

The centerpiece of the Model Benefit Corporation Legislation is its purpose clause, which states that each benefit corporation must pursue a “general public benefit,” defined as “[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.”⁴³ In previous work, this author has claimed that the “general public benefit” concept is too vague, provides insufficient guidance to directors when they face zero-sum games, and should be supplemented to require the prioritization of the interests, or at least the identification of the benefit corporation’s primary interest.⁴⁴ Other commentators have suggested that the “general public benefit” mandate is too broad, and statutes should be made flexible enough to allow social entrepreneurs to focus on one or more narrow social or environmental issues without being forced to consider all stakeholders.⁴⁵

Proponents of the benefit corporation form claim that the benefit corporation law provides a higher level of accountability and transparency

40. Cassady V. (“Cass”) Brewer, *A Novel Approach to Using LLCs for Quasi-Charitable Endeavors (A/K/A “Social Enterprise”)*, 38 WM. MITCHELL L. REV. 678, 685–86 (2012) (noting that the LLC entity form can be used for social enterprise purposes); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 20–21 (2012) (discussing the legal solutions, outside of social enterprise law, for social entrepreneurs); cf. Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1036 (2013) (noting, with approval, that some critics of social enterprise have argued that the existing corporate law is sufficient for social entrepreneurs, but stating that a purpose of the benefit corporation law is not just to allow socially focused behavior, but to mandate socially focused behavior).

41. Johnson, *supra* note 39, at 273–78; Loewenstein, *supra* note 40, at 1008 n.3; Murray, *supra* note 40, at 16–17.

42. J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 505–07 (2013); Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767 (2015).

43. MODEL BENEFIT CORP. LEGIS. §§ 102, 201(a) (2014), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf.

44. Murray, *supra* note 40, at 5.

45. J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 98–104 (2012) (calling the inflexibility of the Model Benefit Corporation Legislation the “Illiberalism Problem”); Loewenstein, *supra* note 40, at 1014–15 (claiming the Model Benefit Corporation Legislation is overly rigid because it would not allow an entity to focus on only one set of stakeholders).

than traditional corporate law.⁴⁶ Proponents argue that accountability is increased by statutory language requiring directors to consider the interests of various corporate stakeholders, mandating a corporate purpose to benefit society and the environment, and providing benefit enforcement proceedings for resolution of complaints related to alleged violations of the benefit corporation statute.⁴⁷ Transparency is increased, proponents argue, by the benefit corporation statutes requiring an annual benefit report and requiring the measurement of general public benefit against a “comprehensive, credible, independent and transparent”⁴⁸ third-party standard.⁴⁹

Various authors have called into question the alleged strength of these so-called accountability and transparency measures in the benefit corporation law.⁵⁰ For example, some commentators have noted that only shareholders, and not the other stakeholders, have standing to bring a benefit enforcement proceeding.⁵¹ Shareholders may not have significant incentives to keep directors accountable to *other* stakeholders, especially when doing so reduces the shareholders’ financial returns.⁵² Delaware Supreme Court Chief Justice Leo Strine has criticized benefit corporation law, writing that “[benefit corporations exist in] a fictional land where you can take other people’s money, use it as you wish, and ignore the best interests of those with the only right to vote.”⁵³ Some academic articles have suggested statutory amendments to provide more serious accountability, including imposing a charitable giving floor, adding a partial-asset lock, instituting stakeholder standing, and regulating the third-party standard providers that currently vary wildly in quality.⁵⁴ At least one author has noted that benefit enforcement proceedings may be used by

46. Clark & Vranka, *supra* note 27, at 15–21.

47. *Id.*

48. William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 846 (2012).

49. *Id.* at 842–50 (paying particular attention to the importance of a third-party standard); Clark & Vranka, *supra* note 27. Bill Clark and Lizzie Babson have done legal work for the primary third-party standard provider, B Lab.

50. Callison, *supra* note 45, at 90–92, 109–111 (discussing the influence of B Lab in passing what he considers unwise legislation and noting the possible use of benefit corporations to greenwash given that the area is largely unregulated); see also David Groshoff, *Contrepreneurship? Examining Social Enterprise Legislation’s Feel-Good Governance Giveaways*, 16 U. PA. J. BUS. L. 233, 262 (2013) (noting the weakness of the benefit corporation’s primary enforcement mechanism—the benefit enforcement proceeding).

51. Murray, *supra* note 40, at 16–17; Reiser, *supra* note 29, at 613–14.

52. See Leo E. Strine, Jr., *Making It Easier for Directors to “Do the Right Thing”?* 4 HARV. BUS. L. REV. 235, 250–52 (2014) (questioning whether a shareholder will be motivated to protect other stakeholders).

53. Strine, Jr., *supra* note 38, at 150.

54. J. Haskell Murray, *Social Enterprise Innovation: Delaware’s Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 363 (2014); Murray, *supra* note 40, at 22; Murray, *supra* note 42, at 507–11.

shareholders to “greenmail” benefit corporations into buying off those particular shareholders, possibly to the detriment of the corporation, its mission, and the other stakeholders.⁵⁵ On the transparency front, authors have noted that the statutory requirements involving benefit reports are extremely vague, susceptible to white- and green-washing, and generally lack an express enforcement mechanism for punishing benefit corporations that do not provide the reports.⁵⁶ A few commentators have suggested that financial tools, and the private market in general, may be more effective than statutes in providing accountability and transparency.⁵⁷

Currently, Maryland and Oregon provide for the formation of benefit LLCs.⁵⁸ The existing benefit LLC statutes are nearly identical to the benefit corporation statutes, but the benefit LLC law relies on the state LLC statute, instead of the state corporation statute, to fill in the gaps.⁵⁹ Most proponents of the benefit corporation statutes, including B Lab, claim that they are not encouraging the passage of benefit LLC legislation at this time because they believe the traditional LLC law to be flexible enough to address the needs of social entrepreneurs who are not interested in the corporate form.⁶⁰ Other proponents, however, believe that the benefit LLC

55. See Callison, *supra* note 45, at 109–11 (arguing that benefit enforcement proceedings may be used improperly by plaintiffs simply looking to extract funds from benefit corporations or for “adherence to their idiosyncratic conception of the good”). The term “greenmail” is often used in the hostile takeover situation when a corporation pays “a firm or individual in exchange for an agreement not to proceed with a tender offer,” but “greenmail” can also be used more generally, as Callison uses the term, to refer to payments for not proceeding with other actions related to the corporation. Jonathan R. Macey & Fred S. McChesney, *A Theoretical Analysis of Corporate Greenmail*, 95 YALE L.J. 13, 14 n.1 (1985); see also Callison, *supra* note 45, at 109–11.

56. Callison, *supra* note 45, at 109–10; Murray, *supra* note 40, at 42–43. Greenwashing can be defined as making false or exaggerated claims about the environmental friendliness of a product, company, or industry. Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 WASH. U. L. REV. 115, 133–34 (2009). Greenwashing, however, does not have one agreed upon definition. Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L. J. 281, 295 (2014). Greenwashing is “when a company tries to portray itself as more environmentally minded than it actually is.” David Gelles, *Social Responsibility That Rubs Right Off*, N.Y. TIMES (Oct. 17, 2015), http://www.nytimes.com/2015/10/18/business/energy-environment/social-responsibility-that-rubs-right-off.html?_r=0. “[A]s a conceptual matter, a whitewash has three essential components: an underlying defect, an attempt to conceal the defect by diverting attention, and a failure to fix the underlying defect.” Lesley Wexler, *Extralegal Whitewashes*, 62 DEPAUL L. REV. 817, 825 (2013).

57. Dana Brakman Reiser & Steven A. Dean, *Hunting Stag with Fly Paper: A Hybrid Financial Instrument for Social Enterprise*, 54 B.C. L. REV. 1495 (2013); see also Murray, *supra* note 40, at 45–46.

58. MD. CODE ANN., CORPS. & ASS’NS §§ 4a-1201–1208 (West 2014); OR. REV. STAT. §§ 60.750–60.770 (2014).

59. See MD. CODE ANN., CORPS. & ASS’NS §§ 4a-1201–1208; OR. REV. STAT. §§ 60.750–60.770.

60. See Murray, *supra* note 40, at 23 n.101 (citing Telephone Interview with William H. Clark, Jr., Partner, Drinker Biddle & Reath and primary draftsman for the Model Benefit Corporation Legislation (Jan. 23, 2012)).

is a useful form because many small businesses prefer the LLC framework, while also desiring the branding and signaling provided by a “benefit” entity form.⁶¹

C. Social Purpose Corporations

Two states, California and Washington, have passed more flexible social enterprise statutes that resist some of the mandatory provisions of the benefit corporation statutes, such as the required “general public benefit purpose.”⁶² Unlike the Model-based benefit corporation statutes, these social purpose corporations (“SPC”) statutes do not require a general public benefit purpose but do require adoption of one or more specific purposes.⁶³ While the Model-based benefit corporation statutes require pursuit of a “general public purpose” and require benefit corporation directors to consider the interests of all stakeholders, the SPC statutes allow focus on a narrower group of stakeholders.⁶⁴

The SPC statutes also expressly provide for dissenters’ rights, the payment of fair value for the shares of shareholders who object to conversion to an SPC from a more traditional entity form.⁶⁵ Dissenters’ rights have been included in a few benefit corporation statutes, including California’s, but are not included in the statutes that follow the Model Benefit Corporation Legislation.⁶⁶ Bill Clark, the primary drafter of the benefit corporation legislation, has argued that dissenters’ rights might harm cash-poor corporations that wish to convert, but do not have the resources to pay the shareholders who do not want to make the change to a social enterprise form.⁶⁷

61. Telephone Interview with James Woulfe, Public Policy and Impact Investing Specialist at the Social Enterprise Trust (Jan. 29, 2015). Mr. Woulfe was involved in the Connecticut benefit corporation efforts and is considering supporting the passage of benefit LLC legislation in Connecticut. *Id.*

62. Rob R. Carlson & Lisa M. Tran, *California Creates Two New Types of Corporations: Understanding the Benefit Corporation and Flexible Purpose Corporation*, STAY CURRENT: A CLIENT ALERT FROM PAUL HASTINGS (Mar. 2012), <http://www.paulhastings.com/assets/publications/2137.pdf>. See generally *What Are SPCs?*, SOCIAL PURPOSE CORP., <http://www.spcwa.com/what-are-spcs/> (last visited Sept. 19, 2015).

63. CAL. CORP. CODE §§ 2500–2517, 2600–2605, 2700–2702, 2800, 2900, 3000–3002, 3100, 3200–3203, 3300–3306, 3400–3401, 3500–3503 (West 2014); WASH. REV. CODE ANN. §§ 23B.25.005–150 (West 2013).

64. CAL. CORP. CODE § 3305 (West 2014); WASH. REV. CODE ANN. §§ 23B.25.020–030 (West 2013).

65. CAL. CORP. CODE § 2602(b) (West 2014); WASH. REV. CODE ANN. § 23B.25.120 (West 2013); Antony Page, *New Corporate Forms and Green Business*, 37 WM. & MARY ENV’T L. & POL’Y REV. 347, 357 (2013).

66. J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the State Statutes* (Jan. 15, 2015) (unpublished chart), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556.

67. Clark & Vranka, *supra* note 27.

Supporters of benefit corporation statutes have stated that the SPC statutes are too weak to support the dual mission of social entrepreneurs.⁶⁸ Benefit corporation proponents worry that SPCs might harm society by focusing on a narrow set of interests, for example, caring for the environment, while treating their employees poorly.⁶⁹ Critics of the benefit corporation framework respond that the benefit corporation statute has overpromised, will suffocate companies with its mandatory provisions, and has not provided the means to live up to its bold claims of achieving both profit and broad purpose.⁷⁰

D. Public Benefit Corporations

In 2013, Delaware, the leader in U.S. corporate law, entered the social enterprise law scene with its own statutory innovation: the public benefit corporation (“PBC”).⁷¹ B Lab places Delaware’s PBC statute under the benefit corporation umbrella, but the Delaware statute differs from the Model statute in a number of ways.⁷² Colorado and Minnesota have already adopted large parts of Delaware’s PBC statute, and other states are considering using portions of, or the entirety of, Delaware’s framework.⁷³ The Delaware statute is more permissive than the Model Benefit Corporation Legislation in most areas, but has more mandatory provisions in the corporate purpose area than the SPC statutes.⁷⁴ In language broader than that in the SPC statutes, a Delaware PBC “is a for-profit corporation . . . intended to produce a public benefit or public benefits and

68. See, e.g., Derek Ridgway, *Flexible Purpose Corporation vs. Benefit Corporation*, HANSONBRIDGETT (Sept. 4, 2012), <http://www.hansonbridgett.com/Publications/articles/2012-09-flexible-purpose.aspx> (calling the FPC “watered down” and opining that the FPC “will undoubtedly become more susceptible to ‘greenwashing,’ which may in turn erode the underlying purpose and benefits of the entity over time”); Clark & Vranka, *supra* note 27, at app. C, 4–9 (stating that the FPC law lacks the accountability and transparency of the benefit corporation law).

69. Clark & Vranka, *supra* note 27, at 8.

70. See, e.g., Callison, *supra* note 45, at 113–14; Loewenstein, *supra* note 40, at 1036–37.

71. DEL. CODE ANN. tit. 8, §§ 361–368 (2011 & Supp. 2015); see also Murray, *supra* note 54, at 350–64 (providing a brief history of the public benefit corporation in Delaware and comparing the Delaware legislation to the Model Benefit Corporation Legislation).

72. Murray, *supra* note 54, at 350 (noting the process, B Lab’s involvement, and the opinion of certain B Lab employees regarding the passage of the public benefit corporation law in Delaware); *Governor Markell Signs Public Benefit Corporation Legislation*, DELAWARE.GOV (July 17, 2013), <http://news.delaware.gov/2013/07/17/governor-markell-signs-public-benefit-corporation-legislation/>.

73. See generally Callison, *supra* note 29; Deborah J. Walker, *Please Welcome the Minnesota Public Benefit Corporation*, U. ST. THOMAS L.J. (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2408241.

