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A Necessary Social Evil:

The Indispensability of the Shareholder Value Corporation

Marc T. Moore[*]

This symposium paper critically evaluates the developing 'Post-Shareholder-Value' ('PSV') paradigm in corporate governance scholarship and practice, with particular reference to Professor Colin Mayer's influential theory of the corporation as a unique long-term 'commitment device'. The paper's positive claim is that, while evolving PSV institutional mechanisms such as Benefit Corporations and dual-class share structures are generally encouraging from a social perspective, there is cause for scepticism about their capacity to become anything more than a niche or peripheral feature of the US public corporations landscape. This is because such measures, in spite of their apparent reformist potential, are still ultimately quasi-contractual and thus essentially voluntary in nature, meaning that they are unlikely to be adopted in a public corporations context except in extraordinary instances. The paper's normative claim, meanwhile, is that while in many respects the orthodox shareholder-oriented corporate governance framework may be a social evil; it is nonetheless a necessary evil, which US worker-savers implicitly tolerate as the effective social price for sustaining a system of non-occupational income provision outside of direct state control. Accordingly, pending fundamental reform of the broader social-institutional context to the shareholder-oriented corporation, the key features of the evolving PSV governance model

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should remain quasi-contractual as opposed to being placed on any sort of mandatory regulatory footing.

Keywords: corporate governance, theory of the firm, shareholder primacy, Benefit Corporations, dual-class voting structures, capital markets, social welfare, United States.

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I. INTRODUCTION

Scholars of the modern public corporation mutually agree that their subject of study is a truly remarkable institution. Far less commonly agreed upon, though, is precisely *why* this is so. Over the past four decades, social-scientific analysis of business corporations – at least in the English-speaking world – has been dominated in large part by highly reductionist theories inspired by neo-classical economics, which essentially seek to break the corporation (or 'firm') down to its component human parts.[1] From this general viewpoint, the purported significance of the corporation is typically perceived as residing in its capacity to enable corporate participants (as notional 'contractors') to economize on the transaction costs involved in both financing and organizing complex production projects on a collective scale.[2]

Accordingly, various legal features of the corporation – including limited liability,[3] separate legal personality[4] and centralized board management[5] – have on different occasions been lauded as its apparently key and distinguishing organizational characteristic. At the same time, debate over the rightful distribution of decision-making influence within the corporate structure has steadily burned on, whereby the relative (dis)advantages of allocating

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[1] *See, e.g.,* Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. PO. ECON. 288 (1980); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983).

[2] *See, e.g.,* Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 *COL. L. REV.* 1416 (1989); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991) [hereinafter CORPORATE LAW]; BRIAN R. CHEFFINS, COMPANY LAW: THEORY, STRUCTURE AND OPERATION (1997); STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE (2008) [hereinafter THE NEW CORPORATE GOVERNANCE]; R. KRAAKMAN ET AL, THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (2ND ed.) (2009).

[3] See F.H. Easterbrook & D.R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1989); P. Halpern, M. Trebilcock & S. Turnbull, *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TOR. L.J. 117 (1980).

[4] See Henry H. Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000).

[5] See Bainbridge, *supra* note 2; Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003) [hereinafter *Director Primacy*].

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legal governance powers to directors versus shareholders have been variously chewed over.[6] However, whilst the instrumental question as to the most effective legal 'means' of corporate governance has been a topic of fervent disagreement; the corresponding issue of the ultimate social 'end' to which these efforts should be driving at has, until fairly recently, been a conspicuous point of *acquiescence* amongst otherwise-diametrically-opposed observers.[7]

For the most part, and despite their differences of opinion on other issues, corporate law and governance scholars have tended to agree upon one thing at least: that the overarching normative objective of corporate governance – and, by implication, corporate law – should be the maximization (or, at least, long-term enhancement) of shareholder wealth.[8] Indeed this proposition – variously referred to as the 'shareholder wealth maximization',[9] 'shareholder value'[10] or (as will be used here[11]) 'shareholder primacy'[12]

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[6] *See, e.g.,* Lucian A. Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43 (2003); Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005) [hereinafter *Shareholder Power*]; Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006); L.A. Stout, *The Mythical Benefits of Shareholder* Control, 93 VA. L. REV. 789 (2007); William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653 (2010); M. Kahan & E. Rock, *The Insignificance of Proxy Access*, 97 VA. L. REV. 1347 (2011); Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy* Access, 61 EMORY L.J. 435 (2012); Bernard S. Sharfman, *Why Proxy Access is Harmful to Corporate Governance*, 37 J. CORP. L. 387 (2012).

[7] On the 'means' versus 'ends' dichotomy in corporate governance scholarship, see Bainbridge, *Director Primacy*, *supra* note 5.

[8] *See, e.g.,* EASTERBROOK & FISCHEL, CORPORATE LAW, *supra* n 2, 35-39; Henry H. Hansmann & Reinier Kraakman, *The End of History for Corporate* Law, 110 GEO. L.J. 387 (2001) [hereinafter *End of History*]; M.C. Jensen, *Value Maximisation, Stakeholder Theory, and the Corporate Objective Function*, 7 EUROPEAN FINANCIAL MANAGEMENT 297 (2001) [hereinafter *Value Maximisation*]; Bebchuk, *Shareholder Power, supra* note 6, 842-43; Bainbridge, *Director Primacy*, *id.,* 574-92; Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993) [hereinafter *SWM Norm*].

[9] *See, e.g.,* Bainbridge, *SWM Norm*, *id.*; Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063 (2001); Bernard S. Sharfman, *Shareholder Wealth Maximization and its Implementation under Corporate Law*, 66 FLA. L. REV. 389 (2014); Robert P. Bartlett, III, *Shareholder Wealth Maximization as Means to an End*, 38 SEATTLE U. L. REV. 255 (2015).

[10] *See, e.g.,* Jensen, *Value Maximisation*, *supra* note 8; William Lazonick & Mary O'Sullivan, *Maximizing Shareholder Value: A New Ideology for Corporate Governance*, 29 ECON. SOC. 13 (2000); William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275 (2002) [hereinafter *Enron*]; Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465 (2007).

[11] For purposes of this paper, the term 'shareholder primacy' is preferred on account of the present author's view that it best encapsulates the essential functional outcome of the key legal principles in this regard; and, in particular, their effect in ensuring the systematic prioritization by corporate management of the collective interests of shareholders over those of other stakeholders (and especially employees) in the event of conflict. On this, see *infra* Part IV.C.

[12] *See, e.g.,* Lynn A. Stout, 'Bad and Not-So-Bad Arguments for Shareholder Primacy', 75 S. CAL. L. REV. 1189 (2003); John Armour, Simon Deakin & Suzanne J. Konzelmann, *Shareholder Primacy and the Trajectory*

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norm – is so ingrained within mainstream corporate governance thinking that it has rarely been subjected to serious policy or even academic question, besides relatively moderate concerns about the appropriateness of the time horizon over which shareholders' collective financial welfare is most appropriately adjudged by managers and boards.[13]

Although the 1990s witnessed the fairly widespread development of competing pluralist or 'stakeholder' understandings of the corporation's rightful social objectives,[14] such counter-theories rarely garnered much serious consideration within the mainstream. And, where they have been picked up on beyond their own periphery, it has more often than not been for the purpose of discrediting the general stakeholder governance model on account of its alleged practical unworkability.[15] Consequently, at the turn of the present century – and notwithstanding the United States witnessing what was (at least at the time) arguably the country's most serious ever corporate governance failure in the form of the Enron collapse – the shareholder primacy paradigm was for all intents and purposes still alive and well.[16] Moreover, federal regulatory reforms implemented in the aftermath of the 2007-08 financial

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of UK Corporate Governance, 41 BRIT. J. IND. RELAT. 531 (2003); William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and "The Modern Corporation"*, 34 J. CORP. L. 99 (2008); David Millon, *Shareholder Primacy in the Classroom After the Financial Crisis*, 8 J. BUS. & TECH. L. 191 (2013).

[13] *See, e.g.,* Michael C. Jensen, *Agency Costs of Overvalued Equity*, 34 FINANC. MANAGE. 5 (2005); The Aspen Institute, *Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management* (September 2009); Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 264 (2012); Marc T. Moore & Edward Walker-Arnott, *A Fresh Look at Stock Market Short-Termism*, 41 J. LAW & SOC. 416 (2014).

[14] *See, e.g.,* MARGARET M. BLAIR, OWNERSHIP AND CONTROL, RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY (1995); John Kay, *The Stakeholder Corporation*, *in* DAVID KELLY, GAVIN KELLY & ANDREW GAMBLE, *Stakeholder Capitalism* (1997) 125; Gavin Kelly and John Parkinson, *The Conceptual Foundations of the Company: a Pluralist Approach*, *in* JOHN PARKINSON, ANDREW GAMBLE & GAVIN KELLY, THE POLITICAL ECONOMY OF THE COMPANY (2000) 113; Luigi Zingales, *In Search of New Foundations*, 55 J. FINANCE 1623 (2000).

[15] See EASTERBROOK &FISCHEL, CORPORATE LAW, *supra* note 2, at 38; BAINBRIDGE, THE NEW CORPORATE GOVERNANCE, *supra* note 2, at 66-67; Jensen, *Value Maximisation*, *supra* n 8, at 301.

[16] Antoine Reberioux, *Does Shareholder Primacy Lead to a Decline in Managerial Accountability*, 31 CAMB. J. ECON. 507, at 507 (2007). In a legal-academic context, this is exemplified most pertinently by Hansmann and Kraakman's provocative *End of History* piece (*supra* note 8), which was published in 2001 (albeit shortly before the materialization of the abovementioned Enron debacle). For arguments to the effect that the prevailing shareholder primacy (or 'value') norm in US corporate governance was the central factor underlying Enron's collapse, see Bratton, *Enron*, *supra* n 10; Simon Deakin and Suzanne J. Konzelmann, *Learning from Enron*, 12 CORPORATE GOVERNANCE: AN INTERNATIONAL REVIEW 134 (2004); MICHEL AGLIETTA & ANTOINE REBERIOUX, CORPORATE GOVERNANCE ADRIFT: A CRITIQUE OF SHAREHOLDER VALUE (2005), ch. 8.

