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## The Law of Social Entrepreneurship – Creating Shared Value through the Lens of Sandra Day O'Connor's iCivics

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## **THE LAW OF SOCIAL ENTREPRENEURSHIP - CREATING SHARED VALUE THROUGH THE LENS OF SANDRA DAY O'CONNOR'S ICIVICS**

Anat Alon-Beck<sup>\*</sup>

### **ABSTRACT**

This Article calls for harmonizing state law legislation on social enterprises, due to the potential discrepancy between the various states on the nature and legal structure of social enterprises. Since 2008, legislators in thirty-five (35) states across the United States of America and the District of Columbia, have enacted some form of innovative social enterprise legislation. This new revolution in corporate law is called social entrepreneurship, mirroring social movements in the aftermath of the 2008 financial crisis. Public opinion has led to a shift in prevalent corporate governance theory, from current share-holder centric corporate governance to collaborative corporate governance. A new generation of entrepreneurs, corporations, shareholders and other stakeholders now work together to resist short-termism, achieve long-term value, and incorporate in their charters a deep obligation to act for the benefit of society at large.

These developments are new. The Article considers the merits and downsides of pushing for hard boundaries on the vocabulary we use when

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we discuss the definitions of social entrepreneurship and social enterprises. To date, no established body of precedent exists for judges, entrepreneurs, managers, boards of directors or legal counsel to rely on when making day-to-day decisions or interpreting and elucidating the governing laws. Accordingly, different jurisdictions will likely adopt different statutory interpretations of the nature and legal structure of a social enterprise. Courts will be faced with determining what constitutes a social enterprise, when there is no agreed upon definition of what it means. Furthermore, a review of current literature on social entrepreneurship reveals ill-defined, fragmented, and incoherent theoretical concepts of social enterprise and social entrepreneur. Definitions are critically important to the productive development of emerging fields. Harmonization of social entrepreneurship law is extremely important because of the prevalence of commercial and other public benefit transactions that extend beyond state borders. It can also drive the development of consensus around defined terms of social entrepreneurship, social enterprise and social entrepreneur.

This Article attempts to bridge the research gap and proposes a simple, inclusive, coherent and unified test that all courts can use to determine what constitutes a social enterprise, while allowing flexibility to the various jurisdictions to tailor the language in the test to meet their unique needs and preferences. One of the elements of the “social enterprise” test centers on the identity of the founder, i.e., the social entrepreneur. Since it is not clear who is a social entrepreneur, this Article also proposes a test to determine whether the founder of the entity is indeed a social entrepreneur or merely a social activist. Justice Sandra Day O’Connor’s iCivics example is used to illustrate the elements in the test for branding a “social entrepreneur.” It presents Justice O’Connor in a new light as an iconic American social entrepreneur and a pioneer of digital learning programs used to teach students civics.

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## INTRODUCTION

*“Sandra Day O’Connor will claim that her most important work began when she stepped down, in 2006. Sandra wanted to make civic education relevant to young people, and she knew that in order to engage them, she had to make it fun. And so in 2009 she founded iCivics, a nonprofit that uses video games to teach middle and high school students how America’s democracy works. Once again, Sandra became a pioneer.”*<sup>1</sup>

Governments, investors and entrepreneurs are turning their attention to a new paradigm in corporate law, called social entrepreneurship. This new movement is led by notable personalities such as Bill Gates<sup>2</sup> and Nobel Peace Prize laureate Muhamad Yunus,<sup>3</sup> who call for a shift in corporate law philosophy away from the current shareholder-centric corporate governance

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1. Sonja Sotomayor, Sandra Day O’Connor, The 100 most Influential People, Time Mag. (2017), available at <http://time.com/collection/2017-time-100/4736341/sandra-day-oconnor/> [<https://perma.cc/B8J3-QKEB>].

2. See Bill Gates, Remarks on “Creative Capitalism,” HARVARD MAG. Oct.13, 2008, available at <http://harvardmagazine.com/2008/10/bill-gates-on-creative-capitalism> [<https://perma.cc/5NXP-YW9K>] (“companies should devote 5 percent of their innovative people resources to solving the problems of the world’s poor—who are their future customers”); see also, Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Premier on Emerging Corporate Ethics in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 642 (2013) (explaining that “[b]usiness luminaries” like Muhammad Yunus, Bill Gates, and Richard Branson encouraging a new generation of entrepreneurs to embrace socially and environmentally responsible business models).

3. See MUHAMMAD YUNUS, BUILDING SOCIAL BUSINESS: THE NEW KIND OF CAPITALISM THAT SERVES HUMANITY’S MOST PRESSING NEEDS xv – xviii (2010) (“No doubt humans are selfish beings, but they are selfless beings, too.”); see also, Esposito, *supra* note 2 (discussing Muhammad Yunus’s call for a shift away from a shareholder-centric model of corporate governance).

theory,<sup>4</sup> towards social (and environmental<sup>5</sup>) emphasis, where the corporations, shareholders and other stakeholders work together to resist short-termism, achieve long-term value, and incorporate in their charters a deep obligation to act for the benefit of society at large.<sup>6</sup>

Since 2008, in the aftermath of the financial crisis, legislators in thirty-five (35) states across the United States of America (U.S.) and the District of Columbia, have enacted some form of innovative social enterprise legislation, passing forty-five (45) bills, mirroring these social movements.<sup>7</sup>

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4. Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1988 (2013). See also LYNN A. STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012) (the rise of shareholder primacy thinking began “in the 1970s with the rise of the so-called Chicago School of free-market economists”); Lynn A. Stout, *The Corporation As Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685, 685 (2015) (“argu[ing] that the board-controlled corporation can be understood as a legal innovation that historically has functioned as a means of transferring wealth forward and sometimes backward through time, for the benefit of present and future generations”); Kent Greenfield, *The Third Way: Beyond Shareholder or Board Primacy*, 37 SEATTLE U. L. REV. 749, 749 (2014) (“[T]his moment, has been engendered because of increasing skepticism the public is showing toward corporations and the people who manage them. The skepticism springs from shocks in the economic and political fields that revealed the risks of unbridled corporate power, short-termism, managerial opportunism and shareholder (read Wall Street) supremacy.”); Emily Winston, *Benefit Corporations and the Separation of Benefit and Control*, 39 CARDOZO L. REV. 1783 (2018) (discussing the implications of Social Enterprise Movement).

5. Different social enterprises pursue various social and environmental goals. For simplicity, this paper will use the term “social” when referring to a broad range of goals to mean benefits to society in large, including people, animals and the environment.

6. See Alina S. Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. 919, 942 (2016) (discussing “the rise of hybrid-entity legislation”); Alicia E. Plerhoples, *Social Enterprise as Commitment: A Roadmap*, 48 WASH. U. J. L. & POL’Y 89, 95 (2015) (“Legal scholars refer to a social enterprise’s pursuit of dual missions as ‘serving two masters,’ i.e. stockholders and stakeholders.”).

7. ARIZ. REV. STAT. §§ 10-2401 - 2422; ARK. CODE ANN. §§ 4-36-101 - 4-36-401; CAL. CORP. CODE §§ 14600–14631 (2013); CAL. CORP. CODE §§ 2500 – 3503; COL. REV. STAT. §§ 7-101-501 - 511, 6-113-102; S.B. 23, 2014 SESS.; DEL. CODE ANN. TIT. 8, §§ 361-368; D.C. CODE §§ 29-1301.01 - 1304.01; FLA. STAT. ANN. §§ 607.601 - .613; FLA. STAT. ANN. §§ 607.501 - .513; HAW. REV. STAT. §§ 420D-1 - 13; IDAHO CODE ANN. §§ 30-20-01 - 30-20-13; 805 ILL. COMP. STAT. ANN. 40/1 - 40/5.01; 805 ILL. COMP. STAT. 180/1-5, 1-10(A)(1), 1-26, 15-5; H.B. 1015, 119TH GEN. ASSEMB., 2015 SESS.; LA. REV. STAT. ANN. §§ 12:1801 - 1832; LA. REV. STAT. ANN. §§ 12:1301(A)(11.1), 1302(C), 1305(B)(3), 1306(A)(1), 1309(A); ME. REV. STAT. TIT. 31, §§ 1502, 1508, 1559, 1611; MD. CODE ANN., CORPS. & ASS’NS §§ 5-6C-01 - 5-6C-08; MD. CODE ANN., CORPS. & ASS’NS §§ 11-4A-1201 - 11-4A-1208, 11-1-502, 5-6C-03; MASS. GEN. LAWS CH. 156E, §§ 1-16; MICH. COMP. LAWS §§ 450.4102, 4204(2), 4803(1); MINN. STAT. ANN. §§ 304A.001 TO- 304A.301; H.B. 258, 64TH LEG. SESS.; NEB. REV. STAT. §§ 21-401 - 414; NEV. REV. STAT. §§ 78B.010 - .190; N.H. REV. STAT. ANN. §§ 293-C:1 - 13; N.J. STAT. ANN. §§ 14A:18-1 TO- 11; N.Y. BUS. CORP. LAW §§ 1701-1709; ORE. REV. STAT. §§ 60.750 - .770; 15 PENN. CONS. STAT. §§ 3301-3305; R.I. GEN. LAWS ANN. §§ 7-5.3-1 - 7-5.3-13; R.I. GEN. LAWS §§ 7-16-2, -9, -49, -76; S.C. CODE ANN. §§ 33-38-110 - 600; TENN.

These developments are new. To date, there is no established body of precedent that judges, entrepreneurs, managers, boards of directors or legal counsel can rely upon to make day-to-day decisions or interpret and elucidate the governing laws.

To illustrate, the most common form of social enterprise legislation adopted is the benefit corporation legislation.<sup>8</sup> According to the Model Benefit Corporation, the purpose of the benefit corporation legislation is to allow the social entrepreneurs to start a business “that operates with a corporate purpose broader than maximizing shareholder value”<sup>9</sup> and that “consciously undertakes a responsibility to maximize the benefits of its operations for all stakeholders, not just shareholders.”<sup>10</sup> In lawsuits for breach of fiduciary duty, courts will be required to use the process of statutory interpretation to determine whether the enterprise in question is operating according to its charter and can be labeled a social enterprise.

A review of current literature on social entrepreneurship reveals ill-defined,<sup>11</sup> fragmented, and incoherent theoretical frameworks<sup>12</sup> of “social

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CODE ANN. §§ 48-28-101 - 48-28-402; UTAH CODE §§ 16-10B-101 - 16-10B-402; UTAH CODE ANN. §§ 48-2C-102, -403, -405, -412, -1411; VT. STAT. ANN. TIT. 11A §§ 21.01 - .14; VT. STAT. ANN. TIT. 11, §§ 3001(27), 3005(A), 3023(A); VA. CODE ANN. §§ 13.1-782 - -791; REV. CODE WASH. 23B.25.005 - .150; W. VA. CODE ANN. §§ 31F-1-101 - -501; WY. STAT. ANN. §§ 17-29-102(A)(IX), -108, -705.

8. The benefit corporation (BC) model is the most common form that was adopted by states (it is also called sustainable business corporation (HI), benefit company (OR)). The other forms are the social purpose corporation (SPC), the public benefit corporation (PBC), the general benefit corporation (GBC), the specific benefit corporation (SBC), the low-profit limited liability company (L3C), and the benefit limited liability company (BLLC). See *Social Enterprise Law Tracker*, available at <http://societylawtracker.org/#/map> [https://perma.cc/M99T-SHUI] (last visited Aug. 3, 2017) (showing the various states and D.C. that enacted the benefit corporation legislation); see also, Ana Vinuesa and Kristin Hiensch, *Social Enterprise Legislation in the United States: An Overview*, MORRISON FOERSTER (Sept. 20, 2016), available at <http://impact.mofo.com/resources/social-enterprise-legislation-in-the-united-states-an-overview/> [https://perma.cc/VP4B-EEC7] (providing examples of benefit corporation legislation).

9. MODEL BENEFIT CORP. LEGIS. § 101 cmt.

10. *Id.*

11. Lynn Barendsen & Howard Gardner, *Is the Social Entrepreneur a New Type of Leader?* Fall 2004 LEADER TO LEADER 43; see also, Jay Weerawardena & Gillian Sullivan Mort, *Investigating Social Entrepreneurship: A Multidimensional Model*, 41 JOURNAL OF WORLD BUS. 21-35, 21 (2006) (“A review of the literature emerging from a number of domains reveals that it is fragmented and that there is no coherent theoretical framework. In particular, current conceptualizations of social entrepreneurship fail to adequately consider the unique characteristics of social entrepreneurs and the context within which they must operate.”)

12. See Samer Abu-Saifan, *Social Entrepreneurship: Definition and Boundaries* (2012) (arguing for a more rigorous definition of social entrepreneurship); Sarah H. Alvord, L. David Brown, & Christine W. Letts, *Social Entrepreneurship and Societal Transformation: an Exploratory Study*, 40 J. APPLIED BEHAVIORAL SC. 260 (2004) (discussing the range of

enterprise.” There are numerous interpretations of this term.<sup>13</sup> Such differences are attributed to the civic, cultural, ecological, and even geographic origin of the social venture.<sup>14</sup> Definitions are critically important to the productive development of emerging fields. Therefore, harmonization of social entrepreneurship law is extremely important because of the prevalence of commercial and other public benefit transactions that extend beyond state borders. It can also drive the development of consensus around the defined terms of social entrepreneurship, social enterprise and social

definitions for the meaning of social entrepreneurship); James Austin, Howard Stevenson, & Jane Wei-Skillern, *Social and Commercial Entrepreneurship: Same, Different, or Both?*, 30 ENTREPRENEURSHIP THEORY AND PRACTICE 1 (2006) (same); Elizabeth Chell, *Social Enterprise and Entrepreneurship Towards a Convergent Theory of the Entrepreneurial Process*, 25 INT. SMALL BUS. J. 5 (2007) (same); Raymond Dart, *The Legitimacy of Social Enterprise*, 14 NONPROFIT MGMT. & LEADERSHIP 411 (2004) (same); Mark Hand, *The Research Gap in Social Entrepreneurship*, STAN. SOC. INNOV. REV. (2016) available at [https://ssir.org/articles/entry/the\\_research\\_gap\\_in\\_social\\_entrepreneurship](https://ssir.org/articles/entry/the_research_gap_in_social_entrepreneurship) [<https://perma.cc/MZ4Q-JW5N>] (same); Johanna Mair & Ignasi Marti, *Social Entrepreneurship Research: A Source of Explanation, Prediction, and Delight*, 41 J. WORLD BUS. 36 (2006) (same); Ana Maria Peredo & Murdith McLean, *Social Entrepreneurship: A Critical Review of the Concept*, 41 J. WORLD BUS. 56 (2006) (same); Scott Shane & Sankaran Venkataraman, *The Promise of Entrepreneurship as a Field of Research*, 25 ACAD. MANG. REV. 217 (2000) (same); Moshe Sharir & Miri Lerner, *Gauging the Success of Social Ventures Initiated by Individual Social Entrepreneurs*, 41 J. WORLD BUS. 6-20 (2006) (same); Peter A. Dacin, Tina M. Dacin, & Margaret Matear, *Social Entrepreneurship: Why We Don't Need a New Theory and How We Move Forward From Here*, 24 ACADEMY OF MANAGEMENT PERSPECTIVES 37 (2010) (same); Jeremy C. Short, Todd W. Moss, & G. Tom Lumpkin, *Research in Social Entrepreneurship: Past Contributions and Future Opportunities*, 3 STRATEGIC ENTREPRENEURSHIP J. 161 (2009) (same); Gillian Sullivan Mort, Jay Weerawardena, & Kashonia Carnegie, *Social Entrepreneurship: Towards Conceptualization*, 8 INT. J. NONPROFIT & VOLUNTARY SECTOR MKTING 76 (2003) (same); John L. Thompson, *The World of the Social Entrepreneur*, 15 INT. J. PUB. SECTOR MANG. 412 (2002) (same); John L. Thompson, Geoff Alvy, & Ann Lees, *Social Entrepreneurship: A New Look at the People and the Potential*, 38 MNGT. DECISION 328 (2000) (same); Jay Weerawardena & Gillian Sullivan Mort, *Investigating Social Entrepreneurship: A Multidimensional Model*, 41 J. OF WORLD BUS. 21 (2006) (same); Weerawardena & Mort, *supra* note 11 (same); Shaker A. Zahra, et al., *A Typology of Social Entrepreneurs: Motives, Search Processes and Ethical Challenges*, 24 J. BUS. VENTURING 519 (2009) (same).

13. See Austin, Stevenson & Wei-Skiller, *supra* note 12, at 371 (“Definitions of social entrepreneurship range from broad to narrow.”); Alvord et. al, *supra* note 12 (stating there are many different approaches to social entrepreneurship); Gregory J. Dees, *The Meaning of “Social Entrepreneurship”* (1998) reformatted and revised (2001), available at <https://entrepreneurship.duke.edu/news-item/the-meaning-of-social-entrepreneurship/> [<https://perma.cc/K5QG-5YJL>] (“Though the concept of ‘social entrepreneurship’ is gaining popularity, it means different things to different people.”); Mair and Marti, *supra* note 12 at 36 (“The concept of social entrepreneurship is still poorly defined and its boundaries to other fields of study remain fuzzy.”).

14. See Bacq & Janssen, *The Multiple Faces of Social Entrepreneurship: A review of definitional issues based on geographical and thematic criteria*, 23 ENTREPRENEURSHIP & REGIONAL DEV. 373, 379 (2011) (discussing how several approaches to social entrepreneurship have emerged in different regions of the world).

entrepreneur.

This Article attempts to bridge the research gap and proposes a simple, inclusive, coherent and unified test that courts, regardless of the jurisdiction, can use to determine what constitutes a social enterprise, while allowing flexibility to the various jurisdictions to tailor the language in the test to meet their unique needs and preferences. Lastly, this Article attempts to harmonize the law of social entrepreneurship across the U.S., which will hopefully be adopted by all 50 states, the District of Columbia, and the U.S. territories. However, even if two U.S. jurisdictions adopt identical statutory language, that language may still be subject to different statutory interpretation by the courts in each jurisdiction.

One of the main elements of the “social enterprise” test centers on the identity of the founder, i.e., the social entrepreneur. Since there is no clear definition of “social entrepreneur,” this Article also proposes a test that courts can use to determine whether the founder of the entity is indeed a social entrepreneur or merely a social activist. This Article uses Justice Sandra Day O’Connor’s iCivics example to illustrate the elements of the test for branding a “social entrepreneur.” It also presents the Justice in a new light as an iconic American social entrepreneur and a pioneer of digital learning programs used to teach students civics.

The following is an overview of the various parts in this Article. Part I calls for harmonizing social entrepreneurship law. It outlines the challenges of structuring, funding, and counseling social enterprises. Its purpose is to lay the foundation for the new and innovative proposed “social enterprise test.” It then introduces the proposed test in an effort to help harmonize social entrepreneurship law, which is the basis for this Article’s theme and discussions.

Part II provides a review of the development of social entrepreneurship research. In order to demonstrate how the “social enterprise test” may be applied, this Article explores the meaning of “entrepreneurship,” as it is rooted in the definition of “social entrepreneurship.”<sup>15</sup> It distinguishes between an innovation-driven entrepreneurial firm, and a small-to-medium business enterprise.<sup>16</sup> It then presents an historic-doctrinal review of the

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15. See Keohane, *supra* note 291, at 11 (discussing the meaning of entrepreneurship as it relates to social entrepreneurship); Saifan, *supra* note 12 (same).

16. See Annie Lowrey, *Why Small Businesses Aren’t Innovative*, SLATE, (Sept. 19, 2011, 7:15 AM) available at [http://www.slate.com/articles/business/small\\_business/2011/09/why\\_small\\_businesses\\_arent\\_innovative.html](http://www.slate.com/articles/business/small_business/2011/09/why_small_businesses_arent_innovative.html) [<https://perma.cc/326K-XFEN>] (stating that there is a difference between the minority of entrepreneurial and growing small firms and small businesses generally); see also William Aulet & Fiona Murray, *A Tale of Two Entrepreneurs: Understanding the Differences in the Types of Entrepreneurship in the Economy*, EWING MARION KAUFFMAN FOUNDATION (May 2013), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2259740](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2259740) [<https://perma.cc/P8SH-AU9>]



development of social entrepreneurship research, and puts forth a proposed test for “social entrepreneur,” which is one of the elements of the “social enterprise test.”