74. Compare DEL. CODE ANN. tit. 8, §§ 361–368 (2011 & Supp. 2015), with MODEL BENEFIT CORP. LEGIS. (2014), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf; see also Murray, *supra* note 54, at 369–70 (comparing major provisions of the Delaware Public Benefit Corporation Law with the Model Benefit Corporation Legislation).

to operate in a responsible and sustainable manner.”⁷⁵ The Delaware PBC statute also requires PBCs to choose a specific purpose and to “manage or direct the business and affairs of the public benefit corporation in a manner that *balances* [1] the pecuniary interests of the stockholders, [2] the best interests of those materially affected by the corporation’s conduct, and [3] the specific public benefit or public benefits identified in its certificate of incorporation.”⁷⁶ The Delaware law only requires a benefit report every two years, instead of the annual requirement under the Model Benefit Corporation Legislation, and the Delaware PBC law does not require the report to be publicly posted.⁷⁷ Further, the Delaware law allows, but does not require, a Benefit Director or use of a third-party standard. In short, Delaware’s PBC law mostly pushes the Model’s benefit corporation framework toward increased private ordering.⁷⁸

The Colorado statute largely followed the Delaware PBC law, but Colorado has reporting requirements that more closely follow the Model.⁷⁹ The Corporate Laws Drafting Committee under the Colorado Bar Association (“CBA”) first attempted to pass a law that would allow firms to choose a general public benefit, a specific public benefit, or both.⁸⁰ The CBA then attempted to pass a law that mirrored Delaware in all areas.⁸¹ The CBA reportedly faced opposition from B Lab and its supporters on both attempts; eventually Colorado passed a compromise PBC law that followed Delaware in most areas except for the reporting requirements.⁸² The Minnesota PBC law, effective January 1, 2015, allows the formation of two types of entities: general benefit corporations and specific benefit corporations.⁸³ The general benefit corporation is akin to the Model-type benefit corporation and the specific benefit corporation is similar to the SPC.⁸⁴

75. DEL. CODE ANN. tit. 8, § 362(a) (2011 & Supp. 2015).

76. *Id.* § 365(a) (emphasis added); *see also* Murray, *supra* note 54, at 355 n.64 (discussing the debate on the choice to use the word “balance” in the Delaware PBC law and the word “consider” in the Model Benefit Corporation legislation in relation to the director duties toward stakeholder interests).

77. DEL. CODE ANN. tit. 8, § 366(b) (2011 & Supp. 2015).

78. Murray, *supra* note 54, at 351–54. Private ordering has been defined as “self-regulation voluntarily undertaken by private parties.” Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 376 (2005).

79. Herrick K. Lidstone, Jr., *The Long and Winding Road to Public Benefit Corporations in Colorado*, *COLO. LAW.*, Jan. 2014, at 40, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2266654 (last visited Sept. 20, 2015).

80. Callison, *supra* note 29, at 159–60.

81. *Id.* at 163.

82. *COLO. REV. STAT. ANN.* §§ 7-101-501–509 (West 2006 Supp. 2014); Callison, *supra* note 29, at 159–64.

83. Walker, *supra* note 73, at 2, 17.

84. *MINN. STAT. ANN.* § 304A (West 2011 & Supp. 2015).

The PBC laws are quite recent, so relatively little legal scholarship has been published on this specific entity type as of the publication of this Article. The academic articles that have been written have largely considered the PBC form to be an improvement on most of the existing social enterprise laws.⁸⁵ The same articles, however, have noted various issues with the PBC laws, including continued lack of clarity for directors and the seeming lack of effective enforcement mechanisms.⁸⁶

II. ITERATIONS AND INNOVATIONS IN SOCIAL ENTERPRISE LAW

As Part I demonstrates, states have passed a variety of social enterprise statutes and social enterprise law has drawn out conflicting views in the literature. Social enterprise law has evolved over time, sometimes due to the passage of a statute that creates a new entity type and sometimes due to the passage of a statute that simply modifies an existing entity type. As described in more detail in this Part, social enterprise statutes have evolved significantly over time. The L3C statutes are very thin and have few requirements, but they do clearly state that the common good must be the primary purpose of the L3C.⁸⁷ The benefit corporation statutes, along with the FPC, SPC, and PBC statutes, are less clear on the priorities of the entities than the L3C, but add significant additional detail in other areas.⁸⁸ The iterations and innovations involving the social enterprise forms, organized by legal issue, are discussed below.⁸⁹

A. Entity Purpose

Defining entity purpose has been at the heart of many of the social enterprise statutes.⁹⁰ For L3C statutes, the law is clear that “charitable or educational purposes” must dominate the “production of income.”⁹¹ Subsequent social enterprise statutes have defined entity purpose, but most have not clearly explained how the interests of shareholders and other stakeholders should be prioritized. For example, the Model Benefit

85. See generally Frederick H. Alexander, Lawrence A. Hamermesh, Frank R. Martin, & Norman M. Monhait, *M&A Under Delaware’s Public Benefit Corporation Statute: A Hypothetical Tour*, 4 HARV. BUS. L. REV. 255 (2014); Callison, *supra* note 29; Murray, *supra* note 54; Strine, *supra* note 52.

86. See *supra* note 85.

87. See, e.g., VT. STAT. ANN. tit. 11, §§ 4001(14), 4161–4163 (2010).

88. Murray, *supra* note 66.

89. See *infra* Part II.A–F.

90. See Clark & Vranka, *supra* note 27, at 15 (stating that defining corporate purpose to “create a material positive impact on society and the environment” is one of three major provisions in the benefit corporation statutes); see also Elizabeth Schmidt, *Vermont’s Social Hybrid Pioneers: Early Observations and Questions to Ponder*, 35 VT. L. REV. 163, 168 (2010) (noting the important social purpose provisions in the L3C statutes).

91. See, e.g., VT. STAT. ANN. tit. 11, § 4162 (2010).

Corporation Legislation and most states that follow the Model require a “general public benefit purpose.”⁹² Shareholders are included among the stakeholders that directors of benefit corporations must consider, but The Model Benefit Corporation Legislation does not provide prioritization among stakeholders.⁹³ The SPC statutes address what Bill Callison calls the “illiberalism problem” created by the broad, mandatory “general public [benefit] purpose,” by providing more flexibility in the definition of entity purpose.⁹⁴ The SPC statutes allow an entity’s focus to be on one or more specific stakeholders.⁹⁵ The PBC statutes, initially championed by Delaware, stake out middle ground by requiring both a specific public benefit purpose and a more general public purpose.⁹⁶ The SPC and PBC statutes, however, do not clearly address the issue of prioritization among shareholders and other stakeholders.⁹⁷

B. *Third-Party Standards and Social Reporting*

L3C statutes do not require the use of a third-party standard in measuring the social impact of an entity.⁹⁸ Benefit corporation statutes, most of which were passed after the L3C statutes, do require use of a third-party standard, while Delaware’s PBC statute expressly allows, but does not require, a third-party standard.⁹⁹ Colorado’s PBC statute follows the Model in requiring a third-party standard, while the SPC statutes do not require entities to use a third-party standard to measure social impact.¹⁰⁰

The L3C statutes do not expressly require any social reporting.¹⁰¹ The Model Benefit Corporation Legislation and most state benefit corporation statutes require annual benefit reports that must be posted on a public portion of the firm’s website.¹⁰² A few of the benefit corporation statutes,

92. MODEL BENEFIT CORP. LEGIS. § 201(a) (2014), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf.

93. *See id.* § 301.

94. Callison, *supra* note 29, at 151–52 (arguing that the “general public purpose” concept is overly restrictive and that different corporate actors are likely to have different understandings of what is good for society).

95. CAL. CORP. CODE § 3305 (West 2014); WASH. REV. CODE ANN. §§ 23B.25.020–030 (West 2013).

96. *See* DEL. CODE ANN tit. 8, §§ 362, 365 (2011 & Supp. 2015); *see also* COLO. REV. STAT. ANN. §§ 7-101-503, 506 (West 2006 & Supp. 2014).

97. *See* COLO. REV. STAT. ANN. §§ 7-101-503, 506 (West 2006 & Supp. 2014); *see also* CAL. CORP. CODE §§ 2500–3503 (West 2014).

98. *See, e.g.*, VT. STAT. ANN. tit. 11, §§ 4001(14), 4161–4163 (2010).

99. Murray, *supra* note 66; *see also* Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 690–91 (2013) (claiming that the third-party standard requirement is a cornerstone requirement of the benefit corporation legislation).

100. Murray, *supra* note 66.

101. *See, e.g.*, VT. STAT. ANN. tit. 11, §§ 3001–3023 (2010) (repeal effective July 1, 2016).

102. Murray, *supra* note 66. Forthcoming research by the author will show, however, that early benefit corporations have had miserably low compliance rates (under ten percent) with

namely Florida, Massachusetts, Minnesota, Nevada, New Hampshire, and New Jersey, create express penalties for failing to provide benefit reports.¹⁰³ For example, in New Jersey, if an annual benefit report is not filed for two years, then that benefit corporation will lose its benefit corporation status.¹⁰⁴ Most of the state benefit corporation statutes, however, have no express enforcement mechanism related to social reporting.¹⁰⁵ The California SPC statute requires both annual and special reports.¹⁰⁶ The Delaware PBC statute requires only biennial reports and the report only has to be shared with shareholders and not the general public, unless the PBC decides to require public disclosure.¹⁰⁷ A minority of states, including Arizona, Arkansas, Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, Pennsylvania, South Carolina, and Utah, require filing the annual benefit corporation report with the state.¹⁰⁸ While many of these states that require filing are also the states that have enforcement mechanisms for failing to file a report, some states like Utah, require filing of the benefit report with the secretary of state, but do not expressly mention a consequence for failing to file.¹⁰⁹ Even worse, many of the states neither require filing of the benefit report with the state nor do they have any effective enforcement mechanism for failing to produce the report on the firm's website.¹¹⁰

regard to the social reporting requirements. *See generally*, J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25 (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2682709.

103. FLA. STAT. ANN. § 607.613 (West 2007 & Supp. 2015); MASS. GEN. LAWS ANN. ch. 156E, § 7 (West 2005 & Supp. 2014); MINN. STAT. ANN. § 304A.301 (West 2011 & Supp. 2014); NEV. REV. STAT. ANN. § 78B.030(3) (LexisNexis 2010 & Supp. 2013); N.J. STAT. ANN. § 14A:18-11(d)(2) (West 2003 & Supp. 2015); N.H. REV. STAT. ANN. § 293-C:13 (LexisNexis 2014).

104. N.J. STAT. ANN. § 14A:18-11(d)(2).

105. Murray, *supra* note 66.

106. CAL. CORP. CODE §§ 2500–2517 (West 2014); *see also* Reiser & Dean, *supra* note 57, at 72–74 (discussing the extensive reporting requirements of the FPC statute).

107. DEL. CODE ANN. tit. 8, § 366 (2011 & Supp. 2015); *see also* Murray, *supra* note 54, at 371 (showing the differences between the Delaware PBC law and the Model Benefit Corporation Legislation).

108. ARIZ. REV. STAT. ANN. § 10-2442 (2013 & Supp. 2014); ARK. CODE ANN. § 4-36-401 (2001 & Supp. 2013); MASS. GEN. LAWS ANN. ch. 156E, § 16 (West 2005 & Supp. 2015); MINN. STAT. ANN. § 304A.301 (West 2011 & Supp. 2015); NEB. REV. STAT. § 21-414 (2012 & Supp. 2014); N.H. REV. STAT. ANN. § 293-C:13 (LexisNexis 2014); N.J. STAT. ANN. § 14A:18-11 (West 2003 & Supp. 2015); 15 PA. STAT. AND CONS. STAT. ANN. § 3331 (West 2013 & Supp. 2015); S.C. CODE ANN. § 33-38-500 (2012); UTAH CODE ANN. § 16-10b-402 (LexisNexis 2014).

109. *See* UTAH CODE ANN. § 16-10b-402.

110. Murray, *supra* note 66. This failure to require filing of the benefit report and the failure to provide enforcement mechanisms may be oversight or may reflect the reality that many states have extremely limited resources and are not willing to invest significantly in benefit corporations at this early stage.

C. Dissenters' Rights

Neither the L3C statutes nor the Model Benefit Corporation Legislation address dissenters' rights for shareholders who oppose the transition to or from social enterprise status.¹¹¹ The authors of the Proponent White Paper argue that dissenters' rights should not be included in social enterprise laws because dissenters' rights are usually coupled with a liquidity event and changing entity types would not provide the liquidity needed to pay dissenters.¹¹² This reasoning is not particularly persuasive because if converting to a benefit corporation was a prudent strategy, new shareholders could be found to buy out any dissenters.

A number of states have departed from the Model Benefit Corporation Legislation and expressly provided for dissenters' rights. California's benefit corporation and SPC statutes were the first to expressly address and require dissenters' rights.¹¹³ Florida, Minnesota, and Washington followed.¹¹⁴ Allowing dissenters' rights, but only when adopting benefit corporation status, not when terminating benefit corporation status, are the states of Colorado, Connecticut, Delaware, Massachusetts, Nevada, and South Carolina.¹¹⁵

Going in a different direction, Virginia addresses the issue of a potentially unwanted entity conversion by requiring one hundred percent shareholder approval for adoption of benefit corporation status, instead of the typical two-thirds shareholder vote.¹¹⁶ No known claims for dissenters' rights in the benefit corporation context currently exist. The mere existence of dissenters' rights in some states, however, may lead to better shareholder protection because of the significant financial liability that could be triggered if firms convert to (or in some states "from") a social enterprise entity form in the face of significant shareholder opposition. While dissenters' rights may protect shareholders who do not want such a change in firm entity type, dissenters' rights may also open the door to costly claims from private company shareholders who are simply looking for liquidity.

111. See, e.g., VT. STAT. ANN. tit. 11, §§ 4001(14), 4161–4163 (2010); Murray, *supra* note 66.

112. Clark & Vranka, *supra* note 27.

113. See Murray, *supra* note 66.

114. FLA. STAT. ANN. §§ 607.604–605 (West 2007 & Supp. 2015); MINN. STAT. ANN. § 304A.103 (West 2011 & Supp. 2015); WASH. REV. CODE ANN. § 23B.25.120 (West 2013).

115. See Murray, *supra* note 66.

116. VA. CODE ANN. §§ 13.1-785–786 (2011). Delaware requires ninety percent shareholder approval for a traditional corporation to convert to a public benefit corporation. DEL. CODE ANN. tit. 8, § 363 (2014).

