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Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?

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OPTING OUT OF SHAREHOLDER PRIMACY:

IS THE PUBLIC BENEFIT CORPORATION TRIVIAL?

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Abstract:

The central command of corporate governance law is that directors must serve the shareholder interest. Directors may not sacrifice shareholder value in favor of other corporate stakeholders or other interests. In this Article, I examine whether this rule of shareholder primacy is mandatory, or merely a default rule which can be altered through private ordering. I argue that Delaware's corporate law, the most important corporate law in the United States, should be understood to have long-permitted privately-ordered deviation from shareholder primacy. This assessment, however, is at least complicated by the recent legislative creation of the Public Benefit Corporation (PBC). The PBC is a new form of business organization that explicitly charges directors with balancing the interests of shareholders and non-shareholders in corporate operations. The PBC innovation may lead judges to conclude that if corporate promoters want to deviate from shareholder primacy, they must do so by using the Public Benefit Corporation. The organizational and governance requirements of the PBC are highly particular, and most of its important features are mandatory. My claim is that the Public Benefit Corporation may inadvertently have narrowed flexibility in the creation of corporations that alter the shareholder primacy norm, rather than expanded it, as the PBC's proponents and many commentators have presumed.

A more desirable interpretation, however, is that private-ordering of corporate beneficiary is still permitted under the Delaware General Corporation Law, and that the PBC is merely one alternative structure – a non-exclusive "menu option" – which promoters seeking alternatives to shareholder wealth maximization might find convenient to use. I urge judges to adopt this second interpretation, and I urge Delaware lawmakers to clarify their intentions to avoid jurists adopting the view that the PBC is the exclusive path to multi-stakeholder governance.

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I. INTRODUCTION

The central command of corporate governance law is that directors must serve the shareholder interest.[2] Directors may not sacrifice shareholder value in favor of other corporate stakeholders or other interests. In this Article, I examine whether this rule of shareholder primacy is mandatory, or merely a default rule which can be altered through private ordering. I argue that Delaware's corporate law, the most important corporate law in the United States, should be understood to have long-permitted privately-ordered deviation from shareholder primacy.[3] This assessment, however, is at least complicated by the recent legislative creation of the Public Benefit Corporation (PBC). The PBC is a new form of business organization that explicitly charges directors with balancing the interests of shareholders and non-shareholders in corporate operations. The PBC innovation may lead judges to conclude that if corporate promoters want to deviate from shareholder primacy, they must do so by using the Public Benefit Corporation. The organizational and governance requirements of the PBC are highly particular, and most of its important features are mandatory. My claim is that the Public Benefit Corporation may inadvertently have narrowed flexibility in the creation of corporations that alter the shareholder primacy norm, rather than expanded it, as the PBC's proponents and many commentators have presumed.[4]

A more desirable interpretation, however, is that private-ordering of corporate beneficiary is still permitted under the Delaware General Corporation Law, and that the PBC is merely one alternative structure – a non-exclusive "menu option" – which promoters seeking alternatives to shareholder wealth maximization might find convenient to use. I urge

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[2] *See* David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L. J. 181 (2013) (demonstrating that the law of Delaware really is shareholder primacy, and critiquing the arguments of scholars who doubt this). *But see* LYNN STOUT, THE SHAREHOLDER VALUE MYTH (2012) (insisting that shareholder primacy is not the law).

[3] Corporate law scholarship lamentably uses the phrase "shareholder primacy" in two distinct senses. Sometimes the phrase is used to describe the *goal* of corporate governance (i.e., firms should serve the shareholder interest), but other times it is used to describe the *means* of corporate governance (i.e., shareholders should have a significant say in how firms are run). I think the phrase should be used exclusively to refer to the *goal* of corporate governance, and that is the only sense in which I use the phrase in this article.

[4] *See, e.g.*, J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345 (2014).

judges to adopt this second interpretation, and I urge Delaware lawmakers to clarify their intentions to avoid jurists adopting the view that the PBC is the exclusive path to multi-stakeholder governance.

The issue of whether and how corporate purpose can be altered is likely to soon emerge in important areas of social contest. First, there appears to be a real desire among some entrepreneurs, investors, workers, and consumers to make use of hybrid forms that fall between the polar extremes of profit-maximizing firms and non-profit ones. Such adventurers want to know what is possible and want is forbidden in the design of alternative entities. Uncertainty will impede broad experimentation, and, where experimentation is undertaken in the face of such uncertainty, costly and disruptive litigation will lurk, and strike.

Ambiguity in this area is likely to trouble small-scale, under-lawyered socially conscious ventures, and it may also bedevil some behemoths. When Facebook, Inc., first went public in 2012, the Registration Statement it filed with the Securities and Exchange Commission included a "Letter from Mark Zuckerberg," the company founder, and (then) 27-year old Chair of Facebook's Board of Directors. The letter reads as a warning that Facebook has a "mission" that is not limited to serving the shareholders:

> Facebook was not originally created to be a company. It was built to accomplish a social mission — to make the world more open and connected. We think it's important that everyone who invests in Facebook understands what this mission means to us, how we make decisions and why we do the things we do.
> . . .
> Simply put: we don't build services to make money; we make money to build better services. . . . These days I think more and more people want to use services from companies that believe in something beyond simply maximizing profits.[5]

If this is not just puffery, Zuckerberg and his appointees may be confused about their legal obligations, or may at least be confusing their investors and the public about it.[6] Suppose two companies, say Apple and

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[5] *See* http://www.sec.gov/Archives/edgar/data/1326801/000119312512034517/d287954ds1.htm#toc287954_10 (hereinafter, "Facebook Registration Statement").

[6] Facebook went public with a dual class structure in which Zuckerberg retained a dominate share of voting stock, while the public was offered non-voting stock. Some analysts suggest that Facebook shareholders have essentially agreed to go along with

The Circle,[7] undertook a bidding war for Facebook, and Zuckerberg privileged a lower Apple bid because he believed Apple would make great products with Facebook's assets, unlike The Circle, which he thought would just focus on profits. Has Zuckerberg violated his fiduciary obligation to Facebook's shareholders? Of course he has. Facebook is a Delaware corporation, and the fiduciary obligations of Delaware directors cannot be altered through letters in registration statements.[8] But this Article suggests that Zuckerberg, and corporate promotors who share the idea of putting the social mission of a business before (or alongside) profits, could have operationalized this mission through a Delaware corporation, and still can, without having to make use of the highly restrictive Public Benefit Corporation form.

Collateral areas of social policy are also newly attentive to the question of corporate purpose. For example, in the controversial 2014 case of *Burwell v. Hobby Lobby*,[9] the United States Supreme Court held that under the federal Religious Freedom Restoration Act (RFRA), the Hobby Lobby corporation was entitled to an exemption from certain commands of the America Cares Act, because the statute substantially burdened the firm's sincerely held religious beliefs.[10] The government had argued that Hobby Lobby could not hold religious beliefs, because it was a business corporation whose sole lawful purpose was to make money for shareholders. The Supreme Court, however, credited board resolutions and public statements of the firm as evidence of its religiosity. Hobby Lobby is a closely held family corporation, and none of its shareholders objected to

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Zuckerberg's ride, wherever he chooses to go. But as a legal matter the fact that Facebook's shareholders have no voice in corporate governance would make it even more important to impose strict fiduciary obligations on the directors, since shareholders cannot protect themselves through corporate democracy.

[7] In his dystopian novel, THE CIRCLE (2014), Dave Eggers imagines the emergence of a corporation that dwarfs the combined influence of Google, Facebook, Apple, and Amazon. It maintains Facebook's databases, purchased for billions of dollars, as a deep archive of its users' personal histories and predilections. *Id.*

[8] And make no mistake, the hypothetical here is posed as a "last period" problem only to starkly express the issue. If Facebook is forbidden from sacrificing profits in the public interest when selling the company, it is just as surely forbidden from doing so in the ordinary course of business (although it may, of course, conclude that operational restraint in the short-term is better for the shareholders in the long-term). *See* Yosifon, *The Law of Corporate Purpose*, *supra* note __ at 219-223 (clarifying that while under Delaware law directors of going-concerns enjoy total discretion to determine what is the most profitable time horizon in which to maximize returns to shareholders, they have no discretion at all regarding whether or not to pursue the most profitable course).

[9] 134 S. CT. 2751 (2014).

[10] 134 S. CT. 2751 (2014).

the board's claims. But what would have been the result if a shareholder had objected, given the absence of religious specification in the corporate charter? The issue was dodged in *Hobby Lobby*, but in other similar cases the question of whether and *how* a firm can opt-out of shareholder primacy will surely become central.

These kinds of questions are likely to come up, as firms struggle with how to structure non-standard organizations, and governments struggle with how to regulate them. The world has a funny way of presenting facts that the law is least able to deal with in simple deductive fashion. After developing my arguments about the relationship between ordinary corporate law and public benefit corporations, I call for and suggest paths towards judicial and legislative clarification, as well as broader reforms.[11]

II. ALTERING THE SHAREHOLDER PRIMACY DEFAULT RULE

Front-Loading a Private-Ordering Anti-Climax

Regardless of whether privately-ordered, idiosyncratic deviation from shareholder primacy can be achieved through the Delaware General Corporation Law, it could surely be accomplished through the use of a Limited Liability Company (LLC) statute.[12] Delaware's LLC law explicitly

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[11] *See infra* Section IV. In the course of this assessment, I make use of and contribute to longstanding doctrinal and normative debates about the desirability of mandatory or mutable rules in corporate law. *See e.g.*, Bernard Black, *Is Corporate Law Trivial? A Political and Economic Analysis*, 85 NORTHWESTERN U. L. REV. 542 (1990); Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1 (1990); Jeffery N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549 (1989); Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461 (1989); Roberto Romano, *Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws*, 89 COLUM. L. REV. (1989). Those debates, prominent in the late-1980's and early-1990s, did not address the question of corporate beneficiary. This literature has in recent years been advanced by newfound attention to "altering rules," that is, the rules that govern not whether, but *how* a rule can be altered, and how altering rules can be most desirably designed. *See generally*, Ian Ayers, *Regulating Opt-Out*, 121 YALE L. J. 2032 (2012) (emphasizing the emerging scholarly and policymaking focus on "altering rules," the rules that regulate how to deviate from default rules); *see also* Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 50 SMU L. REV. 383 (2007) (examining altering rules in the corporate context, but not addressing issue of corporate purpose). I situate my inquiry about private ordering of corporate purpose within that bourgeoning literature.

[12] Prior even to using a "business organization," nothing would stop a person from running a sole proprietorship in a manner that balanced numerous aims, say, profitability and environmental stewardship. Entrepreneurs, however, want to do business through a legal

embraces maximum mutability, stating: "It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."[13] This maximum freedom provision is not found in Delaware's General Corporation Law, or in the new PBC statute.[14] Because of the "maximum flexibility" of the LLC statute, it is appropriate, in a sense, to conceive of the Limited Liability Company as *the* foundational business entity, with the more restrictive corporate form (it is undoubtedly more restrictive in some ways)[15] construed as a sub-species of the LLC, one that provides specific terms that many investors find desirable.[16]

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entity in order to exploit advantages that legal forms provide, including most importantly, limited liability to the entrepreneur for the debts of the business (in both contract and tort), and affirmative asset segregation, insulating the assets of the business from the reach of an owner's personal creditors. *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L. REV. 387 (2000). *See also generally* Ann E. Conaway, *The Global Use of the Delaware Limited Liability Company for Socially-Driven Purposes*, 38 WILLIAM MITCHELL L. REV. 772, 780 (2012) ("The Delaware LLC offers contractual freedom to investors, managers, owners, funds, and foundations to structure a for-benefit, for-profit socially responsible business plan with limited liability for owners and investors . . . due to its completely mobile, contractual character.").

[13] 8 DEL. C. § 18-1101.

[14] The LLC statute further provides that "to the extent that . . . at law or in equity . . . [a] person has duties (including fiduciary duties) to a limited liability company . . . [the] person's duties may be *expanded or restricted* or eliminated by provisions in the limited liability company agreement." 8 DEL. C. § 18-1101. The LLC statute does state that LLC agreements "may not eliminate the implied contractual covenant of good faith and fair dealing." *Id.* The Delaware Court of Chancery has also held that on public policy grounds it will not enforce LLC provisions disclaiming liability for fraudulent misrepresentations where the representations are knowingly falsely made. But these limitation must surely be trivial, in that vanishingly few business-people would seek to contract to such provision. In CML, LLC v. Bax, 28 A.3d 1037, 1043 (Del. 2011) the Delaware Supreme Court held that the LLC statute limits derivative suits to "members" of the LLC, and that creditors did not therefore having standing to bring suit on the LLC's behalf even where the LLC was insolvent, even though creditors of insolvent corporations do have standing to bring derivative suits. *See infra* text accompanying notes __-__ . The Court's discussion in CML suggests that the standing limitation could not be muted by contract. However, the LLC statute stipulates that the LLC agreement may designate "members" who have no equity interest in the LLC.

