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Michael E. Cummings

Hans Rawhouser

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LAWYERS AND BAR ASSOCIATIONS AS INFLUENCERS IN THE NEGOTIATED LANDSCAPE OF SOCIAL-BUSINESS HYBRIDIZATION

Michael E. Cummings and Hans Rawhouser**

I. INTRODUCTION

In recent years, there has been an increasing convergence of the for-profit and non-profit sectors. Many for-profit businesses are becoming more mission-oriented, while non-profits are pushing to become financially sustainable by increasing revenue-generating activities. This convergence has led to state-level adoption of variations on traditional organizational forms,¹ in line with Supreme Court Justice Brandeis' observation that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."² Corporate entities law is in the midst of such an experiment marked by the legal creation of new hybrid forms of organizing—forms that explicitly combine characteristics of purpose-driven and profit-driven organizations.

* Michael E. Cummings is an assistant professor of management at the University of Arkansas Walton College of Business. Ph.D., Strategic Management and Entrepreneurship, University of Minnesota Carlson School of Management (2015); M.P.A., Public Management, Brigham Young University Marriott School of Management (2010); J.D., Brigham Young University J. Reuben Clark Law School (2008); B.S. English Literature, Utah Valley University (2005). Dr. Cummings' research focuses at the convergence of law, policy, and entrepreneurship.

* Hans Rawhouser is an assistant professor of entrepreneurship at UNLV's Lee Business School. He received his Ph.D. from the University of Minnesota's Carlson School of Management, MBA from Thunderbird School of Global Management, and B.S. in Civil Engineering from UNLV. He investigates how entrepreneurs acquire resources and the efforts of organizations to achieve social impact.

¹ See generally J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541 (2016).

² *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932); see also J. Haskell Murray, *supra* note 1, at 563–564.

Creation of these new legal forms requires innovation and negotiation of the boundaries between for-profit and non-profit models of organizing. This article examines how various actors' formal participation in the legislative process shapes the conversation and negotiated boundaries of these types of policy innovations. This article primarily focuses on Benefit Corporations and Low-Profit Limited Liability Companies (L3C), the two most prevalent social business legal forms in the United States, and on the role of attorneys and bar associations in shaping the creation of these forms of organization.³

To complement prior legal scholarship on the Benefit Corporation and L3C movements⁴—which focused on comparing the nuances in various states' legal approaches, or compared firms' adoption rates across jurisdictions—this article focuses on understanding the various interests that shaped these laws in different states.⁵ This article analyzes a diverse and content-rich product of the legislative process: transcripts and written testimony from over 100 separate committee hearings and legislative floor debates. This approach to understanding the legislative process helps identify patterns and tensions between actors with similar but divergent interests. Although these potential tensions are present between several different groups involved in this process, such as business owners, nonprofit leaders, legislators and other public officials, this article mainly focuses on the policy development involvement of the legal community—attorneys and bar associations.⁶

³ See generally Hayagreeva Rao, Calvin Morrill & Mayer N. Zald, *Power Plays: How Social Movements and Collective Action Create New Organizational Forms*, in 22 RESEARCH IN ORGANIZATIONAL BEHAVIOR 237, 237–281 (Barry M. Staw & Robert I. Sutton, eds., 2000); Hans Rawhouser, Michael Cummings & Andrew Crane, *Benefit Corporation Legislation and the Emergence of a Social Hybrid Category*, 57 CAL. MGMT. REV. 13 (2015).

⁴ See e.g. Briana Cummings, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578 (2012); Frederick H. Alexander et al., *M&A Under Delaware's Public Benefit Corporation Statute: A Hypothetical Tour*, 4 HARV. BUS. REV. 255 (2014); Alissa Mickels, *Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe*, 32 HASTINGS INT'L & COMP. L. REV. 271 (2009); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1 (2012); Rawhouser, Cummings & Crane, *supra* note 3.

⁵ Given that it is outside the scope of our article, we acknowledge, but do not substantively address, the issue of whether new hybrid organizational forms are necessary or effective. For a summary of some critiques, see e.g. Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY'S L. J. 617 (2012); Daniel S. Kleinberger, *A Myth Deconstructed: The 'Emperor's New Clothes' on the Low-Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879 (2010); Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L. J. 999 (2012–2013).

⁶ In addition to our review of each bill's legislative history, we also contacted state bar association representatives directly to supplement the information that was present in the legislative record.

Each group's testimony is examined in turn, permitting qualitative analysis of the nature and extent of their testimony in various states. This analysis reveals interesting patterns regarding the existence (or lack) of a legal need for this type of legal entity. For example, while individual lawyers who testify before the legislature tend to enthusiastically support the idea of social hybrid legislation, state bar associations counterbalance this enthusiasm with workable policy, ranging from tacit approval and minor revisions to large scale re-drafting of proposed legislation. Some associations even oppose the social hybrid legislation outright. Our study plays an important role in understanding the messengers (and messages) shaping this convergence of for-profit and non-profit (hybrid) organizational models.

The concept of convergence is especially relevant because organizations have historically been categorized as fitting within the public, the private, or the non-profit sector. But even with relatively strong boundaries between sectors, organizations have partnered and collaborated across these sectoral divides (i.e., public-private partnerships for urban development, corporate philanthropy for poverty reduction, etc.).⁷ New hybrid organizational forms take this idea of bridging sectoral boundaries one step further. Rather than two organizations with separate but complementary purposes collaborating on an area of shared interest, single hybrid organizations have attributes (and purposes) of both private and non-profit entities. Public vs. private benefit, or social vs. financial organizational purposes, are increasingly intertwined and indivisible.

Movement toward the middle has been incremental and has originated from both the nonprofit and for-profit sectors.⁸ Within the for-profit sector, practices such as impact investing,⁹ sustainability certifications,¹⁰ and corporate

⁷ See e.g. John Pelozo & Loren Falkenberg, *The Role of Collaboration in Achieving Corporate Social Responsibility Objectives*, 51 CAL. MGMT. REV. 95 (2009); Young Hoon Kwak, YingYi Chih & C. William Ibbs, *Towards a Comprehensive Understanding of Public Private Partnerships for Infrastructure Development*, 51 CAL. MGMT. REV. 51 (2009); Paola Perez-Aleman & Marion Sandilands, *Building Value at the Top and the Bottom of the Global Supply Chain: MNC-NGO Partnerships*, 51 CAL. MGMT. REV. 24 (2008); Mike Valente & Andrew Crane, *Public Responsibility and Private Enterprise in Developing Countries*, 52 CAL. MGMT. REV. 52 (2010).

⁸ Julie Battilana et al., *In Search of the Hybrid Ideal*, 10 STAN. SOC. INNOVATION REV. 51, 51–55 (2012); Hans Rawhouser, Michael E. Cummings, and Scott Newbert, *Social Impact Measurement: Current Approaches and Future Direction for Social Entrepreneurship Research*, ENTREPRENEURSHIP THEORY AND PRACTICE, forthcoming.

⁹ See Antony Bugg-Levine & Jed Emerson, *Impact Investing: Transforming How We Make Money while Making a Difference*, 6 INNOVATIONS: TECH., GOV. & GLOBALIZATION 9 (2011), http://www.mitpressjournals.org/doi/pdfplus/10.1162/INOV_a_00077.