D. Naming and Notification

One of the often-cited benefits of social enterprise legislation is the branding or signaling aspect, but this benefit may be difficult to capture if a large percentage of the public are not aware of the company's social enterprise entity selection.¹¹⁷ From a legal standpoint, the Model Benefit Corporation Legislation and most benefit corporation state statutes require acknowledgment that the firm is a benefit corporation in the articles of incorporation, but have largely not required notification of entity type in the formal name.¹¹⁸ L3C statutes require that the firm name include the abbreviation L3C.¹¹⁹ California (SPC), Colorado (PBC), Delaware (PBC), Louisiana (BC), Minnesota (PBC), and Washington (SPC) also require designation of the entity type in the firm name.¹²⁰ Statutes without a naming requirement have made it difficult on researchers, and presumably interested consumers and government officials, to track these social enterprises. According to Erik Trojian, B Lab's Director of Policy, the naming requirement was not included in the Model because of the administrative costs that existing firms would have to shoulder to amend various documents related to their name.¹²¹ Of course, B Lab's motivation is to make adoption of these forms as easy as possible; state legislatures, however, may wish to include a naming requirement, as a number of states have, to improve transparency and traceability of these social enterprises.¹²² Some states, including California, Colorado, Delaware, Louisiana, Maryland, Nevada, and New York, have required notification of the entity type on stock certificates.¹²³

Social enterprise legal entity forms are still not well known in many quarters.¹²⁴ The names of the social enterprise entity forms often include words like "benefit," "social," or "sustainable," therefore requiring that the entity type be included in the company's name could aid social enterprises

117. Loewenstein, *supra* note 40, at 1034–35 (discussing the branding challenges that may occur if the benefit corporation statutes vary significantly from state to state); Murray, *supra* note 54, at 357–58; Yockey, *supra* note 42, at 812–13.

118. Callison, *supra* note 45, at 93 ("There are no name requirements, either in the positive sense, where benefit corporations must designate themselves as such, or in the negative sense, where corporations that are not benefit corporations cannot use a name implying benefit corporation status."); Murray, *supra* note 54, at 357–58 (discussing some of the difficulties arising from the absence of a naming requirement in the benefit corporation statutes); Murray, *supra* note 66.

119. See, e.g., VT. STAT. ANN. tit. 11, § 4005(a)(2) (2010).

120. Murray, *supra* note 66.

121. Telephone Interview with Erik Trojian, Dir. of Policy, B Lab (Aug. 15, 2013).

122. *Id.* (discussing the difficulties some companies might have in switching to the benefit corporation form if those companies were required to change their legal name).

123. Murray, *supra* note 66.

124. Reiser, *supra* note 29, at 622–24 (claiming that the benefit corporation brand is not yet well known in the marketplace).

in signaling to managers, employees, customers, and governments the social mission of the firms.¹²⁵ As Professor Joseph Yockey has argued, social enterprise laws may serve as focal points and can “direct[] social enterprises toward a desired starting point for structuring their behavior.”¹²⁶ Even if the social enterprises were well known, Professor Usha Rodrigues wonders if social enterprises can send a strong signal to stakeholders given their dual focus on public purpose and profit.¹²⁷

The names chosen for the hybrid forms—low-profit limited liability company, flexible purpose corporation, social purpose corporation, benefit corporation, and public benefit corporation—may play a role in entity-norm creation and signaling.¹²⁸ The weakest names, from a social perspective, are “low-profit limited liability company” and “flexible purpose corporation.” Recently, each of those forms has attracted less attention, perhaps at least partially owing to the entity names, which do not clearly state the social purpose of the hybrid form. The flexible purpose corporation name has been abandoned altogether.¹²⁹ In contrast, the names “social purpose corporation,” “benefit corporation,” and “public benefit corporation” connote a focus on the society at large.¹³⁰ The public does not generally take the time to dive into the nuances of corporate law, therefore, the name of the entity form may be important in the initial shaping of the

125. Murray, *supra* note 54, at 505–06; Yockey, *supra* note 42, at 812 (noting the influence entity choice may have on the culture of social enterprises); *cf.* Robert C. Illig, *Oregon’s Experiment with Sustainable Corporate Governance: A Friendly Critique*, 25 J. ENVTL. L. & LITIG. 189, 202 (2010) (“Signaling is a dangerous sport, as one loses control of the signal as soon as it is commenced, and it is frequently received either too loudly or not at all. As a result, signals are subject to the twin risks of misinterpretation and misdelivery.”).

126. Yockey, *supra* note 42, at 808.

127. Usha Rodrigues, *Entity and Identity*, 60 EMORY L.J. 1257, 1318–19 (2011).

128. Stronger signals might be sent through more than “mere talk” by states. For example, tax incentives might prove to be a strong signal because in that case states will have made a financial sacrifice, at least in the short run, unlike simply passing a social enterprise statute, which requires almost no financial support from the state. *See* Illig, *supra* note 125, at 194 (arguing that Oregon could send a strong signal to green businesses by “eliminat[ing] the state income tax on any profits an organization earns from selling green technologies”); *id.* at 202; Murray, *supra* note 42.

129. Alicia Plerhopes, *Flexible Purpose Corporations Change Their Name*, SOCENTLAW.COM (Oct. 20, 2014), <http://socentlaw.com/2014/10/flexible-purpose-corporations-change-their-name/>.

130. The positive nature of these names may give rise to reasonable calls for a state requirement for socially beneficial activity. *See* Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 333 (2014) (“Under concession theory, the state retains significant presumptive authority to regulate the corporate entity in exchange for granting this bundle of rights to incorporators.” (citing Larry E. Ribstein, *Why Corporations?*, 1 BERKELEY BUS. L.J. 183, 208 (2004))). *But see* First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978) (noting that a concession theory, the theory that “corporations, as creatures of the State, have only those rights granted them by the State” was an “extreme position” with regard to traditional corporations). Professor Padfield argues that he is only using “‘concession theory’ to denote a theory of the corporation that gives deference to government regulation, as opposed to removing all limits on the state’s right to regulate corporations.” Padfield, *supra*, at 333.

public's view of the entity.¹³¹ Despite the signals sent by the name of the forms, the profit-making of these hybrid forms may taint the social identity if stronger private or public regulation is not put in place to guard against rent-seeking by profit-focused actors.¹³² In fact, the society-focused name might even prove to be a detriment when scandals involving those firms are brought to light and the public lashes out against the hypocrisy.

E. Legacy Preservation Provisions

Connecticut cut a new path with its legacy preservation provisions.¹³³ The legacy preservation provision is an interesting new statutory addition that allows benefit corporations in Connecticut the option to “lock in” their social mission after a twenty-four-month waiting period and unanimous shareholder approval.¹³⁴ A Connecticut benefit corporation with an adopted legacy provision that chooses to merge may only merge with a similar benefit corporation with a legacy provision.¹³⁵ A disposition of assets of a Connecticut benefit corporation with an adopted legacy preservation provision may only be made to a charitable organization or a benefit corporation with a similar legacy preservation provision.¹³⁶

This legacy provision may give some confidence to impact investors who are looking for assurances that their money will be used for social purposes. The provision may prevent managers of benefit corporations from “selling out” when the mission fades or the potential profits from a sale increase. The legacy provision, however, does not ensure that a benefit corporation will do any social good, nor does it prevent managers of benefit corporations from rent-seeking through excessive salaries and personal benefits. Finally, the legacy provision may be overly restricted, as the greatest social good may be achieved by selling the company for a high price to a traditional corporation and allowing the benefit corporation's

131. See Illig, *supra* note 125, at 193 (noting the public's lack of familiarity with corporate law).

132. See MUHAMMAD YUNUS, *BUILDING SOCIAL BUSINESS: THE NEW KIND OF CAPITALISM THAT SERVES HUMANITY'S MOST PRESSING NEEDS* 14–31 (2010) (arguing that social businesses should be sustainable, but should not be run with shareholders seeking profits because the conflicts are too strong).

133. James Woulfe, *Woulfe on Connecticut Benefit Corporation Law*, BUS. L. PROF BLOG (July 18, 2014), http://lawprofessors.typepad.com/business_law/2014/07/woulfe-on-connecticut-benefit-corporation-law.html. The Connecticut benefit corporation statute became effective on October 1, 2014. *State by State Legislative Status*, *supra* note 25.

134. CON. GEN. STAT. ANN. § 33-1355 (2005 & Supp. 2015). The purpose of this waiting period is not clear, but it may lead to fewer benefit corporations adopting this provision because it may simply vanish from the minds of the managers after the benefit corporation is formed. The statute is not clear regarding whether managers could adopt the provision when the benefit corporation is formed, to be effective twenty-four months from formation.

135. *Id.* § 33-1356(c).

136. *Id.* § 33-1356(d).

shareholders to give to society in their own ways through the proceeds.¹³⁷ A better solution to mission drift may be found in a mandatory partial asset lock, a minimum charitable contribution rule, or the use of financial instruments that encourage a social focus.¹³⁸ These solutions are not as highly restrictive, serve a signaling purpose, and provide a likely social benefit.¹³⁹

F. *Relatively Stagnant Areas*

Some areas of social enterprise law have remained relatively stagnant. For example, most social enterprise laws that have addressed the area have provided significant protection to managers.¹⁴⁰ Originally, the Model Benefit Corporation Legislation did not allow any monetary liability for the directors and officers of benefit corporations for “failure of the benefit corporation to pursue or create general public benefit or specific public benefit.”¹⁴¹ Later versions of the Model Benefit Corporation Legislation allowed benefit corporations to opt into monetary liability for such a failure to pursue or create public benefit.¹⁴² The Delaware PBC protects directors, as long as their conduct “is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.”¹⁴³

No social enterprise laws to date have provided automatic standing to sue to external stakeholders despite the mandate in the statutes to “consider” or “balance” external stakeholder interests.¹⁴⁴ In addition, no state, other than Connecticut, has done much in the way of locking in a mission or providing for serious consequences if the mission is aborted.¹⁴⁵

137. See Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html (arguing that businesses should focus on increasing its profits, while staying within “the rules of the game,” and leave “social responsibility” to individuals).

138. See generally Murray, *supra* note 40; Reiser & Dean, *supra* note 57.

139. While no proposed solution is likely to be without some flaws, a minimum charitable contribution (in time or money) would place those contributions into a charitable regime that is much more heavily regulated than the for-profit market.

140. Murray, *supra* note 66.

141. MODEL BENEFIT CORP. LEGIS. § 301(c)(2) (2014), http://benefitcorp.org/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf; Murray, *supra* note 40, at 22 n.98.

142. MODEL BENEFIT CORP. LEGIS. § 301(c)(2), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf; Murray, *supra* note 40, at 22 n.98. There are no indications that any benefit corporations have yet to take advantage of the opportunity to opt into allowing the possibility of monetary liability for directors or officers who fail to pursue or create public benefit.

143. DEL. CODE ANN. tit. 8, § 365(b) (West 2011 & Supp. 2015); Delaware Public Benefit Corporations: FAQs (on file with author).

144. Murray, *supra* note 66.

145. Murray, *supra* note 66; Woulfe, *supra* note 133; *Benefit Corporations Have Arrived in Connecticut*, MURTHA CULLINA LLP (June 2014), http://www.murthalaw.com/news_alerts/1404-

Even Connecticut's legacy protection provisions are optional.¹⁴⁶ Most states allow the benefit corporations to drop their status with a two-thirds shareholder vote. Since the passage of the first statute, the penalty for L3Cs violating the statute has simply been conversion to an LLC; the L3C statutes provide neither express penalties in addition to the conversion nor any statutory remedy to the L3C members who, after conversion, only hold an interest in an LLC.¹⁴⁷

Finally, the general public benefit purpose language and the need of a third-party standard appear to be two items that B Lab clings to in their promoting of the benefit corporation law.¹⁴⁸ Delaware was able to alter the general public purpose language and was able to make the third-party standard optional.¹⁴⁹ Reportedly, B Lab's response to other states that try similar manipulations, especially in regard to the third-party standard requirement, is to tell those states, "[you are] not Delaware."¹⁵⁰

Parts I and II have described *what* has come into being and what has changed in social enterprise law. Parts III and IV will attempt to describe *why* the evolution of social enterprise law occurred and "how" states may proceed in the future.

III. JURISDICTIONAL COMPETITION OR JURISDICTIONAL POSITIONING

A. *Race to the Bottom, Race to the Top, or Neither?*

Jurisdictional competition for corporation charters has been heavily analyzed and hotly debated in the academic legal literature.¹⁵¹ In 1974, William Cary, then a law professor at Columbia University, wrote a seminal article in the *Yale Law Journal* where he argued that Delaware corporate law was leading a "race for the bottom."¹⁵² In basic terms, the race to the bottom theory posits that states competing for charters have enacted management-friendly enabling statutes and "have watered the rights of shareholders vis-à-vis management down to a thin gruel."¹⁵³

may—benefit-corporations-arrived-connecticut (noting the uniqueness of Connecticut's legacy provisions in its benefit corporation statute).

146. CON. GEN. STAT. ANN. § 33-1355 (2005 & Supp. 2015).

147. VT. STAT. ANN. tit. 11, § 4163(a) (2010) ("A limited liability company that elects to be an L3C and subsequently fails to satisfy any one of the requirements set forth in section 4162 of this title shall immediately cease to be a low-profit limited liability company, but by continuing to meet all the other requirements of this chapter, continues to exist as a limited liability company.").

148. Telephone Interview with Erik Trojjan, Dir. of Policy, B Lab (Aug. 15, 2013).

149. DEL. CODE ANN. tit. 8, §§ 362(a), 366 (West 2011 & Supp. 2015).

150. Callison, *supra* note 29, at 163.

151. See generally Roberta Romano, *The Market for Corporate Law Redux*, in OXFORD HANDBOOK OF LAW AND ECONOMICS (Francesco Parisi ed.) (forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514650.

152. Cary, *supra* note 3.

153. *Id.* at 666.