[15] *See infra* text accompanying notes __-__.

[16] For example, if a promoter wanted to form a business that was governed by all aspects of Delaware corporate law *except* that she wanted to opt-out of duty of loyalty liability for LLC managers, as is permitted under the LLC statute but forbidden under the Delaware corporate code, then the promoter could form an LLC with an operating agreement stating that the LLC would be governed by the standards set forth in the Delaware corporate code and case law interpreting it, except for the corporate code's prohibition on eliminating duty

The freedom available in the LLC form makes inquiry into the mutability of shareholder primacy in corporate governance a trivial pursuit, in a technical sense.[17] But only in a technical sense. Mutability *within* the Delaware General Corporation Law matters a great deal as a matter of custom, culture, and practice. Investors prefer the stability and reliability of the Delaware *corporation*, as compared to the still relatively new LLC.[18] Many small firms start out as LLC's, but before they can attract backing from venture capital, and almost certainly before they go public, lawyers and business people will usually insist on re-forming as a corporation. And more often than not, they will insist on a Delaware corporation. The question we are pursuing, therefore, is whether deviation from shareholder

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of loyalty liability. *Cf.* Bob Dylan, *Highway 61 Revisited*, on HIGHWAY 61 REVISITED (Columbia Records 1965) ("He found a promoter who nearly fell off the floor / He said, 'I never engaged in this kind of thing before / But yes I think it can be very easily done.'").

[17] This was understood but not emphasized in the seminal debates twenty-five years ago on the "triviality" of corporate law, perhaps because the LLC was only just emerging at that time as an important form of business organization. The LLC was invented in the 1977 in Wyoming, but its use was not widespread before the 1990's. *See* 17 WY. ST. § 15. Delaware did not adopt an LLC statute until 1991. *See* 6 DEL. C. § 18. *See* Black, *Is Corporate Law Trivial?, supra* note __ at 557 ("We can imagine a continuum of avoidance costs, from the low cost extreme of opting out of a default rule, through the relatively low cost strategy of re-incorporating, the higher cost strategy of altering a company's capital structure, and at the high cost extreme, choosing a different form of enterprise organization. At some point, the cost of avoiding a rule is large enough so that we can't call the rule trivial."); *see also* Butler & Ribstein, *Opting Out of Fiduciary Duties*, *supra* note __ at 11 ("[T]he parties to a firm can opt out of terms that are mandatory for all corporations simply by choosing among different investment and organizational forms. For example, the "mandatory" requirement of at least majority shareholder voting on significant corporate transactions can be avoided by disincorporating into a limited partnership. *See also* McDonnell, *Sticky Defaults*, *supra* note __ (arguing that it is best to conceive of corporate law rules along a continuum from easy to alter (what he calls "Teflon" rules) to very hard to alter, but that it is imprecise to think of rules as being ultimately mandatory; indeed, even if no form permits what you want to do you can always petition the government for a change).

[18] *See e.g.*, William J. Carney, et. al., *Lawyers, Ignorance, and the Dominance of Delaware Corporate Law*, 2 HARV. BUS. L. REV. 123, 125 (2012) ("Even if other states' laws are superior, investors prefer incorporation in familiar Delaware."); Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 COLUM. BUS. L. REV. 1, 121 (1999) ("By many accounts, Delaware's prominence is rooted in its ability to provide a corporate environment that investors most prefer. Managers who choose Delaware are rewarded by investors; those who choose less investor-friendly states are punished."). *Cf.* Black, *Is Corporate Law Trivial?*, *supra* note __ at 545. ("[S]ince 1966, Pennsylvania has allowed companies to adopt by charter any corporate governance provision whatsoever, whether or not contrary to Pennsylvania law")(citing 15 PA. CONS. STAT. ANN. § 1306(a)8(ii)). Yet Pennsylvania is home to few non-domestic corporations.

primacy in corporate governance can be established within the friendly, familiar confines of the Delaware General Corporation Law.

Private Ordering in the Delaware General Corporation Law

The academic literature contains many scattered, undeveloped assertions that shareholder primacy is merely a default rule of corporate governance that can be muted by private ordering. In their landmark study, *The Economic Structure of Corporate Law*, Frank Easterbrook and Daniel Fischel took the mutability of shareholder primacy as a given:

> [W]hat is the goal of the corporation? Is it profit, and for whom? Social welfare more broadly defined? . . . Our response to such questions is: who cares? If the *New York Times* is formed to publish a newspaper first and make a profit second, no one should be allowed to object. Those who came in at the beginning consented, and those who came later bought stock the price of which reflected the corporation's tempered commitment to a profit objective. . . . Corporate ventures may select their preferred "constituencies." The role of corporate law here, as elsewhere, is to adopt a background term that prevails unless varied by contract.[19]

A more recent article by Jonathan Macey makes the same assumption, practically as an aside: "because the corporation is a contract-based form of business organization, maximizing shareholder gain is only a default rule. Shareholders could opt out of this goal if they so desired."[20] Later in the same article, Macey states: "These are the default rules in corporate law [i.e., shareholder primacy], subject to modification by the various participants in the corporate enterprise, *of course*."[21] Scholars typically give no citation for these kinds of statements, they are instead derivations, or postulates really, of the view that the corporation is a "nexus-of-contracts," and corporate law merely a standard form contract that parties can take or tailor as they like.

The American Law Institute's *Principles of Corporate Governance*, developed in the late-1980s and early-1990s, ducked the question of muting corporate beneficiary, averring that the *Principles* "do[] not address the

[19] Frank H. Easterbook & Daniel R. Fischel, *The Economic Structure of Corporate Law*, 35-36 (1991).
[20] Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177, 179 (2008).
[21] Macey, *supra* note __ at 189 (emphasis added).

question, under what circumstances may a corporation that is organized under a business corporation law restrict the general profit-making objective . . . by a certificate provision."[22] A Comment in the *Principles* hedges: "[s]tatutory provisions governing the amendment of the certificate of incorporation are very open-ended on their face, but may nevertheless be subject to various express or implied restrictions."[23] However, the Chief Reporter of the Principles, Melvin Eisenberg, included a *Reporter's Note* to the Comment, where he reflected that: "[b]ecause the [profitmaking] obligations . . . run to the shareholders, rather than to third parties or the state, there is little doubt that such limitations [on profitmaking] would normally be permissible if agreed to by all the shareholders."[24] Eisenberg's *Note*, like the Principles themselves, operate at too general a level to provide precise guidance on the question of mutability in Delaware, or anywhere else. It is impossible to answer hard corporate law questions without answering them about a specific body of corporate law, rather than "corporate law" generally.

The Delaware General Corporation Law contains many clearly mandatory elements, as well as many explicitly mutable ones. For example, firms are free to set the term of years that directors serve upon election to the board, but the term may not be set at more than three years.[25] The charter may exculpate directors from liability for violations of the duty of care, but not the duty of loyalty.[26] Delaware's statute is usually clear about which of its explicit provisions are mandatory, and which are mutable. Where adumbrating mandatory provisions, the statute uses phrases like "every corporation shall," and when describing default provisions it states

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[22] AMERICAN LAW INSTITUTE PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01.

[23] PRINCIPLES OF CORPORATE GOVERNANCE §2.01, Comment D.

[24] Eisenberg was a central figure in the "triviality" debates of the late-1980s and 1990s. *See* Eisenberg, *The Structure of Corporation Law*, *supra* note __. Ann Conaway appears to argue that a corporation could create, through language in the charter, "contractual," but not "fiduciary" duties running to non-shareholders, since to her the corporation is a contract between the state, the stockholders, and the corporation. *See* Anne E. Conaway, *Lessons to Be Learned: How the Policy of Freedom to Contract in Delaware's Alternative Entity Law Might Inform Delaware's General Corporation Law*, 33 DEL. J. CORP. L. 789,793-794 & n. 15 (2008). But that begs the crucial questions: first, why isn't the corporate contract a contract among *all* of the firm's stakeholders, and, second, can the contract that Conaway envisions permissibly be undertaken for purposes other than advancing shareholder interests? These are the questions that I am trying to answer in this Article.

[25] 8 DEL. GEN. CORP. L. §141(d).

[26] 8 DEL. GEN. CORP. L. §102(b)(7). *See also infra* text accompanying notes __-__ (discussing the genesis of this exculpation provision).

"unless otherwise provided in the certificate of incorporation."[27] However, strange as it may (rightly) seem to those unfamiliar with this area of law, the issue of corporate *beneficiary* is not directly addressed in Delaware's corporate law statute.[28] The black letter law on this crucial matter has instead been supplied by case law, clearly specifies that shareholder primacy is (at least) the default rule under Delaware law.[29] Non-shareholder interests can be taken into account, but only when doing so is "rationally related" to serving the shareholders.[30]

This rule of shareholder primacy is stated in a number of Delaware cases, the most recent and explicit of which is *eBay v. Newmark*.[31] A founder of Craigslist, Inc., the popular online "classifieds" website, sold his stake in the company to eBay, Inc. Later, eBay complained that the remaining founders were pursuing designs to entrench themselves in control of Craigslist, in order to ensure that the company would continue to operate as a kind of community service, and not be forced to focus only on shareholders. The founders frankly acknowledged this motive. Chancellor William Chandler made clear that such a motive was impermissible:

> Jim and Craig opted to form craigslist, Inc. as a *for-profit Delaware corporation* . . . . Having chosen a for-profit corporate

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[27] *See* Gordon, *supra* note __ at 1553 & n. 16 ("[T]he phrase 'unless otherwise provided in the certificate of incorporation,' runs through the famously flexible Delaware code like a leitmotif. Nevertheless, many features of corporate law, great and small, are mandatory.").

[28] Compare the situation in Delaware to that in California, where the statute is clear: "A director shall perform the duties of a director . . . in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders." CALIFORNIA CORPORATIONS CODE § 309(a).

[29] *See generally* Yosifon, *The Law of Corporate Purpose*, *supra* note __. The urgency of the question of mutability of corporate purpose only emerges after one understands that shareholder primacy is in fact the prevailing law. If one assumes that directors presently have latitude with respect to whether or not to put shareholder interests first, then the question of muting away from shareholder primacy is moot. *See* Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps*., 25 REGENT U. L. REV. 269, 271-72 (2013) (criticizing proponents of benefit corporations for "misunderstanding that traditional for-profit corporations (like LLCs) are legally free to pursue social or environmental goals and except in limited circumstances in Delaware most notably, are not required to maximize corporate profits and/or shareholder wealth.").

[30] *See* Revlon, Inc. v. MacAndrew & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1985) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.").

[31] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010). The cases that speak directly to the issue of corporate beneficiary all pre-date the creation of the Delaware Public Benefit Corporation, and so we do not have any teaching about the relationship between the two statutes.

> form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders.[32]

In *eBay*, Chancellor Chandler thus made clear both that shareholder primacy is the law *and* that corporate "persona," public statements, routine self-descriptions, and board policies were not sufficient to alter the default rule of shareholder primacy.[33] However, neither *eBay*, nor other cases expressing Delaware's shareholder primacy norm, however, makes clear whether the rule is *mandatory* or alterable, and if alterable, how to alter it.[34]

While the Delaware statute does not supply the shareholder primacy norm, it *does* provide multiple open-ended invitations to private-ordering. The broadest opportunity comes in Section 102, which describes necessary and permissive elements of the "certificate of incorporation." Section 102(a)(3) says the certificate "*shall* set forth … [t]he nature of the business or purposes to be conducted or promoted."[35] It continues: "[it] shall be

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[32] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010).

[33] It should be clear, therefore, that it will not be sufficient for a corporation operating under the default rules in Delaware to point to corporate persona, marketing materials, or statements from the board to establish that the corporation has, say, a sincerely held religious belief that would excuse it from complying with laws of general application under RFRA, unless the directors can also claim in good faith that they believed adherence to religious beliefs was the surest path to profits for the shareholders. *See supra* text accompanying notes __-__ (discussing *Hobby Lobby)*. Even if the Supreme Court were willing to credit non-charter statements for purposes of extending RFRA's protections, if such statements confessed a commitment to sacrifice profits in service of religious believes, then the directors would have to answer for it in Delaware.

