BENEFIT CORPORATIONS, INNOVATION, AND STATUTORY DESIGN

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INTRODUCTION

Benefit corporation legislation, presently adopted in nineteen states and the District of Columbia and likely to be adopted in more jurisdictions over the next several years,[1] is intended to address a particular corporate-governance problem.[2] Specifically, and in a somewhat stylized fashion, corporations that are not nonprofit corporations ("for-profit" corporations) are intended to pursue the pecuniary interests of their owners, the shareholders.[3] These pecuniary

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1 *See* B Lab, *State by State Legislative Status*, BENEFIT CORP. INFO. CTR., http://www.benefitcorp.net/state-by-state-legislative-status (last visited Oct. 27, 2013) (listing the states that have enacted benefit corporation legislation as well as fourteen states that have introduced benefit corporation legislation but have not yet adopted it).

2 I am assuming for purposes of this Article that the problem is real and not merely perceived. The answer to this question may depend on our view of the nature of the corporation, and is beyond the scope of this Article. Edward Rock notes that two ways of thinking about corporations co-exist uneasily within corporate law: the "entity" model, which views the corporation as a social institution, and the "property" model, which views the corporation as nothing more than the shareholders' property; benefit corporations appear to operate within the "property" model. *See* Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1986–88 (2013); *see also* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–66 (1992). Two states have adopted benefit limited liability company statutes. Doug Batey, *Oregon Becomes the Second State to Authorize Benefit LLCs*, LLC LAW MONITOR (June 7, 2013, 2:32 PM), http://www.llclawmonitor.com/2013/06/articles/operating-agreements/oregon-becomes-the-second-state-to-authorize-benefit-llcs/; *see also* H.R. 2296, 77th Legis. Assemb., Reg. Sess. (Or. 2013); MD. CODE ANN., CORPS. & ASS'NS §§ 4A-1101 to -1108 (LEXIS through 2013 Reg. Sess.). In part because I think the concept is oxymoronic, these will not be discussed in this Article.

3 In *Dodge v. Ford Motor Co.*, the Michigan Supreme Court stated:

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

170 N.W. 668, 684 (Mich. 1919); *see also* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 164–66 (2008) (arguing that *Dodge* promotes a strained view of corporate purposes). Some promoters of benefit corporation legislation argue that *Dodge* is "good law" and state that "many still maintain" that *Dodge*'s wealth maximization principles have "been widely accepted by courts over an extended period of

interests can take the form of dividends or other distributions, or stock appreciation. Although for-profit corporations can engage in socially beneficial activities, these activities are measured against an overall profit motive. Thus, the socially beneficial activity of using hormone-free pork in burritos may entail greater expense than using hormone-laced pork, but if it creates market for the restaurant, profits are still generated and shareholders generally have no basis for complaint about the increased expense. Call it product differentiation or marketing. In short, in the context of day-to-day business operations, the business judgment rule generally protects managers of for-profit corporations from judicial and shareholder second-guessing of business decisions that are rationally connected to shareholder benefit.[4] However, there must be

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time." William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 825–26 (2012) (quoting STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS § 9.2, at 413 (2002)). William Allen has referred to the shareholder wealth maximization priority as the "property" model of corporate law. Allen, *supra* note 2, at 264–65 (comparing the property model with an entity model that allows the corporation to serve multiple constituencies' interests simultaneously).

Judge Frank Easterbrook and Professor Daniel Fischel have noted that the tension between the shareholder profit maximization norm and shareholder choice has "plagued" corporate law scholars for many years:

> [W]hat is the goal of the corporation? Is it profit, and for whom? Social welfare more broadly defined . . . ? Our response to such questions is: who cares? If the *New York Times* is formed to publish a newspaper first and make a profit second, no one should be allowed to object. Those who came in at the beginning consented, and those who came later bought stock the price of which reflected the corporation's tempered commitment to a profit objective. If a corporation is started with a promise to pay half of the profits to the employees rather than the equity investors, that too is simply a term of the contract.

FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 35–36 (1991). Judge Easterbrook and Professor Fischel respect freedom of contract and believe shareholders should be free to create corporations that respect their choices and values. *Id.* Others express similar contractarian views. *See, e.g.*, Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 577–83 (2003) (arguing that the shareholder wealth maximization norm should be a default rule because parties would choose this rule in a hypothetical bargain, leaving room for contracting away from the default rule); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1752 (2006) (arguing that flexibility to engage in "private ordering" is a goal in Delaware corporate law); Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 179 (2008) (arguing that shareholder profit maximization is only a default rule that shareholders can vary by agreement).

[4] The business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2000).

some connection of the business decision to shareholder value, and decisions that lack such a connection are open to attack.[5]

Nonprofit corporations, on the other hand, generally pursue socially beneficial ends without a view toward the profit motive of the pecuniary interest of its members/shareholders. A critical difference between nonprofit corporations and for-profit corporations is that nonprofits do not have shareholders who receive distributions or experience stock appreciation. When a nonprofit corporation has a profit from an activity, the profit is used by the nonprofit and is not distributed to owners.

Benefit corporations are designed to occupy a middle ground. As for-profit corporations, they have shareholders who can (and can be assumed to expect to) obtain the financial benefits of dividends and stock appreciation. However, as corporations that embrace a "public purpose," the benefit corporation's shareholders recognize that producing social good might reduce profitability. Therefore, by electing benefit corporation status, a for-profit corporation's shareholders instruct the board of directors and officers to pursue public good—such as considering the environmental and social impact of corporate activities, even at the expense of profit maximization—and protect them from fiduciary and other claims when they do so.

This Article discusses three major approaches to benefit corporations, which I term the Model Approach, the Delaware Approach, and the Colorado Approach. Part I describes the Model Approach and discusses what I perceive to be the major weaknesses in the Model Approach. Part II describes the Delaware Approach and discusses the major differences between the Delaware Approach and the Model Approach, as well as remaining issues with the Delaware Approach. Part III describes the Colorado Approach, which was jettisoned in the 2013 Colorado legislative session in favor of a modified Delaware Approach statute. In my view, the Colorado Approach addresses most or all of the weaknesses of the Model Approach and should be considered by other states that consider benefit corporation legislation. The description in Part III of the political and legislative process that led to Colorado's rejection of the Colorado Approach is instructive, since it demonstrates

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5 *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440–43, 457 (2001); Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Charge of Control Transactions: Is There Any "There" There?*, 75 S. CAL. L. REV. 1169, 1170 (2002). Lynn Stout argues against this understanding and states that the validity of the shareholder wealth maximization model is not supported by theory or empirical evidence. LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 7–8 (2012). The shareholder benefit issues are particularly pronounced in change-of-control transactions, in which wealth maximization principles are dominant.

the difficulties faced by lawyers and others when they attempt to deviate from Model Approach orthodoxy. Deviance has its costs, and those who seek to move from orthodoxy to what they perceive to be a better structure likely will need to contend with forces of well-financed and well-organized orthodoxy. Finally, the Article concludes by discussing the development of benefit corporation legislation in the context of design. It encourages statutory experimentation rather than blind adherence to what some argue is the "only way" to accomplish benefit corporation legislation.