Part III introduces the Sandra Day O’Connor iCivics example of a social entrepreneur and social enterprise. It presents Justice O’Connor in a new light as an iconic American social entrepreneur, as she presents a solution to one of American society’s most pressing social problems: the lack of understanding of civics and resulting anemic community engagement. By founding iCivics, an innovation-driven social enterprise that is dedicated to re-imagining civic education, Justice O’Connor revolutionized the education ecosystem. The iCivics program harnesses the power of well-designed computer games to provide young students with civic education and teachers with lesson plans to do the same. As a result, the iCivics program contributes to social change in American society.

The conclusion offers a summary. This Article lays the foundation to a new, pragmatic, inclusive and innovative test that can be used by judges, regardless of their jurisdiction, to determine whether an entity is a “social enterprise.” Hopefully, this will lead to harmonization in social entrepreneurship law. Researchers could build upon this work, which will also result in knowledge accumulation. This Article also offers a new understanding of the social entrepreneurship movement, the social entrepreneurs, the commercial and philanthropic investors, their contribution to our economy, and the logic of their action.

#### I. A CALL FOR HARMONIZING SOCIAL ENTREPRENEURSHIP LAW

Corporate law scholars are currently debating whether the new social enterprise legislation is necessary, as social enterprises can choose traditional for-profit or nonprofit models, and whether the new corporate forms are even sustainable.<sup>17</sup> This is part of a 1930s Harvard Law Review

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U] (distinguishing between the two definitions).

17. See Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?* 46 WAKE FOREST L. REV. 591, 624 (2011) (offering “four reasons why social entrepreneurs view hybrid organizational forms attractive: articulating and enforcing a dual mission, expanding funding streams, branding their enterprises, and achieving sustainability”); Dana Brakman Reiser *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 686 (“Many legal scholars argue that owner wealth maximization need not be the sole or exclusive goal of a for-profit corporation.”); Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 J. BUS. L. 631, 633 (2009) (exploring “the ambiguities of corporate law by challenging corporate governance models that favor only one view of corporate purpose, and by identifying the differing norms that corporate case law and statutes impose”); J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25, 26 (2015) (“Data from early benefit corporations shows an abysmal benefit report compliance rate (below ten percent), drawing into question the claims

debate between two notable corporate law scholars – Adolfe A. Berle<sup>18</sup> and Merric E. Dodd.<sup>19</sup> This debate about the purpose of the corporation includes a dispute about the roles and responsibilities of corporate managers and directors, and continues to this day.<sup>20</sup>

Many factors suggest that the use of new social enterprise forms in the United States will likely grow. Indeed, new social enterprise hybrid corporate forms have been adopted by most of the states. First, over twelve percent (12%) of the current U.S. working-age adults are starting or leading social enterprises, according to the 2015 Global Entrepreneurship Monitor (GEM) survey.<sup>21</sup> Second, the millennial generation, which is the largest

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about heightened transparency.”); Alicia E. Plerhoples, *Nonprofit Displacement and the Pursuit of Charity Through Public Benefit Corporations* 21 LEWIS & CLARK L. REV. 525, (presenting a commitment approach to social enterprise governance within the bounds of existing social enterprise laws); Leo E. Strine, *Making it Easier for Directors to “Do the Right Thing”?* 4 HARV. BUS. L. REV. 235, 248 (2014) (positing that “benefit corporation statutes have the potential to change the accountability structure within which managers operate”); Winston, *supra* note 4, at 4-5 (evaluating “the potential success of benefit corporations in light of the absence of a legal mandate to prioritize shareholder interests”).

18. See Adolf A. Berle Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) (arguing in favor of profit as a corporation’s sole purpose).

19. See E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932) (arguing that a corporation has both profit-making and social service purposes).

20. See, e.g., Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993) (addressing the debate over corporate responsibility set off by the growing prominence of corporations and the increasing independent power of managers); Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385 (2008) (observing a debate in the contemporary corporate governance space); Choudhury, *supra* note 17, at 633 (discussing “the ambiguities of corporate law by challenging corporate governance models that favor only one view of corporate purpose, and by identifying the differing norms that corporate case law and statutes impose”); Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 625, 939 (2017); Ian B. Lee, *Corporate Law, Profit Maximization, and the “Responsible Shareholder,”* 10 STAN. J.L. BUS. & FIN. 31, 40 (2005) (exploring the nexus between shareholder ethical responsibility and corporate law); Roberta Romano, *Less Is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REG. 174, 174 (2001) (reviewing “corporate finance literature on institutional investors’ activities in corporate governance and us[ing] the findings of the empirical literature to inform normative recommendations for the proxy process”); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189 (2002) (“suggest[ing] that we have made at least some intellectual progress over the intervening decades on the question of the proper role of the corporation”); Leo E. Strine, Jr., *Lecture and Commentary, The Social Responsibility of Boards of Directors and Stockholders in Charge of Control Transactions: Is There Any “There” There?*, 75 S. CAL. L. REV. 1169, 1169 (2002) (arguing that “benefit corporation statutes have the potential to change the accountability structure within which managers operate”).

21. THE 2015 GLOBAL ENTREPRENEURSHIP MONITOR (GEM) SURVEY, *available at* <file:///Users/beckan/Downloads/gem-2015-2016-report-print-version-smaller->

segment of the U.S. labor market,<sup>22</sup> is a leader in social innovation, and is projected to be concerned with social value creation.<sup>23</sup> Third, an estimated \$6 trillion will be aimed at funding social enterprise organizations by 2052, according to economists Lyons & Kickul.<sup>24</sup> Fourth, since 2008, thousands of new social enterprise entities were incorporated using one of these new hybrid legal forms, according to B Lab.<sup>25</sup> B Lab is a nonprofit organization that lobbies for the social enterprise legislation across the U.S., provides certification (B Corporation certification to for-profit corporations), and collects information on thousands of registered benefit corporations.<sup>26</sup> Finally, even established companies like Patagonia, Kickstarter and others,<sup>27</sup>

1481623410.pdf [hereinafter “2015 GEM Survey”].

22. See Neale Godfrey, *Business Not As Usual: The Millennial Social Entrepreneur*, FORBES (Aug. 23, 2015), <http://www.forbes.com/sites/nealegodfrey/2015/08/23/business-not-as-usual-the-millennial-social-entrepreneur/> [https://perma.cc/QV2J-2RN2] (citing Pew Research). See also Richard Fry, *Millennials surpass Gen Xers as the largest generation in U.S. labor force*, PEW RESEARCH CENTER (May 11, 2015), <http://www.pewresearch.org/fact-tank/2015/05/11/millennials-surpass-gen-xers-as-the-largest-generation-in-u-s-labor-force/> [https://perma.cc/CTN3-CACU] (citing a Pew Research Center study showing that millennials are the largest generation in the U.S. labor force); see also, Stephen Edward McMillin, Keong Weon Lee and Sandra R. Naeger, *Millennials and Social Entrepreneurship: A Multiple Streams Analysis of Problems, Prospects, and Implications for Policy and Practice*, 21 GEO. PUB. POL’Y REV. 1, 2 (2016) (citing the large millennial workforce as an untapped source for social entrepreneurship).

23. See 2015 GEM Survey, *supra* note 21.

24. See Lyons & Kickul, *The Social Enterprise Financing Landscape: The Lay of the Land and New Research on the Horizon*, 3 ENTREPRENEURSHIP RESEARCH J. 147 (2013) (projecting that \$6 trillion be allocated to social enterprise organizations by 2052).

25. B Lab has been collecting information on thousands of registered benefit corporations, noting that the list is incomplete because not all states track the names and number of benefit corporations. See *Find a Benefit Corp.*, BENEFITCORP.NET, available at [http://benefitcorp.net/businesses/find-a-benefit-corp?field\\_bcorp\\_certified\\_value=&state=&title=&submit2=Go&sort\\_by=title&sort\\_order=ASC&op=Go](http://benefitcorp.net/businesses/find-a-benefit-corp?field_bcorp_certified_value=&state=&title=&submit2=Go&sort_by=title&sort_order=ASC&op=Go) [https://perma.cc/R2RC-HH M9].

26. Michael B. Dorff, *Assessing the Assessment: B Lab’s Effort to Measure Companies’ Benevolence*, 40 SEATTLE U. L. REV. 515, 525 (2017).

27. Patagonia (clothing) was among the first established companies that converted into a benefit corporation as soon as the benefit corporation legislation was available in California. See Matt McDermott, *Patagonia Becomes a California Benefit Corporation*, TREEHUGGER (Jan. 3, 2012), available at <http://www.treehugger.com/corporate-responsibility/patagonia-becomes-california-benefit-corporation.html> [https://perma.cc/Z34A-476X]. Kickstarter (crowdfunding platform) also converted to a Delaware Public Benefit Corporation in 2015. See Yancey Strickler, et. al., *Kickstarter is Now a Benefit Corporation*, THE KICKSTARTER BLOG (Sept. 21, 2015), available at <https://www.kickstarter.com/blog/kickstarter-is-now-a-benefit-corporation> [https://perma.cc/6S54-NQN9]. Other companies also converted their status, from technology companies to news organizations and banks. For example, Virginia Community Capital (community-based bank), changed into a Virginia Benefit Corporation in April 2016. See Rick Alexander, *VCC: America’s First Benefit Corporation Bank*, VIRGINIA COMMUNITY CAPITAL: NEWS (Apr. 3, 2016), available at <https://www.vacommunitycapital.org/news/2016/04/03/vcc-americas-first-benefit-corporation-bank/> [https://perma.cc/P5CK-

have already converted their corporate entity designation from traditional for-profit to a new social enterprise (benefit corporation) designation. This data contributes to the view that social entrepreneurship is a very important phenomenon that is here to stay.

With a shift in corporate governance mirroring social movements, the use of the terms “social entrepreneur” and “social enterprise,” are commonplace in academia, popular media, law and business schools, and state-level legislation, even though the terms are ill-defined,<sup>28</sup> fragmented, and have no coherent theoretical framework.<sup>29</sup> This Article lays out a preliminary and novel proposal to overcome some of the challenges mentioned below. Specifically, this Article proposes unified tests for researchers and legislators to build on, aiming to increase the likelihood that social enterprises will succeed in producing profit and social returns in the future.

#### A. *Challenges of Structuring, Funding, and Counseling Social Enterprises*

New social enterprise legislation comes in many different shapes, forms and names, depending on the jurisdiction.<sup>30</sup> Traditional nonprofit and for-profit corporation can be regarded as a social enterprise, even without amending their charters,<sup>31</sup> depending on the jurisdiction.

The model benefit corporation legislation, which was developed by B Labs, was adopted by a majority of the states that adopted hybrid

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NJF]. CiviCore (technology), changed from an LLC to a Delaware Public Benefit Corporation in January 2017. See PR Newswire, *Civicore Becomes a Public Benefit Corporation*, YAHOO FINANCE (Jan. 17, 2017), available at <http://finance.yahoo.com/news/civicore-becomes-public-benefit-corporation-134000063.html> [https://perma.cc/8SBZ-2NDY]. Philadelphia Media Network (news outlets) changed to a Delaware Public Benefit Corporation in January 2016. See Elizabeth K. Babson & Robert T. Esposito, *The Year in Social Enterprise: 2016 Legislative and Policy Review*, DRINKER BIDDLE: INSIGHTS & EVENTS (Feb. 7, 2017), available at <http://www.drinkerbiddle.com/insights/publications/2017/02/the-year-in-social-enterprise> [https://perma.cc/Z37U-UU6V]; see also Winston, *supra* note 4.

28. See Lynn Barendsen and Howard Gardner, *Is the social entrepreneur a new type of leader?*, 34 LEADER TO LEADER, Autumn 2004 at 43. See also, Jay Weerawardena and Gillian Sullivan Mort, *Investigating Social Entrepreneurship: A Multidimensional Model*, 41 (1) J. WORLD BUS., 21-35 (2006).

29. See Saifan, *supra* note 12; Weerawardena and Mort, *supra* note 28.

30. See Thomson Reuters Foundation and Morrison & Foerster LLP, et al., *Which Legal Structure is Right for my Social Enterprise? A Guide to Establishing a Social Enterprise in the United States* (May 2013), available at <http://media.mofo.com/files/uploads/Images/Guide-to-Establishing-a-Social-Enterprise.pdf> [https://perma.cc/33TK-RUXA].

31. See J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 (1) AMERICAN U. BUS. L. REV. 1 (2012). See also Stout, *The Corporation As Time Machine*, *supra* note 4.

legislation.<sup>32</sup> However, despite this model legislation, there is significant variation among the states about the conditions for meeting the social enterprise requirements and other attributes that the benefit corporation has depending on the jurisdiction.<sup>33</sup> Additionally, some states have adopted social enterprise forms that are different than the benefit corporation.<sup>34</sup> For example, these forms include low-profit limited liability companies,<sup>35</sup> benefit limited liability companies,<sup>36</sup> and flexible purpose corporations.<sup>37</sup> Notably, the public benefit corporation is similar to the benefit corporation.<sup>38</sup>

Therefore, there are likely to be different statutory interpretations of the nature and legal structure of a social enterprise by courts in different jurisdictions. Additionally, courts will be faced with the uncertainty of how to integrate the new statutes with existing state laws that currently govern conventional for-profit and nonprofit entities.

There are additional difficulties that social entrepreneurs and investors

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32. B Lab lobbies for social enterprise legislation and provides certification. See *About B Lab*, BENEFITCORP.NET, available at <https://www.bcorporation.net/what-are-b-corps/about-b-lab> [https://perma.cc/3EZF-GE66] (last visited Feb. 25, 2018).

33. *Supra* note 30.

34. *Id.* (“For example, California and Florida entities can be a benefit corporation or social purpose corporation (formerly known as a flexible purpose corporation in California), and a Minnesota entity can be a general benefit corporation or specific benefit corporation.”)

35. See, e.g., 805 ILL. COMP. STAT. 180/1-26 (2010); WYO. STAT. ANN. §§ 17-29-102–113 (2010); 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); Carter G. Bishop, *The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243 (2010); J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1 (2011); Robert Lang & Elizabeth Carrott Minnigh, *The L3C, History, Basic Construct, and Legal Framework*, 35 VT. L. REV. 15 (2010).

36. MD. CODE ANN., CORPS. & ASS’NS §§ 4A-1101–1108(a) (West 2013).

37. John Tyler, et. al, *Producing Better Mileage: Advancing the Design and Usefulness of Hybrid Vehicles for Social Business Ventures*, 33 (2) QUINNIPIAC L. REV. 325 (2015) (recounting the development of social enterprise forms, beginning in 2008 with “Vermont’s L3C innovation, followed in 2010 by Maryland’s benefit corporation, and again in 2012 by California’s flexible purpose corporation and Washington’s social purpose corporation.”); see also J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the State Statutes* (Jan. 25, 2015), available at <https://www.law.umich.edu/clinical/internationaltransactionclinic/Documents/May%2011%20Conference%20Docs/Corporate%20Forms%20of%20Social%20Enterprise.pdf> [https://perma.cc/CZ6F-KD4A]. See also Ball, *supra* note 6; *supra* note 29.

38. See, e.g., COLO. REV. STAT. §§ 7-101-501–509 (2014); DEL. CODE ANN. tit. 8, §§ 361–368 (2014); Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who’s Opting In?*, 14 U.C. DAVIS BUS. L.J. 247 (2014) [hereinafter Plerhoples, *Delaware Public Benefit Corporations*]; J. Haskell Murray, *Social Enterprise Innovation: Delaware’s Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345 (2014) [hereinafter Murray, *Social Enterprise Innovation*]; Leo E. Strine, Jr., *Making it Easier for Directors to Do the Right Thing*, 4 HARV. BUS. L. REV. 235 (2014).

face, including measuring impact and outcomes. The following issues are associated with funding and sustaining social entrepreneurship ventures. They are further explored so as to clarify the underlying conceptual framework of the tests.

### 1. Funding

Social ventures, like traditional start-ups, require financing in order to survive. Funding sources (such as grants, investments and loans) for social entrepreneurial start-ups come from many sources, such as philanthropic investors (foundations or program-related investments),<sup>39</sup> angel and early stage impact investors,<sup>40</sup> networks of angel impact investors, venture stage investors, professional investors (high net worth individuals and family offices),<sup>41</sup> private sector corporate impact venturing,<sup>42</sup> financial services institutions, crowdfunding,<sup>43</sup> and government.<sup>44</sup> Several categories of

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39. Program Related Investments (PRIs) were pioneered by the Ford Foundation. See Maximilian Martin, *Making Impact Visible*, 4 IMPACT ECON. WORKING PAPERS 1, 23 (2013), available at <http://www.impacteconomy.com/download/Impact%20Economy%20-%202013%20-%20Making%20Impact%20Investible.pdf> [<https://perma.cc/P9B8-H6GR>].

40. Martin, *supra* note 39, at 23. See also Deborah Burand, *Resolving Impact Investment Disputes: When Doing Good Goes Bad*, 48 WASH. U. J.L. & POL'Y 55 (2015).

41. Martin, *supra* note 39, at 23.

42. *Id.*

43. Joan MacLeod Heminway, *Financing Social Enterprise: Is the Crowd the Answer?* (July 4, 2017), CAMBRIDGE HANDBOOK OF SOC. ENTERPRISE L. (Forthcoming), available at SSRN: <https://ssrn.com/abstract=2997262> [<https://perma.cc/L6XC-78GA>]; see also Dana B. Reiser & Steven A. Dean, *SE(c)(3): A Catalyst for Social Enterprise Crowdfunding*, 90 IND. L.J. 1091 (2015) (proposing crowdfunding tax regime to “unlock the potential of innovative funding platforms capable of channeling capital toward social enterprise.”)

44. See U.S. National Advisory Board on Impact Investing, *Private Capital, Public Good: How Smart Federal Policy can Galvanize Impact Investing - and Why it's Urgent* (2014), <http://www.socialimpactinvestment.org/reports/US%20REPORT%20FINAL%20250614.pdf> [<https://perma.cc/694F-F29T>] (offering recommendations for U.S. federal policy).

“impact investors” (defined below) exist,<sup>45</sup> such as “strategic,”<sup>46</sup> “venture,”<sup>47</sup> or “catalytic,”<sup>48</sup> philanthropists.<sup>49</sup>

Philanthropy is not a new phenomenon. Some claim that the term “Venture Philanthropy” was coined in 1969 by John D. Rockefeller, in order to express ‘an adventurous approach to funding unpopular social causes’.<sup>50</sup> Famous American businessman such as Henry Ford, Andrew Carnegie, Andrew W. Mellon and John D. Rockefeller, are well-known for contributing money to charitable organizations and causes after accumulating vast fortunes through their businesses.<sup>51</sup> Today, new philanthropists exist, including Warren Buffett, Bill and Melinda Gates, Mark Zuckerberg, Gordon and Betty Moore, and Michael and Susan Dell.<sup>52</sup>

Aside from social venture philanthropists, there are also new vehicles, such as the impact investing vehicles that are aimed at generating both financial and social returns.<sup>53</sup> Impact investing (also referred to as “social

45. Christopher Geczy et al., *Contracts With Benefits: The Implementation of Impact Investing*, Apr. 9, 2018, available at <https://ssrn.com/abstract=3159731> [<https://perma.cc/E5XB-YR3F>]; John E. Tyler III, *Essential Policy and Practice Considerations for Facilitating Social Enterprise: Commitment, Connections, Harm, and Accountability*, in *THE CAMBRIDGE HANDBOOK OF SOC. ENTERPRISE L.*, (J. Yockey & B. Means, eds., 2017), John E. Tyler III, *Structuring for Action and Longevity in the Green Economy: Being Intentional About Committing to Social/Green Purposes, Connecting Effort and Impact, and Addressing Harm and Accountability*, 86 UMKC L. REV. 755, 937 (2018).

