Benefit Corporations and the Common Law Tradition

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Contents

1 History of the Corporate Form in the Common Law Tradition

To understand the development of benefit corporations and their place in modern company law, we must put them in their historical context. We will sketch at a high level the development of company law from ancient times to the last century. In so

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doing, we will note the interrelation between the public and private purposes of companies.

1.1 Corporations as Quasi-Public Entities: From Rome to the Early Modern Period

In ancient Rome, there were two types of legal associations that could be formed to pursue a common purpose: a *universitas* and a *societas*.[1] A significant distinction between these two forms in Roman law is that the former was directed to a public or quasi-public end and the latter was formed for the personal profit of the members. A *universitas* is defined as "[a] number of persons associated into one body, a society, company, community, guild, corporation, etc."[2] As the definition implies, this legal form included a sense of something coming into existence, a community, beyond the coordination of individuals. The terms *universitas* and *corpus* (body) are used interchangeably to refer to a collective body with a common end but distinct from an explicitly political community, such as a city. [3] Although distinct from a true political body, Roman jurists saw these entities as analogous to true political bodies. For example, the Roman jurist Ulpian notes the similarity between a municipality and a corporation in how they act:

> If members of a municipality [*municipes*], or any corporate body [*universitas*] appoint an attorney for legal business, it should not be said that he is in the position of a man appointed by several people; for he comes in on behalf of a public [*republica*] authority or corporate body [*universitas*], not on behalf of individuals. [4]

Although the words "municipality" and "corporation" are used in parallel in this context, they were distinct. In a certain sense, *universitas* was an entity that occupies a place between the political community (pure public good) and an association of

[1] Scruton and Finnis (1989), p. 242.

[2] Lewis and Short (1975).

[3] *See, e.g.*, 2 The Digest of Justinian, bk. 2.4, no. 10.4 (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., 1985) [hereinafter Digest of Justinian] stating:

> One who is manumitted by some guild [*corpore*] or corporation [*collegio*] or city [*civitate*], may summon the members as individuals; for he is not their freedman. But he ought to consider the honor of the municipality, and, if he wishes to bring an action against a municipality [*rem publicam]* or a corporation [*universitatem*], he ought to seek permission under the edict although he intends to summon a person who has been appointed their agent.

Notice the term *universitatem* is used to refer to a *collegium* and *corpus* whereas *rem publicam* is used to refer to the *civitas*. A *universitas* was also referred to by the words, *corpus* (body) and *collegium* (college). *See* Berman (1983), p. 215.

[4] Digest of Justinian, bk. 3.4, no 2. ("*Si municipes uel aliqua universitas ad agendum det actorem, non erit dicendum quasi a pluribus datum sic haberi: hic enim pro re publica uel universitate interuenit, non pro singulis*.").

individuals pursuing their collective ends (private good). Such an understanding is evident in Justinian's Institutes, in a passage in which he describes different forms of ownership. He argues that some things are by natural law common to all persons (*omnium*), some are public (*publica*), some belong to a corporate body (*universitatis*), some to no one, with the greater part being the property of individuals. [5] Ownership by a *universitas* is distinguished in Roman legal thinking from both ownership by the whole political community and private ownership by individuals. Finally, a *universitas* was distinct in the ends it pursued, which were neither that of the whole political community nor that of individuals. Such bodies were dedicated to a wide variety of ends, such as religious organizations, burial clubs, political clubs, guilds of craftsmen or traders, orphanages, and asylums.[6] Although their particular end was unique, such organizations shared the attribute of being formed to pursue some aspect of the public good and not merely a for-profit business activity. Accordingly, the property of a *universitas* did not belong to the members who comprised the *universitas.*[7] The assets were owned by the corporate entity for the purpose of pursuing its particular mission and not to enrich the members.

In contrast to a *universitas*, a *societas* is defined as a "pooling of resources (money, property, expertise or labor, or a combination of them)"[8] to form a partnership "for trading purposes."[9] Unlike a *universitas*, whose end encompasses the good of others not merely its members, the end of a *societas* is solely the profit of the partners from trading. Unlike members in a *universitas*, the partners in a *societas* were seen as having a form of ownership directly in the assets of the *societas.* Although the nature of the partners' ownership of contributed assets changed (the partners became joint owners of the assets, contractually agreeing to limit the use of their joint property in accordance with their specific common business purpose), [10] they still retained an ownership interest directly in the joint assets. In contrast, the assets of a *universitas* were those of the body, not of the members.

Following the fall of Rome, for-profit business was conducted either through a *societas* or pursuant to new contractual arrangements between individuals.[11] Yet the legal form of the *universitas* continued to attach to enterprises that pursued other quasi-public ends, such as religious communities and guilds.[12] In addition, the legal

[5] *See, e.g.*, J. Inst. 2.1 (Peter Birks & Grant McLeod, ed. & trans., 1987) ("Things can be: everybody's by the law of nature; the state's; a corporation's; or nobody's. But most things belong to individuals, who acquire them in a variety of ways. . .").