¹⁰ E.g. NICHOLS INSTITUTE FOR ENVTL. POL'Y SOLS., AN OVERVIEW OF ECOLABELS AND SUSTAINABILITY CERTIFICATIONS IN THE GLOBAL MARKETPLACE, 14–15 (Jay S. Golden ed., 2010), https://www.academia.edu/20586265/An_Overview_of_Ecolabels_and_Sustainability_Certifications_in_the_Global_Marketplace.

social responsibility (CSR) activities¹¹ have become increasingly important. Over time, these corporate social initiatives have become more strategic,¹² and directly aligned with the corporation's competencies.¹³ In the non-profit sector, organizations are becoming more focused on performance measurement and mission-related income-generating activities.¹⁴ Paradigm convergence, and the recognition of the need to blend social and financial value, has led to the creation of new social hybrid organizational forms that mix and match characteristics of both purpose-driven and profit-driven organizations.¹⁵

This combination and experimentation seems exciting and groundbreaking,¹⁶ but in order for social hybrids to gain collective strength and widespread impact, states have to carefully negotiate rules and boundaries to clarify the differences between the hybrid organization and its two respective parent organizational forms.¹⁷ This article explores this boundary negotiation process, focusing specifically on the role of lawyers and bar associations in shaping dialogue and subsequent legislation providing for the formation and maintenance of social hybrid organizations.

The Section II briefly outlines the types and history of legal forms established for social-business hybrids in the United States, with specific attention to Benefit Corporations and L3Cs. What follows in Section III is a discussion of the historical role of bar associations' involvement with shaping state law, both

¹¹ E.g. Dylan Minor & John Morgan, *CSR as Reputation Insurance: Primum Non Nocere*, 53 CAL. MGMT. REV. 40 (2011).

¹² See e.g. Christine Vallaster, Adam Lindgreen & François Maon, *Strategically Leveraging Corporate Social Responsibility: A Corporate Branding Perspective*, 54 CAL. MGMT. REV. 34 (2012); Michael E. Porter & Mark R. Karmar, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV. December 2006, at 78.

¹³ David Hess, Nikolai Rogovsky & Thomas W. Dunfee, *The Next Wave of Corporate Community Involvement: Corporate Social Initiatives*, 44 CAL. MGMT. REV. 110 (2002).

¹⁴ William J. Ritchie & Robert W. Kolodinsky, *Nonprofit Organization Financial Performance Measurement: An Evaluation of New and Existing Financial Performance Measures*, 13 NONPROFIT MGMT. & LEADERSHIP 367 (2003).

¹⁵ Jed Emerson, *The Blended Value Proposition: Integrating Social and Financial Results*, 45 CAL. MGMT. REV. 33 (2003).

¹⁶ Jacob E. Hasler, *Note: Contracting for Good: How Benefit Corporations Empower Investors and Redefine Shareholder Value*, 100 VA. L. REV. 1279 (2014); Michael R. Deskins, *Benefit Corporation Legislation, Version 1.0—A Breakthrough in Stakeholder Rights?*, 15 LEWIS & CLARK L. REV. 1047 (2011); William H. Clark Jr. & Elizabeth K. Babson, *Business Organizations: When "Business Purpose" Disappears: How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817 (2012).

¹⁷ This issue of ideal statutory design is an important one. A good idea, if poorly executed, will be ineffective. J. William Callison, *Benefit Corporations, Innovation, and Statutory Design*, 26 REGENT U. L. REV. 143 (2013); Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J. L. & SOC. POL'Y 170 (2012).

generally and specifically with regard to new innovations in organizational forms. Section IV summarizes the involvement of bar associations with this legislation, based on oral and written testimony on social hybrid bills introduced in several state legislatures, and discusses the origins and outcomes of differences between bar associations and their individual member attorneys. Finally, Section V discusses implications for association practice and research on new organizational forms.

II. BACKGROUND

While organizations combining profit and purpose are not new, some have complained that the legal frameworks within which they have operated are often ill-suited to their needs. More recently, this has led to the proposal of various hybrid legal forms among the U.S. states. These include: Benefit Corporations, Benefit Limited Liability Companies,¹⁸ L3Cs, Social Purpose Corporations,¹⁹ and Flexible Purpose Corporations.²⁰ Regardless of their differences, these legal forms are each hybrid—they draw attributes from both profit-oriented legal forms (e.g. corporations and limited liability companies) and purpose-oriented non-profit legal forms (e.g. charitable and philanthropic organizations), which have previously been considered distinct and separate organization types.

These new social business forms represent a type of policy experiment made possible by the U.S. federalist system.²¹ The experiment is widespread and ongoing. Between 2010–2015, thirty-one states and the District of Columbia adopted Benefit Corporation legislation.²² Additionally, a handful of additional state Benefit Corporation laws have been passed or are in progress during the 2016–17 legislative sessions.²³ In comparison, the L3C form saw earlier success, with thirty-four states considering legislation and nine states adopting between 2008 and 2011.²⁴ However, the movement had lost momentum;²⁵ Puerto Rico

¹⁸ *E.g.* S.B. 595-500, 428th Sess. (Md. 2011).

¹⁹ *SOCIAL PURPOSE CORPORATION*, WASHINGTON SECRETARY OF STATE, <https://www.sos.wa.gov/corps/socialpurposecorporation.aspx> (last visited May 2, 2017).

²⁰ *See generally* Dana Brakman Reiser, *The Next Big Thing: Flexible Purpose Corporations*, 2 AM. U. BUS. L. REV. 55 (2012).

²¹ Murray, *supra* note 4, at 45.

²² Carter G. Bishop, Fifty State Series: L3C & B Corporation Legislation Table (Suffolk U. Law Sch., Research Paper No. 10-11, Oct. 5, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561783.

²³ *E.g.* H.B. 616. (N.C. 2017); H.B. 467 (N.M. 2017); H.B. 2125 (KS 2017).

²⁴ Rawhouser et al, *supra* note 3, at 16; Bishop *supra* note 22.

²⁵ L3C model legislation was crafted to fit IRS rules so as to be automatically eligible for IRS-allowed program-related investment (PRI) in for-profit activities that are well aligned with the purpose of the foundation. The IRS was expected to provide guidance to foundations in determining if an investment qualifies as IRS-accepted PRI, but has not done so. Without the IRS ruling, most foundations are wary of making an investment that could be deemed to violate non-profit rules set by the IRS. The lack of a ruling has likely contributed to L3C legislation stalling.

adopted the L3C form in 2015 but no additional states have a bill in process.²⁶ In addition to the two most prominent social hybrid forms, additional social hybrid forms such as Benefit LLCs, Flexible Purpose Corporations (FPC) and Social Purpose Corporations (SPC) have been adopted by a handful of states such as California,²⁷ Maryland,²⁸ and Washington.²⁹

TABLE 1.³⁰

	1	2
Year	Benefit Corporation Adoption	L3C Adoption
2008		VT
2009		IL, MI, UT, WY
2010	MD, VT	LA, ME, NC*
2011	CA, HI, NJ, VA, NY	RI
2012	IL, LA, MA, PA, SC	
2013	AR, AZ, CO, DC, DE, NV, OR, RI, TX	
2014	CT, FL, MN, NE, NH, UT, WV	
2015	ID, IN, MT, TN	Puerto Rico
2016–17	No adoptions since 2015, though 8 states have pending legislation as of 3/1/17 (AK, GA, IA, KS, KY, MS, NM, OK)	(none)

²⁶ See e.g. S.B. 979 (P.R. 2015); S.B. 439-157, 2013 Sess. (N.C. 2013) (removing the L3C statute from the books) Also, one potential reason for the drop-off in legislative support for the concept is the ABA Business Law Section's opposition to the Minnesota L3C bill and other similar bills in progress during the 2012 session.