46. See John Kania, Mark Kramer, & Patty Russell, *Strategic Philanthropy for a Complex World*, STAN. SOC. INNOVATION REV., Summer 2014 (defining “strategic philanthropy”); OECD netFWD, *Venture Philanthropy in Development: Dynamics, Challenges and Lessons in the Search for Greater Impact* (2014), <https://www.oecd.org/dev/Venture%20Philanthropy%20in%20Development-BAT-24022014-indd5%2011%20mars.pdf> [<https://perma.cc/ZPX9-KLUT>] [hereinafter “Venture Philanthropy in Development”].

47. Venture Philanthropy incorporates many of the concepts and practices from the traditional venture capital finance and technology business management. See also *Venture Philanthropy in Development*, *supra* note 46.

48. Catalytic Philanthropy stimulates “cross-sector collaborations and mobilizing stakeholders to create shared solutions.” Mark Kramer, *Catalytic Philanthropy*, STAN. SOC. INNOVATION REV. (Fall 2009). See also *Venture Philanthropy in Development*, *supra* note 46.

49. See *Venture Philanthropy in Development*, *supra* note 46.

50. Some claim that they contributed to causes after making money from the steel, oil, gas and car industries, while creating unfair monopolies and crushing labor unions. See Andrew Beattie, *The Christmas Saints of Wall Street*, INVESTOPEDIA, <https://www.investopedia.com/articles/06/wallstreetsaints.asp> [<https://perma.cc/D9W8-QV7D>]; Charles R. Morris, *The Tycoons: How Andrew Carnegie, John D. Rockefeller, Jay Gould, and J.P. Morgan Invented the American Super Economy* (2006).

51. See *id.*

52. See *id.*

53. See Martin, *supra* note 39 (“Estimates indicate that impact investing could become a new asset class or investment style that will grow to USD 1 trillion by the end of the decade.”)

finance,” “social impact investing,” “blended value investing,” or “impact finance”) is defined by the Global Impact Investing Network (GIIN) as “investments made into companies, organizations and funds with the intention of generating measurable social and environmental impact, alongside financial return.”<sup>54</sup> These new social investment vehicles and their investors are not only looking for the traditional monetary return on their investment, but also seek a social return on their investment.<sup>55</sup> The following are some of the financing difficulties associated with both social venture philanthropy and impact investments.

## 2. Where are the Boundaries Between Public and Private Sectors?

One problem is monitoring and establishing agreed-upon metrics for assessment by both the social venture and the investors. For investors, it is very difficult to determine the “traditional” customer or beneficiary of the social venture.<sup>56</sup> In many cases the desired mission-oriented impact of the social venture is geared towards society at large or certain segments of society.<sup>57</sup> Some scholars suppose that these challenges to impact investors are a function of the double (social and economic) or triple (social, economic and environmental) value creation, which result from blurring the line between the public and private sectors.<sup>58</sup>

It is difficult for social entrepreneurs to ask potential investors, especially commercial (impact investors), to take a risk and invest in their social venture, when there is uncertainty about metrics of assessment for the potential impact of the social entrepreneurial venture and the commitment (or credibility) of the social entrepreneur.<sup>59</sup> Moreover, traditional commercial methods for evaluation, such as monetizing on investment, pricing and market signals, are incapable of showing potential social

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54. According to Martin, this shift also comes with limitations, such as risk aversion for below market returns on investments. See Martin, *supra* note 39 (discussing program-related investments). In January 2013, J.P. Morgan and GIIN published a survey of 99 impact investors with individual portfolios of over USD \$10 million and total investments estimated at USD \$9 billion. Yasemin Saltuk et. al., *Perspectives on Progress: The Impact Investor Survey*, GLOBAL IMPACT INVESTING NETWORK (Jan. 7, 2013), <https://thegiin.org/research/publication/perspectives-on-progress> [<https://perma.cc/R8HC-73NM>].

55. See 2015 GEM Survey, *supra* note 21. See also Lyons & Kickul, *supra* note 24 (“With an estimated \$6 trillion expected to be allocated for social enterprise organizations in the coming decades, the opportunity to explore existing and future financing vehicles, strategies, and challenges present new opportunities for scholars and practitioners alike.”).

56. See Lyons & Kickul, *supra* note 24.

57. See *id.*

58. See Bacq & Janssen, *supra* note 14. See also Dees, *supra* note 13.

59. See Roger L. Martin and Sally Osberg, *Social Entrepreneurship: The Case for Definition*, 5 STAN. SOC. INNOVATION REV. 27 (Spring 2007).



investors whether the social entrepreneurs have been successful in achieving their mission-related impact.<sup>60</sup> As a result, social ventures — without agreed-upon metrics for evaluation — cannot fully capture all of the benefits from their mission-related impact.<sup>61</sup> Additionally, social investors cannot look forward to getting traditional monetary compensation or other “traditional” risk-adjusted return on their investments.<sup>62</sup>

Investors, especially commercial (impact investors), usually have short time horizons,<sup>63</sup> whereas social entrepreneurs tend to have longer time horizons.<sup>64</sup> Therefore, the time horizon may not be aligned. As a result, while social entrepreneurs may find favorable donor funding, these public sector and philanthropic sources can be unpredictable over time because they tend to be geared towards providing start-up capital and not working or growth capital, so the social venture needs to turn to private capital to scale or perform.

### 3. Uncertainty, Risk & Information Asymmetry

Social enterprises experience difficulties in raising capital. Like all growing startups, the firms’ internal cash flow is not usually enough to support its needs. The cash flow especially cannot support the venture’s fast-growing technology, service, or research and development needs, which are comprised of intangible assets, or human resources and hiring needs. Without an injection of new capital to sustain its operations, the venture will probably go bankrupt. Attracting financing via “conventional” means can be difficult for the following reasons.

Specialized equity capital providers, such as impact investors, take into account factors of uncertainty, risk and information asymmetry when considering whether or not to invest in or finance the social enterprise. There is uncertainty concerning the success of the social entrepreneur’s product or service, research, and impact, which in turn affects the motivation of investors to advance capital and the intention of suppliers to extend credit.<sup>65</sup>

Moreover, according to Jensen and Meckling’s<sup>66</sup> “agency theory,”<sup>67</sup> there is always uncertainty surrounding the entrepreneur’s possible

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60. See Lyons & Kickul, *supra* note 24.

61. See *id.*

62. See *id.*

63. See *id.*

64. See *id.*

65. See also PAUL A. GOMPERS & JOSH LERNER, *THE VENTURE CAPITAL CYCLE* (1999), at 127.

66. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

67. *Id.*

mismanagement and opportunistic conduct.<sup>68</sup> The agency relationship problem, of encouraging the entrepreneur (“agent”) to behave as if she is maximizing the investor’s (“principal’s”), interests is quite common. The problem exists in all cooperative efforts and in all organizations (“at every level of management in firms, in universities, in mutual companies, in cooperatives, in governmental authorities and bureaus, in unions and in relationships normally classified as agency relationships such as are common in the performing arts and the market for real estate”).<sup>69</sup>

The asymmetric information problem is caused by the fact that the entrepreneur has the daily involvement with the firm, and, therefore, knows more than the prospective partners, investors or suppliers, and about her company’s outlook.<sup>70</sup> Impact investors, however, will not be involved in the daily management and decision making and therefore, will not possess the same information as the entrepreneur.<sup>71</sup> They will be dealing with information asymmetry issues that are inherent in any agency relationship.

Information asymmetry and uncertainty associated with agency issues contribute to “adverse selection,” where impact investors have difficulty screening and selecting credible, high-quality entrepreneurs and companies, inhibiting investors’ ability to make sound and competent investment decisions.<sup>72</sup>

Managerial decision-making in social startups requires more knowledge about social value creation and impact measurement than the general managerial skills. Investors may have trouble understanding how to measure social impact and how to evaluate the information necessary to decide whether to invest and how to evaluate the social managements’ decision-making process.

#### 4. Intangible Assets

Investment in social entrepreneurial firms means an investment in

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68. See also Gompers & Lerner, *supra* note 65, at 127-31; Manuel Utset, *Reciprocal Fairness, Strategic Behavior & Venture Survival: A Theory of Venture Capital Financed Firms*, 2002 WIS. L. REV. 45, 55 (2002).

69. See Jensen & Meckling, *supra* note 66, at 309.

70. Laura Lindsey, *Blurring Firm Boundaries: The Role of Venture Capital in Strategic Alliances*, 63 J. FIN. 1137 (2008). See also Gompers & Lerner, *supra* note 65, at 128 (discussing the asymmetric information problem).

71. Gompers & Lerner, *supra* note 65, at 127-31 (discussing the information asymmetry and other risks that venture capitalists face while dealing with start-ups). See also Utset, *supra* note 68, at 56.

72. See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 493 (1970) (discussing the problems of “adverse selection” and “lemons”); See also Gompers & Lerner, *supra* note 63, at 129; See also Utset, *supra* note 68, at 56.

intangible assets, such as ideas, talents or trade secrets. Impact investors are experiencing difficulties with investing in (or loaning to) such firms because it is hard to value the intangible assets involved.<sup>73</sup>

In the event of default, intangible assets are worthless to investors.<sup>74</sup> Traditionally, when investors invest in a firm that has tangible assets, such as products, machinery, or buildings, they can later sell these tangible assets and recoup some of their investment. However, when the intangible assets are ideas or concepts that have not been fully developed or commercialized, in the event of default, investors will not be able to recoup their investment.<sup>75</sup>

For these reasons, there is a need to compare corporate governance policies with lessons learned from traditional venture capital investors. VCs play an important role in encouraging innovation while investing in innovation-driven startups. By financing capital hungry young start-ups, who present abundant hazards and uncertainties that often deter “regular” investors, venture capital investors can help to promote innovation.<sup>76</sup> Venture capital funds are “highly specialized financial intermediaries.”<sup>77</sup>

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73. *Infra* note 77. See also Hedva Ber, *Is Venture Capital Special? – Empirical Evidence from a Government Initiated Venture Capital Market* (Bank of Israel, Science Technology and the Economy Program (STE) Working Paper Series STE-WP-9, 2002) (comparing investment in innovation driven startup firms).

74. Lindsey, *supra* note 70. See also Gompers & Lerner, *supra* note 65, at 128 (discussing the nature of the entrepreneur’s asset, which affect her firm’s financial and corporate strategy).

75. See Lindsey, *supra* note 70. See also Gompers & Lerner, *supra* note 65.

76. It should be noted that professional venture capital funds also face the same information asymmetry issues. According to a report by U.S. Gen. Accounting Office, only 10% of venture capitalists manage to get a return on their investment. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON SMALL BUSINESS, U.S. SENATE SMALL BUSINESS EFFORTS TO FACILITATE EQUITY CAPITAL FORMATION 19 (2000), available at <http://www.gao.gov/assets/240/230896.pdf> [<https://perma.cc/N82J-2RFA>] (summarizing evidence that “approximately 80% of new businesses will either fail or no longer exist within five to seven years of formation due to a lack of financial depth, a lack of management expertise, an unworkable business idea, or some combination of these factors. The perceived high risk associated with new and rapidly growing companies is also borne out by the past performance of venture capital investments in the informal, unregulated equity capital market. According to a recent study by the National Association of Seed and Venture Funds, only about 10 percent of venture capital investments meet their expected rate of return.”). See also Amy E. Knaup, BUREAU OF LABOR STATISTICS, *Survival and Longevity in the Business Employment Dynamics Data*, MONTHLY LAB. REV. 50, 51 (May 2005) (stating that 34% of new businesses fail within their first two years and 56% fail within four years); TOMMAS ZIMMERER & NORMAN M. SCARBOROUGH, *ESSENTIALS OF ENTREPRENEURSHIP AND SMALL BUSINESS MANAGEMENT* 10 (3d ed. 2002) (asserting that 24% of small businesses fail within two years and 63% fail within six years).

77. See Ola Bengtsson, *Relational Venture Capital Financing of Serial Founders*, 22 J. OF FIN. INTERMEDIATION 285, 308 (2013) (examining data on 1,500 serial entrepreneurs and finding that a failed entrepreneur is twice as likely to repeat VC relationships (as evaluated against a successful entrepreneur)).

They offer “optimal services” to an entrepreneurial firm that is positioned within the fund’s concentrated industry, which is usually very narrowly defined.<sup>78</sup> This discussion is outside the scope of this Article, and requires further research comparing VCs and impact investors (VPIs).<sup>79</sup> However, in order to design a test for “social enterprise” and “social entrepreneur,” we should first review the differences between commercial and social entrepreneurs.

### 5. The Differences Between Commercial and Social Entrepreneurs

There are several main differences between a social entrepreneur and a commercial entrepreneur. The first relates to the innovation category, as both parties are pursuing an opportunity using innovation and resources that are beyond their control. In the social entrepreneur’s case, whether non-profit, for-profit, or public sector, her innovation category will mainly be the creative destruction innovation.<sup>80</sup> The majority of social entrepreneurs will disrupt the current market, creating “pattern-breaking social change”,<sup>81</sup> whereas the majority of the commercial entrepreneurs will use methods of incremental innovation to create value, and a selected few will be able to disrupt the market.

The second difference is value creation versus capture. Commercial entrepreneurs are concerned with value capture, and able to measure the financial value that they are creating by selling products or services, and their investors can further get a monetary return on their investment. On the contrary, the market area that the social entrepreneur is undertaking deals with the disregarded problems in society which involve positive externalities.<sup>82</sup> It is hard to put a market value on public good, social improvements, or benefits for customers of the social enterprise.<sup>83</sup> Social entrepreneurs are therefore more concerned with value creation than

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78. *Id.*

79. See SCHWAB FOUNDATION FOR SOCIAL ENTREPRENEURSHIP, WORLD ECONOMIC FORUM, THE GOVERNANCE OF SOCIAL ENTERPRISES: MANAGING YOUR ORGANIZATION FOR SUCCESS (2012), available at [http://www3.weforum.org/docs/WEF\\_Governance\\_Social\\_Enterprises\\_2106\\_light.pdf](http://www3.weforum.org/docs/WEF_Governance_Social_Enterprises_2106_light.pdf) [<https://perma.cc/284P-3C87>] (discussing the governance mechanisms of social enterprises).

80. See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (2nd. Ed. 1947).

81. Harvard Business School New Venture Competition, <http://www.hbs.edu/newventurecompetition/social-enterprise-track/Pages/default.aspx> [<https://perma.cc/C46P-2VA7>] (last visited May 10, 2018).

82. See Filipe Santos, *A Positive Theory of Social Entrepreneurship* (INSEAD Working Paper Series, 2009/23/EFE/ISIC, 2009) available at <https://sites.insead.edu/facultyresearch/research/doc.cfm?did=41727> [<https://perma.cc/4XU5-HHNC>].

83. See Dees, *supra* note 13.

capture.<sup>84</sup>

Third, with social entrepreneurship, it is hard to identify the customers and stakeholders, and determine their ability to pay for these services.<sup>85</sup> Therefore, if the customers are not able to pay for the services or products, how can we accurately determine if the social entrepreneur is creating enough social value to warrant and support the resources that she is using to create that value?<sup>86</sup>

Fourth, another notable difference is in the target audience and customer segments. As discussed in more detail below (on the definition of entrepreneurship in general), the objective of innovation-driven entrepreneurs is to operate in global markets and reach as many paying customers as possible. However, the target audience and prospective customer groups of social entrepreneurs are more likely to assist disadvantaged local, regional or national segments of the population, such as the socially excluded, disabled, poor, long-term unemployed, and discriminated against.<sup>87</sup> The problems that the social entrepreneur is dealing might have a local or regional expression, but the proposed solutions to these problems will also have a much larger global impact, which is very hard to measure.<sup>88</sup>

Finally, many researchers, especially in the accounting field, are trying to develop agreed-upon standardized measurement tools that can assess the effect and effectiveness of social enterprises. There is an urgent need to develop an industry-based analysis on the impact of the solutions proposed by the social enterprise, which may have positive spillovers,<sup>89</sup> especially because in many jurisdictions social enterprises are now required by law to file annual reports with these assessments, using third parties.

Another option is not to divide value creation into several categories, such as double (social and economic) or triple (social, economic and environmental), but to simply determine whether the firm will be concerned with value creation or value capture.<sup>90</sup> If the main focus is on value creation, it is a social enterprise.

The following challenges have to do with corporate governance and fiduciary duties.

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84. *Id.*

85. *Id.*

86. *Id.*

87. *See Santos, supra* note 82.

88. *See id.*

89. *See id.*

90. *See id.*

## 6. Corporate Governance

There are numerous calls for a reform to the current corporate governance practices, or the lack of them. This is in line with the recent market instability, which was caused by abuses of large corporations as well financial institutions. There is renewed interest in the corporate governance practices of modern corporations. The public is showing an “increasing skepticism. . . toward corporations and the people who manage them.”<sup>91</sup>

Since the twentieth century,<sup>92</sup> legal scholars, such as Milton Friedman<sup>93</sup> and Michael Jensen,<sup>94</sup> have been using shareholder primacy as a corporate governance model, which mandates the management of large public firms to maximize shareholder (“read Wall Street”) supremacy, and can be measured by the increased short-term focus of public companies.<sup>95</sup> Therefore, management faces pressure not to pursue long-term projects, such as research and development, because such projects cannot rapidly produce financial returns for the shareholders.<sup>96</sup>

Moreover, scholars who advocate for “shareholder primacy” focus solely on the shareholders as the “sole residual claimants” and “owners” of the corporations, ignoring other stakeholders.<sup>97</sup> They suggest that investors focus on short-term results due to their emphasis on stock market liquidity.<sup>98</sup> Increasingly, leading scholars from around the world, such as Lynn Stout, are calling for a radical change in the theory and philosophy of current corporate governance theory. The corporate patterns and theories that we

91. See Kent Greenfield, *The Third Way: Beyond Shareholder or Board Primacy*, 37 SEATTLE L. REV. 749, 749 (2014).

92. See Stout (Time Machine), *supra* note 4; see also Henry Hansmann & Reinier Kraakman, *What Is Corporate Law?* in REINIER KRAAKMAN, PAUL DAVIES, HENRY HANSMANN, GERARD HERTIG, KLAUS HOPT, HIDEKI KANDA, AND EDWARD ROCK, *THE ANATOMY OF CORPORATE LAW: A FUNCTIONAL AND COMPARATIVE ANALYSIS* (Oxford University Press, 2004).

93. See Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAG., SEPT. 13, 1970, available at <http://www.umich.edu/~thecore/doc/Friedman.pdf> [https://perma.cc/9XE3-457A]; see also Stout (Shareholder Value Myth), *supra* note 4, at 18.

94. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Cost and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); see also Stout (Shareholder Value Myth), *supra* note 4, at 18.

95. See also Hansmann & Kraakman, *supra* note 92, at 440-41.

96. Anat Alon-Beck, *The Coalition Model, a Private-Public Strategic Innovation Policy Model for Encouraging Entrepreneurship and Economic Growth in the Era of New Economic Challenges*, 17 WASH. U. GLOBAL STUD. L. REV. (forthcoming 2017); see also Stout (Time Machine), *supra* note 4, at 686 (finding that the increasing importance of shareholder value jeopardizes a corporation’s pursuit of long-term investments).

97. Stout, *supra* note 4, at 693.

98. Alon-Beck, *supra* note 96, at 4.

observe today are not merely products and consequences of the technology or development narratives but lie in politics and economic philosophy as well.<sup>99</sup> Therefore, it is important to bring back a focus on managerialism and allow the board of directors to plan for a long-term strategy of growth that can benefit society as a whole.

However, prior to discussing such calls, it is important to distinguish between the different legal social entrepreneurship enterprise entities. As noted herein, social enterprise entities can take different legal structural forms depending on whether the venture is formed as a nonprofit, takes a new hybrid legal form,<sup>100</sup> or is for-profit market-based.<sup>101</sup>

a. *Calls for a Reform to Traditional For-Profit Social Enterprises*

The main criticism is that boards of directors of for-profit social enterprises are not properly monitored or subject to external oversight and will therefore have difficulty making sound business decisions that will lead to both profit and social maximization.<sup>102</sup> Some legal scholars, like Ball, are calling for more disclosure requirements and are proposing that the federal government monitor and enforce for-profit social enterprise corporate governance practices.<sup>103</sup> Further research and suggestions on how to implement better corporate governance practices are needed in this area.

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99. An examination of classic corporate governance theory will demonstrate that “the public corporation is as much a political adaptation as an economic or technological necessity.” Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10 (1991).