I. THE MODEL APPROACH

B Lab ("Blab"), of Berwyn, Pennsylvania, has been the leading promoter of benefit corporations and has encouraged various state legislatures, with decent success, to adopt its "model" approach (the "Model Approach" or the "Model") to benefit corporation legislation.

A. Elements of the Model Approach

(a) Under the Model Approach, a "benefit corporation" is a for-profit corporation, formed pursuant to the state's general business corporation law, which has elected to subject itself to the benefit corporation provisions of the Model.[6] The corporation's articles of incorporation must state that it is a "benefit corporation," thereby placing potential investors, creditors, and others who inspect organizational documents on notice of the corporation's status.[7] 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.

(b) If an existing for-profit corporation seeks to become a benefit corporation, or if an existing for-profit corporation seeks to merge into a benefit corporation, shareholders owning at least two-thirds of the interests must approve the election.[8] Similarly, a two-thirds shareholder

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6 MODEL BENEFIT CORP. LEGISLATION § 101(c) (B Lab 2013) (bracketed material in original), *available at* http://benefitcorp.net/storage/documents/Model_Benefit_Corporation_Legislation.pdf ("Except as otherwise provided . . . [*the . . . business corporation law*] shall be generally applicable to all benefit corporations."); *id.* § 103 (forming a benefit corporation); *id.* § 104 (electing benefit corporation status).

7 *Id.* § 103.

8 *Id.* § 104 (requiring "minimum status vote"); *see id.* § 102 (defining "minimum status vote" as two-thirds vote). Here, I note that section 101(d) states that "the articles of incorporation or bylaws of a benefit corporation may not limit, be inconsistent with, or supersede" any other Model provision. *Id.* § 101(d). Thus, if the legislature adopts a two-thirds vote requirement, unlike other shareholder vote items, the election cannot be reduced to, for example, majority vote or increased to unanimous vote. In addition, a

vote is needed to terminate benefit corporation status.[9] Notably, the Model does not contain dissenters' rights or other provisions to protect the interests of non-controlling shareholders who invested in what they believed to be a profit-maximizing entity.[10]

(c) A benefit corporation formed under the Model must have the purpose of "creating general public benefit."[11] In addition to, but not instead of, a general public benefit, the articles of incorporation may identify "specific public benefits that it is the purpose of the benefit corporation to create."[12] Identifying a specific public benefit does not limit a benefit corporation's obligation to create a general public benefit.[13] Thus, general public purpose is superior, and specificity is a subcategory of the general.

"minimum status vote" requires the vote of two-thirds of the shareholders of every class or series, irrespective of their other voting powers. *Id.* § 102.

9 *Id.* § 105(a). Further, section 105(b) requires that sales, leases, or other dispositions of substantially all of the benefit corporation's assets "shall not be effective unless" approved by shareholders who own at least two-thirds of the interests. *Id.* § 105(b)(3). This two-thirds vote requirement cannot be reduced by the corporation's articles of incorporation or bylaws. *Id.* § 101(d). In some situations this requirement may create business-planning difficulties, and these difficulties may be exacerbated by the fact that a two-thirds vote is required from the shareholders of each class or series of shares, irrespective of their participation in control of other corporate actions. *See id.* § 102 (defining "minimum status vote").

10 Benefit corporation proponents' position on the dissenters' rights issue is unclear. Although the California benefit corporation statute includes dissenters' rights provisions, CAL. CORP. CODE §§ 14603–14604 (Westlaw through ch. 130, 2013 Reg. Sess.), Blab generally has not promoted dissenters' rights because electing corporations may not have liquid capital to pay dissenters and because any payment would deprive the corporation of operating capital for its business and social good, *see* WILLIAM H. CLARK, JR. & LARRY VRANKA, 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 27 (Jan. 18, 2013), *available at* http://benefitcorp.net/storage/documents/Benecit_Corporation_White_Paper_1_18_2013.pdf. Notwithstanding liquidity issues, state legislatures should include, and some have included, dissenter provisions in their benefit corporation legislation. *See, e.g.*, MASS. GEN. LAWS chs. 156D, § 13.02(a), 156E, § 8(c) (Westlaw through ch. 84, 2013 1st Ann. Sess.) (entitling shareholders of a corporation that becomes a benefit corporation through merger, conversion, or share exchange to an appraisal and payment of the fair value of their shares); S.C. CODE ANN. § 33-38-600 (Westlaw through 2012 Reg. Sess.) (entitling shareholders to dissent from and obtain the fair value of their shares in the event of the election of benefit corporation status). Alternatively, the election of benefit corporation status should require unanimous shareholder consent. *See, e.g.*, VA. CODE ANN. § 13.1-785 (LEXIS through 2013 Reg. Sess.) (requiring unanimous consent by all shareholders entitled to vote when amending articles of incorporation to make the corporation a benefit corporation).

11 MODEL BENEFIT CORP. LEGISLATION § 201(a) (B Lab 2013).

12 *Id.* § 201(b).

13 *Id.*

(d) "General public benefit," to be pursued by all benefit corporations using the Model Approach, is 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."[14] There is no clarification about the hierarchy of benefit purposes served by the corporation.[15] A comment to the Model states: "By requiring that the impact of a business on society and the environment be looked at 'as a whole,' the concept of general public benefit requires consideration of all of the effects of the business on society and the environment."[16]

(e) A "third-party standard" is a "recognized standard for defining, reporting, and assessing corporate social and environmental performance."[17] A third-party standard must be developed by an independent organization, and it must be credible and transparent.[18] The Model attempts to define each of these characteristics, but it does not prescribe any content for the standards. Furthermore, it fails to state how or by whom standards are applied.[19] Neither the government nor the standard-setter is given any enforcement powers.