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crisis – including mandatory shareholder 'say on pay' voting[17] and opt-in proxy access[18] – were indicative of a policy agenda which (somewhat counter-intuitively in many peoples' eyes) saw *intensification* of directors' focus on shareholder welfare as the most appropriate response to the corporate governance and risk oversight lapses exposed in the then-recently failed banks.[19]

At long last, though, the zeitgeist would appear to be slowly but surely changing. The financial crisis may not quite have proved the watershed moment it was initially heralded as in terms of resetting dominant currents of economic or political opinion. Nonetheless, in the narrower but still important domain of corporate governance thinking and policymaking, the past decade's events have triggered the onset of what promises to be a potentially major paradigm shift in the direction of an evolving *Post-Shareholder-Value* (or 'PSV') consensus. On an academic level, this movement is represented by a growing body of influential legal and economic scholarship – including, inter alia, the work by Professor Colin Mayer to which this symposium is partly dedicated[20] – which contests most of the staple ideological tenets of orthodox corporate governance theory. In particular, proponents of the PSV paradigm typically dismiss the common neo-classical equation of shareholder wealth maximization with economic efficiency in the broader social sense. They also typically eschew individualistic understandings of the corporation (or 'firm') in terms of its purported internal

[17] See The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. 111-203) [hereinafter 'Dodd-Frank'], § 951.
[18] See Dodd-Frank, *id.*, § 971; MARC T. MOORE, CORPORATE GOVERNANCE IN THE SHADOW OF THE STATE (2013), 131-32 (hereinafter CORPORATE GOVERNANCE).
[19] For a powerful argument to this effect, see Bratton & Wachter, *The Case Against Shareholder Empowerment, supra* note 6. In a similar vein, Bruner claims that the shareholder empowerment movement 'appears highly suspect in light of the growing postcrisis empirical literature, which tends to suggest that strong emphasis on the interests of risk-preferring shareholders results in more risk-taking, not less'. See CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER (2013), at 271.
[20] See COLIN MAYER, FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT (2013) [hereinafter FIRM COMMITMENT].

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bargaining dynamics, in favour of alternative conceptual models which celebrate the distinctive value of the corporation's inherently autonomous corporeal features.[21]

Of central importance to the PSV thought paradigm is the notion of the corporate legal form as a structural mechanism for indefinitely 'locking in' capital, so as to facilitate significant future advancements in human progress and well-being. Therefore the fundamental problem is not the public corporation itself, but rather the way in which this invaluable vehicle of economic and social development has allegedly been manipulated in the service of objectives that are averse to its fundamental nature. From this perspective, shareholder primacy is presented as an undesirable and – moreover – unnecessary social evil, which has the effect of undermining (if not negating outright) the corporation's core structural attributes for the benefit of short-term financial interests, and at the corresponding expense of current and future humanity at large.[22]

It is submitted that evidence of a potential drift from the formerly dominant shareholder primacy paradigm in corporate governance is additionally apparent on a practical policy-making level today, not least in the rapid proliferation of Benefit Corporations as a viable and popular alternative legal form to the orthodox commercial corporation. At the same time, the apparently increasing use by US-listed firms of dual-class voting structures designed to insulate management from 'outside' capital market pressures, coupled with the seemingly greater flexibility afforded to boards over recent years in defending against unwanted takeover bids from so-called corporate 'raiders', both provide additional cause to question the longevity of the shareholder-oriented corporate governance status quo.[23]

Against the above background, this paper critically evaluates the developing PSV paradigm in corporate governance scholarship and practice, with particular reference to

[21] On these core aspects of the general PSV corporate governance thought paradigm, see *infra*, Part II.
[22] On these issues, likewise see *infra*, Part II.
[23] On this issues, see *infra*, Part III.

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Mayer's influential theory of the corporation as a unique long-term 'commitment device'.[24] It argues that, while evolving PSV institutional mechanisms such as Benefit Corporations and dual-class share structures are prima facie encouraging from a social perspective, there is cause for scepticism about their capacity to become anything more than a relatively niche or peripheral feature of the US public corporations landscape. This is principally because such measures, in spite of their apparent reformist potential, are still ultimately quasi-contractual and thus essentially voluntary in nature, meaning that they are unlikely to be adopted in a public corporations context except in extraordinary instances.

Accordingly, the paper proceeds to examine whether there is a plausible normative justification for placing such measures on a firmer regulatory footing, as a means of more assertively implementing the PSV corporate governance agenda in practice. In this regard, it posits that such measures – irrespective of the extent of their take-up over the coming years – ultimately *should* remain quasi-contractual and voluntary in nature, as opposed to being placed on any sort of mandatory basis. That is, at least pending fundamental reform of the broader social-institutional context to the orthodox shareholder-oriented corporation, and – in particular – the United States' predominantly private (i.e. non-statist) pensions framework.

[24] Mayer, *supra* note 20, at 112.

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II. *FIRM COMMITMENT* AND THE POST-SHAREHOLDER-VALUE THOUGHT PARADIGM

A. Mayer's Firm Commitment *Thesis*

At the heart of the abovementioned PSV intellectual movement sits the book (and author) which is partly the subject of the present symposium, namely Colin Mayer's excellent work *Firm Commitment: Why the corporation is failing us and how to restore trust in it*.[25] Mayer's 2013 monograph represents a central and highly influential component of the developing PSV consensus, in academic terms at least. In particular, it advances and develops an idea that is pivotal to contemporary PSV ideology, which is the notion of the corporation as a sophisticated long-term 'commitment device'.[26]

Essentially, this idea denotes the unique structural capacity of an incorporated business entity to act as an effective long-term store for equity investors' capital, by ensuring that such funds – once committed to the corporate enterprise – become permanent and thus unsusceptible to future withdrawal by investors (or, by the same logic, their personal creditors) on unilateral demand.[27] Mayer claims that, in theory at least, this formal asset lock which the corporate legal form creates enables investors voluntarily to restrain themselves *ex ante* from exercising control over the firm's capital reservoir in ways that are prone to harm the interests of other, more vulnerable firm participants or interests.[28] This applies even – indeed, *especially* – with respect to future situations where such harmful action might actually prove to be in investors' best interests at the relevant time, at least in the short run.[29]

[25] *Supra* note 20.
[26] *Id.*, at 112.
[27] *Id.*, 145-46.
[28] *Id.*, 5.
[29] *Id.*, 124.

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From a corporate governance point of view, the implication is that management can consequently make credible long-term undertakings to protect the continuing value of important non-financial investments advanced by other firm participants, especially the human capital committed to the corporation by its key employees. In turn, this is likely to engender reciprocal trust and loyalty within the firm's various stakeholder relations. Indeed, Mayer places considerable emphasis on the notion of 'self-restraint' in general as a necessary precondition to long-term human well-being,[30] and in particular as an essential means of eliciting trust on the part of those who benefit from such restraint.[31] According to this view, self-restraint – whilst averse to the pursuit of immediate gratification – is nonetheless motivated ultimately by one's own (enlightened) self-interest in the prospective long-term benefits that are likely to ensue from forbearing from encroaching on other parties' interests.

It follows from the above perspective that the separation of ownership and control within Anglo-American public corporations – far from being a problem that merits a corresponding 'solution' (as orthodox corporate governance scholarship typically avers)[32] – is contrarily a source of opportunity in itself, insofar as it facilitates managerial responsiveness to important third party interests which are typically not protected contractually.[33] Indeed, Mayer posits that '[i]n an exact reversal of the problem suggested by Berle and Means of dispersed shareholders, from the perspective of firm commitment, the separation of ownership and control is a benefit, not a cost.'[34] This is because, '[b]y separating ownership and control of the corporation, shareholders are able to delegate authority to directors who

[30] *Id.*, 20.
[31] *Id.*, 145.
[32] For a critical analysis of this general feature of orthodox corporate governance scholarship, see Marc T. Moore & Antoine Reberioux, *Revitalizing the Institutional Roots of Anglo-American Corporate Governance*, 40 ECON. SOC. 84 (2011).
[33] Mayer, *supra* note 20, 6.
[34] *Id.*, at 147.

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can make commitments to other parties that shareholders would like but are unable credibly to provide themselves.'[35]

To this end, Mayer supports the notion of: (i) control and (ii) liquidity as being mutually substitutable attributes, whereby investors acquire the capacity readily to convert their shareholdings into cash at any time on the (external) secondary capital market, in exchange for surrendering influence over aspects of (internal) business policy. Thus Mayer would appear to regard a more or less complete bifurcation of liquidity and control as being a beneficial governance feature for at least some public corporations, in terms of enabling management to make credible long-term commitments to non-shareholder groups that would be impossible were shareholders otherwise in a position to pressurize for the unilateral revocation of those undertakings in future.[36]

However, according to Mayer, the credibility of investors' capital commitments – and, by implication, the ensuing degree of stakeholder trust likely to be placed in the firm and its management – is seriously undermined by capital market institutions which enable shareholders collectively to lobby for withdrawal of their invested funds from the firm on demand, thereby eroding the commitment-facilitating value of the corporate form in practice. In particular, Mayer claims that hostile takeovers motivated by the apparent objective of 'unlocking shareholder value' entirely *undermine* the firm's role as a long-term commitment device in the above sense. This is because such transactions, by enabling prospective control-acquirers to offer a bid premium directly to shareholders irrespective of management support, provide a unique opportunity for an outside corporate 'raider' to wrest control over the firm's internal capital reserves from its incumbent management, thereby making possible the effective withdrawal of these reserves at any given time in future. The overall effect is to make it impossible for investors to make any sort of credible pre-commitment of their capital

[35] *Id.*, at 153.
[36] See *id.*, 210-12.

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to the firm on a permanent or even long-term basis, given the potential opportunity that they may have of collectively participating in the effective withdrawal of these funds in future.[37]

Mayer argues that, in the presence of an active market for corporate control, managers of public corporations are consequently pressurized to distribute high levels of capital to shareholders rather than retain these reserves for purposes of internal enterprise stability and expansion. In this way, managers in effect preclude potential future attempts to 'unlock' these reserves either via an outright control bid, or else by means of activist investor interventions geared to acquiring significant minority shareholder influence.[38] Moreover, hedge funds and other especially activist shareholders – by pressurizing management to return greater amounts of cash to shareholders in the form or dividends or (as is more customary) stock buybacks – in Mayer's view undermine the corporation's capacity to make credible commitments to other stakeholders. This is because depletion of the firm's internal capital reserves creates a greater likelihood of future business financing shortfalls necessitating resort to external capital markets, thereby rendering management subservient to shareholders' (in priority to other stakeholders') collective demands on an ongoing basis.[39] Accordingly, Mayer supports the ready availability of legal-institutional mechanisms that are designed to offset or even negate such capital market pressures in appropriate instances.[40]

B. The Broader Post-Shareholder-Value ('PSV') Thought Paradigm

The central focus of Mayer's work on the theoretical (if not actual) autonomy of the corporate form from extraneous investor interference resonates with a similar current of opinion developing within contemporary *legal* scholarship, which likewise seeks to highlight

[37] *Id.*, 146.
[38] *Id.*, 146-48.
[39] *Id.*, 174-75.
[40] Specific examples of such will be discussed in Part III.C below.