100. Dana Brakman Reiser and Steven A. Dean, *Hunting Stag with Fly Paper: A Hybrid Financial Instrument for Social Enterprise*, 24 B. C. L. REV. 1495 (2013).

101. John Tyler, et. al, *Producing Better Mileage: Advancing the Design and Usefulness of Hybrid Vehicles for Social Business Ventures*, 33 QUINNIPIAC L. REV. 325 (2015); see also Ball, *supra* note 6 (discussing how the structural form that a social enterprise takes is determined by the corporation’s overall mission); J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the State Statutes* (Jan. 15, 2015), <https://www.law.umich.edu/clinical/internationaltransactionclinic/Documents/May%2011%20Conference%20Docs/Corporate%20Forms%20of%20Social%20Enterprise.pdf> [<https://perma.cc/CZ6F-KD4A>] (comparing interstate corporate statutes on the corporate forms of social enterprises); Thomson Reuters Foundation, *supra* note 29 (discussing legal structures particularly designed for social enterprises).

102. Ball, *supra* note 6, at 933.

103. See *id.* (stating that increased disclosure requirements allow the federal government to monitor corporate governance regimes and ensure that managers are following the law).

b. *Calls for a Reform to Traditional Nonprofit Social Enterprises*

There are expressions of concern about the failure to adequately monitor nonprofit social enterprises' internal business decision making. For example, Reiser<sup>104</sup> argues that there is no adequate monitoring of whether the nonprofit is managed according to its mission after the incorporation process. Lee<sup>105</sup> also argues against using the safe harbor – the business judgment rule, which was crafted specially to serve for-profit directors, and therefore, should not be used in the case of nonprofit directors. Additionally, Dent<sup>106</sup> argues that directors do not effectively monitor CEOs, due to the directors' lack of knowledge of the CEO's performance, unclear expectations, and a lack of proper guidance. There needs to be further research, and proposed suggestions, on how to craft a more suitable duty of care for nonprofit social enterprise directors.

c. *Calls for a Reform to New Hybrid Social Enterprises*

There are many questions with regard to the new hybrid entities, such as whether directors and officers of these hybrids are required to prioritize interests that will maximize the entity's profits. Or whether they can seek social returns even if they will ultimately reduce the hybrid's profits. How will courts apply the business judgment rule in future cases involving hybrid entities? There needs to be discussion and further research that will try to answer these questions and that will analyze the current corporate law theories such as agency, team production, property rights and others.

To illustrate, it is possible that an organization whose pursuits are mostly commercial will incorporate as a benefit corporation so that its insiders can take advantage of the lack of accountability mechanisms of both the for-profit and nonprofit corporate mechanisms. The managers and other insiders of a for-profit social enterprise are not prohibited from profiting

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104. DANA BRAKMAN REISER, *Filling the Gaps in Nonprofit Accountability: Applying the Club Perspective in the U.S. Legal System*, in VOLUNTARY REGULATION OF NGOS AND NONPROFITS, 41 (2010); *see also*, Ball, *supra* note 6, at 942.

105. Denise Ping Lee, Note, *The Business Judgment Rule: Should it Protect Nonprofit Directors?*, 103 COLUM. L. REV. 925, 929 (2003); *see also*, Ball, *supra* note 6, at 946 (discussing how the fiduciary duties of for-profit corporations force the board to prioritize owner maximization at the expense of preserving its social mission).

106. George W. Dent, Jr., *Corporate Governance Without Shareholders: A Cautionary Lesson From Non-Profit Organizations*, 39 DEL. J. CORP. L. 93, 114 (2014); *see also*, Ball, *supra* note 6, at 940 (discussing an existing correlation between poor corporate governance and a lack of shareholders).



from the firm,<sup>107</sup> nor are they prohibited from distributing the entity's net earnings to insiders (the doctrine of private inurement).<sup>108</sup> They are also allowed to operate for a commercial private benefit, and therefore, not prohibited by the doctrine of private benefit, which requires that the public charity be organized and operated for a public and not a private benefit.<sup>109</sup> They are not accountable to their shareholders solely for profit maximization (i.e., don't follow the shareholder primacy theory).<sup>110</sup> Without clear corporate governance standards, this lack of accountability puts hybrid entities at risk of mismanagement, director self-enrichment, and corporate waste.

There are several issues that can arise in cases of a sale of a social enterprise. For example, in the event of a sale of a benefit corporation to a for-profit corporation (that is not a social enterprise), such as in the following cases: Campbell's Food acquired Plum Organics,<sup>111</sup> and Unilever acquired Ben and Jerry's,<sup>112</sup> it is not clear which corporate governance standards apply. Who is supervising the small social enterprise subsidiary in these cases (as the large parent corporation is not a benefit corporation)?<sup>113</sup> As noted by Justice Strine, "[a]lthough in both cases, the sold corporation is operating as a subsidiary with a charter still requiring it to pursue the public

107. William H. Clark & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WILLIAM MITCHELL L. REV. 817 (2012).

108. United Cancer Council, Inc., v. Comm'r, 165 F.3d 1173, 1176 (7th Cir. 1999) (interpreting I.R.C. § 501(c)(3)).

109. "An organization is not organized or operated exclusively for one or more of the purposes specified in subdivision (i) of this subparagraph unless it serves a public rather than a private interest." 26 C.F.R. §§ 1.501(c)(3)-1(d)(1)(ii) (2014); see also Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L. J. 835, 838 (1980) (coining the phrase "the nondistribution constraint" to describe the doctrine of private inurement, which prohibits the distribution of corporate assets to insiders).

110. See David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L. J. 1013, 1013, (2013) (discussing a corporation's duty to contribute to improving society even if it comes at the expense of maximizing shareholder wealth).

111. See Leo E. Strine Jr., *Making it Easier for Directors to "Do the Right Thing"?* 4 HARV. BUS. L. REV. 235, 248 (2014). Press Release, Campbell Soup Co., Campbell Completes Acquisition of Plum Organics, <https://www.campbellsoupcompany.com/newsroom/press-releases/campbell-completes-acquisition-of-plum-organics/> [https://perma.cc/R F2G-KLPR].

112. Strine, *supra* note 111; Anne Field, *Ben & Jerry's, Poster Child for the B Corp Movement, Becomes a B Corp*, FORBES (Oct. 22, 2012), <https://www.forbes.com/sites/annefield/2012/10/22/ben-jerrys-poster-child-for-the-b-corp-movement-becomes-a-b-corp/> [https://perma.cc/4GPR-BDZG].

113. According to Justice Strine, the "goal is to replace the standard rules of governance set forth in statutes like the Delaware General Corporation Law with those set forth in benefit corporation statutes so that all public companies must be governed in a manner that accords respect to the best interests of *all* corporate constituencies and that *all* corporations must be governed in a responsible and sustainable manner." Strine, *supra* note 111, at 253.

benefits to which it was committed, the sold corporation lacks any direct stockholders, is a very small unit of a much larger corporation, and it is therefore difficult for even very committed socially responsible investors to monitor these companies' fulfillment of their commitments.”<sup>114</sup>

Hopefully this Article will inspire further research and discussion about ways to craft new governance standards for social enterprises, establish standardized impact reporting systems (including platforms to match impact capital with investments), and facilitate the sharing of market information between the various stakeholders. This Article's main contribution to the field of social entrepreneurship law is its proposal of a simple, inclusive, coherent and unified “social enterprise test” that the courts, regardless of the jurisdiction, can use to determine what constitutes a social enterprise, while allowing flexibility to the various jurisdictions to tailor the language in the test to meet their unique needs and preferences.

### B. *The “Social Enterprise Test”*

There are several reasons for a more flexible test on what constitutes a social enterprise. Many states across the U.S. have adopted various new hybrid forms of social enterprise legislation.

Currently, the states have significantly different conditions for meeting the statute's social enterprise requirements, and different jurisdictions require benefit corporations to have varying attributes.<sup>115</sup> Even though the majority of the states followed the model benefit corporation (Model) legislation, which was developed and advanced by B Labs,<sup>116</sup> judges can still interpret it differently. Additionally, some states have adopted other forms of social enterprise legislation that deviate from the Model.<sup>117</sup>

Furthermore, social enterprise forms are not limited to these new hybrid forms. Depending on the jurisdiction, there are states that might be required to determine whether their traditional for-profit or nonprofit entities can also be regarded as social enterprises.

The following social enterprise test is flexible and is meant to be used by all the various forms and jurisdictions. It builds on the works of Say, Schumpeter, Drucker, Stevenson, Dees, Santos, Martin, Osberg, B Labs and

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114. *Id.*

115. Ana Vinueza and Kristin Hiensch, Social Enterprise Legislation in the United States: An Overview, MORRISON FOERSTER: MOFO IMPACT (Sept. 20, 2016), <http://impact.mfo.com/resources/social-enterprise-legislation-in-the-united-states-an-overview/> [https://perma.cc/VP4B-EEC7]; see Morrison & Foerster LLP, *supra* note 30, at 74 (discussing the variation in social enterprise requirements among state laws).

116. For more info see ABOUT B LAB, <https://www.bcorporation.net/what-are-b-corps/about-b-lab> [https://perma.cc/3EZf-GE66].

117. *Id.*

others. Further analysis as well as the doctrinal-historical review of the theories that inspired the design of the test are detailed below in the next part.

The test is not meant to be exhaustive but to illustrate various characteristics to help judges brand and certify an entity as a “social enterprise,” and hopefully also help to harmonize state law.

In order to be considered a social enterprise, the enterprise should meet as many of the following requirements as possible.

### 1. Aligning Mission with SDGs Goals

A social enterprise is a mission driven enterprise. Therefore, it should articulate in its legal organizational documents a very clear social mission(s), which is its proposed solution to a current social problem (fixing or alleviating an unjust equilibrium in the market).

This Article further recommends that at least one of the missions of the social enterprise be aligned with one of the United Nations Sustainable Development Goals (SDGs). The SDGs, which are officially known as Transforming our world: the 2030 Agenda for Sustainable Development, is a set of 17 “Global Goals,” which include: No Poverty; Zero Hunger; Good Health and Well-being; Quality Education; Gender Equality; Clean Water and Sanitation; Affordable and Clean Energy; Decent Work and Economic Growth; Industry, Innovation and Infrastructure; Reduced Inequalities; Sustainable Cities and Communities; Responsible Consumption and Production; Climate Action; Life Below Water; Life on Land; Peace, Justice and Strong Institutions; and Partnerships for the Goals.<sup>118</sup>

Aligning the enterprise’s mission with one of the SDGs goals will help certify to potential investors as well as judges that the organization aligns itself with a recognized social mission.<sup>119</sup> In practice, many impact investment fund managers usually look for this correlation (as a sort of “mission certification”), prior to making an investment in a social enterprise.<sup>120</sup>

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118. SDGs are spearheaded by the United Nations through a deliberative process involving its 193 Member States, as well as global civil society, the goals are contained in paragraph 54 U.N. Doc. A/RES/70/1 of 25 Sept. 2015, [http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_70\\_1\\_E.pdf](http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf) [<https://perma.cc/F9RS-4NDY>].

119. This view was also expressed by several social impact fund managers at the Grunin Center for Law and Social Entrepreneurship, Legal Issues in Social Entrepreneurship and Impact Investing – In the US and Beyond, conference at NYU School of Law, (May 23-24, 2017). Impact fund managers reported that they usually check if the social entity’s mission is aligned with one of the SDGs goals. For more info on the SDGs goals *see* THE SUSTAINABLE DEVELOPMENT GOALS (SDGs), <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> [<https://perma.cc/6UTK-GG75>].

120. In the US and Beyond, *supra* note 119.

## 2. Aligning Mission with Purpose

This Article joins the calls of Murray<sup>121</sup> and Callison<sup>122</sup> in advocating for a flexible social enterprise purpose in the legal organizational documents, instead of the current mandatory approach (this is only relevant to the majority of the states that adopted the Benefit Corporation Model). It further recommends that the mission of the entity be aligned with its purpose.

There are currently different state requirements concerning the statement of purpose in the legal organizational documents of a social enterprise.<sup>123</sup> To illustrate, this Article will use the Delaware Public Benefit Corporation (“PBC”) and the Benefit Corporation Model (“Model”) examples. According to Murray, when compared to the Model, Delaware’s PBC allows for more “private ordering.”<sup>124</sup>

On the one hand, the Model mandates a very broad general purpose—to pursue a “general public benefit.”<sup>125</sup> This broad mandatory language puts a heavy burden on the directors of the social enterprise to “consider numerous stakeholders in every decision.”<sup>126</sup> The Model doesn’t require specific public benefit purpose. The purpose of the entity in the Model is for the “general public benefit,” and entities can also decide to opt to use “specific public benefit” purpose(s) but are not required to do so.<sup>127</sup>

On the other hand, in Delaware, in line with its philosophy of allowing flexibility and private ordering, PBCs are required to choose a specific public benefit purpose(s). The Delaware PBC model, therefore, provides directors more guidance because the purpose of the corporation can be flexible, thereby allowing both broad and narrow purposes in the organizational documents.<sup>128</sup>

It should be noted that there is also a debate over the word “balance[.]” in Delaware’s PBC model,<sup>129</sup> which some claim creates a heavy burden and uncertainty for directors, as they are required to balance “[1] the pecuniary

121. Murray, *supra* note 38.

122. William Callison, *Putting New Sheets on Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, The Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85 (2012).

123. See generally Murray, *supra* note 38 (comparing Delaware’s PBC with the Model).

124. *Id.* at 354. Murray uses “Private Ordering” to describe company specific contractual provisions regarding corporate governance. *Id.* at 351.

125. MODEL BENEFIT CORP. LEGIS. § 201(a) (2017). See also Murray, *supra* note 38, at 353 (emphasizing the lack of clarity in the phrase “general public benefit”).

126. Murray, *supra* note 38, at 353.

127. See MODEL BENEFIT CORP. LEGIS. § 201(b) (2017) (explaining that benefit corporations may, but are not required to, list a specific public benefit purpose).

128. See Murray, *supra* note 38, at 355 (suggesting that Delaware provides some direction).

129. DEL. CODE ANN. tit. 8, § 365(a) (2018).

interests of the stockholders, [2] the best interests of those materially affected by the corporation's conduct, and [3] the specific public benefit or benefits identified in [the] certificate of incorporation.”<sup>130</sup>

To assist directors with their daily decision making, there is a need to carve out who are the stakeholders, whose interests they need to take into account. This is discussed in more detail below.

### 3. Stakeholders

Social enterprises advance the stakeholder theory to strategic management. This theory first came to light in the mid-1980's, with Edward Freeman's seminal work, *Strategic Management - A Stakeholder Approach* (1984).<sup>131</sup> The stakeholder approach movement is intended to give managers a framework within which to deal with constant changes in the environment, society, technology and industry.<sup>132</sup>

In order to develop business strategies that will encourage long term success, managers need to take into account all stakeholders, not merely stockholders.<sup>133</sup> This approach defines “stakeholders” as “any group or individual who is affected by or can affect the achievement of an organization's objectives.”<sup>134</sup>

There is an ongoing debate between scholars of the traditional view of fiduciary duty,<sup>135</sup> who claim that management is presumably responsible for

130. Murray, *supra* note 38, at 355.

131. See Edward Freeman et al., *A Stakeholder Approach to Strategic Management* (Darden Sch. of Bus, Working Paper No. 01-02, 2001), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=263511](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=263511) [<https://perma.cc/S8NT-HU3J>]. Freeman built his work on the writings of Ian Mitroff and Richard Mason. See IAN MITROFF & RICHARD MASON, *CHALLENGING STRATEGIC ASSUMPTION* (New York: Wiley, 1982); JAMES EMSHOFF, *MANAGERIAL BREAKTHROUGHS* (AMACOM, 1978) (stating that “[t]he impetus behind stakeholder management was to try and build a framework that was responsive to the concerns of managers who were being buffeted by unprecedented levels of environmental turbulence and change” and “[a] stakeholder approach was a response to this challenge”).

132.

“The purpose of stakeholder management was to devise methods to manage the myriad groups and relationships that resulted in a strategic fashion. While the stakeholder framework had roots in a number of academic fields, its heart lay in the clinical studies of management practitioners that were carried out over ten years through the Busch Center, the Wharton Applied Research Center, and the Managerial and Behavioral Science Center, all at The Wharton School, University of Pennsylvania by a host of researchers.”

Freeman et al, *supra* note 131.

133. The stakeholder approach theory has “four main building blocks”: corporate planning, systems theory, corporate social responsibility and organizational theory. *Id.*

134. *Id.*

135. See generally Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38

protecting the interests of the shareholders,<sup>136</sup> and scholars of the stakeholder approach, who claim that management is responsible for protecting the interest of all stakeholders.<sup>137</sup>

The stakeholder approach is a “strategic management process” and not merely a strategic planning process.<sup>138</sup> The strategic management process allows management to actively design a new direction for the firm, which will take into account how the firm can have an effect on the environment, in addition to how the environment possibly will affect the firm.<sup>139</sup>

This Article suggests that if the intention of the social enterprise legislation is to allow management to center on long-term strategic planning, encourage research and development, and invest in vehicles to benefit the current as well as future generations (while taking into account stakeholder interests), then management should have the option to define the stakeholder groups to consider. Therefore, this Article advances the view that there should be a clear definition on who is included in the enterprise’s community of stakeholders. The following is a breakdown of potential stakeholder groups that management can include in its legal organizational documents.

a. *Academic & Research Community*

The academic and research communities include higher education institutions, such as universities, community colleges, and other research institutions, such as government research facilities and laboratories.

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B. C. L. REV. 595 (1997) (describing the origin and development of fiduciary duty).

136. *Id.* See also OLIVER WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (Free Press, 1984) (reformulating the development of capitalism in terms of transaction cost economization and evaluating economic problems through the institutions of contract); Freeman et al., *supra* note 131 (“Williamson [1984] used a transaction cost framework to show that shareholders deserved special consideration over other stakeholders because of “asset specificity.”; “He argued that a shareholder’s stake was uniquely tied to the success of the firm and would have no residual value should the firm fail, unlike, for example, the labor of a worker”).

137. Freeman and Evan [1990] have argued, to the contrary, that Williamson’s approach to corporate governance can indeed be used to explain all stakeholders’ relationships. Many other stakeholders have stakes that are, to a degree, firm specific. Furthermore, shareholders have a more liquid market (the stock market) for exit than most other stakeholders. Thus, asset specificity alone does not grant a prime responsibility towards stockholders at the expense of all others. Freeman et al., *supra* note 131. See also William M. Evan & Edward R. Freeman, *A stakeholder theory of the modern corporation: Kantian capitalism*, in TOM BEAUCHAMP & NORMAN E. BOWIE, ETHICAL THEORY AND BUSINESS 75-84 (Prentice Hall, 5th ed. 1993) (suggesting that a duty is owed not only to stockholders, but to all stakeholders).

138. Freeman et al., *supra* note 131 (“Strategic planning focuses on trying to predict the future environment and then independently developing plans for the firm to exploit its position”).

139. *Id.*

There is a debate on whether enterprises are required to take this group into account. On the one hand, scholars, like Nelson, are adamant about the significance that higher education institutions (and national systems of innovation)<sup>140</sup> should play in the new knowledge economy.<sup>141</sup> Nelson claims that the “standard” growth theory in economics concentrates on the roles of the business firms (including the constraints and incentives that are provided by competition in a market setting) and is blind to a wide range of other institutions that have played key roles in stimulating growth and driving innovation, like higher education institutions.<sup>142</sup>

On the other hand, scholars like Philippe Larédo and Philippe Mustar contest the role of universities and government laboratories in leading research initiatives, stating that higher education institutions control research strategy and missions, and that their “monopoly”<sup>143</sup> over research strategy should end because “even fundamental research becomes driven by ‘problem solving.’”<sup>144</sup>

This Article supports the view that managers of social enterprises should have flexibility to take into account these interests, but also encourages collaboration with higher institutions and research agencies because higher education institutions have a key role in the new knowledge economy,<sup>145</sup> especially since they can provide innovative solutions and address the particular needs of the region’s core industry. Therefore, the academic entities in this category can play a variety of roles. They can encourage collaboration, cooperation, open innovation, shared-use facilities and technology transfer from the participating research institutions to marketable products or manufacturing process. Also, they can provide guidance to the social enterprises.