Professor Cary's seminal article has been cited over 1000 times and a popular legal academic blog even bears the title "The Race to the Bottom."¹⁵⁴ Additional research has sprouted to support and add to Cary's claims.¹⁵⁵

Others, including Judge Ralph Winter of the U.S. Court of Appeals for the Second Circuit, have countered that Delaware has led a "race for the top."¹⁵⁶ Proponents of the "race to the top" theory argue that investors will prefer firms that do not excessively favor management and that competition for charters creates incentives to construct the optimal corporate code. Over time, the choice regarding where to incorporate has essentially boiled down to two potential states: Delaware and the home state of the firm.¹⁵⁷ As explained by Professor Daines, "Federalism has thus resulted in a series of local markets with one national producer, rather than a nationwide 'race to the top/bottom.'"¹⁵⁸ Professor Romano mentioned "Delaware's reputation for responsiveness to corporate concerns"¹⁵⁹ and "comprehensive body of case law, judicial expertise in corporation law, and administrative expertise" as reasons for Delaware's preeminence.¹⁶⁰ Some commentators claim this "race to the top" versus "race to the bottom" debate is now at a stalemate.¹⁶¹

154. Westlaw Keycite of William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974); [THERACETOTHEBOTTOM.ORG](http://www.theracetothetop.org/), <http://www.theracetothetop.org/> (last visited Sept. 21, 2015).

155. See, e.g., Oren Bar-Gill, Michal Barzua & Lucian Bebchuk, *The Market for Corporate Law*, 162 J. INSTITUTIONAL & THEORETICAL ECON. 134, 137, 162 (2006); Lucian Bebchuk, Alma Cohen & Allen Ferrell, *Does the Evidence Favor State Competition in Corporate Law?*, 90 CAL. L. REV. 1775 (2002); Bebchuk, *supra* note 2; Richard W. Jennings, *Federalization of Corporation Law: Part Way or All the Way*, 31 BUS. LAW. 991, 993-94 (1976); Stanley A. Kaplan, *Fiduciary Responsibility in the Management of the Corporation*, 31 BUS. LAW. 883, 885-87 (1976).

156. See generally ROMANO, *supra* note 1; Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 527-31 (2001); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977); Judge Ralph Winter, *Private Goals and Competition Among State Legal Systems*, 6 HARV. J.L. & PUB. POL'Y 127 (1982); cf. Ralph K. Winter, *The "Race for the Top" Revisited: A Comment on Eisenberg*, 89 COLUM. L. REV. 1526, 1528 (1989) ("I am far more confident that Professor Cary's argument about the race to the bottom is wrong than I am that my argument that Delaware is leading the race to the top is right.").

157. Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1559 (2002).

158. *Id.*; see also Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 394-402 (2003) (discussing the existence of "home-state advantage" in the market for corporate law).

159. ROMANO, *supra* note 1, at 38.

160. *Id.* at 39.

161. See, e.g., Robert Anderson IV & Jeffrey Manns, *The Delaware Delusion*, 93 N.C. L. REV. 1049, 1059 (2015); Roe *supra* note 4, at 634. But see Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 842 (1995) (claiming that there is "broad consensus" in favor of some form of the "race to the top" theory).

More recent scholarship on jurisdictional competition has suggested that there is no longer vigorous competition between states for corporate charters, though perhaps there had been such competition in the past before Delaware became so dominant.¹⁶² These commentators argue that Delaware's main competition in the corporate law arena now comes from the federal government, rather than from other states, and have posited that federal law, not state law through state competition, has accounted for most changes in the amount of shareholder protection over the last eighty years.¹⁶³ Professor Romano, however, has argued that Delaware publicly expresses more concern about state competition than federal competition, and that federal legislation in the corporate law arena is still "rare and episodic."¹⁶⁴ Some commentators argue that Delaware has developed monopoly-like power for the charters of large out-of-state corporations and has held the other states at bay by taking a middle-of-the-road approach, balancing appeal to managers and shareholders.¹⁶⁵ Other scholars recently argued that even if states do not actively compete for out-of-state incorporations, they compete defensively to retain corporations located within their borders.¹⁶⁶ Still others claim that states do not even compete defensively because the financial stakes are too low for states other than

162. Mark J. Loewenstein, *Delaware as Demon: Twenty-Five Years After Professor Cary's Polemic*, 71 U. COLO. L. REV. 497, 501–02 (2000); see also Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 748–49 (2002) (concluding that states, other than Delaware, do not have sufficient financial incentive to compete for incorporations); Roe, *supra* note 4.

163. See, e.g., Bebchuk & Hamdani, *supra* note 4, at 604–05; Brian R. Cheffins, Steven A. Bank & Harwell Wells, *The Race to the Bottom Recalculated: Scoring Corporate Law over Time* (UCLA Sch. of Law, Law-Econ Research Paper No. 10, 2014; ECGI-Law, Working Paper No. 261, 2014; Univ. of Cambridge Faculty of Law, Research Paper No. 54, 2014; Temple Univ. Legal Studies, Research Paper No. 38, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2475242; Roe, *supra* note 4.

164. Romano, *supra* note 151, at 46.

165. See e.g., Krešimir Piršl, *Trends, Developments, and Mutual Influences Between United States Corporate Law(s) and European Community Company Law(s)*, 14 COLUM. J. EUR. L. 277, 315–17 (2008).

166. George W. Dent, Jr., *For Optional Federal Incorporation*, 35 J. CORP. L. 499, 505 (2010) (noting that while states do not appear to be competing with Delaware for nationwide dominance, there is evidence that states take action, e.g., through statutory amendments, to defend themselves against the possibility that their current companies will leave the state); Gordon Moodie, *Forty Years of Charter Competition: A Race to Protect Directors from Liability?* (John. M. Olin Ctr. for Law, Econ., & Bus. Fellows' Discussion Paper Series, Paper No. 1, 2004), www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Moodie_1.pdf (showing that states that did not react to major statutory innovations, often from Delaware, lost more local corporations to other states than those that did); Romano, *supra* note 2, at 226; Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 214–36 (2006) (tracking the diffusion of certain corporate law innovations across states and claiming that "after Delaware, states that are early to adopt corporate law innovations are more likely to succeed in the chartering market by retaining more locally-domiciled firms").

Delaware.¹⁶⁷ These commentators claim that political factors and economic barriers prevent states from competing with Delaware.¹⁶⁸

Additionally, some commentators have tried to explain Delaware's sustained success by pointing to Delaware's expert judiciary and their responsive legislature.¹⁶⁹ Others have noted the positive network externalities produced by having many other companies formed in the same state.¹⁷⁰ Professors Robert Anderson and Jeffrey Manns use empirical data around merger reincorporation to claim that Delaware law does not add significant economic value and that the state is dominant simply because lawyers are familiar with the state's law and assume it is superior.¹⁷¹ Professors Brian Broughman, Jesse Fried, and Daran Ibrahim contend that Delaware is dominant, at least in part, because its law serves as "lingua franca" for investors across the country.¹⁷²

B. Indeterminacy and Price Discrimination

Professor Ehud Kamar has argued that the indeterminacy of Delaware's corporate law prevents other states from benefiting from Delaware's positive learning and network externalities and increases Delaware's market power.¹⁷³ Professor Kamar with Professor Marcel Kahan has stated that Delaware uses its significant market power to increase its profits through price discrimination; currently Delaware enjoys

167. Kahan & Kamar, *supra* note 162, at 699–700 (arguing that the financial incentives for states to engage in defensive competition are extremely weak because of the minimal amounts collected from franchise tax revenue and legal business). Kahan and Kamar appear open, however, to the possibility that the benefits to local lawyers may play a role, albeit a minor role, in states attempting to retain locally incorporated businesses. *Id.*

168. *Id.* at 724–35 (claiming the economic entry barriers are created by Delaware's expert and well-paid judges, Delaware's well-known corporate law, and Delaware's reputation). The authors also claim that the political factors deterring competition with Delaware include the relatively small size and delay of profits from incorporation competition, focus on other priorities, and opposition of local interest groups. *Id.*; see also, Marcel Kahan, *The State of State Competition for Incorporations* (NYU Law and Economics Research Paper, No. 14-19, August 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474658 (arguing that competition literature can be divided into three debates: (1) a "directional" debate over whether firms would choose laws that benefit managers or laws that benefit shareholders; (2) a debate on "whether, how, and which states compete for incorporations," and (3) a debate around federalism and corporate law).

169. Romano, *supra* note 151, at 52–55.

170. Klausner, *supra* note 161, at 844–47 (claiming that the value of a corporation's charter increases along with increases in the number of firms formed in the state). Klausner argues that legal services and judicial precedent are likely to improve with a larger network and that once Delaware took a commanding lead, there was a self-reinforcing dynamic that helped the state maintain and even extend its lead. *Id.*

171. Anderson & Manns, *supra* note 161.

172. Brian Broughman, Jesse M. Fried & Darian Ibrahim, *Delaware Law as Lingua Franca: Theory and Evidence*, 57 J. L. & ECON. 865 (2014).

173. Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908 (1998). Legal indeterminacy creates uncertainty stemming from broad standards that provide for significant judicial discretion. *Id.* at 1913–15.

the ability to charge large firms a premium for incorporation, up to \$180,000 per year.¹⁷⁴ Professor Moshen Manesh has claimed that Delaware does *not* have the same market power with LLCs because of, among other things, the contractibility and reduction of legal indeterminacy in LLC law.¹⁷⁵ Despite the apparent lack of ability to price discriminate in the LLC market, professors Bruce Kobayashi and Larry Ribstein concluded that Delaware has won the competition for LLCs for many of the same reasons Delaware has won the competition for corporate charters, and that most other states seem more interested in retaining local LLCs than fighting for LLCs from outside their state.¹⁷⁶

Benefit corporation statutes provide, potentially, even more room for judicial intervention as they currently mandate a plethora of interests that directors of benefit corporations must consider. As mentioned above, the benefit corporation must serve a general public benefit purpose, defined as: “[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.”¹⁷⁷ Almost each word in this key definition could use judicial interpretation. Further, benefit corporation statutes do not allow contracting around or out of the “general public benefit purpose” which takes the issue out of the hands private parties and leaves significant questions for the courts to answer.¹⁷⁸ On the other hand, benefit corporation statutes provide significant protection to managers, which means plaintiffs’ attorneys may not find lawsuits worth bringing, especially if most benefit corporations remain small and unable to pay any large damage awards.¹⁷⁹ Also, currently, most of the benefit corporations formed are small entities and incapable or unwilling to pay large

174. See Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1210–14, 1229 (2001) (discussing the evidence and sources of Delaware’s market power); *Corporate and UCC Fee Information: Franchise Tax Calculator*, STATE OF DELAWARE, <https://corp.delaware.gov/fee.shtml> (noting the maximum fee of \$180,000 a year) (last visited Nov. 21, 2010).

175. See Manesh, *supra* note 31, at 220–41 (explaining that Delaware’s network and judicial advantages are diminished in the LLC context).

176. Kobayashi & Ribstein, *supra* note 2, at 136 (concluding that the quality of the courts is a major factor in attracting LLCs to Delaware and noting that most substantive provisions do not appear to have a significant impact in the LLC market).

177. MODEL BENEFIT CORP. LEGIS. § 102 (2014), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf.

178. Callison, *supra* note 45; J. Haskell Murray, *supra* note 40.

179. MODEL BENEFIT CORP. LEGIS. §§ 301(c), 303(c), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf (protecting directors and officers, respectively, from monetary damages stemming from the directors’ and officers’ action or inaction (as long as acting in compliance with general business duties and the benefit corporation statute) or “failure of the benefit corporation to pursue or create general public benefit or specific public benefit”).

incorporation fees.¹⁸⁰ If benefit corporations become a more popular vehicle for large corporations in the future, and if at least one state can differentiate its product sufficiently, the indeterminacy in the benefit corporation law allows for the possibility of significant price discrimination. The social enterprises built on the LLC base (L3C and Benefit LLC), however, tend toward increased contractibility where potential market power may not be as strong.¹⁸¹

C. Current Financial Stakes and Jurisdictional Positioning

Appendix A to this Article sets forth the number of benefit corporations and L3Cs formed, respectively, in each state as the given dates.¹⁸² The data collection process for benefit corporations was challenging. Kate Cooney (Yale University), Matthew Lee (INSEAD), Justin Koushyar (Emory University), and I collected data over the course of more than twelve months. Many states we contacted did not distinguish between traditional corporations and benefit corporations in their databases.¹⁸³ We had to work our way through secretary of states' offices to find someone who even knew what benefit corporations were. Generally, once we found a knowledgeable person, we had to request a search of their database. Some states were better organized than others. Delaware, along with a few other states like California, had been tracking benefit corporations before we called and were able to provide the data quickly.¹⁸⁴ For the L3C data we relied on the collection efforts of interSector Partners, which has been collecting this data consistently.¹⁸⁵ L3Cs are likely a bit easier to track because the statutes generally require some form of "L3C" in the entity name, while most benefit corporation statutes do not have naming requirements.¹⁸⁶

The best data to date suggests that there is currently very little at stake for states in the social enterprise area, with fewer than 5000 social enterprises formed nationwide.¹⁸⁷ This number is insignificant in the face of almost six million corporations and over three million partnerships

180. *Find a Benefit Corporation*, BENEFIT CORPORATION, <http://benefitcorp.net/businesses/find-a-benefit-corp> (last visited Oct. 29, 2015). Most of the benefit corporations listed are extremely small and many do not even have company websites. *Id.*

181. Manesh, *supra* note 31, at 211–16.

182. *See infra* Appendix A.

183. Part of the benefit corporation legislation pitch to states has been that the law will cost extremely little to implement.

184. Unfortunately, California notified us that they planned to stop collecting data on our behalf, our contact person at the state left his position, and it became difficult to find another person knowledgeable about benefit corporations at their Secretary of State's office.

185. *Here's the Latest L3C Tally*, *supra* note 5.

186. *See supra* Part II.D.

187. *See infra* Appendix A.

currently in existence.¹⁸⁸ The interest in social enterprises would have to increase exponentially for any state to make considerable revenue off of social enterprise franchise fees. States like New Jersey, and South Carolina have been stuck at single digit numbers of benefit corporations for well over twelve months.¹⁸⁹ Washington, D.C. also has fewer than ten benefit corporations and its first (and, for a time, only) benefit corporation was formed with the assistance of the Georgetown Law Center Social Enterprise and Nonprofit Clinic.¹⁹⁰ Professor Eric Talley found that only sixty benefit corporations and fifteen flexible purpose corporations (now called SPCs) were formed in the first eight months of the California laws being enacted.¹⁹¹ Only 5% of the entities formed were headquartered outside of California, suggesting that virtually no revenue was brought in from companies outside of the state.¹⁹² Currently, there does not appear to be vigorous competition for out-of-state social enterprises because so few exist, making the potential financial rewards for states negligible.

