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 wealth in favor of other stakeholders or values. In this Article, I examine whether this rule 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 deviation from shareholder primacy by charter specification. This conclusion, 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. Thus, 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 may find convenient to use. I urge judges to adopt this second interpretation, and I urge Delaware lawmakers to clarify their intentions in order 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.[1] Directors may not sacrifice shareholder wealth in favor of other corporate stakeholders or values. In this Article, I examine whether shareholder primacy is mandatory or merely a default rule that can be altered through private ordering.[2] I argue that Delaware's corporate law, the most important corporate law in the United States, should be understood to have long-permitted privately-

[1]*See* David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L. J. 181, 184 (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).

[2]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.

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ordered deviation from shareholder primacy.[3] This assessment, however, is at least complicated by the recent legislative creation of the Public Benefit Corporation (PBC).[4] 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.[5] 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.[6] Thus, 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.[7]

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 in order to avoid jurists adopting the view that the PBC is the exclusive path to multi-stakeholder governance.

Whether and how corporate purpose can be altered from the shareholder primacy rule is now a pressing matter of organizational law. 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 corporations.[8] Uncertainty regarding what is permissible and what is forbidden 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 the law of socially conscious ventures is likely to trouble small-scale, under-lawyered firms, 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

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[3]More than 50% of all American companies are chartered in Delaware and more than 60 percent of Fortune 500 companies are chartered there. *See* John Armour et al., *Delaware's Balancing Act*, 87 IND. L.J. 1345 (2012) (reviewing explanations for Delaware's dominance).

[4]8 *Del. C.* § 361.

[5]*Id.* § 362.

[6]*Id.* § 363–65.

[7]*See infra* note 110 and accompanying text.

[8]*See* Brett McDonnell, *Benefit Corporations and Strategic Action Fields or (The Existential Failing of Delaware)*, 39 SEATTLE U. L. REV. 263, 264 (2016).

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Commission included a "Letter from Mark Zuckerberg," the company founder and (then) 27-year old Chair of Facebook's Board of Directors.[9] The letter reads as a warning that Facebook has a "mission" that is not limited to serving its 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.[10]

If this is not just puffery,[11] Zuckerberg and his appointees may be confused about their legal obligations, or may at least be confusing their investors and the public about it.[12] Suppose two companies, say Apple and The Circle,[13] 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

[9] *See* Facebook Registration Statement, http://tinyurl.com/fb-sec-reg-stmt (hereinafter, "Facebook Registration Statement").

[10] *Id.* at 67–68.

[11] *See generally* Stefan J. Padfield, *Immaterial Lies: Condoning Deceit in the Name of Securities Regulation*, 61 CASE W. RES. L. REV. 143, 161 (2010) (critiquing lax standards for what constitutes materiality in fraud cases under the securities laws).

[12] Facebook went public with a dual class structure in which Zuckerberg and other initial investors retained a dominate share of voting stock, while the public invested in stock with minimal voting power. *See* Tamara Belifanti, *Shareholder Cultivation and New Governance*, 38 DEL. J. CORP. L. 789, 831-832 (2014) (describing dual class structure at the time of Facebook's IPO). The fact that Facebook's shareholders have no voice in corporate governance makes it even more important to impose strict fiduciary obligations on directors, since shareholders cannot protect themselves through corporate democracy.

[13] *See generally* DAVE EGGERS*,* THE CIRCLE (2013) (imagining the emergence of a corporation named "The Circle" that dwarfs the combined influence of Google, Facebook, Apple, and Amazon). The Circle maintains Facebook's databases, purchased for billions of dollars, as a deep archive of its users' personal histories and predilections. *Id.*

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statements.[14] But this Article suggests that Zuckerberg, and other corporate promoters who share the idea of putting the social mission of a business before (or alongside) profits, could have operationalized this hybrid mission through a Delaware corporation, with proper charter provisions, without having to make use of the highly restrictive Public Benefit Corporation form.

The law of corporate purpose, and the mechanics of specifying deviation from a simple goal of wealth maximization, are also becoming crucial in legal disputes concerning civil and constitutional rights. For example, in the controversial 2014 case of *Burwell v. Hobby Lobby*,[15] the United States Supreme Court held that under the Religious Freedom Restoration Act (RFRA), the Hobby Lobby Corporation was entitled to an exemption from certain commands of the America Cares Act, because complying with the statute would substantially burden the firm's sincerely held religious beliefs.[16] The government argued that Hobby Lobby could not hold religious beliefs, because it was a business corporation whose only purpose was to make money for shareholders.[17] The Supreme Court, however, credited the company's "statement of purpose" (a non-charter document approved by the firm's Board of Directors) and a pledge signed by the firm's owners, all members of the same family, as evidence of Hobby Lobby's religiosity.[18] The Court noted that the firm sacrificed profits in service of this mission.[19] But what would have been the result if the record evidenced shareholder objection to the firm's commitment to this kind of religiosity? The issue was dodged in *Hobby Lobby*, but in other cases involving religious freedom or the exercise of other civil rights, the question of whether and

[14]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, *supra* note 1, 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 for their firm, they have no discretion at all regarding whether or not to pursue the most profitable course).

[15]134 S.Ct. 2751 (2014).

[16]*Id.* Hobby Lobby objected to a provision of ACA regulations that would have required the firm to provide health coverage that included abortion-inducing pharmaceuticals, which the firm said would violate its religious convictions.

[17]*See* Brief for Petitioners at 11–12, Sebelius v. Hobby Lobby Stores, Inc., 2014 WL 173486 (U.S. 2014) (No.13-354).

[18]*Burwell*, 134 S.Ct. at 2766.

[19]*Id.*

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how a firm can opt-out of shareholder primacy will surely become central.[20]

These questions are now pressing in business planning and social policy, 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 unprepared to deal with in deductive fashion. This article will assess the question of private-ordering of socially conscious purpose, in particular by analyzing the relationship between ordinary corporate law and public benefit corporations.[21] After developing my arguments, I call for and suggest paths towards judicial and legislative clarification. I also call for broader reforms that would make ordinary corporations more responsive to the social concerns that public benefit corporations are meant to address.

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[20]Hobby Lobby is, rather idiosyncratically, an Oklahoma corporation. *Id.* at 2765. My focus here is on Delaware law. As I note below, it is more obscuring than revealing to discuss technical questions of corporate law without specifying *which* corporate law you are talking about. I focus on Delaware law because it is the most widely used and most influential corporate law in the world. In the Hobby Lobby case the Supreme Court made no effort to examine what the law of corporate purpose is in Oklahoma, which was understandable in the posture of that case, since no shareholder was challenging the board's assertion of religious purpose. *See also* text accompanying *infra* notes 27–28 (emphasizing the practical importance of Delaware corporate law).

[21]In developing my arguments, I use 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*, 84 N.W. U. L. REV. 542, 543–45 (1990); Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 2–6 (1990); Jeffery N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1550–53 (1989); Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1461–62 (1989); Roberto Romano, *Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws*, 89 COLUM. L. REV. 1599, 1599–1601 (1989). These debates, prominent in the late-1980s and early-1990s, did not address the question of corporate beneficiary. The mandatory vs. enabling 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 Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2035–37 (2012) (emphasizing the emerging scholarly and policymaking focus on "altering rules" which are the rules that regulate how to deviate from default rules); *see also* Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383, 384–86 (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 this burgeoning literature.

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II. ALTERING THE SHAREHOLDER PRIMACY DEFAULT RULE

A. *Front-Loading a Private-Ordering Anti-Climax*

Regardless of whether privately-ordered 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).[22] Delaware's LLC law explicitly 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."[23] This maximum freedom provision is not found in Delaware's General Corporation Law, or in the new PBC statute. 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)[24] construed as a sub-species of the LLC that provides specific terms many investors find desirable.[25]

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[22]Prior to using a "business organization," a person could run a sole proprietorship in a manner that balanced numerous aims, say, profitability and environmental stewardship. Entrepreneurs, however, want to do business through a legal entity in order to exploit advantages that such forms provide, including limited liability to the entrepreneur for the debts of the business, and affirmative asset segregation, which insulates the assets of the business from the reach of an owner's personal creditors. These features also help founders attract outside capital. *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 392–93 (2000). *See also generally* Ann E. Conaway, *The Global Use of the Delaware Limited Liability Company for Socially-Driven Purposes*, 38 WM. 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.").

[23]6 *Del. C.* § 18-1101(b). 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." *Id.* § 18-1101(c) (emphasis added). 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 would not enforce an LLC provision disclaiming liability for fraudulent misrepresentations where the representations are knowingly falsely made. *See* Abry Partners V, L.P. v. F & W Acquisition, LLC, 891 A.2d 1032 (2006). But these limitations must surely be trivial, in that vanishingly few business-people would seek to adopt such provisions.

[24]*See* text accompanying *infra* notes 36-38.

[25]For example, if a promoter wanted to form a business that was governed by all aspects of Delaware corporate law *except* 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 cases interpreting it, except for the corporate code's prohibition on eliminating duty of loyalty

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The freedom available in the LLC form makes inquiry into the mutability of shareholder primacy in corporate governance trivial, in a technical sense.[26] But only in a technical sense. Mutability *within* the Delaware General Corporation Law matters a great deal as a practical matter. Investors prefer the stability and familiarity of the Delaware *corporation*, as compared to the still relatively new LLC.[27] Many small firms start out as LLC's, but before they can attract backing from venture capital, and almost always before they go public, lawyers and business people will insist on re-forming as a corporation. And usually they will insist on a Delaware corporation.[28] The question we are pursuing, therefore, is whether deviation from shareholder primacy in corporate governance can be established within the friendly, familiar confines of the Delaware General Corporation Law.

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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.' ").