(f) The creation of general public benefit and any specific public benefit "is in the best interests of the benefit corporation."[20] Directors "shall" (i.e., must), in discharging their duties and in considering the corporation's best interests, "consider the effects of any action or inaction upon": (i) shareholders, (ii) employees and the workforce of the

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[14] *Id.* § 102. This seems to leave open the question of whether, for example, a corporation whose principal business is brewing and distributing beer has a "material positive impact" on society and the environment. Perhaps "positive impact" is in the eyes of the beholder, but there might be some argument that the producer of alcoholic beverages delivered in cans and bottles that litter the highways does not create a material positive impact on either society or the environment. But then, perhaps the constituencies served by craft-type brewing operations neither drink while driving nor dispose of delivery devices in environmentally harmful ways.

[15] *See id.* § 301(a)(3) (stating that priority need not be given to any particular interest).

[16] *Id.* § 102 cmt.

[17] *Id.* § 102. Note that the Model does not refer only to business operations but requires the consideration of existential questions like the nature of the corporation's business itself. Some corporations likely will shy away from benefit corporation status due to an ongoing need to consider whether, for example, making salad dressing or running a ski resort or brewing beer or manufacturing high-fat ice cream has a material positive impact on society and the environment, taken as a whole.

[18] *Id.*

[19] The author has reviewed numerous standards offered by Blab as acceptable "third-party standards" and, at the time of review, found all of them wanting in at least some respect.

[20] *Id.* § 201(c).

corporation, and its subsidiaries and suppliers, (iii) customers' interests "as beneficiaries of the general public benefit," (iv) societal and community factors (including those of all communities where the corporation, its suppliers, or its subsidiaries have offices or facilities), (v) both the local and global environment, (vi) the corporation's short-term and long-term interests, including whatever benefits that may accrue from "long-term plans and the possibility that these interests may be best served" by the corporation's continued independence,[21] and (vii) the corporation's ability to achieve its general public benefit purpose as well as its specific public benefit purpose, if any.[22] There is no hierarchy to or prioritization of the interests that directors must consider.[23] In addition, under the Model, directors may consider "other pertinent factors or the interests of any other group that they deem appropriate."[24] Further, the Model provides that directors are not "personally liable for monetary damages for" any action taken as a director or the failure of the benefit corporation to create public benefit,[25] and that directors do not have liability to beneficiaries of the corporation's general public benefit purpose or specific public benefit purpose arising from the person's status as a beneficiary.[26]

(g) "Benefit enforcement proceedings" may be brought directly by the corporation or derivatively by (i) shareholders, (ii) a director, (iii) a person or group owning five percent or more of equity interests in the corporation's parent corporation (subsidiaries/parent corporations are defined using a fifty percent ownership standard), or (iv) other persons indicated in the corporation's articles of incorporation or bylaws.[27] Unless otherwise provided in the articles or bylaws, benefit corporation directors do not have duties to beneficiaries of the public purpose who are not listed above.[28] Thus, for example, customers, employees of

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[21] The breadth of this factor likely allows many forms of anti-takeover provisions based on the directors' perception of the corporation's long-term interests. It thereby may gut the shareholder protections contained in much recent corporate case law.

[22] *Id.* § 301(a)(1).

[23] *Id.* § 301(a)(3) ("[Directors] need not give priority to a particular interest or factor . . . over any other interest or factor unless the benefit corporation has stated in its articles of incorporation its intention to give priority to certain interests or factors related to its accomplishment of its general public benefit purpose or of [any] specific public benefit purpose . . . ."). It appears that a benefit corporation cannot indicate a priority for shareholder interests.

[24] *Id.* § 301(a)(2).

[25] *Id.* § 301(c).

[26] *Id.* § 301(d).

[27] *Id.* § 305(c); *see also id.* § 102.

[28] *Id.* § 301(d).

suppliers, and representatives of impacted communities or of the environment cannot sue.[29]

A "benefit enforcement proceeding" is a claim or action for "failure of a benefit corporation to *pursue or create* general public benefit or a specific public benefit . . . set forth in its articles," or for violation of any statutory obligation, duty, or standard.[30] Thus, it is the clear intent of the Model to enable fiduciary duty litigation not only against directors who fail to meet their obligation to consider the effects of their actions in the statutorily-listed ways, but also against directors whose actions fail to create general public benefit. Other than in a benefit enforcement proceeding, no person can assert a claim against the benefit corporation and its directors for failure to pursue or create benefit or violation of a standard of conduct under the Model.

(h) The board of directors of a publicly traded benefit corporation must include an independent "benefit director."[31] The benefit director must prepare an annual opinion concerning (i) whether the corporation acted in all material respects according to its general public benefit purpose and its specific public benefit purpose, if any, (ii) whether directors and officers complied with their obligations to consider the best interests listed in the Model, and (iii) a description of any ways in which the corporation or its directors or officers failed to comply.[32]

(i) Benefit corporations must prepare an "annual benefit report" meeting numerous requirements, including a narrative description of the ways the corporation sought general public benefit (and, if applicable, special public benefit) and the extent to which it was created, circumstances hindering the creation of public benefit, and the process

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[29] This clearly tilts the playing field in favor of the set of interests represented by those who own corporate stock (by issuance or acquisition) and away from those representing other interests.

[30] *Id.* § 102 (emphasis added). The proceeding is direct when brought by the corporation and derivative when brought by directors or shareholders. *See id.* § 305(c). All procedural aspects of derivative litigation will presumably be applicable, including demands for corporate action and the potential for a special litigation committee to consider whether pursuing the litigation is in the corporation's best interests. When drafting state-specific legislation, experience shows that it is necessary to sculpt the Model's "benefit enforcement proceedings" language to the state's derivative litigation statutes. The Model fails to do this. In my view, the derivative litigation issues will likely be complex and thereby will weaken the benefit corporation concept.

[31] *See id.* § 302(a) (stating that publicly traded benefit corporations *shall* include a benefit director, while non-publicly traded benefit corporations *may* include a benefit director); *see also id.* § 102.

