# Going Beyond Ethics and Compliance: The Growing Corporate Movement to Embrace Social Value Creation

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*A growing number of companies are embracing social value creation as a core part of their business strategy. This Essay illuminates why businesses are increasingly committed to doing well and doing good and then analyzes how corporate law is evolving to support this growing corporate movement.*



## INTRODUCTION

Traditional theories of business law assume that corporations are singularly operated to maximize shareholder profits. As Milton Friedman famously remarked, "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[1]

Yet, the practices of corporations today showcase a different reality.

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1. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, at 126.

Big and small companies alike are investing in social causes, measuring their social impact, and communicating their social commitment on issues ranging from health access to climate change. Indeed, Fortune 500 corporations alone invest more than $15 billion annually in corporate social responsibility activities.[2]

This Essay explores why companies are embracing social value creation and what it means for our legal system. Part I tells the story of why traditional corporations are going beyond ethics and compliance and proactively creating social value. Part II analyzes the growth of hybrid companies—or social enterprises—that are explicitly formed to create private and social value. Part III examines the challenges to corporate social value creation presented by legal precedents. Part IV explores the new legal instruments that are helping to affirm and protect the deepening social commitment of the business community.

## I. THE GROWING CORPORATE COMMITMENT TO CREATING SOCIAL VALUE

The growing corporate commitment to social value creation is evident in at least three ways. First, the growing commitment is reflected in the dollars that companies are investing in social good; corporate giving among large companies, for example, rose from .84 percent of pre-tax profits in 2014 to .91 percent of pre-tax profits in 2016.[3] Second, the growing commitment is illustrated by the positions that companies are taking on social issues. For example, hundreds of corporations, ranging from Google and Facebook to Target and Campbell's Soup, recently expressed their policy disagreement on the U.S. withdrawal from the Paris Agreement on climate change, even though the policy was not directly tied to the companies' profits. Third, the growing commitment is increasingly embedded into the core strategies that companies are pursuing. As Pfitzer, Bockstette, and Stamp observe, leaders of companies increasingly

> consider solving major social problems in profitable ways to be a, if not the, raison d'être. Food companies such as Nestlé, Unilever, and Danone are repositioning themselves as nutrition and health companies. Carmakers such as Nissan and Toyota are redefining their purpose as providing low-emissions mobility. And technology and telecommunications firms such as IBM, Intel, and Verizon have made

2. Linda Novick O'Keefe, *CSR Grows in 2016 as Companies Embrace Employees' Values*, HUFFINGTON POST (Dec. 15, 2016, 5:44 PM), https://www.huffingtonpost.com/linda-novick-okeefe/csr-grows-in-2016-as-comp_b_13657368.html.

3. *Giving in Numbers: 2017 Edition*, COMM. ENCOURAGING CORP. PHILANTHROPY 1, 8 (2017), http://cecp.co/wp-content/uploads/2017/10/Giving-in-Numbers-2017.pdf?redirect=no.

> improving education and health care and making cities more livable their central missions.[4]

Why are corporations increasingly committed to doing well and doing good? In short, their long-term performance increasingly depends on it. Companies that have a clear sense of purpose and a commitment to social good are higher performing in their long-term profits, too. Indeed, a recent study that categorized 474 companies by level of purpose found that 58 percent of high-purpose companies said they experienced growth of 10 percent or more over the past three years, compared with 51 percent of medium-purpose companies and 42 percent of low-purpose companies.[5]

The business value of social purpose itself reflects broader shifts in employee attitudes, investor expectations, and consumer demands. The most talented workers are increasingly seeking to work for companies that do well and do good, and they are even willing to take a pay cut to work for a company that aligns with their values. One recent study of graduate students in business school found that 58 percent of such students would take a 15 percent pay cut to "work for an organization with values like my own."[6] As more employees seek to express their commitment to social good through their work, companies stand to do well if they do good.

