

A STRONG FIRST STEP: PUBLIC BENEFIT CORPORATIONS AND GOVERNANCE REFORM

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I. INTRODUCTION

I am deeply grateful for the unique privilege of having scholars whose work I have long admired and from whom I have learned so much respond to *Becoming A Public Benefit Corporation*.¹ I wish to thank all of the contributors to this symposium for taking the time to read my work so carefully. The symposium pieces struck a beautiful balance between rigor and kindness, and they have taught me a great deal not only about this emerging corporate form but also about how to be a truly collegial scholar.

I also wish to thank Professor Danielle Hart and all the members of the *Southwestern Law Review* for their hard work in creating this symposium and the accompanying webinar. Professor Hart is a treasured friend and colleague. Her generosity in initiating this project is emblematic of her thoughtfulness and selflessness. Among the Law Review's staff, I am particularly grateful to Piper Hinson, the *Editor-in-Chief*, and Misha Alam, the *Special Projects Editor*. Although everything has gone so smoothly it appeared effortless, I know how tirelessly they both worked to ensure that would be so.

Finally, Southwestern was my intellectual home for twenty-one years. My colleagues and students over those many years shaped my thoughts and character in innumerable ways. Part of me will always be a Bison, and I am more thankful than I can express for the many benefits my association with Southwestern has brought me. I cannot imagine a better send-off than this symposium issue.

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1. MICHAEL B. DORFF, BECOMING A PUBLIC BENEFIT CORPORATION: EXPRESS YOUR VALUES, ENERGIZE STAKEHOLDERS, MAKE THE WORLD A BETTER PLACE (2024) [hereinafter "BECOMING"].

Rather than reply to the excellent pieces in this issue one at a time, I would like to begin by summarizing the major thesis of *Becoming a Public Benefit Corporation*. Then, I will try to tease out some common themes in the symposium pieces. I will then conclude with a more general response to the critiques as a group.

II. SUMMARY OF BECOMING A PUBLIC BENEFIT CORPORATION

My goal in writing this book was to provide a resource to entrepreneurs, investors, scholars, and students who were interested in learning about this exciting and controversial new form of business organization. Benefit corporations (“BCs”) and public benefit corporations (“PBCs”) differ from traditional corporations in that they not only permit but *require* their boards to balance the pursuit of profit against the interests of other corporate constituencies.² They may also have to consider the impact of the company’s actions on some particular public benefit that the company has adopted as its own.³

By contrast, the conventional understanding states that boards of directors of traditional corporations must do their best to maximize the company’s profits for the sake of their shareholders.⁴ Some noted corporate law scholars, including one of the contributors to this symposium, argue that this is not an accurate description of the law. They point out that there is no statute that specifically requires directors to maximize corporate profits and that the caselaw that so holds is sparse.⁵ Moreover, even if boards’ fiduciary duties to the corporation and its shareholders technically require them to maximize profits, that duty is unenforceable and therefore meaningless. In the absence of fraud or self-dealing, courts generally defer to the boards’ business decisions under a doctrine called “the business judgment rule.”⁶

While I agree that the shareholder wealth maximization rule is difficult to enforce, it remains the law that companies’ attorneys cite to directors when advising them. The rule, therefore, has a strong cultural impact, even though directors who flaunted it would be unlikely to face significant consequences. Corporations often behave as if directors had a fully enforceable duty to

2. *See id.* at 53-54, 66-68.

3. *See id.* at 54-55, 68-69.

4. *See id.* at 9-10.

5. *See* Thomas Joo, *Can Entity Law Cure Corporate Social Irresponsibility: A Response to Becoming a Public Benefit Corporation* By Michael Dorff, 54 SW. L. REV. 90 (2025); BECOMING, *supra* note 1, at 28-30.