[26]Avoidance of mandatory corporate law terms though the use of non-corporate business forms was recognized in the seminal debates twenty-five years ago on the "triviality" of corporate law (although again, the question of purpose or beneficiary was not addressed). The LLC was not emphasized in those debates, perhaps because the form was only just emerging at that time as an important form of business organization. The LLC was invented in 1977 in Wyoming, but its use was not widespread before the 1990s. *See* 17 WYO. ST. ANN. § 15 (1977). Delaware did not adopt an LLC statute until 1991. *See* 6 *Del. C.* § 18. *See also* Black, *supra* note 21, 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, *supra* note 21, 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, *supra* note 21, at 2–3 (arguing that it is best to conceive of corporate law rules along a continuum ranging 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). *Cf.* Black, *supra* note 21, 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)). But Pennsylvania is home to few non-domestic corporations.

[27]*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, 122 (1999) ("By many accounts, Delaware's prominence is rooted in its ability to provide a corporate environment that investors most prefer.").

[28]In 2010, for example, 76 percent of initial public offerings were by companies chartered in Delaware. *See* Armour, et al., *supra* note 3, at 1382.

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B. *Private Ordering in the Delaware General Corporation Law*

The academic literature contains many scattered but undeveloped assertions that shareholder primacy is merely a default rule of corporate governance that can be muted by private ordering. For example, 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.[29]

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."[30] 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*."[31] Scholars typically give no citation for these kinds of statements, which derive from, or really are postulates of, the academic idea 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.[32]

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[29]FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 35-36 (1991).

[30]Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177, 179 (2008).

[31]*Id.* at 189 (emphasis added).

[32]The "triviality" debates referenced *supra* note 21 were concerned with examining the extent to which the "contract" conception really described extant corporate law, and whether it should. The present inquiry is an extension of that conversation into the area of corporate beneficiaries.

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The American Law Institute's *Principles of Corporate Governance*, developed in the late-1980s and early-1990s, punted on the question of muting corporate beneficiary, averring that the *Principles* "do[] not address the 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."[33] 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."[34] The Chief Reporter of the Principles, Melvin Eisenberg, however, 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."[35] Eisenberg's *Note*, like the Principles themselves, is expressed 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.

The Delaware General Corporation Law has many mandatory elements, as well as many mutable ones. A mandatory rule, for example, is that all charter amendments must be approved by at least a majority of shareholders, and every class of stock affected by an amendment is entitled to vote on it even if their shares are otherwise non-voting.[36] An expressly mutable rule is that the board of directors has the power to set their own salaries, but the charter can specify some other way of setting their salaries.[37] Delaware's statute is sometimes clear about which of its provisions are mandatory, and which are mutable. Where stating mandatory provisions, the statute uses phrases like "every corporation

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[33] AM. LAW INST. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 cmt. (d) (1994).

[34] *Id.*

[35] *Id.* Eisenberg was a central figure in the "triviality" debates of the late-1980s and 1990s. See Eisenberg, supra note 21, at 1492. 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* Ann 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, 793–94, 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.

[36] 8 *Del. C.* § 242(b)(1-2).

[37] *Id.* § 141(h).

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shall," and when describing mere default rules it states, "unless otherwise provided in the certificate of incorporation."[38] However, strange as it may (rightly) seem to those unfamiliar with this area of law, the issue of corporate *beneficiary* is not directly addressed at all in Delaware's corporate law statute.[39] The black letter law on this crucial matter has instead been supplied by case law, and that case law specifies that shareholder primacy is the law in Delaware.[40] Non-shareholder interests can be taken into account, but only when doing so is "rationally related" to serving the shareholders.[41] That is, directors may spend $100 to treat

[38]Some provisions of the statute contain neither the phrase "every corporation shall" nor the phrase "unless otherwise provided in the certificate of incorporation." In a well-reasoned opinion in *Jones Apparel v. Maxwell Shoe Company*, 883 A.2d. 837 (2004), then-Chancellor Strine held that some (but not all) provisions of the code could be altered by charter provision even if they did not contain the "magic words" stating "unless otherwise provided in the certificate." *Id.* at 848, 850. *See also* text accompanying *infra* note 103 (further discussing *Jones Apparel*).

[39]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). The closest that the Delaware statute comes to explicating the default rule of corporate beneficiary is in the exculpation provision of 8 *Del. C.* § 102(b)(7), which states that the charter 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." *Id.* This section prohibits limiting personal liability "[f]or any breach of the director's duty of loyalty to the corporation or its stockholders." *Id.* This is the only language in the Delaware statute that addresses the fiduciary obligations of corporate directors. Since it contemplates that firms may exculpate directors from damages for violating their duties to shareholders, it implies that directors do have obligations to shareholders. *See id.* But this does not specify the content of those obligations (other than categorizing them as fiduciary in nature) and does not indicate whether directors do or might also owe responsibilities to other stakeholders. *See* § 102(b)(7). As I argue in the text, those crucial questions are answered in case law.

[40]*See* Yosifon, *supra* note 1 (reviewing this case law). The importance 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, as some scholars do, that directors presently have latitude with respect to whether or not to put shareholder interests first, then the question of deviating from shareholder primacy does not really come up. *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 . . . 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.").

[41]*See* Revlon, Inc. v. MacAndrew & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."). This crucial statement in *Revlon* in no way purports to describe board responsibilities only in final period or auction settings, as commentators often mistakenly claim. The "rationally related benefits accruing to the stockholders" line comes in a portion of the opinion where the Court is clarifying a statement that it had made the previous year in Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985), to the effect that when considering whether and how to fight a tender offer it was appropriate for boards to consider the effect of the offer on

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workers or communities well if they believe that doing so will produce good-will sufficient to generate $101 in profits, but the board may not spend $100 on workers and communities if they think the return to investors will be only $99. Real corporate decisions of course do not arrive in such terms, but the legal principle that directors must always serve the shareholders is clear and decisive.

This rule of shareholder primacy is stated in a number of Delaware cases, the most recent and explicit of which is *eBay v. Newmark*.[42] A founder of Craigslist, Inc., the popular online "classifieds" website, sold his stake in the company to eBay, Inc.[43] Later, eBay complained that the remaining founders were pursuing corporate policies designed 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.[44] Chancellor William Chandler concluded that this was in fact the remaining founders' motive, and he held 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 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

"'constituencies' other than the shareholders." *Id.* at 955. The *Revlon* court *clarified* that consideration of non-shareholders is permissible, but only to the extent that such consideration is "rationally related" to serving the shareholders. 506 A.2d at 182. Since *Unocal* involved a firm that was trying to remain a going concern (the board in that case was resisting the hostile takeover) it is clear that the "rationally related" to the shareholders limitation on considering the interests of other constituencies applies in the going concern condition. 493 A.2d at 952. There are many circumstances where consideration of creditor, worker, or community interests will be "rationally related" to building long-term pathways to shareholder gain. But the directors must see or have in mind such pathway, otherwise the consideration of non-shareholder interests is forbidden. *See* Yosifon, *supra* note 1, at 219–23. In *Revlon*, there was no future for the company, other than a sale and bust-up, so worrying about treating non-shareholders well could not be related to advancing the shareholder interest (which in the *final* period could only be conceived as maximum *present* profits). 506 A.2d at 182.

[42]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.

[43]*Id.*

[44]*Id.*

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> for-profit Delaware corporation for the benefit of its stockholders.[45]

eBay made clear both that shareholder primacy is the rule of corporate governance *and* that corporate "persona," public statements, routine self-descriptions, and board policies would not suffice to alter that rule.[46] However, neither *eBay* nor other cases expressing Delaware's shareholder primacy norm make clear whether shareholder primacy is *mandatory* or alterable, and if alterable, how to alter it.[47]

While the Delaware statute does not supply the shareholder primacy norm, it *does* provide multiple open-ended invitations to private-ordering. The broadest invitation 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."[48] It continues: "[it] shall be 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."[49]

Most Delaware business corporations are today in fact formed with the catch-all purpose of engaging in "any lawful act or activity." Some scholars who doubt that shareholder primacy is bedrock corporate governance law argue that firms that use the "any lawful act or activity" to describe the corporate purpose are by that language authorized to deviate from shareholder primacy and sacrifice shareholder value for other stakeholders.[50] But no Delaware court (nor any court interpreting

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[45]*Id*.

[46]It follows, therefore, that even if the United States Supreme Court is willing to credit non-charter statements for purposes of extending RFRA's protections, such statements would not be sufficient to excuse directors of a Delaware corporation from their fiduciary duty to maximize profits for the shareholders. *See* text accompanying *supra* notes 15-20 (discussing *Hobby Lobby*).

[47]Ian Ayres 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 muted it properly. This would give guidance to future parties, and it would also force the hand of legislatures if they desire some mode of alteration other than that indicated by judicial dicta. *See* Ayres, *supra* note 21, 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).

[48]8 *Del. C.* § 102(a)(3) (emphasis added).

[49]*Id.* (emphasis added).