[32] *Id.* § 302(c). My experience with the Colorado legislative process is that, when pushed, the Blab proponents are willing to eliminate the Model's benefit director requirement.

and rationale for choosing or changing the third-party standard used.[33] The narrative must also include an assessment of the corporation's overall social and environmental performance against a third-party standard, the name and address of the benefit director, the compensation paid to each director, the benefit director's opinion, and a statement of certain relationships with the third-party standard provider.[34] The Model does not state how the benefit report should assess corporate performance. The report (along with the benefit director opinion) must be provided to each shareholder, posted on the "public portion" of its Internet website (or made available to any person requesting it), and filed with the state's secretary of state or other filing official.[35]

(j) Various similar rules apply to officers.[36]

It should be clear from the foregoing that benefit corporation status under the Model involves a large and complex superstructure that cannot be diminished by agreement among the shareholders or otherwise. Assuming that there are benefits to benefit corporation status, they come with large structural and other costs.

B. Problems with the Model Approach

In a previous article, I identified four large problems with the Model Approach's structure, which I termed the "Illiberalism Problem," the "Bipolarity Problem," the "Fiduciary Uncabining Problem," and the "Greenwash/Greenmail Enforcement Problem."[37]

1. The Illiberalism Problem

The "Illiberalism Problem" stems from the Model Approach's requirement that all benefit corporations fit into the box of "general public purpose" rather than allowing the shareholders to choose one or more specific public benefits to be pursued by the corporation.[38] "General

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33 *Id.* § 401(a)(1).

34 *Id.* § 401(a)(2)–(6).

35 *Id.* § 402. Director compensation and proprietary information can be eliminated from public reports. *Id.* § 402(d). One wonders whether almost all information can be delineated as proprietary information.

36 *See id.* §§ 303–304.

37 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 (2012); *see also* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 27–52 (2012) (discussing obstacles to implementation of and imperfections in existing benefit corporation and social enterprise related statutes).

38 *See* Callison, *supra* note 37, at 98–104.

public benefit" is a "state-authorized conception[] of the 'good' "[39] (namely, "a material positive impact on society and the environment, taken as a whole, . . . from the business and operations of a benefit corporation") as measured against a third-party standard.[40] The Model starts down a liberal, choice-inducing path by allowing shareholders to choose to pursue public goods other than wealth maximization.[41] However, it then eliminates further shareholder choice by requiring general public benefit.[42] Rather than allowing shareholders the freedom to use their corporation to pursue their own conceptions of the "good" and their own self-defined ends, the Model Approach forces all electing corporations to pursue broad conceptions of the "good" assessed against a legislatively-endorsed third-party standard.[43] For example, the shareholders of a corporation may seek to locate corporate headquarters in a small Colorado town in order that employees can walk or bicycle to work (proximity being a proxy for community) and to use ten percent of corporate profits to assist in technology education in the town's public schools. If the corporation were to become a benefit corporation using the Model Approach, it would also need to consider the effects of any action or inaction on global environmental issues, customer interests, supplier interests, the interests of all communities in which the corporation's suppliers have offices and facilities (making the purchase of toilet paper more difficult, perhaps), the corporation's long-term interests, including the possibility that those interests may best be served by the corporation's independence, and so forth and so on. That is a mighty load to drag when the public goods sought are technology, education, and employee participation in the community.

Finally, by compelling assessment of public good against a third-party standard, the Model Approach likely militates in favor of politically correct approaches and against corporations that cannot find a credible independent organization under the auspices of which public good can be measured. Trotskyites and Social Darwinians perhaps need not apply, and society is poorer for that. Liberalism is inherently nonpartisan and recognizes that society has no way to evaluate opinions other than by allowing free actors to express them, and any third-party-imposed limitations on, or expansions of, "public good" are illiberal and undesirable.

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[39] *See id.* at 98.

[40] *See id.* at 94.

[41] *See* MODEL BENEFIT CORP. LEGISLATION § 201 (B Lab 2013).

[42] *See id.* § 201(a).

[43] *See id.* §§ 102, 401(a)(2).

2. The Bipolarity Problem

The "Bipolarity Problem" compounds the Illiberalism Problem by dividing corporations into two categories: benefit corporations that must act for "general public benefit" and all other corporations that do not elect benefit corporation status and impliedly must act only in ways that relate to shareholder profit maximization.[44] For non-electing corporations, the existence of the benefit corporation alternative may weaken the promotion of socially responsible decision-making by corporate boards, the directors of which do not want to be brought into litigation or test the protections of the business judgment rule. Corporate governance concepts are, and should be, more nuanced than the two baskets embodied in the Model Approach.

In addition, the Model disables corporations that want to pursue substantial public benefits without subscribing to the "general public benefit" standard or absorbing the significant costs built into the Model. In this view, benefit corporation legislation should be enabling and should allow all corporations that seek substantial, long-term public goods to come under its umbrella. By leaving some corporations out in the fiduciary-duty rain, the Model Approach does not allow benefit corporations to accomplish all that they should.

3. The Fiduciary Uncabining and Fiduciary Logjam Problems

The Model requires directors and officers to consider an enormous number of factors and interests in connection with all corporate actions and inactions.[45] Many of the interests are unspecified (and probably not thought of) by the shareholders who elect benefit corporation status. "General public benefit" is a mish-mash that lacks any specification of fiduciary duty limits and contains few restrictions to hamper the freedom of self-interested directors to act in ways that harm shareholder interests.[46] The door is opened for directors who act in self-interested fashion to point to some nebulous public benefit justification.[47]

Further, shareholders hire and fire directors, and it is likely that when private shareholder benefit and broader public benefit collide, many directors will "follow the money" and align with shareholder interests. Of the groups that the Model states that directors shall consider the effects of corporate actions and inactions on, it lists shareholders first, and then lists broadly stated public goods.[48] Indeed,

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44 *See* Callison, *supra* note 37, at 104–07.

45 *See* MODEL BENEFIT CORP. LEGISLATION §§ 301(a)(1)–(2), 303(a) (B Lab 2013).

46 Callison, *supra* note 37, at 108.

47 *See* Murray, *supra* note 37, at 28.

48 *See* MODEL BENEFIT CORP. LEGISLATION § 301(a)(1) (B Lab 2013).

since shareholders are likely the main protagonists of benefit enforcement proceedings, in cases of conflict, the pursuit of "general public benefit" may be an illusory goal.

Professor Mark Loewenstein points to a corollary issue of social psychology and director stalemate.[49] I find this argument compelling, and it dictates in favor of allowing specific public benefits chosen by the shareholders, rather than general public benefits.