6. *See* BECOMING, *supra* note 1, at 28-30, 38-41.

maximize profits, whether or not they actually do. Changing this message might, therefore, have a significant impact on corporations' actions.⁷

That same judicial deference also applies to BCs' and PBCs' balancing decisions. The fiduciary duty to consider the impact of the company's activities on others and the related duty to consider any specific social benefit adopted by the company is likely to prove difficult to enforce. Although lawsuits are theoretically available when BCs and PBCs focus too much (or too little) on profits, those suits will run into the same deferential business judgment rule that hinders enforcement of the profit maximization rule in traditional corporations.⁸ The courts' long-standing reluctance to police corporations' decisions applies both when traditional corporations care too much about concerns other than profits and when the new hybrid corporations care too little.⁹

BCs and PBCs also have a disclosure obligation that might prevent them from ignoring their other-regarding duties.¹⁰ They must issue a "benefit report" periodically that analyzes their overall social and environmental performance and their provision of any specific public benefit the company has pledged to pursue. But most states are not enforcing this obligation, and most companies are not complying with it.¹¹

Because the social aspects of BCs and PBCs are not easily enforceable either through lawsuits or through disclosure, one might easily jump to the conclusion that the new forms are not meaningfully different from traditional corporations. In *Becoming*, I argue that this conclusion is misguided. As I wrote there:

Although the statutory mechanisms are imperfect enforcement tools for social purpose, they are excellent *reinforcement* tools. Companies with cultures that are sincerely devoted to pursuing a social purpose will find that the new legal forms not only empower boards to sacrifice profit for purpose when they choose to do so but also help companies reflect on the social cost of each decision. Boards that take their balancing duties seriously will consider all the costs and benefits of each decision, not just the impact of the decision on the company's profitability. And companies that also take

7. See *id.* at 28-30.

8. See Lara Aryani & Jess Gorski, *PBCs and the Pursuit of Corporate Good*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 9, 2022), <https://corpgov.law.harvard.edu/2022/12/09/pbcs-and-the-pursuit-of-corporate-good/#:~:text=In%20other%20words%2C%20most%20corporate,best%20interests%20of%20the%20corporation.>

9. See *BECOMING*, *supra* note 1, at 105-109.

10. See Michael B. Dorff, James Hicks & Steven Davidoff Solomon, *The Future or Fancy? An Empirical Study of Public Benefit Corporations*, 11 HARV. BUS. L. REV. 113, 135-136 (2021).

11. See *BECOMING*, *supra* note 1, at 109-112.

their disclosure obligations seriously will find that they offer an annual opportunity to reflect back on the prior year's decisions and how to improve them Moreover, the commitment to the BC or PBC form has value in creating a culture that values purpose as well as profit. That culture itself has tremendous power. Companies that start with a sincere desire to pursue a social purpose alongside profit will likely recruit employees who share that desire and attract investors and customers who cherish the company's commitment to purpose. Those three groups – employees, investors, and customers – can play a critical role in holding the company to its purpose commitments A company's status as a BC or PBC helps reinforce a purpose-driven culture by sending a message to important constituencies like employees, investors, and customers and by providing legal mechanisms that reinforce the company's commitment to social purpose.¹²

Becoming, therefore, charts a middle path between critics of the new forms who argue that they are unnecessary, perhaps even harmful, and enthusiastic supporters who claim that they will humanize capitalism. Not surprisingly, this middle path has attracted objections from both sides.

III. THEMES OF THE SYMPOSIUM PIECES

A. *Factual Commonalities*

Perhaps the most surprising aspect of the excellent papers in this symposium is the widespread agreement on the basic facts that underpin the debate over the utility of BCs and PBCs. In today's highly charged political climate, in which the facts themselves are so often hotly disputed, it is refreshing to participate in a conversation where most of us agree on what the law is and how it should be interpreted. For the most part, where we differ is in our understanding of the likely utility of the new forms, not how they function. That agreement is particularly striking when considering the complete absence of any reported judicial opinions involving the governance of BCs or PBCs.

The one exception to this widespread agreement is the law governing traditional corporations. Since traditional corporations have existed in their modern form for nearly 150 years, and since there is a huge volume of reported opinions about their governance, this disagreement might seem odd. But the topic of disagreement is one that has rarely (some would say never) been squarely presented to a court: are boards of directors required to maximize corporate profits?

12. *Id.* at 125-126.