[50]*See, e.g.*, Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1, 13-14 (2014). The Supreme Court also makes this interpretative error (it is an

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Delaware law) has ever suggested this, and indeed the holding in *eBay* must be read as a direct rejection of such an interpretation. 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."[51] Yet Chancellor Chandler held that the corporate purpose of Craigslist was profit maximization.[52] In fact, the expansive "any lawful purpose" language played *no role whatsoever* in Chandler's disquisition on the law of corporate purpose in the *eBay* case because he understood that the phrase, used without further qualification, refers to the type of activities a company may undertake, not the reason for undertaking them.[53]

The "any lawful act" language in §102(a) is an artifact of the section's byzantine history, and the general history of corporate law statutes.[54] Until the nineteenth centuries, states granted corporate charters only by specific legislative action to enable particular undertakings or "purposes," such as organizing a bank, or a railroad.[55] In the late nineteenth and early twentieth centuries, states (including Delaware in 1899) adopted "general" incorporation statutes, which made corporate charters available by routine administrative action to all comers.[56] The general incorporation statutes still required corporate promoters to specify the purpose or type of business their firm would undertake. At this stage the requirement to stipulate a "purpose" was less a limitation on corporate power imposed by a jealous state (which was now widely offering charters), and more a protection afforded to investors, who were thought to be entitled to some certainty about the kind of business they were funding. Corporate acts that went beyond the purpose specified in the charter were "ultra vires," and could be enjoined.[57] Soon it became evident, however, that what investors really wanted was for their firms to have the flexibility to enter whatever fields of endeavor might prove profitable. Promoters started stuffing long lists of permissible purposes into corporate charters, which could reach cumbersome and absurd lengths. Solicitous legislatures responded by

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error as far as Delaware is concerned, anyway, for reasons described in this text) in *Hobby Lobby*. *See* Burwell v. Hobby Lobby, 134 S.Ct. 2751, 2770-2771 (2014).

[51]Certificate of Incorporation of Craigslist, Inc., October 13, 2004, on file with author.

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

[53]*See id.*

[54]*See* JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA 37-55 (2003).

[55]*See generally* S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 2-3 (1976).

[56]*See id.* at 3–8.

[57]*See* Yosifon, *supra* note 1, at 214.

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reforming general incorporation statutes to allow firms to specify that their purpose was to undertake "any lawful act or activity."[58]

Still, it seems plausible to conjecture that section 102(a)'s invitation to state the corporation's "purpose" *could* be used to specify a deviation from the shareholder primacy norm.[59] We might understand the broad "any lawful act" language to mean that the firm may do anything lawful in service of the default beneficiary (shareholders), while holding that *explicit specification of a purpose to serve multiple-stakeholders*, or to otherwise deviate from shareholder primacy, could be achieved by language making that clear.[60] And, of course, the charter could specify that "any lawful act" (any kind of business activity) may be undertaken to serve the privately ordered beneficiary or corporate goal.

C. *Drawing Insight From Non-Profit Corporate 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. 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 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.[61]

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 states that a non-

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[58] *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.J. 1086, 1089 (2013) (distinguishing between corporate purposes, corporate powers, and corporate beneficiaries).

[59] *See* 8 *Del. C.* § 102(a).

[60] 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, 172–76 (Del. Ch. 2014). 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.

[61] 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. C.* § 391(j).

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stock corporation "shall" state the "non-stock" limitation in its charter, and "shall" state the "conditions of membership of the corporation" in the charter.[62] Crucially, however, 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.[63] Therefore, something other than status as a "non-stock" corporation is required to make a firm a non-profit corporation in Delaware.[64]

As if in response to the lack of clarity in the Delaware statute regarding 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, tax-exempt organizations.[65] 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, "[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."[66] This procedure is not established by statute, but it roughly tracks what I suggest is the path to any kind of private-ordering of corporate beneficiary under the Delaware statute.

The fiduciary law applicable to Delaware non-profit corporations is underdeveloped, but instructive for this inquiry.[67] The Delaware Supreme Court locates the other-than-profit-maximizing goals of non-profits corporations with reference to what is specified in the charter. In the prominent case of *Oberly v. Kirby*,[68] the Delaware Supreme Court stated:

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

[63]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 generally* John Mark Zeberkiewicz & Blake Rohrbacher, *New Day for Nonstock Corporations: The 2010 Amendments to Delaware's General Corporation Law*, 66 BUS. LAW. 271 (2011).

[64]There is nothing in the Delaware code that forbids "non-profit" firms from issuing shares, that familiar prohibition is instead a feature of the federal tax code, which gives tax-exempt status to non-profits, and prohibits non-profits from issuing stock. *See* 26 U.S.C.§ 501. The view under development here is that firms can by charter provision deviate from pure shareholder primacy, while still issuing stock to investors (such firms would clearly not be exempt from federal income taxes).

[65]DEL. DIV. OF CORP., CERTIFICATE OF INCORPORATION FOR EXEMPT CORPORATION (last rev. Sept. 2016), *available at* https://corp.delaware.gov/Inc_Exempt.pdf.

[66]*Id.*

[67]*See* Mary A. Jacobson, *Nonprofit Corporations: Conversion to For-Profit Corporate Status and Nonprofit Corporation Members' Rights* – Farahpour v. DCX, Inc., 20 DEL. J. CORP. L. 635, 641–42 (1995).

[68]Oberly v. Kirby, 592 A.2d 445 (Del. 1991).

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> 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.*[69]

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."[70] He concluded: "nothing in the record indicates that the charitable interests of the Defendants [i.e., charitable decisions made by the board] are incompatible with *the aims of the Fund as stated in its Certificate of Incorporation*."[71]

This expresses it clearly. The goals of a charity are established in the certificate, and those goals describe and limit the responsibilities of the board. The indubitable implication of the fact that non-profit corporations are subsumed within the Delaware General Corporation Law is that the beneficiary of Delaware corporate governance is subject to private ordering.

D. *Public Policy Restrictions on Private-Ordering in Corporations*

Section 102(a) invites promoters to specify in the charter any purpose "for which a corporation may be organized *under the laws of Delaware*."[72] Similarly, section 102(b) of the code provides that 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*."[73] These nods to private ordering contain the important caveat that nothing can be done which is contrary to the law of Delaware. This forces us to ask whether a

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[69] *Id.* at 462 (first emphasis added).

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

[71] *Id.* at *15 (emphasis added).

[72] 8 *Del. C.* § 102(a)(emphasis added). *See* text accompanying *supra* notes 48-59 (discussing this section).

[73] § 102(b)(3)(emphasis added).

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charter provision under section 102(a) or (b) altering the *common law* rule of shareholder primacy would violate "the laws of Delaware."[74]

In a 1952 case called *Sterling v. Mayflower Hotel* the Delaware Supreme Court concluded that the corporation code's restriction that charter provisions not contravene "the laws of this State" *sometimes* includes the common law.[75] *Sterling* concerned a merger between the Hilton Corporation and the Mayflower Hotel.[76] Prior to the merger, Hilton owned a controlling stake in Mayflower, and Hilton's representatives dominated Mayflower's board.[77] 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 transactions.[78] 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.[79]

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 [statute]."[80] The Court allowed Mayflower's charter provision on interested directors to stand.[81] 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

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[74]Given the discussion above on non-profits, we know that Delaware law clearly allows for shareholder primacy to be altered through a charter provision indicating that the firm will be a *non*-profit corporation. So the question under review here is whether the law of Delaware permits a charter provision that deviates from shareholder primacy through a governance design that still calls for the pursuit of profits and payment of dividends to shareholders, while also serving other beneficiaries.

[75]Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 118 (Del. 1952).

[76]*Id.* at 108.

[77]*Id.* at 108–09.

[78]*Id.* at 117.

[79]*Sterling*, 93 A.2d at 117.

[80]*Id.* (emphasis added).

[81]*Id.* at 119.

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> 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*.[82]

In interpreting the *Sterling* case in a 2004 opinion, then-Chancellor (and now Chief Justice of the Delaware Supreme Court) Leo Strine, wrote that the *Sterling* standard "is a cautious one, which does not lightly find that certificate provisions are unlawful."[83] This approach, Strine wrote, "has much to commend it," and soundly reflects "Delaware's commitment to private ordering in the charter."[84] The Delaware common law that has established shareholder primacy as the default governance rule for business corporations neither states nor implies any public policy indicating that the rule should be unalterable by charter provision.[85] Neither does there seem to be a clearly implied policy of the General Corporation Law to prohibit alteration of the shareholder primacy rule in firm governance.

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[82]*Id.* at 118 (emphasis added). The Sterling Court discussed two cases that had held charter provisions invalid on public policy grounds: Greene v. E. H. Rollins & Sons, Inc., 2 A.2d 249, 252 (Del. Ch. 1938), which held invalid a charter provision that contained "unreasonable restrains on alienation of shares," and State ex rel. Cochran v. Penn-Beaver Oil Co., 143 A. 257 (Del. 1926), in which a charter provision denying stockholders their common law right to inspect corporate books. *Sterling*, 93 A.2d at 118.

As part of a sweeping set of reforms in 1967, the Delaware legislature amended §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." 8 *Del. C.* § 114(b). This essentially flipped the default rule. Since §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 was the principle architect of the 1967 reforms, wrote in his 1972 treatise on Delaware's corporate law that: "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). Folk's use of "presumably" here is odd, given his role in crafting the statute.

[83]*See* Jones Apparel Group, Inc. v. Maxwell Shoe Company, Inc., 883 A.2d 837, 845–46 (Del. Ch. 2004) (upholding validity of a charter provision establishing a method of setting record dates for consent solicitation as not contrary to 8 *Del. C.* § 213, which states that the directors "may fix a record date" for such solicitation, and which supplies default rules for establishing record dates where the board does not do so). *See also* text accompanying *infra* note 103 (discussing *Jones Apparel*).

[84]*See Jones Apparel*, 883 A.2d at 845.

[85]*See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1985).

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However, the new Public Benefit Corporation statute *is* literally a part of the General Corporation Law: it is organized as Subchapter 15 of Title 7, which is the General Corporation Law.[86] It might be argued that the presence of the PBC *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. Let us then turn to consideration of the Public Benefit Corporation and its relationship to the overarching General Corporation Law.