4. The Greenwash/Greenmail Enforcement Problem

The ease with which a corporation can become a benefit corporation (election in and inclusion of two words in its articles of incorporation), combined with the lack of any significant non-shareholder enforcement authority, opens the door to significant greenwashing problems.[50] In addition, the Model Approach contains no provisions to prevent regular for-profit corporations from adopting the benefit corporation name. Thus, some corporations that fail to pursue "general public benefit" can hold themselves out as benefit corporations and, assuming that the brand has value, capture the benefit without the cost.

In a related vein, the Model Approach gives shareholders the power to institute benefit enforcement proceedings and allege that the corporation and its directors did not appropriately consider public benefits when acting or failing to act.[51] This empowers shareholders as nags whenever they are unhappy with the corporation's activities. It also allows shareholder greenmail,[52] where claims are made in anticipation of settlement. Time will tell whether either of these obvious risks will come to pass.

II. THE DELAWARE APPROACH

In 2013, after studying the Model Approach and responding to various criticisms of it, the Delaware Bar Association's Corporation Law Section released a version of benefit corporation legislation that is

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[49] Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1030–33, 1036 (2013) (concluding that, considering the large number of factors that directors of benefit corporations must consider under the Model, directors are charged with an impossible task, and the quality of their decision-making, and indeed their ability to make decisions at all, will suffer).

[50] Greenwashing is "the phenomenon of businesses seeking to portray themselves as being more environmentally and socially responsible than they actually are." *See* MODEL BENEFIT CORP. LEGISLATION § 102 cmt.

[51] *Id.* § 305.

[52] Greenmail occurs when, seeking to be "bought off through higher profit distributions or through adherence to their idiosyncratic conception of the good," a benefit corporation's shareholders bring benefit enforcement proceedings alleging failure to adequately pursue general public benefit. *See* Callison, *supra* note 37, at 111.

significantly different from the Model Approach (the "Delaware Approach"). The Delaware Approach was enacted in Delaware, without change from the legislature, on July 17, 2013.[53] Colorado, however, was the first state to enact the Delaware Approach, though with some modifications, in May 2013, with an effective date of April 1, 2014.[54]

A. Elements of the Delaware Approach

(a) The name of the entity is a "public benefit corporation."[55]

(b) A public benefit corporation is a "for-profit corporation . . . that is intended to produce . . . public benefits and to operate in a responsible and sustainable manner."[56]

(c) "Public benefit" is defined as "a positive effect (or reduction of negative effects) on [one] or more categories of persons, entities, communities or interests . . . including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature."[57]

(d) To become a public benefit corporation the certificate of incorporation must (i) "[i]dentify within its statement of business or purpose . . . [one] or more specific public benefits to be promoted," and (ii) "[s]tate within its heading that it is a public benefit corporation."[58] There is no "general public benefit" concept in the Delaware Approach. This is a major change from the Model Approach.

(e) The name of the public benefit corporation must contain the words "public benefit corporation" or the designations "P.B.C." or "PBC."[59]

(f) Also, "a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the . . . public benefits identified in its certificate of incorporation."[60]

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53 *See* 79 Del. Laws ch. 122 (LEXIS 2013).

54 *See* COLO. REV. STAT. § 7-101-501 to -509 (LEXIS through 2013 1st Reg. Sess.); H.R. 1138, 69th Gen. Assemb., 1st Reg. Sess. (LEXIS Colo. 2013) (providing date of enactment).

55 DEL. CODE ANN. tit. 8, § 362(a) (LEXIS through 79 Del. Laws ch. 173).

56 *Id.*

57 *Id.* § 362(b) (LEXIS).

58 *Id.* § 362(a) (LEXIS).

59 *Id.* § 362(c) (LEXIS).

60 *Id.* § 362(a) (LEXIS).

(g) Ninety percent stockholder approval is required for a corporation that is not a public benefit corporation to become a public benefit corporation.[61] Dissenters' rights provisions are applicable for shareholders who do not vote in favor of the change.[62] Further, election out of public benefit corporation status requires a two-thirds stockholder vote.[63]

(h) The directors of a public benefit corporation shall manage or direct its business in a manner that "balances" three considerations: the stockholders' pecuniary interests, "the best interests of those materially affected by the corporation's conduct, and the specific . . . public benefits identified in its certificate of incorporation."[64] Directors do not have any duty to any person on account of that person's interest in the specific public benefits identified in the certificate or due to any interest that is materially affected by the corporation's conduct.[65] Further, with respect to any decision implicating the tripartite balancing standard, directors are deemed to satisfy their fiduciary duties to stockholders and the corporation if the decision is informed, disinterested, and not one such that no ordinary person of sound judgment would approve.[66] Finally, the certificate of incorporation may provide protective language that a disinterested director's failure to satisfy the tripartite decision-making standard shall not constitute an act or omission that is not in good faith or is a breach of the duty of loyalty.[67]

(i) A public benefit corporation shall, at least every two years, provide its stockholders with a statement concerning its promotion of the public benefits specified in the certificate and the best interests of those materially affected by the corporation's conduct.[68] The Delaware Approach contains specific requirements for the stockholder statement.[69] However, there is no requirement for public dissemination of the statement or for use of any third-party standard or certification addressing the corporation's conduct. The certificate may require public dissemination or use of a third-party standard if the stockholders so choose.[70]

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61 *Id.* § 363(a) (LEXIS). Colorado went with a two-thirds shareholder vote. *See* COLO. REV. STAT. § 7-101-504(1) (LEXIS through 2013 1st Reg. Sess.).

62 DEL. CODE ANN. tit. 8, § 363(b) (LEXIS through 79 Del. Laws ch. 173).

63 *Id.* § 363(c) (LEXIS).

64 *Id.* § 365(a) (LEXIS).

65 *Id.* § 365(b) (LEXIS).

66 *Id.*

67 *Id.* § 365(c) (LEXIS).

68 *Id.* § 366(b) (LEXIS).

69 *See id.* § 366(b)(1)–(4) (LEXIS).

70 *Id.* § 366(c)(2)–(3) (LEXIS).

