

Introduction

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Over the past decade, interest in social enterprise has skyrocketed. The core idea – that the pursuit of profit can work in tandem with social objectives – is inspiring a new generation of entrepreneurs and socially conscious investors. Social enterprise also attracts employees who want to make a difference in their professional lives and consumers who consider social impact along with price when making purchasing decisions. As such, social enterprise has the potential to affect entrepreneurship, investment, employment, and the functioning of commercial markets.

Yet the parameters of social enterprise remain open to interpretation and subject to debate. Up close, self-identified social enterprises may seem to have little in common with one another. One venture might prioritize social purpose over profits but terminate at the sole discretion of a founder; another venture might envision a reduced but more permanent role for social objectives. Understandably, then, commentators have struggled to supply a meaningful definition of social enterprise. In the United States, the benefit corporation form may sometimes serve as a stand-in, not because it purports to be synonymous with social enterprise, but because it is a well-known example and readily distinguishable from other entity types, including charities and nonprofits.

Perhaps the answer to the puzzle of social enterprise is hiding in plain sight. Rather than identifying social enterprises by their distinctive location on an imagined map containing all types of business associations, nonprofits, and charities, it may be more useful to focus on how social entrepreneurs and other stakeholders use the law to set and enforce expectations. In particular, law facilitates social enterprise by providing the contractual technology necessary to specify the intensity, duration, and nature of commitments to further the social good across various forms of economic activity. For example, to enhance the credibility of their commitment to nonpecuniary ends, social entrepreneurs might build a social mission into the governing documents of a business, agree to meet third-party certification standards, or, in a growing number of jurisdictions, adopt a form of business organization that explicitly authorizes managers to prioritize public welfare while also returning profits to private investors.

Even though the appeal of social enterprise is undeniable, its actual successes to date are limited and the remaining challenges significant. An aphorism attributed to the poet Robert Bly nicely captures one reason for skepticism: “You can’t get to mother consciousness on a father consciousness machine.” In other words, one might question the feasibility of harnessing for-profit businesses to serve as a vehicle for pursuing social ends.¹ Bly was not

¹ To be clear, we are not suggesting that concern for social goods should be gendered “female” or that for-profit corporations are “male” – rather, we use the metaphor because it is a colorful illustration of the potential problems

speaking of business associations, and his aphorism predates by several decades the social enterprise movement; rather, he was addressing the predicament of the main characters in the movie *Easy Rider*, in which “two Harley-riding hippies complete a drug deal in Southern California and decide to travel cross-country in search of spiritual truth.” Bly claimed that he knew that the two main characters were doomed because their testosterone-enhanced choice of transportation was incongruous with their desired destination.

Perhaps the aphorism is simply inapt: many have argued that there is nothing inconsistent about using business methods to achieve social goals. However, even if one accepts the basic insight regarding the tension between means and ends in social enterprise, Bly’s aphorism could be understood in different ways. The most pessimistic interpretation is that the social enterprise movement is bound to fail because the combination of profit and purpose is unstable at best and ultimately untenable. But a different, more hopeful interpretation could describe social enterprise as a way of altering the “motorcycle” so that means and ends are brought closer to alignment. From this perspective, the shift from corporate social responsibility as a general concept to social enterprise as a more focused phenomenon is significant. For example, although it can return profits to investors, a benefit corporation is not identical to a corporation or an LLC any more than an electric bicycle is the same thing as a Harley-Davidson just because both have motors.

Indeed, the law of social enterprise – which enables individual businesses to specify the nature, intensity, and duration of their commitments to objectives other than profit maximization – provides almost unlimited flexibility. In our view, therefore, the concept of social enterprise is not limited to the confines of the benefit corporation, the low-profit LLC, or any similar entity form created to serve the needs of social entrepreneurs. Quite the opposite: we trace social enterprise from the borderlines of charitable ventures to the heartland of corporate law. Social enterprise law matters, not because social enterprise denotes a novel form of mixed-motive economic activity, but because it offers greater precision in an area long bedeviled by conceptual confusion.