III. PRIVATE-ORDERING AND PUBLIC BENEFIT CORPORATIONS

A. *The Public Benefit Corporation Statute*

In 2013, responding 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.[87] According to the Delaware 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."[88]

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."[89] And impose additional or different requirements it does, in heaps. The PBC statute is strict and appears to allow 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.[90]

Now, of particular importance to this inquiry is the final section of the PBC statute, section 368, which is captioned "No effect on other

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

[87]*See generally* McDonnell, *supra* note 8 (giving background on the PBC movement).

[88]8 *Del. C.* § 362(a). Benefit Corporation statutes are not identical in every state. *See* Johnson, *supra* note 40, at 270-271 (summarizing early history of benefit corporation statutes and adumbrating differences among them). Because my interest here is the relationship between standard corporate law and the benefit corporation, and since Delaware dominates in the standard corporate law world, my focus here is 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.

[89]8 *Del. C.* § 361 (emphasis added).

[90]*See* text accompanying *infra* note 103 (assessing whether "shall" provisions should be considered immutable under *Jones Apparel*).

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corporations."[91] 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]."[92] 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.[93] Or, is a firm that attempts to deviate from shareholder primacy in its own way now an *improperly-formed* Public Benefit Corporation, subject to dissolution for non-compliance with the statute? We must examine the extent to which section 368's "no impact" assertion can prevent viewing what is possible in the General Corporation Law though the lens of what has been created with the Public Benefit Corporation.

To this end, consider first some of the apparently *mandatory* terms of the Public Benefit Corporation. Section 362 of the statute specifies that:

> In the certificate of incorporation, a public benefit corporation *shall*: (1) Identify within its statement of business or purpose pursuant to § 102(a)(3) of this title 1 or more specific public benefits to be promoted by the corporation; and (2) State within its heading that it is a public benefit corporation.[94]

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

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[91] 8 *Del. C.* § 368.

[92] *Id.* The amendment provisions of the PBC will be discussed *infra*, text accompanying notes 159-176.

[93] *See* Black, *supra* note 21, 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)).

[94] 8 *Del. C.* § 362(a)(1)(2) (emphasis added). This, of course, helps vindicate the view, expressed above, that section 102(a)(3) is the place to specify deviation from shareholder primacy.

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> to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.[95]

The PBC also 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.[96] 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.[97] Additionally, Section 364 requires the stock certificates of PBC's to "state *conspicuously* that the corporation is a public benefit corporation."[98]

The statute also includes *mandatory* reporting procedures. 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."[99] The section includes several additional "shalls" concerning what this reporting statement must contain.[100]

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[95]*Id.* § 362(b).

[96]*Id.* § 362(c). No notice is required to be given to workers or consumers dealing with a PBC. These stakeholders are apparently assumed to either have no interest in the public benefit status of the firm, or else to acquiesce in the cost of the public benefit by that cost being impounded into reduced wages for workers or increased prices (or lower quality) for consumers. *See* David G. Yosifon, *Towards a Firm-Based Theory of Consumption*, 46 WAKE FOREST L. REV. 447, 448 (2011) (arguing that consumers may prefer social benefit decisions to be made at the level of firm governance, rather than episodically through consumption decisions in the market). But 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 infra*, text accompanying notes 137-158 (discussing public policy limitations on opting out of mandatory corporate law).

[97]8 *Del. C.* § 362. No notice is required if the stock is registered with the SEC, presumably under the assumption that the registration statement would provide such notice, at least to market-makers.

[98]*Id.* § 364 (emphasis added).

[99]*Id.* § 366(b) (emphasis added).

[100]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.

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Section 368's promise that the public benefit corporation statute has "[n]o effect on other corporations" notwithstanding, is it now plausible to think that a privately-ordered multi-stakeholder corporation that does *not* give actual notice of its deviation from shareholder primacy to investors, or note its deviant status on its stock certificates, would be permissible?[101] 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 done in the way prescribed by the PBC, or not at all.

The PBC's notice and reporting requirements are not particularly onerous or restrictive, although they might be undesirable for some people, because they are costly or boring. Other features of the PBC, however, are quite restrictive indeed.

For example, governance standards for the public benefit corporation are 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.[102]

This is a highly specific, inflexible corporate governance design. Again, no "unless otherwise provided in the articles" is offered.[103] One

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Id. Section 366(c) provides some expressly mutable elements (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). *Id.* § 366(c). These are not hugely important on their own but their very presence serves to highlight the immutability of the rest of the benefit corporation provisions.

[101] *See* tit. 8, § 368. After all, there is no general requirement that notice be given for charter-based departures from standard default terms. The *Sterling* Court imposed no such requirement. For example, a firm might adopt staggered boards, or impose super-majorities for board elections and amendment adoptions, etc., without giving notice to investors, other than in the charter.

[102] *Id.* § 365(a) (emphasis added).

[103] Then-Chancellor Strine held in *Jones Apparel v. Maxwell Shoe Company*, that some code provisions may be altered through the corporate charter even where the "magic words" specifying "unless otherwise provided in the certificate" are absent from the implicated provision. Jones Apparel Group, Inc. v. Maxwell Shoe Company, 883 A.2d 837, 850 (Del. Ch. 2004). Whether a term is mandatory or not must be determined by construing the meaning and significance of the particular provision, Strine holds. Strine even suggests that the phrase "unless otherwise specified in the certificate" should be interpreted as a "bylaw excluder," meaning that any private ordering on the issue must be established through the charter, and cannot be achieved through the bylaws. *Id.* at 848. The "magic words" may be a "bylaw excluder," but they also serve to make it *clear* that the provision is mutable, and that no

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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.[104] One scholar has suggested that "balance" may be construed to mean giving *equal* weight to each factor (otherwise, the thing would be unbalanced).[105] Even if

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searching judicial inquiry is therefore required to know whether it is mutable or not. In *Jones Apparel*, Strine let stand a charter provision specifying how the record date of consent solicitations would be established, despite the fact that §213 of the code says that the board of directors "may" set the record date, and that section does not say "unless otherwise provided in the articles of incorporation." It is very unlikely that the Delaware Supreme Court would hold that a code provision that led with "shall" (rather than "may", as in *Jones Apparel*), and did not contain "unless otherwise provided in the articles of incorporation," would be subject to charter alteration. Certainly the "shall" provisions that are under review in this section seem at the core of the PBC design. This interpretation is buttressed by Strine's reference in Jones Apparel to Loew's Theatres, Inc. v. Commercial Credit Co., 243 A.2d 78 (Del. Ch. 1968), in which the Chancery Court held invalid a charter provision which sought to overturn the statutory rule, codified in § 220, that "any" stockholder can with good cause inspect a firm's books and records and replace it with a rule that stated that only stockholders holding at least 25 percent of the firm's stock would have such access. Seemingly moved by the absoluteness of the term "*any*," Strine wrote:

> Plainly the right of a stockholder to inspect books and records is one that is necessary to allow stockholders . . . to monitor their fiduciaries' discharge of management duties. Section 220 therefore codifies the important public policy that "any" stockholder must be permitted to obtain corporate information . . . and a charter provision that divests all but the most significant stockholders of that right is one that is contrary to the laws of this State.

Jones Apparel, 883 A.2d at 849 n. 30 (discussing *Loew's Theatres*). In any event, the question of whether these PBC "shall" provisions are mutable is another way of stating the core question of this inquiry: is the Public Benefit Corporation the sole means of deviating from shareholder primacy under Delaware law, or may promoters privately order to their own design? My view, developed in the text, is that the core provisions of the PBC itself are clearly immutable, and describe a highly-specific "brand" or "menu option," but that other modes of multi-stakeholder governance can be cobbled together with greater latitude under the corporate statute generally.

[104] 8 *Del. C.* § 365(b).

[105] *See* J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 355 n. 64 (2014). 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 id.* at 354; 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 Delaware's legislation reveal different views among committee members as to what "balance" means, and whether it is meant to be more or less demanding than "consider." *See* Murray, *supra* note 105, at 356 n.64. This suggests either that the language in the statute was not carefully crafted, or else that it was carefully crafted to be ambiguous.

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"balance" were not given such a literal meaning, this is still a specific and rigid governance charge.[106] Can this specificity be avoided by private-ordering, or is it the only way to deviate from shareholder primacy under Delaware corporate law?

The statute also strictly *limits* enforceability of the governance standards of a public benefit corporation. 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."[107] The benefit provisions of a PBC therefore do not create a duty to non-shareholders. Only shareholders can enforce the directors' obligation to pursue the non-pecuniary benefit described in the charter.[108] However, 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 such a design by forming a non-PBC corporation 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

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[106]In addition to the "balance" injunction, the statute also defines a Public Benefit Corporation as one that is "intended . . . to operate in a responsible and *sustainable* manner." tit. 8, § 362(a) (emphasis added). The term "sustainable" is not defined, but if given substantive content it would seem to require firms to be managed in a way that will assure indefinite or continual operation. This is very different from the shareholder primacy norm, which implies that directors should sell-out and dissolve a firm at a particular moment if they in good faith believe that it is in the best interests of the shareholders to do so (i.e., that they have arrived at a moment in which the firm's assets are more valuable than they ever will be in the future). Private adventurers using a benefit corporation, however, might desire firms to be managed with an eye towards some goal that is in tension with the firm's operations being "sustainable." Perhaps the term is meant to refer only to "environmental" sustainability, but the statute does not say that, and in any event even environmental sustainability might be in tension with other public benefits that promoters and stakeholders might want to pursue. *See* David A. Westbrook, *Visions of History in the Hope for Sustainable Development*, 10 BUFF. ENVTL. L.J. 301, 301 (2003) (critiquing the concept of sustainability in remarks that "I might have titled . . . more provocatively . . . 'Against Sustainability.'").

[107]tit. 8, §365(b) (emphasis added).

[108]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. C.* § 367.