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the value of the corporation's inherent structural neutrality vis-à-vis extraneous capital market interests. The intellectual precursor to this evolving thought consensus was Margaret Blair and Lynn Stout's now-classic 1999 exposition of the corporation as a so-called 'team production' device. Blair and Stout's influential theory of the firm in essence depicts equity investors as voluntarily surrendering any formal legal entitlement to demand that directors dutifully serve their private interests. This purportedly frees up corporate boards to balance and mediate between the conflicting claims of different stakeholders, with a view to protecting valuable enterprise-specific investments undertaken by employees and other key corporate constituents, in addition to the value of shareholders' equity capital. Thus the ultimate aim of corporate governance (and, correspondingly, corporate law), according to Blair and Stout, is to encourage the continuing advancement of such specialized financial and non-financial investments in future, thereby enhancing the long-term economic output of the corporation's productive 'team' as whole.[41]

Both authors of this paper have since gone on to develop the fundamental rationality of the team production model in their more recent individual work. In particular, Blair has further elaborated on the notion of the corporate legal form as a long-term capital 'lock-in' device.[42] Meanwhile, Stout has more recently advanced a novel understanding of the corporation in terms of an inter-generational wealth transfer mechanism (or metaphorical 'time machine') that enables both: (i) the locking-in of capital resources from the primary market for the benefit of long-term production projects which promise gains only in the distant future; and – correspondingly – (ii) the immediate realization by present investors of

[41] See Margaret M. Blair and Lynn L. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).
[42] See Margaret M. Blair, *Locking In Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003).

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anticipated future corporate profit streams from such long-term initiatives, via monetization of their risk-adjusted value on the secondary capital market.[43]

In a separate but related line of work, meanwhile, Stout has challenged the common assumption that the shareholder primacy norm is an established proposition of corporate law.[44] Stout posits that '[t]here is no solid legal support for the claim that directors and executives in US public corporations have an enforceable legal duty to maximize shareholder wealth',[45] but – contrarily – that 'American corporate law … fiercely protects directors' power to sacrifice shareholder value in the pursuit of other corporate goals.'[46] In this way, Stout seeks to build not just normative but also positive-doctrinal support for the notion of depersonalized corporate neutrality that lies at the heart of her sophisticated PSV conception of the corporation.[47]

Working along broadly similar theoretical lines to the above authors, Andrew Schwartz has recently rationalized the corporate entity's unique perpetual existence as a means of enabling it to invest 'immortally' in productive operations spanning a potentially infinite future time period.[48] Likewise, Andrew Keay's elegant Entity Maximization and Sustainability (or 'EMS') Model of the corporation emphasizes the long-term survival and value-enhancement of the corporate entity itself, rather than the welfare of its shareholders, as the purportedly central corporate objective.[49]

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[43] See Lynn A. Stout, *The Corporation As Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685.
[44] See Lynn A. Stout, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012) (hereinafter SHAREHOLDER VALUE MYTH); Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008) [hereinafter *Dodge v. Ford*].
[45] SHAREHOLDER VALUE MYTH, *id.*, 25.
[46] *id.*, 32.
[47] See *id.*, Ch. 2; Stout, *Dodge v. Ford*, *supra* note 44, 168-72.
[48] See Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764 (2012); Andrew A. Schwartz, *Corporate Legacy*, 5 HARV. BUS. L. REV. 237 (2015).
[49] See Andrew Keay, *Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model*, 71 663 M.L.R. (2008). In a fundamentally similar vein, Daniel Attenborough has developed a sophisticated normative characterization of the corporation in terms of his purported Equitable Maximisation and Viability (or 'EMV') Principle, which essentially posits that the legitimate dual objective of corporate controllers should be to: '(i) respect, protect, and fulfil the demonstrable, legitimate interests and expectations of the constituent

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Expanding on these core and interlocking themes of organizational neutrality and perpetuity yet further, Simon Deakin has conceptualized the corporation in terms of a 'commons': that is, 'a shared resource whose sustainability depends on the participation of multiple constituencies in its governance (not just shareholders, but employees, core suppliers and customers).'[50] As the corporation's key and distinguishing structural qualities in this regard, Deakin emphasizes the 'permanence'[51] of the autonomous legal entity, the long-term 'continuity'[52] of its asset base, and – relatedly – the 'insulation'[53] of its board from direct shareholder pressure. Deakin claims that '[v]iewing one user group as having priority over the others in the use it can make of common resources and in its power to hold the managers of the resource to account is not compatible with the maintenance of the resource over time.'[54] Accordingly, and in terms somewhat reminiscent of the abovementioned team production model, Deakin asserts that the corporation should rather be understood as 'subject to a number of multiple, overlapping and potentially conflicting property type claims on the part of the different constituencies or stakeholders that provide value to the firm.'[55]

Arguably all of the above works, in their varying ways, form part of an evolving Post-Shareholder Value (or 'PSV') thought consensus.[56] Indeed, despite the specific nuances of each of the individual component theories and works, some core unifying themes arguably emanate from much of this body of scholarship. Above all is the common normative assertion

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groups that contribute to the corporation; and (ii) to facilitate the corporation's viability so that its future is guaranteed with sufficiently high probability.' See Daniel Attenborough, *Giving Purpose to the Corporate Purpose Debate: An Equitable Maximisation and Viability Principle*, 32 LEGAL STUDIES 4 (2012), at 4.

[50] See Simon Deakin, *The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise*, 37 QUEEN'S L.J. 339, at 339. The basic conceptual notion of a 'commons' in the sense referred to by Deakin was first authoritatively developed by Garrett Hardin in his classical piece *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

[51] Deakin, *id.*, at 353.

[52] *Id.*

[53] *Id.,* 360.

[54] *Id.*, at 377-78.

[55] *Id.*, at 381.

[56] Indeed, the potential emergence of a new thought consensus in this regard has been noted by Stout, who remarks (albeit somewhat sanguinely, perhaps) that 'among experts, shareholder value dogma shows signs of being in decline' such that 'the shareholder primacy paradigm is failing, and alternative paradigms are rising to take its place.' See Stout, SHAREHOLDER VALUE MYTH, *supra* note 44, 114.

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that the corporation, far from being rightfully subject to shareholders' determinative control or influence, is contrarily a *neutral* organization whose autonomous existence and interests entirely transcend those of its particular body of shareholders at any given point in time.[57] From this there follows the additional common proposition that corporate law not only *should* – but, moreover, generally *does* – afford overriding constitutional protection to the autonomy, integrity and perpetuity of the corporate legal entity vis-à-vis the private interests and demands of any of its specific constituents, and not least those of its current shareholders.

III. THE POST-SHAREHOLDER-VALUE POLICY PARADIGM

Somewhat curiously, and consistent with the underpinning contractarian rationality of the orthodox shareholder primacy position, proponents of the PSV paradigm would appear to exhibit a general preference – both academically and on a policy level – for flexible private ordering as the principal means of implementing appropriate corporate governance innovations in practice. In this respect, Mayer's *Firm Commitment*[58] thesis stands out as a notable case in point. Indeed, consistent with his understanding of enhanced firm-stakeholder commitment as something motivated by investors' own enlightened self-restraint, Mayer eschews coercive or universalistic regulatory measures in favour of more nuanced and firm-specific private ordering practices. He emphasizes that since 'there is not a universally superior from of ownership and governance of firms which is suited to all firms at all

[57] In this regard, the fundamental normative slant of the PSV position is conspicuously reminiscent of the reformist element of Berle and Means' classical 1932 thesis, and – in particular – these authors' oft-cited (albeit somewhat tentative) prediction that the function of managing the modern public corporation might evolve into that of 'a purely neutral technocracy', balancing the respective claims of its various stakeholders without necessarily affording overriding primacy to any particular constituency's interests. See Adolf A. Berle and Gardiner Means, THE MODERN CORPORATION AND PRIVATE PROPERTY (Harcourt, Brace & World, Inc. rev. ed. 1968) (1932), at 312-13.
[58] *Supra* note 20.

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times',[59] it follows that '[t] he balancing of commitments and control is a delicate activity that will be highly specific to the particular nature and context of the corporation.'[60]

Mayer believes that, against this background, [t]he search for uniform rules of governance is both pointless and damaging',[61] while '[r]egulations that impede firms' choice of their appropriate arrangements undermine their competitiveness.'[62] Interestingly in this regard, Mayer attributes the comparative success of the US corporate financing and governance system to the 'exceptional degree of diversity'[63] that it permits, particularly with respect to those public corporations which (exceptionally) wish to deviate from the norms of widely-dispersed share ownership and shareholder primacy.[64] Mayer therefore advocates that 'policymakers should examine whether there are features of their laws, regulations, or conventions that may discourage variety and experimentation.'[65]

A. *The Benefit Corporation Framework*

As an example of the sort of institutional diversity in corporate governance that Mayer would appear to be supportive of, the developing Benefit Corporation framework is highly pertinent. In essence, the Benefit Corporation is a novel alternative legal form to the standard commercial corporation, which is now statutorily available in the majority of US States. Despite its present statutory status, the Benefit Corporation actually derives from purely

[59] *Id.*, at 189.
[60] *Id.*, at 188.
[61] *Id.*, 188.
[62] *Id.*, 189. In this regard, Mayer is critical of the strong influence wielded by international corporate governance codes today, which – he claims – compel excessive uniformity often with unsuitable practices. See *id.*, 231.
[63] *Id.*, at 230.
[64] Mayer notes how this particular aspect of the US environment is in notable contrast to the UK, where the institutional features of a widely dispersed system – including an unimpeded market for corporate control – are much more firmly entrenched via regulation and entrenched capital market norms. See *id.*
[65] *Id.*, at 254. As a pertinent example in this regard, Mayer cites 'impediments to issuing more than one class of share with different voting rights deriving from corporate law, financial regulation, or the preferred practices of financial institutions and markets' (*id.*, at 255). On the purported benefits of dual-class voting structures from a PSV perspective, see *infra*, Part III.D.