On this issue, I agree with the vast majority of corporate scholars and practitioners; shareholder primacy is the law of Delaware. There is some argument in states that have adopted a corporate constituency statute that those statutes have supplanted the common law in those states. But even in those states, the statutes are rarely applied outside the hostile takeover context.¹³

Professor Joo takes Lynn Stout's approach and argues that traditional corporations have the latitude under the law to do as they please in regard to attending to shareholders' desires for profits, so long as they do not act in bad faith.¹⁴ Moreover, even the duty to act in good faith in attempting to maximize profits for shareholders, to the extent such a duty exists under Delaware law, is, as a practical matter, unenforceable because of the enormous deference courts grant to boards' business decisions.¹⁵

While Professor Joo and I may differ about whether the shareholder primacy duty exists, we agree that it is a very difficult duty to enforce. We also agree that the primary force that shapes corporate behavior is not corporate law. Professor Joo points to executive compensation structures that encourage directors and officers to focus on the company's share price, as well as directors' and officers' desires to resist hostile takeovers, enhance their reputations, and ensure the corporations' access to cheap capital, all of which are furthered by the high share prices that come from maximizing the corporation's profits.¹⁶ I agree that these are all relevant influences, though I prefer to merge them with other factors that together form corporate culture. I believe law constitutes an important factor as well.

It is difficult to separate which factor is a cause and which is a consequence in this context. For example, executive compensation is designed to induce executives to adopt shareholders' priorities by tying their pay to share price. Why do corporate boards formulate executive pay packages this way? I would argue that directors design executive compensation to match their perception of their fiduciary duty to maximize shareholder value. Executive compensation is, therefore, a product of the law, and so any behavior that executive compensation produces is also a consequence of the law. When Professor Joo argues that the law is not important in determining corporate behavior,¹⁷ I believe he overlooks the

13. *See id.* at 29.

14. *See* Joo, *supra* note 5, at 92-96. *See also* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012).

15. *See* Joo, *supra* note 5 at 92-96.

16. *See id.* at 95.

17. *See* Joo, *supra* note 5, at 103-06.

law's critical role in shaping directors' understanding of their role. That understanding is a core component of corporate culture, which in turn formulates corporate behavior.

With that notable exception, though, the other authors in the symposium and I largely agree about the facts that undergird our debate. We agree on the proper description and interpretation of the statutes that enable BCs and PBCs. We agree that the enforcement mechanisms of these hybrid forms are relatively weak. We mostly agree that traditional corporations are required to maximize profits on behalf of their shareholders. And we generally share some degree of misgivings about the impact of the traditional corporate governance system on issues of global importance, such as climate change and income inequality.

Where we differ is on the implications of these agreed upon facts. Many of the contributors to the symposium are less optimistic than I am that BCs and PBCs have an important role to play in rethinking how corporations should function in a capitalist economy, with some arguing that they are unnecessary and perhaps useless and others raising concerns that the new forms may actually cause harm.¹⁸ In contrast, a few of the contributors are probably as optimistic about the new forms as I am, arguing that that executive pay structures can evolve to encourage directors and officers to focus on concerns in addition to profits, that law can empower managers who desire to pursue those social concerns, and that there is some evidence of better disclosure of human capital management in publicly-traded PBCs.¹⁹ I will briefly describe some of the themes that emerged from the papers before providing a general reply.

B. *The Skeptics' Concerns*

The more skeptical contributors expressed a variety of concerns. These included implications of the weak enforcement mechanisms, the strong cultural and economic commitment to shareholder primacy, the structure of

18. See Dana Brakman Reiser, *A Tall Order: Legal Forms and Social Change: A Review of Michael B. Dorff, *Becoming a Public Benefit Corporation: Express Your Values, Energize Your Stakeholders, Make the World a Better Place**, 54 SW. L Rev. 11 (2025); Joo, *supra* note 5; Brett McDonnell, *Unbecoming Public Benefit Corporations*, 54 SW. L Rev. 117 (2025); James J. Park, *Will Public Benefit Companies Commit Securities Fraud?*, 54 SW. L Rev. 128 (2025); David Yosifon, *Director Primacy to the Hilt in the Public Benefit Corporation*, 54 SW. L Rev. 155 (2025); Daryll K. Jones, *Public Benefit and Private Profit*, 54 SW. L Rev. 77 (2025).