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alternative form, then it would appear that such private ordering is not possible.[109]

Policymakers and commentators have described the Public Benefit Corporation as adding flexibility to corporate law design.[110] 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 terms committing themselves to greater social responsibility. This may not have been the intent, but it may end up being the result.

B. *Statutory Interpretation*

The crux of the interpretive problem here is whether the public benefit corporation created merely a "menu option," providing one, non-exclusive, off-the-rack 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 an interpretation that the menu option is the *only* thing of its sort that is permissible. When new legislation explicitly authorizes some act, the law that predates the promulgation of the menu option may

[109]It may also be possible that one could form a PBC that specifies in its charter, pursuant to §102(a) or (b) of the General Corporation Law that the directors *will* have duties to non-shareholders, that will be enforceable. Such duties would not contradict §365(b) of the PBC, because they would not be duties that existed "by virtue of the public benefit provisions [in the charter]," but rather they would exist because of other purpose or governance provisions in the charter. Whether this is possible again restates the basic question whether or not private ordering of purpose is permissible. The Model Benefit Corporation Legislation calls for only shareholders to have 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).

[110]*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). 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://tinyurl.com/del-markell-17vii13 (quoting Markell).

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subsequently be interpreted (or misinterpreted) as having forbid the newly menu-ed option.[111]

As an example of this problem, consider the introduction of the exculpation "menu option" of section 102(b)(7) into the Delaware corporate code in 1987. 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."[112] At the time it was passed, some 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.[113] Indeed, while not widespread, an example of judicial sanctioning of an exculpation clause written into a corporate charter can be traced to an English case from 1911 charging a failed rubber plantation's directors with incompetence.[114] The firm's charter 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."[115] The learned judge 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."[116] The Reporter to the ALI

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[111]*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.").

[112]The section 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. C.* § 102(b)(7). The statute was adopted in response to the shocking decision in Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985), holding the directors of Trans Union, Inc. liable for breach of the duty of care in connection with a profitable but rushed merger.

[113]*See* E. 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.").

[114]*See* In re Brazilian Rubber Plantations and Estates, Ltd., [1911] 1 Ch. 425 (Ch. Div. 1910).

[115]*Id.* at 479-480.

[116]*Id.* at 480. The Reporter to the ALI's Principles opines that the result in the *Brazillian Rubber* case would have been prohibited by subsequent developments in United

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Principles wrote in 1988 that there were no American cases addressing permissibility or prohibition of charter provisions exculpating directors for negligence liability, but it also noted that one prominent corporate law treatise did indicate, prior to the debate emerging, that such a provision would be allowed.[117] The Reporter noted that contract provisions protecting fiduciaries from liability for duty of care were commonplace in trust law, and were recognized in the Restatement of Trusts and the Restatement of Agency.[118]

However, years after section 102(b)(7) was adopted, it has become commonplace for legal scholars and jurists to write 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.[119] This leveling of the historical controversy has substantive impact on contemporary interpretive questions. In the 2009 case of *Gantler v. Stephens*, for example, the Delaware Supreme Court for the first time explicitly held that corporate officers owe the same

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Kingdom Company Law. *See* § 7.19, Reporters Note 1, ALI Principle of Corporate Governance, Tentative Draft No. 8 (Apr 15, 1988).

[117]*See id.* (citing Fletcher's Cyclopedia of Corporations (1986)).

[118]The 1988 Tentative Draft of the Principles, *supra* note 116, contained a note explaining that the Reporter for the section dealing with remedies, John Coffee, thought exculpation provisions were and should be permissible. However, it also noted that the Chief Reporter, Melvin Eisenberg, and the Reporter for Part IV, Harvey Goldschmid, were of the view that such provisions were not and should not be valid in the absence of an enabling statutory provision. Eisenberg and Goldschmid based their view on the importance of the duty of care in disciplining directorial conduct, and considered exculpation provisions in trust and agency law to be inapposite because such provisions were usually specifically negotiated by the parties, unlike in the corporate context, where terms are adopted by adhesion on large impersonal markets. As will be reviewed below, idiosyncratic terms may be better priced in robust impersonal markets than in one-off, personal contracts. In any event, the Tentative Draft from 1988 shows that there was at least a robust debate around the time that Delaware adopted §102 (b)(7) as to whether such a provision was necessary.

[119]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 Conaway 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, supra note 35, at 792. *See also* Marcel Kahan & Edward B. Rock, *Corporate Constitutionalism: Antitakeover Charter Provisions As Precommitment*, 152 U. PA. L. REV. 473, 517 n.178 (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)).

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fiduciary duties to shareholders that directors owe.[120] 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.[121]

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).[122] Years later, the interpretative controversy about the genesis of the exculpatory provision is not even referenced, and the revisionist view that the legislature created something new colors the Court's conception of what is otherwise possible to accomplish under the statute. If section 102(b)(7) merely clarified 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. And after all, why shouldn't firms be free to exculpate officers from liability in the charter if they think doing so well serves the corporate mission?[123] A similar revisionism threatens to infect courts' thinking about the relationship between the PBC and the bounds of permissible private ordering in the corporate code generally.[124]

There is little discussion in the academic literature about the proper way to interpret whether menu options are suggestive or exclusive. Some authorities note the issue, but none sheds light on it.[125]

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

[121] *Id.* at 709 n.37.

[122] *See* ALI Principle of Corporate Governance, *supra* note 116, at § 7.19, Reporters Note 1.

[123] *See* text accompanying *infra* notes 137-158 (reviewing justifications for and critiques of mandatory corporate law rules).

[124] Indeed, if a firm did adopt multi-stakeholder governance through a charter provision outside the PBC mechanism, as I have argued 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 of duties owed to shareholders.

[125] See, e.g., Daniel M. Häusermann, *The Case Against Statutory Menus in Corporate Law*, 9 HASTINGS BUS. L.J. 45, 47 n.8 (2012) ("Whether a statutory menu is open-ended or

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Per Llewellyn, the familiar canons of statutory interpretation reflect rather than resolve the analytic conundrum.[126] The canon of *expressio unius est exclusion alterius* – "the expression of one thing implies the exclusion of others"[127] – is possibly relevant.[128] The expression of a way of deviating from shareholder wealth maximization through the PBC implies that it cannot be accomplished in any other way through the General Corporation Law. However, as Scalia and Bryan note in their

closed-ended is a matter of statutory interpretation, to which the usual principles apply."); Ayres, *supra* note 21, 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.").

[126]*See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950) (arguing that for every 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 conventional 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).

[127]ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012).

[128]*Id.* One case discussed by Scalia and Garner in their treatment of this canon includes language, albeit from an area far 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.* (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*. Possibly relevant in this connection is Chancellor Strine's reading of the Delaware code's requirement of an annual shareholder meeting for the election of directors, *see* 8 *Del. C.* §211(b), in conjunction with the invitation in §141(d) to specify that boards may be classified into two or three classes, with one-class being up for election each year. Strine reads these two provisions to establish that there is a default rule that all directors serve one year terms, and that charters may opt to have classes that serve two or three year terms, but that under no circumstances may the charter specify more than three year terms. He concludes:

> The extent to which a certificate provision could deviate from the default standard of one-year terms for directors was itself set by statute, which limited the deviation to the adoption of a staggered board with members whose three-year terms expire on a rotating basis. Therefore, to permit a deviation beyond that expressly permitted by the statute would contravene Delaware public policy.

Jones Apparel, 883 A.2d 837, 849 (Del. 2004) (discussing Rohe v. Reliance Training Network, Inc., 2000 WL 1038190, at *10-11 (Del. Ch. July 21, 2000)). Analogizing this reasoning to the current question would yield the interpretation that the statute, through the PBC, establishes "the extent to which a certificate provision could deviate from the default standard" of shareholder primacy, and that "deviation beyond that expressly permitted by the statute would contravene Delaware public policy." *Id.*

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treatise on statutory interpretation, "[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."[129] 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."[130]

The legislative history of the PBC statute provides dim guidance. The PBC legislation was drafted by Delaware's Corporation Law Council, a committee of the Delaware Bar Association, which has special responsibility for proposing and vetting reforms to Delaware's corporate law. The Council did not clearly specify the relationship between its PBC innovation and private-ordering under the code as it previously stood. When coming forward in 2013 with its recommendation to adopt the PBC statute, the Council promulgated a FAQ document on the issue.[131] 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.[132]

This does not answer the Frequently Asked Question. It ducks it. Another FAQ was posed: "Can't directors consider the interests of non-stockholders already? Why is it necessary to adopt new legislation?"[133] 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.[134]

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[129] SCALIA & BRYAN, *supra* note 129, at 107.

[130] *See* Kennedy v. Truss, 13 A.2d 431, 433 (Del. Super. Ct. 1940).

[131] "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.

[132] *Id.*

[133] *Id.*

[134] *Id.*

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

The very brief, formal legislative history of the bill indicates only that its purpose was to entice more chartering business to Delaware: "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."[135] At first this strikes as a refreshing bit of legal realism, but one that does little to aid interpretation of the statute under the ordinary means of construction. But on reflection it perhaps does guide the inquiry: the legislative purpose is to attract the formation of more corporations in Delaware; therefore, the relationship between the general corporation law and the PBC should be interpreted in a way that will encourage more chartering in Delaware. But what interpretation will encourage more chartering? A theoretical inquiry may give some answer to that question.

C. *Public Policy and Private Ordering, Redux*

The *Sterling* decision states that charter provisions may deviate from common law corporate governance rules where they are neither contrary to a public policy "implicit in the General Corporation Law itself,"[136] or a "public policy settled by the common law."[137] As indicated earlier, there is nothing clearly implicit in the statutory scheme, or in the longstanding common law of shareholder primacy, to suggest that the rule should be considered immutable by charter provision. However, as we struggle 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 how they might apply to this case. This may inform the positive doctrinal assessment, and it 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.[138] First, mandatory rules might protect vulnerable parties to the corporate contract (especially shareholders) from exploitation that could occur under a private-ordering regime. Second, mandatory rules

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[135] DE LEGIS 122 (2013), 2013 Delaware Laws Ch. 122 (S.B. 47) ("Increasing interest in public benefit corporations necessitates their inclusion in the Code.").