²⁷ See generally Christen Clarke, *California's Flexible Purpose Corporation: A Step Forward, a Step Back, or No Step at All?*, 5 J. BUS. ENTREPRENEURSHIP & L. 301 (2012).

²⁸ MD. CODE ANN., CORPS. & ASS'NS §§ 4A-1101–1108 (LexisNexis 2017).

²⁹ H.B. 2239, 62nd Sess. (Wa. 2012); see also Brakman Reiser, *supra* note 20, at 57–58.

³⁰ Data on individual state statutes based on CARTER G. BISHOP, FIFTY STATE SERIES: L3C & B CORPORATION LEGISLATION TABLE (Research Paper 10-11, 2016) <https://ssrn.com/abstract=1561783>. *North Carolina adopted the L3C form in 2010 and later repealed it. Anne Field, *North Carolina Officially Abolishes the L3C*, FORBES (Jan. 11, 2014, 11:17 AM), <https://www.forbes.com/sites/annefield/2014/01/11/north-carolina-officially-abolishes-the-l3c/#5f1341853d7f>.

Promotion of Benefit Corporations as a legal entity began when B Lab provided a model statute that could be used to further the concept to state legislatures.³¹ This was part of a larger community-building strategy by B Lab, a nonprofit organization that describes itself as furthering the cause of “using business as a force for good. . . .”³² B Lab described Benefit Corporations as corporations that “incorporat[e] under states’ current corporate statutes and [are] subject to private-sector tax laws. They differ from traditional corporations (e.g., S corporations, C corporations), though, in that they spell out their social commitments in their corporate governing documents for all potential investors to see.”³³

Another distinctive attribute of Benefit Corporations is that most have followed the model legislation which requires that the firm be evaluated or rated in accordance with an independent third-party social benefit standard.³⁴ B Lab itself (the promoter of the Benefit Corporation form) is one of many potential certifiers, with its B corporations standard, which is a voluntary assessment of social impact.³⁵ Over 1,800 corporations have paid to be certified as a B corporation by B Lab,³⁶ many of them before Benefit Corporation statutes were passed in their respective states.³⁷ While Benefit Corporations do not have to choose B Lab as a certifier, B Lab has worked to build a cadre of existing companies that use their certification process in order to be Certified B Corps. Early Certified B Corps include Method (cleaning products), Dansko (shoes), and Patagonia (outdoor clothing).³⁸ These well-known organizations, together with local entities, provided

³¹ *Our History*, B CORPORATION, (Apr. 20, 2017, 10:05 AM), <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/our-history>.

³² B THE CHANGE, <http://www.bthechange.com/> (last visited Apr. 20, 2017).

³³ Michael D. Gottesman, *From Cobblestones to Pavement: The Legal Road Forward for the Creation of Hybrid Social Organizations*, 26 YALE L. & POL’Y REV. 345, 355 (2007).

³⁴ Model Benefit Corporation Legislation, B Lab, 3, (2017). Available at http://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf (describing how benefit corporations must report on their general public benefit, defined as “a material positive impact on society and the environment, . . . assessed taking into account the impacts of the benefit corporation as reported against a third-party standard”).

³⁵ This certification is separate from the Benefit Corporation legal status. Although Benefit Corporations are *required* to conduct third-party audits of social impact (one alternative of which is B Lab’s B Corporation certification), B Corporations can obtain an audit and social impact report regardless of their legal organizational form.

³⁶ *Find a B Corp*, B CORPORATION, <https://www.bcorporation.net/community/find-a-b-corp> (last visited Apr. 1, 2017).

³⁷ In this case, the firm would be fulfilling the certification requirement of Benefit Corporation status, but in its existing corporate form. We acknowledge that there is a significant difference between certification and corporate form, but in the case of Benefit Corporations, the two go hand in hand.

³⁸ RYAN HONEYMAN, *THE B CORP HANDBOOK: HOW TO USE BUSINESS AS A FORCE FOR GOOD* at 1–2 (2014).

clear examples to help legislators understand the newly proposed category. For instance, as Arizona was considering benefit corporation legislation in 2013, a legislator asked for an example of social hybrid organizations, and was told about Goodmans Interior Structures, a Phoenix furniture business.³⁹

With the help of B Lab, interested state legislators across the United States introduced bills to facilitate the creation of the new social hybrid organizational forms.⁴⁰ As illustrated by Table 1, Benefit Corporation statutes started more slowly than the L3C, but seem to have become the social hybrid organizational form of choice.⁴¹

The L3C as an organizational form has been similarly promoted across the United States by an organization called Americans for Community Development, while the other less prominent social hybrid forms (FPC, SPC, and Benefit LLC) have grown out of more localized working groups.⁴² These advocacy groups have collectively played an important role in bringing attention to the idea of social hybridity, and have performed a lot of the legwork in drafting legislation to fit within each state's existing corporate code.⁴³ However, enthusiasm alone does not always translate into good public policy.

As a complement to the role of advocacy groups and lobbying by individual attorneys, bar associations acted both in an advisory role and as advocates for (or against) these hybrid organizational forms. When bar associations chose to become involved in social hybrid legislation efforts, their influence was substantial.

³⁹ *Commerce, Energy and Military Committee Hearing*, 51st Legis. (Ariz. 2013) (statement of Courtney KleinJohnson), http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=12131.

⁴⁰ In addition to writing and sharing draft legislation with interested and receptive lawmakers, when he testified before the Arizona Legislature in support of HB 2276 (2013), William Clark, an attorney representing B Labs, explained that he had spoken with attorneys in all 13 states that had passed Benefit Corporation laws up until that point. *Arizona House Commerce Committee Hearing on HB 2276* (Az. 2013) (testimony of William Clark).

⁴¹ See *supra* note 30 and accompanying text.

⁴² *How to Pass Benefit Corporation Legislation*, BENEFIT CORPORATION, <http://benefitcorp.net/policymakers/how-pass-benefit-corporation-legislation> (last visited May 2, 2017); *Considering Legislation in Your State*, AM. FOR COMMUNITY DEV., <https://americansforcommunitydevelopment.org/considering-legislation-in-your-state/> (last visited Apr. 20, 2017) (describing how California's FPC statute was drafted and promoted by a group of California attorneys called the California Working Group for New Corporate Forms).

⁴³ HOW TO PASS BENEFIT CORPORATION LEGISLATION, <http://benefitcorp.net/policymakers/how-pass-benefit-corporation-legislation> (last visited May 2, 2017); *Considering Legislation in Your State*, AMERICANS FOR CMTY DEV., <https://americansforcommunitydevelopment.org/considering-legislation-in-your-state/> (last visited Apr. 20, 2017).