19. See Sung Eun Kim, *Compensating a Public Benefit Corporation*, 54 SW. L Rev. 108 (2025); Harwell Wells, *Changing Corporate Purpose: Law, Managers, and the B Corp.*, 54 SW. L Rev. 143 (2025); Patrick M. Corrigan, *Can the SEC Mandate Disclosures that Contain Both Financial and Social Information? The Case for Mandatory Human Capital Management Disclosures*, 54 SW. L Rev. 24 (2025).

executive compensation, the inherent tension between appealing to investors and executing on a social mission other than profits, the ability of traditional corporations to engage in the same socially positive behaviors as BCs and PBCs, and the struggles of the few existing publicly traded PBCs. I will discuss each of these themes in turn before reacting to the more optimistic papers.

1. Weak Enforcement Mechanisms

In *Becoming*, I spent considerable time analyzing the strengths and weaknesses of the statutory enforcement mechanisms in BCs and PBCs. As I have summarized just above, I argued in *Becoming* that the enforcement mechanisms are inadequate if the goal is to ensure that hybrid companies pursue their social missions at some particular intensity level. They are, however, excellent *reinforcement* tools for companies that sincerely desire to do business differently.

Many of the commentators feel I am too accepting of these weaknesses. They pointed out dangers of having weak enforcement mechanisms that may, for a variety of reasons, cause this movement to fail.

Dana Brakman Reiser argued that if BCs and PBCs are going to “make the world a better place,” as *Becoming*’s subtitle suggests, they must be designed to bolster trust.²⁰ That requires enforcement mechanisms with more teeth than the current statutes provide. She pointed to forms in other countries that do a better job of this, such as the United Kingdom’s Community Interest Company that caps dividends to investors or Romanian social enterprises that require a fixed percentage of profits to be devoted to the social purposes to which they are devoted. She acknowledged, though, that these enforcement mechanisms may prevent these enterprises from securing sufficient investment capital to scale.²¹

Thomas Joo argued that the weak enforcement mechanisms would create a false impression of reform.²² At the same time, the existence of these new forms may bolster the (in Joo’s view, false) impression that traditional corporations are required to maximize shareholder profits. As a result, corporate social responsibility may decrease overall, since most companies will continue to be organized under the traditional form.²³

Brett McDonnell contended that the weak accountability mechanisms in BC and PBC statutes create a weak commitment by founders and directors

20. See generally Brakman Reiser, *supra* note 18.

21. See *id.* at 20-21.

22. See generally Joo, *supra* note 5.

23. See *id.* at 99-100.

to social causes.²⁴ Prosocial investors, employees, and customers who understand this will not be attracted to the new forms. Instead, McDonnell advocated for much stronger enforcement mechanisms, even if that change would result in far fewer hybrid companies.²⁵

David Yosifon pointed out that the directors' central role in determining corporate behavior – “director primacy” – is even stronger in BCs and PBCs.²⁶ The statutes vest the responsibility for determining the balance between profits and purpose with the board. The statutes also provide substantial liability protections to the directors for their corporate decisions. As a result, Yosifon believes that BCs and PBCs may engage in greater degrees of risk-taking. On the positive side, this may result in more creative and dynamic corporate activity that may ultimately prove more profitable as well. But this enhanced profitability will come as a result of directors' greater freedom of action, not from their commitment to social causes (which may, in fact, become neglected rather than pursued without any legal consequence).²⁷

2. Shareholder Primacy's Strong Grip

Several commentators argued that the corporate culture's embrace of shareholder primacy is too strong for a BC or PBC to counteract. Dana Brakman Reiser argued that while small companies may be able to pursue a stakeholder focus, market forces will prevent large companies from doing so.²⁸ Thomas Joo also expressed concerns about the strength of shareholder primacy in corporate culture, highlighting the role that executive compensation plays in enforcing the focus on stock price.²⁹ And Jim Park similarly pointed out the danger that BCs and PBCs that are publicly traded may face strong pressures from public investors to generate profits.³⁰ BCs and PBCs may, therefore, commit securities fraud to support investors' profitability expectations, just as traditional corporations do.³¹