This Handbook seeks to take stock of the social enterprise movement and to chart a course for its future development. In this regard, we are fortunate to have assembled leading legal commentators on social enterprise, both academics and practitioners. Social enterprise can be approached from many directions, but, for the reasons set forth in this Introduction, we believe that a legal perspective is critical. After all, it is law that furnishes the means for social entrepreneurs to define the parameters of their mission. The remainder of this Introduction describes the Handbook’s overall organization and provides brief summaries of the contributions.

I THEORETICAL FRAMEWORK

The chapters in this section take a broad perspective on the nature of social enterprise and its challenges.

In the volume’s first chapter, Elizabeth Pollman observes that many concerns raised regarding social enterprise should be familiar from long-standing debates about corporate social responsibility. For example, some commentators object that empowering managers to pursue ill-defined social objectives will allow them to shirk their duties to shareholders. Also,

that can arise when tools are put to a purpose different from, if not antithetical to, their original design. We should further note that we do not mean to imply that those who ride large, loud motorcycles lack a social conscience.

the creation of a new legal category – the social enterprise – could have the unintended consequence of marginalizing socially motivated activity and recategorizing existing businesses as “asocial.” Professor Pollman focuses on the benefit corporation and identifies possible implications with respect to corporate political activity and the jurisprudence of corporate rights. She argues that benefit corporations contribute to a politicized climate in which customers take values into account. With respect to recent expansions in corporate rights, Professor Pollman expresses concern that the hybrid nature of benefit corporations “might weaken the case for drawing lines between nonprofit and for-profit corporations with respect to religious and expressive rights.”

In Chapter 2, Brian Galle raises questions regarding the effectiveness of the private-ordering foundations of social enterprise law. He observes that benefit corporations and other forms of social enterprise differ from charities and nonprofits in that they operate largely without government regulation and instead are subject only to self-assessment and third-party verification. Drawing upon the financial services industry by way of analogy, Professor Galle argues that the government should have a greater role in approving the firms that provide third-party verification services. Periodic and random assignment of third-party firms would reduce their incentive to accommodate noncompliant social enterprises. Professor Galle concludes that the alternative of insisting upon direct government certification of social enterprise would likely be cost-prohibitive.

John Tyler’s contribution in Chapter 3 is to identify several dimensions along which social enterprises might be assessed: commitment, connections, harm, and accountability. His detailed typology is very much in line with the account we have more briefly set forth in this Introduction. Mr. Tyler emphasizes the importance of metrics to evaluate whether social enterprise efforts produce the intended results with respect to financial growth and social objectives.

II HISTORICAL CONTEXT AND POLITICAL ECONOMY

The chapters in this section provide additional frameworks for social enterprise, situating the movement in historical context, offering international perspectives, and examining the interstices of economic and political motivations.

In Chapter 4, Brett McDonnell compares low-profit limited liability companies, benefit corporations, and second-generation cooperatives. In each case, he shows how the modern entity type was derived from earlier forms of business association. Professor McDonnell argues that the cooperative form, which relies on stakeholder voting to ensure adherence to social mission, has significant advantages compared with other forms of social enterprise. He concludes with proposals for further revisions to the cooperative statutory form that might enhance its ability to give non-shareholder constituencies a voice.

In Chapter 5, Robert Hockett argues that we should revive the concession theory of the corporation – that is, *all* private corporations should be required to serve a public purpose. Professor Hockett observes that corporate charters (along with the privilege of limited liability) were once given only when proposed corporations had a clear social purpose. It follows that there is nothing foreordained about our current, laissez-faire model of corporate regulation. Indeed, contemporary banking regulations show that it is possible and perhaps desirable to apply a much stricter set of conditions.

In Chapter 6, Carol Liao compares social enterprise laws in the United Kingdom, the United States, and Canada and proposes a framework for social enterprise law in other

jurisdictions. Professor Liao observes that the United Kingdom and Canada require that social enterprises use the majority of their earnings to advance the social purpose they have identified. By contrast, there is no single US social enterprise law, and none of the statutory defaults requires that entrepreneurs reinvest the majority of revenue in a social enterprise. Professor Liao argues that, while social entrepreneurs in the United States could adapt existing business forms to their needs, a better-tailored set of default rules would improve their chances of success.