(j) Stockholders meeting a two percent ownership requirement may maintain a derivative suit to enforce the directors' duties.[71]

B. Major Differences Between the Delaware and Model Approaches

The Delaware Approach is conspicuously different from the Model Approach. First, where the Model requires all benefit corporations to pursue "general public benefit,"[72] the Delaware Approach eschews the "general public benefit" requirement in favor of specific public benefits set forth in the certificate of incorporation.[73] Second, while the Model requires directors to "consider" a series of items in connection with any action or inaction,[74] the Delaware Approach sets forth a "balancing" requirement whereby directors must manage or direct the corporation's business in a manner that balances the shareholders' pecuniary interests, the specific public benefits set forth in the certificate, and the best interests of "those" materially affected by the corporation's conduct.[75] Although judicial authority and customary practice will need to develop, "consider" seems more active ("Did you consider these things when acting?") than "balancing" ("Did you balance interests when you acted?"). Third, the Delaware Approach contains specific director protections, whereby directors are *assumed* to meet their fiduciary obligations, and it allows public benefit corporations to provide protections regarding the directors' obligations to act in good faith.[76] Fourth, the Delaware Approach contains naming requirements lacking in the Model.[77] Fifth, the Delaware Approach does not require public reporting unless the corporation elects to do so.[78] Sixth, the Delaware Approach increases the shareholder election requirements to ninety percent[79] and provides for dissenters' rights,[80] making it more difficult

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71 *Id.* § 367 (LEXIS).

72 MODEL BENEFIT CORP. LEGISLATION § 201(a) (B Lab 2013).

73 *See* DEL. CODE ANN. tit. 8, § 365(a) (LEXIS through 79 Del. Laws ch. 173).

74 *See* MODEL BENEFIT CORP. LEGISLATION § 301(a)(1) (B Lab 2013).

75 DEL. CODE ANN. tit. 8, § 365(a) (LEXIS through 79 Del. Laws ch. 173).

76 *See id.* § 365(c) (LEXIS) (setting forth a presumption that directors have met their fiduciary duties of good faith and loyalty and allowing corporations to include section 102(b)(7) provisions as well as indemnification and insurance provisions).

77 *See id.* § 362(c) (LEXIS).

78 *Compare id.* § 366(c)(2) (LEXIS) (stating that a public benefit corporation *may* require public disclosure of a statement of the corporation's promotion of the public benefit), *with* MODEL BENEFIT CORP. LEGISLATION § 402(b)–(c) (B Lab 2013) (*requiring* the posting of benefit reports on the public portion of the benefit corporation's website, or, if the benefit corporation does not have a website, the furnishing of copies of benefit reports to any person requesting copies).

79 *Compare* DEL. CODE ANN. tit. 8, § 363(a) (LEXIS through 79 Del. Laws ch. 173) (requiring ninety percent approval to elect public benefit corporation status), *with* MODEL

for existing corporations to force benefit corporation status on reluctant shareholders. Seventh, the Delaware Approach contains tighter standing requirements for benefit enforcement proceedings.[81] Finally, the Delaware Approach lacks key elements of the Model Approach, including mandatory third-party standards, independent benefit directors, opinions by independent benefit directors, and benefit officers.[82]

The Model Approach and the Delaware Approach, while containing some similar elements, are very different. In my view, Delaware took significant strides to eliminate or mitigate many of the problems with the Model identified above, particularly the Illiberalism Problem. Anyone working with benefit corporation legislation would be well-advised to consider jettisoning the Model Approach in favor of a Delaware-Approach-based statute. As discussed below, Colorado did just that and became the first state to enact the Delaware Approach.[83] Despite its advantages over the Model Approach, however, the Delaware Approach retains some issues, which are described next.

C. Some Remaining Issues in the Delaware Approach

The Delaware Approach requires directors to "balance" shareholder pecuniary interests, the corporation's specific public benefits, and the best interests of those materially affected by the corporation's conduct.[84] Although a balancing requirement seems less onerous than a requirement that directors "consider" a complex list of things in connection with corporate actions and inactions, the practical meaning of "balance" is unclear. Also, the meaning of "those" who are materially affected by the corporation's conduct is uncertain. A dictionary definition

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BENEFIT CORP. LEGISLATION § 104(a) (B Lab 2013) (requiring two-thirds approval to elect benefit corporation status), *and id.* § 102 (defining "minimum status vote").

80 *See* DEL. CODE ANN. tit. 8, § 363(b) (LEXIS through 79 Del. Laws ch. 173).

81 *Compare id.* § 367 (LEXIS) (giving standing to bring a derivative lawsuit only to stockholders owning individually or collectively at least two percent of the corporation's shares, or if the shares are listed on a national securities exchange, the lesser of two percent of the shares or at least two million dollars in market value), *with* MODEL BENEFIT CORP. LEGISLATION § 305(c) & cmt. (B Lab 2013) (expanding the categories of those who may bring derivative suits to include not only those with two percent ownership, but also directors, five percent owners of a parent organization, and others granted standing by the bylaws or articles of incorporation).

82 *Cf.* MODEL BENEFIT CORP. LEGISLATION § 302(a)–(b) (B Lab 2013) (establishing an independent benefit director); *id.* § 302(c) (describing the annual opinion statement required of benefit directors); *id.* § 304 (permitting the designation of a benefit officer and describing his or her functions); *id.* § 401(a)(2) (requiring an assessment of the corporation's performance against a third-party standard).

83 *See infra* Part III.

84 DEL. CODE ANN. tit. 8, § 365(a) (LEXIS through 79 Del. Laws ch. 173).

of "those" is the plural of that.[85] A definition of "that" is "the person, thing, or idea indicated, mentioned, or understood from the situation."[86] Thus, "those," as used in the Delaware Approach, probably means the persons, things, or ideas materially affected by the benefit corporation's conduct. Causation and proximate causation ideas abound. For instance, a benefit corporation uses electricity; electricity can be produced from solar panels or coal-fired plants; burning coal creates CO2; CO2 causes global warming; global warming can swamp Pacific islands and reduce polar bear habitat. Must a director balance the interests of Pacific islanders and polar bears along with the shareholders' pecuniary interests and the specific benefits elected by the shareholders when deciding how the corporation should act? And, if so, what does it mean to balance? My suspicion, given that shareholder pecuniary interests and specific benefits are far more particular than the interests of "those" who are materially affected, is that in practice the specific interests will dominate over the general, and courts will accept this fact.

A similar question arises from the Delaware Approach's definition of "public benefit corporation" as a for-profit corporation that is "intended to produce" public benefits and to operate in a "responsible and sustainable" manner.[87] How does one balance "intent" and actions? What does it mean to "produce" public benefits? "Responsible" meaning exactly what? "Sustainable" in what sense—sustaining the entity, environmentally sustainable, both?