24. See generally McDonnell, *supra* note 18.

25. See *id.* at 118-21.

26. See generally Yosifon, *supra* note 18.

27. See *id.* at 156-62.

28. See Brakman Reiser, *supra* note 18.

29. See Joo, *supra* note 5.

30. See Park, *supra* note 18.

31. See *id.* at 131-33.

3. Executive Compensation Structure

CEO pay, especially in publicly traded companies, is overwhelmingly tied to share price.³² Both Brakman Reiser and Joo therefore argued that at least in public companies, even when organized as BCs or PBCs, executives and directors will overwhelmingly favor financial returns over social mission because that is what they are paid to do.³³

4. Investors v. Social Missions

Three of the commentators emphasized the inherent conflict between companies' social missions and their profitability. Dana Brakman Reiser argued that BCs and PBCs are designed to appeal to capital funding sources to enable them to achieve scale.³⁴ She contended that any entity that is attractive to investors would lack the features necessary to inspire trust in the entities' social missions, such as strong mission enforcement mechanisms.³⁵ Darryll K. Jones focused more on fundamental human nature in his critique that, "Self-interest is hard-wired because survival is the first human instinct."³⁶ Jones is skeptical that when profits are directly opposed to social good, directors and officers will ever choose social good.³⁷ Similar to Brakman Reiser, Brett McDonnell would prefer a statute with stronger enforcement mechanisms, even if that comes at the cost of limiting the participating enterprises to many fewer, and much smaller businesses. He, too, worries that in trying to appeal to profit-seeking investors, the new forms have given up what makes them meaningfully different from traditional corporations.³⁸

5. The Flexibility of Traditional Corporations

As I discussed above, Thomas Joo rejected the shareholder primacy rule as a legal doctrine. He believes that directors of traditional corporations do not have an enforceable fiduciary duty to maximize profits for shareholders.³⁹ He therefore sees the BC and PBC forms as unnecessary and perhaps even harmful. He worries that the existence of these alternative forms may

32. See MICHAEL B. DORFF, *INDISPENSABLE AND OTHER MYTHS: WHY THE CEO PAY EXPERIMENT FAILED AND HOW TO FIX IT* 123-149 (2014).

33. See Brakman Reiser, *supra* note 18; Joo, *supra* note 5, at 95.

34. See Brakman Reiser, *supra* note 18.

35. See *id.* at 20.

36. Jones, *supra* note 18, at 77.

37. See *id.* at 78.

38. See McDonnell, *supra* note 18, at 121.

39. See Joo, *supra* note 5.

decrease corporations' willingness to protect the environment, advance the interests of their employees, and support social causes because directors may wrongly conclude that these hybrid forms would not need to exist if traditional corporations were permitted to engage in these activities.⁴⁰

6. The Fate of Publicly Traded PBCs

In *Becoming*, I devoted a chapter to discussing the impact of the securities laws on publicly traded PBCs.⁴¹ Although most BCs and PBCs are relatively small, there are a number of large, publicly traded PBCs now. There are also several sizeable wholly owned subsidiaries of publicly traded companies. These subsidiaries are not themselves public, but their parent company's disclosure obligations extend to the subsidiaries' operations.

The existence of these companies – both publicly traded and wholly owned – bolsters the credibility of the BC and especially the PBC forms' credibility by demonstrating that sophisticated investors are not shying away from them. My research with James Hicks and Steven Solomon on venture capital investment in PBCs also supports this thesis.⁴²

James Park, however, points out that investors in publicly traded PBCs have not necessarily received the best returns for their capital.⁴³ Most of the PBCs that have gone public in the past few years, either through an initial public offering or a merger with a special purpose acquisition company, are now trading below their IPO price. Worse, both Zymergen, a biotechnology company, and AppHarvest, an indoor farming business, declared bankruptcy within a few years of going public.⁴⁴

In addition, about a quarter of the public company PBCs I listed in *Becoming* have been defendants in federal securities class actions. Some of these cases have made it past the motion to dismiss stage, with courts pointing out disclosures that could be considered materially misleading.⁴⁵