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private origins in its original guise as the Certified B Corporation (or 'B Corp'):[66] a pioneering corporate certification product provided by the Pennsylvania-based non-profit organization 'B Lab'.[67] This facility was initially motivated by a perceived demand from prospective incorporators for a form of corporate entity which enables the carrying on of an essentially for-profit business, but with a guiding social objective *other than* the conventionally-understood one of shareholder wealth maximization.[68] Well-known businesses which have opted for B Corp status over recent years include the online craft bazaar Etsy, Ben & Jerry's, and the socially-responsible Californian clothing brand Patagonia. Moreover, in 2013 the Colorado-based firm Rally Software became the first B Corp to undertake a public offering of its shares,[69] with Etsy following suit two years later by launching the largest B Corp IPO to date.[70]

The B Corp certification was designed for those incorporators who intend their firms to pursue an ultimate social benefit goal, whilst – unlike in the case of a charitable non-profit organization – still maintaining the capacity to attract outside finance on commercial terms by promising the future return of some funds to investors.[71] Following the Certified B Corporation's initially perceived success as a market accreditation service; its essential structure has since been enshrined on a formal legislative footing within 32 States (including the District of Columbia) in the guise of the 'Benefit Corporation'.[72] This implementing

[66] See https://www.bcorporation.net/what-are-b-corps
[67] See https://www.bcorporation.net/what-are-b-corps/about-b-lab
[68] William H. Clark, Jr. & Larry Vranka, *White Paper, The Need and Rationale for the Benefit Corporation: Why it is the Legal Form that Best Addressed the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public* (January 2013), 5-6. See http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf (hereinafter *White Paper*).
[69] Peri Schweiger & Jackie Marcus, *Etsy and the B Corp IPO: Sustainability Meets Wall Street* (April 27th, 2015), at http://www.triplepundit.com/2015/04/etsy-and-the-b-corp-ipo-sustainability-meets-wall-street/
[70] Etsy's widely-reported April 2015 IPO on Nasdaq valued the firm at $3.38 bn. See *id.*
[71] Clark & Vranka, *supra* n 68.
[72] See http://benefitcorp.net/policymakers/why-pass-benefit-corporation-legislation. On the Benefit Corporation phenomenon generally, see Clark & Vranka, *id.*; William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817 (2012).

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group of States notably includes Delaware, where such entities are formally titled 'Public Benefit Corporations'.[73]

In its (commonly-adopted) model form the Benefit Corporation framework exhibits three core legal features, which together are expressly designed to offer 'entrepreneurs and investors the option to build, and invest in, a business that operates with a corporate purpose broader than maximizing shareholder value and that consciously undertakes a responsibility to maximize the benefits of its operations for all stakeholders, not just shareholders.'[74] To this end, the first key distinguishing feature of the Benefit Corporation (in contrast to a standard commercial corporation) is its alternative corporate purpose of 'creating general public benefit'.[75] This criterion is expressly defined by the model legislation as requiring 'consideration of all of the effects of the business on society and the environment'.[76] The Delaware Public Benefit Corporations legislation, meanwhile, adds the further proviso that such firms should be intended to produce 'a positive effect (or reduction of negative effects) on 1 or more categories of person, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.'[77]

The above global mandate is alongside any further 'specific public benefit purposes'[78] that the firm's incorporators elect to add to its articles of incorporation, including:

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[73] See Delaware General Corporation Law, Subchapter XV, 'Public Benefit Corporations'; at http://delcode.delaware.gov/title8/c001/sc15/ (hereinafter 'Delaware legislation').
[74] Model Benefit Corporation Legislation (January 2016), Explanatory Comment to § 101; at http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf (hereinafter 'Model Legislation').
[75] *Id.*, § 201(a).
[76] *Id.*, § 102.
[77] Delaware legislation, *supra* note 73, § 362(b).
[78] Model Legislation, *supra* note 74, § 201(b).

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> '(1) providing low-income or underserved individuals or communities with beneficial products or services; (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) protecting or restoring the environment; (4) improving human health; (5) promoting the arts, sciences, or advancement of knowledge; (6) increasing the flow of capital to entities with a purpose to benefit society or the environment; and (7) conferring any other particular benefit on society or the environment.'[79]

Notably, the Delaware legislation in this regard contains the additional specification that such firms should 'operate in a responsible and sustainable manner',[80] and thus 'shall be managed in a manner that balances the stockholder's pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation.'[81]

This alternative corporate purpose is supplemented by the second and (from a corporate governance standpoint at least) arguably most significant legal feature of the Benefit Corporation framework. This is a corresponding multi-stakeholder director's fiduciary duty, which is expressly designed to broaden the legitimate focus of Benefit Corporation boards beyond directors' conventionally-perceived fiduciary responsibility to further the specific interests of shareholders.[82] Accordingly, the Model Legislation provides that, in determining whether a proposed course of (in)action is in the best interests of a particular Benefit Corporation, its directors should have regard to the likely consequences thereof not just for shareholders, but also for other relevant stakeholder interests including

[79] *Id.*, § 102.
[80] Delaware legislation, *supra* note 73, § 362(a).
[81] *Id.*
[82] Indeed, the Model Legislation itself expressly states that '[t]his [director's multi-stakeholder duty] section is at the heart of what it means to be a benefit corporation.' See *supra* note 74, Explanatory Comment to § 301.

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those of employees, customers, local communities, society more generally, and the local and global environment.[83]

Moreover, as a general default rule the directors of a Benefit Corporation are expressly not required to give priority to any particular social interest or factor, but rather are expected to strike an appropriate *balance* between these various considerations according to directors' own reasonable assessment of their respective materiality to the firm's creation of general (and, where appropriate, specific) public benefit(s).[84] In this context, the business judgment rule expressly operates to protect any such exercises of directorial discretion from subsequent shareholder or stakeholder reproach, subject to the usual proviso that the relevant board decision has been carried out on a rational, disinterested and reasonably informed basis.[85]

The third and final legal feature of the Benefit Corporation, which reinforces the above alternative business purpose and supporting director's duty, is the requirement to compile and publish an annual (or, in Delaware, biannual) benefit report.[86] This report should contain – inter alia – a narrative account of the firm's pursuit and creation of general public benefit (and, where appropriate, any additionally specified public benefits) in accordance with the above statutory definition of the term(s), together with an assessment of the overall social and environmental performance of the relevant firm as measured against a credible third-party standard provided by an appropriate private verification agency (e.g. B Lab).[87] The Model Legislation requires that a publicly traded Benefit Corporation's annual benefit

[83] *Id.*, § 301(a)(1).
[84] *Id.*, § 301(a)(3). In a similar vein, the Delaware legislation provides that '[t]he board of directors shall manage or direct 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.' See *supra* note 73, § 365(a).
[85] Model Legislation, *id.*, § 301(e); Delaware legislation, *id.*, § 365(b).
[86] Model Legislation, *id.*, § 401-02; Delaware legislation, *id.*, § 366(b).
[87] Model legislation, *id.*, § 401(a). Under the corresponding Delaware provision, measurement of corporate social and/or environmental performance against an objective third-party standard is not a mandatory or even default requirement, but rather is subject to affirmative opt-in under a particular Public Benefit Corporation's charter or bylaws. See Delaware legislation, *id.*, § 366(c)(3).

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report additionally contains an annual compliance statement by the firm's appointed 'benefit director',[88] to the effect that, in the relevant officer's opinion, the firm has conformed to its general (and, where appropriate, specific) benefit purpose(s) in all material respects over the reporting period.[89] The benefit director's annual compliance statement must further confirm that the Benefit Corporation's directors have complied with their abovementioned stakeholder-interest-balancing duty, and should also detail any incidences of deviation by the firm or its directors from their statutory responsibilities in the above respects.[90]

B. Practical Limitations of the Benefit Corporation Framework

In terms of the fundamental rationality of the PSV paradigm described above, the Benefit Corporation framework would appear to represent an attractive policy development. Consistent with the logic of Mayer's *Firm Commitment*[91] thesis, such entities arguably constitute an important self-restraint mechanism, enabling investors in effect to 'tie their own hands' by surrendering *ex ante* the privileged legal status that they would otherwise enjoy (at least within an orthodox commercial corporate setting) as the principal collective beneficiary of directors' fiduciary accountability. Instead, Benefit Corporation boards assume a broader-based responsibility to pursue the creation of overall public benefit from the firm's operations in the particular manner that they reasonably see fit, with any resultant long-term benefits for shareholders accruing merely indirectly therefrom.[92]

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[88] Under the Model Legislation, the board of directors of any Benefit Corporation that is publicly traded is required to designate one of its members as the firm's formally recognized 'benefit director', who is accordingly responsible for preparing its annual compliance statement. See *id.*, § 302. Notably, there is no corresponding requirement in this regard contained in the Delaware Public Benefit Corporations legislation.
[89] Model Legislation, *id.*, § 302(c)(1), 401(a)(5).
[90] Model Legislation, *id.*, § 302(c)(2)-(3).
[91] *Supra* note 20.
[92] Indeed, this particular understanding of a Benefit Corporation's function has been affirmed by Doug Becker, founder and CEO of the educational services provider Laureate, which this year is expected to become the first ever formally-registered Benefit Corporation (as opposed to Certified B Corp) to undertake a public offering of its shares. In the firm's IPO prospectus, Becker explained that '[w]ith the benefit of a long-term view, we will

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In line with the basic private ordering rationality of the general PSV position, the Benefit Corporation framework is from an incorporator's perspective a purely voluntary facility, which – in functional terms – could be said to operate as a State-sanctioned means of 'contracting out' of the shareholder primacy norm on a firm-specific basis. However from a social-reformist point of view, this strength is at the same time arguably also the framework's main weakness, especially when viewed alongside the substantive radicalism of the Benefit Corporation phenomenon in comparison with its orthodox commercial-corporate counterpart.

Indeed, adoption of the Benefit Corporation model entails not just the express over-ride by incorporators of a shareholder-oriented directors' fiduciary duty (to the extent that it would otherwise exist[93]) in favour of a neutral and multi-stakeholder-oriented substitute. More fundamentally than that, it involves the outright rejection of a conventional commercial rationality *altogether* in favour of a novel hybrid corporate value system, whereby 'public benefit creation' comes to displace wealth maximization (or even wealth creation) in *any* accepted economistic sense as the firm's pivotal operational objective. Accordingly, whilst the optional Benefit Corporation model is likely to be of considerable instrumental value within certain niche industrial sectors where the partial pursuit of non-commercial goals is a widely accepted element of responsible business policy (and should therefore be welcomed

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balance the needs of stockholders with the needs of students, employees and communities in which we operate, and we believe that this approach will deliver the best results for our investors.' See Brad Edmondson, *The First Benefit Corporation IPO Is Coming, and That's a Big Deal* (February 4th, 2016), at http://www.triplepundit.com/2016/02/first-benefit-corporation-ipo-coming-thats-big-deal/#. Since October 1st, 2015, Laureate has operated as a registered Delaware Public Benefit Corporation, in addition to its previous status as a Certified B Corp.