[34] Ian Ayers argues that when discussing legal rules judges should specify whether they consider the rules to be mandatory or mutable. It they conclude in a case before them that the parties have not effectively altered a mutable rule, the judge should specify how the parties might have done it. This would give guidance to future parties, and it would also force the hand of the legislature if it desires some mode of alteration other than that suggested by judicial dicta. *See* Ayers, *Regulating Opt-Out*, *supra* note __ at 2055-2059. *Cf.* David A. Wishnick, *Corporate Purposes in a Free Enterprise System: A Comment on eBay v. Newark*, 121 Yale L. J. 2405, 2410-2411 (2012) (incorrectly interpreting Chancellor Chandler's verbiage in *eBay* as expressing the view that shareholder primacy in corporate governance is immutable).

[35] 8 DEL. GEN. CORP. L. § 102(a)(3).

sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in *any lawful act* or activity for which corporations may be organized under the General Corporation Law of Delaware."[36] Here would seem to be the place where promoters could specify that their firm will be governed by a multi-stakeholder governance regime, rather than the default rule of shareholder primacy. But this begs the question: is multiple-stakeholder governance a "lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware" or not? I will return to that question below.[37]

Interpretation of the scope of private ordering available under section 102(a)(3) is complicated and confused by the section's history, and the general history of corporate law statutes. In the eighteenth and nineteenth centuries, states granted corporate charters only by specific legislative action, for particular undertakings or "purposes," such as the organization of a railroad, or the building of a canal. In the early twentieth century, states adopted "general" incorporation statutes, which made corporate charters available by routine administrative action to all comers. The general incorporation statutes still required corporate promoters to specify the purpose or type of business their corporation would undertake. In this stage of the evolution of corporate law, however, the stipulation of "purpose" in the charter became less a limitation on corporate power imposed by a jealous state, and more a protection afforded to corporate investors, who were thought to be entitled to some certainty about the kind of business they were investing in. Corporate acts that went beyond the corporate purpose specified in the charter were "ultra vires," void (or later, voidable), and could be enjoined by shareholders or the government. Soon enough it became evident, however, that what investors really wanted was for their firms to enter whatever fields of endeavor might prove profitable. Promoters therefore started stuffing long lists of permissible purposes into corporate charters, which could reach cumbersome and absurd lengths. Solicitous legislatures responded by reforming general incorporation statutes to allow firms to specify that their purpose was to undertake "any lawful act or activity."[38]

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[36] 8 DEL. GEN. CORP. L. § 102(a)(3).
[37] *See infra* text accompanying notes __-__.
[38] *See* David G. Yosifon, *Corporate Aid of Governmental Authority: History and Analysis of an Obscure Power in Delaware Corporate Law*, 10 U. ST. THOMAS L. REV. 1086 (2013) (distinguishing between corporate purposes, corporate powers, and corporate beneficiaries).

Most Delaware business corporations are today in fact formed with the catch-all purpose of engaging in "any lawful act or activity." But this is never taken to establish a deviation from the shareholder primacy norm, or to express an expansion of the default beneficiary to include, say, *any* beneficiary that could be lawfully served by a corporation. Rather, the provision is supplied in order to give directors the greatest possible discretion in selecting means to serve the default beneficiary. Indeed, Craigslist's certificate of incorporation stated that its purpose was to "engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware."[39] Yet this expansive language played *no role whatsoever* in Chancellor Chandler's disquisition on the law of corporate purpose in the *eBay* case.

Still, it seems plausible to conjecture that section 102(a)'s invitation to state the corporation's "purpose" could be used to specify a change in beneficiary, which by default is the shareholders.[40] While it would require a somewhat twisted construction of the statutory language, we could understand (or encourage courts to understand) the broad "any lawful act" language to incorporate the default beneficiary of corporate operations – the shareholders – and to express that the firm may do any business in service of that end. However, explicit specification of a purpose to serve multiple-stakeholders, or to otherwise deviate from the shareholder primacy default could be achieved by stipulation through section 102(a) making that clear. And then, of course, the charter could further specify that "any lawful act" (any kind of business activity) may be undertaken to serve that privately ordered beneficiary or corporate goal.[41]

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[39] Certificate of Incorporation of Craigslist, Inc., October 13, 2004. On file with author.

[40] *See infra* text accompanying notes __-__ (discussing the use of the "purpose" provision in Delaware non-profit corporations).

[41] Many different approaches to private ordering of corporate beneficiary could be imagined. For example, a charter might call upon directors to "balance" the interests of multiple-stakeholders, including shareholders, workers, and consumers. The charter might also specify how the duties it establishes are to be enforced. The default rule in Delaware is that only shareholders have standing to bring derivative claims while the firm is solvent, and the creditors have standing to bring such claims where the firm is insolvent. *See* Quadrant Structured Products Co., Ltd. v. Vertin (2014), 102 A.3d 155 (2014) (Laster, Vice Chancellor). If a charter explicitly indicated that the parties considered workers or consumers to be owed fiduciary duties, then the courts might be willing to recognize consumers as having standing.

Drawing Insight From Non-Profit Corporate Law

Many states have separate "for profit" and "non-profit" corporation statutes. Delaware does not. Both "for profit" and "non-profit" corporations are formed under the Delaware General Corporation Law. The way that a Delaware non-profit is formed is instructive on the question of whether the shareholder primacy norm in Delaware corporate law is subject to private ordering.

The statute does not directly specify how a "non-profit" corporation is created. Section 102(a)(4) contemplates the formation of corporations that are not authorized to issue stock, and that section states that a non-stock corporation "shall" state the "non-stock" limitation in its charter, and "shall" state the "conditions of membership of the corporation," in their charter.[42] Crucially however, for present purposes, there is no requirement that "non-stock" corporations be "non-profit" corporations, and for-profit non-stock corporations are apparently routinely created as special purpose vehicles in complex business settings.[43] Therefore, something more than status as a "non-stock" corporation is required to make a firm a non-profit corporation in Delaware. There is no "for-profit"/"non-profit" binary evident or implied in the architecture of the Delaware code.[44]

As if in response to the lack of clarity in the statute on how to form a non-profit corporation, the Delaware Division of Corporations maintains a form on its website for those who wish to form non-profit, exempt organizations.[45] The form prompts the user to add the verbiage "[t]his Corporation shall be a nonprofit corporation" in the *purpose* section of the charter, and it instructs the user to place that language *after* the phrase,

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[42] The charter may specify that membership conditions are to be provided in the corporation's bylaws. *See* 8 DEL. GEN. CORP. L. §102(a)(4)

[43] A series of 2010 amendments to the Delaware General Corporation Law did provide some clarification on the application of the statute to non-stock corporations. But the 2010 amendments have no guidance to offer with respect to the issues under review here. *See* John Mark Zeberkiewicz & Black Rohrbacher, *New Day for Nonstock Corporations: The 2010 Amendments to Delaware's General Corporation Law*, 66 BUSINESS LAWYER 271 (2010).

[44] When it comes to establishing the fees that corporations must pay for their Delaware chartering privileges, the General Corporation Law does squarely distinguish between for-profit and non-profit corporations. Section 391(j), for example, provides special corporate franchise tax treatment for "exempt" organizations, and it essentially uses federal standards for establishing tax-exempt status under 26 U.S.C. 501(c), to determine whether firms are "exempt" for the purpose of state franchise taxes. *See* 8 DEL. GEN. CORP. L. § 391(j).

[45] On file with author, available at https://corp.delaware.gov/Inc_Exempt.pdf

"[t]he purpose of the corporation is to engage in any lawful act of [sic] activity for which corporations may be organized under the General Corporation Law of Delaware."[46] This procedure is not established by statute, but it roughly tracks what I have suggested is the path to any kind of private-ordering of corporate beneficiary under the Delaware statute.

The fiduciary law applicable to Delaware non-profits is underdeveloped, both in case law and in scholarship.[47] But the Delaware Supreme Court has had no difficulty locating the other-than-profit-maximizing goals of charitable corporations with reference to the private ordering specified in the charter. In a prominent (for other reasons) case called *Oberly v. Kirby*,[48] the Delaware Supreme Court stated:

> because the Foundation was created for a limited charitable purpose rather than a generalized business purpose, those who control it have a special duty to advance its charitable goals and protect its assets. Any action that poses a palpable and identifiable threat to those goals, or that jeopardizes its assets would be contrary to *the Certificate* and hence *ultra vires*.[49]

More recently, Vice-Chancellor Glasscock had occasion to expound on the fiduciary duties of the directors of non-profit corporations. In *Gassis v. Corkery*, he wrote: "[*Oberly]* made clear that a nonprofit charitable corporation's board owes fiduciary duties to its *beneficiaries*, not to its members *qua* members or directors *qua* directors."[50] He concluded: "nothing in the record indicates that the charitable interests of the Defendants [i.e., decisions made by the board] are incompatible with *the aims of the Fund as stated in its Certificate of Incorporation*."[51]

This states it clearly. The goals of the charity are established in the certificate, and those goals describe and limit the responsibilities of the board, which is not otherwise distinguishable, in essence, from an ordinary (default) board of a general business corporation. The indubitable implication of the fact that non-profit corporations are subsumed within the

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[46] On file with author, available at https://corp.delaware.gov/Inc_Exempt.pdf

[47] *See* Mary A. Jacobson, *Nonprofit Corporations: Conversion to For-Profit Corporate Status and Nonprofit Corporation Members Rights – Farahpour v. DCX.*, 20 DEL. J. CORP. L. 635 (1995).

[48] Oberly v. Kirby, 492 A.2d 445 (Del. Supr. Ct. 1991).

[49] Oberly v. Kirby, 492 A.2d 445, 462 (Del. 1991) (first emphasis added).

[50] Gassis v. Corkery, No. CIV.A. 8868-VCG, 2014 WL 2200319, at *14 (Del. Ch. May 28, 2014) *aff'd*, 113 A.3d 1080 (Del. 2015)

[51] Gassis v. Corkery, *supra* note __ at *15 (emphasis added).

Delaware General Corporation Law is that the beneficiary of Delaware corporate governance is subject to private ordering. The legal architecture here makes two points about Delaware law clear: first, the *default* rule is profit-maximization, and second, promoters *can* deviate from that default if they so desire.

Consistency with the Laws of Delaware

The search for permissible private-ordering of corporate beneficiary may fruitfully be continued in section 102(b) of the Delaware corporate code, which states that in addition to required information, the certificate "*may* also contain . . . [a]ny provision for the management of the business and for the conduct of the affairs of the corporation . . . if such provisions are not contrary to the laws of this State."[52] This nod to private-ordering may be as good a place to express deviation from the shareholder primacy norm as is section 102(a), but its import is again obscured by the question-begging language: "if such provisions are not contrary to the laws of this State."[53] This limitation echoes section 102(a)'s invitation to place in the charter any purpose "for which a corporation may be organized under the laws of Delaware,"[54] and the two restrictions may properly be read as co-extensive for present purposes. We must ask whether a governance provision under section 102(b) altering the shareholder primacy norm in corporate governance, a rule established not by statute but by *common law*, would be "contrary to the laws" of Delaware.

In *Sterling v. Mayflower Hotel*, decided in 1952, the Delaware Supreme Court concluded that "the laws of this State" referenced in the cognate rule of the then-existing Delaware corporate code, *sometimes*, but not always, includes the common law.[55] *Sterling* concerned a merger between the Hilton Corporation and the Mayflower Hotel. Prior to the merger, Hilton owned a controlling stake in Mayflower, and Hilton's representatives dominated Mayflower's board. Some minority Mayflower shareholders objected to the merger and asserted that the Mayflower board's approval of the deal was invalid, because the board had counted interested Hilton-representatives on the Mayflower board towards establishing a quorum, in violation of Delaware case law, which stated that interested directors could not be counted towards a quorum for votes involving interested

[52] 8 DEL. GEN. CORP. L. § 102(b)(3).
[53] 8 DEL. GEN. CORP. L § 102(b)(3).
[54] 8 DEL. GEN. CORP. L. §102(a). *See supra* text accompanying notes __-__ (discussing this section).
[55] Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 117 (1952).

transactions.[56] Mayflower's certificate of incorporation contained a provision specifying that interested directors *could* count towards a quorum, but the plaintiff shareholders argued that this charter provision was invalid, since it was "contrary to the laws" of Delaware, as expressed in the common law.

The *Sterling* Court rejected the idea that corporations are precluded from modifying "any rule of the common law relating to the regulation of the corporate enterprise," because "[s]uch a construction unwarrantably narrows the scope of the enabling portion of the paragraph."[57] The Court allowed the charter provision counting interested directors towards a quorum to stand. Before doing so, however, the Court instructed that the common law sometimes will count as "law" that charter provisions cannot contravene:

> [It] it is clear that the scope of the proviso is broader than the field of statutory law. . . .We do not attempt a definition; but we say that the stockholders of a Delaware corporation may by contract embody in the charter a provision departing from the rules of the common law, provided that it does not transgress a statutory enactment or a public policy settled by the common law or implicit in the General Corporation Law itself.[58]

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[56] Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 117 (1952).