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140. The term “systems” means a “set of institutional actors that, together, play[ ] the major role in influencing innovative performance.” RICHARD NELSON, NATIONAL INNOVATION SYSTEMS: A COMPARATIVE ANALYSIS 4-5 (Oxford Univ. Press, 1993).

141. *See id.* *See also* Philippe Larédo & Philippe Mustar, *Public Sector Research: A Growing Role In Innovation Systems*, 42 MINERVA 11 (2004) (explaining the recent advances of universities).

142. Nelson, *supra* note 140.

143. Larédo & Mustar, *supra* note 141.

144. *Id.* *See also* MICHAEL GIBBONS ET AL., THE NEW PRODUCTION OF KNOWLEDGE: THE DYNAMICS OF SCIENCE AND RESEARCH IN CONTEMPORARY SOCIETIES (1994).

145. *See* Larédo & Mustar, *supra* note 141 (stressing the importance of higher education establishments). *See also* Nelson, *supra* note 140 (emphasizing the value of higher education organizations); NATIONAL SYSTEMS OF INNOVATION: TOWARDS A THEORY OF INNOVATION AND INTERACTIVE LEARNING (Bengt-Åke Lundvall ed., Anthem Press 1992) (first person to use term; national system of innovation is social and dynamic); SYSTEMS OF INNOVATION: TECHNOLOGIES, INSTITUTIONS AND ORGANIZATIONS 348 (Charles Edquist ed., 1997) (explaining the significance of universities).

b. *Industry & Economic Development Organizations*

Industry and other organizations for collaboration include, but are not limited to, industry consortia and trade groups, economic development organizations, labor organizations, chambers of commerce, professional associations, and university alumni associations.<sup>146</sup> These organizations can promote the social enterprise's initiatives through marketing, outreach, and collaboration with other similar organizations.<sup>147</sup> They usually specialize in providing forums in which participants can collaborate and network. Again, management should have flexibility to take their interests into account.

c. *Federal, State, Regional & Local Government*

The government stakeholders can take a range of forms, and impose various regulatory constraints, such as zoning. Regional, state and federal governments are likely to be present through initiatives such as research and development grants and other funding. These initiatives are executed by various agencies such as commerce, labor and economic development, whereas economic development companies usually represent the local government. All these government entities can serve as a future client or provider for social enterprises. Therefore, management should have the flexibility of taking their interests into account.<sup>148</sup>

d. *Financial sector*

The financial sector involves various financial investors and institutions, such as angel groups, venture capitalists, impact investors, investment banks, crowdfunding platforms and others. They can take on several roles to help the social enterprise, such as providing seed, angel and venture capital or impact funding, making loans, and creating follow on investment funds. These are strong groups that will probably make sure that their interests are taken into account. Most of them will use a contractual arrangement with the ventures.<sup>149</sup>

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146. BERNA DEMIRALP, PH.D. ET AL., THE EVALUATION OF THE U.S. SMALL BUSINESS ADMINISTRATION'S REGIONAL CLUSTER INITIATIVE: YEAR ONE REPORT (2012), [https://www.sba.gov/sites/default/files/aboutsbaarticle/Evaluation\\_of\\_the\\_SBA\\_Regional\\_Cluster\\_Initiative\\_Year\\_1\\_2012\\_06.pdf](https://www.sba.gov/sites/default/files/aboutsbaarticle/Evaluation_of_the_SBA_Regional_Cluster_Initiative_Year_1_2012_06.pdf) [<https://perma.cc/E7E8-WAYM>].

147. Ofer Eldar, *The Role of Social Enterprise and Hybrid Organizations*, 2017 COLUM. BUS. L. REV. 92 (2017).

148. Roger L. Martin & Sally R. Osberg, *Two Keys to Sustainable Social Enterprise*, HARV. BUS. REV., May 2015.

149. Aaron Burke & Ranajoy Basu, *Social Impact Investing: the Growing Trend of Financing for Good*, J. OF INT'L BANKING AND FIN. L., Aug. 30, 2016.



e. *Traditional stakeholders*

These stakeholders include customers, employees, creditors, suppliers, and other non-shareholder groups, which will supply the partnership with resources (such as funding, labor, expertise, infrastructure, etc.).<sup>150</sup> Their interests should be taken into account.

4. The Identity of the Social Entrepreneur

There is a need to focus on the identity of the founder of the social enterprise and their strategy.<sup>151</sup> In practice, impact investors, as well as many of the foundations, like Ashoka, put substantial emphasis on the identity, character, mission and strategy of the founder, and how she interacts in the market with other economic actors in order to get access to services and resources. This Article also proposes a “social entrepreneur” test below that will help with determining the credibility of the founder. For example, the enterprise’s impact is not limited to the resources that the social entrepreneur was able to pull together, as discussed below.<sup>152</sup>

5. Innovation & Change

The current social enterprise legislation is not clear on whether “innovation” or “change” are elements in the definition of a social enterprise. This Article supports the view that they are. The social enterprise will identify an “unjust equilibrium”<sup>153</sup> in the market and will carry out its business in an innovative system-changing way to fix or alleviate the problem.

This proposal builds on Schumpeter’s<sup>154</sup> creative destruction innovation

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150. Stout, *The Corporation As Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, *supra* note 4 (defining “stakeholders”)

151. The need to focus on the entrepreneur when defining social entrepreneurship was also expressed by the Director of Ashoka, Felix Oldenburg. Felix Oldenburg, *How Should A Social Entrepreneur Be Defined, By Their Impact Or Their Income Strategy?*, <https://www.ashoka.org/en/story/how-should-social-entrepreneur-be-defined-their-impact-or-their-income-strategy> [<https://perma.cc/G989-CR7X>].

152. See Howard H. Stevenson et al., *A paradigm of Entrepreneurship: Entrepreneurial Management*, 11 STRAT. MGMT. 17, 17-27 (1990); Gregory J. Dees, *The Meaning of Social Entrepreneurship*, DUKE INNOVATION & ENTREPRENEURSHIP, <https://entrepreneurship.duke.edu/news-item/the-meaning-of-social-entrepreneurship/> [<https://perma.cc/K5QG-5YJL>].

153. See Roger L. Martin & Sally Osberg, *Social Entrepreneurship: The Case for Definition*, 8 STAN. SOC. INNOVATION REV. 28 (2007) (arguing for a more rigorous and concrete definition of social entrepreneurship).

154. See David B. Audretsch, *Entrepreneurship A Survey of the Literature*, Enterprise Directorate-General European Commission Enterprise Papers No. 14, at 5 (2003) (discussing

theory.<sup>155</sup> Accordingly, the social enterprise should center on an innovative social, economic, and environmental business model that will disrupt the market in system-changing ways, while creating and sustaining social impact.

The terms “entrepreneurship,” “innovation,” and “change” have a rich history and some originated in French economics.<sup>156</sup> Say and Schumpeter are the economists responsible for requiring the entrepreneur to act as a “change agent” and to be labeled as such.<sup>157</sup> According to Jean-Baptiste Say,<sup>158</sup> the entrepreneur is a “master-agent” and being an entrepreneur “requires a combination of moral qualities, that are not often found together,” such as “[j]udgment, perseverance, and a knowledge of the world as well as of business.”<sup>159</sup> That is why this test, which is built on the foundations of entrepreneurship and innovation theories, will also focus on the identity of the entrepreneur.

#### 6. Provide a New Service, Process, Solution, or Product

The social enterprise will provide a new product, solution, process or service for free, or at a lower cost, to its customer. This element is building on the work of Roger L. Martin and Sally Osberg, who argue that in order to

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how Schumpeter’s theory has had the utmost influence on contemporary entrepreneurship literature); *see also* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (2nd ed. 1947) (introducing a new perspective on global economics through the concept of creative destruction). *See generally* JOSEPH A. SCHUMPETER, THEORIE DER WIRTSCHAFTLICHEN ENTWICKLUNG (THEORY OF ECONOMIC DEVELOPMENT) (1911) (analyzing capitalist society and the underlying principles of entrepreneurial profit).

155. Schumpeter, *supra* note 154.

156. Dees, *supra* note 152.

157. Schumpeter, *supra* note 154; Say, *infra* note 158.

158. *See* JEAN-BAPTISTE SAY, A TREATISE ON POLITICAL ECONOMY, OR THE PRODUCTION, DISTRIBUTION, AND CONSUMPTION OF WEALTH, at 329 (C.R. Prinsep trans., Sentry Press 1964) (1803) (emphasizing the entrepreneur’s proclivity to generate new resources such as products or processes); *see also* David E. Pozen, *We Are All Entrepreneurs Now*, 43 WAKE FOREST L. REV. 283, 287-92 (2008) (“A vast crop of empirical studies have attempted to analyze the relationship between entrepreneurial activities, government policies relevant thereto, and economic performance, generally corroborating the commonsense insight that entrepreneurship can facilitate growth.”). According to Pozen, Say was “the one most often credited with elevating the concept to prominence in economic theory” that entrepreneurship “involves not only the relocation of existing economic resources but also the generation of new resources; it is a positive-sum, not a zero-sum, game.”

159. *See* Pozen, *supra* note 158, at 287. In order to fully understand the role of the individual entrepreneur in history, we must begin with evaluating the entrepreneur’s role in the traditional “free market” ideology. O’Kelley, *infra* note 191, at 756-57. According to O’Kelley, “economists working in the tradition of Adam Smith (unlike corporation law scholars) continued to give the entrepreneur a central piece in their study of capitalism long after the birth of the New Deal.”

enable the philanthropic community to accurately determine and support the different funding needs of social entrepreneurs, we first need to distinguish among social entrepreneurs, social activists, and social service providers.<sup>160</sup>

According to Martin and Osberg, social service provision is not the same as social entrepreneurship. For example, setting up a new school to aid orphans with AIDS in Africa

... would certainly help the children it serves and may very well enable some of them to break free from poverty and transform their lives. But unless it is designed to achieve large scale or is so compelling as to launch legions of imitators and replicators, it is not likely to lead to a new superior equilibrium.<sup>161</sup>

Additionally, social activism is not social entrepreneurship because “the social activist attempts to create change through indirect action, by influencing others – governments, NGOs, consumers, workers, etc. – to take action.”<sup>162</sup>

There is a lot of gray area, and distinguishing between these various types of social ventures can be very difficult. Therefore, this Article proposes a more flexible approach where a social enterprise can be categorized as such if (1) it provides a new product, solution, process or service (2) for free, or at a lower cost, (3) to its customer or user. The Article is also flexible about the social enterprise’s outreach. The social enterprise should reach a broad target population.<sup>163</sup> However, unlike Martin and Osberg, this Article supports the view that if the target population is regional or local, it does not preclude the entity from being regarded as a social enterprise.

## 7. Value Creation

While wealth creation, profit, and even serving the needs of customers can be a part of a social enterprise’s business model, the main purpose of the enterprise is to create social value.<sup>164</sup>

Social enterprises that are also concerned with wealth creation need to redefine their purpose as creating “shared value.”<sup>165</sup> The economic value that

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160. See Martin & Osberg, *supra* note 148 (arguing for clearer boundaries of what entities constitute social entrepreneurship).

161. *Id.* at 36.

162. *Id.* at 37.

163. *Id.*

164. See Dees, *The Meaning of ‘Social Entrepreneurship*, *supra* note 152 (distinguishing the differences between businesses and social entrepreneurs).

165. See Michael E. Porter & Mark R. Kramer, *Creating Shared Value: How to Reinvent Capitalism – and Unleash a Wave of Innovation and Growth*, 89 HARV. BUS. REV. 62, 65 (2011) (“[T]he concept of shared value... recognizes that societal needs, not just

the social enterprise is generating must be tied to social progress and, moreover, be conducted in a way that produces value for society by fixing (or alleviating) the social problem that it addresses.

There are many ways for firms to create shared value. According to Porter and Kramer, firms can create shared value in three distinct ways: “by reconceiving products and markets, redefining productivity in the value chain, and building supportive industry clusters at the company’s locations.”<sup>166</sup>

These requirements are not meant to be exhaustive, but rather illustrate that various characteristics can help certify a firm as a “social enterprise” and help with harmonizing state law.

The following provides a historic-doctrinal review of the development of social entrepreneurship and entrepreneurship research by introducing some of the pioneers that have fashioned this research during the past few years.

## II. THE DEVELOPMENT OF SOCIAL ENTREPRENEURSHIP

This Article will explore the meaning of the concept “entrepreneurship” as it is rooted in the definition of “social entrepreneurship.”<sup>167</sup> There should be a clear distinction between an innovation driven entrepreneurial firm and a small or medium business enterprise.<sup>168</sup>

### A. *Defining Entrepreneurship*

Entrepreneurial businesses contribute to job creation as they employ

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conventional economic needs, define markets.”). *See also*, ERIC ORTS AND JOANNE SPIGONARDO, INITIATIVE FOR GLOBAL ENVIRONMENTAL LEADERSHIP SPECIAL REPORT - THE CIRCULAR ECONOMY: FROM CONCEPT TO BUSINESS REALITY 2 (2017) (“Digital economy and ‘big data’ make the sharing economy possible, and its growth has been dramatic in virtually every industry.”).

166. Porter & Kramer, *supra* note 165, at 67.

167. *See* Keohane, *infra* note 291, at 11 (explaining how the entrepreneur provides the force for economic progress and production). *See also*, Abu-Saifan, *supra* note 12 (advocating clear definitions on which social or profit-making activities fall within the category of social entrepreneurship).

168. *See* Annie Lowrey, *Why Small Businesses Aren’t Innovative*, SLATE (Sept. 19, 2011), [http://www.slate.com/articles/business/small\\_business/2011/09/why\\_small\\_businesses\\_aren\\_t\\_innovative.html](http://www.slate.com/articles/business/small_business/2011/09/why_small_businesses_aren_t_innovative.html) [<https://perma.cc/67MB-MA8J>] (last visited Dec. 9, 2014) (dispelling the widespread stereotype that small businesses are start-up innovators). *See also* Aulet & Murray, *supra* note 16 (discussing the differences between the two subcategories of social entrepreneurship with respect to the drastically different risk profiles and types of jobs created).

about half of the private-sector workers in the United States and contribute to market innovation.<sup>169</sup> As noted above, there should be a distinction between an innovation driven entrepreneurial firm and a small or medium business enterprise.<sup>170</sup> As journalist Annie Lowrey puts it:

Scupper the image of Mark Zuckerberg handcrafting a new service to revolutionize how we socialize and adding thousands of jobs to the economy. Replace it with the image of a gas-station owner, servicing a crowded market, happy to be able to make his kid's soccer games without a boss breathing down his neck, and more wary of innovation than eager for it.<sup>171</sup>

Several scholars<sup>172</sup> have attempted to define what constitutes an “entrepreneur” and to show that the classic small business owner is different than the innovation-driven entrepreneur.<sup>173</sup> Hurst and Pugsley<sup>174</sup> demonstrate in a new study that the distinction between the small business owner and an innovation-driven entrepreneur is very important because most small businesses do not innovate, remain small in size throughout their existence, and do not provide the desired job creation that policymakers are intending to create. Moreover, Hurst and Pugsley also illustrate how very few of the small businesses in the market actually spend resources on innovation, such as filing for protection of intellectual property rights or investing in research or development.<sup>175</sup>

There is, therefore, a case for defining the term “entrepreneurship.” The term entrepreneurship is widely used today in popular media, academic theory, research, policy and politics.<sup>176</sup> Institutions of higher education are

169. WILLIAM D. BYGRAVE, *The Entrepreneurial Process*, in THE PORTABLE MBA IN ENTREPRENEURSHIP (William D. Bygrave and Andrew Zacharakis eds., 2010); Ryan Decker et. al., *The Role of Entrepreneurship in US Job Creation and Economic Dynamism*, 28 J. OF ECON. PERSP. 3 (2014).

170. See Lowrey, *supra* note 168 (explaining that government programs aimed at helping small businesses are not necessarily going to reach innovating businesses because small businesses generally do not bring new ideas to the market). See also Aulet & Murray, *supra* note 16 (contrasting small medium enterprises that are the life blood of many developing economies with innovation-driven enterprises that are focused from the inception on addressing global markets).

171. Lowrey, *supra* note 168.

172. See Erik Hurst & Benjamin Wild Pugsley, *What Do Small Businesses Do?* 43 BROOKINGS INST. 1, 37 (2011), [https://www.brookings.edu/wp-content/uploads/2016/07/2011\\_fall\\_bpea\\_conference\\_hurst.pdf](https://www.brookings.edu/wp-content/uploads/2016/07/2011_fall_bpea_conference_hurst.pdf) [<https://perma.cc/4C4U-ATVW>] (reporting results from their study that showed most small businesses in the United States and in other countries do not want to grow or innovate but for different reasons).

173. *Id.*

174. *Id.*

175. *Id.*

176. See generally Alon-Beck, *supra* note 96 (providing an example of how entrepreneurship has become the center of both governmental and private industry initiatives).

now expanding their curricular offerings to include programs on entrepreneurship.<sup>177</sup> Policymakers and regulators from countries around the world<sup>178</sup> are trying to develop ways to encourage entrepreneurial behavior in order to strengthen their economic performance.<sup>179</sup> During the 2016 elections, both presidential candidates, Hillary Clinton and Donald Trump, made promises that if elected, they would support entrepreneurial activities and facilitate new firm formations that would create more jobs in the United States.<sup>180</sup>

Many economic institutions, from regional to international bodies around the world, are encouraging entrepreneurship as a central policy goal.<sup>181</sup> In the international arena, the United Nations (“UN”), passed its “Entrepreneurship for Development” resolution in December 2012, recognizing “that entrepreneurship should be a major tool in reducing poverty, creating sustainable development, and reinvigorating the environment.”<sup>182</sup> The UN’s declaration sustains the recent work by management scholars on the principle of shared value,<sup>183</sup> suggesting that

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177. *Id.*

178. *See, e.g.*, Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

179. *See* Alon-Beck, *supra* note 96 (discussing Startup America and other federal initiatives led by the Obama Administration to foster innovation, entrepreneurship, and economic growth).

180. *See, e.g.*, *Policy Proposal on Technology & Innovation*, THE OFFICE OF HILLARY RODHAM CLINTON, <https://www.hillaryclinton.com/issues/technology-and-innovation/> [<https://perma.cc/3FCR-XT4V>] (last visited May 10, 2018). *See also*, Jonathan Ortmans, *Measuring Presidential Agendas, Mapping the Future of Entrepreneurship Policy*, KAUFFMAN FOUNDATION: POLICY DIALOGUE ON ENTREPRENEURSHIP (July 11, 2016), <http://www.kauffman.org/blogs/policy-dialogue/2016/july/measuring-presidential-agendas-mapping-the-future-of-entrepreneurship-policy> [<https://perma.cc/65PV-7JY2>] (reporting that the Clinton campaign proposed working with incubators, accelerators, and mentoring programs to support entrepreneurship and that Trump did not offer a formal roadmap but indicated he would work with Bill Gates on Internet issue).

181. *See* Alon-Beck, *supra* note 96 (detailing the Obama Administration’s efforts to enact federal laws to stimulate entrepreneurial activity nationwide); *see also* Amir N. Licht, *The Entrepreneurial Spirit and What the Law Can Do About It*, 28 COMP. LAB. L. & POL’Y J. 817 (2007) (evaluating the efficacies of legal measures that regulate the creation and dissolution of new ventures).

182. Issue Papers, The Israel Project, United Nations Passes Israeli Development Resolution Focusing On Entrepreneurship, Innovation News (December 7, 2012), <http://www.theisraelproject.org/united-nations-passes-israeli-development-resolution-focusing-on-entrepreneurship-innovation> [<https://perma.cc/3D9J-TAP6>].

183. *See* Porter & Kramer, *supra* note 165, at 65.