If the financial rewards related to social enterprises are currently so small, why are states passing social enterprise laws? One logical explanation could be called “jurisdictional positioning.” Jurisdictional positioning could be defined as states making sure that they are in a good starting place when the rewards in an area reach a level worth vigorously competing to win. Early movers have a distinct advantage in jurisdictional competition due to significant firm migration costs and the time consuming gestation of network and learning effects.¹⁹³ In addition to the potential

188. U.S. CENSUS DEP’T, 2012 STATISTICAL ABSTRACT 491 (2012) (based on 2008 federal tax filings), <https://www.census.gov/prod/2011pubs/12statab/business.pdf>.

189. See *infra* Appendix A.

190. *Georgetown Law Students Incorporate First Benefit Corporation in D.C.*, GEO. L. (Nov. 21, 2013), <http://www.law.georgetown.edu/news/press-releases/georgetown-law-students-incorporate-benefit-corporation.cfm>.

191. Eric L. Talley, *Corporate Form and Social Entrepreneurship: A Status Report from California (and Beyond)* (UC Berkley Public Law Research Paper, No. 2144567, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144567.

192. *Id.* at 8.

193. See Jonathan Macey, *Delaware: Home of the World’s Most Expensive Raincoat*, 33 HOFSTRA L. REV. 1131, 1138–39 (2005) (describing Delaware’s first mover advantages in the area of traditional corporations). The growth in the “impact investing” movement, which is partially tied to the social enterprise movement, may be one of the things giving states hope of a later payday related to social enterprise. ANTONY BUGG-LEVINE & JED EMERSON, *IMPACT INVESTING: TRANSFORMING HOW WE MAKE MONEY WHILE MAKING A DIFFERENCE* (2011). Large investment banks like J.P. Morgan and Credit Suisse are devoting more resources to impact investing, which, at least in part, services social enterprise. See *Corporate Responsibility and Social Finance*, JPMORGAN CHASE & CO., <http://www.jpmorganchase.com/corporate/Corporate-Responsibility/social-finance> (last visited Sept. 28, 2015); *Responsible Investments*, CREDIT SUISSE, <https://perspectives.credit-suisse.com/ch/private-clients/investments/en/our-products/sustainable-investments/product-range.jsp> (last visited Sept. 28, 2015). Moreover, many of the nation’s top business schools have established social enterprise or social innovation programs, signaling that the next generation of business leaders may be more interested in social businesses. See, e.g., *Social Enterprise*, HARV. BUS. SCH., <http://www.hbs.edu/socialenterprise/>

financial rewards from winning a social enterprise charter competition, states could also be interested in the potential positive externalities flowing from social enterprises' focus on society and the environment.

D. State Niches and Differentiation from Delaware

At this point in jurisdictional competition for business entities, most states have recognized that they cannot compete with Delaware for traditional, large corporations.¹⁹⁴ Instead, states have started to find niches where they can develop expertise and competitive advantage.

Nevada has, perhaps, been the most aggressive challenger of Delaware, loosening its laws to protect managers (directors and officers) even more than Delaware and advertising the benefits of Nevada corporate law heavily.¹⁹⁵ Nevada also charges a much lower maximum franchise tax than Delaware: \$180,000 versus \$11,100.¹⁹⁶ Further, Professors Kobayashi and Ribstein argue that Nevada may be lowering the costs to control cheating for firms through the adoption of more bright-line rules for liability.¹⁹⁷ Some authors claim that Nevada is the only state other than Delaware to openly compete for corporation charters and attract a significant number of out-of-state corporations.¹⁹⁸ Nevada, however, seems to focus most of its efforts on closely-held entities.¹⁹⁹ Closely-held entities are a large group of companies, and perhaps should not be called a niche, but Nevada seems to be shying away from direct competition with Delaware over large public companies, where Delaware is strongest.²⁰⁰

North Dakota attempted to differentiate itself by making its law friendlier to shareholders and focusing on shareholders and shareholder

(last visited Sept. 28, 2015); *Center for Social Innovation*, STAN. GRADUATE SCH. OF BUS., <http://csi.gsb.stanford.edu> (last visited Sept. 28, 2015); *Social Impact*, WHARTON, U. OF PA., <http://socialimpact.wharton.upenn.edu/projects/> (last visited Sept. 28, 2015); *Center for the Advancement of Social Entrepreneurship*, DUKE, THE FUQUA SCH. OF BUS., <http://www.caseatduke.org> (last visited Oct. 10, 2015).

194. See, e.g., Telephone Interview with James Woulfe, Public Policy and Impact Investing Specialist at the Social Enterprise Trust (Jan. 29, 2015) (discussing how Connecticut is looking for ways to attract types of businesses, such as social enterprises, that may not be Delaware's primary focus).

195. Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 949–56, 964–65 (2012).

196. *Id.* at 973–74. As Professor Barzuza notes, even though Nevada is less expensive than Delaware, Nevada charges a maximum initial fee of \$30,000 in addition to its maximum annual fee of \$11,100, which is much more expensive for incorporation than many other states. *Id.* *Corporate and UCC Fee Information: Franchise Tax Calculator*, *supra* note 174.

197. Bruce H. Kobayashi & Larry E. Ribstein, *Nevada and the Market for Corporate Law*, 35 SEATTLE U. L. REV. 1165, 1168–69 (2012).

198. Kahan & Kamar, *supra* note 162, at 716 (citing John G. Edwards, *Nevada Joins the Company of Top Incorporation States*, LAS VEGAS REV. J., Feb. 8, 1998, at 1K).

199. *Id.* at 716–17; Piršl, *supra* note 165, at 317.

200. Kobayashi & Ribstein, *supra* note 2.

activists, rather than managers.²⁰¹ By most accounts, however, North Dakota's experiment, while an interesting one, failed to attract many out-of-state corporations.²⁰² Although North Dakota tried a different strategy than Delaware, it did not seem to focus on a narrower group of companies like most of the other states mentioned in this Section. This lack of narrow focus may have hurt North Dakota.

Outside of Nevada and North Dakota, numerous other states have attempted to chip away at Delaware by focusing on relatively narrow types of companies. These companies are often in complex industries that require special expertise, sophisticated laws, and benefit from tax or other favorable treatment. For example, Wyoming and South Dakota have gotten into the asset protection and trust race.²⁰³ Oregon has attempted to be a leader for green companies, even before the current social enterprise law movement began in earnest in the United States.²⁰⁴ Connecticut has made a bid for financial services companies through tax provisions and other laws.²⁰⁵ Maryland has attracted a number of regulated investment firms, such as Real Estate Investment Trusts ("REITs"). In 2000, Maryland ranked second only to Delaware in the ranking of incorporations of U.S. public companies.²⁰⁶ Massachusetts, like Maryland, has gained some traction in

201. Mark J. Roe, *Delaware's Shrinking Half-Life*, 62 STAN. L. REV. 125, 150–51 (2009) (explaining North Dakota's strategy of focusing on a different group of corporate stakeholders, namely shareholder activists).

202. Barzuza, *supra* note 195, at 971. Barzuza and others mention American Railcar Industries, Inc. as one of, if not the only, major corporation to reincorporate in North Dakota. *Id.* Carl C. Icahn, who had supported the North Dakota legal changes, controlled American Railcar. *Id.*; see also Joshua P. Fershee, *The North Dakota Publicly Traded Corporations Act: A Branding Initiative Without a (North Dakota) Brand*, 84 N.D. L. REV. 1085, 1088–89, 1105 (2008).

203. See Timothy O. Beppler & Christopher M. Reimer, *Domestic Asset Protection Trusts: A Comparison of the Laws of Utah and Wyoming*, UTAH B.J., Mar.–Apr. 2010, at 12, 16 (mentioning that, unlike some states, Wyoming does not impose income tax on trusts); Clay D. Geitmann, *Chaos to Comprehension: Estate Planning in Wyoming*, WYO. LAW., Dec. 2007, at 18, 20 (claiming that amendments to Wyoming law in 2007 to allow for self-settled asset protection trusts helped make Wyoming extremely competitive in the relatively narrow competition for trusts); Christopher M. Reimer, *The Undiscovered Country: Wyoming's Emergence as a Leading Trust Situs Jurisdiction*, 11 WYO. L. REV. 165, 194–95 (2011) (calling Wyoming a top destination for trusts, due, at least in part, to board powers for the settlor).

204. Robert C. Illig, *supra* note 125, at 189 (dating Oregon's efforts in the green business area to 2007 and attributing at least part of the growth in this industry to an organization called Oregon Lawyers for a Sustainable Future); Judd F. Sneirson, *Race to the Left: A Legislator's Guide to Greening a Corporate Code*, 88 OR. L. REV. 491, 495–502 (2009) (mentioning the growth of green or sustainable businesses and noting that Oregon "has already begun efforts to position itself as 'the Delaware of green business'" through amendments to its corporate code).

205. John R. Shaughnessy & Scott E. Sebastian, *2010 Connecticut Tax Law Developments*, 85 CONN. B.J. 71, 80–82 (2011); Richard W. Tomeo, *Connecticut Takes Bold Steps in the Taxation of Financial Service Companies*, 8 J. MULTISTATE TAX'N & INCENTIVES 209, 210 (1998).

206. Professors Kahan and Kamar claim that Maryland's success in this niche area can be traced to the minimal franchise tax and "Maryland's attraction for investment funds is based on the fact that Maryland law contains a number of statutory provisions targeted at investment companies, including provisions designed to assure that the investment company satisfies federal

the REIT area.²⁰⁷ Massachusetts also appears to compete in the business trust and mutual fund areas.²⁰⁸

Given that some of the rhetoric used by proponents of social enterprise has been largely critical of traditional Delaware corporate law, social enterprise may be a niche that other states think they can dominate, or at least compete on a more even playing field.²⁰⁹ In addition to attempting to find a niche in the competition for business entities, another (more cynical) explanation of the widespread passage of social enterprise law is based on the interest groups involved. The next Part explores the influence of these interest groups on the passage of social enterprise legislation and on the social enterprise movement in general.²¹⁰

IV. INTEREST GROUPS AND SKEPTICS

Interest group theory has significant explanatory power with regard to the recent proliferation of social enterprise laws, which skeptics can claim are not being passed for the good of the public, but rather for a relatively small group that stand to benefit from the laws. The interest group theory of legislation, also called the economic theory of legislation, posits that legislation will be bought and sold as a good to the group that values it most.²¹¹ Under this theory, interest groups use currency consisting of

tax requirements, a waiver of the requirement to hold annual meetings of shareholders, and a grant of power to the board of an investment company to increase the number of authorized shares without shareholder approval.” Kahan & Kamar, *supra* note 162, at 721; *see also* Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the “Race” Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1815–16 (2002) (noting that virtually all of Maryland’s success in attracting public companies is due to its success in attracting REITs); Charles M. Elson, *Book Review*, 52 BUS. LAW. 1003, 1004 (1997) (reviewing NAT’L ASS’N OF REAL ESTATE INV. TRUSTS, *THE PUBLIC REIT LEGAL SOURCEBOOK* (1995)) (commenting on Maryland and Delaware’s relative strength in the REIT area).

207. Daines, *supra* note 157, at 1572 n.51; Sheldon A. Jones, Laura M. Moret & James M. Storey, *The Massachusetts Business Trust and Registered Investment Companies*, 13 DEL. J. CORP. L. 421, 428–29 (1988) (noting Massachusetts’ competition in the business trust area, in part through favorable statutes and case law); William L. Martin II, *Federal Regulation of Real Estate Investment Trusts: A Legislative Proposal*, 127 U. PA. L. REV. 316, 316 n.2 (1978) (noting that REITS often form as Massachusetts business trusts).

208. *See* Diane M. Ring, *Exploring the Challenges of Electronic Commerce Taxation Through the Experience of Financial Instruments*, 51 TAX L. REV. 663, 667 (1996) (describing Massachusetts’ strength in the mutual fund industry).

209. TEDx Talks, TEDxPhilly—Jay Coen Gilbert—On Better Businesses, YOUTUBE, at 9:45–10:02 (Dec. 1, 2010), <http://www.youtube.com/watch?v=mGnz-w9p5FU> (claiming that maximizing shareholder value is “the only game in town” in Delaware (citing eBay Domestic Holdings v. Newmark, 16 A.3d 1 (Del. Ch. 2010))). *See generally* Clark & Vranka, *supra* note 27.

210. *See infra* Part V.

211. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227 (1986). *See generally* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35 (1991) (“The defining theme of the interest group theory of lawmaking is its rejection of the presumption that the government endeavors to further the public interest. Rather, under

“political support, promises of future favors, outright bribes, and whatever else politicians value” to achieve passage of legislation that favors the interest groups’ desires.²¹² Using microeconomic tools, the interest group theory claims the price an interest group ultimately pays will be influenced

interest group theory, all the participants in the political process act to further their self-interest.”); Macey, *supra* note 193, at 1136–37 (claiming that attorneys are the primary interest group that benefits under their theory); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987) (applying interest group theory to Delaware corporate law). George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 240 (2009) (“In very general terms, the interest-group theory of the legislative process conceptualizes legislation as carrying out a transfer of benefits from one group (typically thought to be large, disorganized, and with diffuse interests, such as taxpayers generally) to some other group (small, focused, and easily organized, such as persons or firms having some common, special interest.” (first citing DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 23 (1991); then citing William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975); and then citing George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3–4, 10–11 (1971))).

212. Macey, *supra* note 211, at 227–28 (citing William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975)). Later in the article Macey also mentions “investing in congressional retirement funds” and paying “honoraria for speaking engagements” as other currency used by interest groups to purchase legislative favors. *Id.* at 230 (citing G. Easterbrook, *What’s Wrong With Congress?*, THE ATLANTIC, Dec. 1984, at 57, 70–72). Professor Elhauge writes that “interest groups influence the political process . . . by paying lawmakers in the form of bribes, speaking fees, supportive advertising, campaign contributions, or offers of future employment; by pressuring political officials to support or oppose the appointment, promotion, removal, or budget of regulators; and by influencing the information that reaches legislators, regulators, and the voting public.” Elhauge, *supra* note 211, at 35–36 (first citing DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 39–41 (1974); then citing Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371–72, 392 (1983); then citing Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation*, 86 COLUM. L. REV. 223, 230–31 (1986); then citing William Page, *Interest Groups, Antitrust, and State Regulation*, 1987 DUKE L.J. 618, 636 (1987); then citing Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 213–14 (1976); and then citing George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 12 (1971)); *see also* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975); *accord* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410–12 (2003). Macey claims:

[S]tatutes generally can be divided into three distinct categories. The first are those designed to advance some public purpose, such as protection of the environment or providing for national defense. Besides these public interest statutes, there are two types of special interest statutes—“open-explicit” statutes and “hidden-implicit” statutes. Open-explicit statutes are naked, undisguised wealth transfers to a particular, favored group. By contrast, hidden-implicit statutes are couched in public interest terms to avoid the political fallout associated with blatant special interest statutes.