[57] Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 117 (1952) (emphasis added).

[58] Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, 313-14, 93 A.2d 107, 118 (1952) ("In *Greene v. E. H. Rollins & Sons, Inc*. . . . a charter provision was found to contain unreasonable restraints on alienation of shares of stock and was held invalid.). The Court also discussed and held inapposite a case the plaintiffs had cited called, State ex rel. Cochran v. Penn-Beaver Oil Co., 4 W. W. HARR. 81, 34 DEL. 81, 143 A. 257 (1926), in which a charter provision denying stockholders their common law right to inspect corporate books was held invalid. The Sterling Court read the Penn-Beaver Oil decision as "draw[ing] a distinction between regulation and prohibition of the common law rights of stockholders." The Sterling Court acknowledged that "there is also language" in the Penn Beaver cases "suggesting that a right given by the common law may not be abrogated" to which the Sterling Court said, "if the opinion is read as announcing the broad rule contended for by plaintiffs we cannot agree with it." *Id*.

In 1967 the Delaware legislature amended Section 144 to specify that "[c]ommon or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes the contract or transaction." This essentially flipped the default rule. The verbiage in §144(b) is somewhat weird, why does it say that interested directors "may" be counted towards a quorum. What does it depend on? Since Section 144(b) does not state "unless otherwise provided in the articles of incorporation," we now have to ask whether it is permissible for firms to specify in their articles that interested directors *may not* count towards a quorum. Ernest Folk, III, who

It seems to me that nothing is no public policy clearly indicated in the common law establishing shareholder primacy as the corporate governance norm that would suggest that it should be unalterable by charter provision.[59] Neither does there seem to be a clearly implied policy of the General Corporation Law to prohibit alteration of the shareholder primacy norm in firm governance, at least not until recently. *However*, the Public Benefit Corporation statute *is* literally a part of the General Corporation Law: it is organized as Subchapter 15 of Title 7, which in the Delaware Code is the General Corporation Law.[60] It might be argued that the presence of the public benefit corporation form within the corporate code implies that the policy of the General Corporation Law is to offer the Public Benefit Corporation, rather than open-ended private ordering, as the sole alternative to shareholder primacy in corporate governance.[61]

Let us turn now to consideration of the Public Benefit Corporation and its relationship to the overarching General Corporation Law.

III. PRIVATE-ORDERING AND PUBLIC BENEFIT CORPORATIONS

The Public Benefit Corporation Statute

In 2013, in response to activist pressure and a wave of similar legislation in other states, Delaware amended its corporate law to provide for the creation of Public Benefit Corporations. According to the Delaware

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was the principle architect of Delaware's sweeping 1967 reforms, wrote in his 1972 treatise reflecting on and interpreting those reforms: "The effect of §144(b) is to adopt as a rule of law, *presumably subject to charter variation*, the doctrine of the *Sterling* case approving the frequent Delaware practice of permitting interested directors to count towards a quorum." ERNEST FOLK, III, THE DELAWARE GENERAL CORPORATION LAW: A COMMENTARY AND ANALYSIS 89 (1972) (emphasis added). Perhaps the "may" in the statutory formulation invites that interpretation.

[59] Operating from the mistaken view that corporate law presently permits directors to sacrifice shareholder interests on behalf of non-shareholders, Einer Elhague considers whether it would be permissible to include a charter provision *eliminating* such discretion, and insisting on shareholder primacy. *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733 (2005). He concludes that such a provision would be against public policy, in part, because he thinks it would require abrogation of the business judgment rule, which would be too onerous for the courts to manage. *Id.* This is wrong on every level. First, shareholder primacy is already the law of Delaware. Second, courts have found it quite simple to enforce the rule by giving expansive deference to the substance of directorial decision-making, and no quarter at all for deviation from a purpose to serve the shareholders.

[60] Delaware's LLC statute, in contrast, is organized under Chapter 18, under Title VI.

[61] *See infra*, text accompanying notes __-__.

statute, "A 'public benefit corporation' is a for-profit corporation . . . that is intended to produce a public benefit . . . and to operate in a responsible and sustainable manner."[62]

The first section of the statute specifies that Public Benefit Corporations are "subject in all respects" to the General Corporation Law, "except to the extent this subchapter imposes additional or different requirements, in which case such requirements shall apply."[63] And impose additional or different requirements it does, in heaps. The PBC statute is strict and allows very little private ordering. It contains many "shalls," just a few "mays," and the phrase "unless otherwise specified in the certificate of incorporation" is absent altogether.

Now, of particular importance to this inquiry is the final section of the PBC statute, section 368, which is captioned "No effect on other corporations."[64] It states: "This subchapter shall not affect a statute or rule of law that is applicable to a corporation that is not a public benefit corporation except as provided in § 363 of this title [which relates to amendments to charters of existing firms]."[65] So, facially this should mean that *if* opting-out of shareholder primacy through private-ordering was permitted prior to the PBC being passed, then that "rule of law" should be unaffected by the PBC's adoption. It is just that a privately-ordered multi-stakeholder firm cannot call itself a Public Benefit Corporation, because in order to be a PBC you must comply with the PBC statute. Or, is a firm that attempts to deviate from shareholder primacy in its own way now condemned as an *improperly-formed* Public Benefit Corporation?[66] We must examine the extent to which section 368's "no impact" assertion can

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[62] 8 DEL. GEN. CORP. L. § 362(a). The various states' Benefit Corporation statutes are not identical. Because my principle interest here is on the interrelationship between standard corporate law and the Benefit Corporation, and since Delaware dominates in the standard corporate law world, my focus here will be on the Delaware Public Benefit Corporation. Given corporate lawyers' affinity for Delaware, it seems likely that the Delaware Public Benefit corporation will soon become the focus of the field. *See* Lyman Johnson, *Pluralism in Corporate Form, supra* note __ at 270-271 (2013) (summarizing early history of benefit corporation statutes).

[63] 8 DEL. GEN. CORP. L. § 361 (emphasis added).

[64] 8 DEL. GEN. CORP. L.§ 368.

[65] 8 DEL. GEN. CORP. L. § 366(c). The section and which will be discussed *infra*, text accompanying notes __-__.

[66] *But see* Black, *Is Corporate Law Trivial?*, supra note __ at 555 ("[U]nder Delaware's "doctrine of independent legal significance," a court will not overturn a result that can be accomplished one way because that result would have been prohibited if attempted in another way") (citing Rauch v. RCA Corp., 861 F.2d 29 (2d Cir. 1988)).

indeed hold back an effort to view what is possible in the General Corporation Law though the lens of what have been created with the Public Benefit Corporation.

Consider first some of the mandatory terms of the public benefit corporation. Section 362 of the statute specifies that "in the certificate of incorporation, a public benefit corporation *shall* (i) Identify within its statement of business or purpose pursuant to section 102(a)(3) of this title one or more specific public benefits to be promoted by the corporation, and (ii) state within its heading that it is a public benefit corporation."[67] This helps vindicate the view, expressed above, that section 102(a)(3) is the place to pursue multi-stakeholder governance). Section 362(b) defines "public benefit":

> 'Public benefit' means a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.[68]

The PBC includes several *mandatory* notice requirements. Section 362(c) requires that notice of the PBC status of the corporation be given to anyone to whom shares in the firm are issued.[69] Public Benefit Corporations do not have to use the phrase "public benefit corporation" or the abbreviation "PBC" in their corporate name, but if they do, then such usage is sufficient to provide the notice.[70] Additionally, Section 364

[67] 8 DEL. GEN. CORP. L. § 362(a)(emphasis added). "Heading" is not a defined term in the corporate code.
[68] 8 DEL. GEN. CORP. L. § 362(b).
[69] Curiously, no notice is required to be given to workers or consumers, who apparently are assumed to either have no interest in the public benefit status of the firm, or else to acquiesce in it by the cost of the public benefit being impounded into reduced wages for workers or increased prices (or lower quality) for consumers. But this begs the question, if labor and consumer markets are adequate to price the "public benefit" terms for workers and consumers, making notice unnecessary, then why are the capital markets not adequate to price it for equity investors? *See* David G. Yosifon, *Towards a Firm-Based Theory of Consumption*, 46 WAKE FOREST L. REV. 447 (2011) (assessing whether and why consumers might prefer social benefit decisions to be made for them by directors at the level of firm governance, rather than episodically through consumption decisions in the market).
[70] 8 DEL. GEN. CORP. L. §362 (no notice is required if the stock is registered with the SEC, presumably under the assumption that registration would provide such notice). .

requires the stock certificates of PBC's to "note conspicuously that the corporation is a public benefit corporation."[71]

The statute also includes *mandatory* reporting requirements that, while not draconian, might be undesirable for some firm promoters (because they are costly). A PBC: "*shall* no less than biennially provide its stockholders with a statement as to the corporation's promotion of the . . . public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation's conduct."[72] The section includes several additional "shalls" concerning what this reporting statement must contain.[73]

Section 366(c) provides some expressly mutable elements, which are not hugely important on their own (the charter may require the public benefit report to be issued more frequently than biennially, it may require that the report be made available to the public) but their very presence serves to highlight the immutability of the rest of the benefit corporation provisions.

Section 368's promise that the public benefit corporation statute has "no effect on other corporations" notwithstanding, is it now plausible to think that a privately ordered multi-stakeholder corporation that does give actual notice of its deviation from shareholder primacy, or note its deviant status on its stock certificates, would be permissible? After all, there is no general requirement that notice be given for charter-based departures from standard default terms, for example for the adoption of staggered boards, imposition of super-majorities for board elections and amendment adoptions, etc. It is quite possible that Chancery would now say that the implied public policy of the Delaware General Corporation Law is that deviation from shareholder primacy has to be in the way prescribed by the PBC sections of the statute. The notice requirement is not onerous or particularly restrictive to what private-orderers might want to do, but other features of the PBC are quite restrictive indeed.

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[71] 8 DEL. GEN. CORP. L. § 364.

[72] 8 DEL. GEN. CORP. L. §366(b).

[73] The report must contain "(1) The objectives the board of directors has established to promote such . . . public benefits and interests; (2) The standards the board of directors has adopted to measure the corporation's progress in promoting . . . public benefits and interests; (3) Objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting such . . . public benefits and interests; and (4) An assessment of the corporation's success in meeting the objectives and promoting such . . . public benefits and interests." 8 DEL. GEN CORP. L. § 366(b).

For example, governance of the public benefit corporation is also strictly prescribed by the PBC statute:

> The board of directors *shall* manage . . . the business and affairs of the public benefit corporation in a manner that *balances* the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.[74]

This is a highly specific, rigid form of multi-stakeholder governance. Again, no "unless otherwise provided in the articles" is offered. The question we must ask (are asking) is whether this specificity is *trivial*, in the sense that it can be avoided by private-ordering, or non-trivial in the sense that it is the only way to deviate from shareholder primacy under Delaware corporate law.[75] One can easily imagine desirable alternatives, such as a governance design that instructs the board to "pursue profits first and foremost, but in a way that is not unduly disruptive of the legitimate interests of nonshareholders." Or, "pursue profits in a way that privileges environmental sustainability over short-term profitmaking." But the PBC calls for only one model: directors are to "balance" shareholder interests with the public benefits identified in the certificate. One scholar has suggested that "balance" may be construed to mean giving *equal* weight to each factor (otherwise, the thing would be unbalanced).[76] Even if it were not given such a literal meaning, this is still a specific and rigid governance charge.

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[74] 8 DEL. GEN. CORP. L. § 365(a)(emphasis added).

[75] Black, *Is Corporate Law Trivial*?, *supra* note __ at 54 (arguing that mandatory rules are "trivial" if they are "market mimicking, avoidable, changeable, or unimportant.").

[76] *See* Murray, *Social Enterprise Innovation*, *supra* note __ at 355 n. 64. Murray notes that the Model Public Benefit Corporation Legislation crafted and promoted by the non-profit group B Lab requires directors to "consider" both the shareholder and public benefit interests described in the PBC charter, rather than "balance" them, as the Delaware public benefit corporation statute prescribes. *See* MODEL BENEFIT CORP. LEGIS. § 301, available at http://benefitcorp.net/attorneys/model-legislation). Murray reports that his telephone conversations with members of the Delaware Corporation Committee that drafted that state's PBC legislation reveal different views among committee members as to what "balance" means, and whether it is a more or less demanding standard than "consider." *Id.* This suggests either that the language in the statute was not carefully crafted, or else that it was carefully crafted to be ambiguous. In any event, the legislative history of the provision will not provide much guidance to a court confronted with construing it. *See supra* note __ and accompanying text (noting sparse legislative history bearing on the Delaware PBC).