[93] On this, see *infra* note 142.

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on this basis),[94] it is unlikely to be adopted by many firms beyond this relatively peripheral setting, at least in the absence of direct regulatory compulsion to do so.[95]

In any event, even to the extent that the Benefit Corporation model *is* adopted in practice, its capacity to negate (insofar as adopting firms are concerned) the influence of the shareholder primacy norm within the public corporations setting is doubtful. As a reformist agenda, the Benefit Corporation framework is focussed principally on recalibrating the fiduciary responsibilities of relevant directors towards the service of predominantly non-shareholder-oriented goals, with the associated corporate purpose and disclosure provisions largely reinforcing this central policy objective. However, as mentioned above, recent academic literature has challenged the notion that directors are actually under any sort of affirmative fiduciary obligation deferentially to serve shareholders' interests, even in an orthodox for-profit corporate setting.[96] This has, in turn, implicitly called into question the practical value of fiduciary-duty-redesign as a meaningful corporate governance reform measure.[97]

Of course, irrespective of the precise doctrinal substance of directors' fiduciary duties, the mere fact that the law is in practice commonly *perceived* as imposing on directors an imperative to maximize shareholder wealth is arguably still significant from a behavioural perspective, especially when coupled with litigation fears and other pertinent cultural factors.[98] Therefore, on an expressive or educative level at least, the availability of an

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[94] Indeed, even the *White Paper* setting out the need and rationale for the Benefit Corporation would appear to accept the likely extraordinary instances of such entities in the context of the for-profit corporate community as a whole. In this regard, it makes express reference to the 'sustainable business movement, impact investing and social enterprise sectors' as likely user groups for the new corporate form, citing as specific examples of such 'community banks, microfinance institutions, clean-tech or green businesses [and] social venture funds'. See *supra* note 68, at 1, 3-4.

[95] On the (limitations of) the case for direct regulatory compulsion of Benefit Corporation structures and other features of the evolving PSV corporate governance model, see *infra* Part IV.

[96] See *supra* notes 44-47 and accompanying text.

[97] As against this position, however, see the discussion and references cited in note 140 below.

[98] On this, see *White Paper*, *supra* note 68, at 6.

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expressly *non*-shareholder-oriented alternative to the orthodox for-profit corporate form (in the guise of the Benefit Corporation) would appear to have some material functional value.[99]

Notwithstanding these considerations, though, the Benefit Corporation model is still inherently limited as an effective countermeasure to the influence of the shareholder primacy norm in public corporations. This is because directors' corporate law fiduciary duties - regardless of their actual or perceived content – are arguably a relatively trivial component of the overall corporate governance machinery when it comes to determining the actual working objectives of public corporations in practice. Indeed, it would appear that capital market pressures acting on boards of directors and senior executives, derived in the last place from the background threat of displacement following an outside takeover bid, in reality establish a more continuous and compelling form of managerial accountability to shareholders than that which is likely to emanate from directors' fiduciary duties.[100]

C. Broad Judicial Legitimation of Managerial Hostile Takeover Defenses

Mindful of the above fact, proponents of the PSV position typically also argue for the broad judicial legitimation of managerial hostile takeover defenses such as shareholder rights plans (i.e. 'poison pills') and staggered boards, pointing to recent Delaware jurisprudence in this regard as supposed evidence that corporate law is actually moving in a general anti-shareholder-primacy direction. For instance, Mayer supports the use of poison pills and other

[99] On the capacity of law to exert an indirect educative effect by making 'statements' as opposed to determining social behaviour directly, see generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PENN. L. REV. 2021 (1996); and, in the specific context of corporate directorial duty cases, see William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., 'Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of *Van Gorkom* and its Progeny as a Standard of Review Problem', 96 NW. U. L. REV. 449 (2002).

[100] On this generally, see Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POLIT. ECON. 110 (1965); Simon Deakin & Giles Slinger, *Hostile Takeovers, Corporate Law, and The Theory of the Firm*, 24 J. LAW & SOC. 124 (1997). In this regard, the latter authors notably remark that '[a]dvocates of an active market for corporate control see it as important partly because of the ineffectiveness of internal corporate control mechanism.' *Id.*, at 128.

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such preclusive takeover defenses as a means of protecting target corporations from the role of short-term financial 'arbitrageurs'[101] (e.g. hedge funds), who purchase a strategic shareholding in order to effect a transfer of control with a view to making a short-term profit from the resulting share price appreciation.[102]

Mayer argues that the hostile takeover 'freezes management of the target firm out of the most important decision they have to take – whether or not to remain independent or merge with another firm',[103] and as such is fundamentally averse to the firm's capacity to operate as a commitment device. From this perspective, he applauds the Delaware Chancery Court's oft-cited *Airgas*[104] decision in 2010,[105] where a public corporation board's dual adoption of a poison pill and staggered board was regarded as a proportionate response (for purposes of the Delaware *Unocal* test[106]) to the threat of short-term arbitrageurs accepting a so-called 'low-ball' bid which significantly undervalued the long-term business prospects of the target firm.[107]

However, in terms of contemporary corporate governance practice it would appear that – at least in the case of larger US-listed corporations – the dominant direction of travel in recent years has been towards *enhanced* shareholder power with respect to control-related issues, with an increasing number of firms seemingly succumbing to concerted pressure from investors and proxy advisors to remove anti-takeover mechanisms.[108] Furthermore, as Chancellor Chandler emphasized in the *Airgas* case itself, contrary to popular wisdom the dual existence of a poison pill and staggered board does not in itself render a corporation 'takeover-proof', given the outstanding possibility of a hostile bidder acquiring effective

[101] *Supra* note 20, at 109.
[102] *Id.*, 107-11.
[103] *Id.*, at 112.
[104] See *Air Products and Chemicals, Inc. v Airgas, Inc.* 16 A. 3d. 48 (Del. Ch. 2011) (hereinafter *Airgas*).
[105] *Supra* note 20, 109-10.
[106] See *Unocal Corp. v Mesa Petroleum Co.* 493 A. 2d. 946 (Del. 1985).
[107] See *Airgas*, *supra* note 104, *per* Chancellor Chandler, 103-29.
[108] Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987 (2010), 1007-09.

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control via the alternative (albeit costly and difficult) avenue of two successive proxy contests if necessary.[109] Against this background, poison pills and staggered boards can contrarily be said to fulfil their legitimate (shareholder-oriented) purpose of providing a target corporation's board with additional leverage to extract an enhanced tender offer price for shareholders as a precondition to management's future cooperation with the bidder.[110]

D. Enhanced Use of Dual-Class Voting Structures

From a corporate controller's perspective, it would thus appear that the only truly comprehensive way of 'locking up' the firm and its internal capital base from unwanted outside overtures is by preventing the dissipation of voting control amongst outside investors entirely, so as to preclude even the residual threat to incumbent management of ouster by way of proxy contest. To this end, some commentators (admittedly including the present author[111]) have exhibited support for the enhanced use of dual-class voting structures in public corporations, as an effective means of consolidating corporate voting control in the hands of founding entrepreneurs or families, or other committed long-term investors.[112] Accordingly, voting shares can be allocated exclusively or, at least, on a discriminatory multiple-vote basis to 'inside' (i.e. illiquid non-trading) investors, who will consequently enjoy either sole or disproportionate governance influence. Meanwhile, 'outside' (i.e. trading)

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[109] See *Airgas*, *supra* note 104, 115.

[110] In this regard, it has been said that '[t]he length at which Chancellor Chandler's decision [in *Airgas*] focused on whether the Airgas board had a reasonable basis to conclude that the corporation's standalone value would generate returns over time for stockholders that would justify rejecting the premium on the table … demonstrates that he considered the board's sole end to be stockholder welfare', there being 'not a hint or suggestion in the case that the directors should consider other constituencies.' See Leo E. Strine, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, University of Pennsylvania Law School, Institute of Law and Economics, Research Paper No. 15-08 (2015), at 22.

[111] See Moore & Walker-Arnott, *supra* note 13, 437-44.

[112] See, e.g. Mayer, *supra* note 20, 106-07; STOUT, SHAREHOLDER VALUE MYTH, *supra* note 44, 110; Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169 (2013), 1182-84.

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investors can acquire shares with either no or reduced voting rights on a discounted basis, thereby gaining the benefits of liquidity and cash flow rights but without the additional attribute of control.[113] In this way, control and commitment can effectively be aligned within the firm in the manner that Mayer's *Firm Commitment* thesis envisages.[114]

Dual-class voting structures have always been permissible for NASDAQ-listed firms,[115] and NYSE listing rules have since 1986 expressly permitted public corporations to issue dual-class common stock under specific circumstances,[116] in recognition of the potential practical benefits of these structures in enhancing issuing firms' financing and governance flexibility.[117] In turn, a number of high-profile businesses including Google, Facebook, LinkedIn, Ford, CBS, Viacom, News Corporation and Berkshire Hathaway have opted to avail themselves of varying forms of two-tier voting structure in recent years, in order to provide continuing insulation to controlling 'inside' shareholders against potentially destabilizing 'outside' investor pressures.[118] However, in spite of their apparently growing popularity, such arrangements remain the exception rather than the norm within the US public corporations community,[119] and are likely to remain so for as long as their adoption

[113] Moore & Walker-Arnott, *supra* note 13, 440.
[114] See Mayer, *supra* note 20, 209. Contrary to the common concern that such structures entail the unequal treatment of shareholders, Mayer argues that in fact 'equal treatment *of shareholdings* is discriminatory *between shareholders* because those who hold shares for long periods are fundamentally different from those who do not.' *Id.*, at 213 (emphasis added).
[115] Tian Wen, *You Can't Sell Your Firm and Own it Too: Disallowing Dual-Class Stock Companies From Listing on the Securities Exchanges*, 162 U. PA. L. REV. 1496, 1496 (2014).
[116] Joel Seligman, *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy*, 54 GEO. WASH. L. REV. 687, 692-93 (1986).
[117] In particular, § 313.00(B) of the NYSE Listed Company Manual specifies that '[t]he Exchange's voting rights policy permits the listing of the voting common stock of a company which also has outstanding non-voting common stock as well as the listing of non-voting common stock', on the preconditions that: (i) '[a]ny class of non-voting common stock that is listed on the Exchange must meet all original listing standards'; (ii) '[t]he rights of the holders of the non-voting common stock should, except for voting rights, be substantially the same as those of the holders of the company's voting common stock; and (iii) 'holders of any listed non-voting common stock must receive all communications, including proxy material, sent generally to the holders of the voting securities'.
[118] Moore & Walker-Arnott, *supra* note 13, 443; Steven Davidoff Solomon, *Shareholder Vote With their Dollars to Have Less of a Say*, The New York Times, November 4th, 2015.
[119] It has been recorded that, in 2015, approximately 14% of US-listed corporations had some form of dual-class share voting structure in place. Whilst this is by all accounts a materially significant figure (especially when compared to the corresponding 2005 figure of just 1%), it is – in itself – insufficient to infer the onset of any sort