Hidden-implicit statutes exist because the political costs of enacting them is lower than the political costs of enacting open-explicit statutes. We observe open-explicit statutes because they are less ambiguous and therefore more likely to be enforced in precisely the way the relevant interest groups prefer. As described below, in deciding whether to lobby for one type of statute or another, interest groups must make a trade-off between the higher political costs associated with open-explicit statutes and the greater uncertainty associated with hidden-implicit statutes.

Macey, *supra* note 211, at 232–33.

by the value of the legislation to the group and the costs of organizing the coalition.²¹³

Small and large interest groups each have their advantages and challenges. The legislative benefits are less diluted and coordination is easier for smaller interest groups.²¹⁴ Larger interest groups have advantages that include: “(1) more votes, (2) some economies of scale, and (3) perhaps more total resources.”²¹⁵ Interest group resources appear important regardless of size, and the success of an interest group may depend, in part, on the attributes of any opposing interest groups. Interest groups may thrive in a representative government because information costs involving the impact of legislation can be high and transaction costs for organizing lobbying groups, while limiting free-riders, may be

213. Elhauge, *supra* note 211, at 36–37 (discussing collective action problems); Landes & Posner, *supra* note 212, at 877.

214. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 266 (1982); *see also* Elhauge, *supra* note 211, at 37–40 (stating that “large diffuse groups face greater collective action obstacles to group petitioning in three respects:” (1) “for any given level of aggregate group benefits, large diffuse groups are more susceptible to free rider problems because the benefits from seeking or opposing a particular legal change must be spread over a larger number of beneficiaries,” (2) “given a particular incentive to free ride, a larger group will have a tougher time organizing collective efforts to overcome free riding. Having a large number of members makes it more difficult and costly to identify members, reach collective cost-sharing agreements, and monitor and punish free riding. In small groups, free riding will be easier to detect because it has a proportionally larger effect. Small groups also generally have lower organizational costs, and their members are more likely to have ongoing personal contact, making monitoring easier and making social sanctions, in particular, more effective,” (3) “for any given level of per capita benefit to group members from a legal change, a larger group will likely face a smaller opposition that is more motivated because it suffers greater per capita costs. Hence, large groups are not just less effective in their own right; they also generally face more effective opposition than small groups. . . . The confluence of these advantages and disadvantages may not benefit small groups per se. Rather, it may benefit those small to medium-sized groups that enjoy optimal combinations of free-riding avoidance, weak opposition, voting power, resources, and economies of scale.” (footnote omitted)); Rachel Sachs, *The New Model of Interest Group Representation in Patent Law*, 16 YALE J. L. & TECH. 344, 349 (2013–14) (noting the advantages of relatively small interest groups and stating that “legislative activity will be dominated by comparatively small interest groups with members who would reap a disproportionate share of any legislated benefit, while the costs of such legislation are dispersed far more widely” (first citing MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 128 (1965); then citing JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 292 (1965); and then citing Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 266 (1982))).

215. Elhauge, *supra* note 211, at 39 (first citing Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 214 (1976); then citing George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 13 (1971); then citing MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 47 (2d ed. 1971); then citing Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 380 (1983); then citing Peltzman, *supra*, at 213; Stigler, *supra*, at 12; then citing RUSSELL HARDIN, *COLLECTIVE ACTION* 45 (1982); and then citing Richard Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 349 (1974)).

significant.²¹⁶ Groups with lower information costs and lower transaction costs may be more effective in achieving wealth transfers from groups with greater organizational challenges.²¹⁷

Interest group theory works well to explain the widespread adoption and development of social enterprise law. While public interest theory holds that “the ideal and the actual function of legislation [is] to increase economic welfare by correcting market failures,” a shift from the “dominant public perception of ‘government as helper’” to distrust and focus on private interests appears to be descriptively accurate.²¹⁸ The various interests groups, discussed below, appear to have catalyzed the passage of the social enterprise legislation and have made a compelling case to legislators. However, politicians have mixed motives, and a *strong* version of interest group theory, whereby legislation is solely justified by interest group preferences and efforts, likely overstates the reality.²¹⁹

A. *The Activists*

Social enterprise activists, as used here, are individuals or organizations that lobby for the passage of social enterprise law and strongly support the social enterprise movement, often with some personal and professional motives. Social enterprise activists are not only influential in getting laws passed, but may also serve as evaluators of the various state

216. Macey, *supra* note 211, at 229.

217. *Id.* at 229–30 (“The major implications of interest group theory are that legislation transfers wealth from society as a whole to those discrete, well-organized groups that enjoy superior access to the political process, and that government will enact laws that reduce societal wealth and economic efficiency in order to benefit these economic groups. The economic theory of legislation does not predict that all laws will enrich the few at the expense of the many, but it does predict that this will be the dominant outcome and that there will be a trend in this direction.” (citing M. OLSON, *THE RISE AND DECLINE OF NATIONS* 75–117 (1982))).

218. Macey, *supra* note 211, at 223; Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982) (citing W. BAUMOL, *WELFARE ECONOMICS AND THE THEORY OF THE STATE* (2d ed. 1965) and A. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1932)).

219. Sachs, *supra* note 214, at 350–51 (citing research showing “that the effect of interest group pressure on Congress could ‘range from insignificant to determinative,’ depending on ‘the configuration of a large number of factors—among them the nature of the issue, the nature of the demand, the structure of political competition, and the distribution of resources.’” (quoting KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 317 (1986))). Later, Sachs notes, “where legislation is ‘applicable to a particular industry,’ interest group theory likely has comparatively greater explanatory power. Ultimately, the ‘best picture of the political process’ is one in which ‘constituent interest, special interest groups, and ideology all influence legislative conduct.’” *Id.* at 351 (first quoting Posner, *supra* note, 218, at 271; then quoting Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 900–01 (1987); then citing DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 33 (1991); then citing Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 43 (1991); and then citing Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1067–68 (2003)).

laws and may direct entrepreneurs to the states that the activists think have better laws.²²⁰ As such, state government officials seem to be aware of the influential social enterprise activists.

Bob Lang seems to be the primary social enterprise activist for the L3C form, while the nonprofit organization B Lab has been the biggest player in the benefit corporation area.²²¹ Bob Lang may not have included enough supporters, with sufficient resources, to support the widespread adoption of the L3C legislation, and the criticism and constructive suggestions for change do not appear to have led to significant amendments to the substance of the L3C legislation.²²² On the other hand, B Lab appears more inclusive and has been able to reach out to a wider range of people and amass more resources, even though the core B Lab team has remained relatively small.²²³ While B Lab has not always been successful in bringing people in the social enterprise area together, they appear to have made a good faith attempt to consider opposing views and have modified their model legislation a number of times.²²⁴

220. Murray, *supra* note 54, at 350–51 (discussing B Lab’s issues with the Delaware public benefit corporation statutes, including that the statutes do not require public posting of the benefit report and do not require use of a third party standard); Clark & Vranka, *supra* note 27, at app. C. (discussing the perceived weaknesses of the flexible purpose corporation statute, including that it is a “cumbersome” law, that the “special purpose” requirement is not broad or flexible enough, and that the statute does not provide the same level of transparency and accountability as the benefit corporation statute because of limitations on reporting and the non-requirement of a third-party standard).

221. AMERICANS FOR COMMUNITY DEVELOPMENT, <https://www.americansforcommunitydevelopment.org> (last visited June 20, 2015) (compiling information about the L3C, including information about Bob Lang, the inspiration of the L3C entity form). Attorney Marc Lane has also been extremely active in the L3C movement. *About Our Founder*, MARC J. LANE WEALTH GROUP, <http://www.marcjlane.com/index.php?src=gendocs&ref=AboutOurFounder&category=About> (last visited Sept. 3, 2015) (calling Marc Lane “the force behind Illinois’ Low-profit Limited Liability Company (L3C) legislation” and claiming that he “has been instrumental in promoting L3C legislation in other states”).

222. *See generally* Bishop, *supra* note 14; Brewer, *supra* note 19; Callison & Vestal, *supra* note 18; Kleinberger, *supra* note 18; Murray & Hwang, *supra* note 19. To the author’s knowledge, none of the suggestions in these articles by respected academics and practitioners have been adopted in L3C legislation. *See, e.g.*, VT. STAT. ANN. tit. 11, §§ 4001(14), 4161–4163 (2010).

223. Maribel Morey, *The Rockefeller Foundation’s Hand in Hobby Lobby*, STAN. SOC. INNOVATION REV., Aug. 21, 2014, http://www.ssireview.org/bl/entry/the_rockefeller_foundations_hand_in_hobby_lobby (noting that B Lab was an early recipient of a Rockefeller Foundation grant); *Our Team*, BCORPORATION.NET, <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/our-team> (last visited Sept. 2, 2015) (noting that two of the three B Lab founders previously ran “AND1, a \$250 million basketball footwear and apparel business” before co-founding B Lab).

224. Callison, *supra* note 29, at 159 (discussing the heated debates, over more than three years, between B Lab and the Corporate Laws Drafting Committee under the Colorado Bar Association). Stanford Psychology Professor Carol Dweck’s description of the differences between a growth mindset (learning from criticism) and a fixed mindset (ignoring useful feedback) can provide useful advice to all those involved in social enterprise. *See generally*

These activists are a new feature in the jurisdictional competition landscape. Other entity forms did not seem to have similarly visible, organized, and influential champions. These social enterprise forms are the first forms that explicitly mix social purpose and private profit, thus attracting supporters who seek success in both areas. These activists have led to more rapid passage of the social enterprise forms than may have occurred if the process were more organic.²²⁵ While most of the interest groups below have been discussed in the jurisdictional competition literature, activists like Bob Lang and B Lab seem to be absent. Both Bob Lang and B Lab profit from the existence of social enterprise. Bob Lang provides social enterprise consulting services and B Lab charges social enterprises for its certification.²²⁶

Other social enterprise activists like lawyers and additional service providers have also entered the fray, albeit with more minor roles. B Lab appears to have exerted significant effort to recruit these supportive business people and lawyers.²²⁷ Most of these professionals seem hopeful of gaining some personal benefits from their newfound expertise in the social enterprise law and an entire industry has evolved to advise these new social enterprises.²²⁸ Consultants, financial services professionals, and

CAROL S. DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS* (2006). Those with growth mindsets, open to change and improvement, are most likely to flourish. *Id.*

225. Deborah Sweeney, *The Evolution of an Entity: A Closer Look at Benefit Corporations*, MY CORPORATION (Sept. 9, 2013), <http://blog.mycorporation.com/2013/09/the-evolution-of-an-entity-a-closer-look-at-benefit-corporations-infographic/> (comparing the spread of benefit corporation legislation to the spread of LLC legislation). This infographic is a bit misleading because the LLC form spread very quickly once the IRS weighed in on the form, but it took a few decades for the IRS to act. *Id.*

226. *Make it Official*, CERTIFIED B CORPORATIONS, <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/make-it-official> (last visited Sept. 2, 2015) (listing the annual certification fee ranges from \$500 to \$50,000+ based on annual sales). B Lab is, however, a nonprofit corporation and it provides its third-party standard, though not its certification, for free. *About B Lab*, B LAB, <https://www.bcorporation.net/what-are-b-corps/about-b-lab> (last visited Nov. 21, 2010) (noting that the B Impact Assessment is “A Free and Confidential Tool to Compare your Company’s Impact.”) Bob Lang’s Americans for Community Development provides a variety of services for L3Cs, and is currently developing certification courses for social enterprise advisors. *Certification*, AMERICANS FOR COMMUNITY DEVELOPMENT, <https://www.americansforcommunitydevelopment.org/certification.html> (last visited Sept. 3, 2015).

227. *See, e.g.*, Clark & Vranka, *supra* note 27, at 1 (listing drafting authors and some supporters of a white paper advocating for the advancement of benefit corporation law).

228. *See, e.g., About Us*, INTERSECTOR PARTNERS, L3C, <http://www.intersectorl3c.com/aboutus.html> (last visited Sept. 4, 2015) (stating that their services include “Social Enterprise strategy & development”); B CORP ADVISORS, <http://bcorpadvisors.com> (last visited Sept. 4, 2015) (explaining that “B Corp Advisors helps organizations and executive teams understand, evaluate and implement the legal and business dimensions of: Benefit Corporations, Flexible Purpose Corporations, Certified B Corporations, Other Sustainable or Hybrid Legal Forms”); BLUE DOT ADVOCATES, <http://www.bluedotlaw.com> (last visited Sept. 4, 2015) (a law firm with a focus on social enterprise and impact investing); MARC J. LANE WEALTH GROUP, LOW-PROFIT LIMITED LIABILITY COMPANIES (“L3CS”)

lawyers serving the social sector have accounted for a significant portion of the social enterprises formed to date.²²⁹ While these service providers are becoming more of a factor, Bob Lang and B Lab still appear largely in control of their respective social enterprise movements.

B. The Business Managers

Managers of business entities make up another interest group that appears to be impacting social enterprise law drafting, adoption, and implementation.²³⁰ These managers may reasonably be concerned not only with the success of their businesses, but, more personally, with addressing their own potential liability.²³¹ To date, the social enterprise laws have generally offered managers significant protection.²³² These social enterprise laws limit the standing of those who can bring a claim and make building a successful claim extremely difficult.²³³ External stakeholders are not expressly given standing to sue in any of the existing social enterprise statutes, even though the statutes require consideration of their interests.²³⁴ Further, the Model Benefit Corporation Legislation, upon which most state benefit corporation statutes are based, provides that directors are not personally liable for monetary damages for “failure of the benefit corporation to pursue or create general public benefit or specific public

http://www.marclane.com/index.php?submenu=L3C&submenu=Social_Enterprises&src=gendocs&ref=L3C&category=Capabilities (last visited Sept. 4, 2015) (claiming to be “recognized as a national leader in the development of L3Cs”); *Our Story*, UPSRING, <http://upspringassociates.com/who-we-are/> (last visited Oct. 10, 2015) (“We serve the social enterprise community with effective and sustainable consulting services”); WESTAWAY LAW, <http://westawaylaw.com/about> (last visited Sept. 4, 2015) (“an innovative law firm committed to serving the social enterprise sector”).

229. Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who’s Opting In?*, 14 U.C. DAVIS BUS. L.J. 247, 263 (2014) (noting that 31% of early Delaware public benefit corporations were in professional services, many servicing the social sector).

230. The term “managers,” as used here, refers to the board of directors and/or executive officers. See Therese H. Maynard, *Spinning in a Hot IPO—Breach of Fiduciary Duty or Business as Usual?*, 43 WM. & MARY L. REV. 2023, 2034–35, 2035 n.29 (2002) (using the term “managers” to refer to directors and/or officers).

231. Cf. Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1088 n.179 (2000) (discussing the backlash and statutory response resulting from *Smith v. Van Gorkom*, 488 A.2d 858 (Del 1985) in which the directors were held liable for breaching the duty of care).

232. See *supra* Part II.F (explaining how the significant liability protection for managers has been a mainstay in social enterprise legislation).

233. Murray, *supra* note 66.

234. See, e.g., S.C. CODE ANN. § 33-38-440 (2012); VA. CODE ANN. § 13.1-790 (2011). Most benefit corporation statutes, however, do expressly allow benefit corporation managers to choose external stakeholders that may have standing. S.C. CODE ANN. § 33-38-440; VA. CODE ANN. § 13.1-790 To date, the author is not aware of any benefit corporation that has granted standing to an external stakeholder. While such a grant of standing is certainly possible, especially for the benefit corporations that deeply care about accountability, most social enterprises are unlikely to allow another standing to sue and disrupt their business.

benefit.”²³⁵ Delaware’s PBC law protects director actions if the directors’ decisions are informed, disinterested, and not irrational.²³⁶ As long as they are largely protected from liability, managers of socially conscious firms have been generally supportive of social enterprise law, even if their companies have not yet made the switch. B Lab has utilized these managers, many of whom are influential in their respective states, as supporters, and B Lab has seemingly extended its influence by enlisting these significant tax-paying proponents.²³⁷

C. *The Skeptics*

A number of academics and some sophisticated lawyers have criticized all or part of the social enterprise laws.²³⁸ Some of the critics have contributed to the evolution of social enterprise laws, and academics such as Daniel Kleinberger and Carter Bishop, along with practitioner Bill Callison, played a large role in the apparent stall and decline of the L3C form.²³⁹ B Lab has attempted to reach out to academics and high-level legal practitioners to discuss the Model legislation, but B Lab has also been criticized for failing to modify certain controversial provisions of the Model legislation.²⁴⁰ As Macey and Miller recognize, lawyers often act as the gatekeepers of corporate law but frequently, in the social enterprise context, bar association committees are being overruled or pressured into approving the laws by other interest groups.²⁴¹ While some of the skeptics have simply criticized without providing any constructive solutions, most of the skeptics have offered ways forward and could improve the future of social enterprise laws.²⁴²

235. MODEL BENEFIT CORP. LEGIS. §§ 102, 301(c)(2) (2014).

236. DEL. CODE ANN. tit. 8, § 365(b) (2011 & Supp. 2015); Delaware Public Benefit Corporations: FAQs (on file with author).

237. See *State by State Status of Legislation*, BENEFIT CORPORATION, <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Oct. 30, 2015) (listing key supporters such as the businesses of Hawthorne Auto Clinic (Oregon), West Paw Design (Montana), and Dansko (Pennsylvania)).

238. See, e.g., Kent Greenfield, *A Skeptic’s View of Benefit Corporations*, 1 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 17 (2014), http://law.emory.edu/ecgar/_documents/volumes/1/1/greenfield.pdf; Kleinberger *supra* note 18, Bishop *supra* note 18; Callison & Vestal, *supra* note 18; Murray *supra* note 40, at 22–24 (discussing areas of possible improvements for the benefit corporation law); Murray & Hwang, *supra* note 19, at 42–50 (discussing possible improvements for the L3C law).

239. Kleinberger, *supra* note 18; Bishop *supra* note 18; Callison & Vestal, *supra* note 18.

240. Callison, *supra* note 29, at 161–63 (Bill Callison was an attorney involved in the benefit corporation debates and legislative drafting process in Colorado).

241. *Id.*; Macey & Miller, *supra* note 211, at 503–506 (discussing the role of the Delaware bar).

242. See CASS R. SUNSTEIN & REID HASTIE, WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER 9–13 (arguing against “happy talk” to make people feel better and arguing that anxious, critical people can make organizations stronger over time).

D. The Politicians

Under the interest group theory of legislation, politicians act in their own self-interest, for example they may act consistent with their desire to be reelected or keep their political party in power.²⁴³ “In public choice legal scholarship, the role of the legislator has been transformed from that of a passive broker to a rent-seeking actor. A rent-seeking legislator strategically uses the threat of negative regulation or the promise of favorable regulation to secure interest group payments.”²⁴⁴

For state politicians, the reasons to support social enterprise laws are readily apparent. Social business is popular; Wall Street and traditional for-profit corporations are not.²⁴⁵ Even for the pro-market, pro-Wall Street politicians, these laws purport to embrace freedom, do not force anyone to incorporate under the laws, and expressly deny altering the existing corporate laws. Social enterprise laws allow the market to operate. The statutes appear to appeal to both the social justice advocates on the left and to the free market proponents on the right.²⁴⁶ Research has shown that a “larger ‘green’ workforce exerts a significant positive influence on Benefit Corporation legislation passage,” suggesting that environmentally-friendly states are especially interested in social enterprise law.²⁴⁷ Additionally, social enterprise laws have been promoted as no cost or low cost to states. Currently, there are not state-level tax breaks for the social enterprises and not even much in the way of necessary changes at secretary of state’s offices, as the social enterprises are often simply included in the LLC or corporation framework. The benefits, therefore, do not have to be large to justify passage of these laws in the eyes of politicians. While a few cities, such as San Francisco and Philadelphia, have provided some financial benefits to social enterprises, the benefits to date have been quite small.²⁴⁸ States may attract some businesses to the state and may gain some revenue, with negligible costs, or so the pitch goes. The activists and business

243. Nancy J. Knauer, *How Charitable Organizations Influence Federal Tax Policy: “Rent-Seeking” Charities or Virtuous Politicians?*, 1996 WIS. L. REV. 971, 1034–35 n.326; Elhauge, *supra* note 211.

244. Knauer, *supra* note 243, at 1036 (first citing Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 361 (1988); and then citing Richard L. Doernberg & Fred S. McChesney, Review Essay, *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891, 893 (1987)).

245. OCCUPY WALL STREET, <http://occupywallst.org/> (detailing a nationwide movement against “the ruling class”).

246. Kyle Westaway, *Something Republicans and Democrats Can Agree On: Social Entrepreneurship*, STAN. SOC. INNOVATION REV. (Apr. 17, 2012), http://ssir.org/articles/entry/something_republicans_and_democrats_can_agree_on_social_entrepreneurship.

247. Hans Rawhouser, Michael Cummings & Andrew Crane, *Benefit Corporation Legislation and the Emergence of a Social Hybrid Category*, 57 CAL. MGMT. REV. 13, 18 (2015).

248. Murray, *supra* note 40.

managers, mentioned above, are likely vocal, motivated, and influential groups, as those groups pay taxes, vote, and have a good bit to gain from the legislation. While the skeptics also pay taxes and vote, they appear to have less to gain and fewer resources. State bar associations have been involved, to some extent, in the political process, but they have not been significantly involved in every state's process.²⁴⁹ Occasionally, a state politician warms to the social enterprise movement enough to take the legislation to a vote with little or no support from the state bar association.

V. THE PRESENT AND FUTURE OF THE SOCIAL ENTERPRISE LAW MARKET

A. *Leaders and Laggards*

According to the early data, the current leaders in the nascent social enterprise market are Delaware, Nevada, Maryland, California, and New York.²⁵⁰ It is, however, much too early to crown a winner. Delaware seems to have started relatively strong based on its reputation in corporate law. Nevada has been attempting to challenge Delaware on other fronts and is pushing to be a leader in corporate law. Nevada is in the lead currently, but may have been boosted by the inclusion of a benefit corporation check box on the state form, which incorporators may or may not have fully understood.²⁵¹ Maryland has done relatively well by virtue of being the very first mover; Maryland has a year or more head start on most states. Finally, New York and California have done relatively well, probably because they are large states and have more social enterprises located in their states that want to use local law.²⁵²

The District of Columbia, New Jersey, and South Carolina have lagged; they are all stuck in the single digits of benefit corporations formed.²⁵³ From the L3C side, Rhode Island, Maine, and Wyoming have lagged.²⁵⁴ Excluding New Jersey, these states all have relatively low population levels, coupled with a relative lack of corporate law expertise. The Delaware experience might suggest that small size is an advantage, but the business law expertise to attract out-of-state firms, state population, and business formations within the state will likely be correlated. New Jersey is

249. See *State by State Status of Legislation*, BENEFIT CORPORATION, <http://benefitcorp.net/policymakers/state-by-state-status> (listing, for example, the Florida Bar Association, as a "key supporter" of the benefit corporation legislation).

250. See *infra* Appendix A.

251. Cooney, Koushyar, Lee & Murray, *supra* note 30.

252. Cf. Subramanian, *supra* note 206, at 1814–16 (noting that California is a top home for corporate headquarters, but underperforms in the incorporation market if the share of headquartered corporations are taken into account; New York, likewise, seems to underperform in the incorporation market relative to its headquarter status, which is much stronger).

253. See *infra* Appendix A.

254. See *infra* Appendix A.

a curious addition to this group; as mentioned, previously it was a leader in corporate law, is close to New York City, and has a relatively large population itself. From personal interaction with people in the New Jersey Department of State, my working hypothesis is that the relative lack of knowledge of social enterprise within that office is limiting the formation of benefit corporations in the state.²⁵⁵ However, with only about 1000 entities at the number one state, no state has established itself as dominant.

B. Attracting Social Enterprises

The literature dealing with more established entity types suggests that states can attract social enterprises by: (1) being an early mover; (2) having an expert and responsive legal system; (3) making a credible commitment to the desired infrastructure; and (4) engaging the corporate bar.²⁵⁶ Commentators have also mentioned geographic proximity to major financial and political centers as an advantage.²⁵⁷ Surprisingly, one argument that apparently has not been made in the scholarly literature is the importance of states engaging the legal academy.

Lessons from the literature can be applied to the social enterprise situation, along with the suggested importance of engaging the academy. Regarding its being an early mover, Delaware's experience shows that while it is not necessary to be a *first* mover to eventually dominate a law market, it appears that being an early mover is advantageous.²⁵⁸ Being an early mover in social enterprise may position states to take the lead in that niche area, but those early states must be willing to amend their laws to keep up with the developments.²⁵⁹ States wish to be in a good position relative to other states regarding any competition involving social

255. Of the states I contacted, the New Jersey Secretary of State was the least helpful and seemed to be the least knowledgeable about these new forms. See *Secretary of State—Corporate Filings*, N.J. DEPT. OF STATE, <http://www.nj.gov/state/archives/catsestat03.html> (last visited Sept. 4, 2015).

256. See *infra* Part V.B (Present and Future).

257. Christopher M. Bruner, *Market-Dominant Small Jurisdictions in a Globalizing Financial World* 58 (Washington & Lee Pub. Legal Studies Research Paper, No. 2013-19, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2343111.

258. Brett H. McDonnell, *Getting Stuck Between Bottom and Top: State Competition for Corporate Charters in the Presence of Network Effects*, 31 HOFSTRA L. REV. 681, 687 (2003). Learning and network effects accumulate over time and states that enter an area early have an advantage.

259. States that are entering the social enterprise area now, after over twenty statutes have been passed, are able to learn from the mistakes and imperfections in other state statutes. As a general rule, the more recent social enterprise statutes seem more nuanced and evolved than the early statutes. To date, states have not seemed to be updating their social enterprise statutes as other states innovate in their new statutes. Once the social enterprise statutes are passed, the states have shown little interest in amending them, with a notable exception being the FPC in California. Perhops, *supra* note 129. The FPC amendments included a name change and some other minor statutory changes. *Id.*

enterprise, but do not seem willing to spend significant funds yet.²⁶⁰ With respect to having an expert and responsive legal system, states interested in the social enterprise law market may wish to learn from Delaware. Some attribute Delaware's success to its indeterminate case law and expert judiciary.²⁶¹ Others credit, at least in part, an appropriately responsive legislature, the admired Chancery Court, and administrative expertise.²⁶² States could start by forming a business law court (if they do not already have one) and could also make commitments to regularly revise their social enterprise law to respond to developments.²⁶³ A credible commitment to social enterprise might include funding incubator space, being the first state to provide a significant tax benefit to social enterprise,²⁶⁴ a responsive secretary of state's office, and perhaps eventually developing a financial reliance on the social enterprises formed in the state.²⁶⁵ The corporate bar, composed of both litigation and transactional attorneys, likely influences the market for business law.²⁶⁶ Attorneys advise their clients where to

260. See *supra* Part IV.D (explaining how most states are currently spending relatively little money on social enterprises).

261. Kamar, *supra* note 173, at 1910–13, 1927–28, 1935.

262. ROMANO, *supra* note 1, at 39–42.

263. See Anne Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. ST. U. L. REV. 477, 488, 502–03 (2007) (surveying fifteen business courts and proposing a framework for evaluation of business courts that includes attention to “efficiency, quality, and due process”).