III. ROLE AND DESCRIPTION OF BAR ASSOCIATIONS

Although there are several nationally-recognized bar associations, the most prominent of these by far is the American Bar Association (ABA).⁴⁴ The ABA is a voluntary organization founded in 1878, and today has almost 400,000 members.⁴⁵ Its stated mission is, “[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.”⁴⁶ This mission manifests itself in several ways, from issuing normative guidelines for attorney participation in pro-bono work⁴⁷ to promulgating ethical guidelines for attorney-client interactions.⁴⁸ The organization’s involvement, however, is not just limited to regulating attorney behavior—the ABA often seeks to guide the underlying legal framework of state and federal laws through public expression of positions as well as more explicit coordinated lobbying efforts, such as ABA Day, which occurs in April each year, and encourages members to lobby their congressional representatives.⁴⁹ These positions usually take the form of resolutions by the ABA House of Delegates or position papers by the ABA’s other standing committees and address topics as diverse as breed-specific restrictions on ownership of dogs⁵⁰ or zero-tolerance school discipline policies.⁵¹

⁴⁴ Other multi-state bar associations tend to be organized around particular minority groups (National Bar Association, made up of predominantly African American Lawyers and Judges), practice types (American Association for Justice, made up of plaintiffs’ lawyers), or sectors (Federal Bar Association, made up of government attorneys and the small percentage of attorneys whose practice is primarily in federal courts).

⁴⁵ *About the ABA*, A.B.A. (Apr. 20, 2017, 11:00 AM), http://www.americanbar.org/about_the_aba.html.

⁴⁶ *Id.*

⁴⁷ *E.g.* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004).

⁴⁸ *E.g.* Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules*, 59 TEX. L. REV. 639 (1981) (providing a more skeptical perspective); *see also* ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 99-413 (1999) (concluding that a lawyer may transmit information related to the representation of a client by unencrypted email without violating the 1998 *Model Rules of Professional Conduct*).

⁴⁹ *Welcome to ABA Day in Washington*, A.B.A. (APR. 20, 2017, 11:00 AM), <http://www.americanbar.org/calendar/aba-day.html> (showing that in 2017, the ABA topics were funding for legal aid and access to justice for homeless veterans); *Annual Lobbying by the American Bar Association*, OPENSECRETS (last visited Apr. 20, 2017), <http://www.opensecrets.org/lobby/clientsum.php?id=D000043801> (depicting A.B.A. lobbying expenditures of approximately \$1 million annually since 1998).

⁵⁰ *Opposition to Laws Banning Dogs by Breed Grows*, A.B.A. (Sept., 2009) http://www.americanbar.org/news/abaneews/aba-news-archives/2013/09/opposition_to_lawsb.html.

⁵¹ *ABA Opposes ‘Zero Tolerance’ in Schools*, ABC NEWS (Feb. 20, 2002), <http://abcnews.go.com/US/story?id=94043>.

State bar associations operate in ways that are similar to the above description of ABA, with several key differences. First, although state bar associations' aggregate membership numbers exceed those of the ABA, state bar associations are independent from one another.⁵² This leads to variation and diversity in their responses to the same issue. Second, although some state bars follow the ABA's model of voluntary membership, membership in the majority of bar associations are *mandatory* for all licensed attorneys.⁵³ These differences allow us to explore rich variation in the contribution these state-level associations make to the shaping of the hybrid organizational space.⁵⁴

IV. BAR ASSOCIATIONS AS GATE KEEPERS

Bar associations and individual lawyers can play the role of gatekeepers of the law. Similar to the rise of limited liability corporations (LLC) decades earlier, both national and state-level bar associations have taken positions or otherwise participated in the creation of social hybrid legal statutes.⁵⁵ We first discuss the involvement of the ABA in social hybrids legislation, then move to an examination of bar association influence at the state level.⁵⁶

⁵² There is an association to represent the interests of bar association managers (National Association of Bar Executives, nabenet.org) which exists to share best practices among national, state, and even local bar organizations, but the underlying state bars have largely retained the diversity which has arisen from their unique state-level institutional environment and historical development.

⁵³ See Jill M. Kastner, *Mandatory vs. Voluntary: Which State Bar is Better?*, A.B.A. (last visited Apr. 20, 2017), http://www.americanbar.org/publications/affiliate_home/affiliate_index/yld_affiliate_septoct08_kastner.html. (contrasting mandatory from voluntary bar associations); Rita Fuerst Adams, *Nebraska Limits State Bar Lobbying*, NAT'L PARENTS ORG. (Dec. 11, 2013), <https://nationalparentsorganization.org/blog/16-latest-news/21405-nebraska-limits-state-bar-lobbying>. Mandatory membership broadens the revenue base and potential power of the associations, but also broadens the constituency, which seems to have a limiting effect—as a result of recent litigation by dissatisfied bar members, some states have started to place restrictions on the scope of lobbying activities that can be carried out by mandatory bar associations. See, e.g., *In re Nebraska Bar Association*, 841 N.W.2d 167, (Neb. 2013).

⁵⁴ Although bar associations also exist at the local level, and some of these are active in influencing state-level legislation (E.g. Letter from Nancy Sanborn, Chair, Committee on Corporation Law, New York City Bar, to Senator Squadron (Feb. 16, 2011), <http://www.nycbar.org/pdf/report/uploads/20072008-LetteronA.14498BS.7855BAuthorizingtheIncorporationofBenefitCorporations.pdf>) the vast majority of these local bar associations lack the resources to become involved with state policy and legislation that does not directly influence the practice of law.

⁵⁵ See J. William Callison, *Federalism, Regulatory Competition, and the Limited Liability Movement: The Coyote Howled and the Herd Stampeded*, 26 J. CORP. L. 951, 963 (2000) (observing that “lawyers were present at the birth of LLCs, and it can be argued that the rapid adoption of the form resulted from their persuasion and power”). The author of this article takes the position that the consequences of LLCs were not fully investigated or understood prior to their adoption.

⁵⁶ For a historical comparison of A.B.A. involvement in a movement with similar, though not identical, goals of blending firm financial performance and social welfare, see e.g. Committee on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253, 2261 (1990) (Discussing how Pennsylvania in 1983 was the first state to adopt what is called

Proposals for social hybrid legal forms date back to 2006 with the founding of B Lab, followed by the 2008 founding of the Americans for Community Development and passage of L3C legislation by Vermont.⁵⁷ Law professors and other commentators were critical in their responses to Vermont and other states considering the L3C,⁵⁸ but it was a few more years before the ABA took a public position on the L3C form and accompanying legislation.⁵⁹ In 2012, Minnesota considered adopting the L3C; the Business Law Section of the American Bar Association sent the Minnesota legislature a position letter strongly opposing the L3C concept.⁶⁰ In addition to arguing that the legislation as designed did not provide any advantages over existing LLC law and that it did not (as planned) automatically create compliance with federal tax statutes on foundations' program-related investments, the letter also argued more broadly that social hybrid organizational forms would inappropriately use the state to create a socially responsible brand.⁶¹ The letter seemed to be effective—Minnesota's legislature did not pass the bill, nor has any other state passed L3C legislation since that date.

The ABA Business Law Section has taken a much more measured approach to the Benefit Corporation concept and accompanying legislation. In August 2013, the Business Law Section published an article entitled *Benefit Corporation*

a constituency statute, permitting firm directors to consider other constituencies—besides shareholders—in determining allocations of organizational resources and strategies which now, twenty-nine other states have done). The expressed ABA position on constituency statutes was that they were unnecessary and unhelpful.

⁵⁷ Rawhouser et al., *supra* note 3, at 15–16.