The statute also insists that the governance principles of a public benefit corporation can only be meekly enforced. Section 365(b) states that a PBC director:

> *shall not*, by virtue of the public benefit provisions [in the charter] . . . have any duty to any person on account of any interest of such person in the public benefit or public benefits identified in the certificate of incorporation . . . and, with respect to a decision implicating the balance requirement in subsection (a) of this section, will be deemed to satisfy such director's fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.[77]

Non-shareholders have no duty owed to them and have no power to enforce the charter's "benefit" provisions. Only shareholders can enforce the directors obligation to pursue the non-pecuniary benefit described in the charter.[78] It is therefore best to conceive of PBCs as "socially conscious shareholder primacy" firms, rather than firms with multiple genuine beneficiaries. PBC's are still concerned only with the shareholder interest, they simply conceive of the shareholder interest more expansively than the pecuniary regard. But some people – investors, workers, consumers – might desire to associate with a firm that allowed non-shareholders to enforce real duties that were really owed to them. Could a firm achieve

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[77] 8 DEL. GEN. CORP. L. §365(b) (emphasis added). Section 362(c) provides an "exculpation" provision that is broader than that which is available under the General Corporation Law. It states that the charter, "*may* include a provision that any disinterested failure to satisfy this section shall not, for the purposes of § 102(b)(7) or § 145 of this title, constitute an act or omission not in good faith, or a breach of the duty of loyalty." 8 Del. Gen. Corp. L. § 365. The language appears to allow opting out of liability for failures of "oversight," which the Delaware Supreme Court has said is a species of good faith, which is a species of loyalty. *See* Stone v. Ritter, 911 A.2d 362 (Del. 2006) ("Where directors fail to act in the face of a known duty to act . . . they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith."). Opting-out of liability for disinterested bad faith failure of oversight is not permitted under the General Corporation Law.

[78] The PBC statute imposes substantially more onerous derivative standing requirements for shareholders than those that govern derivative suits in ordinary corporations. Shareholders of public benefit corporations can only sue derivatively if they own "individually or collectively . . . at least 2% of the corporation's outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of at least $2,000,000 in market value." 8 DEL. GEN. CORP. L. § 367. The Model Benefit Corporation Legislation calls for only shareholders to have default standing to bring derivative actions by default, but allows firms to specify in the charter that other stakeholders also have standing. *See* MODEL BENEFIT CORP. LEGIS. § 305(c)(iv).

such a design by forming a non-PBC firm with a charter provision specifying that directors have an enforceable obligation to the non-shareholding interest specified in the charter? If such private-altering is possible, then the Public Benefit Corporation was unnecessary. If the Public Benefit Corporation was necessary to achieve any deviation from shareholder primacy, or is now the only allowable alternative form, then such private ordering is not possible.

Policymakers and commentators have described the Public Benefit Corporation as adding flexibility to corporate law design.[79] But it may actually have reduced flexibility, making it more difficult to form socially conscious enterprises, and restricting the ability of existing shareholder primacy firms to adopt charter amendments committing themselves to greater social responsibility. This may not have been the intent, but it may end up being the result.

Statutory Interpretation

The crux of the interpretive problem here is whether the public benefit corporation created merely a "menu option," providing a specific type of non-shareholder primacy governance corporation, or whether it is the first and only type of non-shareholder governance that is permissible under the Delaware General Corporation law. Where legislatures introduce "menu options" to make salient that something is permissible under a statutory scheme, they risk inviting an understanding that the menu-option was *not* available until the legislature offered it, and risk a construction holding that the menu option is the *only* thing of its sort that is permissible. By their explicit authorization of some act, the law that predates the promulgation of

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[79]*See* William H. Clark, Jr. & Larry Vranka, *White Paper: The Need and Rationale for the Benefit Corporation: Why It is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public* (Version of January 18, 2013) (hereinafter, "White Paper) at 1 ("The benefit corporation is the most comprehensive yet flexible legal entity devised to address the needs of entrepreneurs and investors and, ultimately, the general public."). *See also* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations are Redefining the Purpose of Business Corporations*, 38 Wm. Mitchell L. Rev. 817 (2012) (formal publication of the White Paper). Certainly the public statements by the Governor and others emphasized adding flexibility. At a press event announcing the legislation, Delaware Governor Jack Markell said, "We've all heard about corporations wanting to 'do well' while also 'doing good.' With this new law, Delaware corporations will now have the ability to build those dual purposes into their governing documents." *See* "Governor Markell Signs Public Benefit Corporation Legislation," July 17, 2013, available at http://news.delaware.gov/2013/07/17/governor-markell-signs-public-benefit-corporation-legislation/ (quoting Markell).

the menu option may subsequently be interpreted (or misinterpreted) as having forbid the newly menu-ed option.[80]

Consider the introduction of the exculpation "menu option" of section 102(b)(7) into the Delaware corporate code in 1988.[81] This section states that the certificate "may" contain "a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director."[82] Contemporary commentators tend to write and speak as if section 102(b)(7) gave corporations the power to do something that was previously forbidden. But that is far from clear. At the time it was passed, many scholars opined that section 102(b)(7) was not necessary, because the power to exculpate directors by charter provision was already implicit in the statute.[83] Indeed,

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[80] *See* Michael Livingston, *What's Blue and White and Not Quite As Good As A Committee Report: General Explanations and the Role of "Subsequent" Tax Legislative History*, 11 AM. J. TAX POL'Y 91, 93-95 (1994) ("[E]vents taking place after enactment of a statute are relevant to its interpretation. . . . [T]he legislature's action (or inaction) on a later measure may suggest that it takes a particular view of existing law. . . . [T]hese statements are not legislative history; but they may have a similar effect.").

[81] The statute was adopted in response to the shocking decision of Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985), holding the directors of Tran Union, Inc. liable for breach of the duty of care in connection with a profitable but rushed merger. Van Gorkom is today read to have imposed a "process" obligation on directs before they can be given benefit of expansive judicial deference to the substantive decisions under the business judgment rule.

[82] The provision insists that "such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law." 8 DEL. GEN. CORP. L. §102(b)(7).

[83] Norman Veasey, et. al., *Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification, and Insurance*, 42 BUS. LAW. 399, 403 (1987) ("The concept of a provision in the certificate of incorporation limiting or eliminating the liability of directors was not without precedent. Some scholars had suggested that the certificate of incorporation of Delaware corporations could be amended to limit or eliminate liability of directors without enabling legislation . . . . Indeed, some corporations had already adopted such provisions."). In 1990, Butler and Ribstein wrote:

> There is a substantial debate among the Reporters for the A.L.I. project as to whether statutory authorization is necessary to validate opt-out provisions, with [John] Coffee supporting the section 7.17 approach of validating opt-outs even in the absence of a charter provision, and the Chief Reporter and Reporter for Part IV [Ribstein himself] insisting on legislative authority.

Butler & Ribstein, *Opting Out of Fiduciary Duties*, supra note __ at 67. In a footnote, they assert: "The provision is valid only if it merely clarifies an amendment power that existed prior to enactment of the provision rather than enlarging the majority's power to amend the contract." *Id*. at 67 n. 300. *See also* PRINCIPLES, *supra* note 6, at 139—43 (Tent. Draft No. 9, 1989).

while clearly not widespread, an example of jurists sanctioning an exculpation clause privately-ordered into a corporate charter can be traced to an English case from 1911[84] charging a rubber plantation's directors with a level of indifference in running the firm that would have made Mrs. Prichard.[85] The charter of the firm, however, contained a provision stating that, "[n]o director . . . shall be liable . . . for any loss or damage occasioned by any error of judgment or oversight . . . unless the same happen through his own dishonesty."[86] The learned Judge Neville allowed it: "I do not think that it is illegal for a company to engage its directors upon such terms. I do not think, therefore, that an action by this company against its directors for negligence, where no dishonesty was alleged, could have succeeded."[87] I have not found any cases in Delaware or elsewhere, where exculpation by charter provision was *disallowed* prior to the promulgation of section 102(b)(7).

However, years after section 102(b)(7) was adopted, it has become commonplace to read legal scholars writing as if the provision was an innovation that allowed something that had been previously forbidden, rather than as clarifying the existence of a power that was there all along.[88]

This re-framing was soon found also in the Delaware Supreme Court's own retrospective interpretation about what section 102(b)(7) did. In

[84] In re Brazilian Rubber Plantations and Estates, Limited, 1 Ch. 425 (1911).
[85] *See* Francis v. United Jersey Bank, 432 A.2d 814 (N.J. 1981) (holding a corporate director liable for corporate looting undertaken by her children because "they spawned their fraud in the backwater of her neglect").
[86] In re Brazilian Rubber Plantations and Estates, Limited, 1 Ch. 425, 479-480.
[87] In re Brazilian Rubber Plantations and Estates, Limited, 1 Ch. 425, 480.
[88] For example, after noting that LLC's are free to exculpate professional advisors from liability for aiding and abetting managerial breaches of fiduciary duty, Ann Conawy laments that "[u]nder the current corporate scheme of the Delaware General Corporation Law (DGCL), no such protection for advisors to a board of directors is available since section 102(b)(7) only permits the elimination of personal accountability of a director to the corporation or its stockholders for monetary liability for the fiduciary duty of care." Conaway, *Lessons to Be Learned, supra* note __ at 792. *See also* Marcel Kahan & Edward B. Rock, *Corporate Constitutionalism: Antitakeover Charter Provisions As Precommitment*, 152 U. PA. L. REV. 473, 522 (2003) ("Sometimes, a new law or doctrine is needed to clarify an ambiguity or to address a novel issue. At other times, the law may be modified to expand the available choices. The adoption of title 8, section 102(b)(7) . . . falls in the latter category."); Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1639 (2005) ("[S]tockholders [can] reduce or eliminate director monetary liability for breaching the duty of due care. Most states do not extend this protection to officers. Delaware, for example, does not. Companies thus cannot by charter limit this exposure.")(citing §102(b)(7)).

Gantler v. Stephens, the Court for the first time explicitly held that officers owe "identical" fiduciary duties to the shareholders, much as directors do.[89] Immediately after announcing this, the Court dropped a footnote:

> That does not mean, however, that the consequences of a fiduciary breach by directors or officers, respectively, would necessarily be the same. Under 8 *Del. C.* § 102(b)(7), a corporation may adopt a provision in its certificate of incorporation exculpating its directors from monetary liability for an adjudicated breach of their duty of care. Although legislatively possible, there currently is no statutory provision authorizing comparable exculpation of corporate officers.[90]

When section 102(b)(7) was passed there was at least a controversy as to whether it was an innovation or merely a clarification (and the better view was that it was a clarification). Years later, the interpretative controversy about the genesis of the exculpatory provision is not even referenced, and the revisionist view that the legislature had created something new when it passed the provision is allowed to color the Court's conception of what is otherwise possible to accomplish under the statute. After all, if section 102(b)(7) was merely clarifying what firms could always have achieved through private-ordering, then by analogy the *Gantler* court might have better noted that officers *could* be exculpated by charter provision. A similar revisionism threatens to infect courts' thinking about the relationship between the PBC and the bounds of permissible private ordering in the general corporation statute.[91]

There is little direct discussion in the academic literature about the proper way to interpret whether menu options are suggestive or exclusive. What has been written notes the issue, but does not suggest its resolution.[92]

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[89] *Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009).

[90] *Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009).

[91] Indeed, if a firm did adopt multi-stakeholder governance through a charter provision, as I have urged is permissible, it is not clear under the *Gantler* dicta whether the charter could also exculpate directors from duty of care liability to non-shareholding beneficiaries, since §102(b)(7) only references exculpation as to duties owed to shareholders.

[92] *See, e.g.*, Daniel M. Häusermann, *The Case Against Statutory Menus in Corporate Law*, 9 HASTINGS BUS. L.J. 45, 76 n.8 (2012) ("Whether a statutory menu is open-ended or closed-ended is a matter of statutory interpretation, to which the usual principles apply."); Ian Ayres, *Regulating Opt-Out*, *supra* note __ at 2051 ("[L]ike restaurant menus, legal menus might (in second-order fashion) indicate whether the menu options are exclusive--or, like most restaurant menus, a legal menu might be silent as to whether it is exclusive.").