[136] Sterling v. Mayflower Hotel, Corp., 93 A.2d 107, 118 (Del. 1952).

[137] *Id.*

[138] My discussion here is informed by my reading of the "triviality" debates referenced *supra*, note 27.

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might protect against the externalization of harms to third-parties (especially workers, consumers, and communities) brought on by other people's private agreements. Third, mandatory rules may induce efficient, socially desirable "network effects" in organizational design that would not be realized in a system that allowed private-ordering.

The basic *objections* to mandatory corporate law rules are 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.[139] Autonomy and innovation are so highly valued that most legal analysts today embrace a default presumption in favor of contractual-freedom, putting the burden of proof on those urging the adoption of mandatory rules in a particular setting. This allocation of the persuasive burden is not obviously applicable when discussing particular rules within corporate law design, given that affirmative government action is necessary to create corporate entities to begin with.[140] Nevertheless, Delaware's corporate code itself, and the cases interpreting it, clearly invite an orientation towards allowing private-ordering, which must be overcome by persuasive appeal to one or more justification for mandatory rules.

With respect to the exploitation justification, commentators have long noted that the separation of ownership and control in corporate operations creates a situation in which corporate directors can malinger or thieve at the expensive of shareholders, who are too distant and rationally ignorant of corporate affairs to notice or stop it.[141] 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 the shareholder exploitation that the law has been structured to restrain. In the present context, the rigid requirements of the public benefit corporation may be designed to protect shareholders from corporate governance designs that would otherwise waste or distribute to other groups too much of what should go to the stockholders. A single alternative to the shareholder primacy norm, represented by the PBC, may be necessary to ensure that

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[139] *See* Eisenberg, *supra* note 21, at 1524–25.

[140] *See* Hansmann & Kraakman, *supra* note 22, at 440.

[141] *See, e.g.*, ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF 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 with which the partners in a private copartnery frequently watch over their own."); *see also* ADOLF BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933) (seminal modern statement of the agency problem).

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shareholders are protected in their investments in hybrid enterprises.[142] And protection of shareholders, whether in the ordinary corporation or in the PBC, is of course only a means towards the real goal of ensuring the investment of capital sufficient to fund ventures that will employ workers, supply goods to consumers, and otherwise enliven communities.

However, in writings undertaken without reference to the beneficiary issue, the most influential corporate scholars have doubted that private-ordering of corporate governance rules really can exploit shareholders.[143] The capital markets are highly efficient, and corporate governance terms that create greater risk of shareholder exploitation are priced accordingly. If firms want to exploit their shareholders with bad charter rules, the firm's cost of capital will be greater. Shareholders get what they pay for, not more, and not less.[144]

These arguments in favor of private-ordering are strongest in the context of large publicly traded corporations where professional analysts actively scrutinize governance terms, and continuous trading clarifies prices.[145] One might assume that the small-firm context would be better suited to particularized bargaining about idiosyncratic terms, but those are the contexts where ignorance and vulnerability on the part of investors are most likely to be evident, and where uniformity in organizational design would be most justified. Public markets of course are not the only route to insight, and this problem may be mitigated in small private firms with highly sophisticated or well-lawyered investors.

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[142]It is possible that private-parties would want to privately order a deviation from shareholder primacy that provided *greater* protections for investors in socially conscious firms than those that are provided under the PBC. However, the view in favor of a mandatory rule on the shareholder-protection front would be that once you allow for deviation from the prescribed terms, shareholders will not easily be able to discern whether a rule advances or diminishes their interests, and this fog will allow insiders, like directors, to have their way at the shareholders' expense.

[143]*See* AM. LAW INST. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, *supra* note 33.

[144]*See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); *see also* Butler & Ribstein, *supra* note 21, at 35.

[145]Eisenberg makes the important observation that the argument that pro-management, or, for our purposes, pro-worker or pro-consumer, terms are accurately priced through the market, even if correct, is an argument about fairness, not efficiency. *See* Eisenberg, *supra* note 22, at 1514. It is an argument that shareholders got what they pay for, but it does not suggest that such rules are desirable in terms of most effectively aggregating and deploying capital in a scarce, hungry world.

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Presently, most Public Benefit Corporations are small or mid-sized ventures.[146]

The second justification for mandatory terms concerns the exploitation of third-parties who are not a party to the terms of the corporate contract in dispute.[147] Many critics have argued that the *ordinary* shareholder primacy norm gives corporate directors an incentive to over-reach, where possible, in dealings with workers (e.g., on safety), consumers (e.g., on quality), or the environment, in service of the singular purpose of shareholder profit.[148] The PBC is conceived as a way of mitigating this externalizing tendency, by bringing a broader set of interests within the corporate purpose.[149] If we assume that the PBC has been well designed to protect non-shareholders in corporate operations, then we might think that deviation from the prescribed PBC terms might re-expose those stakeholders to corporate exploitation. However, the proper comparison is not between third-party exploitation under the PBC regime and third-party exploitation under a privately-ordered multi-stakeholder regime. Rather, we must ask whether there is likely to be more third-party exploitation under shareholder primacy, than under a privately-ordered multi-stakeholder regime. This seems highly unlikely. Given the exploitation incentivized by shareholder primacy, it is hard to see why any privately-ordered deviation to multi-

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[146] *See* Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?,* 14 U.C. DAVIS BUS. L.J. 247, 277–80 (2014) (surveying companies that sought PBC status in 2013).

[147] In fact (or in theory, I suppose), it is wrong to say that non-shareholders are not a party to the corporate contract. According to the nexus-of-contracts idea of the corporation, the firm is a contractual affair involving shareholders, creditors, workers, consumers, and others. Shareholder primacy is simply a term that shareholders receive, whereas as other parties to the corporate contract receive other kinds of terms. *See generally* EASTERBROOK AND FISCHEL, *supra* note 29, at 1-40. The exploitation of "third-parties" justification for mandatory rules that is under review here could just as easily be viewed as a species of the first justification, which contemplates mandatory rules that are necessary to protect those who are parties to the corporate contract.

[148] *See generally* David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After* Citizens United, 89 N.C. L. REV. 1197, 1202 (2011) (developing this critique). Proponents of shareholder primacy insist that governmental regulation (e.g., labor and consumer protection statutes) can curb such abuse. *Id.* But profit-maximizing corporations work to "capture" government and stunt the effectiveness of such regulations. *Id.* This problem is intensified by Citizens United v. Federal Elections Commission, 588 U.S. 310 (2010) which gives corporations the constitutional right to operate in the political sphere. Some scholars claim that exploitative contracts for workers or consumers will be priced accordingly in the market, just as surely as bad corporate governance terms will be. *See* Yosifon, *supra* note 148, at 1243. But 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. *Id.* at 1244.

[149] 8 *Del. C.* § 362.

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stakeholder governance would not be more desirable, from an externalities perspective. Further, it is unlikely that the PBC standards describe the ideal governance system, from a third-party effects perspective. Indeed, private parties may wish to design governance terms that provide greater protections for third-parties than those afforded by the PBC, not less.

The shareholder protection argument and the third-party protection argument may in this calculus (or simple arithmetic) be regarded as a wash. It is possible that shareholders will be more vulnerable under a system that allows private-ordering of multi-stakeholder governance in idiosyncratic forms other than the PBC. It is likely, however, that any deviation from the shareholder primacy norm, through the PBC or some other design, would be better for third-parties than is shareholder primacy. If these two justifications roughly cancel each other out, then the overarching assessment would yield a conclusion in favor of flexibility to privately order, given the presumption in favor of contractual freedom.

The third policy justification for mandatory rules is the "network effects" that such rules can spur.[150] This may be especially relevant in the PBC context. As noted, the legislative history of the PBC indicates that the legislature adopted it to encourage more chartering in Delaware.[151] Working on other corporate governance issues (not the beneficiary issue, as he presumes shareholder primacy) Jeffery Gordon has 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 scope and meaning of terms, thereby reducing the cost of using them.[152] 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 involved in using the default form. Gordon

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[150]*See* Brett H. McDonnell, *Getting Stuck Between Bottom and Top: State Competition for Corporate Charters in the Presence of Network Effects,* 31 HOFSTRA L. REV. 681, 682 (2003).

[151]*See* H.R. 47, 147th Gen. Assemb., 1st Reg. Sess. (DE 2013).

[152]*See* Gordon, *supra* note 21, at 1567 ("Thus although firms collectively are better off if the standard form is maintained, individual firms will have incentives to deviate from the standard form 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 the point of introducing a "lemons problem." *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 489–90, 499–500 (1970).

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also highlights the social costs borne in connection with litigation over uncertain, privately-ordered deviations from standard forms.[153] Applying these arguments to the present context, it might be said that allowing private ordering of corporate beneficiary, other than through the prescribed terms of the PBC, may result in *fewer* non-shareholder primacy firms than if the PBC were the only option. It may result in more firms being formed as shareholder primacy corporations instead of multi-stakeholder undertakings, or it may simply result in fewer firms forming altogether.

Gordon's "network effects" justification for mandatory corporate law terms has been roundly dismissed by advocates of private-ordering in corporate affairs.[154] Butler and Ribstein, for example, argued that the desirable network effects of a "standard" form would still be achieved if the form were highly desirable and voluntarily used by numerous parties.[155] The dominance of Delaware in a system of competitive state chartering regimes demonstrates the efficacy of network effects, which Delaware corporate law surely enjoys, alongside choice. 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."[156] Gordon's social costs of litigation argument for mandatory terms was also rejected by scholars who note the social *benefits* of such litigation in clarifying expectations of future users of innovative designs.[157] And of course, the state can always raise fees associated with private litigation if there is no collateral public benefit to the litigation.[158] 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.