[T]he concept of shared value... recognizes that societal needs, not just conventional economic needs, define markets. It also recognizes that social harms or weaknesses frequently create internal costs for firms—such as wasted energy or raw materials, costly accidents, and the need for remedial training to compensate for inadequacies in education.

social and economic value can, and must be, considered as harmonious rather than exclusive of one another.<sup>184</sup>

All these initiatives and hopes for job creation and economic growth are very needed, however, it is not clear which kind of entrepreneurship these actors are trying to promote. There is no single agreed definition for the concept “entrepreneur” in the literature.<sup>185</sup> It is also unclear whether self-employment and ownership of a small firm,<sup>186</sup> or self-employment by itself, is sufficient to describe an entrepreneur, or “whether innovation is a necessary element [to describe] entrepreneurship.”<sup>187</sup>

This Article will try to verify the history and intellectual origin of the concept “entrepreneur” over the past few decades, while focusing on the innovation driven social entrepreneur. It also recognizes that there are

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*See also*, Orts & Spigonardo, *supra* note 165 (“Digital technology and ‘big data’ make the sharing economy possible, and its growth has been dramatic in virtually every industry”).

184. Porter & Kramer, *supra* note 165; *see also*, Licht, *supra* note 181, at 817-18 (noting that the empirical literature on entrepreneurship and its enhancement of economic growth is very small: “studies using the GEM data find that entrepreneurship may be conducive to economic growth, although the relations may not be monotonic.”).

185. *See* Licht, *supra* note 181, at 819-20 (discussing the lack of an agreed upon definition of entrepreneurship causing a disarray in the literature); Dan Johanson, *Economics without Entrepreneurship or Institutions: A Vocabulary Analysis of Graduate Textbooks*, 1 ECON. J. WATCH 515, 517 (2004) (“[T]here is no universally accepted definition of the entrepreneur or of the entrepreneurial function.”); *see also* Erik Hurst & Benjamin Wild Pugsley, *What Do Small Businesses Do?*, Brookings Papers on Economic Activity, 43 BROOKINGS INST. 73 (2011), [https://www.brookings.edu/wp-content/uploads/2011/09/2011b\\_bpea\\_hurst.pdf](https://www.brookings.edu/wp-content/uploads/2011/09/2011b_bpea_hurst.pdf) [<https://perma.cc/VSM5-42UN>] (discussing the economic theory that generally deems “entrepreneurs as individuals who (1) innovate and render aging technologies obsolete (Schumpeter, 1942), (2) take economic risks (Knight (1921); Kihlstrom and Laffont (1979); Kanbur (1979), and Jovanovic (1979)), or (3) are considered jacks-of-all-trades in the sense that they have a broad skill set (Lazear, 2005). Policy makers often consider entrepreneurs to be job creators or the engines of economic growth.”); *Entrepreneur*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (2014), <http://www.merriam-webster.com/dictionary/entrepreneur> [<https://perma.cc/2WLN-LSYZ>] (defining entrepreneur as “one who organizes, manages, and assumes the risks of a business or enterprise.”); *Entrepreneur*, THE NEW OXFORD AMERICAN DICTIONARY (2014), [http://www.oxforddictionaries.com/us/definition/american\\_english/entrepreneur](http://www.oxforddictionaries.com/us/definition/american_english/entrepreneur) [<https://perma.cc/B5D7-AS5Z>] (defining entrepreneur as “[a] person who organizes and operates a business or businesses, taking on greater than normal financial risks in order to do so.”).

186. It should be noted that R.H. Coase developed a definition for the concept “firm.” *See* R.H. Coase, *The Nature of the Firm*, 4 ECONOMIA 386 (1937) (explaining what constitutes a “firm”).

187. Licht, *supra* note 181, at 820. *See also* Charles R. T. O’Kelley, *Coase, Knight, and the Nexus-of-Contracts Theory of the Firm: A Reflection on Reification, Reality, and the Corporation as Entrepreneur Surrogate*, 35 SEATTLE UNIV. L. R. 1247, 1250 (2012) (“[C]oase . . . saw the firm as having an ‘inside’ and an ‘outside’ and a distinct central actor – the entrepreneur. . . . Coase looked inside the firm and identified the entrepreneur as the central economic actor; it was the entrepreneur who consciously allocated resources within the firm by command.”).

different types of entrepreneurship with diverse economic roles, which require customized policies to support each type of entrepreneurship on a case-by-case basis.

Quite a few authors have associated entrepreneurs with “capitalist cowboys,”<sup>188</sup> who react autonomously and instinctively to the signals of the marketplace without regard for intervention (or interference) from the government. Ironically, there is a strong historical relationship between the term “entrepreneur” and government collaboration, employment or association.<sup>189</sup> For example, according to the economist Suzanne Scotchmer, the earliest entrepreneur to be recognized in history was Imhotep, a government employee who designed and essentially invented the pyramids.<sup>190</sup>

To define “social entrepreneur”, this Article will briefly describe the role played by the individual entrepreneur in the history of economic theory, beginning with the traditional “free market” ideology.

### 1. Classical and Neo-Classical vs. Contemporary Economists

Classical and neo-classical theories<sup>191</sup> support an economic and political structure that gives strong private property legal rights to the entrepreneur

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188. JOSH LERNER, *BOULEVARD OF BROKEN DREAMS: WHY PUBLIC EFFORTS TO BOOST ENTREPRENEURSHIP AND VENTURE CAPITAL HAVE FAILED — AND WHAT TO DO ABOUT IT* 25 (Princeton University Press 2009) [hereinafter *Boulevard of Broken Dreams*].

189. See ROBERT F. HÉBERT & ALBERT N. LINK, *A HISTORY OF ENTREPRENEURSHIP* 5 (Routledge, 1st ed. 2009) (the term “entrepreneur” was defined as “one who undertakes a project; a manufacturer, a master builder.”). This was verified by the Savary’s *Dictionnaire Universel de Commerce* (1723). *Id.* Moreover, we can even find an earlier version of the term – *entrepreneur* – that appears as early as the fourteenth century. *Id.* (citing B.F. HOSELITZ, *The early history of entrepreneurial theory*, in *ESSAYS IN ECONOMIC THOUGHT: ARISTOTLE TO MARSHALL* 235-57 (J.J. Spengler & W.R. Allen eds., Chicago Rand McNally 1960)).

190. See SUZANNE SCOTCHMER, *INNOVATION AND INCENTIVES* 4 (MIT Press, 2004) (“The first known inventor was a ‘government employee,’ Imhotep, who lived in Egypt about 2650 BC. He built the first pyramid, and was probably a Da Vinci-like genius, who also served as a priest, scholar, sculptor, carpenter, poet, and doctor. Greek and Roman writers continued to revere him, albeit as an exaggerated, wizard-like figure, well into the Christian era. Imhotep’s innovations were steadily eclipsed by later pyramid builders, all ‘government employees.’”); see also Alon-Beck, *supra* note 96 (encouraging governments to fund innovation).

191. These theories started in 1776 with the work of ADAM SMITH, *THE WEALTH OF NATIONS* (1776), and continued for almost 200 years after. See also Charles R.T. O’Kelley, *The Entrepreneur and the Theory of the Modern Corporation*, 31 J. CORP. L. 753, 756-57 (2006) (“economists working in the tradition of Adam Smith (unlike corporation law scholars) continued to give the entrepreneur a central piece in their study and defense of capitalism long after the birth of the New Deal.”).



(and her “wealth and power”<sup>192</sup>). According to these theories, the entrepreneur can control her business assets, and also, put strict limitations on the power of government to control or regulate their economic activity.<sup>193</sup> However, surprisingly, classical and neoclassical economists have not assigned significance to the entrepreneur in their market models.<sup>194</sup>

On the other hand, contemporary economists, such as Baumol, do not forsake the significance of the entrepreneur in a market model.<sup>195</sup> Baumol recognizes how important entrepreneurs are “for the workings of the free-market economy in general and for its growth and innovation in particular”<sup>196</sup> and has “joined the call”<sup>197</sup> for the restoration of the entrepreneurs’ place in

192. O’Kelley, *supra* note 191, at 757 (stating that the political and economic system is “supportive of the individual entrepreneur’s wealth and power . . .”). See also Harold Demsetz, *The Theory of the Firm Revisited*, 4 J.L. ECON. & ORG. 141, 141-161 (1988) (discussing how decentralization leads to the maximization of wealth in complete disregard of others).

193. O’Kelley, *supra* note 191; see also Demsetz, *supra* note 192 (discussing the decentralization of resource ownership).

194. See Pozen, *supra* note 158, at 288-89 (commenting on Adam Smith’s work, finding that Smith (along with economist David Ricardo) does not pay special tribute to the entrepreneur, and moreover, that the entrepreneur is “largely absent” from his work.). Pozen goes on to suggest that, in the same manner, if we turn to the neoclassical economists (for instance, Alfred Marshall & A.C. Pigou, and the mid-to-late twentieth century economists Milton Friedman and George Stigler), we will find that they undervalue entrepreneurship in their models, as they “tended to trivialize entrepreneurship in their formal models of a steady-state economy.” *Id.* Pozen explains that “it remains deeply ironic that the academic discipline most focused on the capitalist process has so marginalized the entrepreneur, while lawyers, sociologists, and political scientists cannot stop talking about her.” *Id.*

195. William J. Baumol, *Return of the Invisible Men: The Microeconomic Value Theory of Inventors and Entrepreneurs*, Allied Social Science Associations Conference (Jan. 7, 2006), <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=28C0775C31044415B0A2EF5F9AC6E78E?doi=10.1.1.75.6753&rep=rep1&type=pdf> [https://perma.cc/7Z6S-VF9L].

196. *Id.*

197. For current endeavors to introduce the entrepreneur to the classical framework, see MARK CASSON, *THE ENTREPRENEUR: AN ECONOMIC THEORY* (1st ed. 1982); see also Milo Bianchi & Magnus Henrekson, *Is Neoclassical Economics Still Entrepreneurless?*, (Kyklos, Working Paper No. 584, 2005), <http://swopec.hhs.se/hastef/papers/hastef0584.pdf> [https://perma.cc/R8E4-HFHN] (“highlight[ing] how a simplistic interpretation of the existing mainstream approaches incorporating entrepreneurship runs the risk of leading to distortionary policy interventions.”); Ying Lowrey, *The Entrepreneur and Entrepreneurship: A Neoclassical Approach* (U.S. Small Bus. Admin. Econ. Research, Working Paper, 2003) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=744785](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=744785) [https://perma.cc/3BCT-9ZD5]. (emphasizing that “[e]ntrepreneurship, specifically, is defined as an ‘economic system’ that consists of three components: (1) entrepreneurs, who desire to achieve their goals of economic survival and advancement; (2) the social constitution, that the entrepreneur’s right of free enterprise is granted; and (3) the government, that has the ability to adjust the economic institutions that can work to protect each individual entrepreneur and to stimulate entrepreneurs’ motive to achieve toward fostering of economic development and growth.”). For a discussion and historical review of the establishment of the firm and the notion of entity shielding, see Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of*

the [economic] theory.”<sup>198</sup>

Therefore, for multiple reasons, it is difficult to devise a clear and inclusive definition of the term “entrepreneurship.” First, there is the question of whether the term “entrepreneur” has to signal that there is some sort of innovation, commercialization or some degree of change<sup>199</sup> involved in the new enterprise, and if so, what kind of change? Change to the enterprise, individual, industry (global or local or regional) or new practice?

## 2. The Debate about Innovation and Change

The term “entrepreneur” has a rich history and was originated in French economics. The first writer to use and introduce this term was Richard Cantillon.<sup>200</sup> Adam Smith and John Stuart Mill followed Cantillon and introduced the concept to the English language.<sup>201</sup>

Abbe Nicholas Baudeau added to the denotation of being an entrepreneur and an innovator.<sup>202</sup> Today, it is very common for people to associate the term “entrepreneur” with “innovator.” However, it is not clear whether “innovation” or “change” are elements in the definition of entrepreneurship.

Say and Schumpeter are the economists responsible for labeling the entrepreneur as a “change agent.”<sup>203</sup> According to Jean-Baptiste Say, the

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*the Firm*, 119 HARV. L. REV. 1333 (2006) (describing the development of entity shielding in four historical epochs: ancient Rome, the Italian Middle Ages, England of the 17th-19th centuries, and the United States from the 19th century to the present).

198. Baumol, *supra* note 195, at 1. (According to “Baumol’s Third Tautology,” innovation is “an entirely heterogeneous output.” Production of whatever was an invention yesterday is mere repetition today. . . . So the job of Schumpeter’s entrepreneur is to destroy all equilibria, while Kirzner’s works to restore them.”).

199. See DAVID B. AUDRETSCH, ENTERPRISE DIRECTORATE-GENERAL, ENTREPRENEURSHIP: A SURVEY OF THE LITERATURE, 3 (2003) (maintaining that “[p]art of the complexity involved with entrepreneurship is that it involves all of these types of organizational forms. No single organizational form can claim a monopoly on entrepreneurship.”).

200. RICHARD CANTILLON, ESSAI SUR LA NATURE DU COMMERCE GENERAL 388 (Henry Higgs eds., trans., Franck Cass & Co. Ltd. 1959) (1755); Hebert & Link, *supra* note 189, at 13.

201. Hebert & Link, *supra* note 189, at 13.

202. According to Baudeau, an “entrepreneur” is the “one who invents and applies new techniques or ideas in order to reduce his costs and thereby raise his profit.” *Id.* at 13 (citing Abbé Nicolas Baudeau, in ABBÉ NICOLAS BAUDEAU, PREMIERE INTRODUCTION À LA PHILOSOPHIE ÉCONOMIQUE (A. Dubois, eds., Paris: P. Geuthner, 1910 [original 1767])). See also Licht, *supra* note 181, at 822 (describing an entrepreneur as having “special skills for innovationFalse”).

203. Dees, *supra* note 152; Say, *supra* note 158. See also Pozen, *supra* note 158, at 287 (stating that Say was “the one most often credited with elevating the concept to prominence in economic theory . . .”). Thanks to Say’s work, entrepreneurship now “involves not only the reallocation of existing economic resources but also the generation of new resources; it is

entrepreneur is a “master-agent,” and being an entrepreneur “requires a combination of moral qualities, that are not often found together, [such as] [j]udgment, perseverance, and a knowledge of the world as well as of business.”<sup>204</sup>

Joseph Schumpeter,<sup>205</sup> the most famous economist who contributed to the theory of entrepreneurship, built on Say’s work and described the entrepreneur as an “innovator” that renders aging technologies obsolete (“the function of entrepreneurs is to reform or revolutionize the pattern of production . . .”),<sup>206</sup> by using the process of “creative destruction.”<sup>207</sup> He also notes that society repeatedly opposes these extreme innovations and changes.<sup>208</sup>

An entrepreneur, according to Schumpeter and Say, means to act as a change agent in the economy.<sup>209</sup> The entrepreneur in their models, moves the economy forward by creating new ways to serve new markets. Therefore, we should distinguish between innovation driven entrepreneurship and other forms of entrepreneurship.

Kirzner builds on Schumpeter’s theory, and adds that the entrepreneur

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a positive-sum, not a zero-sum, game.”)

204. Say, *supra* note 158, at 330; Pozen, *supra* note 158, at 287-88 (quoting Say, *supra* note 158, at 330). In order to fully understand the role of the individual entrepreneur in history, we must begin with evaluating the entrepreneur’s role in the traditional “free market” ideology. O’Kelley, *supra* note 191, at 757. According to O’Kelley, “economists working in the tradition of Adam Smith (unlike corporation law scholars) continued to give the entrepreneur a central piece in their study and defense of capitalism long after the birth of the New Deal.” *Id.* at 756.

205. Schumpeter’s theory has had the utmost influence on the contemporary entrepreneurship literature. Audretsch, *supra* note 199, at 2.

206. *Id.* (quoting Joseph Schumpeter, *CAPITALISM AND DEMOCRACY* 13 (1st ed. 1942)).

207. *Id.* at 44; Pozen, *supra* note 158, at 291; *see also* SCHUMPETER, *THEORIE DER WIRTSCHAFTLICHEN ENTWICKLUNG* (THEORY OF ECONOMIC DEVELOPMENT) 83 (1911) (“Creative destruction” is “process of industrial mutation . . . that incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one.”); Robert M. Solow, *Heavy Thinker*, *NEW REPUBLIC* (May 21, 2007), <http://www.newrepublic.com/article/heavy-thinker> [<https://perma.cc/793C-F9J2>] (“Innovation is not the same thing as invention. Anyone can invent a new product or a new technique of production. The entrepreneur [is the] one who first sees its economic viability, bucks the odds, fights or worms his way into the market, and eventually wins or loses.”).

208. *See* Solow, *supra* note 207 (“Schumpeter’s main legacy to economics: [is] the role of technological and organizational innovation in driving and shaping the growth trajectory of capitalist economies. Whole subfields of economics now pursue the subject of the care, feeding, and consequences of innovation, using qualitative and quantitative, historical and mathematical methods.”); *see also* Pozen, *supra* note 158, at 291 (“Like Marx, Schumpeter thought capitalism unlikely to survive.”); Audretsch, *supra* note 154, at 2 (“Even in his 1942 classic, *Capitalism and Democracy*, Schumpeter (p. 13) still argued that entrenched large corporations tend to resist change, forcing entrepreneurs to start new firms in order to pursue innovative activity . . .”).

209. Dees, *supra* note 13.

is alert in recognizing profitable market opportunities, and takes advantage of the opportunities (providing the pressures that move the economy back toward an equilibrium condition.)<sup>210</sup> Therefore, it is not enough to innovate, as anyone can come up with new ideas. It is also important to include commercialization in our definition. Our entrepreneur has to take advantage of the market opportunities and successfully commercialize her innovation.

How do we label our dentist and other small and medium enterprise owners? Another influential economist, Frank Knight, approached this from a different angle. Knight's leading descriptions of the classic entrepreneur describe the entrepreneur as a "responsible" manager who controls and owns her business.<sup>211</sup> Knight highlighted the entrepreneur's role as a manager, creator, and a bearer of risk<sup>212</sup>, whereas Schumpeter essentially excluded the duties of ownership and the assumption of risk from his description of entrepreneurship.<sup>213</sup> In support of this view, according to the Kauffman Foundation's definition, entrepreneurship enables the conversion of an innovation into a sustainable enterprise, which produces value.<sup>214</sup> Therefore, starting and sustaining an enterprise is also an element of the definition.

The debate continues, on the other hand, famous scholars, like Dees,

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210. Baumol, *supra* note 195, at 2.

211. O'Kelley, *supra* note 191, at 758 (quoting Knight in FRANK H. KNIGHT, RISK, UNCERTAINTY, AND PROFIT 271 (Midway Reprint ed. 1985) (1921)).

212. Knight continued after Cantillon's work. *See also* Pozen, *supra* note 158, at 291-92 ("Knight famously distinguished between risk, which is related to recurring events and is insurable, and uncertainty, which derives from unique events and cannot, Knight claimed, be estimated with any precision.").

213. Knight, *supra* note 211, at 291-312; Pozen, *supra* note 158, at 291-92. *See also* O'Kelley, *supra* note 191, at 760 (O'Kelley interpreted Knight's work to mean that "a reasonable approximation of the classical entrepreneur will be found in control of the typical modern corporation." However, "Knight's view did not predominate." According to O'Kelley, "[T]he ascendancy of the large corporation, the horror of the First World War (coming after nearly a century free from widespread warfare), and the communist in Russia, all played a role in shaping popular sentiment." *See also*, ADOLF F. BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 117 (1932) (Berle and Means claimed that with the quasi-public corporation, individuals (such as the entrepreneur) are no longer in control. Rather, "there are no dominant owners, and control is maintained largely apart from ownership."); ERIC HOBBSAWN, AGE OF EXTREMES: THE SHORT TWENTIETH CENTURY, 1914-1991 6-7 (1994) (According to Hobsawm, "The decades from the outbreak of the First World War to the aftermath of the Second was an Age of Catastrophe for this society. For forty years it stumbled from one calamity to another. It was shaken by two waves of global rebellion and revolution, which brought to power a system to be historically predestined alternative to bourgeois and capitalist society, first over one sixth of the world's land surface, and after the Second World War over one third of the globe's population.").