Finally, I do not think that the Delaware Approach sufficiently addresses the Bipolarity Problem or the Fiduciary Uncabining Problem, discussed above.[88]

III. THE COLORADO APPROACH

Although Colorado enacted a modified Delaware Approach in 2013, enactment came only after a three-and-a-half-year, fairly acrimonious debate between Blab-backed supporters of the Model Approach and the Corporate Laws Drafting Committee under the Colorado Bar Association (the "CBA"). This debate is discussed in greater detail below. During the course of discussions, and in an attempt to be proactive supporters of a workable benefit corporation bill rather than reactive opponents of the Model Approach, the CBA proposed alternative legislation.[89] Although it

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85 MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1301 (11th ed. 2003).

86 *Id.* at 1294.

87 *See* Del. Code Ann. tit. 8, § 362(a) (LEXIS through 79 Del. Laws ch. 173).

88 *See supra* Part I.B.2–3.

89 For the alternative legislation (in other words, the "Colorado Approach"), see H.R. 1138, 69th Gen. Assemb., 1st Reg. Sess. (as introduced in Colo. House, Jan. 18, 2013).

did not pass for political reasons, in my view the Colorado Approach works better than either the Model Approach or, although less so, the Delaware Approach. It should be considered in other states.

A. Elements of the Colorado Approach

(a) The Colorado Approach allows for-profit corporations to become benefit corporations by selecting either general public benefit (á la the Model Approach) or specific public benefit (á la the Delaware Approach), or both.[90] The Colorado Approach neither mandates nor prohibits a general public benefit approach but leaves the decision to the corporation and its shareholders.[91]

(b) In general, under the Colorado Approach, if a benefit corporation elects "general public benefit," the other elements of the Model Approach are mandatory and apply to the benefit corporation. On the other hand, if the corporation elects to pursue one or more specific public benefits, virtually none of the Model Approach's mandates are forced on the corporation. Instead, the Model Approach concepts are precatory, and the shareholders can elect which Model elements, if any, to include in their corporate structure. For example, if they seek to apply some third-party standard, shareholders can elect this.[92] If they seek benefit directors, they can create them. If they want the corporation to have periodic benefit reporting, they can require it.[93] If they want public reporting, they can say so.[94]

The basic theme of the Colorado Approach is shareholder choice. The drafters recognized that the cost of benefit corporation status (in other words, potentially reduced profitability) is borne by the shareholders and, therefore, that it is the shareholders and not the legislature or a Berwyn, Pennsylvania-based entity that should establish the terms. At the same time, the drafters recognized that there might be some constituency of corporations that seek the more rigorous, expensive, and harsh rules of the Model Approach. In keeping with the concept of choice, the Colorado Approach fully enables those for-profit corporations who seek the Model Approach. The drafters believed they were merging dueling concepts of benefit corporations, and I believe that the Colorado Approach is the best proposed to date.

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90 *See id.* § 7-101-507(2).

91 *See id.*

92 *See id.* § 7-101-511(1)(a)(II) (allowing, but not requiring, the application of a third-party standard).

93 *See id.* § 7-101-511(1)(a) (allowing, but not requiring, periodic benefit reporting).

94 *See id.* § 7-101-511(1)(b)–(d) (allowing, but not requiring, public reporting).

B. What Happened in Colorado . . .[95]

In September 2009, a Blab representative approached the Colorado Bar Association Business Law Section's committee (the "Committee") that was considering modifications to the fiduciary duties portion of the Colorado Business Corporations Act. The representative invited Colorado to introduce benefit corporation legislation and thereby become the first state with benefit corporations. The then-current version of the Model Approach was proposed. After extensive discussion, the Committee demurred because it saw many of the issues with the Model discussed above. Further, the Committee decided that it would consider both the need for, and, if need existed, a proper statute to implement benefit corporation legislation at a later date. The Committee's major positions were that benefit corporation legislation should be flexible, should provide protections against misuse, and should not constitute a marketing device for one or a few certifying agencies like Blab.

No bill was introduced in 2010. In 2011, Blab, working with its Colorado supporters, introduced the Model without input from the Committee, which again found it wanting.[96] First, the Model was not linguistically adapted to Colorado's corporate laws; second, it continued to have all of the problems that led the Committee to reject it two years earlier; third, it lacked basic shareholder protections, such as dissenters' rights; and, fourth, the Committee believed it possible to draft a cogent bill that would work for numerous Colorado corporations and not just those that wanted to force "general public benefit," third-party assessment, benefit director, benefit reporting, and other concepts on a few electing corporations.

Members of the Committee worked with the sponsors and Blab supporters to fix the perceived infirmities of the 2011 bill, and a compromise was reached in early spring of 2011. Subsequently, and without further discussion, the Senate sponsor withdrew the compromise bill. It is believed that Blab, through one or two of its Colorado supporters that were politically well-connected, accomplished this because the Colorado compromise differed in significant ways from the

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[95] This account is based on the author's experience with and observations of the Colorado legislative process. For additional accounts covering benefit corporation legislation in Colorado, see Herrick K. Lidstone, Jr., *Entity Legislation Update from the Executive Council, Business Law Section*, COLO. B. ASS'N BUS. L. NEWSL., Feb. 2011, at 1, *available at* http://denbar.org/repository/Newsletter%20--%20February%2025,%202011.pdf (describing briefly the status of legislation in 2010 and 2011); Herrick Lidstone, *Public Benefit Corporations in Colorado: Background*, THERACETOTHEBOTTOM.ORG (May 16, 2013, 7:00 AM), http://www.theracetothebottom.org/home/public-benefit-corporations-in-colorado-background.html (discussing benefit corporation legislation in Colorado).

[96] *See* S. 5, 68th Gen. Assemb., 1st Reg. Sess. (LEXIS Colo. 2011).

Blab-supported Model Approach. If one wants states to adopt a particular statute, it may be strategically and tactically desirable to prevent consideration of alternative statutes adopted in other states.

Then came 2012. In January 2012, it became clear that Blab and its supporters were going to introduce the Model again, and they did so without any further discussion with or input from the Committee or anyone else.[97] There had been no conversation during the period following withdrawal of the 2011 bill. Take it or leave it. Also, 2012 was an election year, the Colorado Senate had a Democratic-party majority, and the Colorado House had a Republican-party majority. The two legislative sides did not work well together, and animosity was increased because significant members of the Colorado House and Senate were running for national and other offices. The political stakes were high, and legislative comity was low.