In summary, then, it seems that neither the Delaware statutory scheme, nor Delaware's common law, nor broader public policy justifications point in favor of prohibiting privately-ordered deviation from shareholder primacy in business corporations, even after the PBC innovation.

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[153] *See* Gordon, *supra* note 21, at 1565–66.
[154] *See generally* Butler & Ribstein, *supra* note 21, at 50.
[155] *See id.*
[156] *See id.*
[157] *See* Black, *supra* note 21, at 578.
[158] *See id.*

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D. *Mid-stream Adoption of Multi-Stakeholder Governance*

Suppose that it were permissible to privately order multi-stakeholder governance in a corporate charter at the firm's inception. Would it also be permissible to amend the charter of an existing shareholder-primacy corporation to adopt a multi-stakeholder regime? 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:

> If the venture at its formation is designed in the ordinary fashion – employees and debt investors holding rights 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.[159]

But Easterbrook and Fischel's 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?

The Delaware code states that a corporate charter can be amended to include any "such provisions as it would . . . lawful . . . in an original certificate of incorporation."[160] Section 242(a) makes clear that a charter can be amended "[t]o change . . . enlarge or diminish the nature of its business or its corporate powers and purposes."[161] The amendment power is thus expansive.[162]

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[159] EASTERBROOK & FISCHEL, *supra* note 29, at 36.

[160] 8 *Del. C.* § 242(a).

[161] *Id.* § 242(a)–(a)(2).

[162] Some analysts consider "midstream managerial opportunism" to be a particularly acute instance of shareholder vulnerability, which counsels making some rules immutable in the mid-stream context that would have been mutable at a firm's launch. *See, e.g.,* Black, *supra* note 21, at 578. There may also be 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) ("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

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However, under Delaware's code, only the board can initiate an amendment.[163] They do so by "adopt[ing] a resolution setting forth the amendment proposed, declaring its advisability, and . . . calling a special meeting of the stockholders entitled to vote in respect thereof."[164] This creates a threshold conceptual problem. If the default corporate governance rule is shareholder primacy, 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.[165] Therefore, at least prior to the PBC innovation, it was not possible for an ordinary corporation, post-formation, to alter the shareholder primacy norm by charter amendment.

However, the Public Benefit Corporation statute *does* explicitly contemplate that an ordinary Delaware corporation could amend its charter to become a PBC.[166] Therefore, it *is* now permissible for an ordinary corporate board to advise amending the corporate charter in order to deviate from shareholder primacy and become a PBC.[167] But we must still presume that an ordinary corporation cannot be amended mid-stream to adopt multi-stakeholder governance other than through the prescribed statutory path to a PBC, because there is no way for the board to propose such an amendment consistent with its obligations under the shareholder primacy norm.

Under Delaware law, once the board proposes an amendment, it is adopted upon an affirmative vote of a majority of the shareholders.[168]

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well-settled shareholder wealth maximization policy, nonmonetary factors charter amendments therefore appear vulnerable."). Then again, if you believe in the efficiency of the IPO, *see* text accompanying *supra* notes 143-145, then you should allow boards broad authority to pursue mid-stream rule changes. Downstream opportunism was priced into the IPO.

[163] 8 *Del. C.* § 242(b).

[164] *Id.* § 242(b)(1) (emphasis added).

[165] For example, the code specifies that directors may offer amendments that cancel accrued but unpaid dividends. *See id.* § 242(a)(4). But under the shareholder primacy norm, directors may only pursue such an amendment if they sincerely believe that doing so will enable the firm to ultimately produce *greater* profits for those shareholders.

[166] *See id.* § 368.

[167] Butler and Ribstein would undoubtedly have challenged this alteration as an unconstitutional interference with the contractual rights of the shareholders. *See* Butler & Ribstein, *supra* note 21, at 68; *see also*, Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. 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," forbids states from fundamentally altering the governance rules of existing firms).

[168] *See* tit. 8, § 242(b)(1)–(4). Delaware's statute also provides that each class of stock that is affected 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. *Id.* § 242(b)(2).

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The charter may specify a greater threshold, but not a lower one.[169] When the Delaware PBC statute was first passed in 2012, however, it required a *90%* 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.[170] In 2015, the statute was changed to allow an ordinary firm to become a Public Benefit Corporation with a two-thirds affirmative vote of the voting shares (rather than each class of effected shares).[171]

These rules prescribing how an ordinary corporation becomes a PBC would appear to control over a provision in a charter that had stricter amendment standards. Suppose you have a corporation that requires a 90% shareholder vote for any amendment to 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 charter of the firm undertaking the transformation. This mandatory rule would also appear to preclude an ordinary corporation from forming with a provision in its charter stating that it could become a PBC upon a vote of a simple majority of its shareholders. Such a provision would apparently not control over the 2/3 vote that the PBC requires. None of these mandatory elements seem absolutely necessary to protect shareholder or stakeholder interests.

Under the original version of the PBC statute, shareholders of ordinary corporations who dissented from a vote to become a public benefit corporation were entitled to appraisal rights.[172] After the 2015 amendments, appraisal rights are only available if the stock of the transforming firm is not publicly traded.[173] Interestingly, the statute

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Historically, corporate charters could only be amended through a unanimous vote of the shareholders. *See* Black, *supra* note 21, at 552 (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 to amend. While the majority-vote threshold is mandatory, Black considers its mandatory nature "trivial," since "public choice theory suggests that a submajority rule is likely to be inefficient, so there may have been no demand for still more flexibility." *Id.*

[169] *Id.*

[170] *See* tit. 8, § 363(a).

[171] *See id.*

[172] *See* Jeffrey R. Wolters, Esq. & James D. Honaker, Esq., *Analysis of the 2015 Amendments to the Delaware General Corporation Law* (Morris, Nichols, Arsht & Tunnell), Aug. 5, 2015, at 6.

[173] Appraisal rights entitle a dissenting shareholder to avoid being forced into a merger and to receive in cash the value of what their shares were worth before the merger, as determined by the Court of Chancery. *See* 8 *Del. C.* § 262. Dissenters rights are not provided for charter amendments, although the corporation statute has always given appraisal rights where a firm merges into a non-profit corporation. *See id.* §§ 257, 262. The exemption of publicly traded firms from the appraisal option in the context of firms adopting PBC status seems fatuous. It makes sense to get rid of the appraisal remedy, as Delaware has, in the

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states that if an ordinary corporation is being merged into a "domestic or foreign public benefit corporation or *similar entity,*"[174] whose stock is not publicly traded, then dissenters are entitled to appraisal rights.[175] This "similar entity" verbiage may signal, or at least provide a statutory foothold for, the idea that corporate deviation from shareholder primacy might come in many shapes and sizes, including privately ordered multi-stakeholder forms.

A Public Benefit Corporations may also *disavow* its public benefit status and become an ordinary shareholder primacy firm with "approval of 2/3 of the outstanding stock of the corporation entitled to vote."[176] Yet, again, there may be demand for some kind of voting requirement other than a 2/3 measure 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 by a majority vote of the shareholders as is the default rule, or through whatever means of amendment were otherwise privately-ordered into the articles.

E. *Menus Matter for Corporate Experimentation*

Even if promoters have all along been free to privately-order a socially conscious corporation under Delaware law, and are still free to do so, this does mean that the PBC is irrelevant. When a legislature articulates a non-exclusive "menu option" that promoters can use if they so desire, it relieves promotors of the cognitive burden, and others costs, of coming up with the idea for themselves. It assures promoters that

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ordinary context of a merging publicly traded company. In such a case a dissenting shareholder is really only objecting to the *means* through which her interests will be pursued, and if the majority of shareholders think the deal will be profitable, the market probably will too, so the disgruntled shareholder can be made whole, or more than whole, by exit. But in the context of an ordinary corporation transforming into a PBC, we have a change not in *means* towards profit, but a change in goals of the firm fundamentally. The public markets provide no relief to a shareholder who objects to the change in goal, for in this case her fellow-shareholders all are agreeing to a change they likely believe will *lower* the stock-price, and the market will undoubtedly reflect that judgement. Whether or not one believes dissenters should receive appraisal rights when they object to being forced into a PBC, the publicly traded status of the firm does not appear relevant to the question.

[174] *See id.* § 363(a)-(c) (emphasis added).

[175] *See id.* § 363(b).

[176] *Id.* § 363(c). This seems again to disregard the interests of workers and consumers in a Public Benefit Corporation. It may be that workers take a wage-cut, or consumers pay a premium, because they prefer to do business with a corporation that has a purpose beyond shareholder wealth-maximization. But this premium, already paid and sitting in the corporate treasury waiting to be spent on, say, beach clean-up, could be paid out to shareholders as a dividend instead, if the shareholders vote to become a shareholder primacy firm.

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such a form is indeed permissible. It may persuade promoters to use the form, rather than some other, as the "menu option" may imply that the state thinks this particular form is a quality design worth using. These reduced costs and perceived benefits of the "menu option" may spur network effects, which make the option even cheaper and more effective over time. 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.[177] Listokin analyzed a "natural experiment" that took place through the proliferation of anti-takeover legislation in the 1980s.[178] In a short period of time, many states adopted rules relating to a common set of anti-takeover measures, including "fair price," "business combination," and "control share acquisition" rules.[179] A majority of states adopted these antitakeover rules as defaults, and explicitly authorized firms to opt-out of the rules by charter amendment.[180] Some states, however, passed legislation that explicitly authorized firms to *adopt* anti-takeover rules, but did not establish such rules as a default.[181] Other states did not adopt 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").[182] Finally, a few states adopted mandatory anti-takeover rules.[183]

Listokin found that the default rules and menu options had significant effects.[184] For example, 98% of firms chartered in states with a "fair price" default rule stuck with the default.[185] In states with a fair

[177] *See* Yair Listokin, *What Do Corporate Default Rules and Menus Do? An Empirical Examination*, 6 J. OF EMPIRICAL LEGAL STUD. 279, 283–85 (2009).