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(like that of the Benefit Corporation form) remains purely optional on the part of issuing firms.[120]

Moreover, besides the rare possibility of some form of dual-class voting structure being adopted (at least partially) by an existing issuer 'in midstream'[121] via a reconstructive secondary offering, it is likely that their take-up will be restricted almost exclusively to newly-issuing firms under continuing entrepreneurial or family control.[122] Therefore, whilst such mechanisms are a crucial component of the general PSV corporate governance agenda, they are – at least as things presently stand – unlikely to attain a sufficiently strong foothold within established capital market practice to displace the orthodox 'one share/one vote' norm in this regard. For the above reasons, it would thus appear that the United States' orthodox shareholder-oriented corporate governance paradigm looks likely to withstand the current wave of challenges to its hegemony, at least insofar as the principal alternative legal structures remain premised on a purely voluntary and quasi-contractual footing.

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of wholesale shift away from the orthodox one share/one vote policy paradigm. See Davidoff, *id.*, based on data collated by Dealogic.

[120] This is particularly so in light of the recent vocal opposition to dual-class voting structures advanced by some high-profile and influential US capital market actors, including the Council of Institutional Investors and the pension fund CalPERS. See Davidoff, *id.*; Council of Institutional Investors, *Dual-Class Stock*, at http://www.cii.org/dualclass_stock; Ross Kerber, *US Investor Group Urges Halt to Dual-Class Structures in IPOs*, Reuters, March 23rd, 2016.

[121] This term – attributable to Professor Lucian Bebchuk – denotes (the extraordinary case of) constitutional amendments implemented by a firm during its existing life cycle as a publicly listed corporation, as opposed to (the standard case of) such provision being made at the earlier, initial public offering stage. See Lucian Ayre Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments* 102 HARV. L. REV. 1820, at 1822.

[122] Moore & Walker-Arnott, *supra* note 13, 440.

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IV. SHOULD THE PSV CORPORATE GOVERNANCE MODEL BE PUT ON A FIRMER REGULATORY FOOTING?

A. The 'Market Failure' Rationale for Mandatory Regulatory Imposition of PSV Corporate Governance Principles

Notwithstanding the unlikelihood of PSV corporate governance principles becoming mainstream norms (at least within the foreseeable future) as a result of micro-level private ordering practices, there may nonetheless be cause to consider the more assertive public-regulatory implementation of these mechanisms. In particular, if the common incapacity of entrepreneurs and investors to recognize the purported economic advantages of the PSV corporate governance platform (at least relative to the shareholder primacy / equality orthodoxy) represents an incidence of *market failure*, then it follows that recourse to firmer methods of regulatory intervention in this regard is arguably justified in the public interest.[123]

On the (presently-assumed) dual premise that: (i) the purported 'lock-in' benefits of the PSV corporate governance platform create long-term economic benefits from which a corporation's stakeholders (including its shareholders) as a whole generally stand to benefit; but (ii) due to a combination of informational limitations and systematic irrationality, entrepreneurs and/or investors will likely not avail themselves of the key features of this model in practice; it arguably follows that the direct regulatory compulsion of those structures is normatively defensible.[124] The 'market failure' case for the mandatory regulatory imposition of PSV corporate governance principles thus rests on a fundamentally *paternalistic* basis. That is to say, public policymakers, via appropriately targeted

[123] On the 'market failure' rationale for mandatory corporate law rules generally, see MOORE, CORPORATE GOVERNANCE, *supra* note 18, 238-47.
[124] See MOORE, *id.*, 240; Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law* 89 COLUM. L. REV. 1395 (1989).

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interventions in private ordering, are arguably capable of providing what corporate contractors 'would have wanted' as determined by reference to a notionally ideal hypothetical bargaining scenario.[125]

Whilst this rationale for the mandatory regulatory imposition of PSV corporate governance principles may hold a certain intuitive appeal to those of reformist zeal, it is nonetheless problematic. As is well known, the principal disadvantage of legally compelling any social-institutional structure (including a particular corporate governance model) is the fact that it admits no room for flexibility or deviation from the standard norms, such that occasional reasonable exceptions to the general rules cannot be accommodated.[126] Indeed, notwithstanding the purported comparative advantages of the PSV corporate governance model, it is conceivable that in many firms pressing managerial accountability (i.e. 'agency cost') concerns will still justify entrepreneurs or investors rationally opting for a traditional shareholder-oriented governance framework, notwithstanding the concomitant loss of long-term capital commitment that this arrangement potentially entails.[127] Largely for this reason, regulatory implementation of any particular feature(s) of the PSV corporate governance model on a mandatory basis (whether at federal, state or stock exchange level) is most likely inadvisable, notwithstanding the purported substantive merits of the relevant model itself.[128]

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[125] On this, see Lucian Ayres Bebchuk, *The Debate on Contractual Freedom in Corporate Law* 89 COLUM. L. REV. 1395, 1410-11 (1989); Bernard Black, *Is Corporate Law Trivial?: A Political and Economic Analysis* 84 NW. U. L. REV. 542, 551-52 (1990); Marc T. Moore, *Private Ordering and Public Policy: The Paradoxical Foundations of Corporate Contractarianism* 34 O.J.L.S. 693, 710-14; David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation* 89 MICH. L. REV. 1815, 1815-16.

[126] On the purported functional benefits of a flexible 'enabling' (as opposed to mandatory regulatory) approach to the design of corporate law rules generally, see EASTERBROOK & FISCHEL, CORPORATE LAW, *supra* note 2, ch. 1; MOORE, CORPORATE GOVERNANCE, *supra* note 18, 101-06.

[127] Indeed, Mayer himself effectively makes this very point, stating that '[t]he success of the corporation depends on its ability to balance its powers of commitment and control', such that 'in some cases a high degree of commitment to many parties is required [whereas] in others, being able to exercise external control with no commitments is essential.' See *supra* note 20, at 234, 230.

[128] On Mayer's general preference for flexible/enabling as opposed to mandatory/regulatory methods for implementing effective firm commitment mechanisms in practice, see *supra*, notes 58-65 and accompanying text.

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B. The (Neglected) Social-Distributive Dimension of Corporate Equity Markets

There is, additionally, a more general cause for concern about the growing appetite for alternatives to the traditional shareholder-oriented corporate governance paradigm, which should provide further grounds for caution when it comes to evaluating the merits of any future regulatory initiatives in this direction. Whilst critics of the shareholder primacy orthodoxy are entirely justified in highlighting the various respects in which excessive shareholder influence can be potentially detrimental to long-term industrial planning and capital formation, this is to present only one part of the overall picture.

Indeed, a common limitation of the abovementioned critiques of the shareholder-oriented corporation is their tendency to focus exclusively on the *productive* or *demand* side of corporate capital markets: that is to say, in terms of what investors – via the medium of capital (and especially equity) markets – contribute *to business corporations* in terms of prospective productive resources. However, arguably at least as important from a social perspective is the converse *distributive* or *supply* side of corporate capital markets: in other words, what business corporations (via capital markets) contribute *to investors* in the form of actual or anticipated private income streams.[129] From this alternative perspective, the principal social utility of capital markets inheres in their capacity to enable the private (i.e. non-state-administered) generation and distribution of non-occupational income streams to citizens (especially private pension-holders) via returns on direct or indirect corporate securities holdings. Moreover, equity markets in particular have special relevance in this regard, insofar as no other type of security is in general capable of yielding a sufficient

[129] My reference in this discussion to the 'demand' and 'supply' sides of corporate capital markets is attributable to Martin Gelter, *The Pension System and the Rise of Shareholder Primacy* 43 SETON HALL L. REV. 909, at 911.

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ongoing rate of return to meet the current and future income expectations of pension fund beneficiaries.[130]

Appreciation of the social-distributive dimension of public equity markets, and the ensuing knock-on effect of these demands on prevailing corporate governance norms, is by no means novel. Indeed, writing as long ago as 1932 (in the context of a debate about the merits of facilitating voluntary corporate social responsiveness[131]), Adolf Berle recognized that 'not less than half of the population of the country'[132] at the time were directly dependent on corporate securities holdings as an essential means of non-occupational income provision, 'to say nothing of indirect results'.[133] Berle ominously warned that 'when the fund and income stream upon which this group rely are irresponsibly dealt with, a large portion of the group merely devolves on the community; and there is presented a staggering bill for relief, old-age pensions, sickness-aid, and the like.'[134] For this reason, Berle believed that any radical proposal to replace shareholder primacy with a more socially-oriented alternative corporate governance paradigm necessarily confronts the corresponding task of 'present[ing] a system (none has been presented) of law or government, or both, by which responsibility of control for national wealth and income is so apportioned and enforced that the community as a whole, or at least the great bulk of it, is properly taken care of.'[135]

Moreover, major demographic shifts – on both a domestic and global level – in the intervening eight decades since Berle and Dodd's fabled exchange have significantly magnified the gravity of the social welfare concerns that Berle identified back in 1932. Globally, it has been recorded that '[s]ince World War II, life expectancy at birth has risen

[130] Gelter, *id.*, at 928.
[131] On this debate generally, see E. Merrick Dodd, *For Whom are Corporate Managers Trustees?* 45 HARV. L. REV. 1145 (1932); Adolf A. Berle, *For Whom Corporate Managers* Are *Trustees: A Note* 45 HARV. L. REV. 1365 (1932); William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and 'The Modern Corporation'* 34 J. CORP. L. 99 (2008); Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century* 51 KAN. L. REV. 77 (2002).
[132] Berle, *id.*, at 1368.
[133] *Id.*
[134] *Id.*
[135] *Id.*

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from around age 45 to 65 – a greater gain over the past 50 years than over the previous 5,000'; whereas '[i]n the developed countries, it has risen from around age 65 to between 75 and 80.'[136] In this regard, a recent United Nations report warns that '[b]etween 2015 and 2030, the number of people in the world aged 60 years or over is projected to grow by 56%, from 901 million to 1.4 billion, and by 2050 … to more than double its size in 2015, reaching nearly 2.1 billion.'[137]

In the specific context of the United States, meanwhile, the number of members of the national population aged 60 or over is anticipated to increase from a current figure of approximately 66.5 million (as of 2015) to 93 million by 2030, and to over 108 million by 2050.[138] Given the unlikelihood of a parallel rise in fertility rates over the same time period, the implication is that a rapidly ageing population[139] – together with the significant social welfare challenges that this necessarily entails[140] – are now considerably greater concerns for public policymakers than they ever were in Berle's lifetime. As will be explained below, this arguably stands true nowhere more so than in the overlapping fields of corporate governance and capital markets.