⁵⁸ Compare Arthur Wood, *New Legal Structure to Address the Social Capital Famine*, 35 VT. L. REV. 45 (2010) (in favor of the new form), with Kleinberger, *supra* note 5 (calling the L3C “a snare and a delusion”), and J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273 (2010) (explaining why the L3C “has little or no value and should be abandoned”).

⁵⁹ At least one observer lamenting state legislatures' credulous responses to L3C advocates called for such involvement a year before it happened. Doug Batey, *Rhode Island Becomes the Newest State to Authorize Low-Profit LLCs - What's Going On Here?*, LLC LAW MONITOR, (Sept. 12, 2011), <http://www.lexology.com/library/detail.aspx?g=ea1f51ed-1ba4-4a14-874a-70ec4becb9e2> (arguing that “one of the national bodies with expertise and a broad constituency . . . should take this issue in hand, study it, and make recommendations after thoroughly analyzing the issue and considering input from the various groups and experts”).

⁶⁰ DANIEL S. KLEINBERGER, ABA BUSINESS LAW SECTION, ON BEHALF OF ITS COMMITTEES ON LLCs AND NONPROFIT ORGANIZATIONS, OPPOSES LEGISLATION FOR LOW PROFIT LIMITED LIABILITY COMPANIES (L3Cs) (Faculty Scholarship, Mitchell Hamline School of Law, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2055823

⁶¹ Professor Kleinberger, whose strong opposition to the L3C aided in killing the idea, was also on the drafting committee of Minnesota's Benefit Corporation statute, which passed in 2014. Letter from Kim Lowe, to Minnesota State Bar Association Public Benefit Corporation Drafting Committee, (Aug. 6, 2013), https://www.mnbar.org/docs/default-source/sections/business-law---msba_b-corps_august-2013-304a-exposure-draft.pdf?sfvrsn=4 (last accessed 5/2/2017).

White Paper which outlined recommendations for state legislators considering whether to incorporate the Benefit Corporation into their state's menu of available entities.⁶²

Notwithstanding this involvement of the ABA in the social hybrid entities movement, it is state-level bar associations (and not necessarily the ostensibly more powerful ABA) that are perhaps best positioned to promote, prevent, or shape the passage of laws creating new social purpose organizational forms such as the Benefit Corporation or L3C. This is because doing so requires some familiarity and involvement with the state legislative process. In this section, we broadly discuss bar association legislative involvement, then more specifically with regard to social hybrids legislation.

Bar associations are not uniform in terms of their general levels of legislative involvement. Table 2a below outlines the state bar associations' activities as reported in the 2012 ABA Bar Activities Inventory.⁶³ Several questions arise concerning governmental relations and bar association involvement in legislative and policy affairs: (1) Does the association take positions on federal legislation; (2) Does the association take positions on state legislation; (3) Does the association have a grassroots lobbying structure in place; and (4) Does the association regularly engage in training legislators on legal concepts? We summarize responses to these four questions in Table 2a, below.⁶⁴

TABLE 2A. PERCENT OF STATE BAR ASSOCIATIONS ENGAGING
IN LEGISLATIVE AND LOBBYING ACTIVITIES⁶⁵

	1	2	3	4
	Positions on Federal Legislation	Positions on State Legislation	Grassroots Lobbying	Law Training for Legislators
Unified Assns.	46.4%	75.0%	32.1%	42.9%
Voluntary Assns.	83.3%	100.0%	72.2%	27.8%
Total	60.9%	84.8%	47.8%	37.0%

⁶² Corporate Laws Committee, *Benefit Corporation White Paper*, 68 BUS. LAW. 1083 (2013).

⁶³ A.B.A. DIVISION FOR BAR SERVICES, 2012 BAR ACTIVITIES INVENTORY, at 419–422 (ed. Joanne O'Reilly, 2012). Of 51 possible jurisdictions (50 states and DC), bar associations from 44 responded to the survey, for a response rate of 86%. There were actually 46 responses in the 2012 survey, because both North Carolina and Virginia have two separate bar associations—one mandatory, and one voluntary. For these states, we include both sets of responses.

⁶⁴ *Id.*

⁶⁵ *Id.*

As shown in the table, the legislative activity most common among bar associations is taking a position on pending state legislation.⁶⁶ All reporting voluntary associations and approximately 75 percent of the unified bar associations indicate a past history of taking public positions on such legislation.⁶⁷ Associations also varied in their activities based on their membership structure. Voluntary associations appear to be more active in legislative affairs, while law training for legislators is the only activity that unified (mandatory) bar associations were more likely to become involved in.⁶⁸ This general observation of greater policy activity by voluntary bar associations was confirmed by our discussions with bar representatives. At least one bar representative informed us that their neutral position on pending social hybrids legislation was the result of being careful to represent the broad-based interests of its members (none of whom could opt out of joining the association).⁶⁹

We turn now to focus on the relationship between overall bar association characteristics and progress of Benefit Corporation and social hybrid legislation, summarized in Table 2b below.⁷⁰ The first observation was that voluntary bar associations were much more likely to introduce (and pass) both types of social hybrid laws.⁷¹ This makes sense because their voluntary nature means the associations are less restricted in their ability to innovate and take risks. We also note that grassroots campaigning bar associations also seemed to be positively associated with both introduction and passage.⁷² Next, our data indicates that bar association participation in legislative training has no clear directional association with introduction of social hybrid legislation, but does have a clear negative relationship with adoption for both types of social hybrid laws.⁷³ It may be that law-trained legislators are more inherently skeptical of these types of entity innovations, or it may be that the process of law training provides for more frequent or meaningful advice-giving between legislators and bar association officials, who then provide their own skeptical perspectives on proposed social hybrid legal forms. Finally, we note that bar associations willing to take positions

⁶⁶ *Id.*

⁶⁷ *Id.* This may occur through a variety of channels, including ad hoc or standing committees focused on particular legal areas. Several bar associations even have formal legislative or lobbying arms. *See e.g., WSBA Legislative Committees*, WASH. STATE BAR ASSOC. (last visited Apr. 20, 2017), <http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Legislative-Committee>.

⁶⁸ *See supra* note 65 and accompanying text (Table 2a).

⁶⁹ Personal communication with James H. Hahn, Chair, R.I. Bar Ass'n Bus. Org. Comm. (Apr. 23, 2014).

⁷⁰ *See infra* note 75 and accompanying text (Table 2b).

⁷¹ *See infra* note 75 and accompanying text (Table 2b).

⁷² *See infra* note 75 and accompanying text (Table 2b).

⁷³ *See infra* note 75 and accompanying text (Table 2b).

on state legislation seem to have positive association with introduction, and a negligible relationship of passage of both types of social hybrid laws.⁷⁴

TABLE 2B. RELATIONSHIPS BETWEEN BAR ASSOCIATION ACTIVITIES AND CONSIDERATION/PASSAGE OF SOCIAL HYBRIDIZATION LAWS⁷⁵

		1	2	3	4	5
		Introduce L3C	Pass L3C	Introduce BCorp	Pass BCorp	Number of Associations
Political Positions and Legislative Activities	FedLeg	73.3%	20.0%	83.3%	53.3%	30
	StateLeg	76.2%	19.0%	81.0%	47.6%	42
	Grassroots	78.3%	21.7%	87.0%	52.2%	23
	LegTrain	73.7%	10.5%	73.7%	42.1%	19
Assoc'n Type	Unified	66.7%	20.0%	76.7%	43.3%	30
	Voluntary	84.2%	21.1%	84.2%	52.6%	19
<i>Overall</i>		73.5%	20.4%	79.6%	46.9%	49

The table above shows the relationship between state bar association characteristics with various social hybrid legislative outcomes. *FedLeg* indicates that the state bar association is willing to take positions on proposed federal legislation. *StateLeg* indicates the same for state legislation. *Grassroots* indicates that the state bar association engages in grassroots lobbying campaigns, and *LegTrain* indicates that the state bar association is involved in training sessions for state legislatures. Lastly, *Unified* indicates a state bar association that requires membership for all licensed attorneys in the state, while *Voluntary* indicates that membership in the state bar association is optional for practicing attorneys, which limits and narrows the scope of its constituency. The totals in Table 2b, Column 5 do not add to 49 because categories overlap with one another.