The Committee, with the backing of the CBA Business Law Section and the CBA, decided that in a take-it-or-leave-it world, the only route was to attempt to kill the Model bill in the legislature. It set out to do so and was successful, primarily by focusing on obtaining the Colorado House's rejection of the Model-based legislation. After hearings, the Model passed the Colorado Senate. On the last day of the session, knowing that the bill was not going to the floor before the constitutionally-required midnight end of the general legislative session due to a very divisive and hotly contested civil unions bill, the Republicans allowed the Model to pass the House Committee. The bill died as expected without coming to the House floor for a vote. Colorado Governor John Hickenlooper then called for a special legislative session to act on the same-sex civil unions legislation (which did not pass in 2012) and several other bills, including the benefit corporation legislation. The benefit corporation bill then passed the Senate again, and, in a face-saving measure because of certain defeat in House Committee, was tabled by the House sponsor before hearings were held in House Committee. Thus, benefit corporation legislation was not enacted in Colorado in 2012.

Because the CBA Committee believed that a benefit corporation statute was desirable, that some benefit corporation legislation was inevitable, and that pushing for workable legislation was a far better use of energy than reacting against undesirable legislation, beginning in spring 2013, the Committee began drafting its own bill, which resulted in the Colorado Approach discussed above.

In November 2012, the Democrats established control of both the Colorado House and Senate, and the CBA obtained Democratic-party

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97 *See* S. 182, 68th Gen. Assemb., 2d Reg. Sess. (Colo. 2012).

sponsors for the Committee's bill. After considerable discussion with leadership and others, and with some opposition from Blab's Model Approach sponsors and small modifications to the CBA bill, the Committee's bill passed the Colorado House on a party line vote, with all Democratic-party representatives voting "yea" and all Republican-party representatives voting "nay."

When the CBA alternative came to the Colorado Senate, it was clear that there was limited but powerful Democratic opposition to the bill. Fortunately, the Delaware drafting committee had released legislation containing the Delaware Approach immediately before the Colorado Senate opposition was clarified. Blab, also recognizing the political power of the Delaware corporate laws committee, and, in my view, seeking to co-opt the inevitable Delaware Approach as a victory for benefit corporations, announced its full-throated support for the Delaware Approach. The CBA Committee decided that the Delaware Approach was far superior to the Model Approach and therefore negotiated a "strike-below," replacing the bill embodying the Colorado Approach with a near-clone of the Delaware Approach.

Blab then took the profound position that "Colorado is not Delaware" and insisted on public reporting requirements. Recognizing the infirmity of the proposed reporting language, the CBA Committee acquiesced and called it a day, and a modified Delaware Approach bill passed the Senate, was adopted by the House, and was signed by the Governor.[98]

There are several morals to this story. First, do not buck a well-financed trend unless you are willing to enter a black hole that sucks out time. Second, work the politics, work the politics, and work the politics. Third, be clear and concise in the analysis of problems and repairs. Fourth, recognize that what Blab really cares about is the name "benefit corporation," even though it is a major stretch to see how it has appropriated the name. In the end, Colorado lawyers were not willing to create yet another form of business entity to allow specific public benefit under a different name. Further, some Colorado lawyers assumed that because Blab cared so much about the "benefit corporation" name, it has some goodwill value that should not be a legislative grant to Blab and its supporters.

CONCLUSION

Tim Brown's book, *Change by Design*, concludes with the following observations:

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98 *See* H.R. 1138, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013) (enacted).

> Active participation in the process of creation is our right and our privilege. . . .
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> . . . What [certain great designers] shared was optimism, openness to experimentation, a love of storytelling, a need to collaborate, and an instinct to think with their hands—to build, to prototype, and to communicate complex ideas with masterful simplicity.[99]

Legal scholars have discussed concepts of innovation and state competition, effectively a design charette, in the corporate law context.[100] In my view, a major impediment to the development and use of benefit corporations has been the friction, induced by Blab and its supporters, between forward-looking, active and creative design on a state level and a rigid orthodoxy embodied in a politically correct Model Approach from which there can be no meaningful deviation. In a nutshell, this is the lesson from Colorado, in which Blab actively prevented a thoughtful alternative approach to benefit corporations from becoming law. It is also the lesson from Delaware, in which the corporate drafting committee had a direct path to legislative enactment and Blab could not create large obstacles. As I have noted above, there are significant problems with the Model Approach, many of which have been alleviated in the Delaware Approach, and many more of which might have been alleviated by the Colorado Approach.

If benefit corporation legislation were to proceed like limited liability company legislation proceeded in the 1990s, namely, by pragmatically embracing alternative approaches and by an amendatory process whereby states accept and adopt viable and useful alternatives,

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[99] TIM BROWN WITH BARRY KATZ, CHANGE BY DESIGN: HOW DESIGN THINKING TRANSFORMS ORGANIZATIONS AND INSPIRES INNOVATION 241–42 (2009). Larry Ribstein and Bruce Kobayashi argued that there can be reasons to avoid enforced uniformity, as opposed to state experimentation, since "uniform" proposals may not produce efficiency and may not even produce a higher level of uniformity. Bruce H. Kobayashi & Larry E. Ribstein, *The Non-Uniformity of Uniform Laws*, 35 J. CORP. L. 327, 328–29 (2009); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 132–33 (1996); Larry E. Ribstein & Bruce H. Kobayashi, *Uniform Laws, Model Laws and Limited Liability Companies*, 66 U. COLO. L. REV. 947, 948–50 (1995). Lyman Johnson makes arguments for pluralism in the benefit corporation arena, although he does not go so far as encouraging "allowing 1,000 flowers to bloom." Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 279–81 (2013).

[100] *See, e.g.*, Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 210 (2006) (concluding that the metaphor of the "states as a laboratory" has worked reasonably well in the corporate law arena and that the observed corporate law-making pattern is a dynamic process in which legal innovations arise from multiple sources, fostering a time of experimentation that tends to coalesce into a statutory formulation that is then adopted by a majority of the states).

the benefit corporation movement would be better served in the long run. To the extent rigid orthodoxy controls the day, the fact that states adopt a flawed Model Approach that satisfies the desires of only a few will mean continued paltry real-world use of benefit corporations and a large opportunity squandered in a "tale [t]old by an idiot, full of sound and fury, [s]ignifying nothing."[101]

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[101] WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5.