[6] Berman (1983), pp. 215–216.

[7] The later Medieval canonists claimed that the property of a *universitas* was owned by nobody and the managers acted as mere guardians of this property. *See* Scruton and Finnis (1989), p. 242.

[8] Zimmermann (1990), p. 451; *see also* Hansmann et al. (2006), p. 1356.

[9] Lewis and Short (1975), in 1715.

[10] *See* Zimmermann (1990), pp. 454–456 and 465–466; *see also* Digest of Justinian, bk. 17.2, no. 1 (describing the assets of the partnership being held in common by the partners).

[11] Particularly the *societas*; however, other contractual forms such as the *census* and the *commenda* were used. *See* McCall (2009), pp. 22–23.

[12] Micklethwait and Wooldridge (2003), p. 12; *see also* Avi-Yonah (2005), p. 783.

term was appropriated to describe the new centers of learning that were founded in the twelfth century, what we now call "universities." The medieval universities were considered distinct legal entities comprised of individual scholars, teachers, and students who pursued the common end of learning and intellectual debate. The jurist Bartolus of Sassoferrato describes a university in a way that recognizes that something exists beyond the particular members and their individual goals at a particular place and time. He says:

> [A] university [*universitas*] represents a person, which is different than the scholars, or its members [*hominibus universitatis*]. . . . Thus, if some scholars leave and others return, nevertheless the university [*universitas*] stays the same. Similarly if all members of a people [*omnibus de populo*] die and others take their place, the people [*populus*] is the same . . . and thus a corporate body [*universitas*] is different from its members [*persone*]. . . .[13]

Bartolus is clearly commenting on the Roman law concept of the *universitas* in general, which term still had a broader meaning than an institution of learning. When speaking about a university, in the modern sense of the word, he needs to qualify it as a *universitas scholares*. An academic university was an example of a *universitas* as a collective entity that pursued a quasi-public good and not mere profit from trading. The *universitas* differs from a mere partnership of members (*societas*) as it survives the complete replacement of all members and its end transcends that of the partnership.

Although the *universitas* was developed and preserved to pursue quasi-public ends, by the High Middle Ages, merchants engaged in profit-making businesses began slowly adopting this form to pursue profits, with the first arguably being the Aberdeen Harbour Board in 1136.[14] This slow development occurred since corporate bodies established as a *universitas* gradually pursued ends that encompassed both individual profit and quasi-public goods. Guilds, which were legally organized as a *universitas*, are a good example of this transformation. They pursued an end that was both public and private. Guilds were organized to advance the interests of various artisans and merchants, but their work transcended commercial activity to encompass religious festivities, poor relief for families of deceased members, and patronage of the arts. [15]

[13] Avi-Yonah (2005), p. 781 (quoting Bartolus of Sassoferato, *Commentary* on Dig. 3.4.1.1 (1653)).

[14] Micklethwait and Wooldridge (2003), pp. 12–13.

[15] *See* Micklethwait and Wooldridge (2003), p. 13; *see also* Duffy (1992), pp. 141–154 (discussing guild involvement in the parish).

1.2 The Modern Era: The Transition from Quasi Public to Private Purpose

By the early modern period, the eighteenth century, some corporate entities were formed throughout the British empire to pursue large-scale commercial and colonization ventures rather than undertaking them as a partnership (a *societas*).[16] Yet even these early corporations, in the modern sense of the term, exhibited an admixture of characteristics of a private for-profit business association and a public institution. They sought commercial profit but also possessed elements typically associated with governments: standing armies and democratic elections.[17] In the age of mercantilism, these corporations generally undertook large-scale projects in partnership with the government, such as exploration of new lands and establishment of colonies. Thus, the for-profit end of the owners of the company was mixed with a quasi-public goal of the government. Employees of the great mercantile corporations in England even referred to themselves as "civil servants." [18]

As the corporate form developed in the United Kingdom and common law jurisdictions that followed their company law, governments became somewhat skeptical of the use of these perpetual entities for profit-making activities since they could be used to evade regulation and taxation by their perpetuity. [19] By the eighteenth century, British corporations were subjected to inspection by a committee of visitors, "which represented the interests of the founder and of the wider community."[20] This board of visitors served the function of overseeing the public impact of these great mercantile corporations. This skepticism, combined with a financial collapse, led to new restrictions on the use of the corporate form (*universitas*) to conduct business.[21] After the passage of the Bubble Act in England, business ventures, in an effort to escape the new restrictions it imposed on the use of the corporate form for private profiteering, had to be formed as creatures of contract through a deed of settlement signed by all shareholders.[22] Corporate law in this phase had to rely on contract (particularly partnership contracts) and trust law. The corporate form was reserved solely for public goods, such as scholarly universities.

With the advent of the English Companies Act of 1844 (which became a model for other common law legal systems), and later the English Joint Stock Companies Act of 1856, the corporate form once again became available to for-profit businesses. These new corporate statutes facilitated registration with the government as a company or joint stock company rather than the execution of a contract or deed of

[16] Avi-Yonah (2005), p. 783.