We move now from a discussion of state bar associations' general legislative activity to an exploration of state bar associations' specific responses to the social hybrid legislation. State bar associations have had diverse responses to state efforts to create new hybrid legal forms of organizing. First, bar associations may be unaware of social hybrid efforts or made an active determination to stay neutral. Second, bar associations may oppose the legislation, either rejecting the concept entirely or the specifics of its execution. Lastly, bar associations may support the legislation, embracing (or at least resignedly accepting) both the underlying concept and the specifics of the legislation under consideration. We summarize and categorize the state associations' representative responses in Table 3 below:

⁷⁴ See *infra* note 75 and accompanying text (Table 2b).

⁷⁵ See *supra* note 63 and accompanying text.

TABLE 3. REPRESENTATIVE BAR ASSOCIATION RESPONSES
TO SOCIAL HYBRID LEGISLATION⁷⁶

Bar Association Response	Examples
Not Involved at All	<i>NY Benefit Corp</i> —“I am not aware of anything proposed or New York State bar association involvement with this issue.” ⁷⁷
Choose to Not Take a Position	<i>AZ Benefit Corp</i> —“The Bar debated it, but didn’t take a stand on it. There were some on either side of the issue. They didn’t make a public statement.” ⁷⁸ <i>RI L3C</i> —“The RI Bar Association is an integrated bar, so we have a process that must be followed before a formal position may be taken on any legislation to protect the first amendment rights of our members. Although no formal position was taken on the legislation, the consensus of the Business Organizations Committee was that the legislation was unnecessary to accomplish its goals under the RI LLC act, . . . the Committee did not feel strongly enough about the issue to follow the formal process to take a position on the legislation.” ⁷⁹
Oppose the Legislation	<i>CO L3C</i> —“Members of the CBA met with the proponents of the legislation and discussed concerns with the proposal. The CBA took the position that L3C legislation was unnecessary and so opposed the bill. The legislation did not pass.” ⁸⁰ <i>LA L3C</i> —“The LSBA OPPOSES this bill with a recommendation that Louisiana Law Institute review the bill.” ⁸¹

⁷⁶ See *supra* note 63 and accompanying text.

⁷⁷ Hermes Fernandez, *BAR INVOLVEMENT IN SOCIAL HYBRID LEGISLATION IN NEW YORK* (2014). Interestingly, although the NY State Bar Association was not involved, the NYC Bar Association took a position on the bill and actively guided its revision and eventual passage. In Florida, the Jacksonville Bar Association supplemented the state bar’s support of Florida’s Benefit Corporation legislation. Most local bar associations, however, do not have the size or expertise to publicly support specific legislative efforts, which is why such involvement most often occurs at the state level.

⁷⁸ Rick DeBruhl, *BAR INVOLVEMENT IN SOCIAL HYBRID LEGISLATION IN ARIZONA* (2014).

⁷⁹ James Hahn, *BAR INVOLVEMENT IN SOCIAL HYBRID LEGISLATION IN RHODE ISLAND* (2014).

⁸⁰ Sarah Steinbeck, *BAR INVOLVEMENT IN SOCIAL HYBRID LEGISLATION IN COLORADO* (2014).

⁸¹ LSBA BILL STATUS REPORT, 4 (2010), <http://files.lsba.org/documents/Legislation/2010-PositionBillsOPPOSE.pdf>.

TABLE 3, CONTINUED. REPRESENTATIVE BAR ASSOCIATION RESPONSES
TO SOCIAL HYBRID LEGISLATION

Oppose the Legislation, continued	<p><i>CT Benefit Corp</i>—“In 2012, The Connecticut Bar Association supported the overall concepts underlying filed bills referencing social enterprise but we opposed the specific bills on the grounds that they contained a number of impractical provisions that would limit their usefulness and they created liability risks that would discourage individuals from serving on the governing boards of such organizations.”⁸²</p> <p><i>CA Benefit Corp</i>—“While we support the enactment of a new law designed to facilitate the organization of California businesses with greater flexibility for combining profitability with a broader social or environmental purpose, the Committee has come to the conclusion that the Bill is flawed. After due consideration, the Committee respectfully opposes enactment of the Bill for the reasons set forth in this letter.”⁸³</p>
Alter the Legislation	<p><i>CO Benefit Corp</i>—“We reviewed the language and proposed changes to make the “Model” language work within Colorado’s existing business law framework and to address other concerns with the bill. We discussed the bill with B Lab’s representatives and the Colorado bill sponsors. Inasmuch as the CBA Business Law Section had significant reservations with the “Model” legislation proposed by B Lab and twice proposed alternative bills, the enactment process was quite contentious and lasted over four years. Once Delaware adopted a Benefit Corporation statute, the CBA drafted a similar bill, which, while still being controversial, was amended and passed . . .”⁸⁴</p>

⁸² Testimony of Hillel Goldman, Bus. Law Section In Support of Governor’s Bill No. 23 An Act Concerning Benefit Corp. and Encouraging Soc. Enter. (Feb. 27 2013) (<http://www.cga.ct.gov/2014/CEdata/Tmy/2014SB-00023-R000227-Hillel%20Goldman,%20CBA-TMY.PDF>).

⁸³ Letter from The Corporations Committee of the Business Law Section of the State Bar of California to the Honorable Jared Huffman, Member of the Assembly (Apr. 26, 2011) (http://www.thecorporatecounsel.net/nonMember/docs/04_26_11_AB361.pdf).

⁸⁴ Steinbeck, *supra* note 77.

TABLE 3, CONTINUED. REPRESENTATIVE BAR ASSOCIATION RESPONSES
TO SOCIAL HYBRID LEGISLATION

Alter the Legislation, continued	<i>CT Benefit Corp</i> —“Since the end of the 2012 session and through the 2013 session, the Section has worked with the proponents of this legislation, principally B Lab and ReSET, to draft a Benefit Corporation bill to be introduced which addresses the technical defects and other shortcomings of prior bills. Our work is reflected in the present Governor’s bill.” ⁸⁵
Support the Legislation	<i>PA Benefit Corp</i> —“Within Pennsylvania’s legal and legislative community, momentum is building for a similar measure, though action by the General Assembly is not expected before next year. . . . The business-law section of the Pennsylvania Bar Association voted to seek approval for the benefit-corporations concept from the full membership’s policy-setting arm at a May 14 meeting.” ⁸⁶

The conclusions and positions of these associations were not the only differences we noted in legislative testimony and other public documents. We also noticed a pattern or difference in the logic underlying the associations’ positions. Whether they supported or opposed the legislation, some associations grounded their position in an underlying business logic, seeing the proposed hybrid form as a threat (or boon) to traditional for-profit corporations.⁸⁷ Other associations grounded their position in a non-profit or charitable logic, seeing the proposed hybrid form as a positive (or negative) consequence for charitable organizations.⁸⁸ Others seemed to be aware of and considering both sectors in their reaction to the proposed social hybrid legislation.⁸⁹ We show representative positions in Table 4 below.