214. KAUFMAN, ENTREPRENEURSHIP IN AMERICAN HIGHER EDUCATION 5 (2008), available at [http://www.kauffman.org/~media/kauffman\\_org/research%20reports%20and%20covers/2008/07/entrep\\_high\\_ed\\_report.pdf](http://www.kauffman.org/~media/kauffman_org/research%20reports%20and%20covers/2008/07/entrep_high_ed_report.pdf) [https://perma.cc/4HD2-DWT2].

claim that “starting a business is not the essence of entrepreneurship.”<sup>215</sup> Also, Peter Drucker does not require the entrepreneur to start a business “not every new small business is entrepreneurial or represents entrepreneurship,” or to be a change agent.<sup>216</sup> Drucker rather puts emphasis on the element of pursuit of opportunity, and exploiting such opportunities.<sup>217</sup>

Another element that Howard Stevenson adds to this debate is the element of resourcefulness to the opportunity aspect of entrepreneurship. He distinguishes between an “entrepreneurial manager” and an “administrative manager,” and suggests defining entrepreneurial management as one that “pursues opportunity regardless of resources currently controlled.”<sup>218</sup>

### 3. Conclusion

This Article builds on all these theories and joins the call by MIT professors Aulet and Murray to settle this debate by distinguishing between innovation driven entrepreneurship, and small and medium enterprises.<sup>219</sup>

For the purposes of this Article, the term “entrepreneur” will include the elements of innovation, as well as the element of pursuit of opportunity, regardless of the opportunities that the entrepreneur has in hand.

The term “innovation driven entrepreneurial enterprise” includes the elements of invention, but most importantly innovation (commercialization effort), business risk, and uncertainty.

The enterprise will be structured with a goal to reach global (not merely local or regional) markets and audiences. The type of innovation that the venture promotes is not limited to Schumpeter’s disruptive innovation theory, but can be based on process, position, technology, business model innovation or others, and be driven by any category of innovation, such as disruptive, incremental or lateral.<sup>220</sup> Therefore, if the innovation driven enterprise is successful, it will contribute to economic growth by creating large number of jobs.<sup>221</sup>

This Article turns to addressing the problem of defining social

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215. PETER DRUCKER, *INNOVATION AND ENTREPRENEURSHIP* 21 (1985).

216. *Id.*; See also Dees, *supra* note 13, at 2 (“Drucker does not require entrepreneurs to cause change, but sees them as exploiting the opportunities that change (in technology, consumer preferences, social norms, etc.) creates.”).

217. See *id.*

218. Howard H. Stevenson & J. Carlos Jarillo, *A Paradigm of Entrepreneurship: Entrepreneurial Management*, 11 *STRAT. MGMT. J.* 17, 23 (1990). See also Dees, *supra* note 13, at 2 (Stevenson “suggests defining the heart of entrepreneurial management as ‘the pursuit of opportunity without regard to resources currently controlled.’”).

219. Aulet & Murray, *supra* note 16, at 3-4.

220. *Id.*

221. *Id.* at 4.

entrepreneurship.

### B. *Defining Social Entrepreneurship*

Although commonly used, the term “social entrepreneurship” is ill-defined,<sup>222</sup> fragmented, and has no coherent theoretical framework.<sup>223</sup> There is a lot of uncertainty and confusion as to the definition of the term.<sup>224</sup> As there are numerous positions about the meaning and definition of the term.<sup>225</sup> Such differences are attributed to the civic, cultural, ecological, and even geographic origin of the social venture.<sup>226</sup> Therefore, it is very important to reach a consensus on a pragmatic definition of the term, so that researchers can build upon each other’s work, which will result in knowledge accumulation.<sup>227</sup> Hopefully this Article and the proposed tests will contribute to creating a unified simple, pragmatic, and inclusive measurement tool to assess who is a credible social entrepreneur that is leading an innovation driven entrepreneurial social enterprise.

As noted above, social entrepreneurs are dealing with difficulties in persuading their potential investors and other audiences that they are indeed credible and are leading a social enterprise as they claim, which result in

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222. Jay Weerawardena & Gillian Sullivan Mort, *Investigating Social Entrepreneurship: A Multidimensional Model*, 41 J. WORLD BUS. 21, 21 (2006). See also, Lynn Barendsen & Howard Gardner, *Is the social entrepreneur a new type of leader?*, LEADER TO LEADER, Fall 2004, at 43, 43 (discovering that social entrepreneurs are more akin to service professionals, but they conduct themselves like business entrepreneurs).

223. See Saifan, *supra* note 11, at 22 (“Social entrepreneurship is a term in search of a good definition. The current use of the term seems vague and limitless. . .”); Weerawardena & Mort, *supra* note 222 (noting that “a substantial controversy remains in the conceptualization of the social entrepreneurship construct”).

224. See *id.*

225. See Austin, Stevenson, & Wei-Skiller, *supra* note 12; Alvord et. al, *supra* note 12, at 262 (explaining that concept of entrepreneurship is associated with social impact, the business sector, and social transformation); Gregory J. Dees, *The Meaning of “Social Entrepreneurship”* (last updated on May 30, 2001), available at <https://entrepreneurship.duke.edu/news-item/the-meaning-of-social-entrepreneurship> [<https://perma.cc/K5QG-5YJL>] (highlighting that many entrepreneurs start profit-seeking business ventures, while others are catalysts and innovators behind economic progress); Mair and Marti, *supra* note 12 (examining how social entrepreneurship provides a chance to rethink the connection between social change and the traditional financial benefits of entrepreneurship); Dana Brakman Reiser, *The Next Big Thing: Flexible-Purpose Corporations*, 2 AM. UNIV. BUS. L. REV. 55 (2012) (defining social enterprises as those dedicated to a mission of earning profits for owners and promoting social good.)

226. Bacq & Janssen, *The Multiple Faces of Social Entrepreneurship*, *supra* note 14, at 379.

227. See Saifan, *supra* note 11, at 23 (stating that there needs to be a better definition for the term social entrepreneurship and it should “be defined in a way that is consistent with what is known about entrepreneurship.”).

inefficiencies in raising capital.<sup>228</sup> There are additional challenges associated with structuring, launching, funding, and counseling social enterprises, which were also discussed above. Social entrepreneurs can choose to incorporate using different entities, ranging from traditional nonprofit or for-profit market-based, to emerging hybrid new legal forms, such as low-profit limited liability company (L3C), benefit corporation and flexible purpose corporation.<sup>229</sup> They might also encounter issues regarding corporate governance and fiduciary duties.

By the same token, impact investors who need to report to their shareholders about their investment in social enterprises, are also faced with difficulties in assessing and monitoring innovation driven social entrepreneurship enterprises.<sup>230</sup> These difficulties result from the uncertainty, high-risk and information asymmetry problems, traditional agency problems, which deter investors from backing such firms. The additional financing challenges<sup>231</sup> that social entrepreneurs experience have to do with the difficulty of measuring value creation<sup>232</sup> and intangible assets. Since social entrepreneurial firms cannot be simply measured by monetary performance or traditional profit creation.

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228. See Murray, *supra* note 38, at 367 (explaining that “the vast majority of social enterprises have been closely-held, and only a few have attracted outside capital, which is often needed to scale business operations”).

229. See John Tyler, et al., *Producing Better Mileage: Advancing the Design and Usefulness of Hybrid Vehicles for Social Business Ventures*, 33 QUINNIPIAC L. REV. 235, 238 (2015) (noting “in 2008 with Vermont’s L3C innovation, followed in 2010 by Maryland’s benefit corporation, and again in 2012 by California’s flexible purpose corporation and Washington’s social purpose corporation.”). See also, Ball, *supra* note 6, at 932 (explaining that due to the absence of regulatory oversight, “most social ventures are not hybrid entities but are formed as traditional for-profit companies or nonprofit corporations”); J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the State Statutes* (last updated Jan. 25, 2015), available at <https://www.law.umich.edu/clinical/internationaltransactionclinic/Documents/May%2011%20Conference%20Docs/Corporate%20Forms%20of%20Social%20Enterprise.pdf> [<https://perma.cc/CZ6F-KD4A>] (providing a chart of different social enterprises and the type of entity which they are incorporated); THOMSON REUTERS FOUNDATION AND MORRISON & FOERSTER LLP, ET AL., *Which Legal Structure is Right for my Social Enterprise? A Guide to Establishing a Social Enterprise in the United States* 3 (2013), available at <http://media.mofo.com/files/uploads/Images/Guide-to-Establishing-a-Social-Enterprise.pdf> [<https://perma.cc/33TK-RUXA>] (providing a guide to help social entrepreneurs (not non-profit organizations) navigate through the array of legal structures that are available for them in the United States).

230. See Lyons & Kickul, *supra* note 24, at 148 (explaining that social capital markets are demanding more transparency and accountability from the social ventures they are funding to show the impact of such ventures).

231. See *id.* at 151 (examining the distinctive challenges for both the social entrepreneur and the investor in launching and investing in social ventures creates).

232. Geoff Mulgan, *Measuring Social Value*, Stanford Social Review, (Summer 2010), available at [https://ssir.org/articles/entry/measuring\\_social\\_value](https://ssir.org/articles/entry/measuring_social_value) [<https://perma.cc/8ULW-UCJT>].

There is difficulty with measuring value creation and intangible assets of social enterprises. Social entrepreneurial firms cannot be simply measured by monetary performance or traditional profit creation. Social enterprises should be evaluated based on their impact on the public, the communities that they serve, the services that they offer, and the various products that they create.<sup>233</sup>

Social enterprise organizations are not limited to the U.S., they can also be found in both developing and developed countries.<sup>234</sup> According to Lyons & Kickul, by 2052 an estimated \$6 trillion will be aimed at funding social enterprise organizations.<sup>235</sup> This Article is part of an effort to bring light to the “new” movement, the social entrepreneurs, the commercial and philanthropic investors, as well their contribution to our economy, and the logic of their action.

One of the founders of social entrepreneurship theory is Dees. According to Dees, the definitions used by Say, Schumpeter, Drucker, and Stevenson to describe “entrepreneurship” can be applied to describe “social entrepreneurship,” because “they can be as easily applied in the social sector as the business sector.”<sup>236</sup> After all, the social entrepreneur is also pursuing an opportunity, regardless of the opportunities and resources that she currently controls or has in hand.

Dees further claims that social entrepreneurs face distinctive challenges due to their social mission and therefore any proposed definition of the term ought to reflect these challenges.<sup>237</sup> Therefore, he describes social entrepreneurs as “entrepreneurs with a social mission.”<sup>238</sup>

In order to deal with the economic question of value-capture and the ways in which to measure the impact of the social enterprise, Dees suggests that social entrepreneurs should not be concerned with wealth creation, but rather with mission-related impact,<sup>239</sup> as “wealth is just a means to an end for social entrepreneurs.”<sup>240</sup> Perhaps it is due to the fact that markets have difficulty in evaluating social value creation, improvement, and overall public goods. Markets especially have trouble with determining whether the

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233. See Blount & Nunley, *infra* note 290, at 303-04 (defining social enterprise as “an organization that utilizes an earned income strategy to accomplish a primary organizational mission of creating value for one or more stakeholders besides the organizations’ shareholders or owners”).

234. *Id.* at 288. See also, Shaker A. Zahara et. al., *Globalization of Social Entrepreneurship Opportunities*, STRATEGIC ENTREPRENEURSHIP J., June 2008, at 117.

235. Lyons & Kickul, *supra* note 24, at 147.

236. Dees, *supra* note 13, at 2.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 2-3.



resources that are used by the social entrepreneur in order to create value actually generate sufficient social value to justify their use.<sup>241</sup>

Some of the reasons that contribute to the value-capture problems<sup>242</sup> have to do with the ability to attribute improvements (via the social innovations) to a specific market intervention, even when such improvements can be measured.<sup>243</sup> Moreover, social entrepreneurs cannot capture the full social value that was created in an economic form that can justify spending or paying for the used resources, even when such improvements can be measured and attributed to a given intervention.<sup>244</sup>

Relying on philanthropy, institutional donations or governmental funding is another hurdle for the sustainability of social enterprises and a major, if not existential challenge that social entrepreneurs have to encounter. In practice, they typically rely on donations, subsidies, and volunteers, to offset this problem. According to Dees, “this further muddies the waters of market discipline.”<sup>245</sup> Therefore, he strongly suggests that any future definition of the term “social entrepreneurship” must also incorporate a substitute for the market discipline, which traditionally works for business entrepreneurs.<sup>246</sup>

There are many calls proposing various definitions for social entrepreneurship. This Article also builds on the work of Roger L. Martin and Sally Osberg, who argue that in order to enable the philanthropic community to accurately determine and support the different funding needs of entrepreneurs, activists and providers, we first need to distinguish among social entrepreneurs, social activists, and social service providers, in order to clarify the value proposition.<sup>247</sup>

Other scholars turn to distinguishing between the various types of ventures based on their incorporation method and selection of a legal form. A social entrepreneurship venture can be a nonprofit or for-profit market-based, and incorporate different legal structures ranging from non-profit to emerging hybrid new legal forms,<sup>248</sup> such as low-profit limited liability

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241. *See id.* at 3 (“The survival or growth of a social enterprise is not proof of its efficiency or effectiveness in improving social conditions. It is only a weak indicator, at best.”).

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. Martin & Osberg, *supra* note 148, at 30.

248. Tyler, et. al, *supra* note 229. *See also*, Ball, *supra* note 6, at 932 (noting that most social enterprises are formed as either traditional for-profit companies or nonprofit corporations); Murray *supra* note 229, at 347-48 (explaining that social enterprises can refer to companies that form as benefit corporations, public benefit corporations, or entities that have a more commercial purpose); THOMSON REUTERS FOUNDATION AND MORRISON & FORESTER LLP, ET AL., *supra* note 229 (explaining the numerous options for incorporation to

company (L3C), benefit corporation and others.

The following is a proposed test for “social entrepreneur.” It takes into account the above challenges and various definitions.

### C. *The “Social Entrepreneur Test”*

One of the most important elements in the “social enterprise test” is the identity of the founding social entrepreneur.<sup>249</sup> The test builds on the works of Say, Schumpeter, Drucker, Stevenson, Dees, Santos, Martin and Osberg. The following are characteristics that a person should have to be labeled as a “social entrepreneur.” In brief, the social entrepreneur is:

A leader of an innovation driven social enterprise. She is a reformer, revolutionary, strategist, and change agent. She recognizes a social problem, and then proposes a solution by forcing structural (pattern-breaking) changes across industries and markets, in the process of Schumpeter’s creative destruction. Her vision and mission is very bold, and attacks the underlying systemic causes of the social problems that she is trying to alleviate.

#### 1. Mission

Her social mission will create and sustain social impact. The main purpose of her enterprise is to create social value, while wealth creation, profit, or even serving the needs of its customers can be a part of the model, but are only means to a social end. As noted above, the United Nations Sustainable Development Goals (SDGs) should be used to determine whether they align with the social ventures mission.<sup>250</sup>

#### 2. Impact & Outreach

She will lead a new equilibrium in the market, and her impact will not be limited to the resources that she is able to pull together. Her impact is not restricted to a limited population outreach, such as regional or local

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which social enterprises have access).

249. The need to focus on the entrepreneur when defining social entrepreneurship was also expressed by the Director of Ashoka, Felix Oldenburg. Oldenburg, *supra* note 151.

250. This view was expressed by several social impact fund managers at a Conference on “Legal Issues in Social Entrepreneurship and Impact Investing – in the US and Beyond,” held by NYU School of Law, Grunin Center for Law and Social Entrepreneurship (May 23-24, 2017). *See generally* Sustainable Development Goals (last visited Feb. 18, 2018), <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> [<https://perma.cc/6UTK-GG75>] (specifying each sustainable development goal created by the United Nations, in addition to providing information on who may use the Sustainable Development Goals’ marketing materials).

communities. Her solutions might have a local or regional expression, but will further have a much larger global national or even international impact.

### 3. Resourceful

Being resourceful is an extremely important trait for any entrepreneur, but especially for an innovation driven social entrepreneur. The innovation driven social entrepreneur must know how to use available resources to the fullest, and moreover, how to use networks and connections to enhance the social mission and sustain the enterprise.

### 4. Collaboration

The social entrepreneur must be able to leverage networks and collaborate with other stakeholders. She must have the skill set to collaborate and foster strategic partnerships to connect with and mobilize non-state actors such as corporations, nongovernmental organizations, foundations, universities, think tanks, and other stakeholders, such as faith based organizations and others.

### 5. Accountability to stakeholders

She must be held responsible to various stakeholders, including the management team and the communities that she serves, as well as for the overall outcomes that she created.

## III. THE SANDRA DAY O'CONNOR EXAMPLE OF A SOCIAL ENTREPRENEUR

To illustrate the new “social entrepreneur test,” this Article will use the successful leadership story of Justice O'Connor. Justice O'Connor was chosen as an example for the proposed test because she is the ultimate social entrepreneur, a visionary leader as well as an agent of change,<sup>251</sup> who contributes to the growth of her enterprise, in this case at the national level.<sup>252</sup>

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251. See Yoram Margalioth, *Not A Panacea For Economic Growth: The Case of Accelerated Depreciation*, 26 VA. TAX REV. 493 (2007).

252. See ANDRÉ VAN STEL, EMPIRICAL ANALYSIS OF ENTREPRENEURSHIP AND ECONOMIC GROWTH 2 (2006) (“It is deeply embedded in the current European policy approach that the creativity and independence of entrepreneurs contribute to higher levels of economic activity.”). See also Audretsch, *supra* note 154 (defining and measuring entrepreneurship with tangible factors, such as finance, taxes, immigration, and social capital); Pozen, *supra* note 158, at 292 (recounting the history of the development of the term entrepreneurship and comparing past and present understanding of the concept).

This Article sheds light on another, not as commonly publicized, aspect of her life's work. She started a social revolution by envisioning and pushing for the establishment of the social enterprise: iCivics, to mitigate education gaps by increasing the understanding of civic education and engagement among young Americans across the country.<sup>253</sup>

First and foremost, Justice O'Connor is a leader who forces structural changes across industries and markets. She is, therefore, essential to supporting a vigorous economy and long-run economic growth because of the improvement to her arena (education). According to Kotter, leaders don't make plans, don't solve problems, don't even organize people. "What leaders really do is prepare organizations for change and help them cope as they struggle through it."<sup>254</sup>

She founded iCivics to ensure that future generations of American children will have access to information and knowledge of civic education. Justice O'Connor is therefore an amazing example of a social entrepreneur who advances the American Dream, especially the notion that opportunity, freedom, and equality must be available to every American, no matter their race, gender, wealth, sexual orientation or status.

The Justice is clearly a credible entrepreneur. She is primarily recognized for her contribution to the women's rights movement as the first woman on the Supreme Court. Her social mobility was achieved through hard work, civil service and individual resourcefulness. She has vast experience in the three branches of government and her appointment was a powerful advancement in women's fight for equality in the American society.<sup>255</sup>

Hopefully, with this Article, she will also be remembered as a leader, visionary, conceptualizer, initiator and change agent in the education social

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253. See Oldenberg, *supra* note 151 (urging that measuring the impact of social entrepreneurship by looking at earned income is flawed and potentially dangerous). See also Dees, *supra* note 13 (exploring the definition of entrepreneurship and differentiating social entrepreneurship from business entrepreneurship); Keohane, *infra* note 291 (examining the impact of social entrepreneurship on nonprofit, private, and public sectors, and pointing out the role of modern entrepreneurship in today's society).

254. John P. Kotter, *What Leaders Really Do*, 79 HARV. BUS. REV. 11, 86 (2001), <https://hbr.org/2001/12/what-leaders-really-do> [<https://perma.cc/9L3E-6WHN>].

255. SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE xiii (Craig Joyce ed.) (2003) ("The appointment of a woman to the Supreme Court of the United States opened many doors to young women all across the country."). As President Ronald Reagan, who appointed her in 1981 stated, "[t]hose who sit in the Supreme Court interpret the laws of our land and truly do leave their footprints on the sands of time. Long after the policies of presidents and senators and congressmen of any given era may have passed from public memory, they'll be remembered." JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 80-81 (2005).

sector as well. Her passion and conviction towards the ideals of the Rule of Law and the Constitution drove her to reform the status quo of the American civic education system. By founding iCivics in 2009, she reformed and revolutionized the civics education arena forever. Therefore, she is an excellent example of the Schumpeterian entrepreneur because she is working in an area of market failure and leading the “creative destruction” revolution.<sup>256</sup> The current education system has failed to provide much-needed civic education, which is crucial for the United States’ long-term viability.