Per Llewellyn, the familiar canons of statutory interpretation reflect rather than resolve this analytic conundrum.[93] The canon of *expressio unius est exclusion alterius*, which stands for the proposition that the "expression of one thing implies the exclusion of others"[94] is possibly relevant.[95] The expression of permissible ordering of non-stakeholder governance through the PBC implies that it cannot be accomplished otherwise in the General Corporation Law, where multi-stakeholder governance is not mentioned. However, as Scalia and Bryan note, "[v]irtually all the authorities who discuss the negative-implication canon emphasize that it must be applied with great caution, since its application depends so much on context."[96] And right on cue, a frequently cited case in Delaware opines that "the Legislature does not necessarily admit that it did not by its prior enactment embrace a particular case by an amendment directly applicable to such case."[97]

We might have recourse to legislative history, but the only formal history indicates that the purpose of the bill was to entice more chartering business to Delaware.[98]

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[93] *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules a Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950) (arguing that for every familiar canon of statutory interpretation pointing the construction of a statute in one direction, another canon can be found pointing it in the opposite direction). The Delaware Supreme Court has adopted all of the usual canons of statutory interpretation. The starting place is that unambiguous words are given exacting effect. Where there is ambiguity, the statute is interpreted to effectuate the legislature's intent. Intent is gleaned from the overarching structure or purpose of the statute of which the language is a part. Where such procedures are unavailing, recourse may be had to legislative history. *See generally Fraternal Order of Police, Delaware-Wilmington Lodge No. 1 v. McLaughlin*, 428 A.2d 1158, 1160 (Del. 1981) (summarizing Delaware jurisprudence on statutory interpretation).

[94] Scalia & Bryan, READING LAW, *supra* note __ at 107.

[95] Scalia & Bryan, READING LAW, *supra* note __ at 107. One case discussed by Scalia and Garner in their treatment of this canon includes language, albeit drawn from an area afield from corporate law, which might apply to our question. The case involved a challenge to the legitimacy of a state statute conferring on the governor the right to appoint temporary superior-court judges, where the state constitution provided that superior court judges "shall" be elected by both branches of the legislature. *Id.* at 107 (discussing *State ex rel. M'Cready v. Hunt,* 2 Hill 1, 171 (S.C. Ct. App. 1834)). In applying the canon of *expressio unius*, the Court struck down the statute, stating, rhetorically: "Does not the act of prescribing the mode, necessarily imply a prohibition to all other modes?" *Id*.

[96] Scalia & Bryan, READING LAW, *supra* note __ at 107.

[97] *See Kennedy v. Truss, Superior Court of Delaware*, New Castle County, 1 Terry 424, 13 A.2d 431 (1940).

[98] DE LEGIS 122 (2013), 2013 DELAWARE LAWS CH. 122 (S.B. 47) ("Increasing interest in public benefit corporations necessitates their inclusion in the Code. Committee Findings:

The Delaware Corporation Law Council, a committee of the Delaware Bar Association which has special responsibility for proposing and vetting reforms to Delaware's corporate law, was similarly indeterminate in the guidance it gave on the purpose of the statue. When the Corporation Law Council came forward in 2013 with its recommendation to adopt the PBC statute, the Council promulgated a FAQ document on the issue.[99] The last question on the FAQ asks: "Couldn't this same goal be achieved through other types of entities?" The answer is evasive:

> By using a Delaware corporation, entrepreneurs and investors who wish to pursue these goals will be able to rely on the long tradition of Delaware corporate law, as well as the Division of Corporations and the Delaware Judiciary, to provide a measure of stability and predictability in an area of law that may evolve rapidly.[100]

Another FAQ (indeed) was posed: "Can't directors consider the interests of non-stockholders already? Why is it necessary to adopt new legislation?" The answer states:

> While the DGCL provides broad authority for a corporation to adopt specifically tailored provisions, that authority does not provide a clear path to alter these fiduciary duties in an enforceable manner.[101]

But this does not answer the pressing question: does the General Corporation law not provide a *clear* path, or does it *not* provide a path?

The language and structure of the statute does not clearly imply that private ordering of corporate beneficiary can now be accomplished only through the means prescribed by the public benefit corporation.

Public Policy and Private Ordering

The committee found that allowing the creation of public benefit corporations in the State would potentially benefit Delaware by creating incentives for new corporations to form in-state.").

[99] "Delaware Public Benefit Corporations: FAQ" (on file with author). Curiously, while the document was originally posted online, it appears to no longer be available online.

[100] *See, e.g.*, "Delaware Public Benefit Corporations: FAQ" (on file with author).

[101] "Delaware Public Benefit Corporations: FAQ," *supra* note __.

The *Sterling* decision states that charter provisions may deviate for common law corporate governance rules where they are neither contrary to a public policy implicit "in the General Corporation Law itself,"[102] or a "public policy settled by the common law."[103] In the previous section I argued that neither the language nor the structure of the Delaware corporate clearly implies that the PBC is to be the exclusive, mandatory means of deviating from shareholder primacy. Earlier I stated that there is nothing in the longstanding common law of shareholder primacy to suggest that it is immutable, and there is as yet no common law relating to the public benefit corporation. However, as we struggles to understand whether the PBC should be considered the exclusive means of departing from shareholder primacy, let us here consider general public policy justifications for mandatory, exclusive corporate law rules, and see if they may shed some light on this case. This theoretical perspective may shed light on the positive doctrinal assessment, and may aid assessment of what kind of reforms are desirable, as policymakers confront the conundrum I have surfaced here.

There are three basic justifications for having mandatory corporate law rules. First, mandatory rules might protect vulnerable parties from exploitation that might occur under a private-ordering regime. Second, and mandatory rules might protect against the externalization of harms to third-parties occasioned by other people's private agreements. Third, mandatory rules may induce efficient, socially desirable network effects that would not be realized in a system that countenanced private-ordering. The trouble with immutable corporate law rules is that they stifle autonomy and innovation, threatening to leave us stuck with government designs that might have been established in ignorance, or through rent-seeking.[104] The principles of a free society and the teachings of economics therefore prescribe a presumption against mandatory rules, with the burden of persuasion placed on advocates for them.

With respect to the exploitation justification, commentators have long noted that the separation of ownership and control in corporate operations creates a dynamic in which corporate directors can malinger or thieve at the expensive of shareholders, who are too distant and rationally ignorant of

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[102] *Sterling*, 93 A.2d at 117.
[103] *Sterling*, 93 A.2d at 117.
[104] *See* Eisenberg, *The Structure of Corporate Law*, *supra* note __ at 1525.

corporate affairs to stop it.[105] Corporate law, and its crown jewel the shareholder primacy norm, is designed to mitigate this agency problem. Private alteration of corporate law's prescribed terms threatens to reintroduce opportunities for shareholder exploitation that the law seeks to restrain. The rigid requirements of the public benefit corporation may be designed to protect shareholders from corporate operations that would otherwise waste or redistribute to other groups too much of what should go to the stockholders. However, in writings undertaken without reference to the beneficiary issue, the most influential mainstream corporate scholars have doubted that private ordering of corporate governance standards really can exploit shareholders. The capital markets are highly efficient, and corporate governance terms that create greater risk of shareholder exploitation are priced accordingly. Professional analysts scrutinize and accurately price atypical terms in a corporate charter, and deviation from shareholder-primacy will be subject to whatever discounts the market deems appropriate. If firms want to exploit their shareholders with bad charter rules, the firm's costs of capital will be greater. Shareholders get what they pay for, not more, and not less.[106]

These arguments are most believable in the context of large publicly traded corporations where professional analysts actively scrutinize governance terms.[107] This argument may ironically suggest that private-ordering of corporate terms is more acceptable in the context of large publicly traded firms than in small, closely held firms, where unusual terms

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[105] *See, e.g.*, ADAM SMITH, THE WEALTH OF NATIONS 849 (1776) ("The directors . . . being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance which the partners in a copartnery frequently watch over their own"); *see also* ADOLF BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) (seminal modern statement of the agency problem).

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

[107] Eisenberg makes that important observation that the argument that pro-management, or, for our purposes, pro-worker or pro-consumer, terms are accurately priced through IPOs, even if correct, is an argument about fairness, not efficiency. *See* Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, __ (1989). It is an argument that shareholders got what they paid for, and are not being robbed, but it does not suggest that such rules are desirable in terms of most effectively aggregating and deploying capital in a scarce, and sometimes hungry, world. Eisenberg also notes that courts sometimes refuse to enforce contract terms that upset the reasonable expectations of consumers even where the terms demonstrably lowered the price to the consumer. The examples he gives involve insurance contracts, which excluded conventionally covered items in homeowner policies.
Eisenberg, *Structure of Corporation Law*, *supra* note __ at 1519.

may be inaccurately priced or result in more onerous surprise as against undiversified owners. One would usually assume that the small context would be better suited to particularized bargaining, but where complicated terms are at issue, the small context may call for uniformity or immutability. Presently, most Public Benefit Corporations are small or mid-sized ventures. There are, as yet, no publicly traded PBCs.[108]

Before a mandatory, exclusive deviation from shareholder primacy can be justified out of fear of shareholder exploitation, we must consider that exploitation is a widespread concern in corporate operations, and in some ways, a zero-sum concern. Critics of prevailing corporate law have argued that the shareholder primacy norm incentivizes firms to manipulate or overreach when dealing with non-shareholders (for example, by skimping on worker and consumer safety, product quality, or environmental impact) in ways workers and consumers will find difficult to observe. Advocates of shareholder primacy insist that such dynamics, which they admit are predictable, should be restrained by operation of external government regulation. However, the economic theory of regulation should lead us to predict that firms will operate in the political sphere to stunt the development of such regulations, or worse, turn them to their own use. The Supreme Court's opinion in *Citizens United v. Federal Elections Commission* gives constitutional dimension to the failure of shareholder primacy theory, as it holds that firms have a constitutional right to operate in the political sphere.[109] Some scholars claim such "bad contracts," will be priced-right in labor and consumer markets just as surely as bad corporate governance terms will be. But then again, if labor or consumer markets are bereft of the kinds of market-makers who routinely scrutinize charter terms for capital, or if labor or consumer markets are small, as the market for a small firm's stock may be small, then such exploitative terms may not be accurately priced for workers or consumers. Privately-ordered deviation from shareholder primacy may make shareholders more vulnerable, but it may make workers and consumers less vulnerable. Mandatory rules may make shareholders less vulnerable, but it makes workers and consumers more vulnerable. The flipability or indeterminacy of the exploitation point should therefore counsel in favor of freedom to privately order corporate beneficiary.

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[108] *See* Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247-77 (2014).
[109] 588 U.S. 310 (2010).

Assessment of the "externalities" justification for mandatory rules in this context leads to a similar conclusion. There are good reasons to believe that shareholder primacy has externality problems. It is hard to see that such problems would be *worse* under a multi-stakeholder governance regime. Therefore, if deviation from shareholder primacy seems likely to mitigate externalization, then flexibility to adopt different governance goals should be permitted, rather than deviation being permitted only though one mandatory form.

The best theoretical argument for a mandatory, exclusive form of opting-out of shareholder primacy in corporate governance may be a "network effects" justification. Working outside of the question of corporate beneficiary, Jeffery Gordon argued that mandatory corporate law rules should be maintained where they constitute a public good, in the sense that their repeated use, and repeated litigation about them, diminishes uncertainty about the use of the standard form, and reduces the cost of using the form.[110] While allowing mutable terms may improve the situation of the individuals who privately order, it may diminish overall social utility by raising the costs to others of using the default form. Gordon also highlighted the social costs borne in connection with litigation over uncertain, privately-ordered deviations from standard forms. Deploying these arguments in the present context, it may be said that allowing deviation by private ordering of corporate beneficiary, or allowing tinkering within the Public Benefit Corporation form, may result in *fewer* non-shareholder primacy firms than if the PBC were the only option. This may be especially important where the charter is describing the relationship of the firm to multiple stakeholders, for whom the capital markets cannot be expected to vet peculiar charter terms.

Gordon's "network effects" arguments were roundly dismissed by strong advocates of private-ordering in corporate affairs. Butler and

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[110] *See* Gordon, *The Mandatory Structure of Corporate Law*, *supra* note __ at 1567-1569 ("Thus although firms collectively are better off if the standard form is maintained, individual firms will have incentives to deviate from the standard from in a way that will eventually undermine it."). This is a version of a "lemons market" argument. In a lemons market consumers find it difficult to distinguish good from bad products, and so prices tend to settle along the mean, which causes sellers of higher quality products to leave the market, which drives down average quality on offer. it could be that the mandatory Public Benefit Corporation form is necessary to rescue benefit corporation forms from proliferating to that point of introducing a "lemons problem." *See* George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).

Ribstein insisted that since standard terms have already acquired a high level predictability, their utility would not be diminished by allowing greater experimentation.[111] This, of course, is not true in the public benefit corporation area, where even the standard form has been relatively untested. More relevant to the PBC context, Butler and Ribstein argued that the network effects of a "standard" form would still be achieved if the form were highly desirable and voluntarily used by numerous parties. They conclude that "Gordon's argument would stifle the most valuable form of innovation—the evolution of new terms to replace a standard form that would die if it were not mandated. . . . [M]andating terms on the basis of the 'public good' theory would impose significant social costs."[112] Gordon's social costs of litigation were also rejected by Bernie Black, who noted that "the negative externality of costs borne by the state will be offset by the positive externality of greater certainty to future users of the new term."[113] These critiques of the network justification for mandatory rules seems applicable in the PBC context. If the PBC is a desirable form, it will be used and its use will become ever cheaper over time as precedents make it more predictable. Such network effects will not be unduly compromised by allowing experimentation by those who prefer another approach.