⁸⁵ Goldman, *supra* note 79.

⁸⁶ Diane Mastrull, *Maryland Adopts New Socially Aware Corporation Law* (2010), http://articles.philly.com/2010-04-15/business/25213936_1_corporations-legislation-law.

⁸⁷ See *supra* note 76 and accompanying text (Table 3).

⁸⁸ See *supra* note 76 and accompanying text (Table 3).

⁸⁹ See *supra* note 76 and accompanying text (Table 3).

TABLE 4. REPRESENTATIVE ATTORNEY AND BAR ASSOCIATION
PERSPECTIVES ON SOCIAL HYBRID LEGAL FORMS LEGISLATION⁹⁰

	For-profit	Non-profit	Both
Support	Social hybrid legal forms “provide unprecedented flexibility to pursue a higher corporate purpose of benefitting society or the environment under higher standards of accountability and transparency to shareholders seeking such flexibility.” ⁹¹	“Passage of this [social hybrid entity] legislation will help [socially-minded] entrepreneurs tap into these investment dollars [which they cannot do as non-profits]” ⁹²	These hybrid entities pay taxes and can have shareholders, without the risk of being sued for not maximizing profits. Companies can consider the needs of customers, workers, the community or environment and be well within their legal right.” ⁹³

⁹⁰ See *supra* note 63 and accompanying text.

⁹¹ *California Assembly Committee on Appropriations Hearing Summary* for A.B. 361 (Ca. 2011).

⁹² *Connecticut House Commerce Committee Hearing Transcript* for HB5466, (CT. 2012), Testimony of Michael Martone, March 15, 2012.

⁹³ *Hawaii House Committee on Consumer Protection and Commerce Hearing* on S.B. 298, (HI. 2011), Testimony of Roger Epstein, March 21, 2011.

TABLE 4, CONTINUED. REPRESENTATIVE ATTORNEY AND BAR ASSOCIATION PERSPECTIVES ON SOCIAL HYBRID LEGAL FORMS LEGISLATION

	For-profit	Non-profit	Both
Oppose	Under the proposed social hybrid entity legislation “there is little protection for shareholders who do not agree with the directors’ unilaterally adopted fiduciary duty standards. Nor does the Bill require disclosure when directors take actions that do not fit within the traditional fiduciary duty standards.” ⁹⁴	Social hybrid entity legislation “introduces a corporate form with purposes similar to those of nonprofit corporations, but does not enact oversight and accountability provisions similar to those applicable to nonprofit corporations.” ⁹⁵	“Unfortunately, the law as it’s written, really treats non-profits and for profits like matter and anti-matter. You know, when you combine the two under one umbrella, you run the risk of a big explosion and the B corporation is just one of a myriad of attempts to try to do just that.” ⁹⁶

Individual attorneys who testify or are otherwise involved with the social hybrid entities movement are considerably more favorable toward it. As an example of this enthusiasm, a Phoenix, Arizona attorney testifying in favor of the then-pending L3C legislation described hybrid entities as follows:

This is a truly nonpartisan economic stimulus bill. It puts the onus on private industry to come forward with their socially beneficial ideas, and to bring those ideas to fruition through a for-profit business that enjoys some of the benefits that a nonprofit enjoys, so long as the purpose is for public benefit.⁹⁷

⁹⁴ John C. Oehmke, Co-chair of California Bar Association Corporations Committee, Letter in Opposition to AB 361, April 26, 2011.

⁹⁵ Juan Vargas, Chair of the California Senate Committee on Banking and Financial Institutions, hearing conducted June 15, 2011 (summarizing the concerns of the California Bar Association’s Nonprofit and Unincorporated Associations Committee).

⁹⁶ *Connecticut Joint Committee on Judiciary for HB 5490* (CT 2012), Testimony of John Horak, March 15, 2012.

⁹⁷ *Hearing of the Arizona Senate Commerce and Energy Comm.*, SB 1503 (Az. 2011) (testimony of Pouria Paknejad).

This tension between attorney enthusiasm and the bar association's typically much more conservative approach could be explained by a variety of reasons. Among them is that individual attorneys may be enthusiastic about a particular idea but lack the nuanced understanding of the difficulties of smoothly integrating the idea into a state's existing corporate or nonprofit code. This is a plausible explanation, since corporate or nonprofit sections of the bar association are typically headed by knowledgeable specialists, while individual attorneys may not have the same specialized expertise or breadth of knowledge about the corporate code. But even given the same level of legal understanding, the differing incentives of the two groups—attorney supporters and their associations—may give rise to different incentives (and reactions) to the social hybridization movement. This is known as a collective action problem.⁹⁸ A state's code is a public good, with diffuse benefits (costs) associated with incremental positive (negative) changes in its quality.⁹⁹ If a social hybrid law is poorly executed such that it creates diffuse costs across the state's legal professionals and *regular* citizens, attorneys who have clients interested in pursuing social hybrid incorporation may still see potential for private benefit if the social hybrid laws are passed, with little to no difference in personal outcome depending on the quality or execution of the underlying statute.¹⁰⁰ On the other hand, innovation can depend on individuals' and organizations' willingness to take on risk, and an overly conservative position could stifle potentially beneficial outcomes for society.

Especially given the mix of incentives among parties involved in the legislative process, our study highlights the importance of legislative sponsors and other advocates seeking support from state bar associations to understand (and if necessary) address any emerging concerns. Bar association opposition to social hybrid legislation can kill a bill, either by changing the sponsoring legislators' minds about the need or usefulness of the social hybrid form, or by

⁹⁸ See generally Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974).

⁹⁹ Tyler Cowen, *Public Goods*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, THE LIBRARY OF ECONOMICS AND LIBERTY, <http://www.econlib.org/library/Enc/PublicGoods.html> (last visited May 2, 2017).

¹⁰⁰ For example, states like Connecticut, Hawaii, and Arizona had individual attorneys testify in favor of pending legislation. See *supra* note 82 and accompanying text; *Connecticut House Commerce Committee Hearing Transcript* for HB5466, (CT. 2012) (testimony of Michael Martone); *Hawaii House Committee on Consumer Protection and Commerce Hearing* on S.B. 298, (HI. 2011) (testimony of Roger Epstein). But many enthusiastic attorneys took matters a step further and became involved in drafting legislation as well as advocating for its passage; the California FPC and Washington SPC working groups were led by attorneys. Stephen R. Chiodini, *Goodbye Flexible Purpose Corporation, Hello Social Purpose Corporation*, LEX MUNDI PRO BONO FOUNDATION, <http://www.lawforchange.org/NewsBot.asp?MODE=VIEW&ID=6384> (last visited May 4, 2017); Susan Mac Cormack and Heather Haney, *New Corporate Forms: One Viable Solution to Advancing Environmental Sustainability*, 24 JOURNAL OF APPLIED CORPORATE FINANCE, 1, 5 (2012); *supra* note 42 and accompanying text.

delaying its consideration into the next legislative session. Although delay is not necessarily deadly for a bill, it may be, because these social hybrid proponents will lose important momentum (and legislative allies) in the push for passage, especially if legislators retire or lose their seats. There is also a limit on the time and resources—both physical and social—legislators are willing to spend on a particular idea. In our review of each state's legislative record, we found no example where the state or local bar association openly opposed social hybrid legislation and the legislation passed.