[17] Micklethwait and Wooldridge (2003), pp. 21, 33–36.

[18] *Id.* at 35, 95.

[19] *Id.* at 13.

[20] Avi-Yonah (2005), p. 783.

[21] Micklethwait and Wooldridge (2003), pp. 28–32 (describing the financial bubbles of the Mississippi Company and the South Sea Company).

[22] Bottomley (1997), p. 282.

trust by all shareholders as a means to found a company. [23] As a part of this legislative change, a positive act of the government—the issuing of a charter—became essential to create a corporate body; in England, this could only be issued by an Act of Parliament, and in the United States by an act of a state's legislature. [24] In order to obtain a charter, these companies generally had to demonstrate to the legislative body that the company would be established for a limited declared public purpose (i.e., fulfilling some aspect of the common good, such as the exploration of new lands, the building of railroads, etc.). [25] Although the chartered company could seek to obtain profits for its investors, its business plan had to involve pursuing some aspect of the public good in that pursuit of profit. This once again transformed the corporate form into a hybrid entity that pursued profit but only if that profit derived from activity supporting the public good.

The requirement of a public aspect of the purpose of a chartered corporation began to break down by the latter part of the nineteenth century. In the 1830s, Massachusetts and Connecticut removed the requirement that a corporation be engaged in some form of public works to obtain limited liability.[26] Eventually, a corporate charter could be obtained by filing a record with a public office (such as Companies House in England) rather than requesting a legislative act. Yet throughout common law jurisdictions, a corporate charter still had to articulate some particular business activities in a purpose or company object clause. Over time, this purpose clause began to detach from the requirement of connection to a public good. Stephen J. Leacock explains how lawyers in common law jurisdictions added flexibility to company charters by expanding the objects or purpose clause:

> First, under English company law, historically, a company could not legally engage in any business activity at all, unless empowered to do so in the objects clause - or clauses - of its memorandum of association. Consequently, in practice, the drafters of objects clauses tended to include a plethora of primary as well as secondary activities in addition to peripheral objects and subordinate powers. All of this was done, in an attempt to provide the company with the greatest flexibility - semantically possible - to engage in every legal business activity imaginable.[27]

By the late twentieth century, many American states amended their corporate legislation to simplify the process for a corporation to be unlimited in its purpose. Rather than requiring positive articulation of a list of purposes, corporations were permitted to engage in all lawful business activities unless the founding documents

[23] *Id.*

[24] *See* Micklethwait and Wooldridge (2003), pp. 40–44.

[25] *Id.*; *see also* Avi-Yonah (2005), p. 784 (noting that "only corporations that were clearly vested with a public purpose and benefited the public fisc, like the East India and Hudson Bay Companies, received royal approval").

[26] Micklethwait and Wooldridge (2003), p. 46. By the end of the nineteenth century, the regulation of corporate bodies changed to do away with specially defined purposes and gave way to broader, more general purposes. *See* Bakan (2004), pp. 13–14; *see also* Micklethwait and Wooldridge (2003), pp. 45–46.

[27] Leacock (2006), p. 72.

restricted it.[28] For example, the Delaware General Corporation Law now explicitly states that a "corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State."[29] The same law also makes clear that although the certificate of incorporation must contain a statement of the "nature of the business or purposes to be conducted," it will be "sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity."[30]

When the United Kingdom amended its Companies Act in 2006, it adopted the same approach as Delaware. The Companies Act now reads "Unless a company's articles specifically restrict the objects of the company, its objects are unrestricted."[31] Thus, objects or purpose clauses in both the United States and the United Kingdom have become merely a formality that enables companies to engage in any lawful business activity. The one limitation that may still remain is that an activity which although lawful has no "business" purpose may be outside the power of a for-profit company.[32] This question was addressed in Delaware in the case of *eBay Domestic Holdings, Inc. v. Newmark* in 2010.[33] In this case, eBay, a minority shareholder, challenged the adoption of takeover defense measures that were designed to prevent eBay from acquiring control after the death of the founders and then changing the culture of Craigslist by increasing monetization of listings. Although the Delaware Court of Chancery found that the directors did not act in furtherance of a business (meaning profit-generating) purpose in adopting takeover defenses, they did not find that the current corporate practice of "seeking to aid local, national, and global communities by providing a website for online classifieds that is largely devoid of monetized elements" was outside the power or purpose of the corporation. The case was focused rather on the overreaching of the directors who attempted to protect that purpose after their death.[34]

Throughout this varied history, we see that the *universitas*, or body corporate, was a legal entity directed toward a public or quasi-public end. In early modern times, the corporate entity evolved to be one that merged private profit seeking with some larger public good, such as infrastructure building or exploration. By the turn of the twentieth century, that mixed purpose gave way to purely private business profit seeking, although one that still needed definite articulation. Finally, the law across the Anglo-American world evolved to allow the establishment of companies

[28] Ibid., at 73.