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[136] RICHARD JACKSON, THE GLOBAL RETIREMENT CRISIS: THE THREAT TO WORLD STABILITY AND WHAT TO DO ABOUT IT (2002), at 10; as quoted in LORNA FOX O'MAHONY, HOME EQUITY AND AGEING OWNERS: BETWEEN RISK AND REGULATION (2012), at 5, fn 27.

[137] United Nations Department of Economic and Social Affairs (Population Division), *World Population Ageing 2015*, at 2 (2015). See http://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2015_Report.pdf

[138] *Id.*, 126.

[139] According to the UN's Population Division, '[p]opulation ageing is an inevitable consequence of the demographic transition [that] began first in Europe and Northern America, where fertility reductions took place over the past two centuries, contributing to their relatively aged population age structures today.' *Id.*, at 57.

[140] On this generally, see Anthea Tinker, *The Social Implications of An Ageing Population* 123 MECH. AGEING DEV. 729; PAUL WALLACE, AGEQUAKE: RIDING THE DEMOGRAPHIC ROLLERCOASTER SHAKING BUSINESS, FINANCE AND OUR WORLD (1999); WILLIAM A. JACKSON, THE POLITICAL ECONOMY OF POPULATION AGEING (1998).

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C. The Shareholder Primacy Norm as a Socially Essential Income-Stabilization Mechanism

At the root of the social dilemma which Berle was alluding to is the basic structure of a private pensions system linked to capital market returns, and – in particular – the need for some agent willing to play a macro-level *risk-underwriting* role therein. That is to say, there must be some public or private constituency prepared to undertake the contingent cost of absorbing any negative deficit arising between: (i) the aggregate value of 'active' contributions to the pensions system by prospective future claimants (i.e. current workers); minus (ii) the aggregate value of current claims against the system by 'passive' members (i.e. pensioners). In a predominantly *public* (i.e. state-administered) pensions system, any such deficit will ordinarily be borne (in the last place) by the relevant national government itself, so that the *taxpayer* in effect plays the principal risk-underwriting role.[141] In a predominantly *private* (i.e. non-state-administered) pensions system, on the other hand, the main risk-underwriting role in this regard is typically played by non-state agents; whether employer firms or – as is increasingly typical today – individual worker-savers.[142]

In the so-called 'defined benefit' private pensions system that was prevalent in this country for much of the previous century; any systemic deficit was customarily borne by employer firms, insofar as beneficiaries' entitlements were guaranteed at a contractually pre-determined level (e.g. as a fixed percentage of the beneficiary's final pre-retirement salary).[143] However, in the 'defined contribution' private pensions system that generally prevails in the United States today, it is instead the general (or at least middle-class) public as *worker-savers* who become principal risk-underwriters in the above sense. This is because the inherent open-endedness of beneficiaries' ultimate entitlements from their respective schemes, which typically include no guaranteed level of post-employment income, in effect

[141] Gelter, *supra* note 129, 965.
[142] See Gelter, *id.*, 941-44.
[143] *Id.*, 941.

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renders worker-savers' future income-generating capacity contingent in large part on the continuing (variable) rates of return on equity investments made on their behalf.[144]

Against the above background, the practical capacity of non-state agents – and, in particular, worker-savers – to underwrite the private pensions system is dependent on the existence of a supportive corporate *governance* system, whereby long-term returns on financial (and especially equity) capital are proximately stabilized.[145] Somewhat paradoxically, though, this in turn necessitates an underpinning legal framework whereby the collective interests of shareholders are systematically given precedence over the countervailing interests of other stakeholders (and especially employees) in the event of conflict, particularly with respect to decisions concerning the ongoing allocation of residual corporate earnings or cash flows.[146] It follows that the legally underpinned principle of

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[144] *Id.*, 943.

[145] On the general collective preference of institutional investors and analysts for ongoing stability and predictability in investee firms' periodic earnings profiles, along with corresponding managerial strategies for 'managing' corporate earnings according to the market's expectations in this regard, see Moore & Walker-Arnott, *supra* note 13, 423-32; Joseph Fuller & Michael C. Jensen, *Just Say No to Wall Street: Courageous CEOs are Putting a Stop to the Earnings Game and We Will All Be Better Off for It* 22 J. APPL. CORP. FINANCE 59 (2002); David Millon, *Why is Corporate Management Obsessed with Quarterly Earnings and What Should be Done About It?* 70 GEO. WASH. L. REV. 890 (2002).

[146] Indeed, it is commonly acknowledged that dividends and stock buybacks – where used strategically by management – constitute important earnings management practices geared to stabilizing perceived levels of shareholder return. In this regard, the market's typical primary demand of an investee firm is that it generates a consistently positive rate of periodic earnings-per-share (or 'EPS') growth, preferably coupled with a correspondingly steady rise in its declared rate of dividend. From the viewpoint of investors, steady EPS and dividend growth are desirable corporate attributes for two main reasons. First, continuing dual EPS and dividend growth ensures ongoing increases in total shareholder return, whether in realized (that is, dividend) or realizable (consequent stock price appreciation) form. And, second, the same qualities are (on a superficial level at least) indicative of management's capacity to forestall potential turbulence in the firm's trading environment, and thus are implicit signals of corporate stability and reliability. Meanwhile, stock buybacks enable management artificially to enhance a corporation's periodic EPS from time to time, thereby further facilitating the abovementioned income stabilization process. In particular, strategic stock buybacks have the intended effect of reducing the denominator (that is, number of shares) to the firm's earnings-per-share ratio, so that each share is notionally representative of a greater proportion of total shareholder wealth created over the relevant time period. At the same time, stock buybacks enable management to increase directly the periodic level of total shareholder return via direct distribution of the corporation's free cash flow, but without bringing about a corresponding rise in its current rate of dividend. Consequently, management is able to avoid enhancing general market expectations as to the trajectory of future annual dividend rate increases. The earnings management function of strategic stock buybacks can be especially valuable for a firm's management in the absence of manifest evidence of significant activity or progress on a business-operational level, insofar as it forestalls potential market concerns about apparent wastage of the corporation's unused free cash flow. See Moore & Walker-Arnott, *id.*, 428-29; Joel F. Houston, Baruch Lev & Jennifer Wu Tucker, *To Guide or Not to Guide? Causes and Consequences of Stopping Quarterly Earnings Guidance'* 27 CONTEMP. ACCOUNT RES. 143, 144 (2010); William Lazonick, *The Quest for Shareholder Value: Stock Repurchases in the US Economy* 74 LOUVAIN ECON. REV. 479 (2008); Michel Aglietta, *Shareholder Value and Corporate Governance: Some*

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shareholder primacy – in the limited yet meaningful form in which it exists within orthodox corporate law today[147] – remains functionally necessary for ensuring that, in the last place, directors' (and, indirectly, managers') continuing right to hold office is formally contingent on shareholders' exclusive (revocable) license.[148]

From a distributive or supply-side perspective, one of the key implications of the shareholder primacy norm – as understood in the above sense – is that it consequently pressurizes management to ensure that any product market or other environmental 'shocks' to the firm's business are borne as much as possible by *non*-shareholder constituents, and especially by labour. This in turn facilitates the proximate stabilization of income streams accruing to worker-savers in their quasi-shareholder capacity as private pension fund

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Tricky Questions 29 ECON. SOC. 146, 151 (2000); JOHN F. WESTON, JUAN A. SIU & BRIAN A. JOHNSON, TAKEOVERS, RESTRUCTURING & CORPORATE GOVERNANCE (2001), 537.

[147] Granted, it is indeed – to quote Lynn Stout – a 'myth' to assert that corporate law imposes any direct or express duty on directors to *maximize* shareholder wealth as such. See STOUT, SHAREHOLDER VALUE MYTH, *supra* note 44, 25. However, to infer from this the broader proposition that corporate law thus affords *no* lexical priority to the interests of shareholders over other stakeholders is equally fallacious. As Delaware Supreme Court Chief Justice Leo Strine has recently stressed, contrary to popular academic assertion shareholder primacy remains a pivotal principle of Delaware jurisprudence on corporate law, particularly in the realm of directors' fiduciary duties. Accordingly, whilst '[t]he fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate goals', such that directors are expressly 'not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit' (*per* Horsey J in *Paramount Communications, Inc. v Time, Inc.* 571 A. 2d. 1140 (1989), at 1154); this does *not* displace shareholder wealth as the ultimate fiduciary litmus test for determining the propriety of directors' discretionary decisions on business policy. Rather, as Chief Justice Strine emphasizes, both classical and recent case law clearly establishes that 'if a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty.' See Strine, *supra* note 110, at 20. This fundamental tenet of Delaware corporate law was most recently reaffirmed in the 2010 case of *eBay Domestic Holdings, Inc. v Newmark* 16 A. 3d. 1 (Del. Ch. 2010), where Chancellor Chandler emphasized (at 34) that '[t]he [orthodox] corporate form … is not an appropriate vehicle for purely philanthropic ends'; and consequently that 'I cannot accept as valid … a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders.' The same essential point is put succinctly by Professor Stephen Bainbridge, who posits that 'despite occasional academic arguments to the contrary, the shareholder wealth maximization norm expounded by these courts indisputably is the law in the United States.' See BAINBRIDGE, THE NEW CORPORATE GOVERNANCE, *supra* note 2, at 53. The author is further grateful to Dr Robert Austin for illuminating recent discussions in relation to this issue, and in particular for sharing his excellent (currently unpublished) paper *Do the Directors of a Business Corporation (Still) Have a Duty to Maximise Shareholder Wealth* (2016), which he presented at the University of Oxford Faculty of Law in May 2016.