In Chapter 7, Nina Boeger evaluates whether social enterprise forms could be used as a model for implementing radical changes in corporate law. She pays particular attention to alternative business models that have been developed in the United Kingdom, including social enterprises, mission-led businesses, employee-owned firms, and cooperatives. Professor Boeger further contends that meaningful reform will require democratic participation, cautioning that activist entrepreneurs should not be entrusted with the unilateral power to make choices with profound consequences for society.

In Chapter 8, Alicia Plerhoples argues that increased entrepreneurship could reduce wealth inequality in low-income communities and communities of color. Professor Plerhoples contends that social enterprise forms are particularly well suited for disadvantaged communities because they enable owners to build wealth in the community while also tackling social or environmental ills. Professor Plerhoples makes clear that it is not enough for well-meaning outsiders to operate social enterprises for the benefit of low-income communities and communities of color – local ownership is crucial and must be supported.

III TAX AND FINANCE

The chapters in this section consider whether and how to incentivize social enterprise and how to ensure that it has access to the capital needed for growth.

In Chapter 9, Lloyd Hitoshi Mayer argues that tax subsidies could be used to incentivize social enterprise but cautions that the empirical data do not yet warrant policy changes at the federal level that would create a distinct regime of tax for social enterprise. Instead, Professor Mayer suggests that state and local tax experiments would reveal more information regarding whether and how to use tax law to support social entrepreneurs.

In Chapter 10, Anne Tucker argues that innovative approaches to financing are necessary if social enterprises are to receive the capital they require to achieve results at scale. Impact investment funds can step in where more traditional sources of financing are unavailable for social enterprise; however, because impact funds are themselves hybrids negotiating the twin impulses of profit and purpose, they must address many of the same organizational questions as the social enterprises in their investment portfolios. Professor Tucker explores in detail how private ordering can be used to set expectations with respect to fund organization, governance rights, financial rights, information rights, conflicts of interest, and exit.

In Chapter 11, Joan MacLeod Heminway evaluates crowdfunding as a source of capital for social enterprise. Professor Heminway observes that, while crowdfunding can benefit from Internet technology and has populist appeal, it may be vulnerable to abuse given the diminished presence of securities regulation. Her chapter illuminates the current use of crowdfunding in social enterprise and the possibilities for further development. Although Professor Heminway acknowledges the appeal of arguments for crowdfunding social enterprise advanced by Dana Brakman Reiser, Steven Dean, and others, she remains concerned

that there is a great deal of uncertainty, especially since the business model and funding model are both in an immature stage of development.

In Chapter 12, Andrew Schwartz continues the discussion of social enterprise crowdfunding, drawing on lessons from New Zealand's early experiences in this area. Professor Schwartz relates the results of his empirical investigation and concludes that, as he hypothesized, investors in crowdfunding markets tend to respond favorably to businesses offering a hybrid of profit and purpose. Accordingly, Professor Schwartz concludes that securities crowdfunding offers a natural source of funding for social enterprises.

IV CHOICE OF FORM

The chapters in this section consider the extent to which social enterprise requires the creation of new forms of business association, and, if so, what features would be most helpful. Readers interested in this topic may also wish to consult earlier chapters by Brian Galle, Brett McDonnell, Carol Liao, and Nina Boeger.

In Chapter 13, Dana Brakman Reiser and Steven Dean argue that the value of social enterprise law cannot be fully assessed at any single moment because “[a]t distinct points in a social enterprise’s evolution, different threats to its chosen balance of profit and social mission wax and wane.” Novel social enterprise forms help entrepreneurs establish businesses that seek to blend profits and public benefit, but this is not the whole story. Professors Brakman Reiser and Dean emphasize the importance of growth, both for individual social enterprises and for the sector as a whole. To this end, echoing Professor Tucker’s analysis in Chapter 10, they argue that creative contracts may help social entrepreneurs obtain capital and demonstrate a long-term commitment to firm mission.