264. Significant tax incentives could be a game changer but would be costly to a state and should be considered carefully to avoid greenwashing. The tax incentives offered to date have been very small, but tax incentives may be among the most effective, though costly, things a state can do to attract social enterprises. See, e.g., The California Benefit Corporation Discount Ordinance, S. F. ADMIN. CODE § 14C.3 (June 3, 2012), http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco_ca (last visited Sept. 15, 2013) (In its S. F. ADMIN. CODE § 14C.3, San Francisco provided preferences in government contracting to California benefit corporations, but these provisions expired on Sept. 1, 2015); see Lloyd Hitoshi Mayer & Joseph R. Ganahl, *Taxing Social Enterprise*, 66 STAN. L. REV. 387, 439–41 (2014) (arguing that full charitable tax benefits should not be offered to social enterprises, but arguing for a few tax accommodations for social enterprises such as expanding the deductibility of charitable contributions); cf. *Philadelphia First City to Offer Green Biz Tax Incentives*, SUSTAINABLEBUSINESS.COM (Dec. 4, 2009), <http://www.sustainablebusiness.com/index.cfm/go/news.display/id/19350> (last visited Sept. 15, 2013) (providing small tax credits to certain Certified B Corporations) Certified B Corporations can be any of the legal entity forms, including benefit corporation, traditional corporation, or LLC).

265. Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1178–79 (2008) (commenting on Delaware's credible commitment, including “investment in legal capital (i.e., judicial expertise, case law, a specialized bar, and a business-like Division of Corporations) and its reliance on franchise taxes”). States like Delaware, New York, California, Nevada, and Maryland, which already have significant infrastructure built for related entity forms, may have a sizeable lead on other states, given that they already have some commitment to other entity types and businesses, in addition to the resources needed.

266. Kahan & Kamar, *supra* note 162, at 705–06 (arguing that “[t]he driving force behind many corporate statutes is corporate lawyers” but noting collective action problems and the lack

incorporate and are often involved in state politics. Attorneys are pointed to as one of the reasons that states still amend their corporate law in spite of the limited financial incentives for most states.²⁶⁷ Attorneys may also be involved, directly or indirectly, in getting laws passed that encourage formations in their home state or at least encourage local entities to stay in their state.²⁶⁸ Attorneys are likely to advise their clients to form in states where they are familiar with the state law: primarily their home state and Delaware. Thus, if states are interested in attracting social enterprises, they need to reach attorneys and educate them about the benefits of their social enterprise laws.²⁶⁹

Geographic proximity to the financial capital (New York City) and the political capital (Washington, D.C.) of the United States may account for some of Delaware's success.²⁷⁰ States near New York City and Washington, D.C. may have an advantage in any future social enterprise competition. Social enterprise, however, seems strongest among progressives, who are more highly concentrated on the west coast. Moreover, geographic proximity to economic and political centers may have decreased in importance as travel has become and is becoming much easier. States that are not close to financial and political centers may increase their competitiveness by funding excellent transportation systems within their state for easy travel for business people and attorneys representing those businesses.

Interestingly, the literature on jurisdictional competition has not paid much attention to the influence of the legal academy. Law professors have significant impact on the future of the law through their role in training future attorneys. If law students learn Delaware law while in school, they may be more likely to advise their clients to incorporate under Delaware law. Current and former Delaware judges spend a substantial amount of time interacting with corporate professors in the legal academy.²⁷¹ Most

of strong incentives (citing William J. Carney, *The Production of Corporate Law*, 71 S. CAL. L. REV. 715, 737-49 (1998)).

267. *Id.* at 696.

268. Romano, *supra* note 151 (noting that "by prodding legislatures to innovate or imitate another state's innovation, in response to exogenous shocks caused by changing business and legal circumstances, [lawyers] benefit their clients and thereby themselves, by maintaining, if not expanding, their practice, by making their state a more appealing domicile").

269. As discussed below, it may be easiest and most efficient to reach law professors and law students because states may have a more eager audience at law schools than in the busy marketplace.

270. Bruner, *supra* note 257, at 58, 60.

271. Chief Justice of the Delaware Supreme Court Leo Strine writes law review articles and teaches at multiple law schools. Leo Strine Author Page, SOC. SCI. RES. NETWORK, http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=328830 (last visited Nov. 1, 2014) (showing over thirty legal articles by Chief Justice Leo Strine and listing his adjunct position at University of Pennsylvania Law School along with his lecturer on law position at Harvard Law School). Chief Justice Strine has even co-authored articles with corporate law professors. *See*,

judges in other states do not seem quite as involved with the legal academy.²⁷² States interested in becoming a leader in social enterprise law should consider involving the legal academic world in their discussions and encouraging more engagement between governmental officials and professors. Incubators for social enterprises, which involve universities and state governments may be one way forward in this area.²⁷³ Also, if professors, especially corporate law professors, are aware of the uniqueness of a state's social enterprise law, and are convinced that it is a valuable addition to the entity menu, the professors may discuss the law with their classes.²⁷⁴ In time, just as most law students graduate knowing Delaware corporate law, we could reach a point where law students graduate knowing

e.g., Leo E. Strine, Jr., Lawrence A. Hamermesh & Matthew Jennejohn, *Putting Stockholders First, Not the First-Filed Complaint*, 69 BUS. LAW. 1, 1 n.* (2013) (stating that Lawrence Hamermesh is a longtime professor at Widener Law School, and Matthew Jennejohn is a former law clerk for then Vice Chancellor Leo Strine on the Delaware Court of Chancery and current law professor at J. Reuben Clark Law School, Brigham Young University) Vice Chancellor Travis Laster, who has been called "Strine on steroids" has become the academic liaison on the Delaware Court of Chancery now that former Chancellor Strine has moved to the Delaware Supreme Court. Ashby Jones, *On Delaware Vice Chancellor Travis Laster: 'Strine on Steroids'*, THE WALL ST. J. L. BLOG (Feb. 11, 2011), <http://blogs.wsj.com/law/2011/02/11/on-delaware-vice-chancellor-travis-laster-strine-on-steroids/>. Vice Chancellor Laster has written at least fourteen legal articles (some before and some after assuming his position on the bench), has lectured at various law schools, and has been involved in the Harvard Law School Program on Corporate Governance. Vice Chancellor J. Travis Laster, *Harvard Law School Program on Corporate Governance*, http://www.law.harvard.edu/programs/corp_gov/laster-bio.shtml. Former Delaware judges have been and are involved in legal academia, including former Chancellor Bill Allen (NYU Law School), former Chief Justice Myron Steele (University of Virginia School of Law) and former Justice Jack Jacobs (Columbia Law School and Vanderbilt Law School). William T. Allen, N.Y.U SCH. OF L., <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.biography&personid=19739> (last visited Aug. 30, 2015); Jack B. Jacobs, COLUM. L. SCH., http://www.law.columbia.edu/fac/Jack_Jacobs (last visited Aug. 30, 2015); Jack B. Jacobs, SIDLEY AUSTIN LLP <http://www.sidley.com/people/jack-b-jacobs> (last visited Aug. 31, 2015); Myron T. Steele, U. OF VA. SCH. OF L., <http://www.law.virginia.edu/lawweb/faculty.nsf/FHPbI/1427463> (last visited Aug. 30, 2015).

272. There are some obvious exceptions to the statement that judges in states other than Delaware do not seem as involved with the legal academy. One notable exception is Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit. *Richard A. Posner*, U. OF CHI. L. SCH., <http://www.law.uchicago.edu/faculty/posner-r> (last visited Aug 30, 2015) (noting Judge Posner's position as a senior lecturer at the law school, as well as his numerous academic articles and books). Judge Posner, however, is a federal judge and corporate law still is primarily a state law subject.

273. Melissa Ip, *5 Social Enterprise Incubators and Accelerators You Should Know About*, SOC. ENTERPRISE BUZZ (Oct. 3, 2012), <http://www.socialenterprisebuzz.com/2012/10/03/5-social-enterprise-incubators-and-accelerators-you-should-know-about/> (noting five major social enterprise incubators). The number of social enterprise incubators has seemed to increase exponentially since this article, though most of the incubators are young and small.

274. Gordon Smith, *Utah Benefit Corporation Act*, THE CONGLOMERATE (May 13, 2014), <http://www.theconglomerate.org/2014/05/utah-benefit-corporation-act.html> (wondering whether corporate law professors should teach benefit corporation law in the general business organizations class).

the social enterprise law of the particular state that best communicates and demonstrates its value to the legal academy.

C. *Considering the Future*

State laboratories have been hard at work. With the assistance of proponents like B Lab, states have created various iterations of social enterprise statutes and spawned numerous innovations, creating a number of entirely new social enterprise entity types. This evolution is likely to continue with over a dozen more states actively considering social enterprise statutes. This experimentation by the states, allowed by federalism, is part of what Professor Roberta Romano calls “the genius of American corporate law.”²⁷⁵ The evolution of social enterprise laws may be the most significant business law product of the state laboratories in the past decade. Professors Erin O’Hara and Larry Ribstein remind us in their book *The Law Market* that firms are free to shop for these new laws.²⁷⁶

Predicting the future can be a dangerous game, and at this early stage it is difficult to tell whether any of the current social enterprise laws will prove attractive enough to draw large numbers of entities. If the social enterprise law market does heat up, predicting a winner of that competition will also be difficult to do at the beginning of the race. On one hand, smaller states may have more incentive to pursue social enterprise due to the potentially significant positive impact on their smaller budgets.²⁷⁷ On the other hand, most social enterprises seem to be staying in their home state currently, which favors large states like California and New York. States with significant infrastructure to service business entities, like Delaware and Nevada, also have a nice starting position because those resources can be easily used for social enterprises in addition to other, more traditional entity types. The early data on the formation of benefit corporations shows Nevada with a strong lead, followed by Delaware, New York, and California.²⁷⁸ At this stage, however, it is still much too early to declare a clear winner. In any event, as discussed above, the state laboratories, prompted by a number of interest groups, have produced a variety of social enterprise laws.²⁷⁹ The evolution of these social enterprise

275. ROMANO, *supra* note 1.

276. ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* (2009).

277. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 278 (1990) (noting that corporate charter franchise taxes constitutes a relatively high percentage of Delaware’s total budget).

278. *See infra* Appendix A; *see also* Cooney, Koushyar, Lee & Murray, *supra* note 30 (explaining that the unique and easy benefit corporation check box on Nevada’s standard incorporation form may be a factor in Nevada’s lead); *cf.* CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* 5–12 (2013) (arguing for doing away with unnecessary complexity and promoting more simple, common-sense processes).

279. *See supra* Part V.

forms will be interesting to watch over the coming years, and states may glean valuable lessons from the jurisdictional competition literature involving more established entity types that this Article discussed.

VI. CONCLUSION

Over less than a decade, we have seen a proliferation of social enterprise forms in the United States. This Article describes some of the evolution of these social enterprise forms and the state of the social enterprise law market. Given the indeterminacy of benefit corporation law, this Article posits that if social enterprises become more popular, a dominant state could eventually engage in significant price discrimination and collect significant revenue related to attracting social enterprises. Currently, only a relatively small number of social enterprises have been formed and thus the financial stakes are quite low. This Article suggests that jurisdictional positioning and interest group theory, rather than serious jurisdictional competition, explain why states are passing social enterprise statutes. If social enterprise forms become more widely used in the future, states may choose to compete more vigorously in the social enterprise area. This Article suggests that interested states could learn from the Delaware experience with traditional corporations, coupled with a few additional suggestions, in any future attempt to attract social enterprises.

Appendix A—Benefit Corporations and L3Cs

State	Benefit Law Effective ²⁸⁰	Benefit Corporations (Benefit LLCs) ²⁸¹	Date Updated	L3C Law Effective	L3Cs ²⁸²	Date Updated
Arizona	2014	5	11/2/15	-	-	-
Arkansas	2014	3	10/27/15	-	-	-
California	2012	189	11/2/15	-	-	-
Connecticut	2014	45	11/2/15	-	-	-
Colorado	2014	87	11/2/15	-	-	-
Delaware	2013	368	10/28/15	-	-	-
Florida	2014	7	11/2/15	-	-	-
Hawaii	2011	13	10/27/15	-	-	-
Idaho	2015	29	10/28/15	-	-	-
Illinois	2013	38	10/27/15	2010	203	11/2/15
Louisiana	2012	9	11/2/15	2010	240	11/2/15
Maine	-	-	-	2011	63	11/2/15
Maryland	2010	33 (50)	10/27/15	-	-	-
Massachusetts	2012	42	11/2/15	-	-	-
Michigan	-	-	-	2009	332	11/2/15
Minnesota	2015	52	11/2/15	-	-	-
Montana	2015	Not Effective	N/A	-	-	-
Nebraska	2014	2	10/21/15	-	-	-
Nevada	2014	1130	10/19/15	-	-	-
New Hampshire	2015	26	11/2/15	-	-	-
New Jersey	2011	5	11/2/15	-	-	-
New York	2012	245	11/2/15	-	-	-
North Carolina	-	-	-	2010 ²⁸³	95	11/2/15
Oglala Sioux Tribe	-	-	-	2009	1	11/2/15
Oregon	2014	96 (590)	10/19/15	-	-	-
Pennsylvania	2013	29	11/2/15	-	-	-
Rhode Island	2014	4	10/21/15	2012	6	11/2/15
South Carolina	2012	5	10/23/15	-	-	-
Tennessee	2016	Not Effective	N/A	-	-	-
Utah	2014	20	10/21/15	2009	73	11/2/15
Vermont	2011	17	11/2/15	2008	210	11/2/15
Virginia	2011	35	11/2/15	-	-	-
Washington D.C.	2013	8	10/21/15	-	-	-

280. *State by State Legislative Status*, BENEFIT CORP., <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Oct. 12, 2015).

281. Kate Cooney, Justin Koushyar, and Matthew Lee assisted the author with collecting data for earlier versions of this chart. Cooney, Koushyar, Lee & Murray, *supra* note 30. For states with an * next to the number, the author was unable to obtain recent data from the state and relied on the data reported at <http://benefitcorp.net/businesses/find-a-benefit-corp>.

282. *L3C Tally*, INTERSECTOR PARTNERS, L3C (July 6, 2015), http://www.intersectorl3c.com/l3c_tally.html.

283. North Carolina repealed its L3C statute effective January 1, 2014, but the then-existing L3Cs were allowed to continue. *See* Brewer, *supra* note 6.

State	Benefit Law Effective ²⁸⁰	Benefit Corporations (Benefit LLCs) ²⁸¹	Date Updated	L3C Law Effective	L3Cs ²⁸²	Date Updated
West Virginia	2014	94	10/19/15	-	-	-
Wyoming	-	-	-	2009	37	11/2/15
Total		2636 (640)			1266	