[29] Del. Code Ann. tit. 8, § 101(b).

[30] Del. Code Ann. tit. 8, § 102(a)(3).

[31] UK Companies Act Sec. 31(1) (2006). See also, UK Palmer's Company Law, 2.601 ("To begin with, a company formed and registered under the 2006 Act is taken to have unrestricted objects unless the company's articles specifically restrict its objects."). See also Avi-Yonah (2005), p. 803.

[32] See Leacock (2006), p. 73.

[33] 16 A.3d 1, 34 (Del. Ch. 2010).

[34] *Id.*

for any lawful business purposes rather than particularly articulated ones. An open question remained if a corporation could pursue nonbusiness purposes.

2 Emergence of the Shareholder Wealth Maximization Norm

One result of the history sketched in Sect. 1.1 of this chapter is the emergence within the common law legal systems of the shareholder wealth maximization norm for company directors. In common law countries, this norm is grounded, by different scholars, in common law concepts of property, tort, and contract.[35] William T. Allen, former Chancellor of the state of Delaware, summarizes aptly the view that decision-makers in companies must pursue the wealth maximization of their owners: "The corporation's purpose is to advance the purposes of these owners (predominantly to increase their wealth), and the function of directors, as agents of the owners, is faithfully to advance the financial interests of the owners."[36] Directors and managers are viewed by this persistent theory as "mere stewards of the shareholders' interest."[37] As Milton Friedman, champion of this conception of the responsibilities of directors of a corporation, stated, the responsibility of directors is to "conduct the business . . . to make as much money as possible while conforming to the basic rules of the society."[38] Professor Joel Bakan cynically observes: "CEO's . . . 'have learned to repeat almost mindlessly', like a mantra, that 'corporations exist to maximize shareholder value'; they are trained to believe self interest is 'the first law of business.'"[39] Whereas in the ancient and medieval period a *universitas* was seen as an entity that brought together a variety of individual and public interests, the modern business corporation in common law countries is to manage for the narrow purpose of shareholder wealth maximization. As Henry Hansmann, summarized it:

> The principal elements of this emerging consensus are that ultimate control over the corporation should rest with the shareholder class; the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders; other corporate constituencies, such as creditors, employees, suppliers, and customers, should have their interests protected by contractual and regulatory means rather than through participation in corporate governance. . . .[40]

[35] See McCall (2011), pp. 513–521.

[36] Allen (1992), pp. 264–265.

[37] Bainbridge (2002), p. 6.

[38] Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. Times, Sept. 13, 1970, § 6 (Magazine), at 33.

[39] Bakan (2004), p. 142 (quoting Robert Simons et al., *Memo To: CEOs*, Fast Company, June 2002, at 117, 118).

[40] Hansmann and Kraakman (2001), pp. 440–441.

Although the shareholder wealth maximization norm remains the dominant theory in common law corporate legal discourse,[41] by the late twentieth century, at least some jurists began to question its worth. Some common law jurists began to develop what has become known as the stakeholder or constituency model of the corporation. The theory is difficult to describe due to the diversity of definitions of stakeholders and constituencies offered. Yet in the midst of these disagreements, a group of scholars can generally be discerned as sharing a common opinion that, to a varying degree, boards of directors may or should consider the interests of identifiable groups of parties other than shareholders in managing a corporation. [42] Yet starting with the early pioneer of this theory, E. Merrick Dodd, in the 1930s, most jurists argue merely that corporate managers should be permitted to take into account private interests other than shareholder wealth, not that these other interests must be accommodated.[43] By the latter part of the twentieth century, the stakeholder theory had resulted in some jurisdictions adopting "constituency statutes."[44] These amendments merely permitted directors to consider, to an unspecified degree, private interests of groups other than shareholders. These laws did not change the shareholder wealth maximization norm; directors still needed to make decisions that advanced that goal, but in so doing they could consider the effects on other groups. These statutes did not return to the corporate form a requirement of pursuing a public good as the interests that directors could consider were essentially private interests.

To return to the *eBay Domestic Holdings, Inc. v. Newmark* case discussed in the prior section, it was not considered unlawful for the corporation to provide listing facilities at low monetization rates to assist the community, but it was considered a breach of the duty of directors to pursue the goal of community access to listings at the expense of wealth maximization for the shareholders, such as eBay. The court explained:

> Jim and Craig did prove that they personally believe craigslist should not be about the business of stockholder wealth maximization, now or in the future. As an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national, and global communities by providing a website for online classifieds that is largely devoid of monetized elements. Indeed, I personally appreciate and admire Jim's and Craig's desire to be of service to communities. The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other

[41] Cortright and Naughton (2002).

[42] *See*, *e.g.*, Colombo (2008), p. 257 ("[T]here is some consensus among stakeholder theorists with regard to what a board of directors ought to be doing with regard to nonshareholder stakeholders.").