Peter Molk argues in Chapter 14 that existing social enterprise laws add little beyond marketing advantages to what traditional forms of business association already make possible. Depending on their specific objectives, social entrepreneurs can achieve public benefits using nonprofits, corporations, or LLCs. The famous flexibility of the LLC may be particularly attractive as it permits founders to design a business in almost any fashion they see fit. Professor Molk concludes with suggestions for how benefit corporation statutes could be revised to offer a more distinctive contribution, particularly in signaling a commitment to preserve the social mission.

In Chapter 15, Tamara Belinfanti argues that the cooperative form has been underappreciated as a vehicle for social enterprise. The combination of social mission and profits has for centuries been a defining feature of cooperatives, and their inclusion of stakeholder voices continues to offer an attractive approach to identifying and preserving a social mission. Professor Belinfanti acknowledges costs in using the cooperative form vis-à-vis other traditional forms of business association and suggests that coops will be most plausible when a community seeks to solve problems using its own resources, as well as when locking in a venture’s social mission is paramount.

In Chapter 16, Cass Brewer contends that many of the objectives of social enterprise can be achieved through the use of taxable nonprofit corporations. To the extent taxable nonprofits “harmonize into one legal form both private wealth creation and broad public benefit,” Professor Brewer suggests that there may be no need to invent additional hybrid forms of business association. Among other advantages, taxable nonprofits could signal a stronger commitment to the identified mission because major changes would require approval of the

attorney general in the state of incorporation. Although taxable nonprofits have not been used much in the past, the burgeoning market for social enterprise creates a new use case.

In Chapter 17, Kyle Westaway provides choice-of-form guidance for social entrepreneurs and their counsel. He explains that a firm's intended business model will largely drive the decision, and he provides a helpful typology, including models described as "buy one give one," "ethical supply chain," "direct employment," "shared ownership," and "cross subsidization." These business models in turn can be distinguished in terms of the expected degree of tension or alignment between profit and purpose. Mr. Westaway argues that specific social enterprise forms such as the benefit corporation are generally well suited to businesses in which profits and purpose are in tension. When the identified social objective does not conflict with generating returns for investors, traditional corporate and LLC business entities are often the best choice.

V FIDUCIARY OBLIGATION

The chapters in this section address the always tricky question of fiduciary obligation. In a hybrid business structure, how should the law constrain managers so that they act according to the expectations of investors and other stakeholders?

In Chapter 18, Andrew Gold and Paul Miller offer a philosophical analysis of fiduciary obligations. They contend that the hybrid nature of fiduciary duties in social enterprise does not pose as large or distinctive a challenge as some have assumed. The concern they address is that managers of social enterprises have divided loyalties inconsistent with serving as fiduciaries and unhelpful given the need to assure investors and other stakeholders that a social enterprise will adhere to its mission. Yet Professors Gold and Miller argue that "hybridity" is common in fiduciary contexts and "that the decision-making exigencies it generates reflect familiar challenges in practical reasoning within and beyond organizations subject to fiduciary administration."

In Chapter 19, Lyman Johnson largely seconds the analysis of Professors Gold and Miller, but argues that most benefit corporation statutes are badly flawed because they include language that distracts managers from the hybrid mission of profit and purpose. In particular, Professor Johnson argues that benefit corporation statutes go awry when they require managers to consider the effect of their decisions on a variety of stakeholders. Adding a vague mandate to consider stakeholder interests dilutes the significance of a benefit corporation's commitment to pursue an identified public benefit. Professor Johnson concludes that public benefit corporation laws should be revised accordingly by removing provisions concerning other stakeholders. A benefit corporation may then choose whether to identify specific stakeholder interests as public benefits the corporation intends to advance.

In Chapter 20, Omari Simmons focuses on Delaware public benefit corporations and evaluates how judicial standards of review developed in the context of traditional corporate law might be applied to the former. Professor Simmons argues that Delaware courts should not invent new standards for judging public benefit corporations because, in most respects, Delaware public benefit corporations replicate the familiar features of corporate law: managerial discretion and shareholder primacy. True, managers are required to balance shareholder interests against identified public benefits and the interests of any other affected groups, but the decision in each case rests entirely with the managers. If anything, the wide variety of permissible choices makes the business judgment rule's protection of managerial

discretion all the more important – otherwise, nuisance litigation might threaten the viability of benefit corporations.