It would seem that in addition to the statutory scheme itself not implying that the public benefit corporation is the only permissible form of deviation from shareholder primacy, broader public policies implicit in the common law (and beyond) also do not clearly indicate that freedom to private-order corporate beneficiary through corporate chartering should be strictly regulated.

Actual Flexibility: Mid-stream Adoption of Multi-Stakeholder Governance

Suppose that it were permissible to privately order multi-stakeholder governance in a corporate charter. Is it permissible to amend the charter of an existing shareholder-primacy corporation to adopt multi-stakeholder governance? In the *Economic Structure of Corporate Law*, Easterbrook and Fischel insisted that the contractual nature of the firm should lead corporate law to look suspiciously on "mid-stream" changes:

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[111] Butler & Ribstein, *Opting-Out of Fiduciary Duties*, *supra* note __.
[112] Butler & Ribstein, *Opting-Out of Fiduciary Duties*, *supra* note __ at __.
[113] Black, *Is Corporate Law Trivial?*, *supra* note __ at 578. Black adds: "And the state has a simple remedy for any remaining net external cost: it can charge a higher price for providing judges and courthouses." *Id.*

> If the venture at its formation is designed in the ordinary fashion – employees and debt investors holding right to fixed payoffs and equity investors holding a residual claim to profits, which the other participants promise to maximize – that is a binding promise. If the firm suddenly acquires a newspaper and declares that it is no longer interested in profit, the equity investors have a legitimate complaint. It is a complaint for breach of contract, not for derogation from some ideal of corporate governance.[114]

But their conclusion begs the question: have shareholders in firms with the default shareholder primacy form of corporate governance entered into a contract where that rule is immutable, or have they entered into a contract where that rule can be altered?

Delaware provides that by default amendments can be adopted by a majority of shareholders.[115] The charter may specify a greater threshold, but not a lower one. Section 242(a) of the Delaware corporate code states that a corporate charter can be amended to include "such provisions as would be lawful . . . in an original certificate of incorporation."[116] The section states that "in particular, and without limitation on such general power of amendment," a charter may be amended so as "[t]o change . . enlarge or diminish the nature of its business or its corporate powers and purposes."[117] The amendment power is thus expansive; it contemplates that

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[114] EASTERBROOK & FISCHEL, ECONOMIC STRUCTURE OF CORPORATE LAW, *see supra* n__. *See also*, Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOKLYN L. REV. 767, 768 (1989) (arguing that that Article 1, section 10 of the United States Constitution, which states that "[n]o State . . . shall . . . pass any . . . Law impairing the Obligations of Contracts," should be interpreted to forbid states from fundamentally altering the governance rules of existing firms).

[115] *See* 8 DEL. GEN. CORP. L. § 242(b)(1), § 242(b)(4). Delaware's statute also provides that each class of stock that is effected by an amendment must approve the amendment by a majority vote, even if the class of stock does not otherwise have voting rights. This rule is immutable. 8 DEL. GEN. CORP. L § 242(b)(2). Historically, corporate charters could only be amended through a unanimous vote of the shareholders. *See* Black, *Is Corporate Law Trivial? A Political and Economic Analysis*, 85 NORTHWESTERN U. L. REV. 542, 552 (1990) (exploring historical evolution of voting requirements for charter amendments). This rule was incrementally eroded in the twentieth-century to the point where today most statutes give the majority of shares the power the amend. While the majority-vote threshold is mandatory, Black considers its mandatory nature "trivial," since, "Public choice theory suggests that submajority rule is likely to be inefficient, so there may have been no demand for still more flexibility." Black, *Is Corporate Law Trivial, supra* note __ at 552.

[116] 8 DEL. GEN. CORP. L. § 242(a).

[117] 8 DEL. GEN. CORP. L. § 242(a).

the rights and financial interests of existing stockholders may be materially diminished by amendment.[118]

Under Delaware's code, only the board can initiate an amendment, and they do so by "adopt[ing] a resolution setting forth the amendment proposed, *declaring its advisa*bility, and . . . calling a special meeting of the stockholders entitled to vote in respect thereof."[119] But if the default corporate governance rule is shareholder primacy, as I insist that it is, then there would seem to be no legitimate path through which a board could initiate an amendment to deviate from shareholder primacy. Under the shareholder primacy norm, the Board can only pursue an amendment that it considers to be in the best interests of the shareholders, and not any other group.

However, the Public Benefit Corporation statute does contemplate that an ordinary Delaware corporation could *amend* its charter to become a Public Benefit Corporation, and section 368 specifically states that such amendment rules are applicable to already existing ordinary corporations. Therefore, it *is* now permissible for an ordinary corporate board to advise amending the corporate charter in order to deviate from shareholder primacy. This truly is a new bit of flexibility introduced by the PBC.[120]

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[118] There may be good reason to conclude that there are stronger public policy justifications for holding common law rules unalterable through the amendment of charters of going concerns, even if it would not have violated public policy to alter the same common law rules in the initial charter. *See* Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 985 (1992) (citations omitted) ("[S]tate law arguably does not permit corporate organic documents to redefine the directors' fiduciary duties. In general, a charter amendment may not derogate from common law rules if doing so conflicts with some settled public policy. In light of the well-settled shareholder wealth maximization policy, nonmonetary factors charter amendments therefore appear vulnerable."). Some analysts consider "midstream manager opportunism" to be a particularly acute instance of shareholder vulnerability, counseling in favor of mandatory rules in the mid-stream context that might legitimately be mutable at a firm's launch. Black, *Is Corporate Law Trivial*?, *supra* note __ at 568 ("Managers of existing companies are the principal political force behind many legislative changes, and they will lobby for the power to avail themselves of the changes."). But if you really believe in the power of the IPO, *supra* text accompanying notes __-__ , then you should allow boards to alter all rules mid-stream. Downstream opportunism was priced into the IPO.

[119] 8 DEL. GEN. CORP. L. §242(b)(1) (emphasis added).

[120] 8 DEL. GEN. CORP. L. §368. The late Larry Ribstein, who passed away in 2011, would undoubtedly have challenged this alteration as an unconstitutional interference with the contractual rights of the shareholders. *See* Butler & Ribstein, *The Contract Clause and the Corporation*, *supra* note __. The fact that the capital-markets evinced not the slightest

When the Delaware Public Benefit Corporation statutes was first passed in 2012, it required a *90 percent* vote of every effected class of stock, even if the stock was otherwise non-voting, before an ordinary firm could become a public benefit corporation.[121] But in 2015, the statute was changed to allow an ordinary firm to become a Public Benefit Corporation with only a two-thirds affirmative vote of the voting shares (rather than each class of shares).[122]

Under the original version of the PBC statute, shareholders of ordinary corporations who dissented from a vote to become a public benefit corporations were entitled to appraisal rights. After the 2015 amendments, appraisal rights are only available if the stock is not publicly traded.[123] Interestingly, the statute states that if an ordinary corporation is being merged into a "domestic or foreign public benefit corporation or *similar entity*,"[124] then dissenters are entitled to appraisal rights. This "similar entity" verbiage may signal, or at least provide a statutory foothold for, the idea that corporation deviation from the shareholder primacy might come in many shapes and sizes, including privately ordered multi-stakeholder forms.

These rules would appear to control over a provision in the charter that had stricter amendment standards. Suppose you have a corporation that requires a 90 percent shareholder vote to amend the charter, which then gains a 2/3 vote to become a public benefit corporation. The public benefit corporation statute does *not* say that the 2/3 vote is required unless otherwise provided in the non-PBC charter of the firm undertaking the transformation. So in this sense, the PBC clearly reduces flexibility. Or consider what effect there would be if a firm had a charter that stated that it could become a PBC upon the vote of a simple majority of its shareholders. Such a provision would apparently not control over the 2/3 percent that the PBC requires.

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shutter at the passage of the amendment provisions of the Delaware public benefit corporation statute suggests either that the provision was not understood, or that they were understood to be not very important, because they are highly unlikely to be used. *See infra* text accompanying notes __-__ (critiquing the PBC statute for its triviality).

[121] 8 DEL. GEN. CORP. L. § 363(a).

[122] 8 DEL. GEN. CORP. L. § 363(a).

[123] Appraisal rights entitle a dissenting shareholder to avoid being forced into a merger and receive the fair market value of what their shares were worth before the merger. Dissenters are not typically entitled to appraisal rights for charter amendments. 8 DEL. GEN. CORP. L. § 262 (1983). However, the corporation statute has always given appraisal rights where a firm merged into a non-profit corporation *See* 8 DEL. GEN. CORP. L. § 257, 262.

[124] 8 DEL. GEN. CORP. L § 363(a)-(c).

Public Benefit Corporations may also *disavow* its public benefit status with "approval of 2/3 of the outstanding stock of the corporation entitled to vote."[125] Another question that the Public Benefit Corporation statute proposes is whether or not there may be demand for any other kind of voting requirement other than a 2/3 voting requirement for dropping benefit status. If a corporation had privately-ordered into multi-stakeholder governance, rather than using the PBC, then they could presumably drop multi-stakeholder governance in favor of shareholder primacy (or consumer primacy, etc.) by a majority vote of the shareholders, or through whatever means of amendment were otherwise privately-ordered into the articles.

Menus Matter for Corporate Experimentation

If my view is correct, that it has all along been possible for promoters to contract-to the public benefit corporation, the adoption of the statute may nevertheless be significant. When the state showcases a "menu option," people are relieved of the burden of coming up with it themselves, and are given assurances that this kind of ordering is in fact lawful. If it was clear that the menu was merely one option, rather than an exclusive option, then it could also stand as a foundation or starting point around which people tinker or "hack" their own alterations.

A nice empirical study by Yair Listokin shows how menus can matter in corporate law.[126] Listokin analyzed a "natural experiment" that took place through the proliferation of anti-takeover legislation in the 1980s. In a short period of time, many states adopted rules relating to a relatively standard set of anti-takeover measures, including "fair price," "business combination," and "control share acquisition" rules.[127] Different states, however, adopted

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[125] 8 DEL. GEN. CORP. L. § 363(c).

[126] Yair Listokin, *What Do Corporate Default Rules and Menus Do? An Empirical Examination*, 6 J. of Empirical Legal Studies 279 (2009).

[127] "Fair price" rules authorize boards to impede structurally coercive tender offers where the hostile bidder tries to pay less than a "fair price" for any outstanding shares. "Fair price" is defined by one representative statute as the "maximum of '(1) the highest price paid for the target company's shares in the two years before the proposed acquisition was announced; (2) the market value per share on the date the proposal was announced; (3) the value determined in clause (2) multiplied by the highest price paid in the previous two years divided by the market value o the common stock on the first date shares were acquired in the two year period.' §§ 33-840 to 33-842." Listokin, *supra* note 286 n. 24. "Business combination statutes" impose significant time delays on mergers between or acquisitions by large shareholders of a firm and the firm itself, unless the incumbent board of the target form approve the combination. *Id.* at 286-87. "Control share acquisition statutes" impede large shareholders from exercising voting rights in their stock unless such

different defaults. A majority of states adopted the antitakeover rules as defaults, and explicitly authorized firms to opt-out by charter amendment. Other states, however, passed legislation which explicitly *authorized* firms to adopt anti-takeover rules, but did not establish such rules as a default. Some states did not pass any anti-takeover legislation, but Listokin assumes that privately-ordered anti-takeover rules would have been permissible in such states (despite the absence of a statutory "menu option"). Finally, a few states adopted mandatory anti-takeover rules.[128]

Listokin found that the default rules and menu options had significant effects. For example, 98 percent of firms chartered in states with a "fair price" default rule stuck with the default. In states with a fair price "menu option," fifty percent of firms opted into the "fair price" rule. In states with no default or menu option, but where Listokin presumes "fair price" could be privately prescribed, only 20 percent of firms had a "fair price" provision in their charter.[129]

For present purposes, the important conclusion is that "menu options" matter. Listokin argues that menu options "reduce transaction costs by reducing the amount of drafting and negotiation required to adopt anti-takeover protections. . . . Menus also create a focal point that engenders the formation of a network effect, which also reduces transaction costs."[130] Listokin claims that these results "contradict the triviality hypothesis" and that "[t]he failure of the triviality hypothesis suggests that legislatures should continue to produce corporate law."[131]

Another example of the power of menu options can be seen in connection with the previously discussed exculpation provision of section 102(b)(7). After the provision was introduced into the Delaware corporate code nearly every major firm adopted "exculpation" clauses in their charters, rushing past the invitation to "limit" directorial liability into a full embrace of "eliminate[ing]" it altogether. If opting-out of duty of care liability was always available before section 102(b)(7), then why did so few

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exercise is authorized by vote of the minority shareholders. Because of judicial acquiesce to privately developed "poison pill" defenses, these rules are not very important today, and many states that adopted them in the 1980s have abandoned them, but Listokin asserts that they were regarded as important at the time. Listokin, *What Do Corporate Default Rules and Menus Do?*, *supra* note __ at 288.