[43] See, for example, Fairfax (2006), p. 681 (citing Merrick Dodd (1932), pp. 1160–1161).

[44] Allen (1992), p. 276. Chancellor Allen continues by noting that:

> The statutes of Indiana, Pennsylvania, and Connecticut are particularly notable. The Indiana statute, as amended in 1989, and the Pennsylvania statute enacted in 1990, explicitly provide that directors are not required to give dominant or controlling effect to any particular constituency or interest. These statutes appear explicitly to decouple directors' duties to the corporation from any distinctive duty to shareholders.
>
> *Id*. (Internal citations omitted).

> stockholders interested in realizing a return on their investment. Jim and Craig opted to form craigslist, Inc. as a *for-profit Delaware corporation* and voluntarily accepted millions of dollars from eBay as part of a transaction whereby eBay became a stockholder. Having 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. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders. . . .[45]

The corporate form, although allowing for a broad definition of purposes that could include providing listing services to the community, did require that any such decision had to be in furtherance to some degree of shareholder wealth maximization. As the chancellor noted, the decision of the directors that was the subject of the dispute was contrary to wealth maximization and was therefore a breach of the directors' fiduciary duties. This case is a good example that demonstrates why a new form of entity not beholden to the shareholder wealth maximization norm is necessary.

3 The Emergence of Benefit Corporations

3.1 Ben & Jerry's Case

Commentators often credit Unilever's acquisition of Vermont-based Ben & Jerry's Homemade Holdings, Inc., as the catalyst for the emergence of benefit corporations.[46] The case is also used as a "cautionary tale"[47] to explain the necessity of benefit corporations. Ben & Jerry's famous ice cream company claimed to operate the business consistently with social responsibility. Yet when Unilever made an offer to purchase the publicly traded company, the board concluded that they had to support the offer since it was a good deal for shareholders. At the time the board was considering the offer, cofounder Ben Cohen said: "It's my strong personal belief that the only way that the company can actualize its progressive values is to remain independent, so within the bounds of my fiduciary duties as director, I am working hard to find a way to remain independent and return adequate value to the shareholders."[48] Ultimately, the board concluded that since Unilever offered a significantly greater price than the value of similar companies, the board had to proceed

[45] *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010).

[46] See, Gleissner (2013), p. 24; Lawrence (2009).

[47] *Id.*

[48] Carey Goldberg, *Vermonters Would Keep Lid on Ben & Jerry's Pint*, New York Times, 22 Dec. 1999, www.nytimes.com/1999/12/22/us/vermonters-would-keep-lid-on-ben-jerry-s-pint.html.

with the sale or face lawsuits from shareholders for breach of fiduciary duties.[49] This support for a sale was necessary even though the directors had reason to believe Unilever would not continue the social goals of the company after the acquisition. Since the acquisition, Ben and Jerry "have since expressed concerns that the company has shifted away from its original mission of social responsibility."[50] Some commentators have claimed that "had Ben & Jerry's been a benefit corporation, there would have been little, if any, fear of a legitimate legal threat against the board of directors" for refusing to sell to Unilever on the ground that the new owner would not operate the company consistently with its social mission.[51]

Not all commentators agree that corporate law forced the Ben & Jerry's board to accept Unilever's offer.[52] They argue that shareholder wealth maximization was not a mandated rule that inevitably led to the legal conclusion that the board must sell. Yet, notwithstanding the nuances of this legal argument, we have the actual decision of the board. The directors believed that a decision to refuse the large premium offered by Unilever would have led to risky and costly litigation against them. The cofounders themselves who did not want the sale to occur believed at the time that the law required the result.

3.2 The Emergence of New Legislation and the Founding of B Lab

Regardless of how one views the Ben & Jerry's case, shortly after the purchase by Unilever, a movement began to emerge for the reconceptualization of corporate forms in the common law world. This movement had two prongs. First, a model Benefit Corporation Act was prepared by a group led by attorney William Clark to propose a new form of entity, and B Lab was founded.[53]

In 2008, Vermont enacted the first US legislation providing for a new form of for-profit business organization that could pursue goals other than shareholder wealth.[54] Vermont chose the name low-profit limited liability company (also called L3C).[55] In 2010, B Lab drafted and proposed a model form of benefit corporation legislation (the "Model Legislation") to encourage more states to adopt a statutory alternative to the traditional corporation.[56] By November 2020, 36 US states had

[49] See Gleissner (2013), p. 25.

[50] Lawrence (2009).

[51] Gleissner (2013), p. 25.

[52] See e.g., Page and Katz (2012).

[53] Shackelford et al. (2020), p. 701.

[54] See Burand and Tucker (2019), p. 33; Vt. Stat. Ann. tit. 11 § 3001 (23) (2008).

[55] See id.