Investors and consumers are also energizing the movement toward corporate social value creation. Socially responsible investing—which includes "assets engaged in sustainable, responsible and impact investing practices"—now accounts for $8.72 trillion of investment or more than 20 percent of the $40.3 trillion in total assets under management; that reflects a nearly fourteen-fold increase from 1995.[7]

Consumers, too, are showing a commitment to purpose through their pocketbooks. Nearly nine in ten consumers seek to purchase products with social or environmental benefits and eight in ten say they would tell friends and family about a company's social responsibility efforts.[8] Indeed, a recent study by BCG found that more than two-thirds of the

4. Marc W. Pfitzer, Valerie Bockstette, and Mike Stamp, *Innovating for Shared Value*, HARV. BUS. REV. (Sept. 2013), https://hbr.org/2013/09/innovating-for-shared-value.

5. THE BUSINESS CASE FOR PURPOSE, HARV. BUS. REV. ANALYTIC SERV. REP. 3, https://hbr.org/resources/pdfs/comm/ey/19392HBRReportEY.pdf.

6. CLIFF ZUKIN & MARK SZELTNER, TALENT REPORT: WHAT WORKERS WANT IN 2012, NET IMPACT 12 (May 2012), https://netimpact.org/sites/default/files/documents/what-workers-want-2012.pdf.

7. REPORT ON U.S. SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING TRENDS, U.S. SIF FOUND. 13 (11th ed. 2016), https://www.ussif.org/files/SIF_Trends_16_Executive_Summary(1).pdf.

8. 2015 CONE COMMUNICATIONS/EBIQUITY GLOBAL CSR STUDY, CONE COMMS. 20 (2015), http://www.conecomm.com/2015-cone-communications-ebiquity-global-csr-study-pdf.

growth in the grocery market from 2010 to 2013 came from purpose-based products such as organic, natural, environmental, fair trade, or local products.[9]

Thus, the corporate trend toward social value creation is more than a fad or marketing campaign—it is increasingly a core ingredient of business performance. In prioritizing purpose, corporations are building long-term value in an environment where employees, investors, and consumers alike are seeking to see their values realized in the marketplace. This corporate world of social responsibility is ultimately far more complex than Milton Friedman portrayed and, as will be discussed in Part III below, leaves CEOs with abundant discretion in how to invest in social good while still fulfilling fiduciary responsibilities to shareholders.

## II. THE RISE OF MULTIPLE BOTTOM LINES

Beyond the corporate movement to create social value, there is a second revolution underway in the business community: the emergence of for-profit companies that were founded explicitly to serve social goals. When Adam Lowry and Eric Ryan founded a cleaning company called Method in 2000, they set out to do nothing less than "to change the world by creating beautiful cleaning products that are as kind to the planet as they are tough on dirt."[10] While the two founders certainly recognized the powerful statement as a branding opportunity, they have backed it with substance: an unwavering commitment to sustainability. Their commitment to sustainability even holds when that sustainability comes at a high cost and does not have clear marketing benefits, such as building LEED manufacturing facilities that are virtually invisible to the end consumers that purchase their products. Indeed, of 650 businesses audited for their environmental performance in 2013, Method was rated the highest for its environmental commitment.[11]

Method is part of a growing trend of social businesses—for-profit companies founded with both social and financial goals. Such social businesses are now estimated to generate over $500 billion annually and employ more than 10 million people in the United States, accounting for

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9. *See generally* Marty Smits et al., *An Imperative for Consumer Companies to Go Green: When Social Responsibility Leads to Growth*, BOSTON CONSULTING GRP. (June 12, 2014), https://www.bcg.com/publications/2014/consumer-products-sustainability-social-responsibility-leads-growth.aspx (discussing a report on responsible consumption and initiatives for companies to be green).

10. ALINA WHEELER, DESIGNING BRAND IDENTITY: AN ESSENTIAL GUIDE FOR THE WHOLE BRANDING TEAM 16 (4th ed. 2017).

11. B CORPORATION: 2013 BEST FOR THE WORLD LIST, http://bestfortheworld.bcorporation.net/2013-best-for-the-world-environmental-honorees.html (last visited Dec. 21, 2017).

more than 3 percent of U.S. GDP.[12] Many of these companies (including Method) have even decided to formally demonstrate their commitments to the world by going through a formal certification process with B Lab, a nonprofit which was founded in 2006 to bring standards to the emerging social business movement. As of December 2017, there were 2,358 such companies across 130 industries that had been certified for meeting "rigorous standards of social and environmental performance, accountability, and transparency."[13]