[148] Specifically, common stockholders' exclusive collective power of (re)appointment over directors, as undergirded by their residual fiduciary entitlement described above (see *id.*), in effect activates the background disciplinary mechanism of the market for corporate control, whose operation is dependent on the technical possibility of outright managerial displacement via a successful proxy contest. See BAINBRIDGE, *id.*, 55; EASTERBROOK & FISCHEL, *supra* note 2, at 67, who explain that whilst voter-shareholders in practice 'delegate extensively to managers and almost always endorse their decisions … this acquiescence should not obscure the fact that managers exercise authority at the sufferance of investors.'

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beneficiaries, thereby making it possible for worker-savers to undertake a collective risk-underwriting function with respect to the significant private (i.e. non-state-supported) component of the pensions system. However, on a macro level, such relative income-stability for worker-savers in their long-term 'saver' identity is necessarily wrought at the cost of increased income-*instability* in their immediate 'worker' guise; given that the current income-generating capacity of private sector employees is consequently exposed to the impact of occasional product market and other environmental shocks to a correspondingly greater extent.[149]

D. Shareholder Primacy as the Effective Social 'Price' of Sustaining a Capital-Market-Based Pensions System

In the above way, the shareholder primacy principle constitutes part of the social contract (or proverbial 'Faustian Pact') that worker-savers can be said implicitly to assent to in order to sustain a system of non-occupational income provision *outside of* direct state control. Accordingly, the risk-adjusted present value of worker-savers' human capital is *reduced* in order to *increase* the risk-adjusted present value of their financial (and especially equity) capital. From this point of view shareholder primacy – for all its alleged faults – can ultimately be regarded as the collective social 'price' that citizens (as worker-savers) pay in order to sustain a pensions system which has the capacity to deliver levels of social income (largely via returns on institutional equity holdings) which would almost certainly be economically and politically infeasible to underwrite via state (i.e. taxpayer) provision alone.

[149] On the purported correlation between: (i) the amount of pension wealth in (employee-underwritten) defined contribution occupational pension plans, and (ii) the general social attractiveness of shareholder-oriented corporate governance policies relative to countervailing labor-oriented measures; see Gelter, *supra* note 129, 946-47.

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Moreover, recent statistics show that the general public's relative dependence on direct or indirect corporate equity holdings as a relative source of non-occupational wealth gains is increasing yet further today.[150] In the United States, this would appear to be especially true for the younger (under-35) generations, for whom housing wealth in particular has become a decreasing component of aggregate household wealth over recent years.[151] This seemingly further enhances the relative social significance of corporate equity markets as a social wealth-generating mechanism, together with the corresponding systemic importance of the shareholder primacy norm in US corporate governance.[152]

The key normative implication of the above findings is that any truly meaningful attempt to reform the shareholder primacy orthodoxy in US corporate governance – for instance, in favour of a more directly-stakeholder-oriented Post-Shareholder-Value paradigm – must contend with the accompanying need for a comprehensive re-writing of the latent

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[150] 2012 Economic Census data demonstrates that the percentage of aggregate US household wealth (both occupational and non-occupational) held in the form of shares, mutual funds and/or stock-market-based savings/retirement plans increased more than five-fold over the past three decades, from a figure of 9% in 1984 to 46% in 2011. At the same time, the corresponding percentage of total household wealth held in the form of home equity substantially *decreased* over the same period, from 41% in 1984 to 25% in 2011. See Alfred Gottschalck, Marine Vornovytskyy & Adam Smith, *Household Wealth in the U.S.: 2000 to 2011*, United States Census Bureau (2012), at https://www.census.gov/people/wealth/files/Wealth%20Highlights%202011.pdf.

[151] Between 1984 and 2011, the percentage of aggregate wealth of households with householders under 35 years of age held in the form of home equity decreased from a figure of 46% in 1984 to 21% in 2011. See *id*.

[152] Of course, it could be said that the aggregate focus of the above figures obscures latent wealth-distributional factors which call into question the claim that corporate equity-holding in the United States represents a 'democratic' phenomenon in any meaningful sense of the word. In this regard, Bratton and Wachter have observed that 'even as shareholding has diffused downward to lower income individuals, the shareholders' overall socioeconomic status has remained largely unchanged', such that even today 'the shareholder class is not meaningfully middle class and retains elite characteristics.' In particular, the authors point to the fact that, between 1983 and 2007, the percentage of all US-listed stock held by the wealthiest 10% of the population decreased only incrementally from 89% to 81%, demonstrating that 'there is nothing inherently democratic or progressive about the shareholder interest in corporate politics.' See William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare* 36 SEATTLE U. LAW. REV. 489, at 490-91, 518 (2013). Drawing on a comparable (slightly earlier) body of data from both the US and UK, Ireland has drawn the similar conclusion that '[a]lthough share ownership has become more widely spread, … it remains very heavily concentrated with the result that shareholder primacy is in reality the primacy of a small privileged elite.' See Paddy Ireland, *Shareholder Primacy and the Distribution of Wealth* 68 M.L.R. 49, at 49 (2005). Whilst I do not contest the significance of such manifest inequality in conditioning the general social legitimacy of the shareholder-oriented US corporate governance model, it remains the case that in *absolute* (if not relative) social terms, stock-market-based wealth is still a highly material source of non-occupational income for a sizeable proportion of American households. Therefore, on a functional or systemic (if not normative or ideological) level at least, its basic social-distributive utility is arguably undiminished, notwithstanding the undisputable fact that some strands of the national socio-economic spectrum stand to benefit considerably more than others with respect to their relative share of the resultant spoils.

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social contract[153] on which the country's current capital-market-based welfare system is predicated.[154] It is submitted that, absent this necessary broader inquiry into the significant systemic overlaps between corporate governance and the prevailing national social welfare framework, reformers should err on the side of caution. Hence, whilst *ad hoc* voluntary adoption of PSV corporate governance structures by individual firms should by all means be tolerated (and indeed encouraged), any civil society pressures for more robust regulatory moves in this general direction should be resisted by public policymakers for the time being.

V. CONCLUSION

To return to the discussion at the beginning of this paper: despite various attempts to identify the 'true' source of the public corporation's institutional uniqueness, it is arguable that the most remarkable of all its structural features remains largely elided by academic observers. That is the public corporation's somewhat peculiar dual identity as both: (i) a *productive*, and (ii) a *social-distributive* mechanism.

Accordingly, public corporations are not only the predominant organizational vehicle for conducting large-scale industrial production projects over indefinite time horizons, as

[153] Of course, irrespective of the continuing social utility of the United States' capital-market-based pension system in actual functional terms (see *id.*), it is arguable that the long-term social (and, in turn, political) sustainability of the shareholder-oriented corporate governance model that undergirds it is ultimately contingent on the credibility of the continuing public *perception* that it exits to benefit the population at large (or at least in substantial part) in some material way, as opposed to just serving a relatively privileged or 'elite' financial-managerial minority. On this, see Bruner, *supra* note 19; JOHN W. CIOFFI, PUBLIC LAW AND PRIVATE POWER: CORPORATE GOVERNANCE REFORM IN THE AGE OF FINANCIAL CAPITALISM (2010), 11. However, at least as things presently stand, it would appear that the so-called 'shareholder class' remains a sufficiently salient and (at least notionally) representative political interest grouping – particularly on the center-left of the US political spectrum – to buttress the continuation of a general public policy agenda (at least at federal level) geared to preserving the shareholder-oriented corporate governance paradigm. See Gelter, *supra* note 127, 949; William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market* 160 U. PA. L. REV. 69, 81. Hence the abovementioned 'social contract' arguably remains valid today, notwithstanding growing public and political disquiet over recent years about the perceived unfair distributional consequences of the prevailing corporate governance (and, moreover, general neo-liberal politico-economic) policy orthodoxy.

[154] On the potential public policy alternative of expanding the taxpayer-funded Social Security system to cover the projected income needs of future retirees, see Paul Krugman, *Expanding Social Security*, The New York Times, November 21st, 2013.

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academic proponents of the Post-Shareholder-Value position have vigorously emphasized. Of comparable importance and ingenuity is that fact that – in the United States at least – public corporations are also a necessary structural means of enabling the residual income streams accruing from successful industrial projects to fund the provision of socially essential financial services, via the medium of public capital (and especially equity) markets. Unfortunately, though, these two dimensions of the public corporation are not always mutually compatible. Rather, it would seem that more often than not they are prone to *antagonize*, rather than complement, one another. This is especially so when it comes to the periodically-vexing managerial question of whether a firm's residual earnings should be committed internally to the sustenance and development of the productive corporate enterprise itself, or else distributed externally to shareholders in the form of either enhanced dividends or stock buybacks.[155]

It is submitted that the evolving PSV corporate governance paradigm – as manifested on both an intellectual and policy level today – focuses exclusively on the *former* of those dimensions at the expense of the latter. Granted, the theoretical insights and practical reform measures that this movement has generated – and, in particular, the proliferation of Benefit Corporations and legitimation of dual-class voting schemes – deserve commendation as highly beneficial developments, at least when viewed from this particular (productive) perspective. For this reason alone, it is submitted that the continuing voluntary adoption of such structures by individual firms should be both permitted and – moreover – actively facilitated by relevant laws. However, facilitation is a very different thing from compulsion; and it does not follow from the peripheral successes of the PSV movement to date that the direct regulatory curtailment of any aspect(s) of the orthodox shareholder-oriented corporate governance framework is consequently merited. That is, at least without public policymakers

[155] On this, see *supra* note 146.

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being receptive to the potentially significant indirect social ramifications of any such course of action.

The somewhat uncomfortable truth for many observers is that, for better or worse, the American system of shareholder capitalism, and its pivotal corporate governance principle of shareholder primacy, are ultimately products of our own collective (albeit unintentional) civic design. And, until academics and policymakers are capable of coordinating their respective energies in the direction of somehow alleviating US worker-savers' significant dependence on corporate equity as a source of non-occupational wealth gains,[156] they would be well advised to heed Professor Berle's warning that '[n]othing is accomplished, either as a matter of law or of economics, merely by saying that the claim of this group [i.e. shareholders] ought not to be "emphasized".'[157] In the meanwhile, the shareholder-oriented corporation – despite its many purported evils – is likely to remain a socially indispensable phenomenon. To those who rue this prospect, it might be retorted 'better the devil you know than the devil you don't.'

[156] As Gelter argues, '[s]keptics of shareholder primacy must rethink their agenda and address U.S. dependence on equity investment … [o]therwise, attempts to challenge the dominant model will be futile.' See *supra* note 129, at 970.
[157] Berle, *supra* note 131, at 1368.

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