[56] See Colombo (2019), p. 77.

adopted laws authorizing one or more new forms[57] of business entity, and four states were considering proposed legislation.[58] Most did not follow Vermont's lead and chose the name benefit corporation.[59] Most states that adopted such legislation generally followed the Model Legislation, with the notable exceptions of Delaware and Colorado, which chose to depart in significant ways from its approach.[60] As of November 2017, the five states with the most incorporated benefit corporations were Nevada (974), Delaware (774), Colorado (513), New York (457), and California (269).[61]

The United Kingdom enacted, as of 2005, legislation providing for a new company form focused on social enterprises, a community interest company (CIC).[62] A CIC may not be a charity and is not subject to laws regulating charities but is subject to the provisions of UK company law, and its directors have the same duties as corporate directors.[63] If company founders opt to form as a CIC, the company becomes subject to a government regulator, to whom the CIC must report concerning its compliance with the community purpose.[64] Yet, in addition to providing by legislation for a specific legal form for social enterprises, the UK government permits a variety of forms that are not exclusive to social enterprise objectives. According to the UK government, "If you want to set up a business that has social, charitable or community-based objectives, you can set up as a: limited company, charity, or from 2013, a charitable incorporated organization (CIO), co-operative, community interest company (CIC), sole trader or business partnership."[65] This list includes traditional company forms of for-profit businesses (such as a limited company) and purely charitable forms. According to B Lab, limited companies in the UK can change their status by amending their articles of

[57] For example, Pennsylvania and Oregon enacted laws authorizing benefit corporations and benefit limited liability companies. See 15 Pa. Stat. and Cons. Stat. Ann. § 8893(a) (2016); Or. Rev. Stat. Ann. § 60.758(2)(a)-(b) (2014); 15 Pa. Stat. and Cons. Stat. Ann. § 3311(a) (2012).

[58] Those states are Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, D.C., West Virginia, and Wisconsin. States that are considering proposed legislation as of November 2020 are Alaska, Georgia, Iowa, and Mississippi. See http://benefitcorp.net/policymakers/state-by-state-status.

[59] See Burand and Tucker (2019), pp. 33–34. Florida adopted legislation authorizing both social purpose corporations and benefit corporations. See Fl. Bus. Corp. Act, Fla. Stat. Ann. § 607.501 (3) (2014); Fla. Stat. Ann. § 607.501.513 (2014).

[60] See Loewenstein (2017), pp. 381–382; Colombo (2019), p. 78 [Hereinafter Colombo, *Taking Stock*].

[61] See Burand and Tucker (2019), at 76 N112.

[62] See UK Palmers Company Law, Vol. 1, 1.225 (2020).

[63] See *Id.*

[64] See Sukdeo (2015), p. 111.

[65] https://www.gov.uk/set-up-a-social-enterprise.

association to amend their object clause.[66] According to B Lab's directory, 297 UK companies have qualified through one method or another as a B-Corp as of November 2020.[67]

Canada's approach has been similar to the UK in that some jurists have argued that no legislation is necessary as current corporate law permits business corporations to consider social concerns.[68] Yet, effective as of July 2013, British Columbia's corporation law provides for a specific form of benefit corporation, a community contribution company.[69] As of mid-2019, 50 such companies had been incorporated.[70] As of November 2020, B Lab certified 278 Canadian entities as being benefit companies.[71]

3.3 The Emergence of B Lab

As noted in Sect. 3.2, an international organization was founded to facilitate the emergence of benefit corporations, B Lab. The organization states that its goal is to "accelerate . . . and make . . . meaningful and lasting" a "culture shift . . . to harness the power of business to help address society's greatest challenges."[72] B Lab "pursues this goal by verifying credible leaders in the business community, creating supportive infrastructure and incentives for others to follow their lead, and engaging the major institutions with the power to transform our economy."[73] The two major contributions of B Lab have been their project to draft Model Legislation to provide for specific company forms of social enterprises and to provide certification that a company is a B-Corp. Requirements to obtain and maintain certification vary depending on the country of organization, but in general B-Corp certification "measures a company's entire social and environmental performance" and "evaluates how" the company's "operations and business model impact . . . workers, community, environment, and customers."[74] As of November 10, 2020, B Lab claimed to have certified 3,608 B-Corps operating in 150 industries and

[66] See https://bcorporation.uk/certification/legal-requirements?field_lr_country_tid_selective=28&field_lr_corporate_structure_tid_selective=18&field_lr_state_tid_selective=14&field_lr_publicly_traded_owned_value_selective=1.

[67] https://bcorporation.net/directory.

[68] See e.g., Sukdeo (2015), p. 89.

[69] See https://www.centreforsocialenterprise.com/community-contribution-companies/.

[70] See *id.*

[71] https://bcorporation.net/directory.

[72] https://bcorporation.net/about-b-lab.

[73] *Id.*

[74] https://bcorporation.eu/certification?_ga=2.94154132.824123640.1604948816-442973657.1600962107.