While Park theorized that PBCs might be less likely to commit securities fraud because of their commitment to a broader purpose than profit, he also postulated that they might lie about their success in providing social benefits. He pointed out that PBCs, when publicly traded, are subject to the same "valuation treadmill" as other publicly traded corporations and may respond similarly both about their finances and their social returns.⁴⁶ In other words,

40. See *id.* at 90-95, 102.

41. See *BECOMING*, *supra* note 1, at 99-126.

42. See Dorff, et al., *supra* note 10.

43. See Park, *supra* note 18.

44. See *id.* at 132.

45. See *id.* at 129.

46. See *id.* at 131.

PBCs might behave no better than traditional corporations in public markets.⁴⁷

C. *The Optimists' Arguments*

While most of the commentators focused on critiques of BCs and PBCs, a few found grounds to share my hope that they will become an important and influential part of the business law ecosystem.

1. Future Evolution of Executive Pay Structure

Summer Kim examined the potential of structuring executive compensation so as to encourage corporate officers to pursue social goals.⁴⁸ She pointed out that attempts at such structures have become more prevalent in traditional corporations. Applying a framework I developed in my earlier book on CEO pay to evaluate the efficacy of different pay mechanisms, she argued that pay tied to social metrics may struggle along some important dimensions, such as measurability, but that these weaknesses can be addressed over time.⁴⁹ BCs and PBCs could therefore strengthen their officers' incentives to pursue social purposes by tying the officers' pay to the companies' progress in achieving their social goals. Kim pointed out that one empirical study had found that this was not yet taking place, but the potential to do so is an encouraging possibility.⁵⁰

2. Law's Power to Shape Culture

Harwell Wells adopted a historical perspective to illuminate the distinct legal and managerial conversations that have taken place over corporate purpose.⁵¹ At times, those conversations have agreed on what the purpose of corporations was, at times they have disagreed. Neither conversation necessarily shaped the other, even when undergoing shifts in perspective. Changing the legal rules around corporate purpose, then, may not have a direct impact on managerial behavior.⁵² While changing the law may not determine how corporations act, it can assist managers who want to run their companies in a way that takes into account the interests of other constituencies in addition to shareholders. As Wells stated, “[T]he legal form is important because it will bolster the culture of the benefit corporation and

47. *See id.*

48. *See Kim, supra* note 19.

49. *See id.* at 109-13.

50. *See id.* at 114-15.

51. *See Wells, supra* note 19.

52. *See id.* at 149.

serve as a constant reminder to those running the firm of the ends they are bound to serve.”⁵³ The law is not a hurricane that drives managerial behavior before it, but it is a wind at the back of reformist-minded entrepreneurs that eases their journey.

3. PBCs’ Disclosure Advantage

Finally, Patrick Corrigan uncovered evidence that publicly traded PBCs may be exhibiting improved public disclosure of some important categories of information.⁵⁴ Corrigan closely examined human capital management disclosures in both traditional corporations and publicly traded PBCs. This empirical analysis revealed that while human capital management disclosure was broadly deficient, PBCs had better disclosure in a number of different subcategories than did comparable companies that were organized as traditional corporations. For example, PBCs exhibited better disclosure concerning the board’s oversight of human capital management concerns, employee engagement, the demographics of their workforce, and diversity, equity, and inclusion matters.⁵⁵

IV. GENERAL REPLY

Requiring for-profit businesses to consider a broader social purpose is a revolutionary idea in corporate law, even if not in managerial theory, as Harwell Wells has reminded us.⁵⁶ Corporations are fundamentally important to our economy and how it functions. We should, therefore, be cautious when experimenting with such a vital social institution, especially when changing one of its core characteristics.

The BC and PBC statutes take a very small, cautious step toward implementing a truly radical concept. The change is voluntary, not mandatory; only companies that opt into the new forms will be subject to the new rules. The most important change in the law – the directors’ fiduciary duty to balance profit against other social interests – is only loosely described. It is also very difficult to enforce, with directors largely insulated from any personal liability. Each of these was a deliberate choice.

While I might have made some changes if I had been the statutes’ author, this “go slow” approach seems to me to be a feature of the new forms, not a bug. The first attempt at a legal form for hybrid organizations *should* be a mild intervention, one that gives us time to assess and evaluate before

53. *See id.* at 151.