[178] *See id.* at 283, 286.

[179] "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 statutory formula. *Id.* at 286 n.24 (citations omitted). "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 firm approves the combination. *Id.* at 286-87. "Control share acquisition statutes" impede large shareholders from exercising voting rights in their stock unless such exercise is authorized by vote of the minority shareholders. Because of judicial acquiescence 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. *Id.* at 287–88.

[180] *Id.* at 283.

[181] Listokin, *supra* note 177, at 288.

[182] *Id.* at 286.

[183] *Id.* at 285–86.

[184] *Id.* at 284.

[185] Listokin, *supra* note 177, at 284.

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price "menu option," 50% of firms opted into the "fair price" rule.[186] In states with no default or menu option, but where Listokin presumes "fair price" could be privately prescribed, only 20% of firms had a "fair price" provision in their charter.[187] 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."[188]

The efficacy of "menuing" an option can help explain why so few promoters adopt a particular corporate structure before the menu is provided, but rush to adopt it after. As noted above, for example, when the exculpation provision of section 102(b)(7) was proposed in 1988, several commentators argued that it was unnecessary because exculpation could be adopted by charter provision.[189] Nevertheless, very few firms had such provisions in their charter before 1988. After Delaware adopted section 102(b)(7), nearly every major firm adopted exculpation clauses in their charters.[190] Twenty-dollar bills, apparently, sometimes lay around on sidewalks for decades before the state points them out, after which the private sector begins to pick them up.[191] The explicit statutory invitation to completely exculpate directors from liability may have aided the development of a business and legal norm that would not otherwise have existed.[192]

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[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *See* R. Franklin Balotti & Mark J. Gentile, *Commentary from the Bar: Elimination or Limitation of Director Liability for Delaware Corporations*, 12 DEL. J. CORP. L. 5, 10–11 (1987).

[190] *See* Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 692 (2009). And nearly all firms rushed right past the invitation to "limit" liability into a full embrace of getting rid of liability altogether.

[191] *See* Gordon, *supra* note 21, 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.").

[192] Possibly, prior to Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985), which spurred adoption of §102(b)(7), corporate lawyers did not think chartering exculpation was necessary, because they assumed the business judgment rule was so strong that directors would never really be held liable for duty of care damages on any imaginable facts. Yet given the ease with which exculpation can literally be written into a charter, and that directors stood only to gain if the provision were valid, and lost nothing if it was invalid, the claim that firms did not think it necessary to privately-ordered exculpation before 1985 seems at least incomplete as an explanation of why the term was not widespread prior to its legislative menuing.

The history of §102(b)(7) may also showcase the inverse of the view, championed by Melvin Eisenberg, that the *moral* obligations that directors feel towards shareholders are buttressed when those obligations are reflected in law. *See* Eisenberg, *supra* note 21, at 1505. Where the law makes explicit the opportunity to opt-out of care liability, the moral obligation

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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. Indeed, menus appear undoubtedly to be important in the area of socially conscious enterprise: there are many more non-shareholder primacy firms since the promulgation of the PBC "menu" than existed before it.[193] But now that the PBC menu option has made salient one way of structuring a socially conscious corporation, creative promoters may be spurred to formulate their own more idiosyncratic designs. And they must know whether that is permissible.

IV. PRESCRIPTIONS, NARROW AND BROAD

A. *Plausible Prescription: Seek Clarification*

Among the principle justifications that activists have given in urging legislatures to adopt PBC provisions into their corporate codes has been the *uncertainty* regarding the permissibility of altering the standard corporate form to achieve deviation from shareholder primacy in corporate governance.[194] A better approach to resolving that uncertainty would have been to petition the legislature for clarity on the point of private ordering, rather than petitioning for an entirely new form that now recapitulates the mystery of whether private ordering of a socially conscious business firm is permissible. It is not too late to pursue legislative clarification, perhaps with an amendment to the General Corporation Law that stated: "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."[195] It would also be desirable to alter the public benefit corporation statute to make it more susceptible to private-ordering.

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to pay damages for one's failure as a fiduciary may diminish, in the hearts of directors and shareholders alike.

[193]In part we must also 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 generally* McDonnell, *supra* note 8.

[194]*See* White Paper, *supra* note 110, 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.").

[195]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 Delaware's LLC statute. *See* Conaway, *supra* note 35, at 817-18.

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There is little risk 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 the 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., has shown great interest both in the subject of corporate purpose, and in private-ordering through the corporate charter.[196] When the next Craigslist case comes along, as it surely will in this era in which large firms are eager to cloak themselves in the wool of social responsibility, the Delaware Supreme Court should assert its views on whether, and how, shareholder primacy in corporate governance can be altered.[197]

B. *Aspirational Prescription: Change the Default Rule*

If the impetus behind the Public Benefit Corporation is to provide a vehicle through which capital can invest in business corporations that pursue profit in balance with other interests, then the statute satisfies the charge.[198] If, however, the motivation behind the Public Benefit Corporation is to offer a cure to the socially irresponsible disruptions occasioned by shareholder primacy corporations in our society,[199] then the PBC statute is entirely inadequate. Capital clearly prefers the superior profits that are available in the shareholder primacy firm to the more "balanced" returns that are available in a PBC. Major corporations are not rushing to amend their charters to get the "balance" in governance that the PBC requires. The fact that the capital-markets evinced no shutter when Delaware adopted the PBC, which allowed shareholder primacy firms to become PBCs upon a 90% shareholder vote, *nor* a quake when the PBC was amended a year later to allow for adoption of PBC status by a two-thirds shareholder vote, suggests the provisions are unimportant, because they are unlikely to be used. Even if PBCs do attract significant capital, it cannot be expected that they will displace the

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

[197] *See supra* note 47 and accompanying text.

[198] *See* White Paper, *supra* note 110, 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."

[199] *See* text accompanying *supra* notes 147-149 (critically assessing the legitimacy and desirability of the shareholder primacy norm).

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socially deleterious effects that for-profit corporations sow in our society.[200]

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.[201] The benefit corporation model also threatens to create a social policy "mirage" of responsiveness to the problems attendant to shareholder-primacy firms.[202] This mirage can help legislators persuade themselves, and the public, that the law has already responded to the social problems 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.

The problems associated with shareholder primacy, from a social policy perspective, counsel in favor of a reform of corporate governance law to explicitly allow or even require corporations to operate in the interests of multiple-stakeholders, including workers and consumers, rather than shareholders alone.[203] An effective multi-stakeholder corporate governance regime could only be established by making it the default rule. And it could only be made the default rule through federal preemption of state chartering, since firms would flee from any state that will not sell shareholder primacy charters to states that will.[204]

Such a reform, however, need not be so sweeping as to foreclose all experimentation or private-ordering in business design. Our policymaking choices are not so stark. First, federal preemption might

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[200] *See e.g.,* Kent Greenfield, *A Skeptic's View of Benefit Corporations*, 1 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 17, 17–18 (2014); Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 592–93 (2011) (doubting the efficacy of the public benefit corporations to respond to the problems occasioned by the operation of ordinary corporations).

[201] *See* Johnson, *supra* note 40, at 295.

[202] *See* Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 4 (2004).

[203] *See, e.g.*, Yosifon, *supra* note 148, at 1199.

[204] From the point of view that doubts whether shareholder primacy is socially desirable, the familiar debate about whether state competition, and Delaware's dominance, in corporate chartering reflects a race to the bottom or a race to the top is beside the point. State competition may result in the provision of the best corporate law for shareholders, but that successful race may be leaving other stakeholders behind. Whereas state chartering incentivizes states to externalize the costs of their corporate law to other states, federal chartering has no such externalization dynamic, as least formally, since the federal government has a responsibility to advance the interests of the nation as a whole. *See* Eisenberg, *supra* note 21, at 1512.

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only apply to very large firms, with small operations allowed the flexibility of state regimes. Second, a federal multi-stakeholder governance standard might merely be a default rule, which firms could opt-out of through a given set of procedures. As we have seen, the selection of the default rule matters, because default rules tend to stick, even where deviation from them is permitted.[205] Consideration of the means through which a multi-stakeholder default could be avoided also opens up a wide array of possibilities, which might be deployed with some nuance in different contexts. For example, the law might prescribe that a default multi-stakeholder governance regime could be transformed into a shareholder primacy firm by a shareholder vote, or it could require an amendment process that involved all corporate stakeholders, before the default regime could be changed. 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.[206]

V. CONCLUSION

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 select if they desire a highly specific form of multi-stakeholder governance with a recognizable "brand." But promoters remain free to order "off the menu," and get their own multi-stakeholder corporate design. Delaware jurists would be wise to make this clear in case law. The Delaware legislature would be prudent to sustain these conclusions through statutory clarification, before the exigencies of litigation end up making bad law on the issue. The PBC itself should also 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 federal pre-emption of corporate law for large firms, and the adoption of a default rule that required directors to attend to the interests of all corporate stakeholder in firm governance, not just shareholders. Such a reform could be flexible enough to vindicate social

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[205] *See* text accompanying *supra* notes 177–93.
[206] Ayres, *supra* note 21, at 2043.

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interests in corporate enterprise, while still leaving substantial space for private-ordering of corporate purpose.

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