74 countries.[75] Depending on the country of organization, certification may involve incorporating as a specific legal form (such as a benefit corporation) or voluntarily adopting commitments to honor the B Lab goals if no special corporate form is available. Finally, B Lab receives grant funding from a "wide range of donors, including foundations, governmental agencies, individuals, and corporations."[76]

3.4 Increased Scholarly Attention by Common Law Jurists

The work of B Lab combined with the enactment of more statutes authorizing new forms of business enterprise has generated greater scholarly attention to the topic of benefit corporations among common law jurists. A ten-year study of academic literature concluding in 2017 found "growing attention paid by legal scholars to the fields of social entrepreneurship and impact investing."[77] The study quantified the literature thus:

> Over 100 articles discuss the 5 highest frequency terms: benefit corporations (156), social enterprise (132), L3C (117), social entrepreneurs (103), and hybrid entities (102). Between 50-60 articles discuss more narrow topics such as flexible purpose corporations and Delaware's public benefit corporations, and double or triple bottom lines (consolidated into one category for reporting purposes).[78]

4 Primary Legal Questions in Common Law Legal Systems Relating to the Creation and Operation of Benefit Corporations

To enable the formation and flourishing of benefit corporations, common law jurisdictions may need to adapt company law in some critical ways. This can take the form of either amendments to corporate law statutes to change their applicability to benefit corporations or the adoption of new legislative frameworks applicable exclusively to benefit corporations. Scott Shackelford, Janine Hiller, and Xiao Ma summarize the key legal issues that must be addressed in common law jurisdictions applicable to benefit corporations: "(1) its purpose must include either a general or specific public benefit; (2) as part of their fiduciary duties, directors must consider broader stakeholder interests as well as profit; and (3) the entity must assess its

[75] https://bcorporation.net/ (visited on November 10, 2020).

[76] https://bcorporation.net/about-b-lab/funders-and-finances.

[77] Burand and Tucker (2019), p. 16.

[78] Burand and Tucker (2019), p. 18.

performance annually, reporting about the benefits delivered, by using a third-party assessment."[79]

4.1 To Legislate or Not to Legislate

As noted previously, there is a question in some common law jurisdictions as to whether amendments to corporate law statutes are necessary to facilitate benefit corporations. Some jurists would argue that a company committed to social improvement can be established within existing law by carefully crafting corporate purpose or company object clauses and relying on existing law regulating director duties. Yet adopting legislation, and its later effectiveness in encouraging companies to use its provisions, can be affected by the contentiousness of the debate, media interest, the support of legal practitioners, and the level of grassroots support.[80] Thus, the decision to legislate may be affected by more than legal issues.

Notwithstanding B Lab's efforts to draft model legislation, no commonly agreed terminology has emerged for benefit corporation legislation. Deborah Burand and Anne Tucker give some examples of confusing and contradictory terminology:

> Oregon uses the term "benefit companies" without distinguishing between whether companies are organized as corporations or LLCs; whereas, Pennsylvania uses the term "benefit company" only in reference to a benefit limited liability company and has yet a different statute recognizing "benefit corporations."[82] Moreover, "B-Corporations" refers to a brand, not a legal form, and so should not be confused with benefit corporations, although the B Lab promotes both.[81] Thus, there is no standardized vocabulary among common law jurisdictions when legislating.

4.2 Entity Purpose or Objects

The critical difference between a benefit corporation and other corporations is the benefit corporation's rejection of shareholder wealth maximization as its sole or most significant purpose. Benefit corporations are not nonprofit entities, nor are they pure for-profit businesses. If a founder wants to be a charity, there are ample legal forms and rules to engage in charitable work that in no way seeks profit. Benefit corporations are "a kind of business that lies somewhere between completely profit-driven enterprises and nonprofit organizations."[82] In this way, benefit corporations can be seen as an attempt to return to an earlier stage in the history of corporate law in which corporations, although pursuing private profit, had to demonstrate some public

[79] Shackelford et al. (2020), p. 702.

[80] See Ibid., at 726.

[81] Burand and Tucker (2019), p. 27.

[82] Shackelford et al. (2020), p. 699.

purpose or common good as their object. That common good could be education or exploration or the building of public goods, such as railways. Likewise, benefit corporations represent an entity with a dual purpose: serving some public good while realizing a fair return on investment for its owners. Whether utilizing a new statutory form of entity or merely carefully crafting a corporate purpose or object clause, founders must pay careful attention to articulating the social purpose or goals of the benefit corporation. These will be the ends that inform the duties of the directors.

4.3 Director Obligations

In common law jurisdictions, the company directors owe duties to act in the best interests of the company and its owners.[83] It is this duty to act in the best interests of the company and its owners, as understood through the lens of shareholder wealth maximization, that causes the most significant legal issues for benefit corporations. As evidenced in the Ben & Jerry's case, the directors felt that the fiduciary duties owed to the company's shareholders compelled the company to accept a lucrative takeover bid that conflicted with its social purposes. Thus, by statute or organizational documents, the directors of benefit corporations must know that making decisions that advance the organization's social goals will not be challenged because those decisions did not maximize shareholder wealth. The directors must at a minimum be able to balance the interests of wealth maximization against the social purposes of the entity and ideally should be obligated to do so.