VI GOVERNANCE

The chapters in this final section take up issues regarding the governance of social enterprise.

In Chapter 21, Haskell Murray argues for changes to social enterprise law that would give stakeholders other than shareholders the ability to insist upon accountability. To this end, Professor Murray advocates for the creation of a representative body comprised of designees elected by specific stakeholder groups including employees, creditors, and customers, and perhaps individuals assigned to speak for the community and the environment. These representatives would have the power to access information, elect directors, bring derivative litigation, and vote on major transactions.

In Chapter 22, Charles Yablon wittily identifies the difficulty inherent in many hybrid products: the amphibious automobile, the low-fat, gluten-free muffin, or the “spork.” Just because two features are independently attractive does not mean they will go well together. Social enterprise, according to Professor Yablon, suffers from a similar incompatibility and poses a “very great, perhaps insurmountable design challenge.” In particular, the removal of both nonprofit law’s nondistribution constraint and corporate law’s wealth maximization norm leaves social enterprise open to ruinous agency costs. All the same, Professor Yablon recognizes that theoretical objections are not conclusive and that it is not yet possible to predict how experimentation with social enterprise will turn out. Perhaps social entrepreneurs will find a way to turn their enthusiasm into a viable long-term strategy.

In Chapter 23, Benjamin Leff also focuses on the problem of agency costs, observing that for-profit social enterprises do not use the nondistribution constraint of nonprofit law to signal a commitment to pursuing social goals and must, therefore, find other credible means of making that commitment. Professor Leff uses agency-cost theory to identify two aspects of the problem: identifying the relevant principal, and quantifying the extent to which the social enterprise is achieving its objectives. For example, a commitment to a “negative” restriction such as catching tuna without harming dolphins may be easier to monitor than a “positive” objective to improve natural ecosystems. Professor Leff concludes that agency costs will be most serious when a social enterprise makes commitments to several different categories of stakeholders at the same time and when it aims to achieve positive outcomes instead of merely avoiding causing certain identifiable types of harm in its operations.

In Chapter 24, Antony Page recommends improvements to benefit corporation laws that would facilitate stronger commitments to achieve social purposes and suggests strategies that individual benefit corporations could take voluntarily to signal their intentions more clearly and reliably. Dean Page points out that benefit corporations are only required to “consider” decisions that would achieve a goal other than generating revenue; also, the mission may be abandoned if the business is later sold. A source of the problem is that benefit corporation statutes “are largely modeled on traditional corporate law, and corporate law focuses primarily on assuring that a firm’s managers are responsive to the shareholders’ interests.” Dean Page concludes that benefit corporations should disclose not only the social objectives they wish to achieve but also the “level of resources that will be dedicated towards the social mission.” They might also consider adopting supermajority voting provisions and class voting strategies to lock in their social mission.

In Chapter 25, Sarah Dadush argues that creating appropriate laws and norms to regulate social enterprise will require us to develop new blueprints that are less reliant on existing forms of business association. Professor Dadush's elegant argument nicely encapsulates critiques of social enterprise that run through the forgoing chapters. According to Professor Dadush, "[b]lueprinting happens when a new market, such as the market for impact, is created based on the template for an already existing market, such as the market for conventional, profit-seeking companies and investments." She argues that blueprinting risks importing norms and governance practices that are a poor fit for the new market.

In particular, Professor Dadush argues that the discrepancy between for-profit business as usual and the objectives of social enterprise is too great for one to serve as an appropriate model for the other. Or, to return to the aphorism we suggested earlier, "you can't get to mother consciousness on a father consciousness machine."

Professor Dadush concludes the volume with some suggestions for a new blueprint, including stronger mechanisms for public accountability, better impact metrics that take into account the lived experience of the intended beneficiaries of social enterprise, frameworks for including stakeholder participation in governance, and voluntary codes of conduct for impact investors.