Her iCivics initiative has a bold mission. iCivics works towards achieving far-reaching and systemic social change that reaches every middle and high school child and civics teacher in the United States of America and aims to largely reform civic education.<sup>257</sup> iCivics has significantly changed the ways in which civics are taught in schools across the country and has thus created a nationwide impact.<sup>258</sup>

She was influenced by her Stanford professor Rathbun, who stated that “an individual had a responsibility to the community.”<sup>259</sup> So, she committed herself and her legacy to resolving the challenge of the lack of understanding of the Constitution and the concept of the Rule of Law. As Rathbun stated, “[t]he law is the expression of the rules of the game which all men play — that of getting along together as members of an organized society.”<sup>260</sup>

It all began with her concern with the results of the 1999 National Constitution Center Poll.<sup>261</sup> The poll showed that Americans do not have a

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256. Schumpeter, *supra* note 154.

257. Dees, *supra* note 13 (“[Social entrepreneurs] attack the underlying causes of problems, rather than simply treating symptoms. They often reduce needs rather than just meeting them. They seek to create systemic changes and sustainable improvements. Though they may act locally, their actions have the potential to stimulate global improvements in their chosen arenas, whether that is education, health care, economic development, the environment, the arts, or any other social field.”).

258. See Keohane, *infra* note 291, at 13. See also Audretsch, *supra* note 199, at 3 (“What may be perceived as change to an individual or enterprise may not involve any new practice for the industry. Or, it may represent change for the domestic industry, but not for the global industry. Thus, the concept of entrepreneurship is embedded in the local context. At the same time, the value of entrepreneurship is likely to be shaped by the relevant benchmark. Entrepreneurial activity that is new to the individual but not the firm or industry may be of limited value. Entrepreneurial activity that is new to the region or country may be significant but ultimately limited. By contrast, it is entrepreneurial activity that is new across all organizational forms, all the way up to the global, that carries the greatest potential value.”). Audretsch maintains that “[p]art of the complexity involved with entrepreneurship is that it involves all of these types of organizational forms. No single organizational form can claim a monopoly on entrepreneurship.” *Id.*

259. BISKUPIC, *supra* note 255, at 24.

260. *Id.*

261. Sandra Day O’Connor, Associate Justice, Supreme Court of the United States,

basic understanding of how the government works, “almost half of our citizens do not know that there are three branches of government. Thirty-five percent believe the Constitution establishes English as our national language. Seventeen percent believe that the Constitution establishes America as a Christian nation.”<sup>262</sup> It was then that she decided to act.

There was a need to help educate the younger generation on civics, their basic rights and the Rule of Law, the idea that “laws should be enacted by democratically elected legislative bodies and enforced by independent judiciaries — is fundamental to a free society. The knowledge that there are certain basic rights of the individual that are enforceable even against the state has been the hallmark of our system of governance.”<sup>263</sup>

Justice O’Connor strategized and founded iCivics, an organization that would carry on her vision to address the problem. Her vision is that we, Americans, must teach our younger generation to understand the Constitution,<sup>264</sup> “the ideas that gave it life and that give it strength still

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Address at the National Constitution Center Liberty Medal Award, (July 4, 2003), [https://www.supremecourt.gov/publicinfo/speeches/sp\\_07-04-03.html](https://www.supremecourt.gov/publicinfo/speeches/sp_07-04-03.html) [<https://perma.cc/Y9AE-MT3B>]; O’CONNOR, *supra* note 255, at 38.

262. O’CONNOR, *supra* note 255, at 37-8 (“It seems natural for Supreme Court Justices to be vitally interested in the document we spend so many of our waking hours thinking and arguing about, and so many pages of the *United States Reports* writing about. But it is perhaps not so natural, in the twenty-first century, for most other Americans to spend much time thinking about or discussing our Constitution. Although more than two hundred years ago most Americans hotly debated the merits of the proposed Constitution, recent polls indicate that today almost half of our citizens do not know that there are three branches of government. Thirty-five percent believe the Constitution establishes English as our national language. Seventeen percent believe that the Constitution establishes America as a Christian nation.”). See also Annenberg Public Policy Center of the University of Pennsylvania, *Americans Know Surprisingly Little About Their Government, Survey Finds* (Sept. 17, 2014), <http://www.annenbergpublicpolicycenter.org/americans-know-surprisingly-little-about-their-government-survey-finds/> [<https://perma.cc/W33J-Z6C2>] (“While little more than a third of respondents (36 percent) could name all three branches of the U.S. government, just as many (35 percent) could not name a single one. Just over a quarter of Americans (27 percent) know it takes a two-thirds vote of the House and Senate to override a presidential veto. One in five Americans (21 percent) incorrectly thinks that a 5-4 Supreme Court decision is sent back to Congress for reconsideration.”)

263. O’CONNOR, *supra* note 255, at 33.

264. According to the Justice, “President Franklin Roosevelt called the Constitution a “layman’s document.” O’Connor, *supra* note 255, at 46-47 (“It was not intended solely, or even primarily, for judges. While James Madison hoped that the courts would be an “impenetrable bulwark” against assumptions of power by the other branches, he also believed that state legislatures would be “sure guardians of the people’s liberty.”). See also James Madison, *House of Representatives Debates—June 8, 1789*, in BERNARD SCHWARTZ, II THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, at 1031-32 (Leon Freidman ed., vol. II. 1971); NATIONAL CONSTITUTION CENTER, Liberty Medal Award, Philadelphia, Pennsylvania, July 4, 2003, Remarks By Sandra Day O’Connor, Associate Justice, Supreme Court of the United States, available at [http://www.supremecourt.gov/publicinfo/speeches/sp\\_07-04-03.html](http://www.supremecourt.gov/publicinfo/speeches/sp_07-04-03.html)

today.”<sup>265</sup> She quotes the Framers Alexander Hamilton, who wrote in the first of *The Federalist Papers* in support of ratification of the Constitution that it was “reserved to the people of this country . . . to decide . . . whether [we] are . . . capable . . . of establishing good government from reflection and choice, or whether [we] are forever destined to depend for [our] political constitutions on accident and force.”<sup>266</sup>

The other purpose was to teach students the freedoms offered to them by the Bill of Rights<sup>267</sup> because their understanding today must go beyond the recognition that “liberty lies in [our] hearts” to the further recognition that only citizens with knowledge about the content and meaning of our constitutional guarantees of liberty are likely to cherish those concepts.<sup>268</sup> “As James Madison reminded us long ago, ‘the advancement and diffusion of knowledge’ is ‘the only Guardian of true liberty.’”<sup>269</sup>

Therefore, the Justice founded and originated the idea of iCivics (then “Our Courts”), to promote the social value of civic education for generations of young Americans, as well as with sustaining the impact of their improvement.

It is important then, to turn to the issues of social mission and value creation.

#### A. *Social Mission & Value Creation*

Justice O’Connor fits perfectly into Say’s description of the entrepreneur as a “master-agent,” which “requires a combination of moral qualities, that are not often found together,” such as “[j]udgment, perseverance, and a knowledge of the world as well as of business.”<sup>270</sup> She

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[<https://perma.cc/Y9AE-MT3B>].

265. NATIONAL CONSTITUTION CENTER, *supra* note 264. *See also* O’CONNOR, *supra* note 255, at 38 (“Knowledge about the ideas embodied in the Constitution and the ways in which it shapes our lives is not passed down from generation to generation through the gene pool; it must be learned anew by each generation. It is not enough simply to read or memorize the Constitution. Rather, we should try to understand the ideas that gave it life and that give it strength still today.”).

266. THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

267. *See* National Constitution Center, *supra* note 264 (“[W]hen Madison argued for a Bill of Rights, he knew that the strength of these freedoms would depend on how firmly they stood in the hearts of citizens.”).

268. *Id.* (citing LEARNED HAND, THE SPIRIT OF LIBERTY 190 (1960)) (“Our Constitution is not - and could never be - defended only by a group of judges. One of our greatest judges, Learned Hand, understood this very well. He explained: ‘Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.’”).

269. *See* O’Connor Address at the National Constitution Center, *supra* note 264, at n. 12 (citing 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 492 (J.P. Lippincott & Co. 1865) (reprinting letter to George Thomson (June 30, 1825))).

270. Say, *supra* note 158, at 330; Pozen, *supra* note 158, at 287-88. In order to fully

is a rare, exceptionally talented and motivated individual.

The main purpose of her social enterprise, iCivics is to create social value. She was able to identify the need for social improvement where the markets fail to act (education arena), where people cannot afford to pay for those benefits (students, parents and teachers), and where private actors are reluctant to invest because the venture will not be profitable.<sup>271</sup>

### B. Resourcefulness

Justice O'Connor was very resourceful because she did not let her own limited financial resources keep her from pursuing her visions. She was not only very skilled at doing more with less (using money efficiently) but also, more importantly, at attracting various resources from other outside sources. She was able to strategically draw in partners and successfully collaborate with others to establish iCivics.

Her life experiences helped her manage the scarce resources in hand to their fullest potential. Growing up as a "ranch childhood" girl on the Lazy B cattle ranch, she was influenced by her life in the Southwest, where she spent her earlier days in a "dry and isolated part of the Arizona desert."<sup>272</sup> She frequently quotes her favorite author, Wallace Stegner:

There is something about living in big empty space, where people are few and distant, under a great sky that is alternately serene and furious, exposed to sun from four in the morning till nine at night, and to a wind that never seems to rest – there is something about exposure to that big country that not only tells an individual how small he is, but steadily tells him *who* he is.<sup>273</sup>

Justice O'Connor also brought a lot of visibility to the organization.<sup>274</sup> Since she founded iCivics, she had multiple challenges with the organization at a strategic level. Similar to other non-profits, the main challenge for a

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understand the role of the individual entrepreneur in history, we must begin with evaluating the entrepreneur's role in the traditional "free market" ideology. See O'Kelley, *supra* note 191, at 756 ("[E]conomists working in the tradition of Adam Smith (unlike corporation law scholars) continued to give the entrepreneur a central piece in their study of capitalism long after the birth of the New Deal.").

271. According to Dees' definition, "Markets do not do a good job of valuing social improvements, public goods and harms, and benefits for people who cannot afford to pay. These elements are often essential to social entrepreneurship. That is what makes it social entrepreneurship." Dees, *supra* note 152. See also Keohane, *infra* note 291, at 13 (providing insight into the social entrepreneurship movement).

272. O'CONNOR, *supra* note 255, preface.

273. SANDRA DAY O'CONNOR & H. ALAN DAY, LAZY B vii (2004) (citing WALLACE STEGNER, "Finding the Place: A Migrant Childhood, in WHERE THE BLUEBIRD SINGS TO THE LEMONADE SPRINGS: LIVING AND WRITING IN THE WEST)

274. Interview with Jeff Curley.



social enterprise is funding. iCivics relies heavily on institutional funding. iCivics secured funding from two major organizations, the Gates and MacArthur foundations. However, today, both of these foundations are evolving their investment models away from game-based learning and civic education.<sup>275</sup> iCivics, like so many other non-profits, has a particularly difficult task of raising funds and generating income to sustain its operations; therefore, they have to carefully and sustainably manage their resources.<sup>276</sup>

### C. Collaboration

iCivics is a great example of an innovation-driven social enterprise that uses cross-sector collaboration methods including participants from non-profit organizations, civil society, the public sector, and for-profit businesses.<sup>277</sup> Justice O'Connor facilitated these collaboration networks by first recognizing the social problem, and then by empowering and encouraging other individuals (agents) in her organization, such as Julie O'Sullivan, Jeff Curley, Abigail Taylor, and now Louise Dube (the Leadership Team) to act on and foster the relationships with the various stakeholders.

Justice O'Connor is a networker and was not bound by sector norms or traditions; therefore, she was very instrumental in developing resource strategies that were likely to reinforce and support iCivic's social missions. She is the change actor. She empowered the Leadership Team to act on her behalf. The Leadership Team is responsible for managing, planning, and supporting the iCivics initiative via administration, collection of data, fundraising, communications, technology, and other functions.

Social entrepreneurs take calculated risks and understand the risk tolerances of their stakeholders and use their understanding to spread the risk to those who are better prepared to accept it. The Justice's goal is to keep iCivics free and accessible to all. Therefore, the Leadership Team explored all funding options, from pure philanthropy (i.e., foundation donor or establishing a legacy fund) to the commercial methods of the business sector (for example, partnering with Filament games and other gaming platforms).

iCivics' Leading Team clearly understands the expectations and values of their stakeholders and investors, including anyone who invests money, time, and expertise to help them. The Leading Team seeks to confer real social improvements to their beneficiaries and their communities, as well as attractive (social and financial) returns to their investors. Therefore, iCivics is a perfect example of a social enterprise because it creates a fit between its

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275. *Id.*

276. *Id.*

277. See also Beck and Fratantuono iCivic's case study, forthcoming.

stakeholders' and investors' values and the many communities it serves. iCivics is currently also working on creating market-like feedback mechanisms in order to reinforce accountability and assess their progress in terms of social, financial, and managerial outcomes.

#### D. *Innovation*

O'Connor created an innovative social enterprise. iCivics draws on Schumpeter's proposed definition of "creative destruction," and that is innovation. When the Schumpeterian lens is applied to the iCivics case, it suggests that iCivics is innovative in creating a new service—a tool for middle school teachers to teach the next American generations civics through game-based learning and lesson plans. The tool is innovative by serving an unmet need to improve people's understanding of the Constitution and Rule of Law.

Justice O'Connor, the ultimate social entrepreneur, continuously engages in the process of innovation, adaptation, learning, and mostly, creative destruction. By incorporating game-based learning with class materials for teachers, iCivics breaks new ground, develops new models, and pioneers new approaches to civics education across the United States. However, as Schumpeter notes, innovation does not require inventing something completely new. Innovation can take many forms, such as applying an existing idea in a new situation or in a new way.<sup>278</sup> Justice O'Connor is an entrepreneur – creative in applying technology developed by other partners (such as Filament games) to her idea. iCivics is also innovative in how it structured the core programs to include teacher resources that accompany the learning games.

Technology is an important aspect of iCivics' social advancements. The advancement of innovations stemming from the technology sector has immensely improved our daily lives. Economists have recognized that innovation is vital to economic growth since the 1950s.<sup>279</sup> The pioneering work of economist Moses Abramowitz established the relationship between innovation and increases in economic growth. Abramowitz evaluated the growth in output (i.e., the amount of services and goods produced), followed by calculating the increase in input (i.e., factors of production) of the American economy between 1870 and 1950.<sup>280</sup> He realized that the outputs could not be explained through the growth of the inputs, especially labor and

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278. See Dees, *supra* note 13.

279. Lerner, *supra* note 188, at 43.

280. Moses Abramowitz, *Resource and Output Trends in the United States Since 1870*, 46 (2) AM. ECON. REV. 5 (1956). See also Lerner, *supra* note 188, at 43 (describing how governments can influence social growth and entrepreneurship).

capital.<sup>281</sup> His main discovery was that the surge in economic activity between 1870 and 1950 was a result of innovation – by getting more things out of corresponding inputs.<sup>282</sup>

Following the footsteps of Abramowitz, economists in the late 1950s and 1960s carried out similar studies.<sup>283</sup> The most prominent of them is Robert Solow, who won the Noble Prize for his work on economic growth theory.<sup>284</sup> According to Solow, technological innovation is the only reliable engine that can drive change and the fundamental source of sustained productivity and growth.<sup>285</sup> iCivics is using technological innovation to make an impact on our society at large. It is trying to solve a very complex problem felt intensely in the US — an inequitable education system. The funding mechanisms for education in US lead to wealthy areas benefitting from better teachers and resources. iCivics is trying to alleviate this inequality by using technology to support greater access to quality education and resources. The games are free and, moreover, are not meant to replace the teachers. On the contrary, technology is merely a tool to help both teachers and students.<sup>286</sup> iCivics is the recipient of the 2015 MacArthur Foundation Award for Creative and Effective Institutions, for its work in reinvigorating civic education for a new generation of Americans.<sup>287</sup>

Justice O'Connor's legacy fund is also a great example of innovation from the funding perspective, providing an innovative way to ensure that iCivics will have access to resources as long as it continues to create social value.<sup>288</sup> To sum up, it is clear that the Justice is not only a social entrepreneur, but also a leader in the social entrepreneurship movement.

281. Lerner, *supra* note 188, at 43.

282. Abramowitz, *supra* note 280.

283. See Lerner, *supra* note 188, at 44 (“These studies differed in methodologies, economic sectors, and time periods, but the results were similar.”).

284. Robert M. Solow, *A Contribution to the Theory of Economic Growth*, 70 Q. J. ECON. 65 (1956); Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 (3) REV. ECON. & STAT. 312 (1957).

285. Robert M. Solow, *Prize Lecture: Growth Theory and After*, Nobelprize.org, (Dec. 8, 1987), [http://www.nobelprize.org/nobel\\_prizes/economics/laureates/1987/solow-lecture.html](http://www.nobelprize.org/nobel_prizes/economics/laureates/1987/solow-lecture.html) [https://perma.cc/BP6Z-4LL4].

286. See interview with Louise Dube.

287. MACARTHUR FOUNDATION, *MacArthur Award for Creative & Effective Institutions* (Feb. 4, 2015), <https://www.macfound.org/maceirecipients/89/#sthash.BYUUWBjo.dpuf> [https://perma.cc/UQ8R-C7PZ].

288. See Dees, *supra* note 13 (“This willingness to innovate is part of the modus operandi of entrepreneurs. It is not just a one-time burst of creativity. It is a continuous process of exploring, learning, and improving. Of course, with innovation comes uncertainty and risk of failure. Entrepreneurs tend to have a high tolerance for ambiguity and learn how to manage risks for themselves and others. They treat failure of a project as a learning experience, not a personal tragedy.”)

## CONCLUSION

The social entrepreneurial revolution is meant to enhance social, environmental, and economic values using innovative methods. This recent surge in entrepreneurial activity with an embedded social purpose<sup>289</sup> and value creation<sup>290</sup> is often a direct result of a market, government, or even philanthropic organization's failure to respond to and alleviate social problems.<sup>291</sup> Policymakers need to take this phenomenon into account as the social entrepreneurs are shaping the development of many of the institutions that we use yet take for granted.<sup>292</sup>

This Article provides a historic-doctrinal review of the development of social entrepreneurship and entrepreneurship research, by introducing some of the pioneers that have fashioned this research during the past few decades. It lays the foundation to a new, pragmatic, inclusive, and innovative test that can be used by judges, regardless of their jurisdiction, to determine whether an entity is a "social enterprise." Hopefully, this will lead to harmonization in social entrepreneurship law. Researchers could build upon this work, which will also result in knowledge accumulation.

Building on the works of Say, Schumpeter, Drucker, Stevenson, Dees and others, the Article also focuses on the social entrepreneur. The social entrepreneur is a leader of an innovation driven social enterprise. She is a reformer, revolutionary, strategist, and change agent. She recognizes a social problem, and then proposes a solution by forcing structural (pattern-breaking) changes across industries and markets, in the process of Schumpeter's creative destruction. Her vision and mission is very bold and attacks the underlying systemic causes of the social problems that she is trying to alleviate.

Finally, this Article recommends that there should be "S.E." or other naming mark that is required for entities that are created as social enterprises, so that researchers could easily track these entities. Currently, there is no way of telling whether the entity is a traditional for-profit, or has incorporated using a hybrid form. There should be a notable mark that will allow tracking of these entities.

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289. Austin, Stevenson & Wei-Skillern, *supra* note 12.

290. Justin Blount & Patricia Nunley, *What is a "Social" Business and Why does the Answer Matter?* 8 BROOK. J. CORP. FIN. & COM. L. 278, 298 (2014).

291. GEORGIA LEVENSON KEOHANE, SOCIAL ENTREPRENEURSHIP FOR THE 21ST CENTURY: INNOVATION ACROSS THE NONPROFIT, PRIVATE, AND PUBLIC SECTOR 3 (2013). *See also* Dees, *supra* note 13 ("Many governmental and philanthropic efforts have fallen far short of our expectations. Major social sector institutions are often viewed as inefficient, ineffective, and unresponsive. Social entrepreneurs are needed to develop new models for a new century.")

292. *See* Dees, *supra* note 13.