In a certain sense, company law has become constricted over the past few centuries due to the rise of the shareholder wealth maximization norm. For centuries, corporate entities were meant to pursue both private and public goods. As the law of directors' duties developed in the twentieth century, this duty often narrowed to focus exclusively, or primarily, upon increasing the investment of the company's owners. Whether this duty is embodied in a statute or developed by courts, the duty must be clarified so that directors can, consistent with the "best interests" duty, pursue the public or social goals of a benefit corporation, even if doing so will not maximize the value of the owner's shares in the company.

To some extent, constituency statutes adopted in some common law jurisdictions achieve this goal. Yet a rule that merely permits a director to consider the interests of groups other than the shareholders does not really embody the essence of a benefit corporation. Such rules merely protect a director against liability in making such decisions; these statutes often do not require the director to consider these interests.

[83] The duty to act in the "best interests" of the company and its owners is found in the following laws of the following common law jurisdictions: *Companies Act* 2006*, sec.* 172(1) (United Kingdom); *Corporations Act* 2001*,* 181(1)(a) (Australia); *Companies Act* 1967*, sec.* 157(1) (Singapore); *Business Corporations Act 1985 (Can)*, *sec.* 122(1)(a) and *Business Corporations Act 1990 (Ont)* Sec. 134(1)(a) (Canada). In some common law jurisdictions, such as Hong Kong and the United States, the duty has not been codified by statute but has been developed by the states.

They also focus on the interests of corporate groups, such as employees or creditors, but the goals of a benefit corporation may transcend group interests. A benefit corporation may be founded to advance education or produce products in an environmentally safe manner. Such goals may not be encapsulated in the interests of groups such as employees.

Such rules often do not require directors to make decisions that advance the nonfinancial goals of a company. Constituency laws typically shield against liability for not solely considering shareholder wealth maximization. Yet those who establish or fund a benefit Corporation intend the directors to advance the stated goals of the benefit corporation. Thus, the company law governing benefit corporations needs to enhance the duties of directors to obligate them to act in the interests of the social or public goals pursued by the benefit corporation. How this duty requiring directors to consider and balance social goals against profit is crafted can be quite difficult to formulate.

4.4 Mandated Disclosure and Verification

Addressing how the duties of directors in benefit corporations differ from those of other corporations is only part of the solution. Investors will buy shares in benefit corporations presumably because they want their capital to be used for the social purposes identified as the objects of a particular benefit corporation. These investors want to see the fruits of this investment. Annual company financial accounts, required to be prepared in many common law countries, will not necessarily provide disclosure on how well the directors are meeting their duties to pursue the stated nonfinancial goals of the benefit corporation. Thus, benefit corporations need a system of disclosure and verification. The law governing benefit corporations must require disclosure by the benefit corporation of their compliance with their purpose. In addition, there must be some third-party standard that can verify that an entity is in fact functioning as a benefit corporation and not merely using the name to raise capital. An equivalent to an outside financial auditor may be called upon to report on compliance. B Lab has emerged as one type of certification and verification entity. Perhaps something like the English board of visitors could be established to review the decisions of the directors.

Finally, shareholders must have some meaningful way to intervene to hold benefit corporations and their directors accountable for the social purposes. Common law jurisdictions often rely on private litigation to enforce directors' duties. In the benefit corporation context, the law needs to determine which parties have standing to bring enforcement action for failure to pursue the social goals. Company law needs to determine if only the shareholders of benefit corporations have legal standing to bring claims or if the beneficiaries of a benefit corporation's purpose can hold them accountable for not pursuing the stated ends.

4.5 Business Combinations

A final general concern will involve how benefit corporations interact with regular companies. Mergers and business combinations are a part of business life in all common law jurisdictions. It was a merger offer for Ben & Jerry's that gave rise to the new legal form. Can benefit corporations combine with regular corporations? If they do merge, what becomes of the social purpose? Should investors who bought prior to the merger have an appraisal right for their shares? Appraisal rights if exercised require a company to repurchase shares at fair value from shareholders who dissent from a business combination decision.

5 Conclusion

In certain ways, the history of the corporate form in common law countries can be summarized by the adage "the more things change, the more they remain the same." The corporate form may be returning to its origins in the Roman and medieval *universitas*. The dominant shareholder wealth maximization norm has been called into question. All major common law jurisdictions have begun to facilitate at least one form of corporate entity that is not directed exclusively to the shareholder wealth maximization norm. Jurists, legislators, and social activists have developed, since the time of Ben & Jerry's sale to Unilever, a legal framework for a business entity that seeks more than profits. The corporate law of each common law jurisdiction may have begun to address this trend using different legal vocabulary and different legal techniques, but all major common law jurisdictions are beginning to address the issues of articulating a broader corporate purpose, adapting director duties to a new form of entity, requiring disclosure and verification, and addressing the merger of a benefit corporation with other business entities.

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