54. *See* Corrigan, *supra* note 19.

55. *See id.* at 56.

56. *See* Wells, *supra* note 19, at 145-48.

committing to more drastic changes. It should also allow for experimentation by contract with other, more robust, options so that we can gather some preliminary data on those provisions as well. That is precisely what the BC and PBC statutes do. They provide a supportive framework, a sandbox in which entrepreneurs can experiment with different governance ideas. The statute gives boards permission to prioritize interests other than profits, both legally and culturally. Selecting the new form also sends a signal to investors so that the shareholders who commit to the enterprise will do so understanding that they are part of a governance experiment.

The scholars who argued for stronger enforcement mechanisms to ensure that BCs and PBCs truly act differently from traditional corporations are, in my view, premature. We may end up wanting such entities for all the reasons they identified – to prevent purpose washing, lower coordination costs, strengthen the legal form’s brand – but we also may not. Entrepreneurs may find the cost of those enforcement tools too high, just as officers and directors of traditional corporations often lament the existence of derivative suits and shareholder class actions. The vision of a much smaller group of truly angelic corporations has some intuitive appeal. But if we impose standards that are too rigorous, we may end up with such a tiny group of participants that they have no meaningful impact on the broader economy. Worse, strong enforcement mechanisms risk tying these companies up in litigation that will often prove meritless. If the early adopters of the imagined, more robust social enterprise find themselves choked by litigation, few entrepreneurs are likely to be inspired to follow them.

Compromise can be messy and unsatisfying, but it is the right path at this stage. The drafters of the BC and PBC statutes wisely chose to move slowly, creating a flexible legal structure that gave social entrepreneurs a safe space to experiment using private ordering, rather than imposing some particular, untested vision of what a social enterprise should be. That choice also came at a cost. There is a significant risk that some BCs and PBCs will engage in purpose washing or be inconsistent in their corporate virtue. Some may be wonderful for the environment but have terrible labor standards. Others may donate millions of dollars to charity but earn that money by selling an unsafe product. We must accept, though, that no company is perfect, just as no human being is perfect. If only those without flaw are invited to the party, the band will play to an empty hall. Our goal should be, to paraphrase Dan Harris, to have corporations that are 10% better.⁵⁷ That is

57. See DAN HARRIS, *10% HAPPIER: HOW I TAMED THE VOICE IN MY HEAD, REDUCED STRESS WITHOUT LOSING MY EDGE, AND FOUND SELF-HELP THAT ACTUALLY WORKS – A TRUE STORY* (2014).

something we can achieve, and if we remain on that iterative path, we will end up with an economy that truly works for all of us.

BCs and PBCs may and should try out different methods of defining their differences from traditional corporations. They can do this with shareholder agreements and charter provisions under the permissive framework of the existing BC and PBC statutes. I suggested a number of methods of doing so in my book, but entrepreneurs should not feel limited to the methods I listed there.⁵⁸ Brett McDonnell's suggestion to include affected groups in governance is another method worthy of serious consideration that I did not discuss in *Becoming*, and certainly, there are many more options that others will create.⁵⁹ It is far too soon in this social experiment for us to declare that we know with confidence the correct formula and are ready to impose it on the economy as a whole.

I respectfully disagree with both the proposed solution of more rigorous enforcement tools and the opposite solution of relying only on external regulation, abandoning this corporate governance experiment in its infancy. Too much regulation too soon risks suffocating the movement before it has a chance to truly draw breath. Abandoning the attempt entirely would mean giving in to the regulatory capture that has already demonstrated its inability to protect us against a host of dangerous externalities. I also reject the conceptual cynicism that selfishness will always triumph over altruism. If we are too demanding in our idealism, nothing will be sufficiently pure to meet our standards, and we will achieve nothing. If we despair that the world as it is cannot be changed, we will fail to try and again achieve nothing.

We must take the middle path. We should adopt a spirit of experimentation, one that accepts that humans never achieve perfection but that we are capable of great improvement by taking one small step at a time. That is the path the drafters of the BC and PBC statutes have chosen. I believe it was the right one.

58. See *BECOMING*, *supra* note 1, at 168-190.

59. See McDonnell, *supra* note 18, at 123-24.