These certified companies, called B Corps, see themselves as part of a movement that seeks to do nothing less than redefine the contours of capitalism. As B Lab cofounders Jay Coen Gilbert, Bart Houlahan, and Andrew Kassoy describe the movement:

> Fortunately, we are in the early stages of a global culture shift that is transforming our vision of the purpose of business from a late 20th century view that it is to maximize value for shareholders to a 21st century view that the purpose of business is to maximize value for society. Significantly, this transition is being driven by market-based activism, not by government intervention. Rather than simply debating the role of government in the economy, people are taking action to harness the power of business to solve society's greatest challenges. Business—what we create, where we work, where we shop, what we buy, who we invest in—has become a source of identify and purpose.[14]

While this movement toward social business is indeed still in its "early stages," it presents a myriad of questions for society at large. One of these questions, which will be addressed in the Section below, is whether U.S. corporate law can be adapted for the social business movement.

## III. CORPORATE LAW AND SHAREHOLDER PRIMACY

While the movement to scale social business has gained momentum in recent years, the foundations of how social business would be treated under corporate law date back nearly a century to a 1919 case, *Dodge v. Ford Motor Company*.[15] The core question posed by this case is whether Henry Ford could operate the Ford company as a social business; according to the court, the answer is no.[16]

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12. Naveen Menon et al., *Scaling Up: Catalyzing the Social Enterprise*, AT KEARNEY (2015), https://www.atkearney.com/social-impact/article?/a/scaling-up-catalyzing-the-social-enterprise.

13. *What are B Corps*?, B CORPORATION, https://www.bcorporation.net/what-are-b-corps (last visited Feb. 26, 2018).

14. Andrew Kassoy et al., *Impact governance and management: Fulfilling the promise of capitalism to achieve a shared and durable prosperity*, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS (July 2016), https://www.brookings.edu/wp-content/uploads/2016/07/b_corps.pdf.

15. *See generally* Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) (describing the lawsuit between Ford shareholders and Ford Motor Company regarding payment of dividends).

16. *Id.* at 683, 685.

The case has appropriately received extensive attention from legal scholars over the last ninety-eight years.[17] Even though the case involved unique circumstances—including that Henry Ford might have been using social good as a way to hide an ulterior motive[18]—the case's core contents are extremely relevant to the social businesses of today.[19] For our purposes here, the key to understanding this case can be summed up in two statements: one from Henry Ford and the other from the court.

In the case, Henry Ford wanted to reinvest the company's surplus, rather than pay dividends to shareholders, as a way to expand opportunity for workers. Specifically, Ford said that his "ambition" was the following: "to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business."[20]

In other words, Ford's primary "ambition" for investing capital was a social good: to help others, rather than to grow the profits of the business. The court reviewed that ambition and conclusively said it fell outside his legal authority. Specifically, the court ruled: "it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others."[21]

The specific dimensions of the *Dodge* case are particularly interesting given that many social businesses today have a central focus on providing upward mobility to their employees. That is—at least by stated intention—exactly what Ford was seeking to do in 1919 when the court overruled him.

Court decisions since *Dodge* have refined and limited this shareholder primary precedent by emphasizing the authority of corporate directors to make business decisions without court interference. Building on other

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17. *See* Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 177–80 (2008) (discussing an essay and illustration interpreting the *Dodge v. Ford Motor Co.* decision).

18. *See generally* HENRY FORD: CRITICAL EVALUATIONS IN BUSINESS AND MANAGEMENT 99 (John C. Wood & Michael C. Wood eds., 2002) (explaining Henry Ford's politics and business practices).

19. Charles K. Hyde, *Chrysler Corporation: The Official History, Chapter Four—The Dodge Heritage*, FCA NORTH AMERICA (2009), http://www.fcanorthamerica.com/company/Heritage/Heritage%20Documents/Chrysler%20Heritage%201920/Chapter%20Four%20%E2%80%93%20The%20Dodge%20Heritage.pdf.

20. Michael B. Dorff, *Can a Corporation Have a Soul?*, THE ATLANTIC (Oct. 20, 2016), https://www.theatlantic.com/business/archive/2016/10/can-a-corporation-have-a-soul-dorff/504173/.