In several states, Benefit Corporation proponents and sponsoring legislators failed to obtain and incorporate adequate input from an interested (in and participating) bar association, which stalled or prevented passage of the social hybrids bill.¹⁰¹ For example, the Legislative Services Director of the Kansas Bar Association wrote a letter complaining that the state bar association hadn't been adequately consulted in the legislative drafting process, and consequently asking for the bill to be delayed for additional revisions.¹⁰² Unsurprisingly, that bill died in committee, highlighting the importance of social hybrid proponents' incorporation of input from state bar associations and other key stakeholders.¹⁰³

IV. CONCLUDING DISCUSSION AND IMPLICATIONS

Until now, our paper has been largely exploratory and descriptive regarding the characteristics and role of bar associations in the ongoing social hybridization process. We close with several insights based on our analysis and observations. First, despite our simplified categories of bar association responses and motivations, we acknowledge that these associations are taking more nuanced positions. For example, between the support and oppose position is a reluctant acceptance based on a desire to not get left behind by more quickly-innovating states. These fast-moving states may have decided that the Benefit

¹⁰¹ Letter from Joseph N. Molina, Leg. Services Dir., Kansas Bar Ass'n, to The Honorable Lance Klee on H.B. 2650 (Feb. 21, 2014), http://kslegislature.org/li_2014/b2013_14/committees/ctte_h_cmrc_e_lbr_1/documents/testimony/20140221_17.pdf ("It was our hope to work together to create a 'benefit corporation' provision [and we are] concerned that without a thoughtful approach we may end up with a provision that fails to take into account Kansas specific language and other details unique to our state. The KBA would like to avoid the unnecessary struggles that plagued a similar bill in Colorado and work together with the proponents to introduce legislation that satisfies both of our goals.").

¹⁰² *Id.*

¹⁰³ Interestingly, a subsequent attempt (HB 2697) failed in 2016, *HB 2697*, KANSAS, 2015–2016 LEGISLATIVE SESSIONS, http://www.kslegislature.org/li_2016/b2015_16/measures/hb2697/ (last visited May 5, 2017), and although a 2017 version passed the Kansas House of Representatives, *HB 2125*, KANSAS, 2017–2018 LEGISLATIVE SESSIONS, http://kslegislature.org/li/b2017_18/measures/hb2125/ (last visited May 5, 2016) it seems to have stalled in the Senate. See also Hans Rawhouser, Michael E. Cummings, and Alfred Marcus, *Sustainability Standards and Stakeholder Engagement: Lessons from Carbon Markets*, ORGANIZATION AND ENVIRONMENT, forthcoming (highlighting the importance of stakeholder involvement in effective regulatory and standard-setting efforts).

Corporation as a commonly-accepted entity was inevitable after Delaware passed its statute. Or perhaps there was a more gradual tipping point once legislation passed in a sufficient number of states. One apparent example is the Minnesota State Bar Association representative's testimony before the legislature:

There are twenty-one other states that have passed legislation like this. There are a whole host of states, probably ten, doing the same thing we are, and anticipating passing legislation like this. So at some point we are going to need to recognize that other states are doing this, and so we need to make sure that we know how to treat these entities when they are formed in Wisconsin or another state and they come here.¹⁰⁴

Second, we recognize that although bar associations may potentially play an important role in shaping the creation of new organizational forms that are directed at improving society, their presence was not actively felt in all states. As gatekeepers of the law, policy makers should perhaps be better about seeking (and heeding) state bar association advice about whether a particular social entity innovation is necessary or desirable, and if so, how it can best be incorporated into the state's existing corporate code. Although individual proponents or organizations such as B Lab or the Association for Community Development have enthusiasm for a particular policy solution, they generally lack the specific expertise to understand a particular state's sociopolitical and legal context, and may therefore advocate a particular form that is ill-suited.¹⁰⁵ The state's corporate bar can act as a realistic and pragmatic check on the (sometimes) idealistic or unrealistic positions taken by social hybrid proponents.

Finally, although our study provides some insight into the role of bar associations in this social hybridization process, future research could expand

¹⁰⁴ *Minn. H. of Rep. Civil Law Comm.* Hearing on SF 2053 (Mn. 2014). (testimony of Kim Lowe, chair of the Minnesota State Bar Association Public Benefit Corporation Act Drafting Committee).

¹⁰⁵ For example, after the the Benefit Corporation bill was designated as high priority, the Nebraska Bar association did not take a public position nor did it testify in the legislature regarding the bill. *Nebraska House Committee Hearing Announcing Priority Bills*, 103 Leg., 1st Sess. (Neb. 2014) <http://nebraskalegislature.gov/FloorDocs/103/PDF/Journal/r2journal.pdf#page=617>. Instead, Nebraska legislators heard William Clark, an attorney from Philadelphia representing B Lab, tout the idea without any caution or advice about how to make the statute fit with Nebraska's existing corporate code. Danielle Conrad, *Benefit Corporations Considered*, UNICAMERAL UPDATE (Feb 4, 2014), <http://update.legislature.ne.gov/?p=14439>. Similarly, when William Clark testified in Arizona at the introduction of that state's Benefit Corporation Statute, he acknowledged that he hadn't yet spoken with local attorneys about their ideas for tailoring the law to better fit the existing code. *Arizona House Commerce Committee Hearing* on HB 2276 (Az. 2013) ("We're planning to have discussions with the Arizona bar"). Another example of a potentially "bad fit" policy is the aforementioned North Carolina adoption (then later revocation) of the L3C form.

on our work by exploring in more detail the role of other associations such as those representing for-profit or nonprofit sectors. Even within the same sector, reactions to social hybridization were varied. For example, nonprofit associations in Montana and Connecticut testified in support of social hybrid legislation,¹⁰⁶ while nonprofit associations in California and Minnesota very publicly opposed it,¹⁰⁷ and a nonprofit association in Michigan took a neutral position.¹⁰⁸ A fruitful study could study antecedents, process, and consequences of such actions.

¹⁰⁶ *Montana House Committee on Business and Labor Hearing on H.B. 534*, 63rd Sess. (Mt. 2013); *Connecticut Senate Committee on Commerce Hearing on H.B. 6356*, (Ct. 2013), Testimony of Jeff Shaw, Director of Public Policy, Connecticut Association of Nonprofits (“The existence of benefit corporations in Connecticut would present a valuable opportunity for nonprofit organizations to create financial partnerships that could provide them with new, sustainable sources of operating revenue.”).

¹⁰⁷ See e.g. Mark Hrywna, *Benefit Corporation in California Meets Chill in San Francisco*, NON-PROFIT TIMES (Mar. 23, 2012), <http://www.thenonprofitimes.com/news-articles/benefit-corporation-in-california-meets-chill-in-san-francisco/>; Interview with Barbara Jacobs, Attorney and member of Minnesota State Bar Association Public Benefit Corporation Drafting Committee, Minn. (July 22, 2013).

¹⁰⁸ S.B. 360, 96th Leg., Reg. Sess. (Mi. 2011).