[128] Listokin, *What Do Corporate Default Rules and Menus Do?*, *supra* note __ at 284-285.
[129] Listokin, *What Do Corporate Default Rules and Menus Do?*, *supra* note __ at 284-285.
[130] Listokin, *What Do Corporate Default Rules and Menus Do?*, *supra* note __ at 284-285.
[131] Listokin, *What Do Corporate Default Rules and Menus Do?*, *supra* note __ at 284-285.

firms do so in their charters before the Delaware legislature put in on the menu? Possibly, prior to the Smith v. Van Gorkom,[132] corporate lawyers did not think formal exculpation in the charter was necessary, because they assumed that the "business judgments rule" was so expansive that directors would never really be held liable for duty of care damages on any imaginable set of facts. But given the ease with which exculpation can be literally written into a charter, and that director's stood only to gain if court's held such provision valid, and lost nothing if they were invalid, the "they didn't think they needed it" explanation for the infrequency of privately-ordered exculpation before 1985 seems at least incomplete.[133]

Sometimes, it seems that it takes a long time for practitioners to realize that an innovation is both permissible and desirable. Twenty-dollar bills, apparently, sometimes lay around on sidewalks for decades before the state points them out, and someone picks them up. The explicit statutory invitation to completely exculpate directors from liability may have signaled a wisdom or aided the development of a business and legal norm that would not otherwise have existed.[134] Thus, even if the Public Benefit Corporation is merely a "menu option," the state's provision of such an option may create a world in which there are more multi-stakeholder governance corporations than would otherwise exist. Menus appear to be important in this context: witness the emergence of many more non-shareholder primacy firms since the promulgation of the PBC "menu" then existed before it.[135]

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[132] *See supra* note __ (explicating the Van Gorkom holding).

[133] The history of §102(b)(7) may also showcase an inversion of the view, championed by Melvin Eisenberg, that the moral impulse that directors feel to on behalf of shareholders are buttressed when those principles are reflected in law. *See* Eisenberg, *The Structure of Corporation Law*, *supra* note __ at 1505. Where the law makes explicit the opportunity to opt-out of care liability, the moral obligation to pay damages for one's failure as a fiduciary may diminish. The statutory imprimatur was a way for directors to signal to shareholders that they were not just completely robbing the firm when offering a liability opt-out.

[134] Gordon, *The Mandatory Structure of Corporate Law*, *supra* note __ at 1592 ("a change that comes upon legislative invitation after public deliberation may give assurance of a likely increase in shareholder wealth [or shall we say, in the PBC context, utility] that eliminates any capital market penalty for the adopting firm.").

[135] In part we must credit the work of social entrepreneurs, such as B-Lab, and even legal scholars, for the work they have done promoting viability of the idea of business corporations severing multiple stakeholders. *See* Brett McDonnell, *Benefit Corporations and Strategic Action Fields or (The Existential Failure of Delaware)*, 39 SEATTLE U. L. REV. __ (2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662532.

IV. PRESCRIPTIONS, NARROW AND BROAD

Narrow, Plausible Prescription: Seek Clarification

Corporate social responsibility activists urging state legislatures to adopt Public Benefit Corporation statutes have insisted that these statutes are necessary because of *uncertainty* regarding the viability of altering the standard corporate form to achieve the multi-stakeholder governance they insist investors, workers, and consumers desire.[136] A better approach would have been to petition the legislature for clarity on the point of private ordering, rather than petitioning for an entirely new form that only more deeply obscures the private ordering question. It is not too late to pursue legislative clarification, perhaps with an amendment to the General Corporation Law that specified: "nothing in this sub-chapter should be interpreted to preclude a corporation other than a public benefit corporation from specifying in its articles of incorporation that the corporation and its directors owe obligations to non-shareholders or other public interests."[137] Along these lines, it is also time that Delaware give statutory imprimatur to the common law rule of shareholder primacy, if this is indeed Delaware's preference, along with clear language that it is mutable.[138] It would also be desirable to alter the public benefit corporation statute to make it more susceptible to private-ordering. There is little risk not otherwise encountered by investors, workers, or consumers, to providing greater and genuine flexibility in the design of social enterprise.

Short of legislative reform, it also is still possible that in future litigation that touches on corporate purpose of ordinary corporations, a jurist will point the way, or throw down the gauntlet, with respect to mutability of shareholder primacy. The current Chief Justice of the Delaware Supreme Court, Leo E. Strine, Jr., for example, has evinced significant interest in the

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[136] *See* White Paper, *supra* note __ at 13 ("[T]he practical reality is that practitioners – general counsel and outside counsel – are typically unwilling to recommend such a course of action because the legal analysis is so unclear.").

[137] Before Delaware adopted its PBC statute, Ann Conaway urged Delaware to adopt statutory language in its General Corporation Law expressing a policy of maximum flexibility and contractual freedom, similar to the language that then existed (and still is found) in the Delaware's LLC statute. *See* Conaway, *Lessons to Be Learned*, *supra* note __ at 817-18.

[138] The language of the California statute, *supra* note __, provides a good model. *But see infra*, text accompanying notes __-__ (arguing that shareholder primacy should not be the default corporate governance rule).

subject of corporate purpose.[139] This interest, combined with business and legal developments, will undoubtedly result in important pronouncement on these questions in the coming years. When the next Craigslist case comes about, as it surely will in this era in which large firms are eager to cloak themselves in the wool of social responsibility, and may forget the duties of the shareholders' shepherd, Chancery, or the Delaware Supreme Court, should speak and clarify its views on whether, and how, shareholder primacy in corporate governance can be altered.[140]

Aspirational Prescription: Change the Default Rule

If the impetus behind the Public Benefit Corporation is to provide a vehicle through which holders of capital can invest in business corporations that pursue profit in balance with other interests, then the statute satisfies the charge.[141] If, however, the motivation behind the Public Benefit Corporation is to offer a cure to the legal and incentive structures that cause shareholder primacy corporations to predictably operate in socially irresponsible ways,[142] then the PBC statute is entirely inadequate. It is not a serious response to the problems engendered by shareholder primacy, because capital clearly prefers the superior profits that are available in the shareholder primacy firm, to the more "balanced" profits that are available in a PBC. Even if the PBC's do attract significant capital, it cannot be expected that they will displace the socially deleterious effects of for-profit corporations.[143]

If shareholder primacy in corporate governance is mandatory, then from the shareholder perspective its mandatory nature is probably trivial, since

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[139] *See e.g.*, Leo E. Strine, Jr., *Our Continuing Struggle With the Idea the For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135 (2012); Leo E. Strine, Jr., *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335 (2015).

[140] *See supra* note __ and accompanying text.

[141] *See* White Paper, supra note __ at 5. The White Paper takes the view that investors, workers, and consumers are all interested in socially responsible business operations, but that market mechanisms, such as branding and third-party certification, are unreliable and subject to manipulation, which the White Paper calls "greenwashing."

[142] *See supra* text accompanying notes __-__ (critically assessing the legitimacy and desirability of the shareholder primacy norm).

[143] *See e.g.*, Kent Greenfield, *A Skeptic's View of Benefit Corporations*, 1 EMORY CORP. GOV. & ACCOUNTABILITY REV. __ (2015); Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591 (2011) (doubting the efficacy of the public benefit corporations to respond to the problems occasioned by the operation of ordinary corporations).

this is the rule that capital would prefer in any event. But even if it is mutable, this mutability is largely trivial to both shareholders and non-shareholders, but for different reasons. It is trivial to shareholders because they do not want to change it, and it is trivial to non-shareholders because they cannot plausibly change it. The default rule of corporate governance, created by government, cannot plausibly be altered by widely dispersed, cognitively limited, rationally ignorant workers and consumers.[144] Firms exist because transactions costs are high, so we cannot expect that it will be easy for stakeholders to opt-out of the default rules that corporate law provides.[145]

The Public Benefit Corporation "menu option," in its present form, therefore, is not a serious response to the problems associated with shareholder primacy firms in our society. Indeed, it may make matters worse by encouraging for-profit firms to behave more rapaciously on the theory that benefit corporations are there for shareholders who want socially responsible investing.[146] It is more likely that ordinary corporations will be content to blur the boundary, so as not to lose market-share to PBCs, while the most rapacious kinds of companies will use it as an excuse not to even pretend to worry about social responsibility. The Benefit Corporation model also threatens to create a social policy "mirage" of responsiveness to the problems attendant to shareholder-primacy firms. This mirage can help legislators persuade themselves, and the public, that the law had responded to the problem associated with corporations. In this sense, creating benefit corporations is worse than doing nothing, because at least if nothing had been done nobody could think that something significant had been done.

I have argued that the weakness of shareholder primacy theory counsels in favor of a reform of corporate governance law to *require* corporate directors to operate in the interests of multiple-stakeholders, including

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[144] According to the Coase theorem, the state's specification of legal entitlements, or default rules, will not disrupt the efficient allocation of resources (or the efficient structuring of organizations), provided that contracting is permitted and transactions costs are low. In such a world, the specification of the default does not much matter, from a social perspective. However, as Ronald Coase stressed more fervently than did many of his followers, real-world contracting situations often involve high transactions costs. Such costs are legion: oxygen, lawyers, ink, paper, cognition, imagination. Where transactions costs are high, the substance of default rules matters a great deal.

[145] *See* McDonnell, *Sticky Defaults*, *supra* note __ at __ (arguing that the "stickiness" of a rule is role-dependent, for directors a rule may be easy to change, but for shareholders, it may be hard to change).

[146] *See* Johnson, *Pluralism in Corporate Form*, *supra* note __ at 295.

workers and consumers, rather than shareholders alone.[147] An effective multi-stakeholder corporate governance regime could only be established by making it the default rule.[148] And this could only be accomplished through federal preemption of state chartering.[149] Such preemption, however, would not necessarily have to foreclose all experimentation or private ordering in business design. Our policymaking choices are not so stark. First, federal preemption might only apply to very large firms, with small operations allowed the flexibility of state regimes. For the largest corporations, we could require through federal legislation that boards at a minimum understand that they are empowered to actively contemplate the effect of corporate action on non-shareholders. Second, the federal multi-stakeholder governance standard might merely be a default rule, which firms could opt-out of through a given set of procedures. Consideration of the means through which a multi-stakeholder default could be avoided opens up a wide array of possibilities, which might be deployed in different contexts. As Ayers reminds us, in the area of defaults, policymakers are not limited to deciding between mandatory or mutable rules, rather, once having decided that a rule is mutable, another "lever" of policymaking is presented in the question of *how* a default can be altered.[150]

V. Conclusion

Proponents of private-ordering must lay the intellectual groundwork now to stunt the evolution of an idea that the only kind of multi-stakeholder governance that is allowed in Delaware is that which is prescribed in the PBC. The Delaware General Corporation Law supplies a default rule of shareholder primacy in corporate governance. This rule should be understood as alterable through private ordering in the corporate charter. The emergence of the Public Benefit Corporation challenges but does not upend this conclusion. The Public Benefit Corporation should be understood as a "menu option," which promoters may choose to pursue a

[147] *See, e.g.*, David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N. C. L. REV. 1197 (2011).
[148] Effectively operating Public Benefit Corporations can help provide evidence of the plausibility of imposing such obligations on corporate directors, without rendering them utterly incapable of governing because they are too confused over competing interests, or too busy stealing from the till under cover of uncertain responsibility.
[149] *See* Eisenberg, *Structure of Corporation Law*, *supra* note __ at 1512.
[150] Ayers, *Regulating Opt-Out, supra* note __ at 2043.

highly specific form of multi-stakeholder governance, but promoters remain free to order "off the menu," and get their own multi-stakeholder corporate design. Delaware jurists or the Delaware legislature would be prudent to explicitly sustain these conclusions through case law or statutory clarification. The PBC itself should be reformed to make its key terms default rules, subject to private-ordering.

A broader-reaching reform which may be pursued over the longer-term would see the federal government overturning the shareholder primacy governance default in favor of a multi-stakeholder presumption which could only be altered through an amendment process that involved all corporate stakeholders, and not just shareholders.