21. Stephen Bainbridge, Opinion, *A Duty to Shareholder Value*, N.Y. TIMES: ROOM FOR DEBATE (Apr. 16, 2015), http://www.nytimes.com/roomfordebate/2015/04/16/what-are-corporations-obligations-to-shareholders/a-duty-to-shareholder-value.

language in the *Dodge* ruling, these court cases have established a so-called business judgment rule, whereby courts assume the good faith of business directors to operate in the company's financial interests.[22] Still, as recently as 2010 (in the case of *eBay v. Newmark*[23]), courts have ruled that corporate directors must act in the interest of shareholders.[24] Thus, while courts are unlikely to interfere in business judgments out of deference to executives' decisionmaking, the law itself remains one of shareholder primacy and corporations remain legal vehicles to enrich shareholders.

This legal structure has consequences for corporate directors who seek to act on social goals. Take, for example, the case of Ben & Jerry's ice cream, a public company long known for its outsized commitment to social goals. After years of underperformance, directors (including founders Ben Cohen and Jerry Greenfield) felt compelled to sell the company to Unilever in the interest of shareholder value creation.[25] As Ben Cohen later described it, "the laws required the board of directors of Ben & Jerry's to take an offer, to sell the company despite the fact that they did not want to sell the company."[26] While further examination of the Ben & Jerry's case has led to a fierce debate regarding whether the sale was, indeed, legally mandated, the ambiguity itself points to a troubling challenge: corporate law does not *explicitly* give directors the right to take social considerations into account.

## IV. THE RISE OF B CORPORATIONS

As business changes, so too must business law. The growing movement by entrepreneurs to create social businesses has invited policymakers to reconsider how U.S. corporate law can best enable and support enterprises with social goals. The emerging answer by policymakers is the Benefit Corporation, a corporate status that explicitly allows directors to consider social interests alongside shareholder value.[27]

In the last seven years, thirty-three states and Washington, D.C., have

22. Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 11 (2006) (explaining the American Law Institute's definition of the business judgment rule).

23. *See generally* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010) (holding that directors owe a fiduciary duty to minority shareholders).

24. Bainbridge, *supra* note 21 ("[D]irectors are bound by 'fiduciary duties and standards' which include 'acting to promote the value of the corporation for the benefit of its stockholders.'").

25. Jenna Lawrence, *Making the B List*, STAN. SOC. INNOVATION REV., Summer 2009, at 66.

26. Anthony Page & Robert A. Katz, *The Truth About Ben and Jerry's*, STAN. SOC. INNOVATION REV., Fall 2012, at 39.

27. William Robinson, Comment, *The Benefits of a Benefit Corporation Statute for Alaska Native Corporations*, 33 ALASKA L. REV. 329, 340 (2016) (discussing Benefit Corporations in the United States).

passed legislation to authorize Benefit Corporations; and a wide array of companies—from Kickstarter to King Arthur Flour to Patagonia—have become Benefit Corporations. Patagonia founder Yvon Chouinard describes his company's decision to become a Benefit Corporation by saying, "[b]enefit corporation legislation creates the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises, and even changes in ownership."[28] As a passionate social business founder, Chouinard thus sought to avoid the challenges that impacted his fellow entrepreneurs at Ben & Jerry's.

Beyond providing explicit authority to corporate directors to consider goals beyond shareholder wealth maximization, Benefit Corporations enable all of the company's stakeholders—its employees, its customers, and its investors—to have greater confidence that social considerations are a core and independent part of the corporation's reason for existence. In this way, the new legal status is also a trust-building opportunity for a company to establish the authenticity of its social purpose strategy among key audiences.

## CONCLUSION

Nearly a century after the landmark *Dodge* decision, which established shareholder primacy as a cornerstone of corporate law, a new movement is underway that has the potential to change the future of business and the laws that govern it. Corporations are deepening their commitments to social purpose, and a new set of social businesses are emerging with the explicit promise of blending social and financial goals. The legal system is evolving to support and enable this growing movement of companies through the Benefit Corporation. The rapid scaling of Benefit Corporation policies across thirty-three states, and the growing movement by businesses to become Benefit Corporations, suggests that the future is promising for businesses that seek to do well and do good.

28. Rich Bruer, *Mission Driven or Mission Accomplished?*, R. BRUER CO. (Apr. 2, 2012), http://www.rbruer.com/mission-driven-or-mission-accomplished/.